HEALTH OFFICER PRACTICE GUIDE FOR COMMUNICABLE DISEASE CONTROL IN CALIFORNIA

(Revised 06/07/13)

This practice guide is a collaborative project of the Public Health Law Work Group. It was originally drafted by several County Counsel and City Attorney Offices in conjunction with the former Office of Legal Services, State Department of Health Services, and edited by several Health Officers. It was then reviewed and edited by representatives of the California Conference of Local Health Officer, County Health Executives Association of California and the California Department of Health Services. It was published on December 14, 2005. The original document was supported by funds from the Centers of Disease Control and Prevention's Cooperative Agreement on Public Health Preparedness.

Following the initial publication of the practice guide, many suggestions and comments were provided to improve the presentation and content of the document. An updated version of the practice guide was issued January 1, 2007. This second revision updates the document to reflect changes in the law. It was submitted to the Public Health Law Workgroup on April 8, 2013 for final review. Your comments on this practice guide are welcome. Please email your comments to Roberta Lawson at RobertaLawson@cdph.ca.gov.

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I. INTRODUCTION.

This practice guide was created to provide guidance to local Health Officers in California when responding to bioterrorism as well as to actual or suspected cases of naturally-occurring communicable disease. It discusses mechanisms that are available or not available prior to the calling of a local or statewide emergency. If a local emergency has been called, the user of this practice guide should also review the guide entitled, "*Authority and Responsibility of Local Health Officers in Emergencies and Disasters.*"[1] This practice guide is a collaborative effort by several offices of the County Counsel and City Attorneys. It serves merely as a starting point and will hopefully help trigger a more detailed analysis and discussions between Health Officers and their legal counsel.

While the users of the guide may want to turn to the particular area of the guide that specifically addresses the proposed action to be taken, such as ordering a mass quarantine, it is important that the user also refer to other general topic areas that are applicable to all Health Officer activities. The first of such topic areas can be found in Section II, "*General Authority of the Health Officer*," which gives an overview of the general statutory powers of Health Officers. Because there is no specific statutory authority for many of the particular orders that a Health Officer may wish to make, the authority for these actions will ultimately flow from the Health Officer's general authority to "take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases."

Health Officers must exercise their power in a manner that is consistent with the protections afforded to individuals under the United States and California constitutions. Any Health Officer order must have an adequate justification if it impacts or limits liberty, freedom of movement, bodily integrity, privacy or property. The necessity of the order should be balanced against the extent of the infringement on the individual's rights. The justification for the order becomes more demanding as the individual interests at stake become more significant. What is sufficient in one set of circumstances may not be sufficient in another. These protections are discussed in the Section III, "*Constitutional Limitations Impacting Authority of the Health Officer.*"

Other general topic areas include: (1) "*Enforcement Of Health Officer Authority,*" which presents a discussion on the types of preliminary procedural considerations that should be analyzed when issuing Health Officer orders; (2) "*Interjurisdictional Coordination and Cooperation,*" for those events when the Health Officer may need to coordinate with various federal, state and local agencies, and (3) "*Confidentiality Of Health Information*" and "*Media Resources and Management,*" both of which address the Health Officer's release of confidential health information in carrying out public health activities.

[1] *Authority and Responsibility of Local Health Officers in Emergencies and Disasters*, D. David Abbott [Emergency Preparedness Office] and Jack S. McGurk, (Chief of Environmental Management Branch), Department of Health Services, State of California (September 30, 1998).

II. GENERAL AUTHORITY OF THE HEALTH OFFICER.

A. HEALTH OFFICER DEFINED.

For purposes of the Communicable Disease Prevention and Control Act, the term "Health Officer" is defined to include county, city and district Health Officers, and city and district health boards, but does not include advisory health boards.[2] Although the county Health Officer is not defined specifically as the "local health officer" in statutes dealing with communicable disease control, several Health and Safety Code sections define the two terms interchangeably, e.g., "health officer" or "local health officer," each of which includes his or her designee.[3]

B. SOURCES OF HEALTH OFFICER AUTHORITY.

1. Appointment by the Governing Body.

The position and powers of the Health Officer derive from statute, but the appointment of each Health Officer is based upon the actions of the local governing body.[4] The statutes authorize the appointment of a Health Officer in each county and city[5] and the purpose for which each position is filled by the local authority.[6] The Health Officer is required to observe and enforce (1) local orders and ordinances pertaining to the public health; (2) orders prescribed by the California Department of Public Health (CDPH); and (3) statutes relating to the public health. Health Officers appointed by county Boards of Supervisors can act as a city Health Officer, if the city by ordinance, resolution, or contract designates the county Health Officer to be the city Health Officer.[7]

2. Local Ordinances and Resolutions.

Under the California Constitution, cities and counties may enforce within their limits "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[8] The governing body of each city and county is required by statute to take measures necessary for the preservation and protection of the public health, including the adoption, if indicated, of ordinances and

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[2] California Health and Safety Code, (hereinafter, "H&S"), §120100 et seq.
[3] H&S §120115(k), 17 California Code of Regulations (hereinafter, "C.C.R."), §§2501 and 2641.50.
[4] Pursuant to H&S §101025, the board of supervisors of each county derives authority to preserve and protect the public health in the unincorporated areas of each county by ordinance, regulations, and orders not in conflict with general law. The county health officer position is authorized by H&S §101000. The governing body of a city derives authority to preserve and protect the public health by regulation and adoption of ordinances, regulations, and orders pursuant to H&S §101450. The city health officer position is authorized by H&S §101460, which also provides authority for the city to make such an appointment.
[5] H&S §§101000, 101460.
[6] H&S §§101025,101030;101375,101400;101405,101415,101450, and 101470.
[7] H&S §§101375, 101400.
[8] California Constitution, Article, (hereinafter, "Cal. Const., art."), XI, Section 7 "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

resolutions not in conflict with the general laws.[9] It is the duty of the Health Officer to enforce these ordinances and resolutions.

3. State Statutes.

The Health and Safety code contains the statutes pertaining to communicable disease prevention and control as well as the authority of the Health Officer.[10]

4. CDPH Regulations and Orders.

Title 17 of the California Code of Regulations contains the regulations of CDPH[11] applicable to Health Officers.[12] In addition to the regulations, CDPH may issue direct orders to Health Officers. The Health Officer must, when required by CDPH, act to enforce all CDPH orders, rules and regulations.[13] When the public health is menaced, the Health Officer's actions may be controlled and regulated by CDPH.[14] CDPH regulations and orders set the minimum measures to be observed by the Health Officer. The Health Officer may take more stringent measures where circumstances require. For a more extensive discussion of the powers of CDPH, see Section V, "*Interjurisdictional Coordination and Cooperation.*"

C. HEALTH OFFICER AUTHORITY TO INVESTIGATE AND REPORT DISEASE.

CDPH is mandated to create a list of reportable diseases and conditions. Specified providers of health care and under certain circumstances, individuals are required by regulation to report those diseases and conditions to the Health Officer[15] and Health Officers in turn, must report specified diseases to CDPH.[16] In addition, Health Officers

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[9] H&S §101025.

[10] Division 105 of the H&S, starting at §120100. Division 105 consists of several 'Parts', entitled (1) "Administration of Communicable Disease Prevention and Control," (2) "Immunizations," (3) "Sexually Transmitted Disease," (4) "Human Immunodeficiency Virus (HIV)," (5) "Tuberculosis," (6) "Veterinary Public Health and Safety," and (7) "Hepatitis C." These statutes can be accessed online at "www.leginfo.ca.gov/calaw".

[11] CDPH was formerly known as the State Department of Health Services (CDHS). Senate Bill 162, Chapter 241, Statutes of 2006, known as the California Public Health Law Act of 2006, provided for reorganization of the CDHS and transferred certain responsibilities from the former CDHS to the California Department of Public Health (CDPH).

[12] See 17 C.C.R. §2500 and following. Under H&S §100275, CDPH is authorized to adopt regulations for the execution of its duties.

[13] H&S §§120130, 120145, 120190, 120195, 120200, 120210, 120215 and 120175.

[14] H&S §131080.

[15] H&S §120130, under which CDPH must establish and publish a list of reportable diseases and conditions. The list is found in 17 C.C.R. §2500 and includes the reporting of any unusual disease and outbreaks of any unlisted disease.

[16] H&S §120130 mandates the Health Officer to report diseases as required by CDPH. 17 C.C.R. §2500 requires health care providers to submit reports of certain diseases and conditions to the Local Health Officer. Pursuant to 17 C.C.R. §2500(g), the Local Health Department must provide these reports to CDPH upon request. Unless there is a written authorization, the information requested does not include drug and alcohol records protected by the Part 2 of Title 42 of the Code of Federal Regulations, (hereinafter, "C.F.R."). Additionally, 17 C.C.R. §2502 mandates that the Local Health Officer provide certain weekly morbidity and individual case and outbreak reports to CDPH.

may require providers of health care in their respective jurisdictions to disclose a disease that is not listed in the CDPH regulations.[17]

Health Officers are also the agent of CDPH for conducting certain studies[18] and undertaking investigations and actions as directed by CDPH.[19] Health Officer's disclosure of information is governed by the California Code of Regulations (CCR),[20] the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[21] the Confidentiality of Medical Information Act contained in California Civil Code §56.10, and may be subject to various other confidentiality statutes, some of which are described in Section VI, *"Confidentiality Of Health Information."*

The primary purpose of these reporting requirements is to alert Health Officers to the presence of disease within their jurisdiction.[22] Upon receiving a report of communicable disease, Health Officers shall take whatever steps as may be necessary for the investigation and control of spread of the disease, condition or outbreak reported. Under CDPH regulations, the Health Officer must provide for an examination of the person or animal in order to verify the diagnosis, existence, or outbreak of the disease, investigate the source and take appropriate steps to prevent or control the spread of the disease.[23]

In circumstances involving an "immediate menace to the public health" caused by calamity, such as flood, storm, fire, earthquake, explosion, accident, or other disaster, the Health Officer may close the area where the menace to public health exists.[24]

D. HEALTH OFFICER AUTHORITY TO PREVENT AND CONTROL COMMUNICABLE DISEASE.

In order to receive state funding, Health Officers must provide: "Communicable disease control, including availability of adequate isolation facilities, and the control of acute communicable diseases..., based upon provision of .... appropriate preventive measures for the particular communicable disease hazards in the community."[25] To fulfill this requirement, Health Officers are authorized to control contagious, infectious, or communicable disease and may "take measures as may be necessary" to prevent and

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[17] H&S §120175.
[18] 17 C.C.R. §2501. The Health Officer is required to conduct morbidity/mortality studies at CDPH request.
[19] 17 C.C.R. §2502. The Health Officer is the agent of CDPH when conducting morbidity/mortality investigations and exercising CDPH investigation and action powers granted by Government Code (hereinafter, "Gov."), §11181. CDPH is also authorized to conduct such studies pursuant to H&S §100325. Gov. §11181 permits CDPH inspection of books, records and other items. Therefore the Health Officer acting at CDPH direction has the same authority to inspect records.
[20] 17 C.C.R. §2500(f) and (g). The Health Officer may report to the CDPH in confidence certain confidential medical information, other than drug and alcohol information, unless written authorization for such information is obtained.
[21] 45 C.F.R., Parts 160 and 164.
[22] If the disease is not yet present within the Health Officer's jurisdiction, the Health Officer may take preventative steps to control spread of disease into the jurisdiction. H&S §120175 and 17 C.C.R. §2501.
[23] 17 C.C.R. §2501.
[24] Penal Code (hereinafter, "Pen."), §409.5.
[25] 17 C.C.R §1276(c).

control the spread of disease within the territory under their jurisdiction.[26] This statutory provision alone can authorize all manner of measures taken by Health Officers, provided that the measures are necessary to prevent the spread of disease. In the sections of this practice guide that address specific measures, the section will commence with a discussion of this general authority, followed by a discussion of the statutes that specifically authorize the particular measure. For example, the general authority can be cited to support the imposition of isolation or quarantine. However, the Health Officer has additional statutory authority to isolate and quarantine,[27] including on a mass level so long as the quarantine is not imposed on another city or county without the consent of CDPH.[28] This is discussed with more detail in Section VIII, *"Limiting the Movement of Individuals and Groups."*

This general authority may also include the ability to close or restrict public assemblies or gatherings, require evacuation, examination, inspection, vaccination, decontamination, disinfection, property destruction or commandeering, and to compel assistance. Each of these potential actions will be addressed more directly in the sections that follow. During an outbreak of communicable disease, or when there is imminent and proximate threat of such an outbreak, the Health Officer may request that health care providers within his or her jurisdiction disclose inventories of critical supplies, equipment, drugs, vaccines and other products that may be used for the prevention of the transmission of the disease. The Health Officer must maintain the confidentiality of this information.[29]

E. HEALTH OFFICER'S JURISDICTIONAL TERRITORY AND ENFORCEMENT OF HEALTH OFFICER ORDERS.

The Health Officers' general powers authorize him or her to act in the unincorporated areas of the county[30] and those of the city Health Officer authorize action within the city's borders.[31] A city may by ordinance, resolution or contract authorize the enforcement of public health laws by the county Health Officer within the city. A county may contract with a city for the enforcement of public health laws by the city in county's jurisdiction. City and county Health Officer enforcement authority in each other's jurisdiction may be authorized by agreement.[32]

The enforcement of the communicable disease control laws is generally initiated by an order from the Health Officer that an individual act or refrain from acting in a particular manner. An individual must comply with the Health Officer's orders, or risk civil or criminal sanctions.[33] These sanctions can include fines and/or imprisonment, depending

[26] H&S §120175.
[27] H&S §120130 (c); H&S §121365 (g) provides specific authority for the local health officer to require isolation.
[28] The authority to require a mass quarantine is implied by a reading of H&S §120175 (control of contagious, infectious and communicable disease) in conjunction with H&S §120205. The Health Officer may impose mass quarantine as directed by CDPH pursuant to H&S §§120145 and 120195.
[29] H&S §120176 (added by Stats. 2006, c. 874 (SB 1430)).
[30] H&S §101030 (for a county Health Officer).
[31] H&S §101470 (for a city Health Officer).
[32] H&S §§101375, 101400, 101405 and 101415.
[33] H&S §131082 and Pen. §409.5(c).

upon the nature of the circumstances. Issues of enforcement are addressed in more detail in Section IV, *"Enforcement of Health Officer Authority."*

F. HEALTH OFFICER POWERS, DUTIES AND RESPONSIBILITIES ARE CIRCUMSCRIBED BY CONSTITUTIONAL LIMITATIONS.

Although Health Officers are statutorily mandated to take all necessary measures to prevent the transmission of disease, and with it the attendant authority to enforce orders,[34] such power is not unlimited. Because the Health Officer's exercise of authority may impact, curtail or impair an individual's protected rights and liberties, constitutional considerations may arise. See Section III, "*Constitutional Limitations Impacting Authority of the Health Officer*."

G. HEALTH OFFICER AUTHORITY TO DECLARE A HEALTH OR LOCAL EMERGENCY.

In situations involving hazardous and or medical waste release that is an immediate threat to the public health, or whenever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease, chemical agent, noncommunicable biologic agent, toxin, or radioactive agent, Health Officers may declare a "local health emergency."[35] The Health Officer cannot declare a local emergency under the Emergency Services Act[36] unless expressly granted that authority by the local governing body.[37] Few California counties have granted such short term authority to its Health Officer. Any formal declaration of local emergency or local health emergency issued by a Health Officer must be ratified by the local governing body within a very limited number of days to remain effective.

The declaration of a local health emergency authorizes other political subdivisions and state agencies to provide mutual aid. It also provides immunity to physicians, hospitals, nurses, and other specified persons providing medical care at the express or implied request of the Health Officer.[38]

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[34] *In re Martin* (1948) 83 Cal.App.2d 164, 167.
[35] H&S §101080.
[36] Gov. §§8550 et. seq*;* H&S §101310.
[37] As noted in the Introduction, this guide is intended only to address those circumstances arising prior to the formal Declaration of Emergency. DHS has published a comprehensive document for such circumstances. *See: Authority and Responsibility of Local Health Officers in Emergencies and Disasters*, D. David Abbott [Emergency Preparedness Office] and Jack S. McGurk, (Chief of Environmental Management Branch), Department of Health Services, State of California (September 30, 1998).
[38] H&S §101085(b) (added by Stats. 2006, c. 874 (SB 1430)).

III. CONSTITUTIONAL LIMITATIONS IMPACTING THE AUTHORITY OF THE HEALTH OFFICER.

A. PROTECTING PUBLIC HEALTH IS AN EXERCISE OF POLICE POWER.

The Health and Safety Code grants broad powers to Health Officers to promote public health or safety. Actions taken under this statutory authority are an exercise of police power.[39] Courts have held that: "The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action."[40] This police power is limited by the protections contained in the United States and California Constitutions as interpreted by the courts.

B. HEALTH OFFICER ACTIONS MUST BE CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS.

1. United States and California Constitutional Requirements.[41]

Both the U.S. and California Constitutions provide that life, liberty, or property shall not be deprived without due process of law. Due process rights protect individuals from excessive "government intrusion." This is especially relevant to Health Officer's orders because violation of such orders carries a risk of imprisonment. Due process requires "fundamental fairness" in governmental action. There are two major components to the concept of fundamental fairness. One addresses the adequate justification for the anticipated action ("substantive due process") and the other concerns the steps used in carrying out the anticipated action ("procedural due process"). Health Officer orders should not be arbitrary, oppressive or unreasonable.42

2. Health Officers Should Have Adequate Justification.

Any Health Officer order must have an adequate justification if it impacts or limits liberty, freedom of movement, bodily integrity, privacy or property. Disease control is generally considered adequate justification if there are sufficient facts to support the action and the action is appropriately tailored to fit the particular circumstances. The necessity of the order is balanced against the extent of the infringement on the individual's rights.[43] The justification for the order becomes more demanding as the individual interests at stake become more

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[39] *Coelho v. Truckell* (1935) 9 Cal.App.2d 47.
[40] *Patrick v. Riley* (1930) 209 Cal. 350, 35.
[41] U.S. Constitution, 5th and 14th Amendments; California Constitution. Article 1, §§7, 15.
[42] *People v. Ramirez* (1979) 25 Cal. 3d 260, 267.
[43] An individual's constitutionally protected interest in avoiding physical restraint may be overridden in certain contexts. Communicable disease control is one such context. "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members." *Jacobsen v. Massachusetts*, (1905). 197 U.S. 11, 26.

significant. What is sufficient in one set of circumstances may not be sufficient in another.[44] Health Officers should be aware that they need adequate justification to intrude on a patient's freedom of movement, bodily integrity, or privacy, and they should make every effort to minimize the impact on personal liberty.

a. Health Officers should have reasonable grounds for the proposed action. Reasonable grounds[45] consist of (1) the Health Officer's reasonable belief[46] that a case of a reportable disease, or any other contagious, infectious or communicable disease exists, or has recently existed, or may spread into[47] the territory under his or her jurisdiction and (2) facts supporting the Health Officer's determination that the proposed action may be necessary to prevent the spread of the disease or occurrence of additional cases.[48]

b. The Health Officer's order should be narrowly tailored and the least restrictive alternative. The parameters of the order must be narrowly tailored to meet the Health Officer's goal in stopping the spread of disease.[49] Only those measures reasonably necessary may be taken to protect the public health and the intrusion must be only until such time as the person no longer poses a threat to public health.[50]

3. Health Officers Should Take Into Account Any Necessary Procedural Safeguards.

Depending upon the nature of the public health risk, all of the surrounding circumstances and the kind of restrictions sought to be imposed, the Health Officer must consider what procedural safeguards or process are due to ensure that the restrictions are fairly imposed. This generally includes fair notice and the opportunity to be heard. Some statutes provide for a specific hearing process,[51] but in general communicable disease control statutes do not provide a specific

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[44] *In re Martin*, (1948) 83 Cal.App.2d 164, 168-169.

[45] Example of grounds include: the individual had been exposed to contagion or infectious influences, someone had contracted the disease from the individual, the individual was one who came within a group which medical statistics or established medical studies or statistics show that a majority of whom are diseased, the home or region from where an individual came was in quarantine or otherwise identified as subject to the disease, the individual had engaged in activity which exposed him or her to the disease. *In re Martin* (1948) 83 Cal.App.2d 164, 167; *In re Arata* (1919) 52 Cal.App. 380, 385.

[46] Depending upon the circumstances surrounding the need for the proposed order, "'mere suspicion' unsupported by facts giving rise to reasonable or probable cause," is insufficient to justify depriving persons of their liberty or property. *In re Arata* (1919) 523 Cal.App. 380, 383.

[47] The Health Officer's authority to take necessary measures to prevent the spread of disease that does not yet exist within his or her jurisdiction derives from CDPH authority and the Health Officer's mandate to follow the rules, regulations and orders of CDPH. Further authority derives from the statutory scheme taken as whole which empowers the Health Officer to take the actions necessary to fulfill his or her duty to control the spread of disease and to take preventative measures.

[48] Health and Safety Code, (hereinafter, "H&S"), §120175; *In re Halko* (1966) 246 Cal.App.2d 553, 558.

[49] *Reno v. Flores* (1993) 507 U.S. 292,301-302; *Jew Ho v. Williamson*, (1900) 103 F. 10, 26.

[50] *In re Milstead* (1919) 44 Cal.App. 239, 244.

[51] For example, the tuberculosis control statutes at H&S §121350, et seq.

mechanism to challenge the order.[52] Due Process is a flexible concept and calls for such protections as a particular situation demands.[53] The extent to which procedural safeguards must be available depends on a balancing of the interests at stake in each case. In some instances where the liberty or property interests at stake are substantial, such as a prolonged isolation in a confined facility or the destruction of a substantial amount of property, this balancing may result in the need for a formal hearing procedure that includes the right of confrontation and cross-examination, as well as a limited right to an attorney.[54] In others, all that may be required is for the Health Officer to provide a phone number to lodge objections. Specific procedural safeguards for particular Health Officer actions are addressed in their respective sections of this document.

The Health Officer's order is the notice to the individual(s) that they must comply with the Health Officer's directive. This order must be in a form calculated to reach the individuals subject to it, set forth its conditions,[55] duration,[56] any potential penalty for violation,[57] and the facts[58] and legal basis[59] to support the order. The order also may need to explain the method by which a person may register objections. The required content for orders directed toward specific actions or events are addressed in their respective sections in this practice guide.

4. Health Officer Actions Involving Searches and Seizures.

Orders that involve the seizure, destruction[60] or search of personal and real property, must be reasonable under the circumstances. If consent is not obtained, a warrant may be required to search, seize and dispose of personal or real property in a manner not otherwise statutorily authorized, such as routine inspection.[61] An exception may be available for exigent circumstances or where the intrusion serves "special governmental needs" beyond ordinary law enforcement, such as

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[52] Writs of habeas corpus or administrative mandamus are two methods that might be used to challenge Health Officer orders.

[53] *Morrissey v. Brewer* (1972) 408 U.S. 481.

[54] For example, in cases involving the seizure of property by Health Officials, a pre-seizure hearing is constitutionally required absent extraordinary circumstances. *Leslie's Pool Mart Inc. v. Department of Food and Agriculture* (1990) 223 Cal. App. 3d 1524, 1532-33.

[55] H&S §120225.

[56] 17 California Code of Regulations, (hereinafter, "C.C.R."), §§ 2515 and 2520.

[57] H&S §120295.

[58] Such as facts obtained from communicable disease reports as well as medical tests results and epidemiological investigation. H&S §120250; 17 C.C.R. 2500(b).

[59] Most orders are based upon the discretionary powers contained in H&S §§120175 and 120130(c) and their accompanying CDPH regulations. The orders may also be based upon county or city ordinances or upon the enforcement of general orders concerning quarantine or isolation directed by CDPH. H&S §120195.

[60] H&S §§120150 and 120210 authorize destruction of personal property when ordinary means of disinfection are considered unsafe and an imminent menace to the public health.

[61] A warrantless search of property to investigate a potential health hazard, absent an emergency situation, is unconstitutional; *Camara v. Municipal Court of San Francisco* (1967) 387 U.S. 523: see also *In re Quackenbush* (1996) 41 Cal.App.4th 1301; for provisions governing inspection warrants, see CCP §1822.50, et seq.)

where the search serves public health or safety objectives.[62] The requirement for obtaining either consent or a warrant is due to the protections of the United States and California Constitutions,[63] which may also require compensation to the owner for property loss or damage.[64] Physical examination and diagnostic testing of individuals may constitute an unreasonable search in some instances. See Section IX, "*Involuntary Vaccination, Examination, Decontamination and Treatment.*"

C. OTHER CONSTITUTIONAL CONSIDERATIONS.

In addition to due process requirements, other constitutional provisions may be implicated by Health Officer actions. These include, but are not limited to: privacy, freedom of assembly, equal protection, and freedom against cruel and unusual punishment.[65]

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[62] See Section X, "*Inspection, Seizure, Decontamination, Disinfection, And Destruction Of Real And Personal Property*"; *Love v. Superior Court* (1990) 226 Cal. App. 3d 736, 741.

[63] The Fifth and Fourteenth Amendments of the U.S. Constitution prohibit the taking of private property without just compensation. The necessity for such compensation depends on the facts and circumstances of each situation. The Fourth and Fourteenth Amendments prohibit unreasonable search and seizure. Article 1, §19 of the California Constitution prohibits the taking of private property without just compensation.

[64] *Brown v. State of California* (1993) 21 Cal.App.4th 1500.

[65] First and Eighth Amendments of the U.S. Constitution. Cal. Const., Article I.

IV. ENFORCEMENT OF HEALTH OFFICER AUTHORITY.

A. THE AUTHORITY TO ENFORCE HEALTH OFFICER ORDERS DERIVES FROM THE STATUTORY DUTIES AND POWERS OF THE HEALTH OFFICER.

One of the methods used to control the spread of communicable disease is the issuance of orders by the Health Officer. These orders consist of a demand by the Health Officer to persons or businesses to either do something or refrain from doing something. Sometimes, the recipient of an order does not comply. In such cases, there needs to be "enforcement" of the order. To "enforce" literally means "to give force to."[66] There are two methods that can be used to enforce a Health Officer order: criminal enforcement and civil enforcement. A failure to comply with an order of the Health Officer may constitute a public offense.[67] If not complied with, the demand or order may be followed by the application of physical force in the form of an arrest of the person who has failed to comply.[68] This is known as criminal enforcement. Civil enforcement is the obtaining of a court order in the nature of an injunction ordering the person or business to comply with the Health Officer's order. Both of these methods are discussed in more detail below in subsection D.

The authority to enforce Health Officer orders is derived from the police powers of the state, county or and city.[69] Article XI, Section 7 of the California Constitution provides that: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[70] Health Officers must enforce and observe orders and ordinances of the Board of Supervisors or the City Council,[71]as applicable, CDPH orders[72] and state statutes and regulations relating to public health.[73] The legal basis for the enforcement of Health Officer orders derives from the Health Officer's duty to uphold and enforce statutes, regulations, local ordinances and CDPH orders.[74] Additional enforcement authority is contained in statutes that expressly mandate compliance with specified Health Officer orders.[75]

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[66] "enforce." *Merriam-Webster.com*. 2011. http://www.merriam-webster.com (23 October 2012).
[67] H&S §§131082, 120275; Penal Code, (hereinafter, "Pen.") §§15, 16, 19.
[68] Pen. §§834, 835, 836, and 836.5.
[69] *Patrick v. Riley*, (1930) 209 Cal.350, 354. "The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action."
[70] See also H&S §§101450, 101025.
[71] H&S §101030, 101470.
[72] H&S §120195.
[73], 17 C.C.R. §2501.
[74] A city may contract with a county for the enforcement of public health laws by the county in the city's jurisdiction. See H&S §101375, 101400 and 101405. A county may contract with a city for the enforcement of public health laws by the city in the county's jurisdiction. See H&S §§, 101400and 101415.
[75] For example, see H&S §§120220 (isolation and quarantine), 121365 (tuberculosis).

B. ENFORCEMENT OF HEALTH OFFICER ORDERS MUST MEET CONSTITUTIONAL DUE PROCESS REQUIREMENTS.

The Health Officer's authority is limited by the United States and California Constitutions, which protect individuals from excessive government intrusion. See Section III, "*Constitutional Limitations Impacting Authority of the Health Officer*."

C. PRELIMINARY STEPS TO ENFORCEMENT.

There are preliminary procedural considerations depending upon the avenue of enforcement involved. The first consideration is that there must be legal authority for the issuance of the order, in other words, the order must be valid. In addition, the facts and circumstances surrounding the order should be considered. These considerations may include: the threat to public health, the facts that supported the issuance of the order, how the order was delivered, the nature of the order, the contents of the order, the recipient's ability to understand and comply with the order, the compliance date, any statutorily required contents, and supporting documentation. The supporting documentation should demonstrate that the failure of the person or entity to comply with the Health Officer's order presents a substantial risk to the public health or welfare. It should also show that the subject of the order had a reasonable opportunity to voluntarily comply under the circumstances.[76] This is necessary to meet the constitutional limitations discussed in Section III. Additional procedural considerations for enforcement of particular Health Officer orders, such as isolation and quarantine and inspection of property, are addressed in their respective sections.

D. ENFORCEMENT METHODS IN THE EVENT OF NONCOMPLIANCE WITH HEALTH OFFICER ORDERS.

Other than orders issued under the tuberculosis statutes, there is no statutorily prescribed procedure for the enforcement of Health Officer orders.[77] A Health Officer has two enforcement avenues available in the event of noncompliance: civil and criminal. The appropriate avenue available in each situation will depend on state and local laws granting the authority to act, the existing circumstances and local policies, procedures and limitations on the powers of the Health Officer.[78] Although legal counsel will be involved in both the civil and criminal court processes, the active participation of the Health Officer to assist in the preparation of court documents as well as testimony should be anticipated.

1. Civil.

Civil enforcement actions are those pursued through the civil court system. Counsel will file a civil complaint for the Health Officer requesting a court order

[76] However, the urgency in some circumstances may not require that showing.

[77] The requirements contained in this statutory scheme reflect the unique nature and lengthy treatment period for tuberculosis. Accordingly, analogy to and applicability of that scheme's mandates to other public health threats is not necessarily dictated.

[78] Since a Health Officer does not have peace officer status, enforcement may require the cooperation of law enforcement. See Section VIII, *"Limitation of Movement Of Individuals."*

compelling compliance with the Health Officer's order or any applicable statute, regulation or ordinance, and requesting the imposition of civil penalties. Civil actions also can be used to obtain an injunction to prohibit an action that is contrary to the public health. The nature of the relief sought depends upon the terms contained in the ordinance, statute or regulation relied upon for the basis of the enforcement action. In situations involving the search or seizure of property, Health Officers should discuss the necessity of obtaining an administrative warrant with their legal counsel.

2. Criminal.

Criminal enforcement actions are those pursued through law enforcement and or the criminal court system. A violation of a Health Officer order may constitute a crime.[79] Various statutes, ordinances, and regulations provide for criminal sanctions.[80] For orders issued under the laws pertaining to communicable disease control, violations of those statutes[81] and Health Officer orders made pursuant to the DHS orders, rules, and regulations regarding quarantine and disinfection[82] are misdemeanors. In addition, every person charged with the performance of any duty under the laws of this state relating to the preservation of the public health, who willfully neglects or refuses to perform the same, is guilty of a misdemeanor.[83] When quarantine or isolation, either strict or modified, is established by a Health Officer, all persons are required to obey the Health Officer's rules, orders, and regulations.[84]

The power to arrest persons for crimes and public offenses is set forth in the Penal Code. An arrest is the taking of a person into custody as authorized by law. Because Health Officers do not have peace officer status,[85] criminal enforcement requires local law enforcement involvement and may also include the District Attorney and Probation department.[86]

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[79] H&S §120275 "Any person who, after notice, violates, or who, upon the demand of any health officer, refuses or neglects to conform to, any rule, order, or regulation prescribed by the department respecting a quarantine or disinfection of persons, animals, things, or places, is guilty of a misdemeanor." Under H&S §131082, "Every person charged with the performance of any duty under the laws of this state relating to the preservation of the public health, who willfully neglects or refuses to perform the same, is guilty of a misdemeanor."

[80] H&S §120290. "Anyone afflicted with any contagious, infectious or communicable disease who willfully exposes himself, or anyone who willfully exposes another person afflicted with any contagious, infectious or communicable disease is guilty of a misdemeanor."

[81] H&S §120295.

[82] H&S §120275.

[83] H&S §131082.

[84] H&S §120220.

[85] Local agencies could by ordinance give Health Officers and their designated employees the authority to arrest a person without a warrant "whenever the officer or employee has reasonable cause to believe that the person to be arrested has committed a misdemeanor in the presence of the officer or employee that is a violation of a statute or ordinance that the officer or employee has the duty to enforce." Pen. §836.5, some counties have adopted such ordinances.

[86] Government Code, (hereinafter, "Gov."), §26601provides that "The sheriff shall arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense."

a. Referrals to the District Attorney.

The Health Officer may refer matters to the District Attorney for prosecution. The referral should include the following information: the facts, the nature of the offense, who committed the offense, why the offense endangers the public health, whether or not time is of the essence and, where appropriate, any recommendations regarding a penalty. As with all referrals made to the District Attorney, it is within the discretion of the District Attorney as to whether to prosecute. When a court order has been obtained, the Probation Officer or District Attorney may require the assistance of the Health Officer regarding detention and or terms of probation.

b. Requests for warrants.

In conjunction with the referral to the District Attorney, the Health Officer may want to discuss with the District Attorney whether a warrant for the arrest of the individual be requested. Once issued, the warrant must be served by law enforcement officers, most likely the sheriff or local police.

E. ENFORCEMENT OF COURT ORDERS.

Once court orders are issued, counsel representing the Health Officer in civil matters and the District Attorney in criminal matters will undertake any necessary follow-up enforcement procedures. The follow-up steps can include service of the order and initiation of contempt of court proceedings for continued violations.

F. PREPAREDNESS POINTS.

1. Health Officers may wish to meet with the District Attorney to establish a protocol or procedure for making public health referrals for prosecution. Such protocol or procedures will expedite the handling of matters that may be time sensitive. The procedures should be reviewed periodically, particularly to ensure that the Health Officer is aware of the current deputy district attorney assigned to handle such matters.

2. Health Officers may wish to consider developing a relationship with local law enforcement agencies to establish a protocol for obtaining their assistance in with enforcing public health related court orders.

3. Health Officers may wish to consider developing a relationship with the Court Executive Officer and the Presiding Judge to establish a protocol for the processing and obtaining of public health related court orders.

V. INTERJURISDICTIONAL COORDINATION AND COOPERATION.

During an outbreak of disease within the Health Officer's jurisdiction, the Health Officer may need to coordinate with various federal, state and local agencies. These agencies fall into several categories: (1) the Governor, under the powers of the executive branch of the government, (2) public health agencies, such as the California Department of Public Health or the U.S. Public Health Service, which may also have or claim some authority to respond to the outbreak, (3) non-public health agencies, such as law enforcement, that may have a role in the response to outbreaks, (4) non-public health agencies that may or may not be subject to control by the Health Officer but have property or facilities within the geographic area, and (5) neighboring local jurisdictions impacted by the event.

A. CALIFORNIA DEPARTMENT OF PUBLIC HEALTH.

1. General Authority of CDPH.

The California Department of Public Health (CDPH)[87] advises all local health authorities, and is required to control and regulate the actions of Health Officers when in its judgment public health is menaced.[88] However, the frontline responsibility to respond to outbreaks of disease rests with the Health Officer.[89] CDPH is unlikely to assert its authority over actions of the Health Officer unless a public health menace results from a Health Officer's failure or inability to appropriately respond. The Health Officer must also respond to any CDPH request for reported information.[90]

2. Disease Surveillance.

In the area of communicable disease control, CDPH may be involved in the surveillance and response to an outbreak of disease, depending upon the pathogen involved.[91] At its request, the Health Officer must report a local epidemic to CDPH.[92]

a. Reportable diseases.

CDPH is statutorily required to establish a list of reportable diseases or conditions,[93] both communicable and non-communicable, and the list must

[87] Commencing July 1, 2007, the public health responsibilities of the former Department of Health Services were transferred to a new State Department of Public Health. Many of the statutes providing authority to the former State Department of Health Services were moved to Division 112 of the Health and Safety Code (commencing with section 131000). (Stats. 2006, c. 241 (SB 162).)
[88] H&S §131080
[89] H&S §120175, §101030 (county), §101475 (city), §120195 & §120585; 17 California Code of Regulations, (hereinafter, "C.C.R."), §2501(a).
[90] 17 C.C.R. §2500(g).
[91] H&S §120125.
[92] H&S §120185.
[93] 17 C.C.R. §2500, H&S § 120130(a).

include the urgency of reporting each disease or condition.[94] Health care providers and, specified circumstances, individuals must report to the Health Officer cases or suspected cases of the diseases or conditions on the list within the timeframe specified.[95]

b. Immediately reportable diseases.

The Health Officer reports immediately by telephone to CDPH cases and suspect cases of anthrax, botulism, brucellosis, cholera, dengue, diarrhea of the newborn (outbreaks), diphtheria, plague, rabies (human only), smallpox (variola), tularemia, varicella deaths, viral hemorrhagic fevers, yellow fever, the occurrence of any unusual diseases, and outbreaks of any disease.[96] Diseases implicated in potential acts of bioterrorism must be reported to the Health Officer immediately by telephone.[97] These diseases include anthrax, botulism (infant, foodborne, wound or other), cholera, plague, varicella (deaths only), smallpox, and viral hemorrhagic fevers (crimean-congo, ebola, lassa and marburg viruses).

c. Morbidity and case reports and studies.

In addition, the Health Officer is required to provide weekly morbidity reports, and case reports for specific diseases, including those potentially implicated in bioterrorism and those requested by CDPH.[98] CDPH can further request that the Health Officer conduct a special morbidity and mortality study.[99]

3. Overlapping Authority of CDPH and Health Officers.

CDPH and the Health Officer have some specific powers in common.[100] However, CDPH also has the power to govern the actions of the Health Officer[101] through its orders, rules and regulations.[102] CDPH has the authority to require the Health Officer to enforce all CDPH orders, rules and regulations.[103] CDPH orders, rules and regulations generally set the minimum measures. Health Officers may take more stringent measures where circumstances require.

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[94] H&S §120130(a).
[95] 17 C.C.R. §2500(b).
[96] 17 C.C.R. §2502(c).
[97] 17 C.C.R. §2500(h).
[98] 17 C.C.R. §2502(a), (b) & (d).
[99] 17 C.C.R. §2501(a).
[100] For example, CDPH may investigate and take measures necessary to ascertain the nature of the disease and prevent its spread upon being informed by the Health Officer of any contagious, infectious, or communicable disease. H&S §120125.
[101] For example, each Health Officer is required by state law to enforce all orders, rules, and regulations concerning quarantine or isolation prescribed or directed by CDPH. H&S §120195.
[102] H&S §120130(b) authorizes DHS to adopt these regulations.
[103] H&S §120195. It is a misdemeanor for a Health Officer to refuse or neglect to comply with a specific CDPH order. H&S §131082). .

a. Possession and control of persons.

Once informed by the Health Officer of any contagious, infectious or communicable disease, CDPH may, if it considers it proper, take possession or control of the body of any living person, or the corpse of any deceased person to address the disease.[104]

b. Isolation and quarantine.

CDPH also has the power to quarantine, isolate, inspect, and disinfect persons, animals, houses, rooms, other property, places, cities, or localities, whenever in its judgment the action is necessary to protect or preserve the public health.[105] CDPH can establish and maintain places of isolation and quarantine,[106] and may destroy personal property when ordinary means of disinfection are considered unsafe, and when the property is in its judgment, an imminent menace to the public health.[107] The Health Officer must ensure adequate isolation and/or appropriate quarantine, and comply with all general and special rules, regulations, and orders of CDPH, in carrying out the quarantine or isolation.[108] CDPH may also require that the local health officer to establish and maintain places of quarantine or isolation that shall be subject to the special directions of CDPH.[109] Where CDPH determines it necessary, it can direct the Health Officer to quarantine or isolate and disinfect persons, animals, houses or rooms, in accordance with general and specific instructions of CDPH.[110]

c. Destruction of property.

CDPH may also direct the Health Officer to destroy personal property when ordinary means of disinfection are considered unsafe, and when the property is, in the judgment of CDPH, an imminent menace to the public health[111] and when CDPH determines it is necessary for the protection or preservation of the public health.

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[104] H&S §120140.
[105] H&S §120145.
[106] H&S §120135.
[107] H&S §120150.
[108] H&S §120215.
[109] H&S §120200.
[110] Regulations containing case and contact requirements are found in Title 17 C.C.R. 2550 *et. seq*. Not all of these regulations require quarantine or isolation, consequently these regulations should be consulted when deciding how to handle a case or suspected case of reportable disease.
[111] H&S §120210. When property is destroyed pursuant to this section, the governing body of the locality where the destruction occurs may make adequate provision for compensation in proper cases for those injured thereby.

4. CDPH Written Consent Required for Multi-Jurisdictional Quarantines in California.

No quarantine shall be established by a county or city against another county or city without the written consent of CDPH.[112] For other preventative measures that may involve multiple jurisdictions, the Health Officer needs the cooperation of the other jurisdictions.

B. UNITED STATES PUBLIC HEALTH SERVICE.

1. U.S. Surgeon General Authority in National and Multi-National Events.

The Surgeon General of the U.S. Public Health Service[113] is authorized to make and enforce "such regulations necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States or its possessions, or from one state or possession into any other state or possession."[114]

a. International quarantine by exclusion.

Whenever the Surgeon General determines that there is serious danger of the introduction of disease from a foreign country into the United States, and that a suspension of the right to introduce persons and property from that country is required in the interest of the public health, he or she may prohibit, in whole or in part, the introduction of persons and property from such countries or places.[115] This is, in effect, quarantine by exclusion.

The Surgeon General manages quarantine stations to prevent the introduction of communicable diseases into the states and possessions of the United States,[116] and is authorized to adopt regulations pertaining to air navigation and aircraft.[117] There are regulatory requirements that ship captains and airline pilots inform the quarantine station of an illness or death aboard the vessel or aircraft prior to arrival at their destination.[118]

b. State authority not preempted by Surgeon General.

The authority of the Surgeon General, however, does not preempt the authority of the states.[119]

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[112] See, for example, H&S §120205.
[113] The Surgeon General now functions under the Assistant Secretary for Health, U.S. Department of Health and Human Services. As such the regulations adopted by the Surgeon General are in effect those of the Secretary.
[114] 42 United States Code, (hereinafter, "U.S.C."), §264(a); see 42 Code of Federal Regulations, (hereinafter, "C.F.R."), Parts 70-71.
[115] 42 U.S.C. §265.
[116] 42 U.S.C. §267.
[117] 42 U.S.C. §270.
[118] 42 C.F.R. §§70.4, 71.21.
[119] 42 U.S.C. §264(e).

c. International travel:

Once a vessel, aircraft, or other means of conveyance arrives from an international destination, and before those passengers, crew, or other individuals clear customs, those individuals have not formally entered the US. The health jurisdiction over these individuals is vested with the Surgeon General. Once they have cleared customs, health jurisdiction over those individual resides at the local level.

C. DIRECTOR OF CENTERS FOR DISEASE CONTROL AND PREVENTION.

Whenever the Director of the Centers for Disease Control and Prevention (CDC) determines that the measures taken by health authorities of any state (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, the CDC Director may "take such measures to prevent such spread of the diseases as he/she deems reasonably necessary."[120] This authority is similar to the general authority granted to state and Health Officers, including the authority to quarantine.[121] Isolation and quarantine are also specifically authorized by regulation.[122] If there is a potential that a disease within the Health Officer's jurisdiction may spread into another state, it is advisable that the Health Officer work cooperatively with CDPH and the CDC to ensure that appropriate measures are taken to prevent its spread.

D. HEALTH OFFICER JURISDICTION WITHIN FEDERAL ENCLAVES.

1. State Control Over Its Territory May be Limited by Federal Ownership of Specific Territory Within the State.

Generally, the state has sole authority and control over all places within in its constitutionally-defined boundaries. However, when property within the state is ceded to, purchased, or condemned by the United States, the state's authority and control may be qualified by the terms of the cession or the laws under which the purchase or condemnation is made.[123] Jurisdiction over several tracts of California land has been ceded to the United States for military or national park purposes.[124] However, some of these tracts may revert back to the state upon the occurrence of specific acts or events.[125]

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[120] 42 C.F.R. §70.2.

[121] If national measures are needed, upon executive decision to be made by the President, the CDC has authority to impose quarantine where there is a risk of infectious disease transmission across state lines. 42 U.S.C. §264(a); The CDC has advised that it anticipates the need to use its delegated federal authority only in rare situations. *American Red Cross Preparedness Guide, Controlling the Spread of Contagious Diseases*.

[122] 42 C.F.R. §70.6. In the 2003 SARS outbreak, quarantine of large groups was used only in selected settings where extensive transmission occurred. *Department of Health and Human Services, Centers for Disease Control and Prevention.* (September 2004).

[123] Government Code, (hereinafter, "Gov."), §110.

[124] Gov. §111.

[125] See, for example, Gov. §§113-115.

a. Where state legislature does not consent to federal government acquisition of state land.

With respect to lands acquired other than by cession from the state,[126] the state has ceded concurrent criminal jurisdiction on land held by the United States for military or national forest purposes if specific conditions have been satisfied.[127]

b. Where state legislature consents to federal acquisition of state land.

Where jurisdiction has been ceded, Congress is empowered under the United States Constitution, to exercise exclusive jurisdiction in all cases over all places purchased by the consent of the state legislature for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.[128] Thus, this federal authority is exclusive of local authority, and a Health Officer cannot exercise authority on such property.[129] To determine whether jurisdiction has been ceded in specific cases, the Health Officer must consult with legal counsel.[130]

E. LAW ENFORCEMENT.

1. Peace Officer Enforcement of Health Officer Orders.

Law enforcement agencies such as the Sheriff's office or the local police department enforce Health Officer orders[131] because Health Officers do not have peace officer status.[132] Peace officers have the broadest authority to effectuate an arrest,[133] and are protected in their use of reasonable force to do so.[134] Therefore, criminal enforcement requires local law enforcement involvement[135] and may also include the District Attorney[136] and Probation[137] department.[138] Further, the

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[126] See *U.S. v. Warne* (1960) 190 F.Supp.645, at 651, for a discussion of the distinction between purchase-by-consent and cession statutes.
[127] Gov. §126.
[128] U.S.C.A. Const. Art. I § 8, cl. 17.
[129] U.S.C.A. Const. Art. VI, cl. 2.
[130] For example, although offices of the U.S. Postal Service are federal property, in the absence of a cession of jurisdiction, this property may be subject to concurrent jurisdiction of state and federal authorities. See *Town of Wibaux v. Brown*, Slip Copy, 2005 WL 1270295.
[131] See, example, *In re Martin* (1948) 83 Cal.App.2d 164; Gov. §§26602, 41601; H&S §120155, 101029.
[132] See Penal Code (hereinafter, "Pen."), §§830, et seq. Local agencies could give this power to Health Officers, see footnote 93
[133] See Pen. §836.
[134] Pen. §835a.
[135] H&S §120275 (misdemeanor to violate or refuse to obey a CDPH quarantine infection rule, order, or regulation prescribed by CDPH); H&S §120290 (misdemeanor for any person with a contagious, infectious or communicable disease to willfully expose himself or herself to another person, and misdemeanor to willfully expose a diseased person to another person); H&S §120220 (all persons to obey rules, orders and regulations of Health Officer); H&S §§121365 and 120280 (criminal sanctions upon violation of a TB order); Pen. §409.5(a) and(c) (misdemeanor for violation of contaminated area closure); Pen. §§17 and 19.
[136] For example, H&S §121365.

enforcement of civil orders for detention, isolation or quarantine of individuals will likely be conducted with assistance from law enforcement.

2. Law Enforcement Authority and Control of a Crime Scene.

Where a reported exposure to a biological pathogen is considered to be the result of a perceived deliberate act in violation of state and federal laws,[139] the location of the exposure or source of exposure will likely be treated as a crime scene by federal, state or local law enforcement officials. This can create conflicts if the Health Officer considers it necessary to access the location or persons involved to prevent the spread of disease.[140] Once law enforcement officials are involved for purposes of carrying out their responsibilities under the criminal law at an accident scene, rather than enforcing Health Officer orders, the law enforcement officials are responsible for management of the scene.[141] It is a crime to interfere with federal officers[142] and state or local peace officers[143] in the performance of their duty. The Health Officer, therefore, needs coordinate and consult with law enforcement officials. The Health Officer may issue an order authorizing first responders to isolate individuals who have been exposed to any biological, toxic, chemical or radiologic agent that may spread to other, and first responders are authorized to execute such an order. However, the period of isolation imposed by first responders may not exceed two hours, after which orders for isolation or disinfection must be issued to the individuals by the Health Officer.[144]

3. Standardized Emergency Management System (SEMS).

Acts of perceived bioterrorism will likely be responded to under the California Standardized Emergency Management System (SEMS).[145] SEMS uses the Incident Command System (ICS) to respond at the field level. Under the ICS, response will be headed by an Incident Commander (IC), initially the senior first-responder to arrive at the scene. As the incident grows, the IC may delegate a number of activities, such as planning, operations, logistics and finance/administration. Where multiple jurisdictions and agencies become involved, a "unified command" structure will emerge. The Health Officer

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[137] H&S §120280. Person convicted of violating Health Officer order may be placed on probation upon condition that the Health Officer order be complied with fully.
[138] Gov. §26601 "The sheriff shall arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense."
[139] See Pen. §§11415 et. seq. 18 U.S.C.A.., §§175 et. seq..
[140] See Pen. §409.5. Law enforcement and Health Officers, among others, have authority to close contaminated areas.
[141] Pen. §409.3; further, under this section, whenever emergency medical technicians are at the scene of an accident, they are responsible for the management of patient care at the scene, in accordance with H&S §1798.6..
[142] 18 U.S.C.A. §111.
[143] Pen. §148.
[144] H&S §101080.2. To implement this authority, the Health Officer must establish a memorandum of understanding with first responders. (Added by Stats. 2006, c. 874 (SB 1430)).
[145] Gov. §8607. SEMS is in compliance with the National Incident Management System, "NIMS". See "http://www.fema.gov/nims/".

responding to an act of perceived bioterrorism must coordinate with the Incident Commander or unified command.[146]

F. OTHER LOCAL JURISDICTIONS.

1. Disease Origin or Exposed Person Believed to be Outside the Jurisdiction.

If a disease is one in which the Health Officer determines that identifying the source of infection is important and believed to be outside the local jurisdiction, the Health Officer must notify the CDPH Director or the other Health Officer under whose jurisdiction the infection was probably contracted. Similar notification must be given if exposed persons who should be quarantined or evaluated for evidence of the disease are believed to be living outside the jurisdiction of the Health Officer.[147]

2. Mutual Aid.

If local resources are insufficient to respond to an outbreak of disease, it may be possible to invoke mutual aid from adjoining or nearby jurisdictions under the Emergency Services Act even though a local declaration of emergency has not yet been enacted.[148]

G. NATIVE AMERICAN TRIBES.

Native American tribes have the right to make and be governed by their own laws. However, this does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border.[149]

1. Disease Outbreak That Threatens To Spread Beyond The Reservation.

When state interests outside the reservation are implicated, states may regulate the activities even of tribe members on tribal land.[150] Thus, if an outbreak of disease within the borders of a reservation threatens to spread beyond its borders, a Health Officer may be able to enforce orders within those borders.

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[146] See "*Incident Command System: Independent Study Course,*" Emergency Management Institute, Federal Emergency Management Agency, IS-100 & 200, Oct., 2012.
[147] 17 C.C.R. §2501(b).
[148] Gov. §8617.
[149] *Nevada v. Hicks* (2001) 533 U.S. 353. Held that the sheriff would have the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes. The court noted at p. 361-62 that "[t]hough tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. `Ordinarily,' it is now clear, `an Indian reservation is considered part of the territory of the State,' " citing, U.S. Dept. of Interior, Federal Indian Law 510 and n. 1 (1958).
[150] See *Washington v. Confederated Tribes of Colville Indian Reservation*, (1980) 447 U.S. 134.

2. Validity and Enforcement of Health Officer Orders Issued While Individual is Outside the Reservation.

It is also well established that states have criminal jurisdiction over reservation Indians for crimes committed off the reservation.[151] Thus, if a tribal member is subjected to an order of isolation outside the reservation, then violates that order and returns to the reservation, the state would have criminal jurisdiction over that individual. [152]

H. UNIVERSITY OF CALIFORNIA FACILITIES.

1. Health Officers Have Jurisdiction at UC Facilities.

Article IX, section 9 of the California Constitution grants broad powers to the Regents of the University of California (UC), and subjects the UC to limited control by the California Legislature.[153] One of the areas in which UC is subject to legislative control is when the control constitutes an exercise of the police power governing private persons and corporations in general. Statutes, regulations, and ordinances pertaining to the control of communicable diseases are based upon the police power of the state and may be applied to UC.

In addition, legislation regulating specific activities on matters of statewide concern rather than internal university affairs, may be applied to UC.[154] Statutes and regulations pertaining to the control of communicable diseases are statutes of statewide concern and thus should apply to UC. Therefore, statutes and regulations for communicable disease control that do not generally apply to the public, e.g., disease reporting and hospital infection control requirements, but regulate matters of statewide concern, would apply to UC.

The jurisdiction of the Health Officer extends to the unincorporated territory of the county, and to the territory of a city within the county upon the consent of the local governing body. The Health Officer has jurisdiction over the UC facility if it is located within the territory of the Health Officer.

2. The UC Police Department Has Primary, But Not Exclusive, Authority at UC Facilities.

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[151] *Nevada v. Hicks* (2001) 533 U.S. 353, 362.
[152] *Id*.
[153] Cal. Const., art. IX, sec. 9 – "The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services."
[154] *San Francisco Labor Council v. Regents of the University of California* (1980) 26 Cal. 3d 785.

Members of the UC Police Department have the status of peace officers. Their authority extends to any place in the state. Their primary duty is the enforcement of the law upon the campuses of the UC and an area within one mile of the exterior boundaries of each campus, and in and about other grounds under the control of the UC Regents.[155] However, the jurisdiction UC Police Department is not exclusive and county sheriffs and/or police departments with jurisdiction over territories in which UC campuses or facilities are located could enforce the orders.

I. STATE CORRECTIONAL FACILITIES.

1. Health Officers Have Jurisdiction Within State Correctional Facilities.

The county Health Officer is obligated to enforce the statutes, regulations and orders pertaining to the public health in the unincorporated territory of the county.[156] The authority of a city Health Officer extends to territory within the city.[157] No exception is provided for land owned or under the control of state agencies. Thus, the Health Officer may exercise his or her authority on territory within his or her jurisdiction occupied by state correctional facilities.

2. Health Officers Must Coordinate with Department of Corrections.

The Secretary of the Department of Corrections and Rehabilitation is responsible for the supervision, management and control of state prisons, and for the care, custody, treatment, training, discipline and employment of persons confined in state prisons.[158] Therefore, in order for the Health Officer to exercise jurisdiction within a state correctional facility, it is essential that the Health Officer first coordinate with the Department of Corrections.[159]

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[155] Educ. § 92600, Pen. § 830.2 (b).
[156] H&S §101030.
[157] H&S §§ 101460, 101470.
[158] Pen. §5054.
[159] The Prison Medical Service is currently under a receiver appointed by the federal courts. The Health Officer may also need to coordinate with the court-appointed receiver. *Plata v. Schwarzenegger*, docket no. 3:01-cv-01351-THE (N.D. Cal.).

J. PREPAREDNESS POINTERS.

1. Health Officers should establish, in advance, direct emergency communication with DHS, CDC and fellow Health Officers, as well as pre-planned protocols. This will greatly enhance the effectiveness and timeliness of cross-jurisdictional emergency and incident responses.

2. Health Officers can establish direct lines of communication and protocols between the Health Officer and local law enforcement regarding Health Officer orders, as well as in anticipation of more extraordinary events, such as a calamity or bioterrorism.

3. Health Officers should actively participate in local emergency planning so that the Health Officer role is already defined should a bioterrorism event occur within the jurisdiction. Health Officers may also want to review the California Emergency Plan[160] to identify what state and federal resources may be available to respond in an event of bioterrorism.

4. Health Officers can get familiar with local emergency response plans and mutual aid agreements.

5. Health Officers can do advance planning with Native American jurisdictions to establish pre-planned protocols. This will greatly enhance the effectiveness and timeliness of cross-jurisdictional emergency and incident responses.

6. Health Officers can do advanced planning with local enforcement in regards to responding to a scene of an actual or potential biological or chemical attack. This type of event can be both a federal and state crime and a major health issue. If a port of international entry is involved, the complexities multiply exponentially. However, if the local jurisdiction decides to respond to these events, required activities will go much more smoothly if they are worked out ahead of time. These scenes ultimately must be handled through a unified command structure.

Since unified command takes some time to set up, there are several ways this can be handled quickly, each with its pros and cons. Due to the need to control access to the scene and limit additional exposures, Health Officers may want to have these scenes handled as crime scenes initially while ensuring access to public health personnel who need to respond. This may be the most expeditious way of controlling the scene and limiting the movement of people. However, law enforcement officials are generally extremely reluctant to enter a scene where the potential for exposure to biological agents or persons ill with communicable disease might be located. Consequently, these scenes could initially be handled as health events with law enforcement officers provided with and instructed in the proper use of personal protective equipment to assist with enforcement of the health officer's directives. This would require the Health Officer to be able to mobilize enough personnel to adequately assess and control the situation in a timely fashion.

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[160] This document may be found under Plans and Publications at website of the Governor's Office of Emergency Services at "www.oes.ca.gov."

7. Health Officers with UC campuses and facilities in their jurisdiction can coordinate with the Chancellor and the Student Health Service to manage outbreaks of disease among students housed in UC facilities. The Health Officer should initially coordinate with the UC Police Department for purposes of enforcing orders on campus.

8. Health Officer should consult with County Counsel to determine whether jurisdiction has been ceded by the federal government in regards specific federal property before exercising authority within that facility. For example, although offices of the U.S. Postal Service are federal property, in the absence of a cession of jurisdiction, this property may be subject to concurrent jurisdiction of state and federal authorities.[161]

[161] See *Town of Wibaux v. Brown*, Slip Copy, 2005 WL 1270295, Mont.,2005.

VI. CONFIDENTIALITY OF HEALTH INFORMATION.

A. THE RELEASE OF PATIENT INFORMATION IS RESTRICTED BY BOTH FEDERAL AND CALIFORNIA LAW.

1. Release Of Patient Information In Manner That Does Not Violate State and Federal Law.

All health care providers must follow the requirements of the California Confidentiality of Medical Information Act ("CMIA"),[162] and the federal Health Insurance and Portability and Accountability Act of 1996 ("HIPAA").[163] However, both HIPAA and CMIA allow health care providers to disclose confidential medical information to state and local health officials for purposes of preventing or controlling disease where the disclosure is required by law.[164]

Most, if not all, public health agencies are health care providers and are covered entities subject to HIPAA. If the covered entity is also a public health authority, the covered entity is permitted to use patient health information in all cases in which it is permitted to disclose such information for public health activities.

a. Patient information is protected whether or not the patient is living.

Both HIPAA and CMIA apply whether or not the patient is still living.

b. Release of information means either oral or written release.

Both HIPAA and CMIA protect the release of patient information whether the release is orally or in writing.

c. Same rules apply to multiple patients/casualties.

There are no special statutory rules governing the release of patient identifiable information in situations involving multiple patients or casualties. The same process of balancing patient privacy rights and the need for the community to know the information must be done in mass events as well.

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[162] Civil Code §56 et. seq.

[163] 45 Code of Federal Regulations, (hereinafter, "C.F.R."), §160.101 et. seq.

[164] See Civil Code §56.10(b)(9), §56.10(c)(18); 45 C.F.R. §164.512(b)(1)(i) – "(b)(1) A covered entity may disclose protected health information for the public health activities and purposes described in this paragraph to: (i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority."

2. Balance Patients' Statutory Privacy Rights and the Community's Need to Know.

Certain circumstances may require the release of patient health information by the Health Officer to protect the public's health and safety. When this occurs, Health Officers need to balance the patients' rights of confidentiality of medical information versus the community's need to know about a suspected or actual outbreak of a communicable disease.

B. USING HEALTH INFORMATION FOR PUBLIC HEALTH ACTIVITIES.

1. Release Of Health Information Permitted But It Must Be The Minimum Necessary Amount Of Information.

HIPAA permits public health agencies to use patient health information for public health activities. These activities include but are not limited to: preventing or controlling disease, injury or disability, reporting disease, reporting injuries, reporting vital events, conduct of public health surveillance, conduct of public health investigations, conduct of public health interventions, or to a foreign government agency that is acting in collaboration with a public health authority.[165] HIPAA specifically allows the release of information, when authorized by law, to persons who may be at risk of contracting or spreading a disease.[166] To the extent that the release of information is truly needed in order to prevent or control disease, injury or disability, the release should be allowable under HIPAA. However, only the "minimum necessary" of patient health information can be released.[167] Because HIPAA does not specify what information constitutes "minimum necessary" information, Health Officers must use their judgment as to what information can be released on a case by case basis.

2. Release Information That Can Not Be Linked To A Specific Patient.

Health Officers should not refer to the medical condition or treatment received by an individual or disclose the individual's name or other identifiable information unless that information is necessary for a designated public health activity.

a. Individually identifiable information-California law.

California law defines "individually identifiable" as information that includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with

[165] 45 C.F.R. §164.512(b)(2).
[166] 45 C.F.R. §164.512(b)(1).
[167] 45 C.F.R. §164.502(b)(1) "This subdivision of the Privacy Rule states that only patient health information which is the minimum necessary to accomplish the intended purpose of a use, disclosure, or request for information, is to be accessed for this purpose."

other publicly available information, reveals the individual's identity."[168] HIPAA contains a similar definition of identifiable information as stated below.

b. Individually identifiable information- Federal law.

HIPAA regulations provide in pertinent part: "Health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual is not individually identifiable health information."[169] The regulations set forth the conditions that must be present in order to determine that the information is not individually identifiable health information. [170]

c. Size of community may have an impact.

As reflected in both state law and HIPAA, the size of the community may have an impact on the amount of identifying information that can be released. It is important to note, especially in small communities, the phrases "alone or in combination with other publicly available information," and "information that could be used, alone or in combination with other reasonably available information, by an anticipated recipient." A violation of an individual's privacy rights may occur even if the information on its face does not identify the patient. For example, in a small community, merely providing the age and gender of a deceased patient could lead to the patient's identification if the media then obtains a copy of the death certificate. In larger communities, this may be less of an issue. In all instances, Health Officers should be cautious as to what information is released and be certain that such release is necessary. The DHS Public Affairs Office uses the following guidelines for the

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[168] Civil Code §56.05(g).

[169] 45 C.F.R. §164.514(a).

[170] 45 C.F.R. §5164.514(b) "A covered entity may determine that health information is not individually identifiable health information only if: (1) A person with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable: (i) Applying such principles and methods, *determines that the risk is very small that the information could be used, alone or in combination with other reasonably available information*, by an anticipated recipient to identify an individual who is a subject of the information; and (ii) Documents the methods and results of the analysis that justify such determination; or (2)(i) The following identifiers of the individual or of relatives, employers, or household members of the individual, are removed: (A) Names; (B) All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if, according to the current publicly available data from the Bureau of the Census: (1) The geographic unit formed by combining all zip codes with the same three initial digits contains more than 20,000 people; and (2) The initial three digits of a zip code for all such geographic units containing 20,000 or fewer people is changed to 000. (C) All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older; 45 C.F.R. §164.514(b) The list goes on to include deletion of telephone numbers, fax numbers; electronic mail addresses; social security numbers; medical record numbers etc.

release of information: (1) counties or cities populations of over 250,000 – the gender, age and condition of the patient; (2) counties or cities with a population between 50,000 and 250,000 - the gender, condition of the patient, and whether the patient is an adult or juvenile; (3) and counties or cities with populations under 50,000 – the gender and condition of the patient.

d. Large number of patients.

In a situation where there are a large number of patients, the Health Officer may inform the media of the number of patients that have been brought into the facilities by gender or age group (e.g. adults, teens, children, etc.), the general cause of their ailments such as, for example, possible exposure to anthrax, and their general condition, as long as the information it is not identifiable to a specific patient.

C. RESPONDING TO PUBLIC RECORDS REQUESTS.

Pursuant to the Public Records Act, public records, which are broadly defined,[171] are open to inspection and may be copied.[172] This includes computerized record keeping and electronic mail.[173] Much of the routine business that Health Officers are involved with is subject to the Public Records Act. In determining whether a document must be disclosed, the Health Officer has the burden of demonstrating that a record which is established as a public record is either (1) exempt from disclosure under express provisions of the Public Records Act,[174] or (2) on the facts of the particular case, the public interest is served by not making the records public outweighs the public interest served by disclosure of the record.[175] There is a specific exemption that permits the withholding of patient medical information under the Public Records Act.[176] In addition there is an exemption for records "the disclosure of which is exempted or prohibited pursuant to federal or state law"[177] and, as discussed above, the release of medical information may violate HIPPA

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[171] Government Code, (hereinafter, "Gov."), §6252 (e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975. See also Gov. §6252 (g) *"Writing" means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation*, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored (emphasis added.).

[172] Gov. §6253; see also Cal. Const., art. I, §3, subd. (b).

[173] *San Gabriel Tribune v. City of West Covina* (1983) 143 Cal. App. 3d 762.

[174] Even if a particular item is not specifically exempt from disclosure, Gov. §6255 establishes a catch-all provision that permits withholding of a record if the agency can justify nondisclosure "by demonstrating that ... on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." A claim that disclosure of a particular item violates an individual's constitutional right to privacy is analyzed under essentially the same balancing test as is used in evaluating the Gov. §6255 catch-all exemption. *Teamsters Local 856 v. Priceless, LLC*, (2003) 112 Cal.App.4th 1500, 1511.

[175] Gov. §6255, *City of San Jose v. Superior Court* (1999) 74 Cal. App. 4th 1008, 1017-1019.

[176] Gov. §6254(c) "[p]ersonal, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy".

[177] Gov. §6254(k).

as well as state law. Once a public record request is received, Health Officers should contact their legal counsel to review what documents must be released and the deadlines for compliance.

VII. MEDIA RESOURCES AND MANAGEMENT.

A. RELEASING GENERAL NONMEDICAL INFORMATION TO THE MEDIA.

1. Using the Media as a Tool.

There may be situations in which the media can be used to disseminate information to the public about a threatened or actual disease outbreak. The media can broadcast facts about the disease and steps that the public should take in order to stop its spread. If there are orders or specific instructions to be given to the public, the media can help with that effort. The media can also be used to enlist the public's help and cooperation.

2. Responding to Media Requests For General Information.

If the media requests information about a threatened or actual disease outbreak or other public health threat, there is no legal duty to give information to the media. The media may follow up with a public request made under the Public Records Act.[178] This act defines what a public record is,[179] what is not a public record,[180] and the time period to produce the record. For example, Confidential Morbidity Reports (CMRs) are not public records to the extent that they disclose the identity of an individual.[181]

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[178] Government Code, (hereinafter, "Gov.") §6250 et seq. See discussion on responding to California Public Records Act requests in Section VI, "*Confidentiality of Health Information.*"

[179] Gov. §6252 (e) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. See also Gov. §6252 (g) *"Writing" means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation*, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored (emphasis added).

[180] There is an exemption for release of patient medical information under the Public Records Act. See Gov. §6254(c) "[p]ersonal, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" and Gov. Code §6254(k) "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law…" Even if a particular item is not specifically exempt from disclosure, Gov. §6255 establishes a catch-all provision that permits withholding of a record if the agency can justify nondisclosure "by demonstrating that ... on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." A claim that disclosure of a particular item violates an individual's constitutional right to privacy is analyzed under essentially the same balancing test as is used in evaluating the Gov. §6255 catch-all exemption. *Teamsters Local 856 v. Priceless, LLC,* (2003) 112 Cal.App.4th 1500, 1511.

[181] Gov. §6276.30; Health & Safety Code, (hereinafter, "H&S"), §100330. Records in morbidity studies are confidential and exempt from production under the public records act but the statistical compilations from the records which excludes personal identifying information is not.

B. RELEASE OF PATIENT HEALTH INFORMATION TO THE MEDIA.

1. Balance Patients' Statutory Privacy Rights and the Community's Need to Know.

As discussed in Section VI, "*Confidentiality of Health Information,*" the release of patient information is restricted by both Federal HIPAA regulations and California law contained in CMIA.[182] When releasing a person's health information to the media, Health Officers need to balance the person's rights of confidentiality of medical information versus the community's need to know about a suspected or actual outbreak of a communicable disease.[183]

2. Health Information Is Protected Whether or Not the Person Is Living.

Both HIPAA and CMIA apply whether or not the person is still living.

3. Release of Information Means Either Oral or Written Release.

Both HIPAA and CMIA protect the release of health information whether the release is oral or in writing.

4. Same Rules Apply To Multiple Patients/Casualties.

There are no special statutory rules governing the release of patient identifiable information in situations involving multiple patients/casualties. The same process of balancing patient privacy rights and the need for the community to know the information must be used for mass events as well.

5. Using Health Information For Public Health Activities.

HIPAA permits public health agencies to use patient health information for public health activities.[184] However, only the "minimum necessary" of patient health information can be released.[185] Because HIPAA does not specify what

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[182] Health care providers must follow the requirements of the Health Information and Portability and Accountability Act of 1996 ("HIPAA") and California Confidentiality of Medical Information Act ("CMIA").

[183] The California courts have equated the right of privacy with the right "to be let alone," which must be balanced against public interest in the dissemination of information demanded by democratic processes." *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 651.

[184] 45 Code of Federal Regulations, (hereinafter, "C.F.R."), §164.512(b)(i) provides that a public health authority is authorized by law to collect or receive patient health information for the purpose of public health activities. These activities include but are not limited to: preventing or controlling disease, injury or disability, reporting disease, reporting injuries, reporting vital events, and conducting public health surveillance, public health investigations, and public health interventions. This section also permits release of patient health information, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority.

[185] 45 C.F.R. §164.502(b)(1). The subdivision of the Privacy Rule states that "When using or disclosing protected health information or when requesting protected health information from another covered entity, a covered entity must make reasonable efforts to limit protected health information to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request."

information constitutes "minimum necessary" information, Health Officers must use their judgment as to what information can be released on a case by case basis.

6. Release Information That Can Not Be Linked To A Specific Patient.

Health Officers should not refer to the medical condition or treatment received by a patient and should not disclose the patient's name or other identifiable information unless that information is necessary for a designated public health activity. See Section VI, "*Confidentiality Of Health Information,"* for a discussion of what constitutes identifiable information.

7. Media Knows Identity Of the Patient.

If the media requests specific information and knows the identity of the patient and the hospital, those inquiries should be referred to the hospital for a response. Health Officers should not verify the identity of the patient or the facility for the media. Health Officers should work closely with the hospital because the hospital will know if the patient has requested that information be withheld. The hospital can also obtain a written release from the patient if the media wants detailed information.

a. If the patient has not requested that the information be withheld.

If the patient has not requested that the information be withheld and a request contains the patient's name, the hospital may release the patient's condition "described in general terms that do not communicate specific medical information about the individual."[186] For such patients, his or her condition can be described as (1) undetermined (2) good (3) fair (4) serious and (5) critical.

b. Activities requiring a prior written authorization.

Under HIPAA, the following activities require prior written authorization from a patient (or parent or guardian of a minor or legal authority for persons incapacitated): (1) issuing a detailed statement (anything beyond the one word description), (2) photographing or videotaping patients, and (3) interviewing patients.[187]

8. Media Knows the Identity of a Deceased Patient.

If the media requests specific information and knows the identity of the decedent through information obtained from a death certificate, only the information that is in the death certificate can be released or commented on. The patient's right to keep confidential medical information not included in the death certificate survives the death of the patient.

[186] 45 C.F.R. §164.510(a)(1)(i)(C).
[187] 45 C.F.R. §164.508.

C. PREPAREDNESS POINTS.

1. Health Officers or public health agencies should set up an internal process to be used in communicating with the media. Health Officers or Public Health Agencies should designate one person to regularly and consistently coordinate responses to requests from media, especially if they relate to protected health information. For each situation that arises, it is also important to designate a "single point of contact" for that given situation. This minimizes the chance for miscommunication with the media outlets.

2. Health Officers can, in order to minimize the number of individuals the media needs to contact, tell the news media ahead of time who is the designated media person.

3. Health Officers can ensure that staff receives specialized training in dealing with the media, especially in crisis communication. Materials for such training have been developed by the Federal Center for Disease Control and Prevention (CDC).

4. Health Officers can keep other Health Department management, elected officials, and county or city administrations up-to-date when talking to the media on matters of public health importance. In certain scenarios, there may be multiple county departments or other non-county agencies involved. There may need to be coordination among these agencies in regard to media contact.

VIII. LIMITING THE MOVEMENT OF INDIVIDUALS AND GROUPS.

A. ISOLATION AND QUARANTINE IN NON-TUBERCULOSIS CONTEXT.

Prevention and control of highly communicable diseases that threaten public health may require the use of isolation and/or quarantine.[188] There is a statutory process designed to prevent and control tuberculosis through involuntary treatment, isolation and detention. No other disease or threat to public health has its own statutorily prescribed set of procedures. While reference to tuberculosis statutes may provide useful general guidance when dealing with other communicable diseases, they are not specifically applicable outside of the tuberculosis context.[189] However, Health Officer isolation or quarantine actions must be consistent with constitutional requirements discussed in Section III, "*Constitutional Limitations Impacting Authority of the Health Officer*."[190]

1. Authority To Isolate And Quarantine.

In addition to the general authority to take steps necessary to control contagious, infectious and communicable disease,[191] Health Officers have the specific statutory authority to require strict or modified isolation or quarantine of persons and/or places.[192] Health Officers may also quarantine any place or person when the procedure is necessary to enforce the regulations of CDPH.[193] However, no quarantine may be imposed upon another city or county without written consent of CDPH.[194] In certain situations, Health Officers may be directed to enforce a CDPH mass quarantine order.[195] The Health Officer may also issue an order to first responders at the scene of a suspected exposure to a communicable disease, chemical agent, noncommunicable biologic agent, toxin, or radioactive agent, authorizing them to immediately isolate exposed individuals that may have been exposed to biological, chemical, toxic, or radiological agents that may spread to others.[196]

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[188] Data from modeling studies suggest that community containment measures such as quarantine are effective for controlling an outbreak even if compliance is less than perfect. Optimally, quarantine applied on a voluntary basis will afford sufficient compliance to attain the necessary effect. Department of Health and Human Services, Centers for Disease Control and Prevention, *Severe Acute Respiratory Syndrome*,June 25, 2010. See "http://www.cdc.gov/sars/quarantine/fs-isolation.html ."

[189] For example, SARS, West Nile Virus or Asian Flu.

[190] Health Officers should be aware that they need a strong justification to intrude on a patient's freedom of movement, bodily integrity, or privacy, and they should make every effort to minimize the impact on personal liberty.

[191] Health and Safety Code, (hereinafter, "H&S"), §120175, See discussion contained in Section II, "*General Authority of the Health Officer*."

[192] H&S §120130(c); see also H&S §121365(g), giving specific authority for the local health officer to require isolation.

[193] H&S §120585.

[194] H&S §120205.

[195] H&S §§120145,120195. Each Health Officer is charged with enforcing all orders, rules and regulations concerning quarantine or isolation prescribed or directed by the Department of Public Health.

[196] H&S §101080.2. To implement this authority, the Health Officer must establish a memorandum of understanding with first responders. (Added by Stats. 2006, c. 874 (SB 1430)).

2. Distinction Between Isolation And Quarantine.

Isolation refers to the separation of persons who have been infected with an infectious agent from other persons. Quarantine refers to the separation and restriction of movement of persons who, while not yet ill, have been or may have been exposed to an infectious agent and therefore may become infectious.[197]

a. Isolation.[198]

Isolation is the separation of infected persons from other persons for the period of communicability in such places and under such conditions as will prevent the transmission of the infectious agent. Isolation orders can be either strict or modified.

i. Strict isolation.

If the particular disease requires strict isolation, Health Officers must insure that instructions are given to the patient and members of the household, defining the place of isolation and identifying the measures to be taken to prevent the spread of the disease. Strict isolation includes an extensive series of measures which are detailed in regulation.[199]

ii. Modified isolation.

Modified isolation has no specified requirements beyond separation of infected persons to prevent transmission of disease. The isolation technique will depend upon the particular disease. Health Officers must issue appropriate instructions prescribing the isolation technique to be followed as detailed in regulation.[200]

b. Quarantine.

Quarantine is the limitation of freedom of movement of persons or animals that have been or may have been exposed to a communicable disease for a period of time equal to the longest usual incubation period of the disease, in such manner as to prevent effective contact with those not so exposed.[201]

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[197] Department of Health and Human Services, Centers For Disease Control And Prevention,http://www.cdc.gov/quarantine/ April 2012; 17 California Code of Regulations, (hereinafter, "C.C.R."), §§2518 and 2520.
[198] 17 C.C.R. 2515.
[199] 17 C.C.R. §2516.
[200] 17 C.C.R. §2518.
[201] 17 C.C.R. §2520.

3. Places Of Quarantine Or Isolation.

There are several alternatives for the location of the isolation or quarantine of persons.[202] Statutes give CDPH authority to establish and maintain its own places of quarantine or isolation,[203] and to require Health Officers to establish and maintain places of quarantine or isolation that are subject to the special directions of CDPH.[204] People in isolation or quarantine may be cared for in their homes,[205] in hospitals, or in designated healthcare facilities.[206] Home isolation may be the easiest and the least intrusive, but compliance is the most difficult to monitor.[207] Health Officers should use caution in considering the use of jails for isolation and quarantine.[208]

4. Constitutional Considerations.

Even though the private interest affected by isolation or quarantine is perhaps the most significant private interest of all, personal liberty, courts have long held that "[h]ealth authorities possess the power to place under quarantine restrictions persons whom they have reasonable cause to believe are afflicted with infectious or contagious diseases."[209] Enforcement of involuntary quarantine and isolation orders will trigger application of constitutional safeguards such as notice, a pre or post-confinement hearing[210] within a reasonable time, and all the attendant procedural protections discussed in Section III, "*Constitutional Limitations Impacting the Authority of the Health Officer*." Isolation and quarantine orders cannot be "arbitrary, oppressive and unreasonable." These orders must have documentation that factually supports the justification for the proposed isolation and/or quarantine.

5. Large-Scale Quarantine/Isolation.

Health Officer sequestration of large groups or geographic areas is considered where there is a serious risk of widespread disease transmission with sufficient risk of serious illness or death.

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[202] During the 2003 global outbreak of SARS, seriously ill patients were cared for in hospitals, and those with mild illness were cared for at home. (Department of Health and Human Services, Centers for Disease Control and Prevention, Isolation and Quarantine, September 2004.)
[203] H&S §120135.
[204] H&S §120200.
[205] H&S §120225.
[206] H&S §121365.
[207] Home isolation minimizes property and liberty intrusions and associated costs. Each of these are factors considered in the determination process to be used in carrying out the isolation order.
[208] *Souvannarath v. Hadden* (2002) 95 Cal. App. 4th 1115 (court found that the Legislature intended to prohibit the use of jails as tuberculosis detention facilities).
[209] *In re Application of Arata* (1921) 52 Cal. App. 380, 383.
[210] In some instances, this balancing may result in the need for a formal hearing procedure that includes the right of confrontation and cross-examination, as well as a limited right to an attorney. See *Morrissey v. Brewer* (1972) 408 U.S. 471. In others, due process may require only that the administrative agency comply with the statutory limitations on its authority. See *Cafeteria and Restaurant Workers Union v. McElroy* (1961) 367 U.S. 886.

a. Health Officer's authority may be impacted by the scale and location of the outbreak.

When a contagious event affects or has potential to spread into the jurisdictional boundaries of a Health Officer from another jurisdiction, the Health Officer needs CDPH's written consent to establish a quarantine.[211] If large sections of the state are implicated, CDPH will direct the Health Officer's actions. Where national or inter-state measures are needed, the CDC has authority upon executive decision to be made by the President.[212] See Section V, "*Interjurisdictional Coordination and Cooperation.*"

b. Practical considerations.

There are also several practical considerations to be resolved before imposing a quarantine or isolation of large numbers of people. These considerations include but are not limited to:

- Existence of effective lesser restrictive means to achieve disease control.[213]
- Substantial human and material resources may be necessary.
- Those quarantined must be detained in safe and hygienic locations.
- Adequate food and other necessities must be provided.
- Access to appropriate medical care.[214]
- Ability to provide rapid vaccination or treatment.
- Availability of medical supplies.
- Ability to effectively monitor and timely enforce orders.
- Applicability of disease control reporting requirements.[215]
- Applicability of medical information confidentiality requirement.[216]

6. Isolation and Quarantine Orders.

There is no express content or method of service statutorily mandated for isolation and quarantine orders.[217] However, these Health Officer orders must be consistent with applicable constitutional requirements discussed above and in Section III, "*Constitutional Limitations Impacting Authority of the Health Officer.*" As with any other Health Officer order, the content and appropriate

[211] H&S §120205. The scale of the problem may also lend itself to state leadership.
[212] 42 U.S.C. §264(a) and (b).
[213] For example voluntary home curfew or public event restrictions.
[214] *Bioterrorism, Public Health and the Law, Legal Basis for Large-Scale Quarantine,*Vernellia R. Randall,; American Medical Association, The Ethics of Quarantine, Ross Upshur, M.D., MSc, MA, November 2003, Vol. 5, Number 11.
[215] H&S §120130, 17 C.C.R. §2500.
[216] 45 Code of Federal Regulations, (hereinafter, "C.F.R."), Health Insurance Portability and Accountability Act of 1996; Civil Code §56.10.
[217] For an example of statutorily mandated content and procedures applicable to tuberculosis orders. See H&S §§121365 et. seq.

procedures for isolation and quarantine orders are fact dependent and must be determined by the particular circumstances.[218]

a. Form of the order.

In general, isolation and quarantine orders should be in writing. However, facts and circumstances may dictate the initial use of an oral order which will be confirmed in writing at the earliest possible opportunity.

b. Contents of the order.

The following is a checklist of potential items to consider, but not necessarily include in isolation or quarantine orders:

- Subject of the Order.
- Individual Orders: Identity and address of the person when known, or if unknown, as detailed a description of the subject as available.
- Mass Orders: Target population/geographic area, described as specifically and narrowly as possible.
- The specific directives that the individual(s) must follow.[219] .
- Duration of the order and date of release.[220]
- Potential penalty for a violation.[221]
- Supporting facts.[222]
- Statutory authority and any other legal basis to support the order.
- Method and opportunity to challenge the order
- Location of the isolation-health facility, home and the reason for any out-of-home isolation.[223]
- Any additional information specific to the event triggering the need for the order.
- Language of the individual.
- Whether the patient is a minor.
- Mental capacity of the individual.
- Signature and title of Health Officer.
- Signature of the patient acknowledging the receipt of order as discussed below.
- Right to representation, if any, for the subject of the order.

[218] Due to the intrusive nature of these orders, Health Officers may wish to consult with legal counsel.
[219] For example, prescribed course of medication, infection control precautions, or limitation on movement or interactions with others.
[220] Where uncertain, a date should be inserted and upon expiration a new order should be issued and served.
[221] If there will be a potential for a penalty of imprisonment or fine, it must be specially set forth in the order.
[222] Include specific facts such as, the individual has a disease or there are reasonable grounds to believe that the individual has a disease, epidemiologic evidence, clinical evidence, laboratory test results, likelihood of disease transmission, the threat to public health and safety.
[223] For example, the person is unable or refuses to take medication or take necessary precautions.

- Method(s) of informing the individuals subject to the order as discussed below.

c. Service of the orders.

i. Orders directed to individuals.

To ensure immediate effectiveness of the order and successful enforcement, individual isolation and quarantine orders should be personally handed to the individual.[224] The date and time that the individual was given the order should be documented as well as who handed the order to the individual. This method of service does not require the signature of the subject of the order to be effective.

In general, it is statutorily sufficient to serve Health Officer's orders by registered or certified mail.[225] However, an order is not effective until and unless the registered or certified return receipt on the envelope containing the order is signed by the subject of the order.

ii. Orders directed to a mass.

Dependent upon factors such as the nature of the incident, potential number of individuals implicated as well as the geographic area concerned, the methods of communicating the isolation and quarantine order will vary. Personal service, mail, media, posting of the venue, site, or place in question, or combination of these and other methods can be used to communicate the directives to the target group or area. To ensure reaching the broadest population in the most effective manner and to ensure successful enforcement, Health Officers may want to employ multiple communication methods.

7. Enforcement Authority For Quarantine And Isolation.

In addition the general enforcement authority discussed in Section IV, "*Enforcement of Health Officer Authority,*" there is a specific statute mandating compliance with orders of quarantine or isolation.[226] A violation of an isolation

[224] Use of both methods of service may be optimal.
[225] H&S §120105. "Whenever in the Communicable Disease Prevention and Control Act (Section 27), service or notice of any order or demand is provided for, it shall be sufficient to do so by registered or certified mail if a receipt therefore signed by the person to be served or notified is obtained. The receipt shall be prima facie evidence of the service or notice in any civil or criminal action."
[226] H&S §120220. "When quarantine or isolation, either strict or modified, is established by a health officer, all persons shall obey his or her rules, orders, and regulations."

or quarantine order constitutes a misdemeanor.[227] It is also a misdemeanor for any person with a contagious, infectious or communicable disease to willfully expose himself or herself to another person. [228]

8. Challenges To Isolation And Quarantine Orders.

Any challenge to a quarantine or isolation order should be resolved within a reasonable time. Prior to issuing quarantine and isolation orders, it may be useful to consider how challenges to the order can be registered and resolved. For large scale isolation and quarantine events, Health Officers may want to have protocols and procedures in place that may involve internal processes or interaction with other agencies as well as the courts.

B. TEMPORARY CLOSURES OF PUBLIC GATHERINGS.

When it cannot be quickly determined which specific persons are actually ill or exposed and/or there is no need to control all of their movements, temporary closures of public gatherings may be an appropriate disease control measure. If the closures involve multiple venues and appear likely to exceed several days, Health Officers should consider and consult with local officials as to whether a local emergency should be declared.

1. Authority For Temporary Closures of Public Gatherings.

Whenever an immediate menace to the public health or safety is created by a calamity including a flood, storm, fire, earthquake, explosion, accident, or other disaster, the Health Officer may close the area where the menace exists under specified conditions. In such a closure, the persons within the affected area can be ordered to leave.[229] In addition to this specific power, the general powers of the Health Officer to control the spread of disease discussed in Section II, "*General Authority of the Health Officer*." also apply to temporary closures of public gatherings.[230] When the gathering is subject to a permitting requirement, the Health Officer may consider consulting with the permitting agency to explore the possibility of an immediate permit suspension.

2. Constitutional Considerations.

Closures of public gatherings raise issues regarding freedom of assembly, freedom of speech, due process and equal protection rights. Closure orders

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[227] H&S §120275. "Any person who, after notice, violates, or who, upon the demand of any health officer, refuses or neglects to conform to, any rule, order, or regulation prescribed by the department respecting a quarantine or disinfection of persons, animals, things, or places, is guilty of a misdemeanor."

[228] H&S §120290. "Except as provided in section 120291 or in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who willfully exposes himself or herself to another person, and any person who willfully exposes another person afflicted with the disease to someone else, is guilty of a misdemeanor."

[229] Penal Code, (hereinafter, "Pen.") §409.5.

[230] This is in addition to any express statutory authority for particular closures such as food establishments (H&S §114409) and certain funerals (17 C.C.R. §2538).

cannot be "arbitrary, oppressive and unreasonable," and must be narrowly drawn to be free from vagueness and over-breadth. These orders must have documentation that factually supports the justification for the proposed closure. The process for issuing and enforcing the orders should adhere to applicable procedural protections discussed in Section III, "*Constitutional Limitations Impacting Authority of the Health Officer*."[231]

3. Form of the Orders.

There is no express content or method of service statutorily mandated for closure orders. In general, closure orders should be in writing. However, facts and circumstances may dictate the initial use of an oral order which will be confirmed in writing at the earliest possible opportunity. As with any other Health Officer order, the content and appropriate procedures for closure are fact dependent and must be determined by the particular circumstances.[232]

4. Contents of the Order.

The following is a checklist of potential items to consider, but not necessarily include in closure orders:

- Subject of the Order: Target population/geographic area described as specifically and narrowly as possible.
- The specific directives that the individuals must follow.
- Right to representation, if any, for the subject of the order.
- Parameters and conditions of the order.[233]
- Duration of the order-both beginning and end dates and times.
- Potential penalty for a violation.
- Supporting facts.[234]
- Statutory authority and any other legal basis to support the order.
- Method and opportunity to challenge the order.
- Any additional information specific to the event triggering the need for the order.
- Languages of the individuals.
- Signature and title of Health Officer.
- Method(s) of informing the individuals subject to the order as discussed below.

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[231] *Nunez v. San Diego* (9th Cir. 1997) 114 F.3d 935; *Bykosky v. Borough of Middletown* (1975) 401 F.Supp. 1242 *Halvonic v. Reagan* (1972) 457 F.2d 311; *People v. Richardson* (1994) 33 Cal.App.4th Supp. 11; *In re Juan C.* (1994) 28 Cal.App.4th 1093; *People v. McKelvy* (1972) 23 Cal.App.3d 1027, 1035.

[232] Due to the intrusive nature of these orders, Health Officers may wish to consult with legal counsel.

[233] Persons of common intelligence should not have to guess at the order's meaning. The order should be specific enough to prevent arbitrary and discriminatory interpretation and enforcement by the police.

[234] For example, a factual explanation of why there is an emergency, information regarding specific damage to property or injury to life and the need for the protection of the public's health and safety.

a. Service of the order.

Dependent upon factors such as the nature of the incident, potential number of individuals implicated as well as the geographic area concerned, the method(s) of communicating the closure order will vary. Personal service, mail, media, posting of the venue, site, or place in question, or combination of these and other methods can be used to communicate the directives to the target group or area. To ensure reaching the broadest population in the most effective manner and to ensure successful enforcement, the Health Officer may want to employ multiple communication methods. As discussed in the context of closures and other emergency orders, to avoid any challenges on constitutional grounds, orders need to be narrowly drawn, Health Officers should describe with particularity the activities being modified or curtailed, the reason for the action, and the length of time the closure or restriction will occur. An opportunity to consult should be given before the effective date of the order unless the situation is suddenly grave, such as a toxic release, in which case no prior opportunity need be afforded, but an opportunity for the event sponsor to object should be accorded as soon afterward as it may safely be conducted.

C. EVACUATION.

Health Officers may find it necessary for the protection of public health and safety to order the immediate movement of individuals away from a particular building or geographic area.

1. Authority For Evacuation Orders.

Express statutory authority provides that "Whenever an immediate menace to the public health or safety is created by a calamity including a flood, storm, fire, earthquake, explosion, accident, or other disaster,…" the Health Officer "…may close the area where the menace exists…" under specified conditions. The statute further provides that the Health Officer can order persons within the affected area to leave.[235] In addition to this specific power, the general powers of the Health Officer to control the spread of disease discussed in Section II, "*General Authority of the Health Officer,*" are also applicable in an evacuation event.

2. Constitutional Considerations.

Evacuations raise issues regarding freedom of assembly, freedom of speech, due process and equal protection rights. Evacuation orders cannot be "arbitrary, oppressive and unreasonable," and must be narrowly drawn to be free from vagueness and over breadth. These orders must have documentation that factually supports the justification for the proposed evacuation. The process for issuing and enforcing the orders should adhere to the applicable procedural protections

[235] Pen. §409.5.

discussed in Section III, "*Constitutional Limitations Impacting Authority of the Health Officer.*"[236]

3. Form of the Orders.

There is no express content or method of service statutorily mandated for evacuation orders. In general, evacuation orders should be in writing and posted on the subject area or site. However, facts and circumstance may dictate the use of an initial oral order which will be confirmed in writing at the earliest possible opportunity. As with any other Health Officer order the content and appropriate procedures for closure are fact dependent and must be determined by the particular circumstances.[237]

D. CURFEWS.

1. Curfews Can Be Implemented Only After A Local Emergency Has Been Declared Or Through Enactment Of An Ordinance.

Prevention and control of highly communicable diseases that threaten public health may require the use of a curfew. However, curfews may only be imposed after (1) the declaration of a local emergency[238] by the "governing body of a city, county, or city and county, or by an official designated by ordinance"[239] or (2) in a non-emergency situation pursuant to a local ordinance. Unless a Health Officer has been designated by a local ordinance to declare a local emergency, Health Officers have no independent authority to implement a curfew.[240]

2. Constitutional Considerations.

Curfews raise issues regarding freedom of assembly, freedom of speech, due process and equal protection rights. Curfew orders cannot be "arbitrary,

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[236] See generally, *Nunez v. San Diego* (9th Cir. 1997) 114 F.3d 935; *Bykosky v. Borough of Middletown* (1975) 401 F.Supp. 1242; *Halvonic v. Reagan* (1972) 457 F.2d 311; *People v. Richardson* (1994) 33 Cal.App.4th Supp. 11; *In re Juan C.* (1994) 28 Cal.App.4th 1093; *People v. McKelvy* (1972) 23 Cal.App.3d 1027, 1035.

[237] Due to the intrusive nature of these orders, Health Officers may wish to consult with legal counsel.

[238] Government Code ("Gov.") §8634. "During a local emergency the governing body of a political subdivision, or officials designated thereby, may promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety. Such orders and regulations and amendments and rescissions thereof shall be in writing and shall be given widespread publicity and notice. The authorization granted by this chapter to impose a curfew shall not be construed as restricting in any manner the existing authority of counties and cities and any city and county to impose pursuant to the police power a curfew for any other lawful purpose."

[239] Gov. §8630(a). "A local emergency may be proclaimed only by the governing body of a city, county, or city and county, or by an official designated by ordinance adopted by that governing body. (b) Whenever a local emergency is proclaimed by an official designated by ordinance, the local emergency shall not remain in effect for a period in excess of seven days unless it has been ratified by the governing body. (c) The governing body shall review the need for continuing the local emergency at least once every 30 days until the governing body terminates the local emergency. (d) The governing body shall proclaim the termination of the local emergency at the earliest possible date that conditions warrant."

[240] Due to the nature of a curfew order, Health Officers will be working with law enforcement in regards to enforcing the order.

oppressive and unreasonable," must be based on a clear showing of necessity and must be narrowly drawn to be free from vagueness and over breadth. The process for issuing and enforcing the orders should adhere to the applicable procedural protections discussed in Section III, "*Constitutional Limitations Impacting Authority of the Health Officer*."[241]

3. Curfews Orders Issued After The Declaration Of A Local Emergency.

a. Orders must be necessary for the protection of life or property, in writing, have specific duration and be given widespread notice.

The statutory scheme for declaring local emergencies provides that emergency curfew orders: (1) Can be issued only after an emergency is proclaimed; (2) Are lawful only so long as an emergency exists; (3) Must be necessary for the protection of life and property; (4) Must be in writing; (5) Must be given widespread publicity and notice; and (6) Any amendment or rescission must be in writing and be given widespread publicity and notice.[242] Other than these requirements, there is no express content or method of service statutorily mandated for curfew orders. However, curfew orders must be consistent with the applicable constitutional requirements discussed above and in Section III, "*Constitutional Limitations Impacting Authority of the Health Officer*." The content and appropriate procedures for curfew orders are fact dependent and must be determined by the particular circumstances.

b. Contents of the Order. The following is a checklist of potential items to consider, but not necessarily include in curfew orders:

- Authority for Declaration of Emergency and fact that emergency has been declared.
- Reason for Declaration of Emergency.
- Basis for need for Curfew.[243]
- Details of curfew restrictions regarding locations, hours and/or for population.[244]
- Languages of the individuals.
- Parameters and conditions of the order.[245]
- Potential penalty for a violation.

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[241] See generally, *Nunez v. San Diego* (9th Cir. 1997) 114 F.3d 935; *Bykosky v. Borough of Middletown* (1975) 401 F.Supp. 1242, *Halvonic v. Reagan* (1972) 457 F.2d 311; *People v. Richardson* (1994) 33 Cal.App.4th Supp. 11; *In re Juan C.* (1994) 28 Cal.App.4th 1093; *People v. McKelvy* (1972) 23 Cal.App.3d 1027, 1035.

[242] See text of Gov. §8634 in footnote 238.

[243] For example, a factual explanation of why there is an emergency, information regarding specific damage to property or injury to life and the need for the protection of the public's health and safety.

[244] If the curfew does not apply to all persons within a designated area, there should be a factual basis for its selective application.

[245] Persons of common intelligence should not have to guess at the order's meaning. The order should be definite enough to prevent arbitrary and discriminatory enforcement by the police.

- Exemption of police officers, firefighters, emergency personnel authorized representatives of the media.
- Enforcement authority.
- Method and opportunity to challenge the order.
- Any additional information specific to the event triggering the need for the order.
- Right to representation, if any, for the subject of the order,
- Signature and title of designated official.
- Method(s) of informing the individuals subject to the order (see "Service of the Order" below).

c. Service of the order.

Dependent upon factors such as the nature of the incident, potential number of individuals implicated as well as the geographic area concerned, the method(s) of communicating curfew orders will vary. Personal service, mail, media, posting the venue, site, or place in question, or combination of these and other methods can be used to communicate the directives to the target group or area. To ensure reaching the broadest population in the most effective manner and to ensure successful enforcement, Health Officers may want to employ multiple communication methods.

E. PREPAREDNESS POINTS.

1. Health Officers should, in planning for isolation and quarantine, address home isolation of patients, the availability and use of existing or temporary structures as alternative facilities for isolation, the management of patients housed at home or in alternative facilities, and resources for supplies and services.

2. Health Officers can, when dealing with large "temporary" events, work with the city or county to craft and adopt standing conditions for temporary event permits which the agency can adopt and which the permittee can be required to accept ahead of time. Such conditions could include Health Officer authority to immediately suspend all issued permits.

3. Health Officers can, in regards to areas zoned for uses such as: commercial, industrial, recreational and sports venues, churches, auditoriums, theatres, hotels and convention centers work with planning agencies to develop permit conditions addressing immediate closures, contingency plans and required equipment.

4. Health Officers can, in regards to closures of public gathering made pursuant to Penal Code §409.5(a), work in conjunction with law enforcement, fire protection and other agencies, such as Department of Parks and Recreation in plan responses. Advance establishment of protocols and procedures will expedite coordination and cooperation.

IX. INVOLUNTARY INVESTIGATION, EXAMINATION, DECONTAMINATION, TREATMENT AND VACCINATION.

Investigation, examination, decontamination, treatment and vaccination constitute a spectrum of measures that may, under certain circumstances, be available to the Health Officer if such action is necessary to contain the spread of communicable disease. A discussion of these powers is contained in Section II, *"General Authority of the Health Officer."* For more intrusive action, [246] there must be more compelling factual justification. Additionally, these actions involve medical procedures of examination, treatment, testing, the laws governing the requirement for patient consent apply.

The Health Officer is "vested with considerable discretion as to what actions should be taken to control the spread of infectious disease."[247] However, the extent of the exercise of this power and discretion is limited by the factors discussed, in Section III, *"Constitutional Limitations Impacting Authority of the Health Officer*."

A. INVOLUNTARY INVESTIGATION, EXAMINATION AND DIAGNOSTIC TESTING.

1. General Authority and Discretion to Investigate, Examine and Test.

Health Officers may investigate[248] as well as conduct or order examinations[249] and testing[250] of persons[251] and animals,[252] under specified circumstances.[253] Health Officers may also perform these functions when requested by CDPH.[254] Expressly included in the investigatory role is the authority to order examinations of allegedly infected persons to verify the existence of the disease.[255] Such preliminary investigation and the measures taken to address the situation may be

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[246] For example, involuntary tests and vaccinations.
[247] *Derrick v. Ontario Community* (1975) 47 Cal.App.3d 145; *Jew Ho v. Williamson* (1900) 103 F. 10.
[248] 17 California Code of Regulations, (hereinafter, "C.C.R."), §2540. "Health Officer shall *after suitable investigation* take additional steps necessary as he deems necessary to prevent the spread of communicable disease or a disease suspected of being communicable in order to protect the public health." (emphasis added).
[249] 17 C.C.R. §§2534 (common carriers), 2606 (rabies); *Ex Parte Dillon* (1919) 44 Cal.App. 239.
[250] 17 C.C.R. §2501(a). The Health Officer "shall take whatever steps deemed necessary for the investigation and control of the disease, condition or outbreak reported. If the Health Officer finds that the nature of the disease and the circumstances of the case, unusual disease, or outbreak warrant such action, the Health Officer shall make or cause to be made an examination of any person who or animal which has been reported pursuant to Sections 2500 or 2505 to verify the diagnosis, or the existence of an unusual disease, or outbreak, make an investigation to determine the source of infection, and take appropriate steps to prevent or control the spread of the disease." "Laboratory test" means a clinical laboratory test or examination as defined in Business and Professions Code, Section 1206(a)(4); 17 C.C.R. §2534.
[251] 17 C.C.R. §§2612 (Salmonella), 2613 (Shigella), 2628 (Typhoid).
[252] 17 C.C.R. §§2603(2) and (3) (lab tests of pet birds); 2606 (rabid animals).
[253] 17 C.C.R. §§2501(a), 2540, 1 Opn.Cal.Atty.Gen. 541, 542 citing *In re Travers* (1920) 48 Cal.App.764, 766.
[254] Health and Safety Code, (hereinafter, "H&S"), §§120145, 120175; *Ex parte Arata* (1921) 52 Cal.App. 380.
[255] 17 C.C.R. §2501(a).

only those reasonably necessary to protect the public health.[256] Generally, investigation includes examination and testing.[257]

The type of examination is left to a Health Officer's discretion because the statutory language reads "to make such exams as are deemed necessary."[258] In the tuberculosis context, the statutory scheme expressly provides that "examination" includes "conducting tests, including, but not limited to skin tests, laboratory examination and X-rays, as recommended by" anyone from the articulated authorized list of persons, including Health Officers.[259] While this statutory authority is directed to one particular type of disease, it serves to demonstrate the breadth of functions that may be incorporated by the term "examination."

2. Court Order Required For Noncooperation.

Although Health Officers have the power to investigate[260] and to issue and seek enforcement of examination and testing orders,[261] they cannot enforce orders for involuntarily examination, testing or treatment without either (1) the subject's consent or (2) obtaining a court order. If the subject refuses to comply with the court's order, Health Officers may implement isolation and quarantine and/ or institute a contempt of court proceeding.

Failing voluntary cooperation or consent to treatment by the infected person subject to the issued orders, the Health Officer may be statutorily authorized to isolate and quarantine such individuals.[262] This authority extends to the temporary detention of an individual believed to have been exposed to biological agents[263] or other contaminants in order to verify exposure and carry out decontamination procedures, provided that such actions are reasonably necessary to protect the public health.[264]

The least restrictive and least invasive principles, as described in Section III, "*Constitutional Limitations Impacting Authority of the Health Officer,"* should also be considered in this context.[265] Any intrusion must be limited to only such

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[256] *In re Milstead* (1919) 44 Cal.App. 239, 244.
[257] For example, in the venereal disease context, it is expected that investigation will include examination and testing. 17 C.C.R. §2636(h).
[258] *Jones v. Czapkay* (1960) 182 Cal.App.2d 192, 199.
[259] H&S §120115(f).
[260] 17 C.C.R. §§2501(a), 2540 (General Clause), 2574(c) (Food Poisoning), 2622 (Trichinosis).
[261] *In re Martin* (1948) 83 Cal.App.2d 164, 167.
[262] H&S §120215, See discussion in Section VIII, "*Limitation of Movement Of Individual and Groups; Subsection A Isolation and Quarantine In Non-Tuberculosis Context*."
[263] Pen. Code §11419 provides a list of biological agents that includes anthrax, smallpox virus, pneumonic plague, botulism, and hemorrhagic fever virus.
[264] *In re Milstead* (1919) 44 Cal.App. 239, 244.
[265] An examination that consists of visual inspection conducted without removal of clothing is most likely permissible without a court order. But if the individual refuses to present for the examination or inspection or to provide testing samples upon service of a Health Officer order, resort to the court may be the only option.

time as needed to complete the examination and/or determine that the person no longer poses a menace to the health of society.[266]

3. Mass Investigation, Examination And Diagnostic Testing.

The same principles discussed above would apply to mass involuntary investigation, examination and diagnostic testing.

B. INVOLUNTARY DECONTAMINATION, DISINFECTION AND TREATMENT.

1. General Authority and Discretion to Decontaminate, Disinfect And Treat.

Health Officers may issue orders for decontamination, disinfection and/or treatment, if necessary to control or prevent the spread of the disease, condition or outbreak.[267] The type of treatment, like the type of examination, is left to the Health Officer's discretion[268] as is necessary and appropriate to address the circumstances of the presented situation. In addition, DHS may request the Health Officer to assist with[269] and perform such functions as disinfection,[270] treatment and decontamination.[271]

2. Court Order Required For Non-cooperation.

Although, Health Officers may have the power to order decontamination, disinfection and or treatment, they cannot enforce such orders without either (1) the subject's consent or (2) obtaining a court order. If the subject refuses to comply with the court's order, the Health Officer may implement isolation and quarantine and/or institute a contempt of court proceeding.

The least restrictive and least invasive principles described in Section III, "C*onstitutional Limitations Impacting Authority of the Health Officer,"* should also be considered in this context. Any intrusion must be limited to only such time as needed to complete the examination and/or determine that the person no longer poses a menace to the health of society.

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[266] *In re Milstead* (1919) 44 Cal.App. 239, 244.

[267] H&S §120175, 17 C.C.R. §2501(a). It is uncertain if these measures can be taken in circumstances involving chemical agent that is not of a biological origin.

[268] *Jones v. Czapkay* (1960) 182 Cal.App.2d 192, 199.

[269] The Health Officer is charged with enforcing and observing both the statutes related to public health, and the orders and regulations prescribed by the Department of Health Services. H&S §§101030, 120130, 120190, 120195, 120200, 120210, 120215, and 120175.

[270] 17 C.C.R. §2524. Disinfection is included in isolation and quarantine measures. "Each person released from quarantine or isolation shall bathe and wash his hair with soap and hot water and put on clean clothes. The area of isolation shall be *disinfected* according to the instructions of the Health Officer." H & S §120275. "Any person, who, after notice, violates, or who, upon the demand of any Health Officer, refuses or neglects to conform to, any rule, order or regulation prescribed by the department respecting quarantine or *disinfection* of person, animals, things, or places, is guilty of a misdemeanor."

[271] H&S §120530. "Any state agency conducting a public hospital shall admit acute venereal disease cases, when, in the opinion of the department or Health Officer with jurisdiction, persons infected with venereal disease may be a menace to public health."

Failing voluntary cooperation or consent to treatment by the infected person subject to the issued orders, the Health Officer may be statutorily authorized to isolate and quarantine such individuals.[272] This authority extends to the temporary detention of an individual believed to have been exposed to biological agents[273] or other contaminants in order to verify exposure and carry out decontamination procedures, provided that such actions are reasonably necessary to protect the public health.[274]

The least restrictive and least invasive principles described in Section III, "*Constitutional Limitations Impacting Authority of the Officer,"*[275] should also be considered in this context. Any intrusion should be limited to only such time as needed under the circumstances to complete the treatment, decontamination, or disinfection and/or determine that the person no longer poses a menace to the health of society.[276]

3. Mass Involuntary Decontamination, Disinfection And Treatment.

The same principles discussed above apply to mass involuntary decontamination, disinfection and treatment.

C. VACCINATION AND IMMUNIZATION.

1. Limited Express Statutory Authority for Voluntary Vaccination Programs.

In addition to the Health Officer's general authority to take steps necessary to control or prevent the spread of communicable disease, there is limited express statutory authority for use of vaccination as a measure to address public health and safety concerns under particular circumstances.[277] However, such measures are voluntary.[278] Health Officers have the statutory authority to "organize and maintain a program to make immunizations available" to all persons required by the Health and Safety Code to be immunized,[279] and for which immunizations must be documented.[280]

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[272]H&S §120215; See discussion in Section VIII, "*Limitation of Movement Of Individual and Groups; Subsection A Isolation and Quarantine In Non-Tuberculosis Context*."

[273] Pen. §11419 provides a list of biological agents that includes anthrax, smallpox virus, pneumonic plague, botulism, and hemorrhagic fever virus.

[274] *In re Milstead* (1919) 44 Cal.App. 239, 244.

[275] Freedom of religion along other constitutional rights may implicated.

[276] *In re Milstead* (1919) 44 Cal.App. 239, 244.

[277] Such as described in 17 C.C.R. §§2636(h) (tuberculosis), 2614 (smallpox), and 2566 (diphtheria).

[278] 17 C.C.R. §2566(f). The Health Officer shall take appropriate measures to *encourage and facilitate* a continuing program of active immunization against diphtheria for all children within the Health Officer jurisdiction (emphasis added). 17 C.C.R. §2614. The Health Officer is required to provide smallpox vaccinations for persons who have been exposed to a case or suspected case of smallpox.

[279] H&S §120350.

[280] H&S §§120325 et. seq. , 121525 (TB examinations).

2. No Express Statutory Authority in California for Compulsory Vaccination, Absent Court Order or Declaration of Emergency.

There is no statutory authority for involuntary vaccination or immunization.[281] In those circumstances in which CDPH or the Health Officer determines that the public health and safety requires vaccination or immunization to control and contain the spread of an infectious disease, or to enforce existing statutory immunization mandates, the Health Officer may:

- Seek voluntary consent[282] as defined and understood in the standard health care context.
- Impose Isolation and Quarantine where the necessary criteria and procedures are met (See Isolation & Quarantine, and Enforcement sections).
- Petition for a court order.

3. Mass Involuntary Vaccination/Immunization.

The same principles discussed above would apply to mass involuntary vaccination and immunization.

D. PREPAREDNESS POINTS.

1. Health Officers may wish to meet with the courts, counsel, the public defender, district attorney, and members of the medical community, as well as the community-at-large to prepare sample Petition, Declaration and Order Forms in anticipation of a need to implement involuntary individual or mass vaccination orders.

2. Health Officers may want to provide advance education and planning for mass/large scale immunization or vaccination events, including solicitation of health care volunteers, pharmaceutical cache acquisition and storage, as well as dispensary location. This may encourage voluntary participation, minimize anxiety, assuage individual resistance, and alert the public to its availability.

3. Health Officers may when seeking a court order to enforce a Health Officer order for examination, include in the proposed order, the full breadth of authority that may be needed to fully conduct all potential forms of examination, including testing. The actual exercise of the authority can be suitably tailored to meet the specific needs of the investigation and examination without resort to the courts for additional authority as the investigation progresses.

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[281] California has not adopted the Model State Health Emergency Powers Act which authorizes compulsory vaccination during a "state of public health emergency." See also *Jacobson v. Massachusetts* (1905) 197 U.S. 11.
[282] The standard medical definition of consent may apply.

X. INSPECTION, SEIZURE, DECONTAMINATION, DISINFECTION, AND DESTRUCTION OF REAL AND PERSONAL PROPERTY.

A. INSPECTION AND SEIZURE.

The Health Officers' general statutory authority[283] to investigate and take measures necessary to prevent spread of contagious disease gives them the power to inspect and seize real property[284] and personal property.[285] Although this power extends to real and personal property, in most instances, Health Officers will seize only personal property and will quarantine real property. In addition, when acting as the local enforcement agency under state law, Health Officers have express statutory authority to inspect and seize property under specific circumstances.[286]

Health Officers' ability to inspect and seize property is conditioned upon the property owner or occupants' consent to the inspection. If consent is either (1) refused or (2) cannot be obtained, an inspection or search warrant is required absent "exigent circumstances."[287]

As discussed in Section III, "*Constitutional Limitations Impacting Authority of the Health Officer*," the constitutions of the United States and California both prohibit unreasonable searches and seizures. A warrantless search or seizure of personal property or warrantless entry into a home or business,[288] in order to administratively investigate a health hazard is presumptively unreasonable absent consent.[289] This presumption can be overcome by a showing of an emergency situation in which there is such a serious and urgent threat to public health and safety that a warrant cannot be obtained in time to carry out the necessary measures to eliminate, reduce or contain the threat.[290]

B. DECONTAMINATION, DISINFECTION, AND DESTRUCTION.

If seized or quarantined property requires decontamination, disinfection, or destruction to protect public health and safety, absent express statutory authority permitting it under

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[283] Health and Safety Code, (hereinafter, "H&S"), §120175, 17 California Code of Regulations, (hereinafter, "C.C.R.") §2501. See discussion in Section II, "*General Authority Of The Health Officer.*" In addition, certain local nuisance abatement ordinances may provide additional or alternate authority. A Health Officer has express authority to inspect real or personal property when necessary to enforce the regulations of CDPH.

[284] Real property consists of land and the buildings located on it. Black's Law Dictionary (9th ed. 2009), property.

[285] Personal property consists of possessions such as clothing, cars, equipment, and furniture. Black's Law Dictionary (9th ed. 2009), property.

[286] For example, in cases of sexually transmitted diseases, inspection of restaurants, underground fuel tanks, and hazardous waste there is an express statute authorizing inspection and seizure. H&S §§ 25289, 113713, and 120585.

[287] For example, imminent spread of contamination and disease that is a serious threat to public health and safety, or the need to prevent imminent release of hazardous materials, or an immediate risk of serious danger to the public inside or outside the building. For a discussion of the concept of exigency and the need for a warrant in a criminal context, see *People v. Celis* (2004) 33 Cal.4th667, 676-77..

[288] A warrant might be required to search commercial property in a manner that is not otherwise statutorily authorized, such as routine inspections. Cal.Const. Art. 1, § 13. Cal. Code Civ. Pro., (hereinafter, "C.C.P"), § 1822.50. Penal Code, (hereinafter, "Pen."), § 1523.

[289] *People v. Celis* (2004) 33 Cal.4th667, 67-77..

[290] *People v. Rogers*, (2009) 46 Cal.4th 1136, 1156-57.

certain circumstances[291] or CDPH authorization, Health Officers must first obtain either the owners' consent or court orders to take such actions, unless there are exigent circumstances. As with searches and seizures, a court order may not necessarily be required. If an urgent situation exists, and the court order cannot be obtained in time to carry out the necessary measures to eliminate, reduce or contain the serious threat to public health and safety, Health Officers may choose to take action until the emergency no longer exists and a court order can be obtained.[292]

C. OWNER COMPENSATION.

Depending upon the specific facts of each unique set of circumstances, property owners may be entitled to seek compensation.[293]

[291] H&S § 120145. H&S §§120150 and 120210 authorize the destruction of personal property when ordinary means of disinfection are considered unsafe and there is an imminent menace to the public health.

[292] For example, the detention of a man infected with tuberculosis was appropriate and necessary to protect the public health, despite the fact that the health officer did not have time to obtain an order of detention from the court prior to taking action. *Robert Levin, as Public Health Officer v. Adalberto M.* (2007) 156 Cal.App.4th 288.

[293] *Massingill v. Dep't. of Food & Agriculture*, (2002) 102 Cal.App.4th 498, 507-08; *Holtz v. Superior Court* (1970) 3 Cal.3d 296

XI. RATIONING OF RESOURCES.

A. AUTHORITY FOR HEALTH OFFICERS TO ORDER RATIONING.

Where there is a potentially limited resource[294] necessary to prevent the spread of disease or the occurrence of additional cases and the limited quantity creates or contributes to a public health and safety threat, Health Officers may determine that this resource should be rationed. Rationing activities can range from orders limiting the use of a resource to actual resource distribution.

If there is an actual or suspected case of disease within a Health Officer's jurisdiction, the Health Officer may rely upon the general Health Officer powers to ration certain resources.[295] However, Health Officers have no express statutory authority to ration resources.

During an outbreak of communicable disease, or when there is imminent and proximate threat of such an outbreak, the Health Officer may request that health care providers within his or her jurisdiction disclose inventories of critical supplies, equipment, drugs, vaccines and other products that may be used for the prevention of the transmission of the disease. The Health Officer must maintain the confidentiality of this information.[296] Manufacturers, distributors and health plans may also be required to disclose this information.[297]

Health Officer authority to ration may also be derived from orders issued by the Governor,[298] CDPH,[299] or other state or federal agency. In the absence of such state agency orders, Health Officers must obtain the declaration of a local emergency[300] prior to using rationing as a preventative measure.[301] Several other federal and state agencies have specific regulatory and enforcement powers in particular areas such as air quality, food, water and some drugs.[302]

B. CONTENT OF RATIONING ORDERS.

Health Officers' orders issued pursuant a directive from the Governor or DHS, or other state or federal agency must be consistent with the parameters of the directive. All other Health Officer rationing orders must be narrowly drawn to be free from vagueness and

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[294] For example, medication, pharmaceuticals, medical equipment and supplies. Rationing must be distinguished from commandeering. Rationing involves the setting of limitations on resource distribution, whereas commandeering involves taking involuntary possession of resources or facilities.
[295] Health and Safety Code, (hereinafter, "H&S"), §120175; 17 California Code of Regulations, (hereinafter, "C.C.R."), §2501. For the general powers of the Health Officer see Section II, "*General Authority of the California Local Health Officer*."
[296] H&S §120176 (added by Stats. 2006, c. 874 (SB 1430)).
[297] H&S §120155 (added by Stats, 2006, c. 589 (SB 699)).
[298] Government Code, (hereinafter, "Gov."), §8550 et seq.
[299] See Section III, "*Interjuridictional Coordination and Cooperation.*"
[300] Gov. §8630.
[301] H&S §101040.
[302] For example, Sherman Food, Drug, and Cosmetic Law (H&S §§109875 et. seq.), State Department of Water Resources and the State Water Resources Control Board (Water Code §350).

over breadth. These orders must have documentation that factually supports the justification for the proposed rationing. The process for issuing and enforcing the orders should adhere to applicable procedural protections discussed in Section III, "*Constitutional Limitations Impacting Authority of the Health Officer*." The following is a checklist of potential items to consider, but not necessarily include in a rationing order:

- Subject of the Order: Target population/geographic area described as specifically and narrowly as possible.[303]
- The specific directives that the individuals must follow.
- Method(s) of informing the individuals subject to the order.
- Parameters and conditions of the order.[304]
- Duration of the order-both beginning and end dates and times.
- Potential penalty for a violation.
- Supporting facts.[305]
- Statutory authority and any other legal basis to support the order.
- Method and opportunity to challenge the order.
- Any additional information specific to the event triggering the need for the order.
- Languages of the individuals.
- Signature and title of Health Officer.
- Right to representation, if any, for the subject of the order.

C. PREPAREDNESS POINTS.

1. Health Officers should establish lines of communication with pharmaceutical companies, distributors, local pharmacies, and local health care providers.

2. Health Officers should coordinate with those state and federal agencies that have specific regulatory and enforcement powers in areas such as air quality, food and drug, and water.

[303] If the rationing does not apply to all persons within a designated area, there should be a factual basis for its selective application.
[304] Persons of common intelligence should not have to guess at the order's meaning. The order should be definite enough to prevent arbitrary and discriminatory enforcement by the police.
[305] For example, a factual explanation of why there is an emergency, information regarding specific damage to property or injury to life and the need for the protection of the public's health and safety.

XII. COMMANDEERING.

A. COMMANDEERING REAL OR PERSONAL PROPERTY.

Certain circumstances may dictate the need to use real or personal property[306] belonging to private individuals or businesses to protect public health and safety. Commandeering is distinguished from rationing in that commandeering involves taking involuntary possession of resources or facilities. Rationing is setting forth the limitations of resource distribution. Commandeering differs from quarantine and isolation in that commandeering involves the taking possession of a space rather than a restriction of occupant movement.

B. AUTHORITY TO COMMANDEER REAL OR PERSONAL PROPERTY.

If there is an actual or suspected case of disease within the Health Officer's jurisdiction, the Health Officer may rely upon the general Health Officer powers to commandeer real and personal property.[307] However, Health Officers have no express statutory authority to commandeer.

During an outbreak of communicable disease, or when there is imminent and proximate threat of such an outbreak, the Health Officer may request that health care providers within his or her jurisdiction disclose inventories of critical supplies, equipment, drugs, vaccines and other products that may be used for the prevention of the transmission of the disease. The Health Officer must maintain the confidentiality of this information.[308]

Health Officer authority to commandeer may also be derived from orders issued by the Governor,[309] CDPH,[310] or other state or federal agency. In the absence of such state agency orders, Health Officers must obtain the declaration of a local emergency[311] prior to commandeering property as a preventative measure.[312] Such use may impact property rights protected by the United States and California Constitutions. Considerations similar to those discussed in Section X, "*Inspection, Seizure, Decontamination, Disinfection, And Destruction Of Real and Personal Property,"* also apply in the commandeering context.

C. CONTENT OF COMMANDEERING ORDERS.

Health Officer orders issued pursuant to a directive from the Governor or CDPH or other state or federal agency, must be consistent with the parameters of the directive. All other Health Officer commandeering orders must be narrowly drawn to be free from vagueness and over breadth. Orders should specify only the minimum amount of property to be

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[306] This can include medication, pharmaceuticals, medical equipment and supplies.
[307] Health and Safety Code, (hereinafter, "H&S"), §120175, 17 California Code of Regulations, (hereinafter, "C.C.R."), §2501. For the general powers of the Health Officer see Section II. "*General Authority of the California Local Health Officer*."
[308] H&S §120176 (added by Stats. 2006, c. 874 (SB 1430)).
[309] Government Code, (hereinafter, "Gov."), §8550 et seq.
[310] See Section III, "*Interjuridictional Coordination and Cooperation."*
[311] Gov. §8630.
[312] H&S §101040.

commandeered which will respond to the emergency situation. These orders must have documentation that factually supports the justification for the proposed commandeering. The process for issuing and enforcing the orders should adhere to applicable procedural protections discussed in Section II, "*Constitutional Limitations Impacting Authority of the Health Officer*." The following is a checklist of potential items to consider, but not necessarily include in a commandeering order:

- Subject of the Order: Target population/geographic area described as specifically and narrowly as possible.[313]
- The specific directives that the individuals must follow.[314]
- Method(s) of informing the individuals subject to the order.
- Parameters and conditions of the order.[315]
- Duration of the order, both beginning and end dates and times.
- Potential penalty for a violation.
- Supporting facts.[316]
- Statutory authority and any other legal basis to support the order.
- Method and opportunity to challenge the order.
- Any additional information specific to the event triggering the need for the order.
- Languages of the individuals.
- Signature and title of Health Officer.
- Right to representation, if any, for the subject of the order.
- Owner Compensation.

Depending upon the specific facts of each unique set of circumstances, property owners may be entitled to seek compensation.[317]

[313] If the commandeering does not apply to all persons within a designated area, there should be a factual basis for its selective application.
[314] The order should specify with as much detail as possible the property to be surrendered and the precise terms, conditions and location that the property is to be surrendered to the appropriate authority.
[315] Persons of common intelligence should not have to guess at the order's meaning. The order should be definite enough to prevent arbitrary and discriminatory enforcement by the police.
[316] For example, a factual explanation of why there is an emergency, information regarding specific damage to property or injury to life and the need for the protection of the public's health and safety.
[317] *Brown v. State of California* (1993) 21 Cal.App.4th 1500; *Teresi v. State of California* (1986) 180 Cal.App.3d 239.

D. PREPAREDNESS POINTS.

1. Health Officers can determine what medical resources might be necessary to address various common medical emergency scenarios: limited impact, wide-spread impact, and catastrophic impact.

2. Health Officers can survey local and regional governmental and private availability and supply of potentially necessary medical services and supplies.

3. Health Officers can consider building reserves and stockpiles of non-perishable medical goods and supplies.

4. Health Officers can survey local suppliers to determine availability of medical goods and services.

5. Health Officers can enter into standby agreements with suppliers of medical services and goods.

6. Health Officers can obtain medical goods and services pursuant to any local agreements.

7. Health Officers can, if routine availability of medical goods and services is not sufficient, survey availability through mutual aid agreements.

8. Health Officers can if medical supplies and services are not adequate, work through the local emergency services organization to obtain a declaration of local emergency.

XIII. CONSCRIPTION.

A. CONSCRIPTION.

Certain circumstances may dictate the need to order private citizens[318] to provide services that will assist in the protection of public health and safety. Involuntary servitude is prohibited by the United States and California Constitutions.[319] This section does not address the power to command the aid of citizens during a declared emergency under the Emergency Services Act. [320]

B. AUTHORITY TO CONSCRIPT.

Absent a declaration of emergency under the Emergency Services Act, Health Officers have no specific or general statutory authority to conscript the aid of private citizens.[321] Any such authority would be derived from the Governor[322] or CDPH[323] orders pursuant to a declared emergency. In the absence of such state agency orders, Health Officers must obtain the declaration of a local emergency[324] prior to conscription.

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[318] For example, health service workers and providers, lab technicians, administrators, drivers, building contractors.

[319] Statutorily authorized conscription for limited periods for the purpose of the protection of public health and safety is not considered involuntary servitude.

[320] See Gov. §8610. "The governing body of a county, city and county, or city may, by ordinance or resolution, authorize public officers, employees, and registered volunteers to command the aid of citizens when necessary in the execution of their duties during a state of war emergency, a state of emergency, or a local emergency."

[321] H&S §120175, 17 C.C.R. §2501. For the general powers of the Health Officer see Section II, "*General Authority of the Local Health Officer*."

[322] Gov. §8550 et. seq..

[323] See Section III, "*Interjuridictional Coordination and Cooperation*."

[324] Gov. §8630. After a local emergency is declared, the Health Officer must determine that conscription of persons is a preventive measure necessary to protect and preserve the public health. "Preventive measure" means abatement, correction, removal or any other protective step that may be taken against any public health hazard that is caused by a disaster and affects the public health. H&S §101040.

C. PREPAREDNESS POINTS.

1. Health Officers can determine what private sector volunteers and government personnel might be available to address the various common medical emergency scenarios: limited impact, wide-spread impact, and catastrophic impact.

2. Health Officers can survey local and regional governmental and private availability and supply of potentially necessary medical workers and/or individuals who could carry out the responsibilities of the Health Officer and protect the public health during an emergency.

3. Health Officers can consider first utilizing all area public employees who are declared disaster services workers pursuant to Government Code Section 3100, et seq. to carry out the responsibilities of the Health Officer.

4. Health Officers can enter into standby agreements with nearby medical facilities to utilize their medical personnel if necessary in a declared emergency.

5. Health Officers can, if the number of medical and/or nonmedical personnel are not adequate, work through the local emergency services organization to obtain a declaration of local emergency.

6. Health Officers can coordinate with local law enforcement agencies in regard to what kind of assistance they can provide through any conscription authority they may have.