

Memorandum 2022-12

**Emergency-Related Reforms: Emergency Powers
(Introduction of Study)**

In May 2020, in response to the COVID-19 pandemic, the Commission¹ decided to devote part of its resources to studying legal issues posed by the public health crisis.² As a part of this effort, the Commission has, to date:

- Prepared a report identifying 2021 sunset dates in the statutes to assist the Legislature in prioritizing matters that required legislative attention to avoid unintended lapses in the law.³
- Recommended changes to the law, which were enacted as an urgency statute, to permit common interest development meetings to occur via teleconference during an emergency.⁴
- Prepared a survey of the legislative responses to the COVID-19 pandemic.⁵
- Requested and received additional authority from the Legislature to undertake emergency-related work more broadly.⁶

In 2021, the Commission was authorized to study the following topic:

Whether the law should be revised to provide special rules that would apply to an area affected by a state of disaster or emergency declared by the federal government, a state of emergency proclaimed by the Governor under Section 8625 of the Government Code, or a local emergency proclaimed by a local governing body or official under Section 8630 of the Government Code. Before beginning a study under this authority, the commission shall provide notice to legislative leadership and any legislative policy committee with jurisdiction over the proposed study topic and shall

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Minutes (May 2020), p. 3; see also Memorandum 2020-19 and its supplements.

3. *Pending Sunset Dates*, 47 Cal. L. Revision Comm'n Reports __ (2020).

4. *Emergency-Related Reforms: Common Interest Development Meetings*, 47 Cal. L. Revision Comm'n Reports __ (2020); 2021 Cal. Stat. ch. 276 (SB 391 (Min)).

5. Memorandum 2021-36.

6. See 2021 Cal. Stat. res. ch. 108 (ACR 24 (Chau)); Minutes (Aug. 2020), pp. 4-5.

consider any formal or informal feedback received in response to the notice...⁷

With the ongoing pandemic, the Commission decided to commence work on this timely topic in 2022.⁸

This memorandum introduces the new study and provides general background on the relevant laws. This memorandum also discusses next steps and stakeholder outreach.

SCOPE OF STUDY

In August 2021, the Commission considered Memorandum 2021-36, which reported on legislative responses to the COVID-19 pandemic. During the discussion of that memorandum, the Commission identified two topics of emergency-related law reform for possible study:

- (1) Revising and clarifying the California Emergency Services Act in light of the lessons learned during the COVID-19 pandemic.
- (2) Revising the law to expressly accommodate necessary adjustments to professional licensure requirements during an emergency.⁹

Both of these topics would involve the California Emergency Services Act, which contains the statutory provisions governing states of emergency, the Governor's emergency powers, and related matters. It seems likely that they could be addressed together, as parts of a single study.

The first topic is quite broad (reforms addressing lessons learned during the COVID-19 pandemic). At its prior meeting, the Commission discussed a specific possible reform: revising the statute to include an illustrative, non-exhaustive list of powers granted to the Governor. **The staff welcomes additional specific suggestions from Commissioners regarding reforms related to the lessons learned during the COVID-19 pandemic.** Going forward, the staff will also seek stakeholder input on specific reform ideas.

The second topic relates specifically to the emergency suspension of statutory or regulatory rules related to professional licensure.

In line with the Commission's expressed interest in this topic to date, this memorandum provides some introductory background on the California

7. See 2021 Cal. Stat. res. ch. 108 (ACR 24 (Chau)).

8. See Memorandum 2022-3, pp. 29-30, 46; Minutes (Jan. 2022), p. 3.

9. See video recording of August 26, 2021 meeting (Part 1), starting at 34:50, *recording available at* <http://clrc.ca.gov/Menu1_meetings/video.html>.

Emergency Services Act below, focusing on the provisions related to the proclamation of a state of emergency and the Governor’s emergency powers related to statutory and regulatory requirements.¹⁰

CALIFORNIA LAW ON EMERGENCY AUTHORITY

The California Emergency Services Act (“CESA,” Gov’t Code §§ 8550-8669.7) is the primary statutory law related to emergencies in California.

After a brief, high-level description of CESA’s contents, the remainder of this discussion focuses on the narrower issue of the Governor’s powers related to statutory or regulatory requirements in an emergency.

Location and Contents of CESA

CESA is codified as Chapter 7 of Division 1 (General) of Title 2 (Government of the State of California) of the Government Code.¹¹ To provide a high-level overview of the contents of CESA, the attached Exhibit lists the articles contained in Chapter 7. Among other things, CESA establishes certain entities with specified emergency-related responsibilities,¹² requires certain emergency preparedness and planning actions,¹³ provides rules for the procurement of emergency-related equipment,¹⁴ and creates rules pertaining to emergency-related communications and notices.¹⁵

Purpose of CESA

The first provision of CESA, Government Code Section 8550, provides, in part:

10. This memorandum does not address the Governor’s authority related to spending and procurement under the California Emergency Services Act. See, e.g., Gov’t Code §§ 8645-8654.1. Similarly, this memorandum does not address provisions governing state of war emergencies and local emergencies (declared by local agencies or officers). See Gov’t Code §§ 8620-8624, 8630-8634.

11. See Gov’t Code § 8551.

12. See, e.g., Articles 5 (Office of Emergency Services) and 5.1 (Alfred E. Alquist Seismic Safety Commission); see also, e.g., Articles 4 (California Emergency Council) (designating the Office of Emergency Services as the State Disaster Council) and 6.1 (California Olympic and Paralympic Public Safety Command) (requiring the Office of Emergency Services to undertake specified work related to safety and security at the 2028 Olympic and Paralympic Games in Los Angeles).

13. See, e.g., Articles 3.8 (Hazardous Substances Emergency Response Training) and 7.5 (Statewide Natural Disaster Volunteer Corps Program). In general, the articles in CESA that pertain to specific types of emergencies appear to focus on emergency preparation and planning responsibilities. See Articles 3.5 (Oil Spills), 3.7 (Toxic Disasters), and 6.4 (Cybersecurity).

14. See, e.g., Articles 5.5 (State Assistance for Fire Equipment Act) and 5.7 (Firefighting Thermal Imaging Equipment Act of 2001).

15. See, e.g., Articles 6.2 (Public Safety Communication Act of 2002), 6.3 (The Manny Alert Act), and 6.5 (Accessibility to Emergency Information and Services).

The state has long recognized its responsibility to mitigate the effects of natural, manmade, or war-caused emergencies that result in conditions of disaster or in extreme peril to life, property, and the resources of the state, and generally to protect the health and safety and preserve the lives and property of the people of the state. To ensure that preparations within the state will be adequate to deal with such emergencies, it is hereby found and declared to be necessary:

(a) To confer upon the Governor and upon the chief executives and governing bodies of political subdivisions of this state the emergency powers provided herein; and to provide for state assistance in the organization and maintenance of the emergency programs of such political subdivisions.

...

Proclamation of State of Emergency

CESA authorizes the Governor to proclaim a state of emergency when certain criteria are met.

CESA defines “state of emergency” as:

the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, plant or animal infestation or disease, the Governor’s warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy or conditions causing a “state of war emergency,” which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission.¹⁶

Section 8625 of CESA empowers the Governor:

to proclaim a state of emergency in an area affected or likely to be affected thereby when:

(a) He finds that circumstances described in subdivision (b) of Section 8558 [definition of “state of emergency” quoted above] exist; and either

(b) He is requested to do so (1) in the case of a city by the mayor or chief executive, (2) in the case of a county by the chairman of the board of supervisors or the county administrative officer; or

16. Gov’t Code § 8558(b).

(c) He finds that local authority is inadequate to cope with the emergency.¹⁷

CESA obligates the Governor to proclaim the termination of a state of emergency “at the earliest possible date that the conditions warrant.”¹⁸ A state of emergency can also be terminated by a concurrent resolution of the Legislature.¹⁹

The grant of powers to the Governor related to a state of emergency terminate when the state of emergency terminates.²⁰

Powers of Governor

CESA grants the Governor general emergency-related powers, as well as specific powers when a state of emergency has been proclaimed.

CESA contains a general grant of power to the Governor to “make, amend, and rescind orders and regulations necessary to carry out the provisions of [CESA].”²¹

In addition, CESA grants the Governor the certain powers in a proclaimed state of emergency, including the powers to:

- “Suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, including subdivision (d) of Section 1253 of the Unemployment Insurance Code, where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.”²²
- “[Exercise] complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. In exercise thereof, he shall promulgate, issue, and enforce such

17. The Governor’s proclamation declaring an emergency in response to COVID-19 includes such findings:

WHEREAS I find that conditions of Government Code section 8558(b), relating to the declaration of a State of Emergency, have been met; and

...

WHEREAS under the provisions of Government Code section 8625(c), I find that local authority is inadequate to cope with the threat posed by COVID-19...

See Proclamation of a State of Emergency (Mar. 4, 2020), available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

18. Gov’t Code § 8629.

19. *Id.*

20. *Id.*

21. Gov’t Code § 8567(a).

22. Gov’t Code § 8571.

orders and regulations as he deems necessary, in accordance with the provisions of Section 8567.”²³

- “[M]ake, amend, or rescind orders and regulations during a state of emergency that temporarily suspend any state, county, city, or special district statute, ordinance, regulation, or rule imposing nonsafety related restrictions on the delivery of food products, pharmaceuticals, and other emergency necessities distributed through retail or institutional channels, including, but not limited to, hospitals, jails, restaurants, and schools.”²⁴

STATE OF EMERGENCY RELATED TO COVID-19

On March 4, 2020, Governor Newsom declared a state of emergency due to the COVID-19 pandemic.²⁵ Since then, he has issued numerous executive orders related to the state of emergency.²⁶

As is the case in many states, the Governor’s actions to address the COVID-19 pandemic have not been without controversy.²⁷

In the legislative sessions following the state of emergency proclamation, concurrent resolutions have been introduced in both houses of the Legislature to terminate the state of emergency.²⁸ As indicated above, under CESA, a legislative resolution terminating the state of emergency would have the effect of terminating the Governor’s grant of powers related to the state of emergency.

In addition, several of the Governor’s orders related to the pandemic have been challenged in lawsuits.²⁹

23. Gov’t Code § 8627.

24. Gov’t Code § 8627.5(a).

25. See Proclamation of a State of Emergency (Mar. 4, 2020), *available at* <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

26. See, e.g., Cal. Exec. Order Nos. N-25-20 (Mar. 12, 2020), N-60-20 (May 4, 2020), N-77-20 (Aug. 28, 2020), N-84-20 (Dec. 14, 2020), N-03-21 (Mar. 4, 2021), N-07-21 (Jun. 11, 2021), N-15-21 (Sept. 20, 2021), N-1-22 (Jan. 5, 2022). The Governor’s executive orders can be found at <https://www.library.ca.gov/government-publications/executive-orders/>.

27. See generally [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021).

28. See SCR 5 (2021-2022 Reg. Sess.), ACR 46 (2021-2022 Reg. Sess.), SCR 93 (2019-2020 Reg. Sess.), ACR 196 (2019-2020 Reg. Sess.).

29. See generally [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021) (Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic, 2020-2021); see also, e.g., *Tandon v. Newsom* (2021) 141 S.Ct. 1294; *S. Bay United Penecostal Church v. Newsom* (2021) 141 S.Ct. 716; *Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099, 278 Cal.Rptr.3d 397, *rev. denied* Aug. 11, 2021.

BROADER LEGAL CONSIDERATIONS

Going forward, the Commission will need to be mindful of broader federal and California constitutional considerations as it undertakes work on CESA.

In particular, the legal challenges to the Governor's acts during the COVID-19 state of emergency raise issues related to the delegation of authority and separation of powers, freedom of speech, freedom of assembly, free exercise of religion, the right to education, and the right to bear arms.³⁰

Depending on the direction this study takes, it may be necessary to evaluate these complex legal frameworks in more detail going forward.

NEXT STEPS

Study Work

As a next step, the staff plans to discuss judicial decisions related to the Governor's authority under CESA, with an eye towards identifying necessary or helpful reforms of the statute.

Stakeholder Outreach

The Commission has directed the staff to, at the beginning of a new study, provide some information on stakeholder outreach for the topic.

It is common for the Commission's work to be in areas of the law where it has a well-developed and long-standing email distribution list (as with probate and trial court restructuring matters).

In this case, the Commission established its email list for emergency-related law reform only last year, when it commenced work on the topic. The current list consists of just over 30 people, some of whom were probably interested in the Commission's emergency-related work on common interest developments. That list needs to be broadened.

For this reason, the staff will be conducting further outreach to persons and entities who play a part in emergency planning and response. We will also be looking for scholars with expertise in the permissible scope of emergency-related powers. The staff will be preparing an initial list of potentially interested parties

30. See generally [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020-2021](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021) (descriptions of *A.A. v. Newsom*, *Brandy et al. v. Newsom et al.*, *Gateway City Church v. Newsom*, *Harvest Rock Church, Inc. v. Newsom*, *Looney v. Newsom*, *South Bay United Pentecostal Church, et al. v. Newsom*, and *Tandon v. Newsom* under "Noteworthy Lawsuits").

to contact, which will be provided to the Commission at an upcoming meeting. **The staff welcomes any suggestions of persons or organizations who should be invited to participate in this study.**

As always, anyone is welcome to participate in the Commission's study, regardless of whether the staff has contacted them about participating. Interested persons can subscribe to the email distribution list on the study page for this topic: <http://clrc.ca.gov/X100.html>.

Does the Commission have any concerns or suggestions related to the proposed direction of this study?

Respectfully submitted,

Kristin Burford
Staff Counsel

LIST OF ARTICLES IN CALIFORNIA EMERGENCY SERVICES ACT

GOVERNMENT CODE

...

Title 2. Government of the State of California

Division 1. General

...

Chapter 7. California Emergency Services Act

Article 1. Purpose

Article 2. General Definitions

Article 3. Powers of the Governor

Article 3.5. Oil Spills

Article 3.7. Toxic Disasters

Article 3.8. Hazardous Substances Emergency Response Training

Article 3.9. Regional Railroad Accident Preparedness and Immediate Response

Article 4. California Emergency Council

Article 4.5. Urban Heavy Rescue Act

Article 5. Office of Emergency Services

Article 5.1. Alfred E. Alquist Seismic Safety Commission

Article 5.5. State Assistance for Fire Equipment Act

Article 5.7. Firefighting Thermal Imaging Equipment Act of 2001

Article 5.9. Human Trafficking Victims Assistance

Article 6. Advisory Committees

Article 6.1. California Olympic and Paralympic Public Safety Command

Article 6.2. Public Safety Communication Act of 2002

Article 6.3. The Manny Alert Act

Article 6.4. Cybersecurity

Article 6.5. Accessibility to Emergency Information and Services

Article 7. Other State Agencies

Article 7.5. Statewide Natural Disaster Volunteer Corps Program

Article 8. Mutual Aid Regions

Article 9. Operational Areas

Article 9.5. Disaster Preparedness

Article 9.8. Disaster Preparedness

Article 10. Local Disaster Councils

Article 11. Mutual Aid

Article 12. State of War Emergency

Article 13. State of Emergency

Article 14. Local Emergency

Article 15. Preservation of Local Government

Article 16. General Fiscal Provisions

Article 16.5. California Wildfire Mitigation Financial Assistance Program

Article 17. Privileges and Immunities

Article 18. Political Activity

Article 19. Penalties and Severability

Article 20. Effect Upon Existing Matters

Article 21. California Firefighter Peer Support and Crisis Referral Services
Act

Article 22. Law Enforcement Peer Support and Crisis Referral Services
Program