

Why Many Nursing Facilities Are Not Ready For Emergency Situations

Seven Recommendations to Address Current Law's Gaps

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Executive Summary

Nursing facility residents can be particularly at risk during natural disasters, as has been demonstrated yet again during Hurricanes Harvey, Irma, and Marie. The hurricanes resulted in death and injury in nursing facilities across the region, including twelve deaths in one Florida facility.

These deaths and injuries, and the desire to prevent harm in the future, have directed renewed attention on emergency preparedness. This issue brief discusses existing federal and state law, and makes recommendations to address gaps in current law.

Federal regulations on nursing facility emergency preparedness were issued in September 2016, and are scheduled for full implementation in November 2017. The regulations address five primary areas: emergency plans, facility procedures, communication plans, training and testing, and emergency power systems.

Unfortunately, these new regulations are inadequate to protect residents, in part because some of the regulatory standards are excessively vague, and in part because the regulations only govern nursing facilities and cannot mandate the broader coordination that would be advisable for community-wide emergency preparedness. Federal, state, and local governments should take additional steps to ensure adequate preparation for the natural disasters that inevitably will envelop nursing facilities and other health care providers in years to come. This issue brief offers seven recommendations.

1. The federal government should clearly require emergency generators sufficient to maintain safe temperatures.

The State of Florida recently established this requirement as a result of the recent heat-related deaths of twelve nursing facility residents, after electrical power had been knocked out by Hurricane Irma.

2. Federal and/or state governments should require advance coordination among facilities, other healthcare providers, and relevant government agencies.

During a natural disaster, a nursing facility will need to work cooperatively with local government, other health care facilities, transportation companies, and other entities. Planning should include all relevant parties, so that each is better able to enlist the assistance of the others, as appropriate.

3. Federal and/or state governments should require contractual arrangements for evacuation procedures.

Contracts provide more certainty that transportation companies and receiving facilities will be prepared to assist if evacuation of residents becomes necessary.

4. Local communities should maintain relevant information on an ongoing, community-wide basis.

Once a natural disaster strikes, facilities and others will be hard-pressed to submit relevant information to a local agency, and the agency will face difficulties in timely compiling and acting on that information. All concerned would benefit if information is submitted and compiled on a routine basis, so it is immediately available if and when disaster strikes.

5. Government agencies or provider associations should develop resources to assist in emergency plan development.

A template or model agreement can identify relevant questions and suggest appropriate strategies.

6. Federal and/or state governments should require review of emergency plans by knowledgeable agencies or persons.

Since many facility operators or administrators will have limited experience with emergency preparedness, review is important to ensure that plans are adequate.

7. Federal surveyors should assess meaningful sanctions for violations of emergency preparedness requirements.

Currently, most violations result in no penalty. Meaningful sanctions would incentivize compliance.

Federal Emergency Preparedness Regulations

In September 2016, the Centers on Medicare & Medicaid Services (CMS) released a federal regulatory package devoted solely to revising federal regulations on emergency preparedness in healthcare settings. The revised regulations address emergency preparedness in seventeen different types of healthcare settings, including hospitals, nursing facilities, home health agencies, transplant centers, and kidney dialysis centers. In each case, regulation implementation is scheduled for November 15, 2017, pursuant to instructions issued during the 2016 release.¹

¹ 81 Fed. Reg. 63,860, 63,860-61 (Sept. 16, 2016).

The nursing facility regulations set standards in five separate but related areas: emergency plans, facility procedures, communications plans, training and testing, and emergency power systems. In each area, the regulations leave much discretion to the individual facility, with CMS emphasizing an intent to maintain facility flexibility.²

Emergency Plan

Under the regulations, each facility must develop and maintain an emergency preparedness plan, including an annual review and update. The plan must follow an all-hazards model, which CMS describes as “an integrated approach to emergency preparedness planning that focuses on capacities and capabilities that are critical to preparedness for a full spectrum of emergencies or disasters.”³ The plan must address both the resident population and continuity of operations. Also, the plan should include a process for working with federal and state emergency preparedness officials, including documentation of the facility’s efforts in that regard.⁴

Procedures

The regulations require that the facility’s procedures be consistent with the emergency plan and, like that plan, are reviewed and updated at least annually. The procedures must address all “subsistence needs,” which are defined to include food, water, medical supplies, medications, and “alternate sources of energy.” These “alternate sources” must be adequate to maintain emergency lighting, alarm systems, and temperatures appropriate for residents and for safe storage.⁵

The procedures also must provide for a system to track the location of residents and on-duty staff. The procedures should address how to care for residents who remain in the facility, and also how to handle evacuation of residents to another location. The facility should develop relationships with other facilities and healthcare providers who may be willing to care for the facility’s residents if full or partial evacuation becomes necessary.⁶

Communication Plan

A facility’s communication plan must include contact information for staff, resident physicians, other facilities, emergency preparedness agencies, the licensing and certification agency, and the long-term care ombudsman program. The facility must have both primary and alternate methods for communicating with staff members and with emergency preparedness agencies.⁷ Regarding residents and residents’ families, the facility must develop a “method for sharing information from the emergency plan that the facility has determined is appropriate with residents and their families or representatives.”⁸ Some commenters had suggested more prescriptive standards for communicating with residents and families, but CMS cited facility flexibility in declining these suggestions.⁹

2 See, e.g., 81 Fed. Reg. at 63,909 - 12.

3 81 Fed. Reg. at 63,861.

4 42 C.F.R. § 483.73(a).

5 42 C.F.R. § 483.73(b)(1).

6 42 C.F.R. § 483.73(b)(2)-(7).

7 42 C.F.R. § 483.73(c)(1)-(3).

8 42 C.F.R. § 483.73(c)(8).

9 81 Fed. Reg. at 63,909 - 10.

Training & Testing

Under the regulations, the facility must train staff in emergency preparedness at least annually. The facility also must test its procedures at least annually, and this testing must include unannounced staff drills. A mandatory “full-scale” exercise should be “community-based” when “accessible,” but otherwise is facility-based. The facility must conduct at least one other exercise, which may be another full-scale exercise, or may be a “tabletop exercise” that includes a relevant emergency scenario and group discussion. The facility must analyze performance in each exercise and revise the facility’s emergency plan as necessary.¹⁰

Emergency Power Systems

As discussed above, the regulations’ provision on “procedures” requires that a facility’s policy ensures “[a]lternate sources of energy to maintain ... [t]emperatures to protect resident health and safety.”¹¹ The appropriate temperature range runs from 71° to 81° F, pursuant to a federal resident’s rights provision.¹²

Other regulations more specifically address electricity and generators. Under the nursing facility regulation on “physical environment,” each facility must have an “emergency electrical power system” that can support 1) lighting at entrances/exits; 2) fire detection, alarm, and extinguishing systems; and 3) life support systems.¹³

Furthermore, under the emergency preparedness regulations, each facility must have an emergency generator. The regulations address inspection, testing and maintenance through a cross-reference to the standards of the National Fire Protection Association. Also, if a facility has an onsite fuel source for an emergency generator, the facility must have a plan for keeping emergency power systems operational during an emergency.¹⁴

Recommendations for Federal or State Laws or Guidance to Address Gaps in Federal Requirements

1. Clearly require emergency generators sufficient to maintain safe temperatures

The insufficiency of current standards is well illustrated by a recent tragedy. As a result of Hurricane Irma, a Florida nursing facility lost air conditioning for several days. Due to high temperatures in the facility, eight residents died during the third day following the storm, and an additional four residents died in the days immediately following.¹⁵

As discussed above, federal standards regarding emergency power are scattered within federal regulations. The generator-specific subsection focuses primarily on location and testing, and requires ongoing generator operation only from those facilities that maintain an onsite fuel source.¹⁶ A provision within the “physical environment” section speaks of an “emergency electrical power system” rather than a generator, and requires such a system only for lighting or exterior doorways, fire protection systems, and life support

10 42 C.F.R. § 483.73(d).

11 42 C.F.R. § 483.73(b)(1)(ii).

12 42 C.F.R. § 483.10(i)(6).

13 42 C.F.R. § 483.90(c).

14 42 C.F.R. § 483.73(e).

15 Ellen Gabler et al., *A Preventable Descent into Suffocating Chaos*, N.Y. Times, at A1, Sept. 23, 2017.

16 42 C.F.R. § 483.73(e).

systems.¹⁷ Finally, an emergency preparedness provision, combined with a resident's rights provision, require that "[a]lternate sources of energy" be used to maintain temperatures from 71° to 81° F.¹⁸

Under the best reading of these various provisions, a facility must have a generator and fuel that are sufficient to keep temperatures between 71° to 81° F. CMS should issue guidance to make this requirement clear, effective on November 15, 2017, the deadline for implementation of the emergency preparedness regulations. Facilities should not be allowed to claim compliance with (for example) limited battery power that would be insufficient to maintain required temperatures.

Florida provides a helpful model for the required specificity. A recently-issued emergency regulation explicitly requires facilities to provide for emergency generators that can maintain safe temperatures. Under the emergency regulation, each facility must have a generator and fuel sufficient to maintain temperatures of 80° F or less for at least four days (96 hours).¹⁹

2. Require advance coordination among facilities, other healthcare providers, and relevant government agencies

The importance of coordination was noted by the HHS Office of Inspector General (OIG) in a 2012 report. Based on interviews in regions that had experienced natural disasters from 2007 through 2010, the OIG found a correlation between nursing facilities that had challenges in following their emergency plans, and facilities with plans that had not been reviewed by local emergency managers. Furthermore, of those facilities that had experienced challenges, not one had participated in communitywide emergency preparedness exercises. In interviews, many local emergency managers noted that they lacked authority to monitor or verify compliance with the facilities' plans.²⁰

The new emergency preparedness regulations call for facility-specific emergency plans, with relatively little discussion of overall coordination. The coordination requirement consists primarily of a requirement that the facility's plan "[i]nclude a process for cooperation and collaboration with local, tribal, regional, State, or Federal emergency preparedness officials' efforts to maintain an integrated response during a disaster or emergency situation, including documentation of the LTC facility's efforts to contact such officials and, when applicable, of its participation in collaborative and cooperative planning efforts."²¹

Ideally, relevant regulations and procedures would create a structure through which facilities, other service providers, and government agencies could plan and cooperate. It may be that such a structure cannot easily be created by federal nursing facility regulations, which are focused on setting requirements for nursing facilities that accept reimbursement from Medicare and/or Medicaid.²² The Centers for Medicare & Medicaid Services does not have jurisdiction over the Federal Emergency Management Agency (FEMA) or the Department of Homeland Security, although of course these federal agencies should work together whenever appropriate.

17 42 C.F.R. § 483.90(c).

18 42 C.F.R. §§ 483.10(i)(6), 483.73(b)(1)(ii).

19 Fla. Admin. Code r. 59AER17-1, available at fgov.com/wp-content/uploads/2017/09/AHCA916.pdf. Florida also issued a comparable emergency rule for assisted living facilities. See Fla. Admin. Code r. 58AER17-1, available at fgov.com/wp-content/uploads/2017/09/EN_DEA.pdf.

20 HHS Office of Inspector General, *Gaps Continue to Exist in Nursing Home Emergency Preparedness and Response During Disasters: 2007-2010*, OEI-06-09-00270, at 18-19 (April 2012).

21 42 C.F.R. § 483.73(a)(4).

22 42 C.F.R. § 483.1(b).

Emergency response often is coordinated on the state level, and states ideally will take steps to provide for advance coordination. Louisiana regulations, for example, require that all nursing facilities within certain flood-prone parishes submit their emergency preparedness plans to the state health department for review. All other facilities must submit this information to the state upon request. In each case, if the state determines that a facility's plan is inadequate, the facility must develop and submit a revised plan within ten days.²³ Facilities' plans also must be shared locally with the parish or local office of Louisiana's Office of Homeland Security and Emergency Preparedness, and a facility must address any recommendations made by such local entity.²⁴

California regulations also reference coordination with local emergency preparedness authorities, although with considerably less detail. A facility's emergency preparedness plan must "be developed with the advice and assistance of county or regional and local planning offices and shall not conflict with county and community disaster plans."²⁵ In South Carolina, likewise, a facility's emergency preparedness plan is developed "by contact and consultation with [the] county emergency preparedness agency."²⁶

3. Require contractual arrangements for evacuation procedures

Federal regulations require that a nursing facility's procedures include "safe evacuation from the LTC [long-term care] facility," including but not limited to transportation.²⁷ In addition, the facility must develop "arrangements with other LTC facilities and other providers to receive residents in the event of limitations or cessation of operations to maintain the continuity of services to LTC residents."²⁸

Each of these requirements could be improved by adding the certainty of contracts. Considering transportation needs, and developing "arrangements" with other providers, may prove to be inadequate preparation when an emergency strikes. The Louisiana regulations require contracts with "a primary sheltering host site(s) and alternative sheltering host site(s) outside the area of risk."²⁹ Likewise, a facility must secure "a written transportation contract(s) for the evacuation of residents and staff to a safe location outside the area of risk that is signed and dated by all parties."³⁰ Texas has somewhat comparable requirements relating to evacuation. The facility must enter into an agreement with a "receiving facility" that sets forth arrangements for caring for residents if evacuation is necessary.³¹ In South Carolina, a facility must obtain a "letter of agreement" from each "sheltering facility" that sets forth the number of residents that can be accommodated, plans on caring for those residents, and provisions for accommodating relocated staff members.³²

4. Maintain relevant information on an ongoing, community-wide basis

The federal emergency preparedness regulations require a facility to have a "means of providing

23 La. Admin. Code tit. 48, § 9767(A)(1), (3). This issue brief frequently will reference the Louisiana standards, which were developed in part by a Nursing Home Emergency Preparedness Review Committee created by statute after the 2005 hurricanes of Katrina and Rita. *See* La. Rev. Stat. Ann. § 40:2009.25.

24 La. Admin. Code tit. 48, § 9767(E).

25 22 Cal. Code Regs. § 72551(a).

26 S.C. Code Regs. 61-17, § 1502(A).

27 42 C.F.R. § 483.73(b)(3).

28 42 C.F.R. § 483.73(b)(7).

29 La. Admin. Code tit. 48, § 9767(C)(3).

30 La. Admin. Code tit. 48, § 9767(C)(8)(b).

31 40 Tex. Admin. Code § 19.1914(d)(5)(C).

32 S.C. Code Regs. 61-17, § 1502(B)(c).

information about the LTC facility's occupancy, needs, and its ability to provide assistance, to the authority having jurisdiction or the Incident Command Center, or designee.”³³ Such a requirement is important, of course, but could be much more effective if it called for some level of advance coordination between the facility and the relevant government agency.

For example, Louisiana calls for facilities to share relevant information with the state on an ongoing basis, so that both facilities and the state will be better prepared to coordinate if and when a disaster occurs. Each month, the facility must input all of the following information through a state webpage:

- Facility’s operational status;
- Number of residents;
- Emergency contact information;
- Emergency destination location; and
- Emergency evacuation transportation needs classified by how many residents will need advanced life support ambulances, will need ambulances, or can be transported by car or van.³⁴

Furthermore, when the state declares that an emergency situation exists, each facility must input additional specified information, along with any other information required by the state. The required information includes the facility’s operational status, availability of beds at the facility, the status of the facility’s generator, and the status of any evacuation and the facility’s capacity to continue to care for residents.³⁵

5. Develop resources to assist in emergency plan development

Many nursing facility operators and administrators will know relatively little about emergency preparedness. That unfamiliarity, of course, is no excuse for negligence, and all facilities must be responsible for complying with regulations and planning for potential emergency scenarios. That being said, federal and state agencies, or provider organizations, likely could advance the process by developing template emergency preparedness plans. At a minimum, these templates could identify important questions and suggest potential strategies. Ideally, these templates would incorporate information and expertise from specialists in emergency preparedness and nursing facility care.

The State of Louisiana has developed a Model Nursing Home Emergency Plan that usefully identifies important issues.³⁶ Of special relevance to Louisiana, the Model Plan provides a method of estimating the risk of flooding by considering the facility’s relationship to sea level and to ground level.³⁷ Specific tabs solicit information regarding such topics as likely hazards, evacuation routes, items to be sent with evacuating residents, and operational deadlines.³⁸

33 42 C.F.R. § 483.73(c)(7).

34 La. Admin. Code tit. 48, § 9767(B)(1).

35 La. Admin. Code tit. 48, § 9767(B)(3).

36 Louisiana Model Nursing Home Emergency Plan, *available at* <http://gohsep.la.gov/PREPARE/PLANNING-OVERVIEW>.

37 La. Model Plan, p. 7-8.

38 La. Model Plan, p. 25-28.

6. Require review of emergency plans by knowledgeable agencies or persons

Under federal procedures, a facility's "disaster plan" is obtained at the beginning of a Life Safety Code survey, which is focused on a facility's fire safety.³⁹ As discussed above, some state laws establish more useful procedures for sharing a facility's emergency preparedness plan with the relevant government agencies. In Louisiana, if a nursing facility is in an area susceptible to flooding, it must submit its emergency preparedness plan to the state health department for review. Other nursing facilities submit their plans upon request, and all facility plans are subject to review during state licensure and certification surveys.⁴⁰ California and South Carolina call for plans to be developed in cooperation with relevant local agencies.⁴¹

7. Assess meaningful sanctions for violations of emergency preparedness requirements

During the last four years, nursing facility surveyors found 2,300 violations of emergency preparedness requirements. The surveyors, however, classified only 20 of these violations as likely to cause harm. In addition, a third of nursing facilities were cited for violating requirements to inspect a generator weekly and test it monthly. None of these violations was categorized as a major deficiency, even at the more than 1,300 facilities that were cited more than once for inadequate inspection or testing.⁴²

To be effective, regulations require enforcement that commands the attention of nursing facility operators. Surveyors and enforcement agencies should adjust their procedures in order to authorize meaningful and appropriate sanctions for violations of emergency preparedness requirements.

Conclusion

The underlying principle of emergency preparedness is that action must be taken ahead of time. Waiting until a disaster strikes—or until meteorologists foresee an imminent hurricane—guarantees a tardy, inadequate response. In nursing facilities, this can be a matter of life and death.

The same principle should be followed in evaluating standards for emergency preparedness. As discussed above, current standards are inadequate to protect nursing facility residents. Action should be taken now to revise regulations and procedures so that nursing facilities caught in future natural disasters will be better prepared to provide their residents with the safe environment and comprehensive care that those residents deserve.

39 CMS State Operations Manual, Appendix I, Survey Procedures for Life Safety Code Surveys, The Survey Tasks, Task 2.

40 La. Admin. Code tit. 48, § 9767(A)(1).

41 *See supra* at 6.

42 Jordan Rau, *Nursing Home Disaster Plans Often Faulted as 'Paper Tigers'*, Kaiser Health News, Sept. 19, 2017, available at [khn.org/news/nursing-home-disaster-plans-often-faulted-as-paper-tigers](https://www.khn.org/news/nursing-home-disaster-plans-often-faulted-as-paper-tigers).