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THE PREPAREDNESS PIÑATA: KNOCKING OUT THE PROBLEMS IN TEXAS’S EMERGENCY MANAGEMENT LEGAL FRAMEWORK TO ENHANCE PERFORMANCE AT THE LOCAL LEVEL

WILLIAM S. GRIBBLE[†]

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I. ABSTRACT

Texas has a very comprehensive emergency management program that should be the envy of every state in the union. However, the manner in which we as a profession have achieved this may have inadvertently circumvented the proper administrative law procedures required in Texas. This has likely caused Texas to accidentally engage in ad hoc rulemaking that—if left as is—could set the conditions to create a damaging friction between the state and municipal governments. That friction would erode the interoperability necessary to protect property and to save lives during a disaster. This Article provides: (1) a brief history of the development of statutes and formal rules related to emergency management in Texas; (2) an examination of ad hoc rulemaking in Texas and how Texas Division of Emergency Management explanatory material and compliance manuals may have exceeded simply being “guidance”; and (3) solutions that may preserve interoperability within the profession and compliance with the Texas Administrative Procedures Act. Common to each solution, though, two themes develop: (1) the need for a comprehensive study on how municipalities plan, train, and prepare for disasters; and (2) the need for collaboration between the legal and emergency management professions throughout the state.

II. INTRODUCTION

Emergency management in Texas follows a bottom-up approach to emergency and disaster response.¹ This means everything begins and ends with a local municipality's response capabilities. Since 1998, Texas has had more federal disaster declarations than any other jurisdiction in the United States.² With local governments at the forefront in a seemingly disaster-prone State, it is clear why Texas wants to be disaster ready. The Texas Division of Emergency Management ("TDEM") emphasizes that every local government in the state must be ready for a disaster.³ This has led the agency to require all municipal and county governments achieve the "Basic Level" standards for planning, training, and exercises.⁴ Though preparing for an emergency is right thing to do; does state statute or agency rules allow TDEM to require every municipality to have an emergency management program, whether they can afford it or not?⁵ This Article examines how current TDEM's well-intended material may have exceeded the agency's statutory authority and explores how these mandatory emergency management standards may inhibit preparedness activities in rural and smaller communities throughout the state.

1. TEX. GOV'T CODE ANN. § 418.101 (West 2016) ("Each political subdivision is . . . responsible for disaster preparedness and coordination of response."); 37 TEX. ADMIN. CODE § 7.23 (2016) ("[A] local government is expected to use its own resources and the resources available to it through mutual aid agreements before requesting assistance from the state. Municipalities must request assistance from their county before requesting assistance from the state.").

2. Texas has had 348 federal disaster declarations since 1988. There has been a total of 3,993 declarations for all U.S. states, territories, and federally recognized tribal governments. States have an average of seventy-one declarations each. Declarations for territories, federally recognized tribes, and affiliated states—like the Federated States of Micronesia—make up approximately 2.3% of the total declarations. These statistics include Major Disaster Declarations, Emergency Declarations, and Fire Management Assistance Grants. See *Disaster Declarations by State/Tribal Government*, FEMA, <https://www.fema.gov/disasters/state-tribal-government/> [<https://perma.cc/BN3N-SYCF>] (last visited June 30, 2018).

3. See TEX. GOV'T CODE § 418.044 (West 2017) (stating that TDEM shall "take an integral part in the development and revision of local and interjurisdictional emergency management plans").

4. TEX. DIV. OF EMERGENCY MGMT., TEX. DEPT. OF PUBLIC SAFETY, TDEM-100: PREPAREDNESS STANDARDS FOR EMERGENCY MANAGEMENT IN TEXAS 1-3 (2000) [hereinafter TEX. DIV. OF EMERGENCY MGMT., PREPAREDNESS STANDARDS] ("The Basic Level of Planning Preparedness is the minimum acceptable level of preparedness.").

5. See generally David A. McEntire & Amy Myers, *Preparing Communities for Disasters: Issues and Processes for Government Readiness*, 13 DISASTER PREVENTION & MGMT.: AN INT'L J. 140 (2004) (highlighting what local governments must do to prepare for disasters and lessons learned); Laurie Pearce, *Disaster Management and Community Planning, and Public Participation: How to Achieve Sustainable Hazard Mitigation*, 28 NAT. HAZARDS 211, 223 (2003) (discussing how county funds used to repair damage from a landslide were more than the new town could afford).

This Article will first provide an overview of Texas's statutes, rules, and agency material at the heart of the matter. Next, this Article will analyze state statutes, rules, and agency material to attempt to validate a mandatory municipal emergency management program requirement. Finally, this Article concludes with a brief description of potential impacts, possible solutions, and areas for future research. This Article will specifically not assess the ability for TDEM to enforce this requirement or if it has been enforced since implantation.

III. FRAMING THE ISSUE

To coherently frame the issue at hand, it is necessary to briefly examine how the current enabling statutes and agency rules came to be.

A. Background on Texas Emergency Management Law

1. Texas Government Code Chapter 418

Emergency management in the United States did not really develop until after World War II. In 1947, the U.S. War Department⁶ published the *Bull Report*. This report was commissioned to study the role of the War Department in "Civil Defense"⁷ and illustrated the necessity of local governments being the first level of response, rather than the federal government.⁸ After publication, Congress responded by passing various statutory provisions that would lay the groundwork for the establishment of today's Federal Emergency Management Agency.⁹ Texas has had a comprehensive emergency management statute since the early 1950's.¹⁰ The adoption of the Texas Civil Protection Act in 1951 echoed the "self-help" strategy proposed by the *Bull Report*.¹¹ The initial Texas statute is only four

6. The War Department (later becoming the Department of the Army) was merged together with the Navy Department in the late 1940's to become the U.S. Department of Defense, headed by the Secretary of Defense. *About the Department of Defense*, U.S. DEP'T OF DEF., <https://dod.defense.gov/About/> [<https://perma.cc/UZ22-XRMZ>] (last visited Dec. 5, 2016).

7. Civil Defense is a predecessor to today's emergency management profession. HOMELAND SEC. NAT'L PREPAREDNESS TASK FORCE, CIVIL DEFENSE AND HOMELAND SECURITY: A SHORT HISTORY OF NATIONAL PREPAREDNESS EFFORTS 12 (2006).

8. *Id.* at 6 (discussing how the War Department's Civil Defense Board released a report finding that civil defense is primarily the responsibility of civilians and proffered that it was best implemented locally using a concept of "self-help"); *see id.* (noting that the board was led by Major General Harold Bull, giving the report the name of "the Bull Report").

9. *Id.*

10. The Texas Civil Protection Act of 1951 was enacted on June 1, 1951. *See* 1951 Tex. Gen. Laws 529, 531. It was later repealed and codified to its current version. *See* 1975 Tex. Gen. Laws 731, 740 (codified at TEX. GOV'T CODE ANN. § 418.001 (West 2017)).

11. *See* HOMELAND, *supra* note 7, at 6.

pages long but provided the necessary statutory authority for the state, counties, and municipalities to establish a civil defense organization for their jurisdiction.¹² The statute was more aspirational in that it permitted—but did not mandate—civil defense organizations at the municipal level.¹³ In fact, during two of Texas’s major overhauls of emergency management in the mid-1970’s, it was still optional for a municipality to have its own emergency management agency unless the governor specifically required one due to the municipality’s vulnerability.¹⁴ Municipalities were not void of having any emergency management responsibilities though. An alternative to having a civil defense or emergency management agency established was to identify a liaison to help coordinate disaster management functions within the jurisdiction.¹⁵ The only formal planning required by the Texas Legislature was for established programs.¹⁶ The purpose of the liaison was to provide a singular point of contact at the municipality for the county program to coordinate with before, during, and after a disaster.¹⁷ Subsequent legislation has brought some additions and changes to requirements and terminology; however, the changes do not substantively impact this Article’s analysis.¹⁸

2. Texas Administrative Code Title 37, Chapter 7

Agency rules play a special role in public governance. They allow for an agency to carry out a legislature’s intent by regulating an activity or a class of persons—like an occupation—within their jurisdiction.¹⁹ Unlike statutes, agency rules can be more adaptable to the changing needs of the population being regulated than what it might take to revise a statute.²⁰

12. See generally Texas Civil Protection Act of 1951, 52d Leg., R.S., ch. 311, 1975 Tex. Gen. Laws 529, 529 (“An Act relating to the development of a civil defense and disaster relief plan for this State and its political subdivisions; granting necessary powers to State and local governments of this State to cope with emergencies threatening life and property within the State; authorizing cooperative and mutual aid agreements for relief work between this and other States; and for related purposes; and providing a means for financing of such program by counties, towns and cities; repealing all laws or parts of laws in conflict; providing a saving clause; and declaring an emergency.”).

13. *Id.* §§ 4(f), 6.

14. See Texas Disaster Act of 1973, 63d Leg., R.S., ch. 216, § 8(c), 1973 Tex. Gen. Laws 493, 498 (repealed 1975); Texas Disaster Act of 1975, 64th Leg., R.S., ch. 289, § 8(c), 1975 Tex. Gen. Laws 731, 738 (repealed 1987).

15. Texas Disaster Act of 1973 § 8(e); Texas Disaster Act of 1975 § 8(e).

16. See Texas Disaster Act of 1975 § 8(f)–(g).

17. See TEX. GOV’T CODE ANN. § 418.105 (West 2017).

18. Compare Texas Disaster Act of 1975, with GOV’T § 418.105.

19. PHILLIP J. COOPER, PUBLIC LAW & PUBLIC ADMINISTRATION 143 (4th ed. 2007).

20. See generally, OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS 2–9 (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/T3VC-C9ES>] (discussing the process for federal agency rulemaking and formalities required for promulgating rules which are usually more efficient than revising statutes).

Shortly after the Civil Protection Act of 1951, the Texas Department of Public Safety adopted a set of rules similar to the statutory language, briefly outlining what disaster agencies of municipalities would be required to do if they were established.²¹ By 1977, Texas passed the Texas Administrative Procedures Act and implemented the Texas Administrative Code, which compiled, indexed, and published all state agency rules in the State of Texas.²² Before 1976, Texas did not require state agencies to publish rules or give public notice of them.²³

With the development of the Texas Register and Texas Administrative Code, rules that had been previously promulgated by Texas agencies were transferred to the Secretary of State's Office of the Texas Register for safekeeping, but were not necessarily included in the new Texas Administrative Code.²⁴ The codification of the Texas Administrative Code, required that new rules be promulgated in accordance with the Administrative Procedures Act.²⁵ The rules created by the Governor's Division of Disaster Emergency Services—essentially TDEM's predecessor—essentially tracked the 1970s statute in that only municipalities with disaster agencies (now called programs) were required to have a written emergency management plan and have it submitted to the state for review.²⁶

B. What Does It Look Like Today?

1. The Texas Disaster Act of 1975

Today's statutory guidance has expanded as needed to address new problems the emergency management profession in Texas faces. Though it is still known as the Texas Disaster Act of 1975, it has undergone several

21. See Tex. Dep't of Pub. Safety, Rules 201.04.02.001–003 (1975). Though it is unclear if the rules that were submitted at the Texas Register's creation were the only rules, it appears that the pre-Texas Administrative Code rules were incorporated into the final set of rules found in the 1977 Texas Administrative Code. Because of the lack of records of the rules prior to 1975, it is reasonable to presume that the filing made in 1975 by the Texas Department of Public Safety were the complete agency rules as they existed before the Disaster Acts of 1973 and 1975.

22. *The Texas Administrative Code*, TEX. SECRETARY OF ST., <https://www.sos.state.tx.us/tac/index.shtml> [<https://perma.cc/2RCN-566Z>] (last visited July 1, 2018).

23. THE GREENBOOK: TEXAS RULES OF FORM 93 (Texas Law Review Ass'n ed., 13th ed. 2015).

24. State agencies promulgated, codified, and maintained their own rules and were not required to give public notice, since there was no public notice requirement necessarily in place. *Id.*

25. *Id.*

26. See Tex. Dep't of Pub. Safety, *supra* note 21 at 201.04.002. Compare Texas Civil Protection Act of 1951, 52nd Leg., R.S., ch. 311, §§ 4(f), 6, Tex. Sess. Law Serv. 529, 529–30 (West) (amended 2007) (current versions at TEX. GOV. CODE ANN. §§ 418.101–103 (West 2017) & 37 TEX. ADMIN. CODE §§ 7.11–12 (2018)), with Tex. Dep't of Pub. Safety, *supra* note 21 at 201.04.002.

amendments since then.²⁷ The statutory guidance for municipalities to have emergency management programs states: “The governor shall determine which municipal corporations need emergency management programs of their own and shall recommend that they be established and maintained. The governor shall make the determinations on the basis of the municipality’s disaster vulnerability and capability of response related to population size and concentration.”²⁸

The statute continues by requiring each emergency management agency to provide an emergency management plan in writing.²⁹ The statute has several additional requirements including: (1) that TDEM is to assist local and county governments in developing their own emergency management programs;³⁰ (2) county and municipal governments may participate in interjurisdictional programs;³¹ and (3) municipalities without an emergency management program must at least have a liaison assigned to emergency management activities.³²

2. Formal Rules via the Texas Administrative Code

TDEM’s formally promulgated rules in the Texas Administrative Code are expansive of the initial 1951 rules.³³ The two rules setting the stage for this paper’s issue is Title 37, sections 7.1 and 7.12 of the Texas Administrative Code:

Each county and incorporated city in Texas shall maintain an emergency management agency or participate in a local or interjurisdictional emergency management agency.³⁴

.....

Each local and interjurisdictional emergency management agency shall prepare, keep current, and distribute to appropriate officials a local or interjurisdictional emergency management plan that includes the minimum content specified by the Texas Division of Emergency Management in its local emergency planning standards and has been signed by the presiding officer(s) of the jurisdiction(s) for which it was prepared.³⁵

27. Gov’t § 418.001.

28. *Id.* § 418.103(a).

29. *Id.* § 418.106.

30. *Id.* § 418.044.

31. *Id.* § 418.104.

32. *Id.* § 418.105. Compare Tex. Dep’t of Pub. Safety, Rules 201.04.02.001-003 (1975), with 37 TEX. ADMIN. CODE § 7 (2016).

33. 37 TEX. ADMIN. CODE. Although double what the original rules state, the current rules do not exceed five pages.

34. 37 TEX. ADMIN. CODE § 7.1 (2016).

35. *Id.* § 7.12.

One section of the Texas Administrative Code requires the applying jurisdiction to have an established emergency management program to be eligible for certain federal incentive programs.³⁶ Under this section, each local emergency management program must: (1) be legally established; (2) have an emergency management plan that meets the planning standards for minimum content and is current; and (3) have formally adopted and be implementing the National Incident Management System.³⁷ An argument could be made that this aspect would essentially eliminate every excuse for municipalities not to have an emergency management program. It is important to note that applying to these incentive programs are optional and financial awards made under them are often discretionary.³⁸ This makes long-term budgeting primarily on grants an almost impossible task. Additionally, some disaster preparedness programs can impact post-disaster recovery funding—such as the National Flood Insurance Program.³⁹

From a macro perspective, emergency management rules in the Texas Administrative Code closely track the statute—except for the program participation requirement.⁴⁰ In fact, TDEM has very few formal rules in comparison to other Texas agencies and the formal emergency management rules of other disaster-prone states.⁴¹

3. Agency Explanatory Material and Compliance Manuals

To supplement the formal rulemaking process, Texas agencies are allowed to issue explanatory material and compliance manuals to help regulated parties comply with laws and rules.⁴² Though helpful, explanatory material has sometimes led an agency to inadvertently engage in ad hoc

36. *Id.* § 7.13.

37. *Id.* There is a fourth requirement for the submission of a work plan and budget for specific projects, however, it is irrelevant to this paper's analysis.

38. *See* 42 U.S.C. § 5148 (2018); *see also* 42 U.S.C. § 5133(b) (2018) (“The President may establish a program to provide technical and financial assistance”); 42 U.S.C. § 5196c(a) (2018) (“The Administrator of the Federal Emergency Management Agency may make grants”); *St. Tammany Parish v. FEMA*, 556 F.3d 307, 319 (5th Cir. 2009).

39. Communities are required to meet certain standards for planning and land use controls before the National Flood Insurance Program will issue policies in the community. 42 U.S.C. § 4022(a)(1) (2018). However, disaster relief can be unavailable in non-NFIP communities. *Id.* § 5154a(a). *But see* *Nat'l Wildlife Fed'n v. FEMA*, 354 F. Supp. 2d 1151, 1157 (W.D. Wash. 2004) (noting that disaster relief is unavailable to non-NFIP communities that suffer from floods and that federally regulated banks, lenders, and agencies are prohibited from offering loans or other financial assistance for acquisition or construction in non-NFIP communities).

40. *Compare* TEX. GOV'T CODE ANN. §§ 418.001–.192 (West 2017), *with* ADMIN. § 7.13.

41. *Compare* ADMIN. § 7, *with* 25 TEX. ADMIN. CODE § 296 (2016). Texas's Administrative Code has 18 sections for Emergency Management while California has 225, Florida has 47, Oklahoma has 45, and Washington State has 44.

42. *See* GOV'T §§ 2001.004, 2001.007(a)(2).

rulemaking when the issued explanatory material creates a new rule.⁴³ Generally, ad hoc rulemaking occurs when explanatory materials meet the definition of a rule, but does not go through the formal procedures required by the Texas Administrative Procedures Act.⁴⁴

TDEM has a robust array of explanatory material, compliance resources, and job aids for emergency managers to use in the development of their local programs and plans.⁴⁵ These resources range from standardized formats for emergency management planning, training, and exercises⁴⁶ to guides in how to research current and pending legislation.⁴⁷ The state has even published Emergency Operations Plans (“EOP”) templates for local level emergency management programs to use in developing their own plans and programs.⁴⁸ These tools can be a great resource for emergency managers—who often do not serve as the emergency manager on a full-time basis—to use as a starting point in their own plans. However, like the legal world, forms and templates are only a starting point. There is no template that can replace a well-drafted and specifically tailored document which addresses the unique needs and challenges of the community.

Two of TDEM’s explanatory materials in this Article’s discussion are the *Texas Emergency Management Executive Guide* (“TEMEG”) and the *TDEM-100: Preparedness Standards for Emergency Management in Texas* (“TDEM-100”).⁴⁹ The TEMEG provides a comprehensive overview of statutes and agency policies; TDEM-100 details specific emergency

43. OFFICE OF THE TEX. ATTORNEY GEN., ADMINISTRATIVE LAW HANDBOOK 50–51 (2016).

44. Recall, that a “rule” under the Texas Administrative Procedures Act is an agency statement that makes some requirement that generally applies to the regulated population beyond an agency’s internal operations and replaces or amends some previously issued rule. *See* GOV’T 2001.003(6)(A)–(C).

45. *See, e.g.*, 37 TEX. ADMIN. CODE §§ 7.1–.45 (2016).

46. TEX. DIV. OF EMERGENCY MGMT., PREPAREDNESS STANDARDS, *supra* note 4.

47. TEX. DIV. OF EMERGENCY MGMT., TEX. DEP’T OF PUB. SAFETY, THE PLANNER’S TOOLKIT, 2 (2014).

48. Though the webpage is no longer updated with the local emergency operations plan templates, Texas previously had all example annexes and base plans in a Microsoft Word format with notes and examples. TEX. DIV. OF EMERGENCY MGMT., TEX. DEP’T OF PUB. SAFETY, FORMS AND PUBLICATIONS, <http://www.txdps.state.tx.us/dem/downloadableforms.htm#annexindex> [<https://perma.cc/W622-MZH5>] (last visited June 26, 2018).

49. Though there are likely other relevant agency publications for this discussion, this article will focus on the TEMEG and TDEM-100. Both documents were published for use by elected leaders of and public safety practitioners within county and municipal governments throughout the State of Texas. This narrowing helps simplify this article’s analysis. *See* TEX. DIV. OF EMERGENCY MGMT., TEX. DEP’T OF PUB. SAFETY, TEXAS EMERGENCY MANAGEMENT EXECUTIVE GUIDE (2015) [hereinafter TEX. DIV. OF EMERGENCY MGMT., EXECUTIVE GUIDE]; *see also* TEX. DIV. OF EMERGENCY MGMT., PREPAREDNESS STANDARDS, *supra* note 4.

management training,⁵⁰ exercises, and planning standards required by the agency.⁵¹

IV. WHAT DOES THE CURRENT SITUATION BRING TO LIGHT?

To understand the issue, we must first narrow the question to what statement TDEM has made consistently across at least two of its materials. Once narrowed, the next step is to determine whether there is a statute or rule on point. If not, an analysis of ad hoc rulemaking is done to determine if the agency's statement violates the Texas Administrative Procedures Act.

A. Narrowing and Framing the Issue?

Comparing the explanatory material with the statute and regulations reveals that TDEM's well-meaning actions may have amounted to ad hoc rulemaking. Though Texas statute requires that municipalities and counties participate in an emergency management program, it does not necessarily require that every municipality have their own emergency management plan.⁵² Even the formally promulgated rules show that not every municipality is mandated to have its own emergency management program that meets the TDEM standards.⁵³

Consider TDEM-100 and the TEMEG. The TEMEG implies that both the Texas Government Code and Texas Administrative Code require jurisdictions to develop their own emergency operations plans to meet the agency's standards.⁵⁴ Additionally, TDEM-100 guides local emergency management programs in an emergency management program's three main areas: (1) planning; (2) training; and (3) exercises. Each of the areas is broken down into a "basic," "intermediate," and "advanced" level of preparedness.

50. Though training is a relevant standard, an exploration of the statutory authority and agency rules in this area exceeds the scope of this article's discussion.

51. See TEX. DIV. OF EMERGENCY MGMT., PREPAREDNESS STANDARDS, *supra* note 4; TEX. DIV. OF EMERGENCY MGMT., EXECUTIVE GUIDE, *supra* note 49.

52. By nearly any interpretation, counties are required to maintain an emergency management program and provide a liaison officer to work with state and federal emergency management officials. See TEX. GOV'T CODE ANN. §§ 418.102(a), 105(a), 106(a), (c) (West 2017).

53. See 37 TEX. ADMIN. CODE §§ 7.1, .12 (2016) (supporting that those who need to have a written plan in place, must have one that meets the minimum content specified by TDEM).

54. TEX. DIV. OF EMERGENCY MGMT., EXECUTIVE GUIDE, *supra* note 49, at 4, 6 ("In accordance with Chapter 418 of the *Texas Government Code* and Title 37, Part 1, Chapter 7 of the *Texas Administrative Code*, Texas jurisdictions develop emergency operations plans that consist of a basic plan and functional annexes and appendices."). As identified later in this Section, the statement in the guide addressed to mayors and judges does not delineate that counties are required to have a developed emergency management program by statute, that municipalities that have emergency management agencies or programs are required to adhere to these standards, and that if an agency does not have a program or agency, they are required to participate in an interjurisdictional program.

For planning, TDEM-100 states that: “All jurisdictions are expected to meet Basic Level planning requirements, which is the minimum acceptable level of preparedness.”⁵⁵ For training, TDEM-100 outlines what kind of training is available from the state for free and what types of training individuals within the jurisdiction should have.⁵⁶ For exercises, TDEM-100 states that: “All local governments and emergency management organizations are expected to achieve a Basic Level of Preparedness.”⁵⁷ An exercise is intended to train personnel in emergency management duties, test and validate plans, procedures, policies, and facilities, and enhance the capabilities of an emergency or disaster response activity.⁵⁸ Essentially, before a jurisdiction can have an exercise—at a very minimum—there needs to be a plan.⁵⁹ By combining at least the exercise and planning components, arguably the implied requirement for each municipality to possess an emergency management program comes into existence.⁶⁰ The question becomes, what is the statutory or rulemaking support for this statements?

B. Exploring the Statute

The first step is to analyze the statute to determine if there is a basis for the agency’s statement in its material. Statutory interpretation begins with reading the statute as a whole and considering the plain meaning of the text and intent of the legislature.⁶¹ If the statute is clear and unambiguous on its

55. TEX. DIV. OF EMERGENCY MGMT., PREPAREDNESS STANDARDS, *supra* note 4, at 1-2. The basic level of preparedness requires the basic plan and ten functional annexes to address specific situations. *Id.* at 1-3. These include: (A) Warning, (B) Communications, (C) Shelter and Mass Care, (E) Evacuation, (I) Public Information, (M) Resource Management, (N) Direction and Control, (O) Human Services, (Q) Hazardous Materials and Oil Spill Response, and (V) Terrorist Incident Response. *Id.* These requirements also meet both the federal requirement for adoption of the National Incident Management System (NIMS) and the Emergency Planning and Community Right-to-Know Act (EPCRA). *Id.*

56. *See id.* at 2-1 to 2-6.

57. *See id.* at 3-1, 3-3 (discussing the “Basic Level of Preparedness” requirement that an agency have one exercise annually, either table-top, operations-based functional, full-scale, or an actual event).

58. *See id.* at 3-1.

59. In theory, even personnel lacking formal emergency management could pick-up at least some individual position-specific skills during a disaster exercise. *See Course IS-120.b: An Introduction to Exercises*, FEMA EMERGENCY MGMT. INST., <https://training.fema.gov/is/courseoverview.aspx?code=is-120.c> [<https://perma.cc/9WNU-5KZ5>] (last visited July 1, 2018).

60. *See generally* GEORGE D. HADDOW ET AL., INTRODUCTION TO EMERGENCY MANAGEMENT 98–103 (Pamela Chester & Gregory Chalson eds., 4th ed. 2011) (illustrating the systems approach to emergency management planning involves the emergency operations plan itself, training, and exercising the plan to truly be effective).

61. *See* *Theil v. Harris Cty. Democratic Exec. Comm.*, 534 S.W.2d 891, 894 (Tex. 1976) (“[Cannons of Statutory Construction] are necessarily subordinate to the plain intent of the Legislature as manifested in the clear language of statutes.”); *see also* Ron Beal, *Statutory*

face, the interpretation stops there.⁶² If a statute is ambiguous or unclear, a court can help interpret a statute's language by referring to: (1) the intent of the legislature; (2) the history of statute's development; or (3) canons of construction.⁶³

Considering Chapter 418 of the Texas Government Code as a whole—the Texas Disaster Act of 1975—the following sections stand out in the issue at hand:

Texas Government Code Section 418.103(a): The governor shall determine which municipal corporations need emergency management programs of their own and shall recommend that they be established and maintained. The governor shall make the determinations on the basis of the municipality's disaster vulnerability and capability of response related to population size and concentration.⁶⁴

Texas Government Code Section 418.105(a): Each city that does not have a program and has not made arrangements to secure or participate in the services of an existing program shall designate a liaison officer to facilitate the cooperation and protection of the city in the work of disaster mitigation, preparedness, response, and recovery.⁶⁵

Texas Government Code Section 418.106(a): Each local and interjurisdictional agency shall prepare and keep current an emergency management plan for its area providing for disaster mitigation, preparedness, response, and recovery.⁶⁶

Texas Government Code Section 418.1015(a)–(c): The presiding officer of the governing body of an incorporated city or a county . . . is designated as the emergency management director for the officer's political subdivision.

An emergency management director serves as the governor's designated agent in the administration and supervision of duties under this chapter. An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.

An emergency management director may designate a person to serve as emergency management coordinator. The emergency management coordinator shall serve as an assistant to the emergency management director for emergency management purposes.⁶⁷

Construction: Texas Style, 64 BAYLOR L. REV. 339, 363–65 (2012) (using canons of construction are inappropriate if the statute is clear and unambiguous using the plain meaning of words, defined by dictionaries of the time).

62. Beal, *supra* note 61, at 363–64.

63. *See id.* at 342.

64. TEX. GOV'T CODE ANN. § 418.103(a) (West 2017).

65. *Id.* § 418.105(a).

66. *Id.* § 418.106(a).

67. *Id.* § 418.1015(a)–(c).

From these relevant sections, three major points can be drawn. First, the Texas Legislature intended every municipality of the state to be capable of handling emergencies as they come up, whether it is by having an internal program of their own or by providing a conduit for the county to do so.⁶⁸ Second, unless directed, municipalities do not necessarily need to establish an emergency management program. Should a municipality establish a program, it must meet the minimum planning, exercise, and training criteria that the Texas Division of Emergency Management establishes.⁶⁹ Finally, the governor—through TDEM—can require a municipality to have an emergency management program, but doing so must be for a specific reason and not be simply an arbitrary and generic requirement.⁷⁰

Considering these conclusions from the four corners of the statute, the Texas Legislature did not intend to require each municipality to have its own emergency management program. The requirement to have a local emergency management program likely cannot be found in the statute. Chapter 418 does allow TDEM to promulgate rules via the Texas Administrative Procedures Act.⁷¹ Logical progression then leads to an analysis of TDEM's formal rules encapsulated by the Texas Administrative Code.

C. Exploring the Agency Rules

Because an analysis of Chapter 418 likely reveals no statutory requirement in Texas to establish an emergency management program, the next analytical stop is TDEM's formally promulgated rules. This Section examines relevant rules within the Texas Administrative Code.

1. The Text

Similar in a statutory interpretation analysis, the first step is to analyze TDEM's rules. Considering the formally promulgated emergency management rules in the Texas Administrative Code⁷²—the following sections stand out to answer this question:

Each county and incorporated city in Texas shall maintain an emergency management agency or participate in a local or interjurisdictional emergency management agency.⁷³

68. See *id.* §§ 418.105(a), 418.1015(a)–(c).

69. See *id.* §§ 418.103(a), 418.106(a).

70. See *id.* § 418.103(a).

71. See *id.* § 418.043(3), (4), (11), (12), (21).

72. These rules are found in their entirety within Title 37, Chapter 7 of the Texas Administrative Code.

73. 37 TEX. ADMIN. CODE § 7.1 (2016).

The mayor of each municipal corporation and the county judge of each county are designated as the emergency management director for their respective jurisdictions. The mayor and county judge may each designate an emergency management coordinator who shall serve as an assistant to the presiding officer of the political subdivision for emergency management purposes when so designated.⁷⁴

Each local and interjurisdictional emergency management agency shall prepare, keep current, and distribute to appropriate officials a local or interjurisdictional emergency management plan that includes the minimum content specified by the Texas Division of Emergency Management⁷⁵

To participate in [Federal Incentive Programs under the Robert T. Stafford Disaster Relief and Emergency Assistance Act] a city or county must meet, as a minimum, the basic eligibility requirements of this subsection: (1) Have a local emergency management agency legally established (2) Have a local or interjurisdictional emergency management plan that meets state planning standards for minimum content and is current.⁷⁶

In responding to emergencies and disasters, a local government is expected to use its own resources and the resources available to it through mutual aid agreements before requesting assistance from the state. Municipalities must request assistance from their county before requesting assistance from the state.⁷⁷

Isolating an analysis to the relevant portions of the Chapter, it can be surmised that TDEM's formal rules track very close to the statute in that: (1) every jurisdiction in Texas must participate with or have a stand-alone emergency management program; (2) programs and agencies must have a written plan that meets TDEM standards; (3) the mayor is responsible for emergency management in their jurisdiction; and (4) not participating in an emergency management program can inhibit the ability of the jurisdiction from participating in federal emergency management grant programs.⁷⁸ It is important to note that the only mandatory provision in the rules comes into effect when competing for grant funding through the U.S. Department of

74. *Id.* § 7.2.

75. *Id.* § 7.12.

76. *Id.* § 7.13(a)(1)–(2). The other requirements include having formally adopted the National Incident Management System (NIMS) and submitting acceptable project narrative or work plan and budget for eligible activities.

77. *Id.* § 7.23.

78. *Compare id.* § 7.1, with TEX. GOV'T CODE ANN. §§ 418.101(a), 418.103, 418.104, 418.105 (West 2016) (municipalities and counties must have a program of their own or participate in an emergency management program); *Compare* ADMIN. § 7.2, with GOV'T § 418.1015 (mayor or county judge is the emergency management director). *Compare* ADMIN. CODE § 7.12, with GOV'T § 418.106(a), (c) (local planning required).

Homeland Security and the Federal Emergency Management Agency.⁷⁹ It is also important to note that grant funding is a discretionary function and may come with more unfunded mandates.⁸⁰ Though this is not in the Texas statute, it is generally a condition of grant funding that an organization meet the requirements outlined in section 7.13.⁸¹ A liberal interpretation of section 7.1 might allow for the agency to require each municipality to meet the basic standards of emergency management planning and exercises since it would imply the creation of a quasi-program.

2. *The Analysis*

Texas courts have held that an agency rule “is reasonable when it is based on some legitimate position by the agency” and is generally “in harmony with the general objectives of the enabling statute.”⁸² It is a rebuttable presumption that agency rules are facially valid.⁸³ The burden of proof is on the party challenging the rule to show that it is not.⁸⁴ For a challenger to do so, he or she must show that the rule: “(1) contravenes specific statutory language, (2) is counter to the statute’s general objectives, or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.”⁸⁵

Here, it is likely that loosely construing the rule could fall in line with the Texas Disaster Act’s general objectives of providing for the cooperation and coordination of political subdivisions within the state in disaster mitigation, preparedness, response, and recovery.⁸⁶ However, this interpretation would run afoul of the statute requiring the governor to base the requirement for a mandatory municipal emergency management program on the “disaster vulnerability and capability of response related to population size and concentration,”⁸⁷ and that only formally established emergency

79. ADMIN. CODE § 7.13.

80. MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* 3–4 (1970).

81. See Homeland Security Presidential Directive/HSPD-5: Management of Domestic Incidents (Feb. 28, 2003), <https://www.dhs.gov/sites/default/files/publications/Homeland%20Security%20Presidential%20Directive%205.pdf> [<https://perma.cc/AL2C-7YGY>].

82. *McCarty v. Tex. Parks & Wildlife Dep’t*, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no writ).

83. *Id.*

84. *Id.*

85. *Ware v. Tex. Comm’n on Law Enf’t Officer Standards and Educ.*, No. 03–12–00740–CV, 2013 WL 2157244, at *2 (Tex. App.—Austin May 16, 2013, no pet.) (mem. op.) (citing *Pub. Util. Comm’n of Tex. v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 315–16 (Tex. 2001); *Pub. Util. Comm’n of Tex. v. GTE–Southwest*, 901 S.W.2d 401, 407 (Tex. 1995)).

86. See TEX. GOV’T CODE ANN. § 418.002 (West 2016).

87. *Id.* § 418.103(a).

management agencies are required to “prepare and keep current an emergency management plan.”⁸⁸ Municipalities without a program simply need a liaison office to be a conduit for the county program.⁸⁹ Read together plainly, the statute requires that municipalities at least provide for someone to spread the word about emergency management within a community, but it does not need to be a full-fledged program with planning and exercises. Thus, such a liberal interpretation of section 7.1 would likely run afoul of the specific statutory language allowing for municipalities to be exempt from the specific requirements of a formal emergency management program.

3. Conclusion

The forgoing considered; it is likely to be found clear and unambiguous that the TDEM’s formal rulemaking would not require each municipality to have its own emergency management program. State agencies are allowed to develop compliance manuals and explanatory material for its rules and enabling statutes.⁹⁰ Logical progression takes us to evaluate TDEM’s explanatory material and compliance manuals.

D. What Does an Analysis of the Agency’s Material Look Like?

Finding that the enabling statute and agency’s formal rules lack a provision requiring municipal emergency management programs, the next place to evaluate is agency explanatory material and compliance manuals.

1. What is “Ad Hoc” Rulemaking?

Ad hoc rulemaking occurs when a Texas agency issues a statement or material that meets the APA’s definition of a rule but did not complete the formal rulemaking procedures required by the APA.⁹¹ Sometimes ad hoc rulemaking can occur within the statements and material lawfully issued by an agency under the APA to help the regulated population comply with a rule or statute.⁹² Ad hoc rulemaking is only considered “illegal” because Texas law favors adopting rules through formal rule-making procedures, ensuring

88. *Id.* § 418.106(a).

89. *Id.* § 418.105(a).

90. *See id.* § 2001.007(a)(2).

91. OFFICE OF THE TEX. ATTORNEY GEN., *supra* note 43, at 50–51; *see also* El Paso Hosp. Dist. v. Tex. Health and Human Serv. Comm’n., 247 S.W.3d 709, 714 (Tex. 2008).

92. OFFICE OF THE TEX. ATTORNEY GEN., *supra* note 43, at 50.

the public and affected persons have an opportunity to be heard on the matter.⁹³ A “rule” under the Texas APA:

(A) [M]eans a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency; (B) includes the amendment or repeal of a prior rule; and (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.⁹⁴

Simply restating an already promulgated rule does not count as ad hoc rulemaking.⁹⁵ Generally, if a court finds that an agency implemented a rule without undergoing the formal rulemaking processes, a court may invalidate, enjoin enforcement, or remand the rule to the agency to meet the rulemaking requirements.⁹⁶

2. Evaluating TDEM Material Under an “Ad Hoc” Rulemaking Analysis

The first step in the analysis is to consider what rule is purportedly being established in the explanatory material or compliance manuals. Here, an analysis focuses on two statements made by the agency in TDEM-100: “All jurisdictions are expected to meet Basic Level planning requirements, which is the minimum acceptable level of preparedness,”⁹⁷ and “all local governments and emergency management organizations are expected to achieve a Basic Level of Preparedness [in the exercise category].”⁹⁸ Considered together, these functions require all municipalities in Texas to have an emergency management program or agency that can build, maintain,

93. *El Paso Hosp. Dist.*, 247 S.W.3d at 715 (The formal rulemaking process includes: (1) providing the public notice, (2) publication of the proposed rule, and (3) public comment on the proposed rule).

94. GOV’T § 2001.003(6)(A)–(C) (West 2016); *see also El Paso Hosp. Dist.*, 247 S.W.3d at 714.

95. *See Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 616 (Tex. App.—Austin 2014, pet. denied).

96. *See* GOV’T §§ 2001.035(a), 2001.040 (West 2016); *see also El Paso Hosp. Dist.*, 247 S.W.3d at 715 (“When an agency promulgates a rule without complying with the proper rule-making procedures, the rule is invalid.”).

97. TEX. DIV. OF EMERGENCY MGMT., PREPAREDNESS STANDARDS, *supra* note 4, at 1-2, 3-1. The basic level of preparedness requires the basic plan and ten functional annexes to address specific situations. *Id.* at 1-3. These include: (A) Warning, (B) Communications, (C) Shelter and Mass Care, (E) Evacuation, (I) Public Information, (M) Resource Management, (N) Direction and Control, (O) Human Services, (Q) Hazardous Materials and Oil Spill Response, and (V) Terrorist Incident Response). *Id.* These requirements also meet both the federal requirement for adoption of the National Incident Management System (NIMS) and the Emergency Planning and Community Right-to-Know Act (EPCRA). *Id.*

98. *Id.* at 3-1, 3-3 (discussing the “Basic Level of Preparedness” requirement that an agency have one exercise annually, either table-top, operations-based functional, full-scale, or actual event).

test, and revise an emergency management operations plan. It was not likely the intent of the legislature that municipalities have a “boilerplate”⁹⁹ emergency operations plan developed and have a “check the box” drill once a year and call it “disaster preparedness.” It would not only be meaningless to the municipality, but it would do nothing more than provide a “smoke and mirrors” effect on how ready the municipality is for a disaster. The next step is to evaluate the purported rule against the APA’s definition of a rule.

a. The Statement Element

The first of the three elements is whether the purported rule is a “statement [by a state agency] of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency.”¹⁰⁰

A statement has “general applicability” if it “affect[s] the interest of the public at large such that they cannot be given the effect of law without public comment.”¹⁰¹ In one case, a letter from the Texas Medical Board warning a medical provider against a certain business practice was considered a generally applicable statement because it: (1) “implements, interprets, or prescribes law or policy”; (2) was written by the agency’s general counsel in their official capacity; and (3) “implements a broader policy judgement by the Board.”¹⁰² However, a letter from the Texas State Securities Board to a settlement company was not considered to have general applicability because it was narrowly directed at the specific type of security that was being issued by the company at that time.¹⁰³

Here, both TDEM-100 and the TEMEG appear to be statements of general applicability. TDEM-100 was developed and issued by the agency’s preparedness section in June 2000 based on its authority in Chapter 418 of the Texas Government Code.¹⁰⁴ In contrast, though, the TEMEG was actually written by the agency and addressed to the senior leaders of political subdivisions across the state and joint boards in the State of Texas and signed by the Chief of the Texas Division of Emergency Management.¹⁰⁵

99. The term “boilerplate” is used to describe (1) “Ready-made or all-purpose language that will fit in a variety of documents” or (2) “Fixed or standardized contractual language that the proposing party views as relatively nonnegotiable.” *Boilerplate*, BLACK’S LAW DICTIONARY (2nd Pocket ed. 2001).

100. GOV’T § 2001.003(6)(A).

101. *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 615 (Tex. App.—Austin 2014, pet. denied).

102. *Id.* at 614–15.

103. *See Trinity Settlement Servs., LLC v. Tex. State Secs. Bd.*, 417 S.W.3d 494, 502 (Tex. App.—Austin 2013, pet. denied).

104. TEX. DIV. OF EMERGENCY MGMT., PREPAREDNESS STANDARDS, *supra* note 4, at i.

105. *See* TEX. DIV. OF EMERGENCY MGMT., EXECUTIVE GUIDE, *supra* note 49.

b. The Amendment or Repeal Element

The second of the three elements is that a rule “includes the amendment or repeal of a prior rule.”¹⁰⁶ An agency’s “interpretation” or “application” of existing formally enacted rules will be held as a “rule” when they have the effect of amending existing rules or creating new rules and the other two elements of the APA’s rule definition are met.¹⁰⁷ However, an agency statement is not a rule when it restates its own rules that had undergone the formal rulemaking procedure.¹⁰⁸ Courts have noted that agency interpretation and application of formally promulgated rules can fall along a spectrum ranging from “amendment” to “notice.” At one end, an agency’s creation of a requirement not found in the Texas Administrative Code was found to be an amendment to the formally promulgated rules.¹⁰⁹ On the other end of the spectrum, an agency’s informational notice on regulatory changes was substantively identical to the agency’s formally promulgated rules.¹¹⁰

Here, the statement made in the TEMEG at least partially contradicts both the statutory provision and formally promulgated rules on emergency management planning.¹¹¹ This would likely place the statement towards the “amendment” end of the spectrum. Additionally, TDEM’s statements on planning and exercises would likely not be found as an “informational notice” because of the amount of additional matter. Specifically, the statutory provisions and formal rules on the optional aspect of having an emergency management program so long as there is a liaison, are likely contradicted by the statement.¹¹² A similar analysis would likely place TDEM’s statement in TDEM-100 on the “amendment” end of the spectrum.

c. The Non-Internal Element

The final element of an APA rule is that it is not “a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.”¹¹³ An agency’s internal operating

106. TEX. GOV’T CODE ANN. § 2001.003(6)(B) (West 2016).

107. *Teladoc, Inc.*, 453 S.W.3d at 616.

108. *Id.*

109. *Id.* at 620.

110. *Id.* (citing *Tex. Dep’t of Trans. v. Sunset Trans., Inc.*, 357 S.W.3d 691 (Tex. App—Austin 2012, no pct.)).

111. Compare TEX. DIV. OF EMERGENCY MGMT., EXECUTIVE GUIDE, *supra* note 49, with GOV’T § 418.106, and 37 TEX. ADMIN. CODE § 7.12 (2016).

112. Compare TEX. DIV. OF EMERGENCY MGMT., EXECUTIVE GUIDE, *supra* note 49, with GOV’T §§ 418.044, .101, .1015, .103, .105, .106, and ADMIN. §§ 7.1, .12, .13, .23.

113. GOV’T § 2001.003(6)(C).

procedures, which have no legal effect on private persons, are not under the APA.¹¹⁴

Technically, municipalities are not an agent of the state like counties are and could be considered analogous to an individual corporation under the law.¹¹⁵ Municipalities have the private right—as detailed in the statute—to design how they will plan and prepare for emergencies and disasters based on the individual needs of their community while considering some minimum content required by statute.¹¹⁶ Because municipalities are political subdivisions and analogous to a hospital district, the agency statement could be seen as having an effect on the private rights of the municipality.¹¹⁷ Further, if a municipality does have the ability to establish a small emergency management program to obtain grant funding through a FEMA grant program, it could be faced with an overwhelming requirement¹¹⁸ of developing and maintaining an emergency operations plan at the basic level of planning or higher—depending on the grant program. Thus, a court would likely consider that the rules established by both the TEMEG and TDEM-100 implicate the private rights of political subdivisions in Texas, and not merely describe internal agency operating procedure.

3. *Ad Hoc Rulemaking Conclusion*

A court would likely conclude that the agency statements contained in both TDEM-100 and TEMEG meet all three elements of a rule under the Texas APA. If a court finds that an agency implemented a rule without undergoing the formal rulemaking processes required by the APA, it could: (1) invalidate the rule; (2) enjoin its enforcement; or (3) remand the rule to the agency and allow reasonable time for the agency to revise or formally

114. *Sunset Trans. Inc.*, 357 S.W.3d at 703–04.

115. *See* TEX. CONST. art XI, § 1. *See generally* *Lyle v. State*, 193 S.W. 680, 683 (Tex. Ct. App. 1917) (noting that unlike counties, municipal corporations are a tool of self-governance rather than an agent of the state).

116. *See* GOV'T §§ 418.044(b), .106.

117. *El Paso Hosp. Dist. v. Tex. Health and Human Serv. Comm'n.*, 247 S.W.3d 709, 714–15 (Tex. 2008).

118. This can be overwhelming if done properly by a small municipality's Department of Public Safety since it could result in an increased number personnel assigned to "administrative duties" rather than public safety duties, be it patrol or response. An empirical study is needed to collect actual data and determine the "full-time equivalent" requirements each section takes to prepare, coordinate, and maintain. A "full-time equivalent" is a unit of measurement used by governmental entities—most commonly the federal government—to easily compare workload across different agencies and organizations. *See* OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11: PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET 20-6 (2016).

readopt the rule under the APA.¹¹⁹ Here, the court would generally have any of these options available to it.

V. WHAT'S THE MATTER AND WHAT'S THE FIX?

Because TDEM's statements likely amount to an ad hoc rule, what should be done? There are three different courses of action for TDEM to consider. This Section analyzes (1) the potential socio-political impact of the ad hoc rule; (2) the courses of action; and (3) whether it is time to partner with the Uniform Law Commission ("ULC") on a uniform emergency management law for consideration by the states.

A. *The Impact of an Ad Hoc Rule*

Though it may seem annoying, a sound legal framework can mean the difference between compliance and non-compliance. A major reason for this is simply the lack of capacity for a municipal government to accomplish every requirement thrust upon them. At some point a decision is made to prioritize some things, while de-prioritizing others.

1. *Opportunity Cost and Limited Resources*

Economists use the term "opportunity cost" to describe the dynamic of a consumer's "highest valued alternative that the decision maker must forego [when pursuing some goal]."¹²⁰ This concept of having to prioritize and deliberately allocate more resources to one endeavor at the cost of others is most prevalent in times of fiscal austerity.¹²¹ In our resource-constrained world, at some point there are not enough hours in the day or dollars in the bank to satisfy both our wants and needs. Public entities are no different from businesses or families in this context. Public entities have an additional dynamic of managing its capacity to accomplish what its citizenry's expectations are. One public administration scholar has defined this *capacity* as being "the ability of a local government to do what it wants to do [based on] community expectations, resources and problems."¹²² This intersection

119. GOV'T §§ 2001.035(a), .040; *El Paso Hosp. Dist.*, 247 S.W.3d at 715 ("When an agency promulgates a rule without complying with the proper rule-making procedures, the rule is invalid.").

120. Gary M. Lucas, Jr., *Out of Sight, Out of Mind: How Opportunity Cost Neglect Undermines Democracy*, 9 N.Y.U. J. L. & LIBERTY 249, 265 (2015).

121. *Id.* at 271.

122. Theodore H. Poister & Robert P. McGowan, *The Use of Management Tools in Municipal Government: A National Survey*, 44 PUB. ADMIN. REV. 215, 215 (1984).

of problems, expectations, and resources is largely what drives the “opportunity cost” analysis at all levels of government.¹²³

In small and rural municipal governments, where paid employees can be incredibly outnumbered by volunteers, the concept of opportunity cost is a constant consideration. In these areas, attempts to raise revenue for city services are often met with stiff resistance from citizens or fundamental economic principles.¹²⁴ This tension often forces hard decisions to be made on what the local government can and cannot do.¹²⁵ Sometimes, this leads municipal leaders to take on debt with no real plan for ensuring it is only a short-term solution, essentially setting a fiscal time bomb.¹²⁶ When federal, state, or county leaders impose new unfunded program requirements on these municipalities, it can disturb a delicately balanced situation.

2. *The Potential Socio-Political Fallout*

TDEM’s requirement for municipalities to essentially have an emergency management program adds an element of disruption into an already delicately balanced fiscal and political situation. This disruption could possibly create some level of implicit or explicit disdain for the agency within the community, negatively impacting cohesiveness during a disaster response. Despite the abundance of TDEM’s technical advice, it is no replacement for someone—or a team—at the municipality taking action on the plans and advice. It could be argued that grant funding is available to help these municipalities build programs of their own. However, these programs are often sporadic in availability and often include additional compliance and reporting requirements that can sometimes offset any perceived benefit from the grant award.¹²⁷ This places smaller municipalities in the position to simply do what they can, when they can to meet TDEM’s program standards because there is no real consequence for non-compliance. After all, they are only risking discretionary pre-disaster grant money. Further, should a small municipality lacking any true capacity to maintain a program find the capacity to meet TDEM’s standards even once, it will likely find their efforts in a dust covered notebook on a shelf in the breakroom.

123. UNITED NATIONS CONFERENCE ON TRADE AND DEV., PRIORITIZATION AND RESOURCE ALLOCATION AS A TOOL FOR AGENCY EFFECTIVENESS 4 (2013), http://unctad.org/meetings/en/SessionalDocuments/ciclpd20_en.pdf [https://perma.cc/CHJ7-2PNC].

124. Thomas W. Fletcher, *What Is the Future for Our Cities and the City Manager?*, 31 PUB. ADMIN. REV. 14, 17 (1971); accord Edward M. Gramlich & Harvey Galper, *State and Local Fiscal Behavior and Federal Grant Policy*, 1 BROOKINGS PAPERS ON ECON. ACTIVITY 15, 34–37 (1973).

125. Fletcher, *supra* note 124, at 17–18.

126. Lucas, *supra* note 120, at 279–86.

127. See Gramlich, *supra* note 124, at 44–45.

Was this the legislature's intent, though? Was it to only inject grant funding requirements and metrics into statute so that federal agencies and the public that organizations getting grants do good things? All while our overall preparedness level as a state remains unchanged? Arguably, this is not what the legislature intended.

B. What Are the Options?

The premise of the options suggested in the next Section focuses on the idea that, by discovering how small and rural municipalities currently handle emergency management, and revising legal framework to match these current practices that are scalable based on the municipality's capacity, true efficiency and effectiveness of a local emergency management program is attainable. This Section first analyzes general concepts that are common to all courses of action. Next, each of the three different courses of action will be assessed in turn.

1. Solutions Common to All Courses of Action

Common to courses of action one and two, an empirical study is needed to show the effectiveness of current program requirements and assess how municipalities of varying sizes handle emergency management tasks and needs. Some departments may feel that they are already doing the majority of the work required by meeting other standards for their field—such as the Commission on Law Enforcement Accreditation (“CLEA”) or the National Fire Protection Association (“NFPA”). A study would highlight what programmatic areas Texas municipalities are focusing their efforts towards and allow TDEM and the legislature to develop a well-thought out plan to streamline the current emergency management legal framework. This study could be done by TDEM, the Emergency Management Association of Texas, or a Texas Emergency Management Reform Task Force to assess how some of the smaller municipalities are preparing for disasters and find a way to make the emergency management program scalable using the materials and resources provided by the FEMA and three of the nation's leading emergency management educational icons—which all happen to be in Texas.

The University of North Texas (“UNT”) has the Emergency Management and Disaster Sciences (“EMDS”) Program in Denton, Texas. The UNT EMDS program has an established degree program in Emergency Management and Public Administration at both the undergraduate and graduate levels.¹²⁸ The Texas A&M University System has the Texas A&M

128. See *Emergency Administration and Planning*, THE UNIV. OF N. TEX., <https://public-administration.pacs.unt.edu/programs/undergraduate/emergency-administration-and-planning>

Engineering Extension Service (“TEEX”) in College Station, Texas, Texas A&M School of Law, and the Texas A&M Forestry Service. TEEX provides numerous training courses and research for the public safety industry in Texas. In 2013, Texas A&M University acquired its new law school in Fort Worth, Texas and since then has developed a public policy program.¹²⁹ The Texas A&M Forestry Service assists the state in providing training and grant programs for career and volunteer fire departments throughout the state.¹³⁰

The Texas A&M School of Law Public Policy Program could be the incubator needed to lead the research and help build a collaborative relationship between the legal and emergency management professions.¹³¹ The incubation of the Texas A&M School of Law Public Policy Program could create the opportunity for TDEM, TEEX, UNT EMDS, and the Texas A&M Forestry Service to come together and develop effective emergency management policy for Texas. In reality, the only thing preventing these organizations from collaborating now is an incentive to do so.

2. *Course of Action One: Promulgate Agency Material as Formal Rules or Legislation*

The first option is to put TDEM’s explanatory material and compliance manuals that provide guidance and standards for emergency management in Texas through the formal rulemaking process. It is unclear whether the explanatory material and compliance manuals developed were part of a collaborative effort between TDEM and professionals in the field or not. If so, it is likely that formatting the agency material into proper rules and through the APA formal rulemaking process should be a formality. If not, this would be a new opportunity for the state’s emergency management profession to have input into an updated standard. Currently, the Texas Administrative Code’s compilation of emergency management rules is incredibly short when compared to other regulations such as the Indoor Air

[<https://perma.cc/MQN-Y7GF>] (last visited Dec. 5, 2016); *Programs*, THE UNIV. OF N. TEX., <https://public-administration.pacs.unt.edu/programs> [<https://perma.cc/68VA-QFRR>] (last visited Dec. 5, 2016).

129. *See Acquisition by Texas A&M University*, TEX.A&M U. SCH. OF L., <https://law.tamu.edu/about-us/acquisition-by-tamu> [<https://perma.cc/75S8-VYBG>] (last visited Dec. 5, 2016); *Residency Externship Program in Public Policy*, TEX. A&M U. SCH. OF L., <https://law.tamu.edu/current-students/academics/centers-clinics-programs/externship-program/residency-externship-program> [<https://perma.cc/9KV5-95ZP>] (last visited Dec. 5, 2016).

130. *Preparing for Wildfires*, TEX. A&M FORESTRY SERV., <http://texasforests.tamu.edu/FireDepartmentPrograms/> [<https://perma.cc/48RL-TRCS>] (last visited Mar. 3, 2017).

131. *See generally* William C. Nicholson, *Obtaining Competent Legal Advice: Challenges for Emergency Managers and Attorneys*, 46 CAL. W. L. REV. 343, 345–46 (2010) (noting a general lack of understanding of emergency management issues and connectedness among local government attorneys, emergency management, and political leadership).

Quality/Asbestos Health Protection Rules.¹³² Doing so could help streamline the requirements for emergency management programs across the state of Texas and help the state be a further example for other states to follow.

3. Course of Action Two: Revise TDEM's Explanatory Material and Compliance Manuals

The second course of action is to revise TDEM's explanatory material and compliance manuals to make the mandatory requirements clearly aspirational unless certain conditions are met. This would likely be the expedient and cost-effective approach to remedying any ad hoc rulemaking. In theory, a change like this could cause some municipalities to place emergency management projects lower on the list of priorities. However, public expectations and a moral duty of the municipality to prepare for disasters may mitigate this loss in stature.

4. Course of Action Three: Do Nothing

The third course of action is for TDEM and the state legislature to do nothing and maintain the status quo. This would keep predictability for both the agency and jurisdictions throughout the state. However, it may not prevent the friction and socio-political consequences caused by doing so. At the very least, the recommendations common to courses of action one and two should be actioned by either the agency or the legislature.

C. Could it be Time for a Uniform Emergency Management Code or Rules?

States generally follow the same types of methods and procedures when managing emergencies and disasters.¹³³ Though each state's statute follows the same principals of emergency management in slightly different ways, they all accomplish the same goals. Because of this parallel among the states, and a need for synchronization across the nation, it may be an appropriate time to consider the creation of a uniform law to help achieve interoperability at the national, state, and local level during times of crisis and disaster. To be clear, a uniform law is not a "cramdown" type of law. A uniform law provides

132. There are eighteen relatively broad rules dedicated to emergency management with numerous explanatory materials published by the agency, while the Texas Asbestos Health Protection rules have very little explanatory material and seventy-one highly detailed sections. Compare 37 TEX. ADMIN. CODE § 7 (2018), with 25 TEX. ADMIN. CODE § 295(C) (2018).

133. Compare TEX. GOV'T. CODE ANN. § 418.002 (West 2017), with CAL. GOV'T. CODE § 8550 (West 2016), and FLA. STAT. ANN. § 252.32 (West 2018), and OKLA. STAT. ANN. tit. 63, § 683.2 (West 2018).

a well thought out baseline that can be adopted in whole, part, or rejected by any state or local government.

To explore this idea, two distinct non-governmental organizations would need to collaborate to evaluate this idea, the Uniform Law Commission (“ULC”) and the National Emergency Management Association (“NEMA”). The ULC provides states with non-partisan legislation recommendations to address critical areas of state law common across all or many states.¹³⁴ Further, the ULC has already touched on a uniform emergency management law with fourteen states enacting the Emergency Volunteer Health Practitioners Act since its development in 2007.¹³⁵ The NEMA is an association of state, federal, and territory emergency managers from across the United States that seeks to enhance emergency management capabilities throughout the nation.¹³⁶ What is important about this organization is that it has both a Legislation and Legal Council Committee that would be best suited to partner and develop a Uniform Emergency Management Act.¹³⁷ A collaborative effort between the ULC and NEMA could help launch a nationwide streamlining and synchronization of efforts between the federal-state and the state-local relationships.

VI. CONCLUSION

The Texas Division of Emergency Management may not have intended to circumvent the Administrative Procedures Act with ad hoc rulemaking by placing the majority of its requirements and standards into explanatory material and compliance manuals. It is not a fatal error though. If properly addressed, emergency management in Texas could be streamlined and encourage more municipalities to meaningfully participate in preparedness activities, increasing the number of municipalities who meet the preparedness standards (regardless of grant funding). Though there are several courses of

134. *About the ULC*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> [https://perma.cc/654Y-TH6T] (last visited Dec. 5, 2016) (the ULC is also known as the National Conference of Commissioners on Uniform State Laws).

135. *Emergency Volunteer Health Practitioners*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Emergency%20Volunteer%20Health%20Practitioner%20s> [https://perma.cc/B7G3-F32Q] (last visited Dec. 5, 2016).

136. *See What is NEMA?*, NAT’L EMERGENCY MGMT. ASS’N, <http://nemaweb.org/index.php/about/what-is-nema> [https://perma.cc/X4C9-ACYJ] (last visited Dec. 5, 2016).

137. *Legal Counsel Committee*, NAT’L EMERGENCY MGMT. ASS’N, <http://nemaweb.org/index.php/committees/legal-counsel-committee> [https://perma.cc/9ESV-SGML] (last visited Dec. 5, 2016); *Legislative Committee*, NAT’L EMERGENCY MGMT. ASS’N, <http://nemaweb.org/index.php/committees/legislative-committee> [https://perma.cc/3JGW-K4NK] (last visited Dec. 5, 2016).

action that can address the issue, common to all is a study on how many municipalities in Texas currently meet the various standards or why they do not meet the standards compared with their size, location, and resources. This information would help any prospective Texas Emergency Management Reform Task Force in developing an appropriate set of scalable standards that are achievable for even the smallest municipality. Hopefully, the solutions in this article will allow for the development of a sound legal framework for emergency management in Texas and prevent the emergency management program standards' singular purpose from being a paperweight at municipalities and a grant funding metric for the state.