

MEMORANDUM

January 31, 2002

TO: Mary Selecky, Secretary
Nancy Ellison, Deputy Secretary
Department of Health

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SUBJECT: **Public Health Emergencies -- Current Legal Authority**

TABLE OF CONTENTS

I. Introduction1

II. Current Legal Authority to Respond in a Public Health Emergency.....3

 A. Authorities of Local Jurisdictions3

 1. Local Health Officers and Boards.....3

 2. Local Emergency Operations Center.....7

 3. Local Public Safety Authority.....11

 B. Authorities of State Agencies.....12

 1. Department of Health.....12

 2. State Board of Health14

 3. State Military Department, Emergency Management Division16

 C. Authority of the Governor.....19

 1. Emergency Management.....19

 2. Emergency Proclamations.....20

III. Conclusion22

I. INTRODUCTION

The tragic events on September 11, 2001 in New York and Washington, D.C. were soon followed by widespread national concern about bioterrorism when letters containing anthrax were discovered in Florida, Washington, D.C., and New York. Bioterrorism had been a concern for public health officials prior to September 11, but the events following that date raised public awareness of the need to prepare for a bioterrorism event. Public health officials realized that the

pace of their planning needed to be accelerated. The anthrax events highlighted the need for a quick, decisive response and accurate communications among a variety of interested parties.

In the state of Washington, law enforcement and public health authorities responded to a number of concerned citizens and businesses, who sought information about anthrax, wanted to know how to protect themselves, and expected swift response when they encountered possible anthrax exposures. Fortunately, none of the reported possible exposures tested positive in this state.

Nonetheless, these events tested the public health system in Washington. Washington's public health system involves a number of governmental agencies at both the state and local levels. The purpose of this memo is to explain the roles of the various agencies with roles in responding to public health emergencies. Most of the roles overlap to some degree, which benefits the public with a deeper blend of resources to meet the public health emergency than a single authority may be able to provide. The alacrity with which the authorities must respond for a bioterrorism event demands that each of the authorities understand its own role and the roles of the other agencies, as well as becoming familiar with the available resources within the entire system.

This memorandum provides a description of the roles and responsibilities among the various authorities as exists in statutes and rules. The memo commences with a description of the authority of the local health jurisdictions, as Washington's public health system recognizes the primacy of local governments in the public health system through the local health boards and officers. The local health jurisdictions provide services tailored to the public health needs of the community in which they serve. The local health jurisdictions are generally more familiar with the health providers and facilities within their community. The memo then describes the authorities of state agencies, both the public health agencies and the emergency management agency. The memo concludes with a description of the governor's authority.

II. CURRENT LEGAL AUTHORITY TO RESPOND IN A PUBLIC HEALTH EMERGENCY

A. AUTHORITIES OF LOCAL JURISDICTIONS

- 1. Local Health Officers and Boards**
- 2. Local Emergency Operations Centers**
- 3. Local Public Safety Authorities**

1. Local Health Officers and Boards

Local health officers and boards have broad authority to protect the life and health of the people within their jurisdictions. As discussed below, the courts have upheld a number of different actions taken by the local officers and boards under this broad authority.

The authority for local health officers and boards is contained in chapter 70.05 RCW. Local boards of health are granted the authority to “[supervise] all matters pertaining to the preservation of the life and health of the people within its jurisdiction.” RCW 70.05.060. Local boards of health are directed, in RCW 70.05.060, to take the following actions to preserve the life and health of the people within their jurisdiction:

- (1) Enforce through the local health officer . . . the public health statutes of the state and rules promulgated by the state board of health and the secretary of health;
- (2) Supervise the maintenance of all health and sanitary measures for the protection of the public health within its jurisdiction;
- (3) Enact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof;
- (4) Provide for the control and prevention of any dangerous, contagious or infectious disease within the jurisdiction of the local health department;
- (5) Provide for the prevention, control and abatement of nuisances detrimental to the public health;
- (6) Make such reports to the state board of health through the local health officer or the administrative officer as the state board of health may require;
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Local health officers act under the direction of local boards of health and, under RCW 70.05.070, are mandated to:

- (1) Enforce the public health statutes of the state, rules of the state board of health and the secretary of health, and all local health rules, regulations and ordinances within his or her jurisdiction . . . ;
- (2) Take such action as is necessary to maintain health and sanitation supervision over the territory within his or her jurisdiction;

(3) Control and prevent the spread of any dangerous, contagious or infectious diseases that may occur within his or her jurisdiction;

(4) Inform the public as to the causes, nature, and prevention of disease and disability and the preservation, promotion and improvement of health within his or her jurisdiction;

(5) Prevent, control or abate nuisances which are detrimental to the public health;
. . . ;

(9) Take such measures as he or she deems necessary in order to promote the public health, . . .

Both RCW 70.05.060 and .070 were discussed and applied by the court in Spokane County Health District v. Brockett, 120 Wn.2d. 140, 839 P.2d 324 (1992). The Spokane County Health District Board of Health had directed its health officer to implement a needle exchange program to “slow the spread of AIDS and other infectious diseases among [intravenous drug users] and those with whom they come into contact.” *Supra* at 144. The Spokane County Prosecutor challenged the implementation of the needle exchange program on the grounds that it constituted unlawful distribution of drug paraphernalia. The court noted that the local health officials had been given a broad grant of powers by the legislature in chapter 70.05 RCW. *Supra* at 148. The court went on to note that chapter 70.05 RCW should be liberally construed “[b]ecause protecting and preserving the health of its citizens from disease is an important governmental function.” *Supra* at 149. This governmental function was deemed so important that the court said “[t]he legislatively delegated power to cities and health boards to control contagious diseases gives them extraordinary power which might be unreasonable in another context.” *Supra* at 149.¹ The court upheld the needle exchange program as a valid exercise of the local health board’s police power, noting that the judiciary does not examine “the subject matter and expediency of public health disease prevention measures . . . except as they may violate some constitutional right guaranteed to defendants.” *Supra* at 149. *See also Brockett* at 155 (“Moreover, we are persuaded the broad powers given local health boards and officers under

¹ Interestingly, the court cites to State ex rel. McBride v. Superior Court, 103 Wash. 409, 420, 174 P. 973 (1918), one of a series of cases from the early twentieth century discussing the quarantine authority of the state and local health boards. These quarantines were primarily for the diseases of syphilis and smallpox.

Const. art. 11, § 11 and RCW 70.05 authorize them to institute needle exchange programs in an effort to stop the spread of HIV and AIDS.”).

Washington cases have upheld the exercise of the authority of local boards and officers to protect the public health in a variety of contexts: limitation on outdoor advertisement of tobacco products [Lindsey v. Tacoma-Pierce County Health Department, 8 F.Supp.2d 1213 (1997, W.D. Washington)]; regulations on the installation of private sewage disposal systems [Snohomish County Builders Assoc. v. Snohomish County Health District, 8 Wn.App. 589, 508 P.2d 617 (1973)]; fluoridation of the water supply [Kaul v. City of Chehalis, 45 Wn.2d 616, 277 P.2d 352 (1954)]; smallpox vaccination as a condition of public school attendance [Lehman v. Partlow, 119 Wash. 316, 205 P. 420 (1922)]; quarantine of persons possibly infected with smallpox or syphilis [City of Seattle v. Cottin, 144 Wash. 572, 258 P. 520 (1927); State v. Superior Court for King County, 103 Wash. 409, 174 P. 973 (1918); Westman v. Superior Court for King County, 103 Wash. 701, 174 P. 979 (1918)].²

The variety of activities, addressing a myriad of public health concerns, upheld by the courts in these cases demonstrates one advantage with the broad grant of legislative authority in the current law. The local authorities have wide flexibility to tailor their activities to address the specific public health needs of the people in their jurisdictions.³

WAC 246-100-036 (1) makes it the responsibility of the local health officer to “review and determine appropriate action for . . . [i]nstituting disease prevention and infection control, isolation, detention, and quarantine measures necessary to prevent the spread of communicable disease, invoking the power of the courts to enforce those measures when necessary.” Local

² The discussion of the broad authority of the local health departments in these quarantine cases remains valid; however, while not explicitly overruled, these cases also held that the persons quarantined did not have access to the courts for review of their detention. In reaching this decision, the courts relied on legislation identifying the state board of health as the final arbiter of the propriety of the quarantine. The courts deemed this legislation as preventing judicial review. More recent decisions make it clear that constitutional procedural due process requires access to the courts. See Brockett, *supra* at 149; Snohomish County Builders Assoc. v. Snohomish Health District, *supra* at 623.

³ This can also raise concern about lack of uniformity; however, under the authority of state agencies, that concern can be addressed at the state level if necessary.

health officers are also directed to “conduct investigations and institute control measures consistent with those indicted in the seventeenth edition, 2000, of *Communicable Diseases Manual*, James Chin, MD, MPH, editor, except . . . [w]hen superseded by more up-to-date measures, or . . . [w]hen other measures are more specifically related to Washington state.” WAC 246-100-036 (6). RCW 43.20.050 (4) requires local board of health and local health officers to enforce all rules adopted by the Washington State Board of Health.⁴

RCW 70.05.090 requires physicians to report dangerous contagious or infectious diseases, or any disease required to be reported by the state board of health, to local health officers or the department of health within twenty-four (24) hours of attending to that patient. Physicians who refuse or neglect to report are guilty of a misdemeanor, and if convicted, are fined from ten to two hundred dollars for each case not reported. RCW 70.05.120.⁵ Under RCW 70.05.110, the local boards and officers are required to report to the state board of health certain specified diseases, upon discovery of the diseases. Failure of the local board to report subjects the members of the board to misdemeanor charges and, upon conviction, fines of ten to two hundred dollars.

The question of whether a person is affected or sick with a dangerous, contagious or infectious disease is solely within the authority of the local health officer, until the state department of health is notified. RCW 70.05.100 . The state department of health’s “executive officer,” or a physician she appoints to examine the case, makes the final determination.

RCW 70.05.120 contains, in the last paragraph, the penalties for any person:

(i) violating chapter 70.05 RCW;

⁴ The authority of the Washington State Board of Health (WSBOH) is discussed in the section addressing authorities of state agencies.

⁵ RCW 70.05.090 and .120 contain different reporting timelines; RCW 70.05.090 refers to twenty-four hours and RCW 70.05.120 refers to twelve hours. In addition, RCW 70.05.120 allows the physician to report to an “administrative officer” or the “proper health officer” and there is no definition of “administrative officer.” This could become an issue in implementing the enforcement provisions of RCW 70.05.120. The differing timelines for reporting are contained in statutes, so clarification of this ambiguity must be by legislation. The definition of “administrative officer” could be clarified by an administrative rule.

(ii) violating, refusing or neglecting to obey the state board, local board or officer's rules, regulations or orders for the prevention, suppression and control of dangerous contagious and infectious diseases;

(iii) who leaves an isolation hospital or quarantined house or place without the consent of the health officer;

(iv) who evades or breaks quarantine or assists in evading or breaking any quarantine; or

(v) who conceals a case of contagious or infectious disease.

Any of the above actions subjects the person to misdemeanor charges and, upon conviction, a fine of twenty-five to one hundred dollars and/or up to ninety days imprisonment in the county jail.

2. Local Emergency Operations Centers

Perhaps due in part to the frequency of natural disasters in this state,⁶ Washington has implemented a comprehensive emergency management system. Chapter 38.52 RCW contains the authority of both the state and local jurisdictions for the operation of the emergency management system. To the extent possible, this section will address the authority of the local emergency operations centers⁷, reserving the discussion of the authority of the state emergency management division located within the state Military Department for the section discussing state agencies' authorities.

First, it may be useful to review the definition "emergency or disaster" to ascertain the scope of activities addressed by chapter 38.52 RCW. RCW 38.52.010 (6) defines an "emergency or disaster" as "an event or set of circumstances which: (i) Demands immediate action to preserve public health, protect life, protect public property, or to provide relief to any stricken community overtaken by such occurrences, or (ii) reaches such a dimension or degree of

⁶ It was reported that this was a reason given by FEMA for selecting Washington as the first state to be surveyed when that federal agency began its survey of states' preparedness for terrorism response.

⁷ Some local jurisdictions may have joint local emergency operations centers, serving two or more local jurisdictions. These centers may have a name other than emergency operations centers; however, their functions are as provided in chapter 38.52 RCW.

destructiveness as to warrant the governor declaring a state of emergency pursuant to RCW 43.06.010.” This broad definition of “emergency or disaster” encompasses public health emergencies.

The policy and purpose of chapter 38.52 RCW as specified in RCW 38.52.020 are:

(1) Because of the existing and increasing possibility of the occurrence of disasters of unprecedented size and destructiveness . . . , and in order to insure that preparations of this state will be adequate to deal with such disasters, to insure the administration of state and federal programs providing disaster relief to individuals, and further to insure adequate support for search and rescue operations, and generally to protect the public peace, health, and safety, and to preserve the lives and property of the people of the state, it is hereby found and declared to be necessary:

(a) To provide for emergency management by the state, and to authorize the creation of local organizations for emergency management in the political subdivisions of the state;

(b) To confer upon the governor and upon the executive heads of the political subdivisions of the state the emergency powers provided herein;

(c) To provide for the rendering of mutual aid among the political subdivisions of the state and with other states and to cooperate with the federal government with respect to the carrying out of emergency management functions; . . . ; and

(e) To provide programs, with intergovernmental cooperation, to educate and train the public to be prepared for emergencies.

(2) It is further declared to be the purpose of this chapter and the policy of the state that all emergency management functions of this state and its political subdivisions be coordinated to the maximum extent with the comparable functions of the federal government including its various departments and agencies of other states and localities, and of private agencies of every type, to the end that the most effective preparation and use may be made of the nation's manpower, resources, and facilities for dealing with any disaster that may occur.

RCW 38.52.020 refers to “emergency management.” The term “emergency management” is defined in RCW 38.52.010 (1) as “the preparation for and the carrying out of all emergency functions, other than functions for which the military forces are primarily responsible, to mitigate, prepare for, respond to, and recover from emergencies and disasters, and to aid victims suffering from injury or damage, resulting from *disasters caused by all hazards, whether natural, technological, or human caused*, and to provide support for search and rescue operations for persons and property in distress.” RCW 38.52.010 (1) excludes from the definition of

“emergency management,” the preparation for emergency evacuation or relocation of residents in anticipation of nuclear attack.

The establishment and authority of the local emergency operations centers are addressed in RCW 38.52.070. Each local emergency operations center or department must coordinate with the state Emergency Management Division (EMD) to ensure that the emergency plans developed by the locals are consistent with the state Comprehensive Emergency Management Plan (CEMP) developed by the state EMD’s director.⁸ RCW 38.52.070 (2) directs the local emergency operations centers to take the following actions:

In carrying out the provisions of this chapter each political subdivision, in which any disaster . . . occurs, shall have the power to enter into contracts and incur obligations necessary to combat such disaster, protecting the health and safety of persons and property, and providing emergency assistance to the victims of such disaster. Each political subdivision is authorized to exercise the powers vested under this section in the light of the exigencies of an extreme emergency situation without regard to time-consuming procedures and formalities prescribed by law (excepting mandatory constitutional requirements), including, but not limited to, budget law limitations, requirements of competitive bidding and publication of notices, provisions pertaining to the performance of public work, entering into contracts, the incurring of obligations, the employment of temporary workers, the rental of equipment, the purchase of supplies and materials, the levying of taxes, and the appropriation and expenditures of public funds.

RCW 38.52.070 (1) authorizes the local emergency operations centers to provide assistance outside the boundaries of their political subdivisions when required. RCW 38.52.080 extends the powers, duties, rights, privileges and immunities of those employees to work outside their political subdivisions when they are rendering necessary aid in other jurisdictions. In addition, RCW 38.52.080 (3) recognizes that these employees and equipment owned by political subdivisions may be used to render aid outside the state under a reciprocal mutual aid agreement or compact with other states or as required by the federal government.

Mutual aid agreements are authorized in RCW 38.52.091. Local emergency operations centers are authorized to enter into mutual aid agreements with public and private agencies

⁸ The CEMP is also discussed in the section addressing the authorities of state agencies.

within this state “for reciprocal emergency management aid and assistance in case of disasters too great to be dealt with unassisted.” RCW 38.52.091 (1). These agreements must be consistent with the state CEMP. The state EMD adjutant general maintains and distributes a mutual aid and interlocal agreement handbook.

If a local emergency operations center wants to enter into mutual aid agreements with emergency management agencies or organizations in other states, the governor must approve the agreements. RCW 38.52.091 (2). RCW 38.52.091 (3) contains required terms for the mutual aid agreements.

Under RCW 38.52.110 (1), the governor and executive heads of the political subdivisions can utilize any of the services, equipment, supplies and facilities of the departments, offices and agencies of the state and political subdivisions, including municipal corporations and quasi-municipal corporations, in carrying out the disaster response. In addition, officers and personnel of these offices and agencies are directed to cooperate and extend the needed services and facilities to assist in the disaster response.

If the governor issues an emergency proclamation⁹ in response to the disaster, the chief executive of counties, cities and towns and the directors of the local emergency operations centers “have the power to command the service and equipment of as many citizens as considered necessary” to deal with the disaster. RCW 38.52.110 (2). These citizens have the same privileges, benefits and immunities as provided by chapter 38.52 RCW and the federal and state emergency management regulations for registered emergency workers.

Every emergency management organization established in chapter 38.52 RCW must execute and enforce orders, rules, and regulations of the governor. Failure to do so is punishable as a misdemeanor.

⁹ The governor’s authority to issue emergency proclamations is described in the third section of this memo, addressing the governor’s authorities.

3. Local Public Safety Authority

Local public safety authority is generally as broad as the police power of government. Only specific authority relating to public health emergencies will be discussed in this memo.

RCW 43.20.050(4) requires “[a]ll local boards of health, health authorities and officials, officers of state institutions, *police officers, sheriffs, constables*, and all other officers and employees of the state, or any county, city, or township” to enforce all rules adopted by the state board of health. Failure to comply with the provision subjects the individual to a fine of at least fifty dollars and injunctive, mandamus, or other civil proceedings under RCW 43.70.190. A temporary order can be issued without notice (*ex parte*) if warranted under the circumstances. RCW 43.70.190.

Under WAC 246-100-036 (1) and (6), local health officers are required to institute disease prevention and infection control measures, including isolation, detention, and quarantine when necessary to prevent the spread of communicable diseases. There have been discussions about the importance of assistance from local law enforcement in enforcing these actions by the local health officers. Case law from the early twentieth century, involving quarantine for small pox and syphilis,¹⁰ indicate that law enforcement assisted the local health officer in enforcing quarantine and isolation. The cooperative relationship between local law enforcement and local health officers in the early 1900s may have evolved from the local health officers’ roles in assisting with enforcement of the public moral criminal code, e.g. prostitution. The recent discussions about the relationship between law enforcement and local health officers suggest that law enforcement may not be as aware of the authorities of the local health officers as in the past. The State Board of Health (SBOH) is assisting in bringing together representatives of local law enforcement and local health officers to address this issue. In addition, the SBOH has issued a

¹⁰ The quarantine cases are listed on page 5 of this memo.

rule-making notice, indicating that it will be initiating rule-making on the issue of quarantine and isolation.¹¹

Under the emergency management act, chapter 38.52 RCW, local law enforcement can be directed by the political subdivision executive head to cooperate in providing services in response to an emergency. RCW 38.52.110 (1).

B. AUTHORITIES OF STATE AGENCIES

- 1. Department of Health**
- 2. State Board of Health**
- 3. State Military Department, Emergency Management Division**

Three state agencies are authorized explicitly to plan for and respond to public health emergencies: the State Department of Health, the State Board of Health, and the Emergency Management Division of the State Military Department. The Governor has additional powers to act in times of emergency. The authorities granted state agencies are discussed in this section of the memo. The Governor's authority is discussed in the next section.

1. Department Of Health

The statute creating the Department of Health (DOH), RCW 43.70.020, also imposes a responsibility on DOH, which is relevant when considering the various roles and responsibilities in responding to a health emergency. DOH is required to:

Provide leadership and coordination in identifying and resolving threats to the public health by:

- (a) Working with local health departments and local governments to strengthen the state and local governmental partnership in providing public protection;
- (b) Developing intervention strategies;
- (c) Providing expert advice to the executive and legislative branches of state government;
- (d) Providing active and fair enforcement of rules;
- (e) Working with other federal, state, and local agencies and facilitating their involvement in planning and implementing health preservation measures;
- (f) Providing information to the public; and

¹¹ As discussed below in the section addressing state agencies' authorities, the SBOH has the authority to adopt rules relating to isolation and quarantine, with which local law enforcement and others must comply pursuant to RCW 43.20.050 (4).

(g) Carrying out such other related actions as may be appropriate to this purpose.

RCW 43.70.020 (3).

The more specific powers and duties of the secretary of DOH are contained in RCW 43.70.130. The secretary is authorized to act in lieu of the local boards of health and the local health officers if:

(i) the local boards fail to act or are unable to act in response to an emergency, or the local boards agree to the secretary's involvement, or

(ii) the local health officer fails or is unable to act, the local health officer agrees to the secretary's involvement, or if the safety of the public health demands it in an emergency.

RCW 43.70.130 (4) and (7) (paraphrased). In addition, RCW 43.70.130 directs the secretary to take the following relevant actions:

(3) Strictly enforce all laws for the protection of the public health and the improvement of sanitary conditions in the state, and all rules, regulations, and orders of the state board of health;

...

(5) Investigate outbreaks and epidemics of disease that may occur and advise local health officers as to measures to be taken to prevent and control the same;

(6) Exercise general supervision over the work of all local health departments and establish uniform reporting systems by local health officers to the state department of health;

...

(10) Take such measures as the secretary deems necessary in order to promote the public health, . . . ;

(11) Establish and maintain laboratory facilities and serves as are necessary to carry out the responsibilities of the department.

The secretary also has authority to "investigate, examine, sample or inspect any article or condition constituting a threat to the public health, including, but not limited to, outbreaks of communicable diseases, food poisoning, contaminated water supplies, and all other matters injurious to the public health." RCW 43.70.170. The secretary and her representative have "free and unimpeded access to all buildings, yards, warehouses, storage and transportation facilities or any other place" as needed to carry out the investigation. RCW 43.70.170. If necessary, the secretary has the authority to issue an order, valid for fifteen days, prohibiting the disposition or

sale of any food or other item involved in the investigation. RCW 43.70.180. If the circumstances warrant an order of longer duration, the secretary may apply to the court for an order, which can be obtained without notice (ex parte) “upon a showing of an immediate and serious danger to residents constituting an emergency.” RCW 43.70.180 and .190.

2. State Board of Health

The State Board of Health (SBOH) is directed to adopt “rules for the imposition and use of isolation and quarantine” and “rules for the prevention and control of infectious and noninfectious diseases, including food and vector borne illness, and rules governing the receipt and conveyance of remains of deceased persons.” RCW 43.20.050 (2)(d) and (e). RCW 43.20.050 (4) mandates that “all local boards of health, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and all other officers and employees of the state, or any county, city or township” enforce all rules adopted by the SBOH. However, as discussed above in the local public safety authorities section, the penalty for failing or refusing to enforce is a fine of not less than fifty dollars. RCW 43.20.050 (4). The nominal amount mentioned in this statute for failing to enforce the SBOH rules has been the subject of considerable discussion and concern for the local health officers and boards, who view local law enforcement as necessary partners for successful enforcement of quarantine rules.¹²

The SBOH has promulgated an extensive series of rules in chapters 246-100 and 246-101 WAC on communicable diseases and notifiable conditions. WAC 246-100-011 (6) defines a “communicable disease” as “an illness caused by an infectious agent which can be transmitted from one person, animal, or object to another person by direct or indirect means including transmission via an intermediate host or vector, food, water, or air.” A “notifiable condition” is defined in WAC 246-101-010 (30) as “a disease or condition of public health importance, a case

¹² The SBOH is discussing this issue with representatives of local law enforcement and the State Patrol. In addition, the SBOH has issued a notice of its intent to consider rule-making on the subject of quarantine and isolation.

of which, and for certain diseases, a suspected case of which, must be brought to the attention of the local health officer or the state health officer.”

WAC 246-101-010 (11) defines “disease of suspected bioterrorism origin” and requires immediate reporting to the local health department of certain situations which “could represent a possible bioterrorism event.” WAC 246-101-010 (11) reads as follows:

“Disease of suspected bioterrorism origin” means a disease caused by viruses, bacteria, fungi, or toxins from living organisms that are used to produce death or disease in humans, animals, or plants. Many of these diseases may have nonspecific presenting symptoms. The following situations could represent a possible bioterrorism event and should be reported immediately to the local health department:

- (a) A single diagnosed or strongly suspected case of disease caused by an uncommon agent or a potential agent of bioterrorism occurring in a patient with no known risk factors;
- (b) A cluster of patients presenting with a similar syndrome that includes unusual disease characteristics or unusually high morbidity or mortality without obvious etiology; or
- (c) Unexplained increase in a common syndrome above seasonally expected levels.

The SBOH has adopted rules requiring health care providers, laboratories, health care facilities, veterinarians, and others to report specified notifiable conditions to the local health officer or DOH.¹³ WAC 246-101-101, -201, -301, and -405. Any disease of suspected bioterrorism origin must be reported immediately. The specified notifiable conditions include anthrax, botulism, brucellosis, plague, smallpox, tularemia, “other rare diseases of public health significance,” and “unexplained critical illness or death.” The rules specify the means of communication (telephone or secure electronic data transmission for conditions requiring immediate notification) and the content of the communication.

As discussed above in the first section, which addresses the authority of the local health officers and boards, WAC 246-100-036 (1) vests considerable authority in the local health officers to take action to prevent disease and control infection, including the authority to isolate, detain and quarantine. As described earlier in this memo, the courts have upheld a broad range

¹³ WAC 246-101-605 (4) requires the DOH to maintain a twenty-four hour telephone number for reporting notifiable conditions.

of actions taken by local health boards and officers to address health concerns within their jurisdiction, including quarantine.

WAC 246-101-505 (1)(d) contains the same language as in WAC 246-100-036 (1), recognizing the broad authority for the local health officers to prevent disease and control infection. In addition, WAC 246-101-505 (10) authorizes the local health officer to:

- (a) Carry out additional steps determined to be necessary to verify a diagnosis reported by a health care provider;
- (b) Require any person suspected of having a reportable disease or condition to submit to examinations required to determine the presence of the disease or condition;
- (c) Investigate any case or suspected case of a reportable disease or condition or other illness, communicable or otherwise, if deemed necessary;
- (d) Require the notification of additional conditions of public health importance occurring within the jurisdiction of the local health officer.

WAC 246-101-425 requires members of the general public to “cooperate with public health authorities in the investigation of cases and suspected cases, or outbreaks and suspected outbreaks of notifiable conditions or other communicable diseases” and to “cooperate with the implementation of infection control measures, including isolation and quarantine.”

3. State Military Department, Emergency Management Division

The statutory authority for the Emergency Management Division (EMD) of the Military Department is contained in chapter 38.52 RCW, the same chapter that addresses the authority of local emergency operations centers. The same definitions of “emergency or disaster” and “emergency management” apply to the EMD, as apply to the local emergency operations center.

(1) "Emergency management" or "comprehensive emergency management" means the preparation for and the carrying out of all emergency functions, other than functions for which the military forces are primarily responsible, to mitigate, prepare for, respond to, and recover from emergencies and disasters, and to aid victims suffering from injury or damage, resulting from disasters caused by all hazards, whether natural, technological, or human caused, and to provide support for search and rescue operations for persons and property in distress. However, "emergency management" or "comprehensive emergency management" does not mean preparation for emergency evacuation or relocation of residents in anticipation of nuclear attack.

...

(6)(a) "Emergency or disaster" as used in all sections of this chapter . . . shall mean an event or set of circumstances which: (I) Demands immediate action to preserve public health, protect life, protect public property, or to provide relief to any stricken community overtaken by such occurrences, or (ii) reaches such a dimension or degree of destructiveness as to warrant the governor declaring a state of emergency pursuant to RCW 43.06.010.

RCW 38.52.010.

The Legislature recognized that state coordination and involvement is essential for adequate planning and response for emergencies exceeding the capacity of the local emergency operations centers. Accordingly, RCW 38.52.020 declares the policy and purpose of the emergency management act as follows (emphasis added):

(1) Because of the existing and increasing possibility of the occurrence of *disasters of unprecedented size and destructiveness* as defined in RCW 38.42.010 (6), and in order to *insure that preparations of this state will be adequate* to deal with such disasters, to insure the *administration of state and federal programs providing disaster relief to individuals*, and further to insure adequate support for search and rescue operations, and *generally to protect the public peace, health, and safety, and to preserve the lives and property of the people of the state*, it is hereby found and declared to be necessary:

(a) To provide for emergency management by the state . . . ;

(b) *To confer upon the governor and upon the executive heads of the political subdivisions of the state the emergency powers provided herein;*

(c) To provide for the rendering of mutual aid among the political subdivisions of the state and with other states and to cooperate with the federal government with respect to the carrying out of emergency management functions; . . . ;

(e) To provide programs, with intergovernmental cooperation, to educate and train the public to be prepared for emergencies.

(2) It is further declared to be the purpose of this chapter and the policy of the state that all emergency management functions of this state and its political subdivisions be coordinated to the maximum extent with the comparable functions of the federal government including its various departments and agencies of other states and localities, and of private agencies of every type, to the end that the most effective preparation and use may be made of the nation's manpower, resources, and facilities for dealing with any disaster that may occur.

The duties and authority of the adjutant general (the title of the director) of the EMD are contained in RCW 38.52.030. The general is "subject to the direction and control of the governor" and is "responsible to the governor for carrying out the program for emergency management of the state." RCW 38.52.030 (2). The general "coordinate[s] the activities of all organizations for emergency management within the state, and . . . maintain[s] liaison with and cooperate[s] with emergency management agencies and organizations of other states and of the

federal government.” RCW 38.52.030 (2). The general is responsible for developing and maintaining the comprehensive emergency management plan (CEMP), which must “include an analysis of the nature, technological, or *human caused hazards* which could affect the state of Washington.” RCW 38.52.030 (3). The CEMP must include the procedures to be used during emergencies for coordinating resources of local and state agencies. RCW 38.52.030 (4).

RCW 38.52.030 includes other responsibilities of the general, which may be necessary in case of a public health emergency (emphasis added):

(4) In accordance with the comprehensive emergency management plans and the programs for the emergency management of this state, the director shall *procure supplies and equipment, institute training programs and public information programs*, and shall take all other preparatory steps, including the partial or full mobilization of emergency management organizations in advance of actual disaster, to insure the furnishing of adequately trained and equipped forces of emergency management personnel in time of need.

(5) The director shall make such studies and surveys of the industries, resources, and facilities in this state as may be necessary to *ascertain the capabilities of the state for emergency management, and shall plan for the most efficient emergency use thereof*.

(6) The emergency management council shall advise the director on all aspects of the *communications and warning systems and facilities* operated or controlled under the provisions of this chapter.

.....
(9) The director, subject to the direction and control of the governor, shall prepare and administer a *state program for emergency assistance to individuals within the state who are victims of a natural, technological, or human caused disaster*, as defined by RCW 38.52.010 (6). Such program may be integrated into and coordinated with disaster assistance plans and programs of the federal government which provide to the state, or through the state to any political subdivision thereof, services, equipment, supplies, materials, or funds by way of gift, grant, or loan for purposes of assistance to individuals affected by a disaster. .
....

(10) The director shall appoint a state coordinator for radioactive and hazardous waste emergency response programs. The coordinator shall consult with the state radiation control officer in matters relating to radioactive materials. The duties of the state coordinator for radioactive and hazardous waste emergency response programs shall include:

(a) Assessing the current needs and capabilities of state and local radioactive and hazardous waste emergency response teams on an ongoing basis;

(b) Coordinating training programs for state and local officials for the purpose of updating skills relating to emergency mitigation, preparedness, response, and recovery;

(c) Utilizing appropriate training programs such as those offered by the federal emergency management agency, the department of transportation and the environmental protection agency; and

(d) Undertaking other duties in this area that are deemed appropriate by the director.

RCW 38.52.180 (1) declares any owner of a building or premises designated as an emergency shelter not liable for any injuries sustained by any person using the emergency shelter, unless the owner or the owner's agents were willfully negligent. Under RCW 38.52.180 (2), the state accepts all legal liability for damage to property or injury or death to persons caused by actions taken under the authority of chapter 38.52 RCW.

RCW 38.52.180 (3) suspends the requirement for a license to practice any "professional, mechanical or other skill" for any authorized emergency workers, who, in the course of providing emergency care, practices the professional, mechanical or other skill. "Emergency worker" is defined in RCW 38.52.010 (4) as:

any person, including but not limited to an architect registered under chapter 18.08 RCW or a professional engineer registered under chapter 18.43 RCW, who is registered with a local emergency management organization or the department and holds an identification card issued by the local emergency management director or the department for the purpose of engaging in authorized emergency management activities or is an employee of the state of Washington or any political subdivision thereof who is called upon to perform emergency management activities.

Several sections of chapter 38.52 RCW exempt any person assisting in responding to the emergency from liability if the injury, loss or damage was not due to willful misconduct or gross negligence or the intoxication of the worker. RCW 38.52.195 (construction, equipment or work); RCW 38.52.1951 (architects and engineers); RCW 38.52.198 (mine rescue or recovery work).

C. AUTHORITY OF THE GOVERNOR

- 1. Emergency Management**
- 2. Emergency Proclamations**

1. Emergency Management

The Emergency Management Act, chapter 38.52 RCW, authorizes the governor to "assume direct operational control over all or any part of the emergency management functions

within this state” if there is a “disaster beyond local control.” RCW 38.52.050. The governor is given a broad range of authority to act under the Emergency Management Act:

(2) In performing his or her duties under this chapter, the governor is authorized to cooperate with the federal government, with other states, and with private agencies in all matters pertaining to the emergency management of this state and of the nation.

(3) In performing his or her duties under this chapter and to effect its policy and purpose, the governor is further authorized and empowered:

(a) *To make, amend, and rescind the necessary orders, rules, and regulations to carry out the provisions of this chapter within the limits of the authority conferred upon him herein, with due consideration of the plans of the federal government;*

(b) *On behalf of this state, to enter into mutual aid arrangements with other states and territories, or provinces of the Dominion of Canada and to coordinate mutual aid interlocal agreements between political subdivisions of this state;*

(c) To delegate any administrative authority vested in him under this chapter, and to provide for the subdelegation of any such authority;

(d) To appoint, with the advice of local authorities, metropolitan or regional area coordinators, or both, when practicable;

(e) To cooperate with the president and the heads of the armed forces, the emergency management agency of the United States, and other appropriate federal officers and agencies, and with the officers and agencies of other states in matters pertaining to the emergency management of the state and nation.

RCW 38.52.050 (emphasis added).

Under RCW 38.52.110 (1), the governor has the authority to use the “services, equipment, supplies and facilities” of state agencies for an emergency and personnel of state agencies are directed to cooperate with the governor.¹⁴ RCW 38.52.110 (2) authorizes the governor, after an emergency proclamation, “to command the service and equipment of as many citizens as considered necessary in the light of the disaster proclaimed.”¹⁵

2. Emergency Proclamations

The governor is authorized to proclaim an emergency, under RCW 43.06.010 (12), “after finding that a public disorder, disaster, energy emergency, or riot exists within this state or any

¹⁴ RCW 38.52.110 addresses the agencies of both state and political subdivisions. As discussed above in the section discussing the authority of local emergency operations centers, the executive heads of the political subdivisions are authorized to utilize the counties or municipalities government resources.

¹⁵ The chief executive of counties, cities and towns and the local emergency management directors have the same authority in their jurisdictions, if the governor has issued an emergency proclamation. RCW 38.52.110 (2).

part thereof which affects life, health, property, or the public peace.” The proclamation is effective “only within the area described in the proclamation.” RCW 43.06.010 (12).

RCW 43.06.210 requires the emergency proclamation to be in writing and filed with the secretary of state. The governor is to give as much notice of the issuance of the proclamation as practical to the news media. RCW 43.06.210. The emergency proclamation continues until terminated by the governor; however, the governor is directed to terminate the emergency proclamation when “order has been restored in the area affected.” RCW 43.06.210.

The governor’s proclamation can prohibit any or all of the activities described in RCW 43.06.220, including some activities that may be appropriately prohibited in a public health emergency:

- (1) Any person being on the public streets, or in the public parks, or at any other public place during the hours declared by the governor to be a period of curfew;
- (2) Any number of persons, as designated by the governor, from assembling or gathering on the public streets, parks, or other open areas of this state, either public or private;
- ...;
- (7) The sale, purchase or dispensing of other commodities or goods, as he reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace;
- (8) The use of certain streets, highways or public ways by the public; and
- (9) Such other activities as he reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace.

Anyone violating the governor’s emergency proclamation is guilty of a gross misdemeanor. RCW 43.06.220. After an emergency proclamation, engaging in certain activity is subject to criminal sanctions. RCW 43.06.230 (malicious property damage or personal injury); RCW 43.06.240 (disorderly conduct); RCW 43.06.250 (refusing to leave public property or a public right of way).

The governor has discretion to order the state militia or the state patrol to assist local officials in restoring order in an area for which an emergency has been proclaimed. RCW 43.06.270.¹⁶

III. CONCLUSION

This memo describes the authorities of the various governmental entities, which have a role in responding to a serious public health emergency, such as a bioterrorism event. The order of describing the authorities in this memo follows the expected pattern of local health first recognizing and reporting a likely terrorism event up through the escalation of the response to an emergency proclamation by the governor. There is sufficient redundancy in the legal authorities of these various agencies to allow intervention by multiple authorities when necessary to protect the public.

The existence of legal authorities is only a preliminary step in the establishment of an effective response to a public health emergency. The authority in law serves as the most basic, minimal foundation upon which to build the complex infrastructure necessary to achieve an effective and efficient public health emergency response for a major event. Establishing and maintaining relationships among the various response agencies are essential elements for a successful implementation of the emergency response plan. A robust infrastructure would include sufficient resources to meet both the day-to-day maintenance demands on the system and provide sufficient capacity for continual review and maintenance of the public health system's emergency response preparedness.

One governmental entity not addressed in this memo, but which should be included in the emergency response network, is the judiciary. Emergency orders do not overcome civil rights.

¹⁶ The governor's authority to order enforcement of emergency proclamations is separate from his authority to order martial law. The authority to order martial law (complete or partial) is contained in chapter 38.08 RCW. This memo does not discuss the martial law authority; reserving this discussion for the governor's counsel and the governor. However, the authority does exist. Using the state militia to assist in the enforcement of emergency proclamations is not the declaration of martial law. When the governor declares complete or partial martial law, he is subordinating civil authority to the military rather than simply making the National Guard available to aid the local authorities. Martial law generally will not be ordered if county and city governments are functioning.

The citizens of this state retain their constitutionally protected civil rights, including the right to due process. While the governmental agencies may take immediate action, prior to affording due process when necessary to protect the public health, safety, and welfare, their actions should be judiciously tailored to address the nature and magnitude of the emergency. Citizens affected by these immediate actions must be afforded due process promptly. Rather than wait until the emergency arises, the local and state agencies described in this memo may want to acquaint the judiciary with their authorities and establish, with the judiciary, the means for prompt due process reviews during a public health emergency.

This memorandum contains the opinions and conclusions of the author and does not represent the opinion of the Office of the Attorney General or of the Attorney General.

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