



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

2425 Bristol Ct SW • PO Box 40109 • Olympia WA 98504-0109

MEMORANDUM

DATE: October 20, 2006

TO: Mary Selecky, Secretary
Bill White, Deputy Secretary
Department of Health, MS 47890

FROM: Joyce A. Roper, Sr. Assistant Attorney General *JAR*
Agriculture & Health Division, MS 40109

SUBJECT: **Public Health Emergencies – Update to January 31, 2002 Legal Authority Memo**

TABLE OF CONTENTS

- I. Introduction.....1
- II. Current Legal Authority to Respond in a Public Health Emergency.....3
 - A. Authorities of Local Jurisdictions3
 - 1. Local Health Officers and Boards.....3
 - a. Authority to Control Communicable Diseases5
 - b. Authority to Close Schools and Day Care Centers.....6
 - c. Isolation and Quarantine Authority and Procedures.....7
 - 2. Local Emergency Operations Center.....9
 - a. Scope and Definitions.....9
 - b. Authorized Activities.....10
 - c. Mutual Aid Agreements.....11
 - 3. Local Public Safety Authority.....12
 - B. Authorities of State Agencies.....13
 - 1. Department of Health.....13
 - a. Secretary’s Authorities.....13
 - b. Secretary’s Authority to Act in Lieu of Local Jurisdictions.....14
 - c. Secretary’s Authority Over Pet Animals.....14
 - 2. State Board of Health15
 - 3. State Military Department, Emergency Management Division16
 - a. Authority of Adjutant General and the CEMP.....17
 - b. Liability and Waiver of Professional Licensing Requirements.....18
 - c. Interstate and International Mutual Aid Agreements.....19
 - C. Authority of the Governor.....19
 - 1. Emergency Management.....19
 - 2. Emergency Proclamations.....20
- III. Conclusion21



ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 2

I. INTRODUCTION

On January 31, 2002, following the tragic events on September 11, 2001 in New York and Washington, D.C. and the widespread national concern about bioterrorism after letters containing anthrax were discovered in Florida, Washington, D.C., and New York, I prepared a memorandum describing the legal authorities of the different entities within the local and state government in responding to an emergency involving the public health. The public health system has a long history of responding to emergencies which trigger high mortality and morbidity for human populations. However, with the advent of modern medicine and environmental protections, such as wastewater treatment, immunizations, standards for drinking water, the public health system's work in nations such as the United States went unnoticed and underappreciated by the average citizen in the twentieth century. We now take for granted the public health protections put in place prior to and during our lifetime.

While public health officials were already concerned about the potential for bioterrorism and the rapid spread of diseases as greater numbers of the world's population began to travel quickly by air from one location to another and our nation's economy became increasingly dependent upon international trade, the public health infrastructure, taken for granted for so long in the United States, was being minimally maintained. The events following September 11, 2001 raised public awareness of the need to prepare for a bioterrorism event or a novel disease, such as SARS which affected large populations in Toronto, particularly with the imposition of quarantines. Public health officials realized that the pace of their planning needed to be accelerated. Several public health events (anthrax, monkeypox, SARS, bovine spongiform encephalopathy, west Nile virus, high pathology avian influenza, e coli in food), highlighted the need for a quick, decisive response and accurate communications among a variety of interested parties.

These events, even when we did not have active cases in our state, tested the public health system in Washington. Washington's public health system is comprised of a number of governmental agencies at the state and local levels. The purpose of this memo is to update the discussion of the roles of these various agencies and their intersection with other entities involved in emergency preparation and response, sharing a common mission of protecting the people of this state. 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 demands that each of the entities understand its own role and the roles of the other agencies, as well as becoming familiar with the available resources within the entire system. The government agencies need to partner with each other and with private entities to effectively fulfill this mission. Ultimately, every person should be prepared to protect and respond for oneself and one's family during an emergency; assisting neighbors, the community, and the government responders to the extent possible.

The memo commences with a description of the authority of the local health jurisdictions, as Washington's public health and emergency management systems recognize the primacy of local governments for both public health delivery and emergency management through the local health boards, local health officers, local emergency management, and heads of political subdivisions. The local health jurisdictions provide services tailored to the public health needs of the communities in which they serve. The local health jurisdictions are generally more familiar with the health providers, facilities, and other resources within their communities. 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.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 3

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

A. AUTHORITIES OF LOCAL JURISDICTIONS

- 1. Local Health Officers and Boards**
 - a. Updated Authority to Control Communicable Diseases**
 - b. Authority to Close Schools and Day Care Centers**
 - c. Isolation and Quarantine Authority and Procedures**
- 2. Local Emergency Operations Centers**
 - a. Scope and Definitions**
 - b. Authorized Activities**
 - c. Mutual Aid Agreements**
- 3. Local Public Safety Authority**

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;

...

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;

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 4

- (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,

In *Spokane County Health District v. Brockett*, 120 Wn.2d 140, 839 P.2d 324 (1992), the Washington Supreme Court discussed and applied RCW 70.05.060 and .070. 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 an 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 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 (W.D. Wash. 1997)]; regulations on the installation of private sewage disposal systems [*Snohomish County Builders Association 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)²]; 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)].³

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.

² The local jurisdiction’s authority to require fluoridation of the water supply has been modified by the legislature’s specific grant of authority to water districts in RCW 57.08.012. *Parkland Light & Water Company v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004).

³ 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 said that legislation precluded judicial review. More recent decisions make it clear that access to the courts must be available under the procedural

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 5

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.⁴ However, if the legislature has adopted a specific law on a particular topic, vesting authority traditionally within the local health jurisdiction to another entity, then the specific law overrides the broad grant of authority to the local health jurisdiction. *Parkland Light & Water Company v. Tacoma-Pierce County Board of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004).

a. Authority to Control Communicable Diseases

In September 2003, the State Board of Health⁵ amended the administrative rules to update the authorities and responsibilities of local health officers, consistent with the renewed recognition of public health's key role in protecting the public health, safety and welfare with respect to emerging diseases, food safety, and the potential for bioterrorism. WAC 246-100-036(1), as amended in 2003, makes it the responsibility of the local health officer to "establish, in consultation with local health care providers, health facilities, emergency management personnel, law enforcement agencies, and any other entity he or she deems necessary, plans, policies, and procedures for instituting emergency measures necessary to prevent the spread of communicable disease or contamination." This amendment recognized the necessity of strong partnerships and collaboration to effectively protect the public.

WAC 246-100-036(4) recognizes the importance of these partnerships by authorizing local health departments to "make agreements with tribal governments, with federal authorities or with state agencies or institutions of higher education that empower the local health officer to conduct investigations and institute control measures [for isolation and quarantine] on tribal lands, federal enclaves and military bases, and the campuses of state institutions." "State institutions" are broadly defined in WAC 246-100-036 (4) as including, but not limited to, "state-operated colleges and universities, schools, hospitals, prisons, group homes, juvenile detention centers, institutions for juvenile delinquents, and residential habilitation centers."

In WAC 246-100-036(3), local health officers are charged with "conduct[ing] investigations and institut[ing] *disease control and contamination control measures*, including medical examination, testing, counseling, treatment, vaccination, decontamination of persons or animals, isolation, quarantine, vector control, condemnation of food supplies, and inspection and closure of facilities, consistent with those indicated in the 17th edition, 2000 of the *Control of Communicable Disease Manual*, published by the American Public Health Association, or other measures he or she deems necessary based on his or her professional judgment, current standards of practice and the best available medical and scientific information." "Disease control measures" are defined in WAC 246-100-011(11) as "the management of persons, animals, goods, and facilities that are infected with, suspected to be infected with, exposed to, or suspected to be exposed to an infectious agent in a manner to prevent transmission of the infectious agent to humans." "Contamination control measures" are defined in WAC 246-100-011(8) as "the management of persons, animals, goods, and facilities that are contaminated, or

due process protections in the state and federal constitutions. See *Brockett, supra* at 149; *Snohomish County Builders Association v. Snohomish Health District, supra* at 623.

⁴ 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.

⁵ The authority of the Washington State Board of Health (WSBOH) is discussed in the section addressing authorities of state agencies.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 6

suspected to be contaminated, in a manner to avoid human exposure to the contaminant, prevent the contaminant from spreading, and/or effect decontamination.”

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 70.05.120.⁶

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.

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.

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.

In the last paragraph of RCW 70.05.120, it is declared a misdemeanor, subject to a fine of twenty-five to one hundred dollars and/or up to ninety days imprisonment in the county jail for any person:

- (i) violating chapter 70.05 RCW;
- (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.

b. Authority to Close Schools and Day Care Centers

Under chapter 246-110 WAC, local health officers have the authority, after consultation with the Secretary of the Department of Health or her designee, to take all medically appropriate actions deemed necessary to control or eliminate the spread of disease, including, but not limited to:

⁶ 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.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 7

- closing the affected schools or day care centers or parts thereof;
- closing other schools or day care centers in the local health officer's jurisdiction;
- ordering the cessation of selected school or day care center activities or functions;
- excluding from schools or day care centers in the jurisdiction any students, staff, and volunteers infected with or susceptible to the disease.

Prior to taking such action, the local health officer must consult with and discuss the ramifications of the proposed action with the school district superintendent or the chief administrator of the day care center. A written decision and order directing the action to be taken needs to be provided to the board of directors and the school district superintendent or the chief administrator of the day care center. The terms and conditions for permitting the reopening of the schools or day care centers, the resumption of activities and functions, and the readmission of excluded students, staff or volunteers must be established. The local health officer must pursue, in consultation with the Secretary of the Department of Health and the school or day care officials, an investigation of the source of the disease or order the actions necessary for the ultimate control of the disease.

c. Isolation and Quarantine Authority and Procedures

In September 2003, the Board of Health also adopted rules to more specifically provide the procedures for isolating or quarantining individuals. WAC 246-100-040(1) recognizes the local health officer's discretion to issue an emergency detention order for isolation or quarantine or to seek a judicial order *ex parte* to isolate or quarantine a person or group of persons, if the local health officer has:

- (a) made and documented reasonable efforts to "obtain voluntary compliance with requests for medical examination, testing, treatment, counseling, vaccination, decontamination of persons or animals, isolation, quarantine, and inspection and closure of facilities" *or*
- (b) determined, in his or her professional opinion, that seeking voluntary compliance will create a risk of serious harm, *and*
- (c) "reason to believe that the person or group of persons is, or is suspected to be, infected with, exposed to, or contaminated with a communicable disease or chemical, biological, or radiological agent that could spread to or contaminate others if remedial action is not taken" *and*
- (d) "reason to believe that the person or group of persons pose a serious and imminent risk to the health and safety of others" if not isolated or quarantined.

WAC 246-100-040(2) authorizes the local health officer to "invoke the powers of police officers, sheriffs, constables, and all other officers and employees of any political subdivisions with the jurisdiction of the health department to enforce immediately orders given to effectuate the purposes in WAC 246-100-040 in accordance with RCW 43.20.050(4) and 70.05.120."

An emergency involuntary detention may be ordered by the local health officer, which must include documentation of measures taken to secure voluntary compliance and the basis for believing the individual or group of persons will not voluntarily comply, or must include the basis for the local health officer's determination that seeking voluntary compliance will create a risk of serious harm to the public. The local health officer must also state the medical basis justifying the isolation or quarantine. WAC 246-100-040(3). The emergency involuntary detention order must contain a notice advising the persons quarantined of their right to petition the superior court for a release from isolation or quarantine, their right to counsel, including counsel at government expense if they cannot afford legal counsel, and their right to immediately access legal counsel. The specific language for this notice is contained in

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 8

WAC 246-100-040(3)(d). The emergency involuntary detention order is only valid for ten days. Extensions granted by a court are limited to thirty days; however, successive extensions may be granted upon a finding that the continued isolation or quarantine is necessary to prevent a serious and imminent threat to the public health and safety of others. WAC 246-100-040(5), (6).

In lieu of, or in conjunction with, the issuance of an emergency involuntary detention order, the local health officer may petition the superior court *ex parte* (without notice to the affected persons) for an order authorizing the involuntary detention of persons for isolation or quarantine. WAC 246-100-040 (4) specifies what must be contained in the petition to the court. A hearing on the petition should be conducted within seventy-two hours, exclusive of Saturdays, Sundays, and holidays. WAC 246-100-040 (4) (d); (5) (e). Extensions of the isolation or quarantine detention orders must be heard by the court, as provided in WAC 246-100-040 (5) and (6).

WAC 246-100-055 authorizes persons detained for isolation or quarantine to petition the superior court for relief from the detention order by a show cause process. The court will rule on the petition within forty-eight hours of filing the petition to show cause and set the hearing on the order to show cause as soon as practicable, no later than five days. WAC 246-100-055 (1); (5).

Persons isolated or quarantined are entitled to certain conditions during the period of detention, as specified in WAC 246-100-045:

- The isolation or quarantine must be the “least restrictive means necessary to prevent the spread of communicable disease,” and may include confinement to the individual’s own home.
- Isolated individuals (only those with symptoms of illness are isolated) are confined separately from quarantined individuals (those who have been contacts with ill individuals, but who do not manifest any symptoms of the disease are quarantined).
- The health status of isolated and quarantined individuals must be monitored regularly to determine if they need continued isolation or quarantine, or if their status changes from quarantine to isolation.
- Isolated or quarantined individuals must be released as soon as the local health officer determines that they have been successfully decontaminated or they no longer pose a substantial risk of transmitting a communicable disease, which constitutes a serious or imminent threat to the health and safety of others.
- The needs of the persons isolated or quarantined “must be addressed to the greatest extent possible in a systematic and competent fashion, including, but not limited to, providing adequate food, clothing, shelter, means of communication with others in isolation or quarantine and those outside those settings, medications, and competent medical care.”
- The premises for isolation or quarantine “must be maintained in a safe and hygienic manner to minimize the likelihood of further transmission of infection or other harm” to isolated or quarantined persons.
- Cultural and religious beliefs should be considered to the extent possible for isolated or quarantined persons. The isolated or quarantined individual’s right to rely exclusively on spiritual means alone through prayer shall not be abridged; however, the local health officer, in his or her sole discretion, “may isolate infected individuals declining treatment for the duration of their communicable infection.”

Entry into isolation or quarantine premises is restricted as provided in WAC 246-100-050. The local health officer has discretion to authorize persons to enter, including health care workers and others necessary to meet the needs of the isolated or quarantined individuals. Persons entering the premises will receive infection control training and may be required to wear personal protective equipment or receive a vaccination. Any person entering, even with the health officer’s authorization, may be isolated or quarantined if necessary to protect the public health and safety.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 9

The isolated or quarantined individual's right to counsel is recognized in WAC 246-100-060. If a person cannot afford counsel, then the court shall appoint counsel consistent with chapter 10.101 RCW. The local health officer must provide adequate means of communication for the individuals isolated or quarantined and their legal counsel.

WAC 246-100-065 authorizes the court to consolidate the individual claims into group claims if:

- the number of individuals involved is so large as to render individual participation impracticable,
- the questions of law or fact are common, the groups' claims or rights to be determined are typical of the affected persons' claims or rights, and
- the entire group will be adequately represented in the consolidation.

These September 2003 rule amendments, detailing the process and procedures for isolating and quarantining individuals, arose from the SARS events in Toronto. Public health officials realized that these measures, rarely used in modern times, with the exception of recalcitrant tuberculosis patients, may be necessary to protect the public health and safety. The laws protecting the liberty rights and interests of individuals evolved considerably, since the time when these measures were more commonly used in the early twentieth century. These 2003 amendments strive to incorporate those protections, while maintaining the effectiveness of isolation and quarantine as tools to protect the public health and safety.

2. Local Emergency Operations Centers

Perhaps due, in part, to the frequency of natural disasters in this state,⁷ Washington has implemented a comprehensive emergency management system. Chapter 38.52 RCW contains the authority of both the state and local jurisdictions operate a system for emergency management. To the extent possible, this section will address the authority of the local emergency operations centers⁸, 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.

a. Scope and Definitions

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 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 emergencies affecting the public health, sometimes referred to in abbreviated form as "public health emergency."⁹

⁷ This reason was given by FEMA when Washington was selected as the first state to be surveyed as that agency began its survey of states' preparedness for responding to terrorism.

⁸ 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.

⁹ "Public health emergency" is not specifically recognized in statute or regulations. Chapter 38.52 RCW addresses all hazards emergency preparedness, response and recovery. The reference to "public health emergency" has generally come to mean emergencies in which Emergency Support Function (ESF) 8 of the Comprehensive Emergency Management Plan (CEMP) has been triggered. See the section on the State Military Department, Emergency Management Division for a greater discussion of the CEMP.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 10

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.

b. Authorized Activities

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.¹⁰ RCW 38.52.070 (2) directs the local emergency operations centers to take the following actions:

¹⁰ The CEMP is also discussed in the section addressing the authorities of state agencies.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 11

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.

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 proclamation¹¹ 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.

c. Mutual Aid Agreements

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 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

¹¹ The governor’s authority to issue emergency proclamations is described in the third section of this memo, addressing the governor’s authorities.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 12

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.

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,¹² 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.

Failure to comply with a local health officer’s order is a misdemeanor under RCW 70.05.120. RCW 10.31.100, in its opening paragraph, allows law enforcement officers to arrest when a misdemeanor is committed in the presence of the law enforcement officer. Some representatives of law enforcement agencies have expressed concerns that RCW 70.05.120 is not included in the list in RCW 10.31.100(1) through (12), which specifies when law enforcement officers may arrest for a misdemeanor *not* committed in their presence. Some local health jurisdictions are including arrest warrant language in their judicially obtained isolation or quarantine orders to eliminate any doubt or hesitation in the law enforcement community to detain an individual who may spread a dangerous, contagious disease to the general population.

In addition, under RCW 38.52.110(1) of the Emergency Management Act, local law enforcement can be directed by the political subdivisions’ executive heads to cooperate in responding to an emergency. For the most part, law enforcement will take the necessary steps to protect the public health and safety, as this is their core mission and the reason they chose law enforcement as their career.

¹² The quarantine cases are listed on page 5 of this memo.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 13

B. AUTHORITIES OF STATE AGENCIES

- 1. Department of Health**
 - a. Secretary's Authorities**
 - b. Secretary's Authority to Act in Lieu of Local Jurisdictions**
 - c. Secretary's Authority Over Pet Animals**
- 2. State Board of Health**
- 3. State Military Department, Emergency Management Division**
 - a. Authority of Adjutant General and the CEMP**
 - b. Liability and Waiver of Professional Licensing Requirements**
 - c. Interstate and International Mutual Aid Agreements**

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

a. Secretary's Authorities

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 services as are necessary to carry out the responsibilities of the department.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 14

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.

b. Secretary’s Authority to Act in Lieu of Local Jurisdictions

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) in the Secretary’s opinion, an emergency exists and the local board fails to act, or
- (ii) the local health officer fails or is unable to act, the local health officer agrees to the Secretary’s involvement, or if, in an emergency, the safety of the public health demands she act.

RCW 43.70.130(4) and (7) (paraphrased).

One difference between RCW 43.70.130(4) and (7) is the ability of the Secretary of the Department of Health to recoup the costs incurred to the Department. Under RCW 43.70.130(4), if the local board of health has failed to act in an emergency, necessitating the Secretary of the Department of Health to assert her authority, all expenses incurred by the Department of Health must be paid upon demand of the Secretary by the local health department “out of moneys accruing to the credit of the municipality or the local health department in the current expense fund of the county.” RCW 43.70.130(7) contains no similar provision for reimbursement of expenses to the Department of Health.

c. Secretary’s Authority over Pet Animals

Under RCW 16.70.030, the Secretary of the Department of Health has authority over pet animals when there is “an emergency arising out of an outbreak of communicable disease caused by exposure to or contact with pet animals.” “Pet animals” are defined in RCW 16.70.020(1) as “dogs (*Canidae*), cats (*Felidae*), monkeys and other similar primates, turtles, psittacine birds, skunks, or any other species of wild or domestic animals sold or retained for the purpose of being kept as a household pet.”

The Secretary is authorized to “take any reasonable action deemed necessary . . . to protect the public health, including but not limited to the use of quarantine or the institution of any legal action authorized pursuant to Title 7 RCW and [RCW 43.70.170 through 43.70.190]¹³.” Title 7 RCW authorizes injunctions and remedies for nuisances, among a variety of special proceedings. RCW 43.70.170 through 43.70.190 authorize the Secretary to “investigate, examine, sample or inspect any article or condition constituting a threat to the public health,” to issue an order

¹³ RCW 16.70.030 references RCW 43.20A.640 through 43.20A.650, which were repealed and simultaneously recodified as RCW 43.70.170 through 43.70.190.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 15

prohibiting the sale or disposition of any item pending the investigation, and to initiate an injunctive proceeding.

Under RCW 16.70.030, the Secretary has the authority to destroy any pet animals which “may reasonably be suspected of having a communicable disease dangerous to humans and such animal or animals are hereby declared to be a public nuisance.”

The Secretary, with the advice and concurrence of the Director of the Department of Agriculture, is authorized in RCW 16.70.040 to develop rules for adoption by the State Board of Health “relating to the importation, movement, sale, transfer, or possession of pet animals which are reasonably necessary for the protection and welfare of the people of this state.” The Secretary and the Director of the Department of Agriculture, under RCW 16.70.060, have concurrent powers in this area and are to cooperate in exercising their responsibilities in this area.

2. State Board of Health

The State Board of Health (SBOH) is mandated, in RCW 43.20.050(2)(d) and (e), 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.” Effective September 2003, the SBOH adopted rules which specified in greater detail the procedures and rights of persons isolated or quarantined. These rules are discussed in detail on pages 7 through 9 in the section addressing the authority of the local health jurisdictions.

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 hose 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 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.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 16

In addition, WAC 246-101-010(31) defines "other rare diseases of public health significance" as "a disease or condition, of general public health concern, which is occasionally or not ordinarily seen in the state of Washington, including, but not limited to, viral hemorrhagic fevers, Rocky Mountain Spotted fever, and other tick borne diseases. This also includes a communicable disease that would be of general public concern if detected in Washington." 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.¹⁴ WAC 246-101-101, -201, -301, and -405. Any disease of suspected bioterrorism origin and "other rare diseases of public health significance" 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.

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."

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.

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.

¹⁴ WAC 246-101-605(4) requires the DOH to maintain a twenty-four hour telephone number for reporting notifiable conditions.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 17

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.

a. Authority of the Adjutant General and the CEMP

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).

The CEMP contains a number of Emergency Support Functions (ESFs), which specify which state agency is the primary agency for different types of emergencies. Some emergencies may trigger several different ESFs. The health emergency ESF is ESF-8.

The local jurisdictions have also adopted a CEMP for their geographic area. The ESFs are categorized similarly to those contained in the state CEMP, so all jurisdictions refer to ESF-8 when discussing the preparation for, response to, and recovery from an emergency with serious health consequences for their population.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 18

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.

b. Liability and Waiver of Professional Licensing Requirements

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

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 19

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.

c. Interstate and International Mutual Aid Agreements

RCW 38.10.010 contains the legislatively authorized terms for the Emergency Management Assistance Compact (EMAC), a mutual aid agreement which all fifty states have executed. The EMAC allows for the deployment of state resources and personnel from state to state without the intervention of federal authority. The Emergency Management Division of the Military Department controls the deployments under EMAC.

The Pacific Northwest has the only congressionally approved international mutual aid agreement, the Pacific Northwest Emergency Management Assistance Compact (PNEMA). Effective April 1, 1996, the states of Alaska, Idaho, Oregon, and Washington and the province of British Columbia and the Yukon Territory agreed to mutually assist each other in an emergency. In the summer of 2006, the Governor of Washington and the Premier of British Columbia signed Annex B to PNEMA, which specifies the implementing procedures for PNEMA. The other signatories to PNEMA have been asked to also sign Annex B. In addition, the Secretary of Washington's Department of Health and the Minister of Health for the Province of British Columbia signed a Memorandum of Understanding for a collaborative approach to the use of public health and health service resources in preparation for, responding to and recovering from an emergency endangering the public health.

All of these mutual aid agreements, at the international, federal, state, tribal and local levels, are authorized under chapter 38.52 RCW. They help all these jurisdictions to understand their respective roles and responsibilities and allow for a cooperative preparation, response and recovery from large scale emergencies.

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 of range of authority to act under the Emergency Management Act:

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 20

(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 and local government agencies for an emergency and personnel of state and local government agencies are directed to cooperate with the governor.¹⁵

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.”¹⁶

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 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.

¹⁵ 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 use government resources when necessary to respond to a locally declared emergency.

¹⁶ 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).

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 21

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 43.06.270.¹⁷

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 absolutely essential for a successful implementation of the emergency response plan. A robust infrastructure would include sufficient resources to meet both the day-to-day demands on the public health system and provide sufficient capacity for effective coordination of resources when an emergency occurs.

¹⁷ 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.

ATTORNEY GENERAL OF WASHINGTON

Mary Selecky, Secretary
Bill White, Deputy Secretary
October 20, 2006
Page 22

The judiciary is becoming more aware of their role in emergency preparedness and response. Emergency orders do not overcome civil rights. 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. The judiciary is another important partner, who should be invited to participate in emergency planning and exercises. The private bar, including the public defenders, should also be made aware of the powers and authorities of emergency response and recovery partners, so they, too, can assist in the development of effective response plans.

These plans are never final. They are always being revised as we learn more about how to better respond and to anticipate the unexpected. Ultimately, educating the general population, so they participate fully and effectively in their own emergency response plans, understanding what they can do for themselves and what others can and cannot do to assist them, will be the best preparation for the next major catastrophe.

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.

JAR:jkc