

# Attachment A

## **Existing Statutory and Regulatory Mechanism for Public Health**

Health departments have been part of our lives in Washington State for quite some time, but the current statutory structure is most pertinent to this discussion. An understanding of the statutory structure is important when analyzing the extent to which gubernatorial authority under RCW 38.08, RCW 38.52, and RCW 43.06 can be asserted in alleged health emergencies.

The best summary of the laws currently in effect<sup>1</sup> regarding to role of the different public health stakeholders is found on Washington State Department of Health (DOH) webpage<sup>2</sup>:

### ***“Washington's Public Health System***

*Along with the state Department of Health, Washington's public health system includes 35 local health departments and local health districts (serving 39 counties), the Board of Health, tribal governments and other partners.*

### ***Washington State Department of Health***

*The Department of Health was formed in 1989 to promote and protect public health, monitor health care costs, maintain standards for quality health care delivery and plan activities related to the health of Washington citizens. The [Secretary of Health](#) is appointed by the governor. The statutory authority for the Department of Health is in the [Revised Code of Washington 43.70.020](#).*

### ***Washington State Board of Health***

*The 10-member [Board of Health](#) provides a citizen forum for the development of public health policy. It recommends strategies and promotes health goals to the Legislature and regulates a number of health activities including drinking water, immunizations and food handling. The Board is housed with the Department of Health although it is an independent entity.*

### ***Local Health Departments/Districts***

*Washington has 31 county health departments, three multi-county health districts and two city-county health departments. We refer to them as local health jurisdictions. They are local government agencies, not satellite offices of the state Department of Health or the State Board of Health. Local health jurisdictions carry out a wide variety of programs to promote health, help prevent disease and build healthy communities.*

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<sup>1</sup> See, RCW 43.70 (Department of Health); RCW 43.20 (State Board of Health); RCW 70.05 (Local Health Departments); RCW 70.08 (Combined City-County Health Departments); RCW 70.46 (Health Districts)

<sup>2</sup> <https://www.doh.wa.gov/AboutUs/PublicHealthSystem>

We provide [links to local health jurisdiction websites](#) on our local health jurisdiction map page.

### ***Tribal governments***

*Washington State and the American Indian tribes located in Washington State work together, government-to-government, to address the public health issues that affect all of us. The involvement of Indian Tribes in the development of public health policy promotes locally relevant and culturally appropriate approaches to issues of mutual interest or concern.*

### ***Public Health Partners***

*The Department of Health works with many health partners including hospitals and clinics, the [University of Washington School of Public Health and Community Medicine](#); and state and local community-based organizations, associations and coalitions. It also has close working relationships with federal agencies including the [Centers for Disease Control and Prevention](#), the [Department of Health and Human Services](#), the [Department of Agriculture](#) and the [National Institutes of Health](#).*

### ***Regional Healthcare Coalitions***

*The coalitions are made up of hospitals, clinics, home care providers, local government, emergency medical services and trauma care councils, tribes and others that work together to help plan a coordinated regional healthcare response for emergencies. The coalitions' work includes helping healthcare systems to create, exercise and update their response plans, and participating in emergency response training. [View Coalitions contacts page.](#)"*

The Board of Health creates regulations that local health departments/districts must follow. RCW 43.20.050(5). This rule-making authority extends to rules regarding "isolation and quarantine" and for "the prevention and control of infectious and noninfectious diseases" RCW 43.20.050(2)(e) and (2)(f). Board of Health regulations are found in WAC 246. The response to communicable diseases is regulated in WAC 246-100.

Local health officers in health departments/districts are charged with several duties including enforcing local and state health laws/regulations as well as controlling and preventing dangerous diseases. RCW 70.05.070.

The Secretary of the Department of Health has "...the same authority as local health officers, except that **the secretary shall not exercise such authority** unless the local health officer fails or is unable to do so, or when in an emergency the safety of the public health demands it, or by agreement with the local health officer or local board of health" RCW 43.70.130(7).

As an example of control by local health officials, not state health officials, is found in WAC 246-100-036(1), which provides:

*“The local health officer shall 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.”*

The key phrases are, “*local health officer shall establish*” and “*in consultation with*” others. This means that others act at the direction of the local health officer, not the other way around.

For example, the Governor’s 2020 stay at home order was the equivalent of an isolation order. Isolation and quarantine orders are implemented by local health officers, not state health officials. WAC 246-100-036. The very specific procedures for isolation and quarantine are found in WAC 246-100-040. The local health official, not the state, makes the determination for individual or group isolation or detention.<sup>3</sup> There are very specific rights delineated, including the right to seek judicial review<sup>4</sup> and the right to counsel<sup>5</sup>, including indigent defense if someone cannot afford counsel to fight the order to isolate or quarantine.

The local health official can also close public or private facilities, but they must comply with the “*Control of Communicable Diseases Manual*, 20th edition, published by the American Public Health Association” when doing so. See WAC 246-100-036(3). A copy of that publication would be useful for the analysis here.

In addition, local health officials, not state health officials, address school closures for communicable diseases. WAC 246-110-020. Parenthetically, school districts have communicable disease policies and, in addition, school closure policies are adopted pursuant to public notice and comment. See RCW 28A.335.020. Generally, emergency closure decisions are also made by school districts, not the Office of the Superintendent of Public Instruction. See RCW 28A.335.030.

So one might ask how this relates to broader issues, like pandemics. The answer is that the legislature took the time in 2006 to reinforce this local command and control system for public health response when it passed a bill entitled “*Pandemic Influenza – Preparedness*” now known as RCW 70.26.<sup>6</sup>

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<sup>3</sup> WAC 246-100-4-4(1) provides, “At his or her sole discretion, a local health officer may issue an emergency detention order causing a person or group of persons to be immediately detained for purposes of isolation or quarantine...”

<sup>4</sup> WAC 246-100-055

<sup>5</sup> WAC 246-100-060

<sup>6</sup> <http://lawfilesexternal.wa.gov/biennium/2005-06/Pdf/Bills/Session%20Laws/Senate/6366-S.SL.pdf?cite=2006%20c%2063%20C2%A7%201>

This collection of laws defines the powers and duties of county health departments and the State Department of Health in a pandemic. The centerpiece of the legislation was the requirement for each county, not the state, create “*pandemic flu preparedness and response plans.*” King County’s 2013 *Pandemic Influenza Response Plan* does assume some powers of the governor, but the bulk of the document supports local command and control in conjunction with others. In addition, King County’s 2014 *Isolation and Quarantine Response Plan* has no provision for gubernatorial intervention.

This health district by health district duty to respond is consistent with the 2006 pandemic response law, which states that, “*An effective response to pandemic influenza in Washington **must focus at the local level** and will depend on preestablished partnerships and collaborative planning...*” RCW 70.26.010(5).

DOH formed Emergency Preparedness and Response Regions to plan for and address, not ironically, emergencies.<sup>7</sup> The map below depicts this regional approach to health emergencies in which a “...*lead agency and coordinator help local health jurisdictions to create local emergency preparedness plans and to collaborate on a regional plan that will tie the local plans together.*”<sup>8</sup>

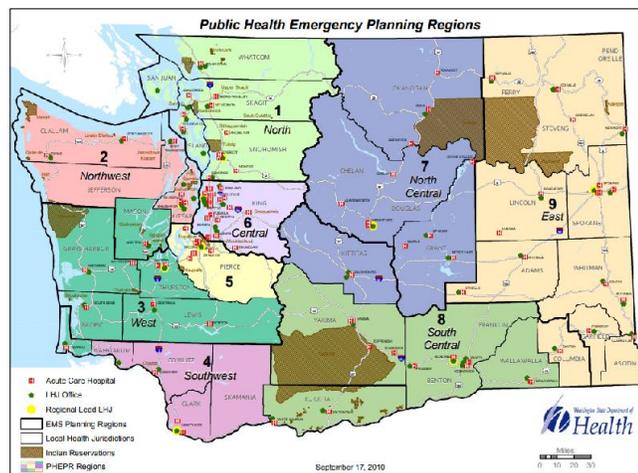


Figure 1: <https://www.doh.wa.gov/Portals/1/Documents/1200/phsd-PHEPR.pdf>

<sup>7</sup><https://www.doh.wa.gov/AboutUs/ProgramsandServices/EmergencyPreparednessandResponse/EmergencyPreparednessRegions>

<sup>8</sup><https://www.doh.wa.gov/AboutUs/ProgramsandServices/EmergencyPreparednessandResponse/EmergencyPreparednessRegions>

# Attachment B

## Powers of the Governor in Public Health Emergencies

The Governor has some emergency powers under RCW 43.06.010 and RCW 43.06.220, but there is an absence of language that ties those powers to pandemics or health emergencies.

There are powers to address “infestation of plant pests<sup>9</sup>” and invasive aquatic species<sup>10</sup>, but not viruses or pandemics. The closest one comes is RCW 43.06.010(12) which provides that the governor’s power can only extend to the “area affected<sup>11</sup>” by a “public disorder, disaster, energy emergency, or riot...which affects life, health, property, or the public peace,” but that section was originally adopted to “*control or suppress riots or unlawful strikes...*” and not to address health emergencies. See 1965 c 8 § 43.06.010. Prior: 1890 p 627 § 1; RRS § 10982.<sup>12 13</sup>

RCW 43.06.010 has been amended five times after the Department of Health was created in 1989. Energy emergencies were added in 1976. 1975-'76 2nd ex.s. c 108 § 25. Plant infestations were added in 1982. 1982 c 153 § 1. Aquatic species were added in 2014. 2014 c 202 § 305. The legislature never included health emergencies or allow for gubernatorial intervention in contagious diseases, epidemics, or pandemics.

One would need to use common sense and rules of statutory construction to reconcile the clear intent for local control of health emergencies<sup>14</sup> with the specific absence of the governor’s power to address health emergencies in RCW 43.06 to answer the question of the validity of gubernatorial intervention here. The legislature could have easily provided for gubernatorial intervention when it adopted RCW 70.26, but it did not.

A health emergency is not a public disorder, energy emergency, or a riot, so the only remaining question is whether it is considered a “disaster” under RCW 43.06.010(12). RCW 43.06 does not define disaster, but RCW 38.52.010(9)(a) provides:

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<sup>9</sup> RCW 43.06.010(13)

<sup>10</sup> RCW 43.06.010(14)

<sup>11</sup> In addition, “...powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation”

<sup>12</sup> “(12) He may control or suppress riots or unlawful strikes, or any unlawful assembly of ten or more persons, when by such riot, unlawful strike, or unlawful assembly any persons are attempting to commit a felony, or inciting others to commit such crime, or any person or persons are in imminent danger of losing either life or property. Before taking any such action, the governor shall first notify and request the local authorities to suppress such riot, unlawful strike, or unlawful assembly, and if they fail, refuse, neglect, or are unable to do so, he shall issue his proclamation commanding such persons to disperse and refrain from taking part in or encouraging or inciting such riot, unlawful strike, or unlawful assembly, and if thereafter such imminent danger still continues, the governor shall proceed to suppress it by calling into action all the force necessary to accomplish that purpose.”

<sup>13</sup> The section was amended in 1969. 1969 ex.s. c 186 § 8 to read, “He may, after finding that a public disorder, disaster, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in the area affected, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation;”

<sup>14</sup> Specifically, local response to pandemics in RCW 70.26.

*"Emergency or disaster" as used in all sections of this chapter except RCW 38.52.430 means 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 proclaiming a state of emergency pursuant to RCW 43.06.010."*

One must construe RCW 38.52.010(9)(a) in the context of all other existing laws and regulations. Arguably, the COVID-19 issue presented a "set of circumstances" that affected "public health," but the question remains whether "immediate action" was, or is still, required by the governor when there is and was an existing legally adopted methodology for responding to pandemics that does not include gubernatorial intervention. See RCW 70.26, WAC 246-100, and WAC 246-110.

The next question is whether RCW 38.52 gives EMD, and therefore the governor, the right to exert direct command and control authority over local health departments/districts. The definitions found in RCW 38.52.010 do not seem to fit local health districts/departments because they are not a "*county, city or town*"<sup>15</sup> and do not "*provide firefighting, police, ambulance, medical, or other emergency services.*"<sup>16</sup> This does not mean that EMD plays no role, it just means that EMD does not play a supervisory role that can supplant the statutory and regulatory authority of local health officers. Therefore, the governor cannot exercise such control either.

One might argue that the governor has authority, through the Secretary of DOH, to bypass local health officers under RCW 43.70.130(7), but there has been no evidence presented that local health officials have failed or have been unable to perform their duties. In addition, to construe a pandemic as the type of emergency that would require the Secretary of DOH to assume local control would not make sense in light of the stated legislative intent in RCW 70.26.010(5) to provide for local control and response in pandemics which are, by definition, emergencies.<sup>17</sup>

Further evidence suggests that the governor's powers do not extend to pandemics is that under RCW 43.06.220(2)(g) (iii) the governor cannot suspend laws if the "*the waiver or suspension would conflict with the rights, under the First Amendment, of freedom of speech or of the people to peaceably assemble.*" If the governor cannot waive laws to infringe on those rights the governor certainly cannot impose restrictions on those rights

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<sup>15</sup> RCW38.52.010 (20) "*Political subdivision*" means any county, city or town.

<sup>16</sup> RCW38.52.010(21) "*Public agency*" means the state, and a city, county, municipal corporation, district, town, or public authority located, in whole or in part, within this state which provides or may provide firefighting, police, ambulance, medical, or other emergency services."

<sup>17</sup> "*An effective response to pandemic influenza in Washington must focus at the local level and will depend on preestablished partnerships and collaborative planning...*"

either. On the other hand, health officers do have the authority to prevent people from congregating in ways that spread disease. WAC 246-100-030(3).

In sum to construe a “disaster” under RCW 38.52.010(9)(a) in a manner that would give the governor the power to order the closure of businesses, schools, churches, require people to isolate in their homes, and mandate vaccinations would essentially nullify all of the above-referenced health laws and regulations. Any such interpretation would fly in the face of basic rules of statutory construction.

Even if we can get past the apparent intent of RCW 70.26 to provide for local control of pandemics, the question remains whether the governor’s orders are reasonable and not arbitrary or oppressive. That question will not be addressed here except as noted above.