

MEMORANDUM

TO: State Administration and Veterans' Affairs Interim Committee

FROM: David S. Niss, Staff Attorney

RE: Model State Emergency Health Powers Act

DATE: December 7, 2001

I INTRODUCTION

On October 30, 2001, the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities released for review by a number of associations¹ a draft of the Model State Emergency Health Powers Act (the "Act" or the "Model Act")(attached). The Act was prepared under contract with the Centers for Disease Control and Prevention (CDC) and is intended to address the problem perceived by its authors that health laws of most states are fragmented and outmoded and for that reason do not facilitate strong state responses to health emergencies such as bioterrorism.

The over all purpose of the Act is to provided an integrated or coordinated scheme to (1) detect and track a potential public health emergencies; (2) declare a public health emergency; (3) provide special powers for government entities during the emergency in order to control both persons and property; (4) provide for planning for public health emergencies and (5) provide for release of information regarding those emergencies.

The Act is based upon statutes of numerous other states, principally those of California, New York, Colorado, Georgia, Illinois, and Arizona. As a whole, the result is a coherent scheme but, as later discussed, may well be duplicative of the existing Montana statutory authority and at the same time more heavy handed in its operation and effect than Montana politics or culture will allow². The Act is, while not one that the Montana Legislature would enact wholesale, a useful collection of powers and procedures, taken from a survey of other state laws, from which the Legislature may pick and choose in order to modernize our public health laws and provide for the eventuality of bioterrorism within Montana. The following pages therefore contain a review of

¹ The National Governor's Association, the National Conference of State Legislatures, the National Association of City and County Health Officers, and the National Association of Attorneys general.

² See, for example, the provisions for control of property, *infra*, page .

the Act itself and a comparison of the Act's provisions with existing Montana statutes.

II DISCUSSION

A. Review of the Act.

The Act is divided into eight main subject matter groupings, designated Articles I through VIII. Those eight articles are further broken down into sections. The outline below corresponds to those main articles but the section numbers have been omitted for purposes of readability.

Article I - Findings, Purpose, and Definitions. This article states the legislative basis for action and provides a purpose statement to assist in the interpretation of the Act. The article also provides definitions of:

- bioterrorism, an intentional act using a germ or disease to cause death or injury.
- chain of custody, methodology of maintaining control or accountability for evidence so that it can later be used for proof of commission of a crime.
- health care provider, such as hospitals, clinics, doctors, nurses, etc.
- public health care authority, the state's primary health care agency or a local agency.
- public safety authority, means state or local police.
- public health emergency planning commission, appointed by the Governor to carry out the Act.

Article II - Detection and Tracking of Potential Health Care Emergencies. This article is intended to facilitate the early detection and tracking of a potential health emergency. For these purposes, this article requires:

- every physician to report illnesses or symptoms that may be the result of bioterrorism.
- every veterinarian to report unusual animal diseases that may be the result of bioterrorism.
- every pharmacist to report unusual prescriptions or level of prescription activity that may be taken to treat diseases caused by bioterrorism.
- public health authority to investigate facts that are the basis for mandatory reports and determine whether the basis may be acts of bioterrorism.
- a public health authority discovering bioterrorism to notify public safety authorities, and vice versa..

Article III - Declaring a State of Public Health Emergency. This article requires the Governor to declare a state of public health emergency "if the Governor finds an occurrence or imminent threat of an illness...caused by bioterrorism...poses a substantial risk ...of fatalities...or long-term disability." The effect of a declaration is to implement the disaster emergency plans drawn up by the state and local governments and authorizes the use of supplies or facilities according to those

plans, as necessary. The Governor or the public health authority may or shall:

- suspend the provisions of certain statutes.
- transfer functions of state agencies.
- mobilize the national guard.
- coordinate the emergency response between state and local authorities.
- collaborate with the federal government.
- organize public information activities.

Article IV - Special Powers to Control Property During a Public Health Emergency. During a public health emergency, this article gives a public health authority the power or duty to:

- close, evacuate, or decontaminate any public or private facility.
- decontaminate or destroy any material that endangers public health.
- procure by condemnation or otherwise any material or facility necessary to respond to the emergency.
- compel a health care facility to provide services.
- control the disposal of infectious wastes or corpses.
- control, ration, and distribute any health care supplies.
- destroy property for protection of public health.
- compensate owners of property taken or destroyed as part of the emergency.

Article V - Special Powers to Control Persons During a Public Health Emergency. This article requires the public health authority to use "every available means" to prevent the transmission of an infectious disease during a health emergency and during that emergency allows the authority to:

- compel persons to take a physical examination.
- require a health care provider to perform medical examinations and testing.
- quarantine persons.
- prevent entry to a quarantined area.
- quarantine a person without a due process hearing if the hearing would threaten public health. Otherwise a hearing must be held on every person quarantined.
- compel persons to be vaccinated.
- access, on a "need to know" basis, health records of individuals under quarantine and disclose those records to others, without the person's consent, under limited, specified circumstances.
- act as the licensing authority for health care personnel.

Article VI - Public Information Regarding Public Health Emergency. This article requires the public health care authority to inform the public when a health care emergency has been declared and when it terminates.

Article VII - Planning for Public Health Care Emergencies. Under this article, the Governor is required to appoint a Public Health Emergency Planning Commission consisting of directors of those agencies considered by the Governor to be relevant to public health emergencies. Within 6 months of its appointment, the commission must deliver a public health emergency plan that includes plans for:

- procurement and location of health care supplies.
- use of the judicial system, including "emergency judges".
- guidelines for emergency vaccination, quarantining, and medical treatment of exposed persons.
- tracking infected persons.
- ensuring that political subdivisions have adequate places for quarantined persons.
- coordination with the United States and other states.

Article VIII - Miscellaneous. This article provides for:

- financing and payment of expenses.
- adoption of rules by the public health authority.
- immunity of the state and its political subdivisions from liability during the emergency for acts constituting simple negligence.
- provides for varying degrees of protection from civil liability for private persons and entities who are negligent in performing a service or using their property for the state.
- compensation to be paid to persons whose property is permanently or temporarily taken by a public health authority during the emergency. The amount of compensation is to be calculated according to the laws of eminent domain.

B. Comparison of Montana Statutes with the Model Act.

1. Reporting.

Like the Model Act, Montana has several statutes requiring reporting of diseases. For example, sections 37-2-301, 37-26-303, and 37-30-412 require reporting by various classes of licensees. Unlike the Model Act, however, these statutes require the reporting of only those diseases labeled "communicable diseases" by the Department³, whereas the Model Act reporting requirements are

³ARM 16.28.202(1)(c) does list anthrax as a communicable disease, along with 58 other illnesses or types of illnesses. It should be noted that under the definition of "communicable disease" in ARM 16.28.101(5) a communicable disease may be spread by, for example, spores on an envelope going from one desk to another and not necessarily directly from one person to another.

probably broader, in that the Model language requires reporting of any "illness or health condition that may be caused by bioterrorism, epidemic or pandemic disease, or novel or highly fatal infectious agents or biological toxins and might pose a substantial risk of a significant number of human fatalities or incidents or permanent or long-lasting disability".⁴ Regarding the reporting of diseases in livestock, the Montana statute⁵ is in one respect broader than the comparable provision⁶ in the Model Act in that the Montana statute applies to "any person"⁷, but the Montana statute is again not directed toward "any disease that may be caused by bioterrorism, epidemic or pandemic disease", but toward "a dangerous, infectious, contagious, or communicable disease in livestock".

2. Tracking and information sharing

Model Act sections 202 and 203

50-16-700

ARM 16.28.306

82-1-107

81-2-106

3. Declaring a state of Public Health Emergency

a. Public Health Statutes Administered by State and Local Health Departments T.50, chaps 1 and 2

The majority of Montana statutes expressly concerned with management of health care emergencies, such as the outbreak of communicable diseases, are found in Title 50, chapter 1, for powers and duties of the Department of Public Health and Human Services (DPHHS or "Department"), and in Title 50, chapter 2, for the powers and duties of local boards of health and local health officers. A close examination of these two chapters should therefore be made and their provisions compared to the Model Act.

⁴ARM 16.28.202(bh) does require, as the result of a recent amendment, to the reporting of "any unusual incident of unexplained illness or death in a human or animal." However, it would appear that both the Montana statutes and rules are still narrower and more limited than the diseases contained within the language of the Model Act's definition of "bioterrorism".

⁵81-2-107

⁶Section 201(d)

⁷The Department rule, ARM 16.28.201,

The duties of the Department with regard to unspecified⁸ health matters are set forth in 50-1-202. These duties include the duties to make investigations, advise agencies on the heating and plumbing in public buildings, conduct health education programs, provide consultation to local boards of health, and so forth. The only authority in this general statute the Department is given over diseases is in subsection (18), whereby the Department is required to "adopt and enforce rules regarding the definition of communicable diseases and the reporting and control of communicable diseases." Two other sections giving the Department general authority over diseases are 50-1-203 and 50-1-204. Section 50-1-203 ("Public health inspections") authorizes but does not require the Department to make public health inspections of schoolhouses, churches, theaters, and other places where "persons assemble". Section 50-1-204, the Department's sole authority for quarantine of persons who may have unspecified diseases, provides:

50-1-204. Quarantine measures. The department may adopt and enforce quarantine measures against a state, county, or municipality to prevent the spread of communicable disease. A person who does not comply with quarantine measures shall, on conviction, be fined not less than \$10 or more than \$100. Receipts from fines, except justice's court fines, shall be deposited in the state general fund.

More significant are the administrative rules adopted by the Department implementing its authority in 50-1-202(18) to adopt and enforce rules regarding communicable diseases. In Title 16, chapter 28, ARM, the Department has adopted reporting requirements, general control measures, and specific control measures on a disease-by-disease basis⁹, for all diseases defined as "communicable diseases" by the Department.

Local boards and officers have powers and duties similar to those of DPHHS. The powers and duties of local boards are provided for in 50-2-116, and include the general duties to "guard against the introduction of communicable disease" and "supervise the destruction and removal of all sources of filth that cause disease". The local boards have the power under the same statute to "quarantine persons who have communicable diseases", "prohibit the use of places that are infected with communicable diseases", "abate nuisances affecting the public health and safety", and adopt rules "for the removal of filth", among other purposes.

Powers and duties of local health officers are addressed in 50-2-118, and include the duties to

⁸Most of the powers of the DPHHS over disease control apply to specific diseases, like Title 50, chapter 17, regulating tuberculosis, Title 50, chapter 18, regulating sexually transmitted diseases, and Title 60, chapter 23, regulating rabies. The remaining chapters of Title 50 are organized around very specific subject health subject matters such as abortion control, smoking, food establishments, etc., that are not related to bioterrorism.

⁹The specific control measures for anthrax include "strict isolation must be imposed upon each case of inhalation anthrax."

"make inspections for sanitary conditions", "with the written approval of the department, order buildings or facilities where people congregate closed during epidemics", and "with the approval of the department...forbid persons to assemble in a place if the assembly endangers public health".

While the foregoing powers of the DPHHS and local boards and officers may prove useful in response to an act of bioterrorism, they do not contain the sweep of powers, especially those powers that would be used to control health care facilities and property¹⁰, health care supplies¹¹, and persons¹², available under the Model Act after the declaration of a public health emergency by the Governor. Only statutes administered by the Division of Disaster and Emergency Services within the Department of Military Affairs, provide for the declaration of an emergency based upon a proclamation by the Governor.

b. Statutes Administered by the Division of Disaster and emergency Services.

2. DES 10-3-000

- a. State Planning and Execution 10-3-300
- b. Emergency resource management 10-3-500 (minor role)
- c. Tactical Incident Assistance 10-3-700 (minor role)
- d. Response to Hazardous Materials incidents 10-3-1200

3. Infectious waste (75-10-1000)

4. Health Care Information 50-16-400 and 50-16-500

5. Other players?

EMAC 10-3-1000??

Livestock 81-2-100??

6. Do chart with side by side comparison of state statutes and Model Act sections ?

¹⁰Section 402.

¹¹Section 405.

¹²Sections 503 and 504.