

# Michigan Public Health Law 101: Authority and Limitations

The Network for Public Health Law – Mid-States Region  
Presented December 6, 2022

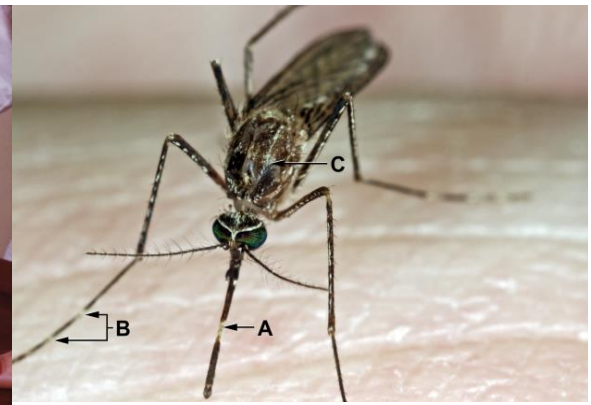
**Carrie Waggoner, JD**  
**Denise Chrysler, JD**

## About the Network for Public Health Law

- The Network provides **visionary leadership** in the use of law to promote, protect and improve health and advance health equity.
- We work with local, tribal, state and federal **public health officials** and practitioners, **as well as attorneys**, policymakers, advocates and community organizations.
- We provide **information, resources, consultation and training**, as well as opportunities to connect.

# Law can protect the public

- Air quality
- Water quality
- Sanitation
- Injury prevention
- Safe food
- Workplace safety
- Environmental controls to prevent disease
- Vaccination



# Outline

- **Overview of law and public health**
  - **Key Concepts**
  - **Sources of public health authority**
  - **Michigan Public Health Code**
  - **Public health law in practice**
  - **Limitations on public health authority**



# Overview of Law and Public Health

# Key Concepts

# Overview: I

- **Law as foundation for public health action**
- **Tension between protecting community's health and intruding into personal liberties (e.g., stay-at-home orders)**
- **Public health law as cumulative body of constitutional doctrine, statutes, administrative regulations, executive orders, case law**

# Overview: II

- **Relationship between individual and government**
- **Relationship between individual and community**
- **Relationship between various levels of government**
- **Relationship between courts and other branches of government**



# Policy Context

- **Social compact as basis for public health laws**
- **Public health as collective endeavor in age of individualism**
- **Public distrust of government/scientific denialism (vaccine protesters)**
- **Steady decline in public health workforce/investment**
- **Lack of public support/public health voice**
- **Political accountability**

# Concepts: Federalism

- **States and federal government as co-equal units**
  - **Some powers explicitly federal (defense, nuclear power)**
  - **All powers not specifically federal are reserved for the states (public health)**
  - **Cooperative federalism (environment)**
- **Historical tension for control over policy**

# Concepts: Preemption

- Higher level of government can preempt (block) actions of lower level
  - Congress can reserve power to the federal government
  - State government can override local municipalities

# Concepts: Governance

- **Separation of powers**
- **Checks and balances**
- **Political accountability**
  - **Exists at every level**
  - **Boards of Health**
  - **County Commissioners**

# The Administrative Process

- **Functions**
  - Issuing regulations
  - Enforcement
  - Issuing policy guidance
- **Public hearings**
  - Generating community support
  - Identifying opposing arguments
  - Timelines
- **Judicial standards of review**

# Gostin's modes of legal intervention

- » **Power to tax and spend** (e.g., cigarette or "sin" taxes)
- » **Power to alter the information environment** (e.g., drug labeling)
- » **Power to alter the built environment** (e.g., zoning, toxic waste)
- » **Power to alter the socioeconomic environment** (e.g., programs to reduce socioeconomic disparities)
- » **Direct regulation of persons, professionals, and businesses** (e.g., seat belts, helmets, professional licensing)
- » **Indirect regulation through the Tort system** (e.g., tobacco and opioid litigation)
- » **Deregulation** (e.g., distribution of sterile injection equipment)

# Sources of Public Health Authority

# Sources of Public Health Authority

- Police powers
- *Jacobson v. Massachusetts*
- State Public Health Codes
- Common law (*parens patriae*)
  - State's inherent power/authority to protect vulnerable persons/populations



# Police Powers: I

- **State sovereignty—10<sup>th</sup> Amendment**
- **Police powers**
  - **Provides for state/local public health authority**
  - **Inherent authority to enact laws, promulgate and enforce regulations**

**“[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people...”**

# Police Powers: II

- **Broad delegation of authority to administrative agencies**
- **Broad discretion accorded to agency (e.g., whether/when to notify public of Legionella outbreak)**
- **Must follow administrative procedures**
- **Regulations must be within scope of legislation**

# ***Jacobson v. Massachusetts***

197 U.S. 11 (1905)

- **City of Cambridge, MA, mandated smallpox vaccinations**
- **Reverend Henning Jacobson objected and brought 14<sup>th</sup> Amendment challenge**
- **Legal issue:**

*“Is this statute . . . inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the State” (Justice Harlan)*

# ***Jacobson v. Massachusetts*** (1905)

- » **Federalism**
- » **Separation of Powers**
- » **Limits (to protect individual liberty)**

# *Jacobson v. Massachusetts* (1905)

## » **Federalism**

“The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government.”

## » **Separation of Powers**

## » **Limits (to protect individual liberty)**

# ***Jacobson v. Massachusetts*** (1905)

» **Federalism**

» **Separation of Powers**

“It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain.”

» **Limits (to protect individual liberty)**

# ***Jacobson v. Massachusetts*** (1905)

- » **Federalism**
- » **Separation of Powers**
- » **Limits (to protect individual liberty)**

“[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.”

# *Jacobson v. Massachusetts* (1905)

- **Guiding principles**
  - **Public health necessity**
  - **Reasonable means**
  - **Proportionality**
  - **Harm avoidance**

Lawrence O. Gostin, *Jacobson v Massachusetts at 100 years: Police Powers and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576 (2005).



# ***Jacobson v. Massachusetts*** (1905)

- ***Jacobson*** remains a robust standard
  - ***South Bay Pentacostal Church v. Newsom***, 140 S.Ct. 1613 (2020), Roberts, C.J. Concurring
- But challenged in litigation related to COVID-19 orders

# **Organization of Public Health in Michigan & Public Health Code**

# Michigan Constitution

## **§ 51 Public health and general welfare.**

**The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.**

**Const. 1963, Art. IV, § 51, Eff. Jan. 1, 1964**

# The Michigan Public Health Code

Over 40 years old!



## Commentary on the Michigan Public Health Code

by  
Richard Strichartz  
Professor of Law, Wayne State University

This publication and the project upon which it  
is based were supported by grants from the W. K. Kellogg  
Foundation, Battle Creek, Michigan

Commentary on the Michigan Public Health Code

<https://babel.hathitrust.org/cgi/pt?id=mdp.39015020571702&view=1up&seq=5>

## **Legislative Intent:** Ascertain and give effect

### **PUBLIC HEALTH CODE**

#### **333.1111 Intent and construction of code.**

**(1) This code is intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency.**

**(2) This code shall be **liberally construed for the protection of the health**, safety, and welfare of the people of this state.**

# Michigan Department of Public Health

- » **Core public health functions and general powers to protect and improve the public's health**
- » **Regulatory programs to protect the public**
  - Implemented by state & local public health departments



# Executive Orders re Michigan Department of Public Health 1996-1, 1996-2, and 1996-4

MDPH	Agriculture	Food Service Sanitation
MDPH	Commerce	Radiation Machine Licensing
MDPH	Commerce	Health Facility Licensing
MDPH	Labor	Occupational Health
MDPH	Envir Quality	Radiological Health
MDPH	Envir Quality	Water Supply; Sewer Systems
MDPH	Envir Quality	Dry Cleaning
MDPH	Envir Quality	Super Fund

# Today . . .

» **Core public health functions and general powers to protect and improve the public's health**



» **Regulatory programs to protect the public**



**Certain regulatory programs delegated to local public health**





# Michigan Public Health Code

1978 PA 368, as amended

MCL 333.1101 et seq.

- **Article 2 Administration**
  - Part 22 State Health Department
  - Part 24 Local Health Departments
- **Article 5 Prevention and control of diseases and disabilities**
- **Article 9 Supportive personal services** (covers immunizations)
- **Article 12 Environmental health** (smoke free law, pools, body art facilities, agricultural labor camps, etc.)

# Additional Laws to Protect the Public

- » **Food Law of 2000**
- » **Safe Drinking Water Act**
- » **Housing Law of Michigan**
- » **Natural Resources & Environmental Protection Act**
- » **Occupational Safety & Health Act**
- » **Local Ordinances**



# Structure of the Code

## » State:

- » Provide leadership and specialized services
- » Take action regarding local matter if LHD unable or unwilling to respond
- » Respond to imminent danger / menace to public health anywhere in the state

MCL 333.2221, 333.2224, 333.2235, 333.2251, 333.2437

# Structure of the Code

- » **LHD: Primary responsibility for health of people within its jurisdiction**
  - » Duty to protect health; power to investigate, prevent, and control disease and environmental factors
  - » “Local health officer” means the individual in charge of a local health department
  
- » **State & LHD: Parallel powers and responsibilities**
- » **State & LHD: Both have rule-making authority**

MCL 333.2235, 333.2413, 333.2415, 333.2417 333.2428, 333.2433, 333.2435

## Local governing entity role and responsibilities

- » Provides for a local health dept; can unite with other Bds of Commissioners to form a district department
- » Submits organizational plan to MDHHS
- » Appoints Bd of Health
- » Appoints health officer for county health dept
- » Approves or disapproves public health regulations
- » Fixes and requires fees for county health dept services
- » May adopt schedule of monetary civil penalties for violation of specified sections of Code, PH regulations, or HO's orders; must provide appeals process
- » Receives local public health funding; must comply with requirements for state funding of local public health services
- » Appropriates funds for local health dept

## Health Officer determines:

- » That an imminent danger to the health or lives of individuals exists (MCL 333.2251, 333.2451)
- » That control of an epidemic is necessary to protect the public health (MCL 333.2253, 333.2453)
- » That a building or condition is a nuisance, unsanitary condition, or cause of illness (MCL 333.2455)
- » That an individual is a “carrier” and a “health threat to others” (MCL 333.5203)

.... and as a result, issues orders or takes other action

# Health Officer takes action

- » **Order to Abate a Nuisance**
- » **Imminent Danger Order**
- » **Emergency Order to Control an Epidemic**
- » **Warning Notice to individual with hazardous communicable disease**
- » **Civil Penalties**
- » **Court action**



# Nonlegal response to protect the public

- » **Educating the public**
- » **Recommending voluntary measures (e.g. home quarantine)**
- » **Advisories and warnings**
- » **Directing pharma countermeasures**
- » **Providing health care delivery**





# General authority to protect the public

**Powers necessary and appropriate to perform their duties:**

- » **Promote and safeguard the public health**
- » **Prolong life**
- » **Prevent and control health hazards**
- » **Prevent and control the spread of disease**



# Public Health Law in Practice

# Using law to protect the public's health

**CAN I?**

**Legal question:** Do I have authority?

**MUST I?**

**Legal question:** Does law leave me no choice?

**SHOULD I?**

**Policy question:** How should I exercise my discretion?

# Using law to protect the public's health

CAN I?

Legal question: Do I have authority?

## POWER . . .

- » Do I have the power?
- » What is the scope of my power?
  - » What interventions can I use?
  - » Consider power to act vs. power to implement and enforce
- » Who else has power?

# Using law to protect the public's health

**MUST I?**

**Legal question:** Does law leave me no choice?

## **DUTY . . .**

- » **Am I mandated to take action?**
- » **Am I mandated to take a particular action?**

# Using law to protect the public's health

SHOULD I?

**Policy question:** How should I exercise my discretion?

## PROFESSIONAL JUDGMENT

Based on discretionary power ...

- Should I act?
- How should I act?
- When should I act?
- What should I consider in exercising my discretion to act, and the nature of my actions?
- What are the policy considerations?

**Making  
choices  
vs. abusing  
discretion**

**Consider facts, principles, and law**

**Be able to articulate basis for decision**

**Show that you considered/weighed alternatives**

**Does decision make sense?**

**Is it reasonable?**

**vs.**

**Decisions that are “arbitrary” and “capricious”**

**Doing nothing is doing something – make sure  
doing nothing is a conscious choice**

**Arbitrary - not considered, ignores the facts,  
whimsical**

**Capricious - impulsive and unpredictable**

# Should I? Ethical Considerations

**Autonomy**

Respect for individual's right to make own choices

**Non-Maleficence**

First, do no harm

**Beneficence**

Do good

**Justice**

Treat all people equally and equitably

**Law defines what an agency can do.**  
**Ethics define what an agency should do.**



# Public Health Decision-Making Tool

## Use this tool as a guide to:

- **Assess the situation**
- **Evaluate the threat**
- **Consider the options**
- **Communicate the risks**

## And to:

- Record these steps
- Share “Up” -- Provide situation updates, facts and analysis, basis for decisions with other agencies/governor’s office/legislators, etc.

Available to download as a fillable form at

<https://www.networkforphl.org/resources/public-health-decision-making-tool/>

# Imminent danger order used to address vaccine shortage



2004 seasonal flu vaccine shortage

State ordered all health care providers to limit influenza vaccinations to persons in high-risk categories

# Imminent danger order used to prohibit occupancy

- » Vapor intrusion caused excessive levels of Tetrachloroethylene (PERC) in indoor air in homes and businesses
- » Local health department ordered affected properties to remain unoccupied until remediation plan implemented and air quality returned to safe levels

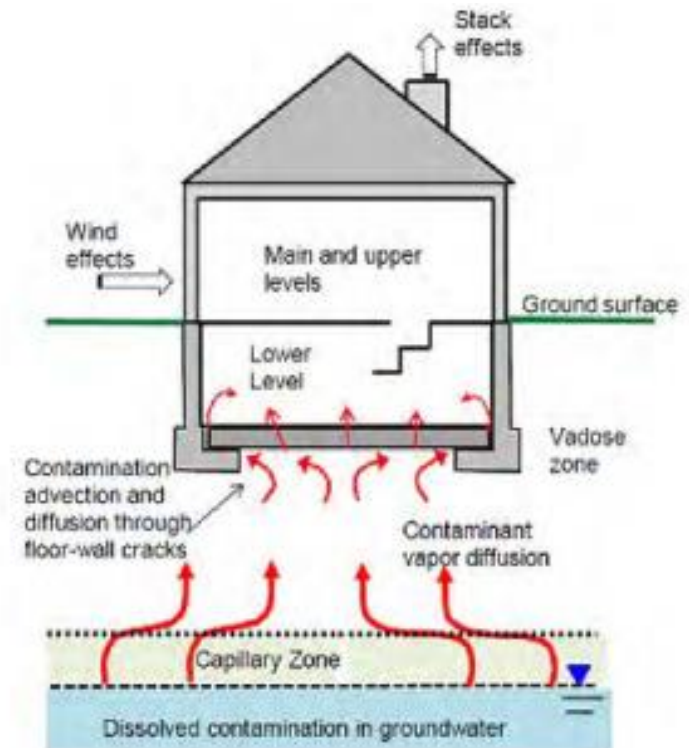


Figure 1-1 – Simplified Model of Vapor Intrusion

Image: [MDEQ Guidance Document for the Vapor Intrusion Pathway](#) (May 2013)

# Local Health Dept Order to Control Spread of Hepatitis A in Nursing Home



## ST. CLAIR COUNTY HEALTH DEPARTMENT

### EMERGENCY PUBLIC HEALTH ORDER

#### IMMINENT DANGER and CORRECTIVE ACTION

This order is made pursuant to Section 2451 of the Michigan Public Health Code, being MCL 333.2451. The Health Officer of St. Clair County Health Department has determined the following conditions exist that constitute a hazard or danger to the health of individuals: **Consumption of imported frozen strawberries potentially contaminated with Hepatitis A within a congregate setting. See attached recall notice.**

This condition puts the following affected at risk:

**Medilodge of Port Huron, 5635 Lakeshore Rd, Fort Gratiot Twp, MI 48059**

- **Residents, staff, visitors and family who may have consumed uncooked strawberries on 10-21-2016 from the affected product lot.**

This condition could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided. This situation constitutes an imminent danger to the health or lives of the residents of St. Clair County, Michigan.

***It is therefore ordered that the following actions be undertaken immediately:***

- a) Identification of those potentially exposed to suspect product.**

- b) Post Exposure Prophylaxis (PEP) for Hepatitis A.**
- c) Education of affected staff on Hepatitis A disease and vaccination.**

*Additionally, the following long-term actions may be considered:*

- a) Testing and identification of symptomatic patients for Hepatitis A disease.**
- b) Cohorting and/or isolation of symptomatic patients throughout the period of communicability.**
- c) Exclusion of staff and volunteers who refuse prophylaxis and are directly involved in patient care or food service.**
- d) Other infection control measures deemed necessary by medical health officer.**

A copy of this order shall be delivered to the **Medilodge Administrator, Dr. Daniel Souphis – Medical Director, Liz King – SCCHD Nursing and Community Health Director, Steve Demick – SCCHD EH Director. The Medilodge Administrator or others acting at his direction shall post a copy of this order in conspicuous locations (e.g. on bulletin boards) throughout its facility located at 5635 Lakeshore Road, Fort Gratiot Township.**

If you do not comply with this order, court action to compel compliance may be initiated in accordance with MCL 333.2451.

\_\_\_\_\_  
Medical Health Officer or Authorized Agent  
St. Clair County Health Department

Date: \_\_\_\_\_

Notary

# Limitations on Public Health Authority

## Police Powers ≠ Police State

### Jurisdictional

**Separation (branches)**

**Allocation (levels)**

**Assignment (agencies)**

**Territorial**

**Statutory**

**Preemption**

# Limitations on Public Health Authority

## Police Powers ≠ Police State

### Constitutional

Liberty

Due Process

Protection Against Search & Seizure

Equal Protection

Right to Privacy

Freedom of Association

Freedom of Religion

Just Compensation



## Courts interpret the law as applied to particular facts

- » Ensure government actions are consistent with constitution, law, due process requirements
- » Role in enforcement of public health orders
- » Historically, courts have upheld reasonable exercises of police power to protect public health:

*Jacobson v. Mass., 197 US 11 (1905)*

*McNeil v. Charlevoix County, 275 Mich. App. 686 (2007)*

*Nikolao v. Lyon, 875 F.3d 310 (6<sup>th</sup> Cir. 2017)*

# Law-related resources

## 1. Network for Public Health Law

<https://www.networkforphl.org/>

## 2. Network resources for Michigan

[www.Networkforphl.org/Michigan](http://www.Networkforphl.org/Michigan)

## 3. Summary of health officer powers and includes hyperlinks to the cited laws

<https://www.networkforphl.org/wp-content/uploads/2020/09/Michigan-Issue-Brief-Summary-Authority-Actions-Re-Public-Health-Emergencies-updated-06-2019.pdf>

## 4. Michigan's Guide to Public Health for Local Governing Entities

[https://accreditation.localhealth.net/wp-content/uploads/2022/11/Public\\_Health\\_Guide\\_Final-Digital-Accessible.pdf](https://accreditation.localhealth.net/wp-content/uploads/2022/11/Public_Health_Guide_Final-Digital-Accessible.pdf)



# Thank you!

Carrie Waggoner, JD [cwaggoner@networkforphl.org](mailto:cwaggoner@networkforphl.org)  
Denise Chrysler, JD [dchrysler@networkforphl.org](mailto:dchrysler@networkforphl.org)



Robert Wood Johnson  
Foundation

**The Network for Public Health Law is a  
national initiative of the Robert Wood Johnson  
Foundation.**