

Public Health Law 201
Public Health Decision-making
Can I? Must I? Should I?

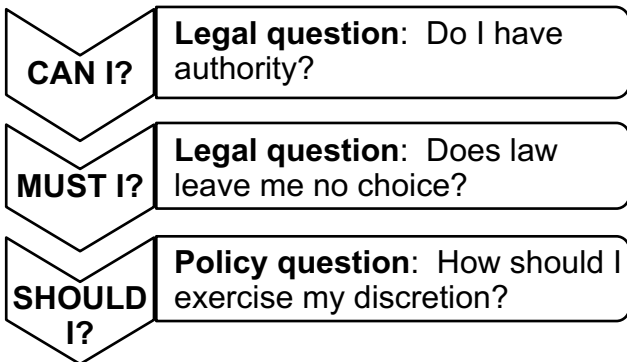
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University of Michigan School of Public Health
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Battle Creek, Michigan

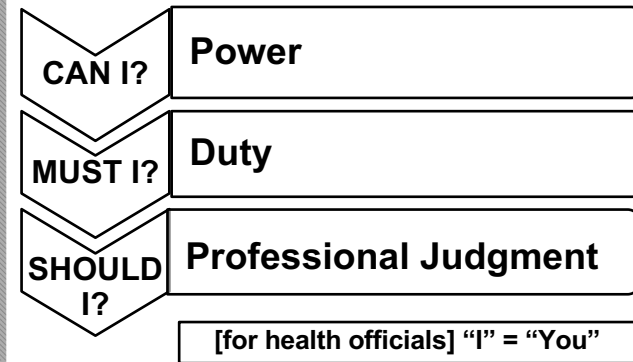
Overview

1. Legal framework
2. Working with legal counsel
3. Case scenarios
 - A. To identify and apply law
 - B. To explore parameters of decisionmaking
 - C. To apply tools
4. When things "go south"

Using law to protect the public's health



Using law to protect the public's health



Navigating Law: When do you bring in the lawyers?



“If you want to squelch a good idea, have it reviewed by your attorney.”

Quote from presentation by a public health practitioner

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How lawyers think

- » Duty: protect client
- » Risk averse
- » Law: fact-based and nuanced
- » Requires interpretation
- » Judgment calls



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Navigating Law: When do you bring in the lawyers?

- » Building relationships
- » Expanding their horizon balancing risks
- » Part of the team
- » Effort justified by value



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Navigating Law: Getting to Yes!



This is what we want to do . . .

How do we best do it?


- Pathways to yes
- Detour when needed
- Minimizing risk

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The Fine Print



This presentation is for informational purposes only. It is not intended as a legal position or advice from the presenters or their employers.

For legal advice, attendees should consult with their own counsel.

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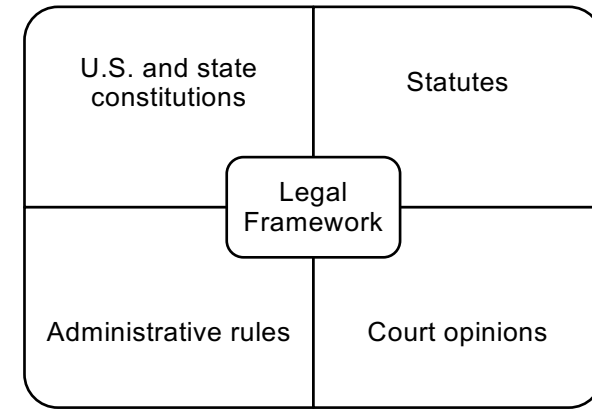
Public Health Legal Framework

- **4** sources of law
- **3** branches of government
- **3** levels of government

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4 Sources of Public Health Authority



U.S. and state constitutions

Statutes


Administrative rules

Court opinions

Legal Framework

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Public Health Code, available at www.legislature.michigan.gov (select "Chapter Index," then Chapter 333).



MICHIGAN LEGISLATURE
Michigan Compiled Laws Complete Through PA 170 of 2018
House: Adjourned until Wednesday, July 25, 2018 10:00:00 AM
Senate: Adjourned until Wednesday, July 25, 2018 10:00:00 AM

Home Register Why Register? Login New! Help

Legislature

- Bills
- Appropriation Bills
- Calendars
- Committees
- Committee Bill Records
- Committee Meetings
- Concurrent Resolutions
- Initiatives/Alternative Measures
- Joint Resolutions
- Journals
- Legislators
- Public Act (Signed)

Recent Bill Activity (current news cycle has 63 items) [List all recent bill activity]

- HB 4176 of 2017 Vehicles; equipment; use of amber flashing lights on

Legislative Bill Search for 2017-2018 Session

Bill Number House bills begin with 4001, Senate bills begin with 1

Bill Content You can use a wild card, e.g., "limit**"

Select Category (2017-2018)

(For Example: Select 'weapons' to show related bills even if 'weapons' is not found in the text of the bill.)

Michigan Compiled Laws Search

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**Commentary on the
Michigan Public Health Code**

by
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is based were supported by grants from the W. K. Kellogg
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Commentary on the Michigan Public Health Code
<http://www.miphcommentary.org/>

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Performance and Transformation

MICHIGAN
TRANSPARENCY OFFICE OF
REGULATORY
REINVENTION OFFICE OF INTERNAL
AUDIT SERVICES OFFICE OF GOOD
GOVERNMENT REINVENTING
PERFORMANCE (RPM)

OPT / OFFICE OF REGULATORY REINVENTION

Select the Department

View Code by Department

If you know the Michigan Department or Agency Administrative rule or proposed rule change, you can access the information using the "Department Index" or the "Search by Department" links. Under each department, a list of all relevant administrative code sections can be found for that department.

Select a Department

- Agriculture and Rural Development
- Attorney General
- Civil Rights
- Corrections
- Education
- Environmental Quality
- Health and Human Services
- Insurance and Financial Services
- Licensing and Regulatory Affairs
- Military & Veteran's Affairs

**State Administrative Rules
(select department)**
http://www.michigan.gov/opt/0,5880,7-338-35738_5698-118524--_00.html

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**The Network
for Public Health Law** Separation of powers

3 Branches

Legislative	Executive	Judicial
Make law; Appropriate \$	Implement law; Make law	Interpret law; Make law; Protect from other two branches

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**The Network
for Public Health Law** Allocation of powers

3 levels + many agencies

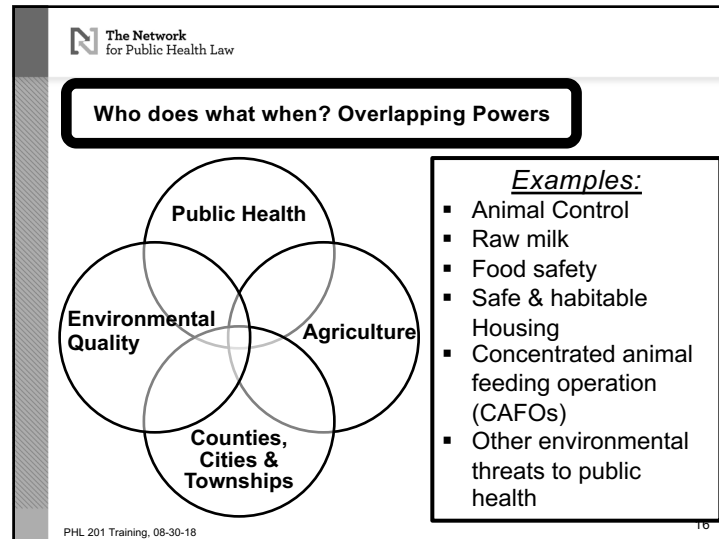
Federal

State

Local

- » CDC
- » FDA
- » USDA
- » EPA
- » FBI
- » Public health
- » Agriculture
- » Environmental
- » Social Services
- » State police
- » City, township, county, schools
- » Public health
- » Environmental
- » Social Services
- » Local police

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Scenario 1

Safe & habitable housing

Role of local health officer to protect occupants in housing without water:

- » "Residential" motel
- » Private landlord who repeatedly fails to pay water bill
- » Public housing complex
- » Mobile home park
- » Private owner-occupied residence

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Safe & habitable housing

- » LPH broad authority includes investigation and control of environmental health hazards and nuisances within their jurisdiction. MCL 333.2433, 333.2455
- » Minimum standards for dwellings used for living or sleeping established by Housing Law of Michigan, MCL125.401 et seq. and local ordinances

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Public health & housing resource

See, **Michigan Manual for the Prevention and Control of Bed Bugs** for discussion of public health threats and regulation of housing, residences, and facilities available at https://www.michigan.gov/documents/emergingdiseases/Bed_Bug_Manual_v1_full_reduce_326605_7.pdf

Page 15-20 and 85-88 (Appendix A)

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Ours is a society unwilling to abandon bleeding bodies upon the highway

"Although plaintiffs argue that the only person affected by the failure to wear a helmet is the operator of the motorcycle, the impact of that decision would be felt well beyond that individual. Such a decision imposes great costs on the public. As Professor Laurence Tribe has commented, ours is "a society unwilling to abandon bleeding bodies upon the highway, [and] the motorcyclist or driver who endangers himself plainly imposes costs on others." Benning v Vermont, 161 Vt 472 (1994)

Can I? Can you? Can both of us?

Considerations:

- Specific vs general powers (MCL 333.1114)
- Tradition
- Best able / suited to address
- Agreement among agencies (e.g. emergency preparedness & response)

Who rules?

State Department vs. State Department

333.1114 Prohibited construction of code.

(1) This code shall not be construed to vest authority in the department [of health and human services] for programs or activities otherwise delegated by state or federal law or rules to another department of state government.

Who rules?

State vs. local government (counties, cities, townships, school districts, etc.)

MCL 333.1115: A state statute, a rule of the department ... shall control over a less stringent or inconsistent provision enacted by a local governmental entity for the protection of public health.

Who rules?

Local health department vs. other local government entities (cities, townships, school districts, etc.)

MCL 333.1115: ... [A]n applicable local health department regulation shall control over a less stringent or inconsistent provision enacted by a local governmental entity for the protection of public health.

MCL 333.2441: ...Regulations of a local health department supersede inconsistent or conflicting local ordinances.

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Can I? Specific Powers and Specific Threats



- Food establishments
- Methamphetamine labs
- Clean indoor air (smoking)
- Body art facilities
- Public swimming pools
- Communicable diseases

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Can I? General Powers

- » 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
- » Provide expertise and education regarding health

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Can I? Limitations

Broad & Flexible Powers: Any legal limits?

Police Powers ≠ Police State

Jurisdictional

Separation (branches)

Territorial

Allocation (levels)

Statutory

Assignment (agencies)

Pre-emption

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Can I? Limitations

Broad & Flexible Powers: Any legal limits?
Government has awesome powers
AND MAJOR RESPONSIBILITIES

Constitutional

- Liberty
- Due Process
- Protection Against Search & Seizure
- Equal Protection
- Right to Privacy
- Freedom of Association
- Freedom of Religion
- Just Compensation



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Scenario 2

Can I? Exclusion of children from school

Protecting children from communicable disease:

- »Unvaccinated child diagnosed with measles
- »Class includes children who are unvaccinated, including children with medical, religious, and “other objection” waivers

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Scenario 2, continued

Who (below) has legal authority to exclude unvaccinated children from public school during an outbreak?

1. Superintendent of school district
2. Local health officer
3. Medical director (LHO is not a physician and medical judgement is needed)
4. Board of Health
5. MDHHS Director
6. No one, child has a legal right to public education

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Revised School Code

- »School districts have powers necessary to the education of pupils and operation of schools and related services.
- »Includes “[p]roviding for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity.”

MCL 380.11a

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Health Department Authority to Protect Public from Disease

- **Local health department has duty to protect health, power to investigate, prevent and control disease**
- **Local health officer is the “administrative officer” of the BOH and LHD – takes actions and makes determinations to carry out LHD’s functions to protect public and prevent disease**

MCL 333.2428, 333.2433

Health Officer makes determination:

- » **That an imminent danger to the health or lives of individuals exists in the area served by the local health department (MCL 333.2451)**
 - » **That control of an epidemic is necessary to protect the public health (MCL 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

What is the role of the Local Medical Director?

"Medical director" means a physician who qualifies as a medical health officer but who is employed ... to provide direction in the formulation of medical public health policy and program operation. **A medical director shall be responsible for developing and carrying out medical policies, procedures, and standing orders and for advising the administrative health officer on matters related to medical specialty judgments.**

Mich. Admin. Code R. 325.13001(d)

Board of Health

- » **Bd of Commissioners may appoint a BOH for single county health department – mostly advisory; may serve as appeals body for local public health actions**
- » **District BOH required, must include 2 members from each county board of commissioners; appoints the health officer**

MCL 333.2413, 333.2415, 333.2428

State vs. local public health

- **LHD:** Primarily responsible for health of people within its jurisdictions
- **State:** Provides leadership and specialized services, but can take action regarding local matter if LPH unable or unwilling to respond; can respond to an imminent danger anywhere in the state
- **State:** May take full charge of administration of state and local laws to address conditions that are a menace to the public health

MCL 333.2224, 333.2235, 333.2251, 333.2437

Public Good vs. Individual Quarantine, Isolation, & Immunization

The liberty secured by the Constitution on the United States to every person within its jurisdiction does not import an absolute right to 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, 197 US 11 (1905)

Caution

Jacobson vs Massachusetts

Caution, as noted by the Court:

“The police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression.”

Who rules? Exclusion of children from school

Dispute between superintendent and local health officer

Court Opinions

▪ Hill v Board of Education, (Michigan Supreme Court, 1923)

Court upheld authority of local health department to close a school because of disease outbreak even though the local school board disagrees.

Michigan Administrative Rule 325.175 (2014 revision)

If LHO confirms or reasonably suspects an attender has a communicable disease, LHO may exclude unvaccinated individuals/individuals unable to show immunity from school or program until such time as the health officer deems there to be no likely further risk of disease spread.

Must I? Am I mandated to take action? Am I mandated to take a particular action?

Mandatory functions

- »Mandated by law
- »Mandated by funding source (\$ with strings)

Discretionary functions

- »Involves exercise of judgment or discretion
- For mandatory duties, often an agency has a great deal of discretion in determining *how* to fulfill its obligation

Must I?

What is duty?

- »Legal duty – obligation created by law (compare to moral duty)
- »Right – To have duty, means someone has a right. To whom is the duty owed? How is right enforced?
- »Public duty doctrine a/k/a no public duty doctrine
- »Govt action vs. govt failure to act or failure to warn
- »Exceptions: Special relationship

Must I?

Mandatory + Discretion

Statutory powers and responsibilities

The Department of Public Health shall:

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

Should I?

Based on discretionary power

Must be used reasonably, impartially.

Policy considerations:

- »Resources » Impact » Population health
- »Feasibility » Priorities vs. private disputes

Uniformity, consistency, and proportionality

Strength of evidence, strength of legal authority

Public opinion

Politics – relevant?

Doing “nothing” is doing “something” (risk assessment)

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.

Scenario 3

Can I? Local Regulation of Septic Systems

Baashir Hussain owns a cottage on Gem Lake that has an on-site septic system. When he sells the cottage, the health department inspects under its local sanitation code, which requires inspection and compliance with standards at the point of sale. The health department requires correction of several deficiencies before issuing a septic system permit to the new owner.

Mr. Hussain's attorney argues that the local health department has no authority because the Public Health Code does not grant it specific power to regulate on-site septic systems.

Is the attorney correct? Why or why not?

Can I? Local Regulation of Septic Systems

Mr. Hussain claims that the health department did not conduct a point of sale inspection when his neighbors sold their cottage and the new owner was not required to make any corrections, even though the condition of the neighbors' septic system was worse than his.

His attorney argues that the local health department is treating Mr. Hussain unfairly and must treat him the same as the neighbors.

Q. Is the attorney correct? Why or why not?

Can I? All or nothing?

Youngberg v. Romeo

"[I]t is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities.... Nor must a State choose between attacking every aspect of a problem or not attacking the problem at all."

457 U.S. at 457 U. S. 317 (1982)

Can I?

Selective Enforcement

- **Generally**, government officials such as police officers, prosecutors, or regulators exercise enforcement discretion, i.e. they have the power to choose whether or how to punish a person who has violated the law.
- **However**, the biased use of enforcement discretion, such as that based on racial prejudice or corruption, is usually considered a legal abuse and a threat to the rule of law.

House Bills No. 5752 & 5753

- Introduced March 22, 2018; referred to Committee on Natural Resources
- Would amend Part 127 and add Part 128 to Public Health Code to establish state and local standards for septic systems
- Would require DEQ to adopt rules (statewide code)
- Would allow DEQ to authorize LHDs to implement law
- Would require local health departments to adopt rules to implement law consistent with Part 128 and DEQ rules

House Bills No. 5752 & 5753, continued

If enacted, Part 128 would:

- Would require conventional septic system inspections every 10 years
- Would prohibit point of sale ordinances

Q. Can the legislature do this?

- Mandate local inspections at set intervals?
- Prohibit POS inspections?

Q. Why or why not?

What is Pre-emption?

- Higher level of government can pre-empt actions of lower level
- Congress can reserve power to the federal government
- State government can override local municipalities

Q. Can the county government pre-empt city and township ordinances?

Who rules?

Local health department vs. other local government entities (cities, townships, school districts, etc.)

MCL 333.1115: ... [A]n applicable local health department regulation shall control over a less stringent or inconsistent provision enacted by a local governmental entity for the protection of public health.

MCL 333.2441: ...Regulations of a local health department supersede inconsistent or conflicting local ordinances.

Point of sale & pre-emption HB No. 5752 provides:

SEC. 12816. (1) a local unit of government or a local health department shall not adopt a point of sale ordinance related to onsite wastewater treatment.

(2) a local unit of government or a local health department that has adopted a point of sale ordinance to require inspections of onsite wastewater treatment systems shall phase out or repeal the point of sale ordinance within 3 years after the effective date of the amendatory act that added this part.

Degrees of pre-emption - POS options available to the legislature. Range from those that are least supportive of POS to those that are most supportive:

1. All POS ordinances are prohibited as of the effective date of this Act.
2. All POS ordinances are prohibited as of the effective date of this Act. Existing POS ordinances must be eliminated within three years. (HB 5752)
3. New POS ordinances are prohibited as of the effective date of this Act. Existing POS ordinances are grandfathered in.
4. [Law is silent]
5. Local health department **may** adopt a POS ordinance.
6. Local health department **must** adopt a POS ordinance.

Q. Which one do you prefer? Why?

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Floor pre-emption

- Higher level of government passes a law that establishes a minimum set of requirements, and expressly allows lower levels of government to pass or enforce laws.
- **Ceiling pre-emption**
- Prohibits lower levels of government from requiring anything more than or different from what the higher-level law requires.

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Local Health Department's Power to Adopt Rules

Michigan Public Health Code: MCL 333.2441-2442

- » **Adopt regulations that are necessary and proper**
- » **Must be approved by governing entity**
- » **Must be at least as stringent as similar state requirements**
- » **LHD regulations supersede conflicting local ordinances**
- » **Notice of public hearing required**

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The Power of Local Public Health

- » **McNeil v Charlevoix County, MI S Ct (2009)**
(workplace smoking):
 - Law to be liberally construed to protect the public
 - PHC granted LHD power to adopt rules
 - Does not matter that LHD does not have specific power to regulate smoking; has general powers, including power to adopt rules to properly safeguard the public health
- » **Local government leads, state government follows**
 - TOBACCO – Clean Indoor Air
 - IMMUNIZATION – Waiver requirements

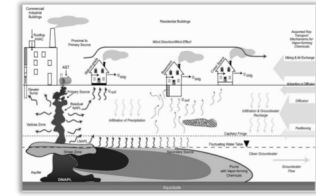
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Case Scenarios, continued

Can I? Vapor Intrusion Investigation

The MDEQ has alerted your local health department and MDHHS that it is aware of a soil contamination site in your county. Based on existing site information, it has determined that several potential VI pathways exist whereby the contamination could be affecting local homes and businesses. MDEQ is planning to conduct initial soil gas investigations.



Source: USEPA OSWER [Technical Guide for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air](#) (June 2015)

Can I? Vapor Intrusion Investigation

MDEQ staff need to enter several private properties to obtain soil samples.

The first is a private, single-family home, where they knock on the front door and no one answers. They decide to go ahead and take soil samples from the property without obtaining permission.

Is this lawful?

Can I? Vapor Intrusion Investigation

At the next home, Anita answers the door and identifies herself as the homeowner. The MDEQ staff member explains why they are there. Anita responds that she would prefer not to have her soil tested and she refuses permission to MDEQ staff to access the property.

What can the MDEQ staff member do?

If MDEQ does not take further action to enter the property, what can/should the LHD do?

Can I? Vapor Intrusion Investigation

At the next home, which is a home divided into apartments, Beatriz answers the door and identifies herself as a tenant. The MDEQ staff member explains why they are there and asks to obtain a soil sample from the common backyard. Beatriz gives permission to MDEQ staff to access the property.

Is the tenant's permission adequate?

Does the MDEQ staff person need to seek permission from the landlord as well?

What about permission from other tenants within the same home?

Can I? Vapor Intrusion Investigation

At the next home, the occupant of the home, Calvin, does not speak English. The MDEQ staff member ascertains that Calvin is a tenant and obtains contact information for the landlord. The staff person contacts the landlord and the landlord refuses to give permission for MDEQ staff to access the property.

What can the MDEQ staff member do in this case?

If MDEQ does not take further action to enter the property, what can/should the LHD do?

Can I? Entering Property

Broad & Flexible Powers: Any legal limits?
Government has awesome powers
AND MAJOR RESPONSIBILITIES

Constitutional

Liberty

Due Process

Protection Against Search & Seizure

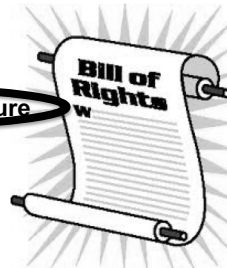
Equal Protection

Right to Privacy

Freedom of Association

Freedom of Religion

Just Compensation



Can I? Entering Property

U.S. Constitution – Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Can I? Entering Property

Michigan Constitution – art. 1, § 11

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

Can I? Entering Property

» **Search:** government action that infringes upon reasonable expectation of privacy (e.g., privacy in one's home, business, vehicle, person)

» Includes collection & analysis of biological samples

» **Seizure:** government action meaningfully interferes with individual's possessory interest in property

Can I? Entering Property

- **General rule: Government must obtain a warrant to enter and inspect private property.**
- Applies to administrative inspections and investigations as well as to criminal investigations
- Probable cause must be shown to obtain a warrant, but standard for administrative warrants ≠ criminal warrants

Camara v. Municipal Court, 387 U.S. 523 (1967) (searching residences); *See v. City of Seattle*, 387 U.S. 541 (1967) (searching commercial property).

Can I? Entering Property

"[P]robable cause" to issue a warrant to inspect must exist if **reasonable legislative or administrative standards** for conducting an area inspection are satisfied with respect to a particular dwelling.

Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e. g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling."

***Camara v. Municipal Court*, 387 U.S. 523 (1967).**

Authority to protect the public (specific)

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



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Can I? Entering Property

Natural Resources & Environmental Protection Act (NREPA)

Environmental Remediation (MCL 324.20101 et seq.)

- MDEQ shall coordinate all activities required under this part. (MCL 324.20104(1))
- Requires notification/consultation w/ MDARD for substances MDARD regulates (pesticides, fertilizers, etc.) (MCL 324.20115)

Leaking Underground Storage Tanks (MCL 324.21301 et seq.)

- MDEQ shall coordinate and integrate the provisions of this part with appropriate state and federal law for purposes of administration and enforcement. (MCL 324.21329)

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Can I? Entering Property

MCL § 324.20117(3): If there is a reasonable basis to believe that there may be a release or threat of release, the directors [of MDEQ, MDHHS, MDARD, and state police] or their authorized representatives have the **right to enter** at all reasonable times any public or private property for any of the following purposes:

- (a) Identifying a facility.
- (b) Investigating the existence, origin, nature, or extent of a release or threatened release.
- (c) Inspecting, testing, taking photographs or videotapes, or sampling of any of the following: soils, air, surface water, groundwater, suspected hazardous substances, or any containers or labels of suspected hazardous substances.
- (d) Determining the need for or selecting any response activity.
- (e) Taking or monitoring implementation of any response activity.

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Can I? Entering Property

MCL § 324.20117(4)-(6): Inspections/investigations must be conducted reasonably promptly and dept. staff must:

- » (1) Present credentials; (2) make reasonable effort to contact the landowner/occupant; (3) describe the nature of the activities that will be undertaken; and (4) inform landowner/occupant of right to participate in collection of split samples & right to obtain a copy of analysis results & photographs/videotape taken.
- » Provide receipt for samples taken.
- » Landowner/occupant may accompany investigator and participate in collection of split samples, but his/her absence or unavailability shall not delay or limit investigator's authority

MCL § 324.20117(7): Warrant / Civil Action: If refused entry or information, AG may either petition the court for a warrant or bring a civil action to compel compliance with request.

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Can I? Entering Property

Public Health Code Article 12, Environmental Health

- » **Part 121, General Provisions**
- » **MDEQ is environmental health agency for the state:**
 - » Shall cooperate w/ and provide environmental health resource support to MDHHS and local health agencies
 - » Shall develop and maintain capability to monitor and evaluate environmental health hazards
 - » MCL 333.12103
- » **MDEQ may delegate license inspection function under Article 12 to a LHD**
 - » see MCL 333.12106 (describes process for resolving disagreements between state and local dept. re licenses)

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Can I? LHD General Powers

- » **Powers necessary and appropriate to perform their duties**
- » **Promote and safeguard the public health**
- » **Prolong life**
- » **Prevent and control environmental health hazards**
- » **Prevent and control the spread of disease**
- » **Provide expertise and education regarding health**

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Can I? Entering Property

MCL § 333.2433 Local health department; powers and duties generally.

- (2) A local health department shall:
- (c) Make investigations and inquiries as to:
 - (iii) The causes, prevention, and control of environmental health hazards, nuisances, and sources of illness.
 - (f) Have powers necessary or appropriate to perform the duties and exercise the powers given by law to the local health officer and which are not otherwise prohibited by law.

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Can I? Entering Property

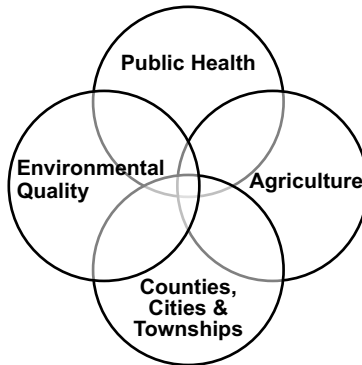
MCL § 333.2446 Inspection or investigation.

To assure compliance with laws enforced by a local health department, the local health department may inspect, investigate, or authorize an inspection or investigation to be made of, any matter, thing, premise, place, person, record, vehicle, incident, or event. Sections 2241 to 2247 [pertaining to obtaining a warrant] apply to an inspection or investigation made under this section.

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Should I? Overlapping Powers



Considerations:

- Specific vs general powers (MCL 333.1114)
- Tradition
- Best able / suited to address
- Agreement among agencies

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Can I? Entering Property

Exceptions to warrant requirement:

1. Consent obtained at time of entry (e.g., via consent form)—must be voluntary
2. Consent obtained as provision of an application for a license or permit
3. Pervasively regulated industry (e.g., liquor, firearms, commercial fishing)
 - See *Tallman v. Michigan DNR*, 421 Mich. 585 (1985))
4. Exigent circumstances
5. Open fields doctrine + plain view doctrine
6. Checkpoints & other blanket searches

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Can I? Entering Property

Consent in Landlord / Tenant Situations

In general:

- » Consent may be given by someone with common authority over / mutual use of / joint access or control over the premises.
- » A co-tenant may give consent to a search of his/her leased premises and to common areas over which they have shared mutual use (but cannot prevail over present & objecting co-tenant). *Georgia v. Randolph*, 547 U.S. 103 (2006)
- » The landlord may not give or withhold consent on behalf of a tenant, unless specifically provided in the lease. *Chapman v. U.S.*, 365 U.S. 610 (1961)

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Investigations: additional considerations when working with law enforcement

Individual rights:

- » **Fourth amendment:** higher standard to obtain a criminal search warrant*
- » **Fifth amendment:** privilege against self-incrimination; consider when interviewing

Admissibility of evidence:

- » **Chain of custody** must be documented to authenticate evidence

Other Challenges: differences in mission, community trust, interest in informing the public

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Can I? Vapor Intrusion Response

MDEQ has determined that soil samples indicate a high likelihood that vapor intrusion is occurring within buildings, so staff proceed to sampling indoor air in individual homes and businesses.

This testing indicates that **remedial action is needed** in several homes and businesses.

What's next?

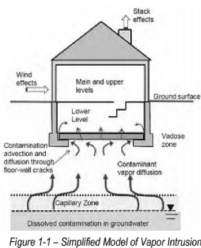


Figure 1-1 – Simplified Model of Vapor Intrusion
Source: [MDEQ Guidance Document for the Vapor Intrusion Pathway](#) (May 2013)

Vapor Intrusion Response

Once a person has knowledge that their property is a “facility” (i.e., affected to specified level by hazardous substance), certain obligations arise even for “nonliable” landowners:

- » Must undertake measures to prevent exacerbation; exercise **due care** to mitigate unacceptable exposure; take precautions against foreseeable third party acts; cooperate with response activities; comply with land or resource use restrictions. (MCL 324.20107a(1)).
- » See “**Due Care**” rules, located at Mich. Admin. Code R. 299.51001 et seq.
- » Must give **written notice before selling** the property (MCL 324.20116).

Can I? VI Response

MDEQ may:

- **Issue an administrative order to a responsible person to perform response activity**
- **Undertake or approve of remedial actions**
 - Public meeting / notice / comment requirements apply if state funds will be used or there is a significant public interest
- **Establish cleanup criteria**
- **Commence a civil action to recover costs of response activity**

MCL 324.20118—20126a

Can I? Vapor Intrusion Response

MDEQ has limited staffing and financial resources. They determine to delay pursuing remediation in this particular case in order to prioritize higher-risk vapor intrusion incidences elsewhere.

You determine that it is important to act now. How can the LHD respond in this case?

Can I? VI Response

LHD (under NREPA)

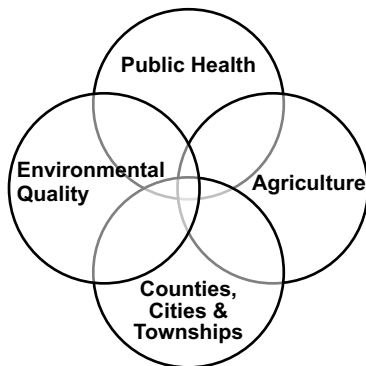
- » **Undertake response activity approved by MDEQ and sue liable party to recover costs reasonably incurred**
 - » See MCL 324.20118 & MCL 324.10126a(1), (7)
- » **Commence a civil action against a person liable for the release under MCL 324.20126 (seeking injunction or action, possibly resulting in civil fine)**
 - » MCL 324.20135(1)(a)-(b)
- » **Commence a civil action against one or more of the directors alleging that they failed to perform a nondiscretionary act or duty**
 - » MCL 324.20135(1)(c)

Can I? VI Response

LHD (general public health powers)

- » **Order to abate a nuisance:** Order the property owner to avoid, correct, or remove the harmful condition.
 - » Person who caused the violation is liable to the owner of the premises for expenses incurred to remove the condition.
 - » MCL 333.2455 (1) – (3)
- » **Imminent danger order:** Order an authorized person to immediately take action to avoid, correct, or remove the imminent danger. MCL 333.2451
- » **Of course, the liable party may be unknown, unable to be found, or not collectible**

Should I? Overlapping Powers



Considerations:

- Specific vs general powers (MCL 333.1114)
- Tradition
- Best able / suited to address
- Agreement among agencies
- *Alternative, non-legal courses of action*

Can I? Vapor Intrusion Response

In consultation with MDEQ and MDHHS, you conclude that several homes must be vacated until a remediation plan is implemented and air quality returns to safe levels. You inform occupants that their homes are unsafe and offer temporary relocation financial assistance (funded by MDHHS) for them to move for the duration of the remediation efforts.

What if owner-occupants do not want to leave? Can they be forced to vacate the home?

What if tenant-occupants do not want to leave? Can they be forced to vacate the home?

Can I? Must I? Should I? VI Response

MDEQ may approve land or resource use restrictions, including “institutional controls” such as local ordinances, health regulations, or other measures to limit or prohibit activities that may lead to exposure to hazardous substance

» MCL 324.20107a(1), MCL 324.20121(1), (8), (9), Mich. Admin. Code R. 299.2

Imminent Danger Order (MCL 333.2451): A local public health officer can issue an order to avoid, remove, or correct an imminent danger.

- “**Imminent danger**” means a condition or practice which 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.
- The order **may**: (1) specify action to be taken or (2) **prohibit the presence of individuals** in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger.

Should I? Vapor Intrusion Response

Unbeknownst to you, EPA and MDEQ have been investigating potential vapor intrusion sites in your LHD's jurisdiction. MDEQ informs you that several homes and businesses must be vacated until a remediation plan is implemented and air quality returns to safe levels. They have determined that the LHD should issue the imminent danger order.

What should you do next?

Documents follow, next page



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

NICK LYON
DIRECTOR

June 14, 2016

Adam London, MPA, RS, DAAS
Administrative Health Officer
700 Fuller N.E.
Grand Rapids, Michigan 49503-1918

To Health Officer London:

The Michigan Department of Health and Human Services (MDHHS) has determined that the indoor air at 312 Ellsworth, Grand Rapids represents an imminent public health hazard caused by trichloroethylene (TCE) vapor from a concentrated TCE source under the building. MDHHS recommends that no person occupy the building until the TCE vapor intrusion has been mitigated such that indoor air can confidently be expected to remain at or below TCE levels that represent a minimal risk to human health.

Background

On June 7, 2016, the Michigan Department of Environmental Quality (MDEQ) brought to the attention of the MDHHS that a vapor plume of TCE had been identified under the building at 312 Ellsworth, Grand Rapids. MDEQ coordinated indoor air samples to be immediately collected and analyzed for TCE including its environmental degradants. Preliminary indoor air data was received by MDEQ and immediately shared with MDHHS on June 10th. MDHHS, MDEQ, the United States Environmental Protection Agency (USEPA), and the Kent County Health Department convened on June 11th by conference call to review the preliminary analysis of the indoor air quality results relative to the MDHHS Memorandum June 10, 2016.

Environmental Data

Sub-slab Soil Gas

On June 7, 2016, MDEQ provided to MDHHS nine sub-slab soil gas TCE results for 312 Ellsworth, Grand Rapids ranging from 237 to 8,240,000 $\mu\text{g}/\text{m}^3$ (Figure 1). MDHHS uses a model that calculates the theoretical indoor air levels from sub-slab measurements. Eight of the TCE sub-slab soil gas results exceeded the MDHHS Action Level for sub-slab measurements (290 $\mu\text{g}/\text{m}^3$), therefore, MDHHS recommended collection of indoor air samples¹ (Table 1).

Indoor Air

On June 9, 2016, MDEQ provided oversight for indoor air sampling. MDEQ reported the preliminary

RE: Order to Prohibit Occupancy
401 Hall SE, 1168 Madison SE, and 1170 Madison SE (Apt #2)
City of Grand Rapids

Dear Mr. Schaefer:

On May 19, 2016, this office was contacted by the Michigan Department of Environmental Quality (DEQ) regarding high levels of Tetrachloroethylene (PERC) at the above referenced properties. PERC vapor levels must be no greater than 6 parts per billion (ppb) in order to avoid excess risk to human health according to standards provided by the US Department of Health and Human Services. Testing conducted by the DEQ has demonstrated levels ranging between 25 and 50 ppb.

Given the indoor air levels of PERC vapors, this office considers this an imminent threat to the health of individuals occupying these addresses. Under the authority of Public Act 368 of 1978 as amended, the properties located at 401 Hall SE, 1168 Madison SE, and 1170 Madison SE (Apt #2), shall remain unoccupied. This order may lift once this office, in conjunction with the Michigan Department of Health and Human Services and DEQ, has been provided reliable clearance testing data demonstrating that the PERC vapors are mitigated to less than 6 ppb under closed window and door operating conditions.

While the test results at 1170 Madison (Apt #1) were within the acceptable level of PERC vapor concentration, this department has serious concerns about the safety of this address as well. This department is conducting further investigation and may extend this order to prohibit occupancy to include this address. In the meantime, vacancy of this address is encouraged.

Thank you for your attention to this matter. Please do not hesitate to contact the Supervising Sanitarian, Sara Simmonds, at this office if you have any questions. She can be reached at (616) 632-7316 or at Sara.Simmonds@kentcountymi.gov

Sincerely,



Adam London, MPA, RS, DAAS
Administrative Health Officer

cc: Linda Dykema, Michigan Department of Health and Human Services
Kory Groetsch, Michigan Department of Health and Human Services
Abigail Hendershott, Michigan Department of Environmental Quality
David O'Donnell, Michigan Department of Environmental Quality

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Should I?

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”
- Repeat: Doing nothing is doing something – make sure doing nothing is a conscious choice
- Arbitrary - not considered, ignores the facts, whimsical
- Capricious - impulsive and unpredictable

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Can I? Must I? Should I? VI Response

Ethical and practical considerations

- » **Autonomy vs. protecting health**
- » **Ways to assist with costs to displaced occupants, landlords, businesses, employees**
- » **Strategies for minimizing impact of displacement**
- » **Coordinate communication to the public with other agencies**
- » **Prepare to answer questions about health impacts & remediation process**

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Scenario 6

Hepatitis A in frozen strawberries

- **National recall of imported frozen strawberries from Jan. 1, 2016 until Oct. 25, 2016.**
- **Sold in bulk, went to hospitals, nursing homes, institutional, food service.**
- **Oct. 28, MDHHS notifies MDARD of facility that received recall notice from supplier for imported frozen strawberries.**

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Scenario 6, cont.

Hepatitis A in frozen strawberries

- **FDA cannot share commercially confidential information with agencies without signed 20.88 agreements.**
- **MDHHS can use information for investigation and action, but cannot share list with LHDs.**
- **Oct 31 - MDARD contacts supplier for distribution list to share with LHDs.**

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Hepatitis A in frozen strawberries

- **928 Michigan facilities received recalled product**
 - Majority included restaurants under LHD jurisdiction
- **Possibly only 24 - 48 hours remaining to administer post exposure prophylaxis (PEP)**

Must I? Taking action

MCL 333.2433(1) requires a local health department to continually and diligently endeavor to prevent and control disease.

For mandatory duties, often an agency has a great deal of discretion in determining *how* to fulfill its obligation.

Exercise of power to protect public health



Identify



Investigate



Respond



Enforce

Can I? Inspection or Investigation Authority

MCL 333.2446

- LHDs are authorized to inspect or investigate:
 - Any matter, thing, premises, place, person, record, vehicle, incident, or event
- LHD investigators to be provided with medical and epidemiological info pertaining to individuals exposed or may have been exposed to a disease of public health significance

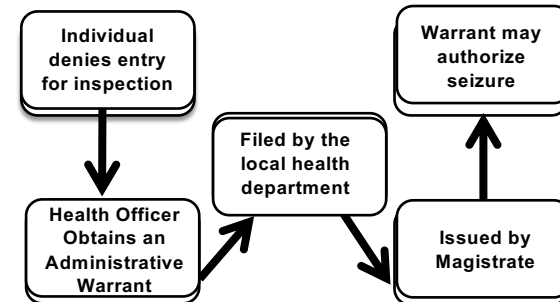
Can I? Interference with investigators

When conducting site visits to obtain information from facilities on the distribution list, one of the facilities refuses to allow entry or provide information to the public health investigators and even uses inappropriate, intimidating and harassing language.

What can be done?



Inspection or Investigative Warrant



Can I? Interference with investigators

MCL 333.2242

Upon receipt of an affidavit made on oath establishing grounds for issuing a warrant, a magistrate shall issue an inspection or investigation warrant authorizing the department applying for the warrant to conduct an inspection or investigation.

Can I? Interference with investigators

MCL 333.2245

An inspection or investigation warrant may be directed to the sheriff or any law enforcement officer, commanding the officer to assist the state or local health department in the inspection or investigation.

Notification Considerations

- Who should be notified?
- What information is sufficient to provide to those potentially exposed?
- How far back in time should notification extend?
- What is the duty to warn when the risk of exposure is less certain?

PEP Considerations

- In some cases, only 24 - 48 hours remaining to administer PEP
- No confirmed illness
- Vaccine unlikely to cause harm in those that are not infected
- Voluntary consent vs. emergency order

Should I? Imminent Danger Order

MCL 333.2451

- Issued by Local Health Officer
- Requires determination of "imminent danger"
- Require immediate action to avoid, correct, or remove imminent danger

Emergency Public Health Order,
next page

Should I?



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

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Respond

Key Elements of Imminent Danger Order


1. Determine “that an imminent danger to the health or lives of individuals exists in the area served by the local health department”
2. Deliver to person or entity authorized or able to correct or resolve the danger
3. Provide warning to affected individuals or post notice at site of danger
4. Require immediate action and may specify action to be taken to resolve the danger

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Respond

Drafting an Imminent Danger Order



1. List the facts (as understood at the time)
2. Describe the condition or practice that exists
3. Explain why the condition or practice could reasonably be expected to cause death, disease or serious physical harm
4. Explain why and/or how the danger is imminent
5. Specify what corrective action is needed
6. Identify who is to make this corrective action
7. State what happens if the individual does not comply with order

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Scenario 6, cont.

Warning and Restraint

An individual that was potentially exposed to HAV refuses the PEP and continues to work as a food service worker in a facility. The individual has been cited in the past for improper food handling practices.

What can be done?

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Warning and Restraint Considerations

- No confirmed illness
- What level of health threat does the food service worker pose to others?
- Health officer must implement the least restrictive, but medically necessary, procedures to protect public health.
- Was an Imminent Danger Order issued?


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Enforce

Court Enforcement

If there is a failure to promptly comply with order



1. File petition with circuit or district court having jurisdiction
2. Request court to restrain the condition or practice which was determined to cause the imminent danger or
3. Request court to require action to avoid, correct or remove the imminent danger.

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**Can I?
Petition to Restrain**

MCL 333.2451

Upon the failure of a person to comply promptly with an order, the LHD may petition a circuit or district court to restrain a condition or practice which the local health officer determines causes the imminent danger or to require action to avoid, correct, or remove the imminent danger.

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**Must I?
Warning Notice**

MCL 333.5203

- Individual is determined to be a health threat to others
- SHALL issue warning notice requiring cooperation with LHD
- May require participation in education, counseling, or treatment programs
- Undergo medical tests to verify the person's status as a carrier.

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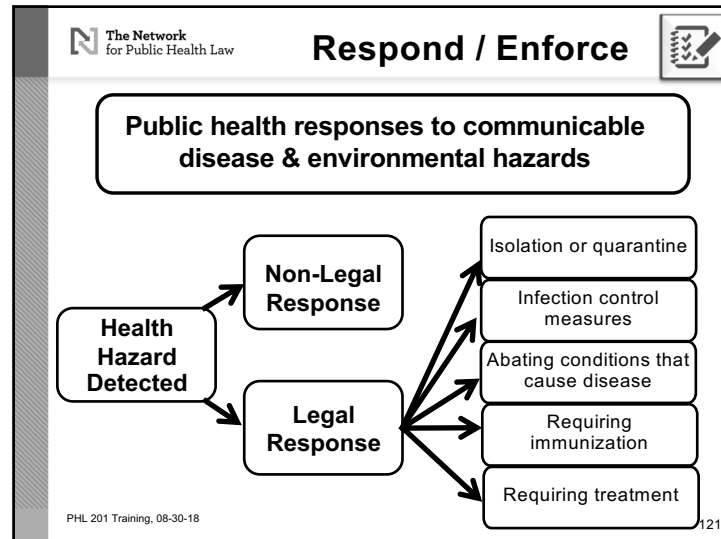
Scenario 6, cont.

Failure to Comply

The food service worker refuses to comply with the warning notice issued under section 5203 requiring the worker to undergo testing and, if found to be a carrier, to undergo treatment.

What can be done?

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Failure to Comply Considerations

- Individual appears to be suffering from a serious disease capable of being easily transmitted?
- Does individual poses a risk to the public's health sufficient to necessitate deprivation of their liberty?
- Other ways to gain compliance?

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Can I? Failure to Comply

MCL 333.5207

Circuit court may order an individual whom the court has reasonable cause to believe is a carrier and a health threat to others into custody and transport them to an appropriate emergency care/treatment facility for observation, examination, testing, diagnosis, or treatment and, if determined necessary by the court, temporary detention.

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When should an local health department name a business as a suspected/confirmed source of illness?

MUST I?

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

SHOULD I?

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

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MUST I?

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

Law requires agency to protect information

- » **E.g., Public Health Code and communicable disease rules protect the confidentiality of information gathered about individuals**

Communicable Disease Rules, R 325.181

- » Medical and epidemiological information which **identifies an individual** and which is gathered in connection with an investigation is **confidential** and is not open to public inspection without the individual's consent or the consent of the individual's guardian, unless public inspection is necessary to protect the public health as determined by a local health officer or the director.

MUST I?

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

Law requires LHD to disclose information

Michigan Freedom of Information Act

- » **Must provide public record unless exemption applies**
- » **“Public record” includes any writing related to agency work (There is no such thing as work-related “personal records”)**
- » **Not required to create records**
- » **Failure to respond to request is a denial**

Law: Communicable disease outbreaks & FOIA exemptions

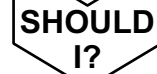
- » **Information of personal nature if disclosure is an unwarranted invasion of an individual's privacy**
- » **Investigating records compiled for enforcement if it would interfere with enforcement proceedings, deprive person of impartial hearing, etc.**
- » **Records or information exempted from disclosure by a statute**

Law: Communicable disease outbreaks & FOIA exemptions, continued

- » Information that is privileged under statute or court rule (e.g. attorney-client, physician-patient)
- » Advisory, nonfactual communications within/between public bodies that are preliminary to final agency determination where public interest in frank communications outweighs interest in disclosure
- » Information compiled and provided by another public body, if reason to exempt information continues

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SHOULD I?

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

- » **No FOIA request** – E.g., should you identify the company in a press release regarding outbreak / investigation?
- » **No law either requires or prohibits disclosure**
- » **Does your LHD have a policy?**
- » **Weigh pros and cons of disclosure**

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Policy: Reasons to not identify business

- Disclosing business name may not be necessary to protect public
- Outbreak ended; Situation remedied
- Encourage/reward business reporting and cooperation
- Economic impact on business
- May be unfair to blame business absent fault
- Contaminated food from suppliers
- Results of investigation not conclusive
- Politics, minimize legal exposure

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Policy: Reasons to name business

- Right to know – public & sickened individuals
- Public need to know
- Government transparency
- Prior outbreaks
- Contaminated food might still be consumed – e.g. leftovers in freezer
- Accountability
- Motivates industry to intensify efforts to protect food supply, improve food handling practices
- Opportunity for business to publicly correct mistake

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Hindsight is 20/20

It's easy to know the right thing to do after something has happened, but it's hard to predict the future.



... If only it were this easy

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Public Health Decision-Making Tool

Situation - What are the facts? What is the threat?
Consequences - What are the consequences?
Likelihood - What are the chances of occurrence?
Mitigation - How can the threat be addressed?
Certainty - Should you take action now? Should you wait?
Communication - What do you communicate to the public and when do you communicate it?

https://www.networkforphl.org/_asset/49I35q/PH-Decision-Making-Tool.docx

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Building support /Reducing exposure

- » Engagement (community, other govt entities)
- » Transparency
- » Risk communication
- » Documentation – facts known at the time of decision and basis for decision
 - Avoid second guessing based on hindsight
 - Practical challenges:

How/where to document? Group decisions, evolving, iterative (not like a doctor making notes in patient's medical record of options considered and basis for choice)

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Thank you!

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 Colleen Healy Boufides, JD chealyboufides@networkforphl.org



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