

MDHHS Declaratory Ruling Form

Michigan Department of Health & Human Services Request for Declaratory Ruling	
Applicants' full name: <ul style="list-style-type: none"> • American Civil Liberties Union of Michigan • Edwards & Jennings, P.C. • Maurice & Jane Sugar Law Center for Economic and Social Justice • Detroit Justice Center • Moratorium Now • Marine-Adams Law, P.C. • Great Lakes Environmental Law Center 	Applicant's degree or title (if applicable):
Applicant's mailing address: Correspondence to all Applicants will be received by: ACLU of Michigan Attn: Mark P. Fancher 2966 Woodward Ave. Detroit, MI 48201	Professional/occupational license no. (if applicable):
Daytime telephone no.: Mark P. Fancher (313) 578-6822	Name and address of legal counsel (if applicable): Mark P. Fancher, Esq. (ACLU of Michigan) Bonsitu Kitaba-Gaviglio, Esq. (ACLU of Michigan) Alice Jennings, Esq. (Edwards & Jennings) John Philo, Esq. (Sugar Law Center) Desiree Ferguson, Esq. (Detroit Justice Center) Jerome Goldberg, Esq. (Moratorium Now) Anthony Adams, Esq. (Marine-Adams Law, P.C.) Erin Mette, Esq. (Great Lakes Environmental Law Center)
Statement of facts: (Please provide a complete, accurate and concise statement of the facts or situation upon which the request is based. The statement shall include all facts known to you which are or may be relevant to a determination of the applicability of statute, rule, final order or decision.) See the Attachment for the Statement of Facts.	

Laws/Rules/Orders: (Please provide references to all statutes, rules, final decisions or orders which are to be considered.)

MCL 333.2251; MCL 333.2253

Issues: (Please provide a concise statement of the issues presented)

Health experts have concluded that mass water shutoffs in Detroit directly cause the spread of water-borne illness. Thus, the relevant questions are:

- Whether mass water shutoffs are an “imminent danger” as defined in MCL 333.2251 requiring the health director take “immediate action” to suspend the shutoffs.
- Whether the spread of water-borne illness constitutes an “epidemic” as defined by MCL 333.2253 that requires the health director to suspend water shutoffs in order to “insure continuation of essential public health services” as defined by statute.

Analysis and Conclusions: (Please provide an analysis, legal brief or memorandum of the issues presented, including reference to any legal authority relied upon, and the applicant’s conclusions.)

See the Attachment for the Analysis and Conclusions.

Certification: I hereby certify the existence of the actual state of facts set forth and the submission of all relevant facts known to me:

Date: July 23, 2019

Signature: /s/ Mark P. Fancher

Attachment to
REQUEST FOR MDHHS DECLARATORY RULING

Submitted by:

- American Civil Liberties Union of Michigan
- Edwards & Jennings, P.C.
- Maurice & Jane Sugar Law Center for Economic and Social Justice
- Detroit Justice Center
- Moratorium Now
- Marine-Adams Law, P.C.
- Great Lakes Environmental Law Center

Pursuant to MCL 24.263 and Administrative Rule 325.1211, Applicants request a Declaratory Ruling from the Michigan Department of Health and Human Services (MDHHS) because ongoing water shutoffs in Detroit are causing widespread health problems and there is a high likelihood that shutoffs will lead to outbreaks of disease. This circumstance constitutes an “imminent danger” as defined by the Public Health Code. Applicants seek voluntary restraint or injunctive relief to stop the termination of water services to thousands of Detroit households pursuant to Michigan’s Public Health Code sections 333.2251 and 333.2253. Applicants respectfully request an accelerated ruling from MDHHS on this request.

A. Statement of Facts

1. The Detroit Water and Sewerage Department (DWSD), the municipal utility responsible for the delivery of water services to residents and businesses in Detroit, regularly engages in water shutoffs as a response to customers’ purported payment delinquency. The number of affected households has frequently numbered in the thousands. For instance, in 2014, 33,000 households had their water shutoff; in 2015, 23,000 residents were disconnected; in 2016, 27,552 residents were disconnected; in 2017, 17,665 residents were disconnected; and for 2018, as of August of that year, 11,422 residents were shut off from clean running water at their

homes.¹ The United Nations General Assembly formally recognized “the importance of equitable access to safe and clean drinking water as an integral component of the realization of all human rights.”²

2. Researchers and other public health experts are particularly concerned about the threat of large outbreaks of communicable diseases that can result from mass water shutoffs. While the occurrence of epidemics after mass water shutoffs is often sporadic and unpredictable, several other dangers to public health occur predictably and routinely whenever a water authority engages in mass water shutoffs to the scale seen in Detroit. This petition places special emphasis on such health hazards because too often the threat and significance of such health conditions are disregarded.

3. Providers of support services for low income residents of the Brightmoor neighborhood in northwest Detroit report that widespread water shutoffs in the area have triggered a variety of serious health problems.

4. One of the health problems observed in Brightmoor (that occurs in other communities as well), is low infant weight. When family households lose water service, mothers are unable to consistently prepare infant formula and feed their babies. As a direct result, infants do not receive adequate nourishment and the lack of nourishment is reflected in the babies’ physical condition.

5. Some persons who have lost water service experience elevated blood pressure brought on by the stress of not having water.

¹ Joel Kurth, “In Detroit, surviving without running water has become a way of life” (October 24, 2018), *Bridge Magazine*, <<https://www.bridgemi.com/detroit-journalism-cooperative/detroit-surviving-without-running-water-has-become-way-life>>.

² United Nations Resolution 64/292 (accessed October 26, 2018), <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292>.

6. Service providers report that in some Brightmoor homes without clean running water, residents experience illnesses resulting from the consumption of rain water accumulated in barrels.

7. Persons with diabetes living without clean running water have been reported to suffer complications because they cannot prepare meals without clean water.

8. Brightmoor residents living without clean running water cope with a variety of other illnesses that include, among others: chronic urinary tract infections among women and children; upper respiratory illnesses; and chronic and infected eczema and other skin disorders.

9. While some might discount the seriousness of the health conditions described above, what makes the reported illness stand out is that they are all preventable. But because of the lack of access to clean running water, these illnesses occur needlessly and affect thousands of water customers with terminated service. Additionally, other observable consequences of water shutoffs can affect households that have not been shutoff. Because mass water shutoffs dramatically decrease the number of consumers using the water distribution system, shutoffs directly contribute to conditions that contaminate the water supply itself and create breeding grounds for communicable disease. This is because far fewer consumers are regularly flushing the distribution pipes and there are areas of the city where the water stagnates.

10. Researchers who study the effects of water interruptions on the water distribution system explain:

Increasingly, concern has been raised on contamination occurring within the distribution system. This can occur through cross-connections, contaminated storage facilities, backflow and during low and negative pressure incidents. There are many causes of pressure transients, such as turning on and off a pump, opening and closing valves, power failures, flushing of the network, fire fighting and **anything that causes a sudden change in demand**. Mains breaks, maintenance work and repair can cause loss of water pressure lasting for hours. Studies performed in the United States have shown that low-pressure incidents in otherwise

satisfactory water distribution pipes can cause aspiration of microorganisms from the surrounding soil. (Emphasis added.)³

11. There is also a measured correlation between poverty and lack of water. In Detroit, 35.7 percent of the population lives below the federal poverty line, meaning that among major U.S. cities, Detroit has one of the highest rates of poverty.⁴ Although the U.S. Environmental Protection Agency recommends that water services should cost no more than 4.5 percent of household income, Detroit residents often pay as much as 20 percent of their household income on water.⁵ Consequently, many Detroit residents are unable to afford clean running water.

12. In 2014, DWSD initiated a campaign to terminate the water services of city residents with bills delinquent by more than 60 days or with arrearages of over \$150.⁶ It is estimated that as of October 2018, DWSD had disconnected more than 112,000 homes as part of this ongoing program of mass water shutoffs.⁷

13. These mass water shutoffs have not gone unnoticed. Rapporteurs from the United Nations condemned the DWSD policy and issued a statement that the Detroit water shutoffs are “contrary to human rights.”⁸

³ *Breaks and Maintenance Work in the Water Distribution Systems and Gastrointestinal Illness: A Cohort Study*, by: Karin Nygard, et al., *International Journal of Epidemiology*, 36:873-880 (Feb. 7, 2007).

⁴ Frank Witsil, “Metro Detroit’s poverty gets worse despite city’s comeback” (April 26, 2018), *Detroit Free Press*, <<https://www.freep.com/story/news/local/michigan/detroit/2018/04/26/detroit-poverty-getting-worse/553439002/>>.

⁵ Cria Kay, et al, “Water Insecurity in Southesat Michigan: The Impacts of Unaffordability and Shutoffs on Resident Wellbeing” (April 2018), University of Michigan School for Environment and Sustainability, <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/143169/Roadmap%20to%20Water%20Security_320%20%281%29.pdf?sequence=1&isAllowed=y>.

⁶ Mary M. Chapman, “Hundreds in Detroit Protest Over Move to Shut Off Water” (July 18, 2014), *New York Times*, <<https://www.nytimes.com/2014/07/19/us/protesters-picket-detroit-over-move-to-shut-off-water.html>>.

⁷ *Id.* at fn 1.

⁸ UN News, “In Detroit, city-backed water shut-offs ‘contrary to human rights,’ say UN experts,” (October 20, 2014), <<https://news.un.org/en/story/2014/10/481542-detroit-city-backed-water-shut-offs-contrary-human-rights-say-un-experts>>.

14. In April 2017, the Henry Ford Global Health Initiative and Division of Infectious Disease released the results of a study which found a significant association between water shutoffs and the spread of water-borne illnesses, even when controlling for socioeconomic status.⁹ Authors of the study included Alexander Plum, MPH and Dr. Marcus Zervos, MD. Their study -- "The Impact of Geographical Water Shutoffs on the Diagnosis of Potentially Water-associated Illness, with the Role of Social Vulnerability Examined" -- examined "the relationship between city-imposed water shutoffs and health outcomes among patients at its hospital in Detroit."

15. The study utilized block level data where the city-imposed water shutoffs occurred along with information about Henry Ford patient admissions and the diagnosis of certain gastrointestinal (GI) and soft tissue diseases. The research shows that "patients who are the most likely to be impacted by water-associated illness resulting from the shutoffs are also the most socially vulnerable. . . . [T]he effect of living on a block that has been affected by shutoffs results in increased likelihood that patients will be diagnosed with water-associated illness."

16. In July 2017, co-author Dr. Zervos publicly qualified the study's findings as "preliminary," and he cautioned against the politicization of the research. Specifically, he noted that available data identified only residential blocks where shutoffs occurred, and specific houses that lost water services could not be pinpointed. Consequently, researchers were unable to make specific findings regarding illnesses of specific individuals and the specific causes.¹⁰

⁹ Alexander Plum, MPH, CHES, Kyle Moxley, ABD, Marcus Zervos, MD, "The Impact of Geographical Water Shutoffs on the Diagnosis of Potentially Water-associated Illness, with the Role of Social Vulnerability Examined" (April 8, 2017), <<http://wethepeopleofdetroit.com/wp-content/uploads/2017/07/Water-ShutoffsIllnesses-Report.pdf>>.

¹⁰ Jennifer Chambers, "Experts: Water shutoffs causing public health emergency" (July 26, 2017), *The Detroit News*, <<https://www.detroitnews.com/story/news/local/detroit-city/2017/07/26/detroit-water-shutoffs-health-study/104016812/>>.

17. However, Dr. Zervos' co-author, Dr. Alexander Plum, wrote: "because bacteria can begin to grow when water shutoffs occur, neighbors of impacted shutoff residences can also become sick. For that reason, and while still imperfect, our level of analysis in the current research (i.e. the block level) is still an appropriate associative level for analysis."¹¹

18. Other health experts have concluded that the water shutoffs have caused a "public health crisis." These include Dr. Wendy Johnson, clinical assistant professor at the University of Washington;¹² Dr. Abdul El-Sayed, former health director of the City of Detroit;¹³ and George Gaines, MSW, MPH, who in a 2018 analysis found that the shutoffs caused "epidemic levels" of water-borne illness.¹⁴ In a document titled "Memorandum of Waterborne and Food borne Disease in Detroit 2015- 2017," Gaines, a former Deputy Director of the Detroit Health Department identified four diseases which are directly related to the absence of water in a community. They are: gastroenteritis, campylobacter, shigellosis, and giardiasis. Gaines compared annual data for the period 2012 through 2015 with data from 2016 and 2017 when as many as 80,000 shut offs occurred.

19. Additional research is in progress, and it is expected to add to the already disturbing evidence that mass water shutoffs trigger public health emergencies. These projects are being conducted by We the People of Detroit and the Community Research Collective in cooperation with other researchers. The projects include:

¹¹ Alexander Plum to Dr. Marcus Zervos and Dr. Joneigh S. Khaldun, "Re: Thanks & 2 next steps" (April 18, 2017). Email.

¹² *Supra.* fn 10.

¹³ Jonathan Oosting, "Gov hopeful pledges moratorium on shutoffs" (November 2, 2017), *The Detroit News*, <<https://www.detroitnews.com/story/news/politics/2017/11/02/el-sayed-water-shutoff-moratorium/107247470/>>.

¹⁴ George Gaines, MSW, MPH, "Three Waterborne Outbreaks in Detroit" (June 2018), <<https://www.peopleswaterboard.org/wp-content/uploads/2018/07/DetInfDisease.pdf>>.

- A collaborative effort with Michigan State University that focuses on water quality within the water distribution system of DWSD. The project seeks an answer to the question of how water shut offs impact the quality of water.
<https://engagedscholar.msu.edu/magazine/volume11/quality-water.aspx>
- A Youth-led project conducted in partnership with Freshwater Futures and the University of Michigan that involves, among other things, water sampling and testing for high lead and copper levels in Detroit water.
<https://vimeo.com/320809586>
- A project led by Prof. Nadia Gaber to examine the psychosocial impact of water shut-offs – specifically the mental and physical health impact of water insecurity. The results of this study will soon be released by the New England Journal of Medicine. The research includes surveys that examine the health impact of water insecurity on prenatal care, medical necessity and other health vulnerabilities.¹⁵

ANALYSIS AND CONCLUSION

Scientific studies and the actual circumstances of persons without water services as set forth in detail above provide the basis for a declaratory ruling from MDHHS for a moratorium on water shutoffs in Detroit. MCL 333.2251 provides in relevant part:

Upon a determination that an imminent danger to the health or lives of individuals exists in this state, the director immediately shall inform the individuals affected by the imminent danger and issue an order that shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. The order shall incorporate the director's findings and require

¹⁵ <http://www.urbanwaterslearningnetwork.org/water-as-a-human-right-public-health-research-and-advocacy-in-detroit/>
<http://www.urbanwaterslearningnetwork.org/author/kaitlin-popielarz>
(Pages 7 - 9/ highlight the WPD: CRC work on the psychosocial impacts of water insecurity)
<https://haasinstitute.berkeley.edu/detroitwaterequity>
<http://inthesetimes.com/article/21412/detroit-water-shutoffs-child-services-debt>
<https://www.npr.org/2019/02/08/691409795/a-water-crisis-is-growing-in-a-place-you-d-least-expect-it>

immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or 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.

The statute further provides:

If the director determines that conditions anywhere in this state constitute a menace to the public health, the director may take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances in addressing that menace.

Given the facts and circumstances set forth above, this law minimally requires MDHHS to consider the facts and studies presented in this petition, and to make a determination of whether the conditions described pose an imminent danger to the people of Detroit.

The statute defines “imminent danger” as “...a condition or practice [that] exists that 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 existing and potential health crises demand an immediate official response. As provided by the statute, the Applicants request that MDHHS order correction of the imminent danger, specifically by the cessation of residential water shutoffs. If there is non-compliance or non-cooperation by the City of Detroit, and it is determined that conditions resulting from the water shutoffs are a menace to the public health, then Applicants urge “the director...[to]... take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances in addressing that menace.”

Finally, Applicants are concerned about actual or potential epidemics. MCL 333.2253 provides in relevant part:

If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people

for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

Applicants conclude that water constitutes an “essential public health service” necessary to prevent the spread of water-borne illness, and therefore finds this statute applicable to the mass water shutoffs. Applicants further highlight the fact that the Director’s emergency procedure options “shall not be limited to” the statute, and the Director is authorized pursuant to MCL 333.2253 to suspend water shutoffs. We urge the Director to do so now.

Respectfully Submitted:

/s/ Mark P. Fancher

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Dated: July 23, 2019