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MICHAEL VAN BEEK

EMERGENCY POWERS
IN MICHIGAN LAW

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The Mackinac Center for Public Policy

Emergency Powers in Michigan Law

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Introduction

Emergency powers enable the executive branch of government to make laws unilaterally, bypassing the statutory and constitutional requirements meant to protect the public from authoritarianism.* The Michigan Constitution holds that the state Legislature — the Senate and House of Representatives — is the only institution that may create laws. A grant of emergency power forfeits this lawmaking authority to the executive branch in certain circumstances.

The theory behind emergency powers is that the public could be spared from harm if the government established new laws quickly. The executive branch — the governor and various state departments and agencies — can respond more swiftly to fast-developing threats than the Legislature can. Such threats are, fortunately, rare, and emergency powers are used only occasionally.

The COVID-19 pandemic, however, spurred unprecedented use of this authority. These temporary powers persisted for months, even years. They were pervasive: invoked by multiple state officials and departments and impacting Michiganders' daily lives. Nothing was outside the reach of COVID-19 emergency rules; virtually all public interactions — and many private ones, too — were regulated by the executive branch.

Gov. Gretchen Whitmer used emergency powers to close businesses and schools and lock down large segments of society. The governor, however, violated the Michigan Constitution in attempting to maintain these powers for too long. This is a clear example of why emergency powers need to be reviewed and reformed.

While governments have mostly ended their use of emergency powers for the COVID-19 pandemic and returned to the normal lawmaking process, they could invoke them again. But the powers given to state officials in case of a pandemic are only one of many grants in state law of unilateral lawmaking authority to the executive branch.

Emergency powers should be treated with caution. They enable a single government official — even an unelected one — to suspend or deny citizens their fundamental rights. Yet, these powers are necessary if voters demand that their government attempt to protect them from certain dangers. This report identifies and analyzes the emergency powers that exist in Michigan law. It explains how to better ensure that these powers serve their purpose and how to reform these laws so that individuals are protected from their potential to be misused.

* The Merriam-Webster dictionary's definition of "authoritarianism" includes this: "of, relating to, or favoring a concentration of power in a leader or an elite not constitutionally responsible to the people." This concentration of power is a defining characteristic of emergency power laws.

The Case and Concern For Emergency Powers

Political leaders have yielded unilateral and authoritarian control of governments and societies throughout human history. In democratic governments constrained by the rule of law, however, this power may only be used in times of crisis, such as wars or natural disasters. Since all populations face risks and threats like these, most modern societies allow government officials to temporarily employ unilateral control to respond to emergencies.

If governments are to protect the public from emergent threats, they must act promptly. But lawmaking is typically designed to move slowly. To protect the public from harmful rules and abuse of power, government officials are required to follow a deliberate process to propose and enact new laws. Constitutions define these procedures.

The Michigan Constitution of 1963, for example, says that only elected members of the Senate or House of Representatives can propose new laws.[1] These proposed bills cannot become law until copies have been printed and made available to the Legislature for at least five days, and they must be read at least three times in each legislative chamber. Bills become laws if a majority of the members in both the House and Senate approve them in a recorded vote.[2] New laws do not take effect until 90 days after the end of a legislative session, which run in two-year cycles. If two-thirds of each chamber agree, however, a new law can be made immediately effective.[3] The governor must also approve of new legislation passed by majority vote in the Legislature. Bills that are vetoed by the governor must then gain two-thirds support from both chambers to become law.[4]

It takes time to fulfill these requirements: It is not uncommon for new legislation in Michigan to be months in the making. This provides opportunities for bills to be scrutinized, debated, modified and improved before they become law of the land. It also affords elected officials the chance to get feedback from their constituents about these specific proposals. This creates a tighter connection between the preferences of voters and the creation of new laws.

The benefits of a constitutionally required process to make laws are numerous, but so are the reasons why strict adherence to this process might make it more difficult for governments to protect the public from immediate threats. The dangers associated with a fast-developing threat might come and go before the Legislature is able to act, even if it works as quickly as possible. A defining element of emergency powers, therefore, is that they enable the executive branch to temporarily forego these procedural requirements and create law unilaterally, at the stroke of a pen.

Constraints on Emergency Powers

The exercise of emergency powers by the executive branch, on its face, violates the constitutional requirements for creating law through legislative procedures. It disregards democratic decision-making, the rule of law and maintaining a separation of powers among the three branches of government. Emergency powers, therefore, are only proper if the Legislature creates constraints on their use. In other words, the Legislature cannot properly delegate its lawmaking authority to the executive branch without maintaining some control over the use of this authority.

The Michigan Supreme Court's decision in October 2020 that struck down Gov. Whitmer's use of emergency powers made this clear. The court found that the only constraint in the 1945 Emergency Powers of Governor Act used by Gov. Whitmer was that the unilateral orders it authorized be "reasonable" and "necessary." This requirement did not provide "genuine guidance … nor constrained the Governor's actions in any meaningful manner," the court said.[5] It was for this reason the court declared the EPGA unconstitutional.

The dissenting justices argued that "reasonable" and "necessary" were in fact sufficient constraints on the Legislature's delegation of power to the governor.[6] Their argument raises an important point: It is not the mere existence of constraints that matters. All emergency power statutes in Michigan contain explicit or implied controls of some kind. What matters is how effectively the statues limit the delegation of the Legislature's constitutional, lawmaking authority.

Determining whether a textual constraint is strict enough is not an easy task. But the Michigan Supreme Court offered guidance in its 2020 decision. The court explained that the broader the delegation of power to the executive branch, the stricter and more precise the statutory constraints must be.[7] Many emergency power laws grant considerable power to the executive branch, so they should include strict and precise controls on their use.

There are four types of constraints that are commonly found in emergency power laws. Not all emergency power laws in Michigan contain each type, but many do. They vary widely in their wording and specificity, however. The effectiveness of these constraints varies, based on the language used in a statute. The four types of constraints are:

1) Trigger: conditions that must exist for emergency powers to be used.
2) Scope of authority: actions the executive branch is permitted to take.
3) Duration: how long the executive branch may exercise extraordinary authority, and how long its resulting emergency orders may last.
4) Procedural requirements: steps the executive must follow to exercise unilateral control.

Triggers

A trigger defines the circumstances that must exist for the government to use emergency powers. Governors and state officials cannot exercise unilateral authority whenever they please. A trigger limits this power to a temporary situation that may require immediate state action. Triggers are important because allowing the executive branch to make law unilaterally is otherwise unconstitutional.

Michigan's emergency powers statutes contain a variety of triggers. Many mention threats or harms to public health and safety, but most statutes use a unique description of an emergency situation. Here are examples from different emergency power statues:

- "a danger exists that could reasonably be expected to cause death or serious physical harm."[8]
- "endanger[s] the public health and safety."[9]
- "constitut[es] a danger to the public health, safety, or general welfare."[10]
- "potential to harm human health."[11]
- "imminent danger to the public health."[12]
- "poses an imminent risk of injury to the public health."[13]
- "poses an imminent or existing threat to the safety and security of a person."[14]
- "poses an extraordinary emergency to the … public health."[15]
- "presents a threat to public safety and health."[16]
- "poses an imminent hazard to the public health."[17]

The definitions of the terms used in these triggers matter a great deal. For example, what makes a risk of injury "imminent," or what qualifies as "serious physical harm"? What does "public health" include, and how does that differ from "public safety" or "general welfare"? Without clear definitions of these terms, the executive branch gets to determine whether these conditions are met.

An effective trigger is unambiguous and specific. It creates a distinct demarcation of when emergency conditions exist. It defines these circumstances precisely, often relying on a measure of a threat or harm that can be quantified and verified. Some triggers in Michigan law are designed this way, but others are severely lacking.

An example of a well-designed trigger can be found in a Michigan statute that grants governors the power to declare a state of energy emergency. The law says a governor may do this only when there is "a condition of danger to the health, safety, or welfare of the citizens of this state due to an impending or present energy shortage."[18] Existing or impending energy shortages can be quantified and confirmed, making this trigger's definition of emergency conditions specific enough to both guide executive action and protect against its misuse.

The Emergency Management Act of 1976, the most regularly used emergency power law, also contains a robust trigger. It names specific circumstances under which it may be used: fires, floods, snowstorms, ice storms, tornadoes, windstorms, oil spills, major transportation accidents, epidemics, droughts, infestations, explosions and more. But the law has a weakness: It also states that its use is "not limited to" the situations it names.[19] Thus, governors could use it for other purposes they alone determine are appropriate.

The now-repealed Emergency Powers of Governor Act, on the other hand, is an example of a law with an insufficient trigger. The statute said that governors could invoke emergency powers "during times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger thereof, when public safety is imperiled."[20] The statute is silent about what constitutes a great public crisis, disaster, catastrophe or a similar public emergency. As a result, governors had complete discretion to determine when to use these emergency powers. Other key terms, such as "reasonable apprehension," "immediate danger" and "imperiled," were also left undefined. Not surprisingly, governors have invoked this statute in many different situations: threats of coal shortages, labor strikes, urban riots, high mercury levels in lakes and rivers, and, most recently, a novel respiratory virus. Also not surprisingly, its use has often been controversial.[21]

The Administrative Procedures Act's Insufficient Triggers

If a trigger lacks details, it could allow the executive branch to grant itself lawmaking authority in situations the Legislature did not intend to provide it. As with the EPGA, many existing emergency powers statutes leave a substantial amount of discretion to governors or state officials over when emergency authority may be triggered. In these cases, executive branch officials determine for themselves when they may use broad, unilateral powers. This is concerning, as it undermines the separation of powers protection that statutory triggers are designed to maintain.

The Administrative Procedures Act of 1969 provides an example of a poorly constructed trigger. This law controls the process state agencies and departments must use when they make rules and regulations that have the force of law. The APA, however, gives bureaucrats a way to skip these procedural requirements by issuing what the statute calls emergency rules. These can be created unilaterally by a department and may last up to one year.

The APA provides little guidance about when these emergency rules may be issued. The statute states: "If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule … the agency may dispense with all or part of the procedures and file … an emergency rule."[22] This is an ineffective trigger because it relies on broad terms, such as "preservation," "public health," "safety" and "welfare." Equally troubling, it leaves the determination of what situation requires emergency rules to the discretion of bureaucrats who are not directly accountable to voters.

The APA says that the governor must sign off on these emergency rules, but this provides only a weak check on a department's powers.[23] The decision remains exclusively within the executive

branch; it does not involve a separate branch of government. In other words, the APA allows the executive branch to determine unilaterally when it may grant emergency powers to itself. It is worth pointing out that directors of state agencies serve at the pleasure of the governor.[24] As a result, the provision that an emergency rule cannot take effect without a governor's signature is little more than a formality.

This weak trigger allows departments to take a broad view of when emergency rules are needed. State bureaucrats have justified emergency rules simply when they want to issue rules quickly — not necessarily when the public's health, safety or welfare is at risk.

For instance, an emergency rule issued within the first decade of the APA required some real estate developers to register with the state. Another tweaked how gas stations reported prices to the state, while others imposed licensing and registration requirements on automobile repair shops and mobile home dealers.[25] The state even once issued emergency rules to require horses used in a parade in the St. Joseph County community of Mendon be tested for an infectious disease.[26] While there may have been legitimate state concerns in each of these situations, it is difficult see how public health or safety was at risk.

In some cases, agencies use emergency rules simply to buy themselves time as they prepare permanent rules.* This occurs when the Legislature passes a law that enables a department to promulgate new regulations to deal with a particular concern. Because the process of preparing and posting new rules is time-consuming, agencies sometimes issue an emergency rule, which has immediate effect. They then get to regulate behavior right away while having to 12 months to go through all the steps of creating a permanent rule.

Officials have used emergency rules to protect the state's finances from the consequences of inadequate or ineffective state action. Gov. James Blanchard considered using them in 1984 to avoid financial sanctions from the U.S. Environmental Protection Agency, for instance.[27] The state treasury department in 1997 created emergency rules to require cigarette wholesalers to attach a tax stamp to every pack. Legislation requiring tax stamps was in the works, but the department sought immediate rules to boost and protect state tax revenue from the perceived growing threat of cigarette smuggling.[28]

The APA's trigger is ineffective because it fails to constrain the use of emergency powers by the executive branch to specific situations. This is evidenced by wide-ranging application of emergency rules in Michigan's history. The APA's broad terminology and weak constraints allow departments to use unilateral authority whenever they are compelled to act quickly, not necessarily when the preservation of the public health, safety or welfare might necessitate it.

* For instance, the Department of Natural Resources issued emergency rules in 1975 to ban the use of nets in commercial fishing for Lake Michigan chubs. It did this while simultaneously seeking to establish permanent rules to the same effect. John Vanden Heede, "Snoopin' Around" (The Herald-Palladium, Saint Joseph, Mich., June 24, 1975), https://perma.cc/P9P4-NRX6.

Scope of Authority

Another feature of an emergency powers law is its indication of what state officials may and may not do during an emergency. This is referred to here as a scope of authority. It is important because the executive branch possesses what is known as the police power.[29] The police power is the most severe authority state government owns, allowing it to control and detain people in the interest of protecting the public from grave danger. Without scope-of-authority limits, the executive branch could use emergency powers to unilaterally exercise sweeping control over we the people.

As with triggers, clear definitions are best in describing what actions governors or state officials may take. A good definition gives the executive branch clear instructions for how to use emergency powers, reducing legal disputes about their use and better protecting citizens from abuse at the hands the government's police power.

A Michigan law that enables the governor to use emergency powers to deal with adulterated products provides a good example of an effective scope of authority. The statute says that the governor may order an adulterated product to be removed from retail stores, to prohibit its sale, to require it to be turned over to law enforcement or other state officials, and to issue other controls related to its manufacture, importation, sale or transport.[30] By specifying the actions a governor may consider in response to such an emergency, the Legislature provides clear guidance in what constitutes lawful use of this power.

A statute aimed at empowering the state to deal with problems involving public water supplies contains an example of a poorly constructed scope of authority. The Safe Drinking Water Act of 1976 authorizes the Department of Environment, Great Lakes, and Energy to take unilateral action "if a public water supply poses an imminent hazard to the public health."[31] But the statute does not provide any guidance about what actions the department may take. It leaves this decision to the department, authorizing "such actions as the department determines is necessary to protect the public health."[32] Essentially, the department may do whatever it likes.

Restraining the executive branch's power with a scope of authority helps preserve the balance of power in government and protect the rights of individuals. A proper scope of authority is also valuable for the executive branch, guiding and legitimizing its actions when using emergency powers.

Duration

Emergencies are situations that require immediate action. Emergency powers may only be used under these conditions. The need for immediate action diminishes with time, and emergency conditions end. A problem may be permanent, but there is no such thing as a permanent emergency. So, emergency powers, by definition, must be temporary.

This is not a mere quibble about language. Limiting the duration of emergency powers is necessary if public officials are to maintain the rule of law and separation of powers. As the government's only creator of official law, the Legislature must control these aberrations to the

constitutionally required lawmaking process and determine when they expire. If the executive branch could maintain lawmaking authority for however long it chose, there would be no functional separation of powers.

Durational limits are less complex than triggers and scopes of authority. They simply specify how long a grant of unilateral authority to the executive branch may last. Many grants of emergency powers in Michigan statutes fail to achieve this, however.

The most common problem with durational limits is that they do not stipulate a precise end date for emergency powers. Most statutes recognize or imply that the unilateral powers they authorize end when the emergency is over, but many defer the decision of when that occurs to the executive branch.

The controversial and now-repealed Emergency Powers of Governor Act provides a clear example. The first section of the statute authorized unilateral orders, and the second section addressed how long that authorization may last. It stated that the orders would "cease to be in effect" upon "declaration by the governor that the emergency no longer exists."[33] This formulation meant that the governor alone would decide how long unilateral emergency powers would last.

This deference to the executive branch conflicts with the constitution's requirement for a separation of powers between the branches of government. As mentioned, the EPGA also featured an ambiguous trigger that left to the governor the decision about what constitutes an emergency. This meant governors themselves could autonomously determine when they could grant themselves unilateral authority and for how long. This lack of durational restraint on the use of these powers was one thing the Michigan Supreme Court identified in its ruling that Gov. Whitmer's use of the EPGA was unconstitutional.[34]

A well-designed emergency powers statute establishes a precise length of time when these powers may be used, and once that duration has ended, the unilateral authority automatically expires. This mechanism is consistent with the temporary nature of emergencies and prevents the executive branch from violating the constitutionally requirements for separation of powers.

The Emergency Management Act of 1976 contains a model durational limit on the executive power it authorizes. The statute stipulates that a "state of disaster" or "state of emergency," circumstances enabling the governor to wield emergency powers, may persist for a maximum of 28 days.* After that time has passed, the governor must terminate the disaster or emergency and all lawmaking authority reverts to the Legislature.[35]

Time limits that require emergency powers to automatically expire provide a rigid restraint on the use of unilateral, executive authority. Statutes can be designed, however, to provide a flexible

* The bill that became the EMA of 1976 did not originally contain any time limit, and, like the EPGA, deferred entirely to the governor's discretion to determine when this unilateral authority would expire. A 14-day limit was added to the bill during legislative proceedings and before it was signed into law by Gov. William Milliken on Dec. 30, 1976. This limit was increased to 28 days in 2002. "House Bill No. 5314" (State of Michigan, June 5, 1975), § 3(3), https://perma.cc/26QZ-X7L3; "Enrolled House Bill No. 5314" (State of Michigan, 1976), https://perma.cc/4ZGX-UY4F; "Public Act 132 of 2002" (State of Michigan, March 29, 2002), https://perma.cc/JX22-AE3N.

limit, while still respecting the state constitution's separation of powers requirement. A law may, for example, contain a procedure by which the Legislature can prolong the automatic expiration of an emergency.

Both the energy emergency statute and the EMA include such a mechanism. A state of energy emergency can last a maximum of 90 days unless the Legislature votes to extend it. Legislators would need to pass a resolution specifying the length of the extension and do this by a majority vote in both chambers.[36] Under the EMA, the governor may ask legislators to extend the authorized use of emergency powers for a specified number of days. The Legislature must approve of this extension by passing a resolution to that effect.[37]

Durational limits are an important tool to prevent the executive branch from misusing emergency powers. Emergencies are temporary events, so this authority must expire. Statutes granting the executive branch extraordinary powers should require that they automatically expire after a specified length of time. Using powers beyond this hardcoded expiration date should only be possible if the Legislature approves, thereby preserving separation of powers.

Procedural Requirements

Emergency power laws also prescribe procedures executive branch officials must follow when using this authority. These measures prevent misuse of power by requiring a level of checks and balances, often through a separation of powers.

Michigan's emergency power laws contain a variety of procedural requirements. Some include multiple mandates, but others have none. One of the most common requirements is that officials notify the public or persons affected by the emergency action. Several emergency powers laws require departments to hold a public hearing about their emergency orders.

A 1945 statute charges the state agricultural department with preventing the spread of insect pests and plant diseases. It empowers the agency to "enter any premises in the state" to examine vegetation for such threats and to exterminate them if found.[38] Before the department may destroy any plants, however, it must comply with a list of procedural requirements.

After identifying a dangerous pest or disease, the department must "make a complete report" of the finding and justify the need to destroy the affected vegetation.[39] The statute also requires it to provide written notice to owners of the property that harbors the threat. Notices, at least one foot square in size, must also be posted in four "conspicuous places in the area" and mailed to every known owner or occupier of land affected by the department's orders. Officials must do this at least 15 days before they remove the pest or disease. Property owners, within 10 days of being notified, may appeal the state's decision to order their plants be destroyed.[40]

These procedural requirements protect the rights of property owners. They allot them time to prepare for and challenge the department's decision. Several emergency powers laws in Michigan included similar protections.

For instance, a handful require departments to hold a hearing within a certain number of days of issuing unilateral orders that affects businesses or individuals. The state environmental department must hold a hearing within seven days if it revokes a business's license to handle solid waste.[41] Similarly, it must provide a hearing within 15 days of issuing an emergency order to a dam owner.[42]

Other requirements are aimed at involving another branch of government in a department's use of emergency powers. This provides a check on the executive branch. For instance, a statute empowers the state's environmental department to "restore, reclaim, abate, control or prevent the adverse effects of coal mining practices" if the public health is threatened.[43] Before entering private property, however, the agency must obtain a warrant from a court, authorizing its actions.

A 1956 statute grants the state health department the power to unilaterally order drain commissioners to modify drain or sewer operations. But before the state can enforce these orders, the department must obtain the approval of a county judge.[44]

Procedural requirements constrain the power of the executive branch when it takes emergency actions. They protect individual rights, whose only other recourse is the slow, lengthy and expensive conventional legal system. It took the courts months to rule on cases against Gov. Whitmer's use of emergency powers to respond to COVID-19, for instance. Requirements for hearings and other judicial checks are important means to protect citizens and others in the private sector against officials who would abuse individual and property rights.

Emergency Powers in Michigan Law

There are more than 30 instances in Michigan law where the Legislature grants the governor or a state agency the authority to act unilaterally in an emergency. These grants vary significantly in their scope, purpose and use. Some emergency powers are used regularly — multiple times a year, on average — while others have likely never been used.* Some give the executive branch broad discretion to regulate large portions of society, while others apply only to minor concerns.

For this analysis, emergency powers are organized into four categories. The first category consists of three well-known and often-used statutes that confer broad authority on a department, agency or the governor. These are referred to here as "The Big Three." The second category consists of laws that provide broad authority, with only weak constraints. These are distinguished from a third group, statutes that provide limited authority and strong constraints. And the fourth set includes statutes that are either antiquated or duplicative. These have likely never been used, or they grant powers that the executive already possesses through a different statute.

* There is no requirement and mechanism for the state to formally report or record the use of these powers, so it is difficult to determine when or if some of these powers have been used in the past. Most of the historical information presented here is based on a review of past editions of Michigan newspapers that are digitized and available online through Newspapers.com.

The Big Three Emergency Powers Laws

These three laws are Michigan's most used and well-known emergency powers statutes. Two — the Emergency Management Act of 1976 and the Administrative Procedures Act of 1969 — have been exercised hundreds of times over the last several decades. They are deployed for a wide range of circumstances, including anything a state department has the power to regulate. There are few limits on the subjects for which these emergency powers might be used. The third law, conversely, has been invoked only once, but its use was more extensive and far-reaching than any other emergency power ever used.

Emergency Management Act of 1976

This statute provides the broadest authority for the governor to declare an emergency and take charge of the state's response. The EMA specifies that it may be used for fires, floods, snowstorms, ice storms, tornadoes, windstorms, oil spills, water contaminations, utility failures, radiological incidents, major transportation accidents, hazardous material spills, epidemics, blight, drought, infestation, explosions or hostile military action.[45]

The EMA contains a long list of potential actions governors may take. They can suspend laws and regulations, issue unilateral orders that have the force of law, make use of local or federal resources, redirect functions of state government, commandeer private property (subject to just compensation), force residents to evacuate or restrict them from occupying certain areas, suspend the sale of alcohol and explosives, and establish temporary emergency housing.

A governor's actions are not strictly limited to this list, however. The statute prefaces its listing with this clause: "In addition to the general authority granted to the governor by this act."[46] It is not clear from a plain reading of the statute what this general authority refers to, but it could be construed to permit a substantial grant of power to governors. A section of the EMA covering the responsibility of governors in emergencies appears to give them broad control over any emergency. It states, "The governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency."[47]

Although the EMA has a broad scope of authority, it includes a tight durational limit. Emergency declarations and the powers they authorize automatically expire after 28 days. The statute also provides a process for extending declarations: Governors must receive approval from the Legislature to extend their emergency powers. Only if a majority of lawmakers approve may the EMA's emergency powers last longer than 28 days. A legislatively approved extension must also explicitly state how long it will last, and it must automatically expire at the end of that time.[48] Hypothetically, these powers could be extended indefinitely, but this would require repeated support from both chambers of the Legislature and the governor.

The EMA is most often in response to local natural disasters, such as blizzards, floods and tornados. It was used more than 80 times between 1977 and 2019, according to a 2019 report by the Michigan State Police.[49] Gov. Whitmer used it in her initial response to the COVID-19 pandemic, in conjunction with the EPGA. But the Michigan Supreme Court unanimously ruled,

as part of its decision against the governor in October 2020, that her use of the EMA in the pandemic was illegal. The governor attempted to extend her unilateral authority under the EMA without legislative approval.[50]

Another function of the EMA is to authorize the use of state and federal funds to help with local disaster relief. When a governor declares an emergency under the EMA for a particular city or county, the state may use its resources to help with the relief effort. These resources can include state-provided financial aid as well as management and coordination of resources.[51] An emergency declaration also enables the state or local unit of government to accept federal relief funds.[52] Finally, the EMA provides immunity for people providing disaster relief and for medical professionals providing services in the area affected by the emergency declaration.[53]

The Administrative Procedures Act's Emergency Rules

As previously mentioned, the Administrative Procedures Act of 1969 provides a broad set of emergency powers to state agencies. The APA controls the rulemaking process departments must follow to create new regulations. Agencies may only create rules when explicitly empowered by state statute, and the APA establishes procedures that agencies must follow when they do this. Among other things, departments must submit proposed rules for legislative review, provide public notice and conduct a hearing.[54]

The APA enables state departments to skip the rulemaking process and immediately implement emergency rules. These rules can last up to six months and be extended for another six months. The decision of when to implement an emergency rule, as well as when to extend it, is left to the department.

As described in a previous section, the APA has a poorly defined trigger. The statute also has a weak scope of authority. It provides no clear guidance about what a department may do when issuing emergency rules.

That said, the scope of these emergency rules appear limited in the same way an agency's conventional rules are. Departments may only write rules pertaining to subjects that the Legislature grants them authority to regulate. Typically, statutes identify the subject and purpose of the rules a department may promulgate. The APA makes this clear: "A rule must not exceed the rule-making delegation contained in the statute authorizing the rule-making."[55]

Emergency rules appear to fall under the APA's definition of a "rule." The statute defines a rule as "an agency regulation, statement, standard, policy, ruling or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure or practice of the agency."[56] It then lists and excludes dozens of other agency actions from this definition.[57] Emergency rules are not listed as being excluded. Thus, like all other rules, emergency rules appear limited to issues which a department is statutorily authorized to regulate.

Some departments have broad authority to issue emergency rules under the APA. Many laws use far-reaching language when they grant departments the power to create rules. For example, the Michigan Department of Natural Resources is statutorily authorized to "promulgate rules to protect and preserve lands and other property under its control from depredation, damage or destruction."[58] This broad grant of authority appears to empower the department to write rules about anything that might possibly cause damage to land — which is a long list, no doubt.

Similarly, the Michigan Department of Health and Humans Services is authorized by statute to "promulgate rules to safeguard properly the public health."[59] What properly safeguarding the public health means is not defined. The health department could, seemingly, issue emergency rules about anything that it determines might conceivably affect "public health" — an undefined term. When a state department is bound only by nebulous concepts such as this, there appear to be few limits on how it could use emergency rules.

The Michigan Occupational Safety and Health Administration response to the COVID-19 pandemic provides an example of a state department stretching its authority to new heights when issuing emergency rules. MIOSHA's unilaterally developed rules were unprecedented in their depth and breadth. They applied to every employer in the state. They required employers to conduct daily health screenings of every employee and keep records of these screenings. The department mandated that employers actively monitor their employees' movements, require them to use personal protective equipment, train every employee and require employees and their customers to wear masks.[60]

No statute in Michigan law grants MIOSHA the power to regulate the transmission of respiratory viruses in workplaces, as the agency's rules did. But the law empowering MIOSHA to issue rules contains broad language about its purpose. It defines its objective this way: "[A]ll employees shall be provided safe and healthful work environments free of recognized hazards."[61] It goes on that employees must have "a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee."[62] It was this language that MIOSHA pointed to in justifying its power to issue emergency rules under the APA in response to the public health threat of COVID-19.[63]

Emergency rules issued under the APA are common. State departments issued 254 such rules from 1984 to 2021, according to Michigan's Legislative Service Bureau.[64] That's an average of nearly seven per year. But before the COVID-19 pandemic, they were being used less and less. Only 34 emergency rules were issued by state departments between 1998 and 2019, according to state records.

Epidemic Orders

The last of the Big Three emergency powers are known as epidemic orders and were used extensively during the first two years of the COVID-19 pandemic. Gov. Whitmer pivoted to using these powers after the Michigan Supreme Court ruled her use of both the EPGA and the EMA unconstitutional. These statewide powers had likely never been used before 2020.*

These epidemic orders are part of state law known as the Public Health Code, a massive section of the law that regulates most medical services and products, as well as other health-related issues. These orders empower the director of the state health department to "prohibit the gathering of people for any purpose" and "establish procedures … to insure continuation of essential public health services and enforcement of public health laws."†

There is little else to this statue, and as such, it provides few, if any, guidelines for how this power may be exercised properly. Its scope of authority is far too vague. For example, what constitutes a "gathering"? What actions could qualify as "procedures" to protect public health? What are the "essential public health services" that need to be preserved? Answers to these fundamental questions are left entirely to the discretion of the department.

The statute also lacks a durational limit on how long epidemic orders may last. This means the health director's unilateral authority could theoretically last indefinitely. In fact, many of the orders issued through this statute in 2020 and 2021 contained no expiration date.[65] Several epidemic orders are still in effect in Michigan of this writing, more than two and a half years after the onset of the COVID-19 pandemic.[66]

Gov. Whitmer's administration used epidemic orders in broad fashion. The first order, issued on March 23, 2020, appeared to establish procedures to protect health care capacity. It required hospitals to report COVID-19 incidences, bed capacity, personal protective equipment inventory, staffing shortages and more. It also required testing facilities to prioritize COVID-19 tests. It had no expiration date.[67]

The second order, issued April 2, 2020, did not prohibit gatherings or establish any procedures. Instead, it declared that three executive orders Gov. Whitmer had issued under the EPGA and EMA were necessary to protect public health. It further stated that every person in Michigan must comply with them or risk criminal penalties. The order authorized local health departments, sheriffs, chiefs of police, county prosecutors and other local law enforcement entities to investigate potential violations and enforce the governor's executive orders. It had no expiration date.[68]

The governor's executive orders did prohibit some types of gatherings, so perhaps this could be construed to fall within the statute's authority. But the executive orders included many other

* This conclusion is based on a search of past editions of digitized newspapers made available online by Newspapers.com for stories about previous epidemic threats in Michigan, including those in 1918, 1957 and 1968. The search did not find any mention of statewide epidemic orders like those used for COVID-19 under the authority of the state health department.

† MCL § 333.2253(1). The statute also declares that "emergency procedures shall not be limited to this code." Presumably, this means that other emergency actions may be taken in coordination with these powers, perhaps authorized by the EMA or other emergency powers laws.

mandates that do not appear within the health department's power to regulate, such as what constitutes critical infrastructure, how certain businesses could operate and what goods people could purchase.[69]

In addition to this questionable application, the April 2 order also required every Michigan resident to comply with the executive orders' "accompanying frequently asked questions that may be updated from time to time."[70] There were several hundred FAQs already, and within the coming months, the state added hundreds more, bringing the eventual total to more than 1,000.[71] It is not clear how these FAQs were produced, or by whom. But they appeared to be created and updated on an ad hoc basis, without following any legally established method or statutorily authorized process.

In other words, the state health department appears to have used epidemic orders to require every person in Michigan to comply with, under penalty of law, mandates created arbitrarily, simply posted online by a state employee or bureaucrat. Nothing in statute permits a department to issue legal orders by way of periodic postings to a state website. Subsequent epidemic orders dropped references to these FAQs.[72]

Later epidemic orders, issued after the governor's executive orders were ruled unconstitutional, were expansive in other ways. These orders defined gatherings as "any occurrence where persons from multiple households are present in a shared space in a group of two or more."[73] This allowed the department to regulate nearly all social interactions.

The orders were used to limit the number of people who could enter certain venues, such as retail stores, libraries, museums, public pools, fitness centers, bowling alleys, roller rinks, ice rinks and trampoline parks.[74] At times, "gatherings" in certain places were prohibited entirely, such as at high schools, casinos and restaurants.[75] This forced thousands of businesses to close. The statute does not authorize the department to shutter businesses, but by defining every social interaction as a "gathering," it effectively granted itself this power.

The orders also established rules for some gatherings. For example, "gatherings for the purpose of sports practice and competition involving persons age 13 to 19" were for a time only permitted if the participants tested for COVID-19 on a weekly basis.[76] People could only "share space" at barber shops, hair salons, massage parlors and exercise facilities if those businesses recorded the name, phone number and time of entry of every visitor.[77]

Rules on gatherings restricted what people could do on their own private property, such as hosting people in their own homes. The orders stated, "All persons participating in gatherings are required to wear a face mask."[78] This meant that anyone sharing space with someone from a different household, even in their own home, was required by law to wear a mask. The rule was impossible to enforce, of course, but criminal penalties awaited violators of this provision.

The state issued nearly 50 epidemic orders, averaging a new one each week, from late March 2020 to June 2021.[79] In addition to the sweeping rules on gatherings, other orders appear aimed at protecting public health services. The connection between the regulated activity and health care

capacity was not always obvious. For example, some orders addressed housing for the homeless, visitation rules at juvenile detention centers, and testing and reporting requirements at prisons, adult foster care homes and certain agricultural businesses. Orders related to the handling and reporting of the dead, the licensing requirements of morticians, and visitation protocol and limits at hospitals had a stronger link to health care services.[80]

The department often issued new epidemic orders to rescind previous ones. This was necessary because many orders did not include an expiration date. The most significant recision was issued June 17, 2021. It canceled most of the previous epidemic orders in one fell swoop.[81]

Other Broad Emergency Powers Laws

The Big Three are not the only emergency power laws that grant the executive branch expansive, unilateral control in certain circumstances. Seven other laws are broad in scope and contain few constraints on executive power. They tend to have weak triggers, poorly defined scopes of authority, no durational limits and few procedural requirements.

Imminent Dangers

Two laws grant state departments unilateral power in case of so-called imminent dangers. These statutes are related, as they use similar language to define imminent dangers and provide similar authority to MIOSHA and the state health department.

The definition of an "imminent danger" in both statutes is broad. The Public Health Code says it occurs when "a condition or practice 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."[82] Terms such as "reasonably be expected" and "serious physical harm" are too subjective to offer much guidance about when this power may be triggered. The definition in the MIOSHA-related law is no better: It uses similar language and differs only in specifically referring to imminent dangers in workplaces.[83]

Despite this imprecise trigger, both statutes imply that an imminent danger is a localized event, affecting, at most, one area and a small group of people. For example, the director of the state health department is required to "inform the individuals affected by the imminent danger" and "issue an order … to a person authorized to avoid, correct, or remove the imminent danger."[84] Similarly, MIOSHA's imminent danger orders concern an individual business and its employees.[85] In fact, the MIOSHA statute envisions only select areas of a workplace being at risk; it requires the health department to "apply a tag to the equipment or process that is the source of the imminent danger."[86]

Both MIOSHA and the health department may order individuals to address an imminent danger and prohibit them from entering locations where the danger exists.[87] Interestingly, neither statute appears to grant the departments the ability to enforce these unilateral orders. If a person or employer does not comply, the departments must get a circuit court to order them to do so, according to the statutes.[88]

This procedural safeguard constrains the unilateral element of these emergency powers. But the statutes' broad definitions of "imminent dangers" mean they could, nevertheless, have a far-reaching impact. There is also no durational limit to these emergency orders articulated in either law.

Menace to Public Health

Another broad emergency power relates to a so-called menace to public health. It resides in the Public Health Code, in the same section as the imminent danger powers.

The most concerning element of this power is that the term "menace to public health" is not defined anywhere in Michigan law. What constitutes one is left entirely to the opinion of the state health director. This official may exercise these powers, according to the statute, when he or she "determines that conditions anywhere in this state constitute a menace to the public health."[89]

The word "menace" appears 21 other times in Michigan Compiled Laws, but these uses do not shed light on how this emergency power may be used. The term refers to many different things: released prisoners, dynamite, fire hazards, urban blight, inadequate drain filtration, neglected or abandoned trees and plants, economic insecurity due to unemployment, and the habits and conduct of a juvenile, among other things.[90] What a menace to public health means in the Public Health Code is a mystery.

The scope of authority in this statute is also ill-defined. The state health director may "take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances" to deal with the menace. Whether this would allow the director to issue unilateral emergency orders is not clear. Further, the department already administers state health laws and regulations, so exercising this power may amount to simply enforcing local health laws and regulations.

If this interpretation is correct, the scope of authority to deal with menaces to the public health would be sufficiently constrained. But the statute should still be considered broad and potentially far-reaching. It relies on a completely undefined trigger and provides no durational limit or procedural safeguards.

Animals and Insects

Michigan law grants the executive branch emergency powers to deal with the threat of animal diseases. While these powers reside in the Animal Industry Act of 1988, they apply to all animals, not just livestock used in food production or other industries.* The statute enables the governor to assume emergency powers if the director of the state agriculture department recommends it. In addition, the director may issue his or her own emergency orders about animal-related threats to public safety. Lawmakers added these powers to the act in 2019.[91]

* The statute defines "animal" as "mollusks, crustaceans, and vertebrates other than human beings including, but not limited to, livestock, exotic animals, aquaculture species, and domestic animals." MCL § 287.703(b).

The state agriculture director can trigger this emergency if he or she "determines that a disease or condition in animals in this state poses an extraordinary emergency to the animal industry, public health, or human food chain" in Michigan.[92] "Disease" is defined as "any animal health condition with potential for economic impact, public or animal health concerns, or food safety concerns."[93] This broad trigger offers significant latitude to the director to claim authority for initiating unilateral action.

Once an emergency is declared, the governor may "expedite necessary procedures to control the spread of, or to eradicate, the disease or condition."[94] That is the extent of the statute's scope of authority. What actions could qualify as "necessary procedures" is not defined, leaving the decision entirely to the governor. As highlighted previously, the EPGA used similar language, which the Michigan Supreme Court found insufficient as a safeguard. The statute also lacks a durational limit on the governor's grant of unilateral authority.

The powers the director of the agricultural department possesses to issue emergency orders in case of animal diseases are similarly wide-ranging. The trigger is broad, enabling the director to issue and enforce an emergency order whenever he or she determines that an "animal disease or condition in animals will cause a significant impact on animals, the animal industry, or public health."[95] The order must be "scientifically based" and "specific" and must "consider the impact on animals and product movement." But these terms are not defined, and no other language in the law defines the scope of authority.

Unlike the governor's power, however, a director's emergency orders have a durational limit and must follow some procedural requirements. Emergency powers may not last longer than six months, and the director must notify the relevant animal industry within 72 hours of issuing emergency orders. If the emergency has "a significant impact on public health," the director must consult with the state health department.[96]

The agriculture department also may assume emergency powers through the Insect Pests and Plant Diseases Act of 1945. These powers are not as broad and include several procedural safeguards. The scope of authority is also limited — to entering premises, examining potentially harmful insects or plants with infectious diseases and exterminating them.

What might trigger this unilateral action is poorly defined, however. The statute authorizes emergency action when the director becomes aware that "any dangerous insects or infectious diseases exist or are supposed to exist within this state."[97] If they do exist, the director must notify affected property owners. If they cannot be reached, the department must post notices in conspicuous places and notify nearby landowners. The department must issue these notices 15 days before it starts to remove the pests or diseased plants. Landowners who disagree with the department's decision may appeal to the department within 10 days, but the director has the final say.[98]

The statute implies that these notices should contain an order for property owners to remove the plants that are infected or harbor harmful pests. It states that if they refuse to "carry out the orders

[of the department] within the period stated in the notice," then the department must "employ such aid as may be necessary to carry out" the orders.[99] Presumably, this means the department may remove the plants itself.

Safe Drinking Water and Adulterated Products

The state department of environmental quality — now called the Michigan Department of Environment, Great Lakes, and Energy — regulates city water departments and other entities that supply drinking water. Its authority comes from the Safe Drinking Water Act of 1976, which charges the department with supervising and controlling public water supplies. Under it, the department has the power to enter the premises of and inspect a supplier of water and order changes to its system of operation.[100] A supplier may request a hearing within 30 days and challenge the department's orders, but it must comply with the department's final decision.[101]

The act also empowers the department to, without notice, issue emergency orders that are not subject to a hearing.* It may exercise this power if it determines that "a public water supply poses an imminent hazard to the public health."[102] The orders may "requir[e] such action as the department determines is necessary to protect the public health."[103] Orders persist until the department rescinds them — there is no durational limit.†

While these orders impact only public water suppliers, large populations can depend on a single water supplier. For instance, if the department errs and its orders degrade the quality of the water in an area, it could impact thousands of people. Michiganders know this risk well, having witnessed the regulatory failures that contributed to the Flint water crisis.

Errors of this kind are, thankfully, rare, but there are other concerns with the language of this statute. Its trigger and scope of authority are deficient, lacking specificity. An "imminent hazard" is defined as a condition that "in the judgment of the [department's] director … require[s] immediate action to prevent endangering the health of people."[104] This offers broad discretion to the director. Similarly, the actions the department may take are not defined or limited in any way.[105] How long these orders may persist is also unaddressed.

Another emergency power law concerns a similar threat and suffers from similar deficiencies. The Adulterated Products Act of 1988 permits the governor to declare a public health emergency in case "any food or beverage that is consumed by humans" or "any medicine … consumed or used by humans" has been "adulterated."[106] The statute uses the definition of "adulterated" contained in a separate act, the Food Law of 2000. Products can be adulterated for at least 14 different reasons, such as containing a "substance that may render it injurious to health," consisting of "diseased, contaminated, filthy, putrid or decomposed substance," having been "produced,

* The statute suggests that the "normal administrative procedures" required in the APA must "proceed concurrently" when, after the department issues an emergency order, an entity that supplies water to the public makes an appeal within 15 days. It is not clear from the statute which specific APA requirements must be followed, however. MCL § 325.1015(3).

† The statute also states that orders may be rescinded by a court. Presumably this means the statute envisions these orders facing a legal challenge from a public water supplier. MCL § 325.1015(3).

prepared, packed, or held under unsanitary conditions," or simply being "otherwise unfit for food."[107] Although this creates wide discretion for a governor to declare a product adulterated, it is does not appear that any governor has ever used this power.*

Governors may trigger an emergency declaration when they have "a reasonable basis to believe that a consumer product has been adulterated and presents a threat to public safety and health."[108] The type of evidence that could be used to inform a governor's belief is not specified, providing them broad discretion.

The scope of authority for this statute is better than it is for the Safe Drinking Water Act, but it is still wide-ranging. The statute lists three actions that governors may take: forbid the sale of the product, require retailers to remove it from public display, or require them to hand the product over to state officials.[109]

The statute authorizes a fourth, troubling action. Governors may order "any other limitations, controls, or prohibitions considered necessary … regarding the manufacture, importation, sale or transportation of the consumer product."[110] This language is so broad it renders the enumerated actions needless. Governors may use this catch-all to unilaterally do virtually anything they deem necessary.

The statute does include a durational limit on how long governors may possess emergency powers. The initial emergency declaration cannot last longer than 60 days, and the governor may unilaterally extend it only once. The extension cannot last for more than 30 days. A declaration could persist longer, however, if the Legislature, by majority approval in both chambers, passes a resolution to renew and continue the state of emergency.[111] This provides a check on the governor's unilateral authority, but still leaves open the possibility that these emergency powers could last indefinitely.

Limited Grants of Emergency Power

The laws in this set of emergency powers laws contain enough constraints to safeguard against their abuse. They tend to have well-defined triggers, limited and precise scopes of authority, durational limits and procedural requirements. Many of these laws could, nevertheless, still be improved. They are generally designed well enough to make their misuse unlikely.

Energy Emergency Powers for Governors

One of the most frequently used emergency powers in this group is the governor's ability to declare a state of energy emergency. This comes from an act created in 1982. As previously stated, it may be triggered when there is "a condition of danger to the health, safety, or welfare of the citizens of this state due to an impending or present energy shortage."[112] The governor determines

* The state failed to produce any records of its use when asked, and a search of past editions of digitized Michigan newspapers available online through Newspapers.com returns no stories of governors using this power.

when there is a "lack of adequate available energy," and these powers can be used whenever there is a shortage in "any part of the state" — perhaps in a single village, town or city.[113]

The statute contains a detailed scope of authority. Governors may restrict the use and sale of energy; the interior temperatures of public buildings; the use of lighting and hours of operation of any type of building; and the use of vehicles and public transportation.* In addition, the governor may require suppliers to deliver energy to a certain person or facility if that person or facility provides "essential services for the health, safety, and welfare of the residents of this state."[114] Governors may suspend a state statute, order or rule if it "will prevent, hinder, or delay necessary action."[115]

What key terms in the scope of authority mean are left to the discretion of the governor, however. "Essential services," for example, is not defined, nor is the "necessary action" that would justify suspending a state statute. The scope of authority does prohibit certain actions during a declared energy emergency. A governor "may not suspend a criminal process or procedure or a statute or rule governing the operation of the legislature."[116]

The state contains a firm durational limit, with emergency declarations automatically expiring after 90 days.[117] It can be extended, but only if the Legislature approves. Additionally, the Legislature, with a majority vote in both chambers, may end an energy emergency declaration at any time.[118] Effectively, this means that both the executive and legislative branches must agree on the need for extraordinary action.

Environmental Emergency Powers

The Natural Resources and Environmental Protection Act of 1994 is one the state's most wide-ranging laws. It contains hundreds of sections, covering topics such as endangered species, wetlands, beach erosion, waste management and pesticide control. It also provides seven emergency powers to state officials that are properly limited in their scope.

Dam safety is the subject of one emergency powers law. The department of natural resources may "order an owner to immediately repair, draw down, breach, or cease operation of a dam." This is a limited and precise scope of authority. The trigger is less specific, but it only pertains to a dam that is "in imminent danger of failure and is causing or threatening to cause harm to public health, safety, welfare, property or the public trust in those natural resources."† If a dam owner fails to

* The statute refers to the interior temperatures of "public, commercial, industrial, and school buildings." Presumably, this means that the governor could not restrict the temperatures of private homes and residences. MCL § 10.84(a).

† MCL § 324.31521(1). Although not labeled an emergency order, one section of the NREPA appears to empower state bureaucrats to issue unilateral orders to dam owners to "limit dam operations." This is permitted for similar reasons the emergency orders are allowed: ("[w]here significant damage to the public health, safety, welfare, property, and natural resources or the public trust in those natural resources or damage to persons or property occurs or is anticipated to occur due to the operation of a dam"). State officials may also order the removal of a dam for similar reasons. How these powers differ from the emergency powers also contained in the statute is not clear from a plain reading. MCL § 324.31519(1)-(2).

comply with this order, the department may take action to "alleviate the danger" and may charge the owner for the costs of doing so.[119]

The law leaves it to state officials to determine when a dam-related emergency ends. But it has a procedural restriction: The department must provide a hearing to the affected dam owner within 15 days of issuing the emergency order.[120] The department has the final say about whether the orders will continue, be modified or end.

The NREPA regulates nonnative organisms and prohibits people from possessing certain species.[121] It outlines a process for the state's natural resources department to modify this list of prohibited species.[122] But the department may also use an emergency order to skip this process and immediate designate an organism a prohibited species, making its possession a violation of state law.[123] The department must publicize these emergency orders, which may last for a maximum of 90 days.[124]

A handful of emergency powers in the NREPA address industrial mining. They use similar triggers, referring to dangers and threats to public health or the environment. The state environmental department may issue emergency orders to require operations that mine for metals — copper, iron ore and nonferrous metallic minerals — to suspend their activity, a concise scope of authority.[125] These orders have strict durational limits of only 10 to 30 days.*

The environmental department has somewhat broader powers when it comes to coal mining. Officials may enter private lands and "restore, reclaim, abate, control or prevent adverse effects of coal mining" if there is an emergency.[126] No durational limit appears in the law, but the department may only take this action if no one else, including the landowner, mine owner or other unit of government, is addressing the situation.[127] A further procedural constraint is that the department must obtain a warrant from a court before entering the property.[128] These rules provide proper guardrails on the use of this power.

Finally, the NREPA also controls outdoor recreational activity in Michigan, including boating. Under this section of law, state bureaucrats may use emergency powers to unilaterally "establish a temporary reduced maximum vessel speed limit."[129] There are several limits and procedural requirements on this power, however. The state cannot act unless it is petitioned by a county or municipality; it cannot prohibit the use of boats; it must place buoys in the waters to notify vessels; and it must post the limits and maximum fine amount on its website.† These emergency speed limits can only be in effect from Sept. 1 to June 20, may not last for more than 14 days, and may only be reissued once per calendar year.[130]

* Emergency orders dealing with copper mining may last 10 days but then be extended for up to 30 days if the department conducts a hearing. MCL § 324.63417(3); MCL § 324.63506; MCL § 324.63221(4).

† The maximum fines are established in statute: $100 for first offense and $500 for the second and subsequent offenses. MCL § 324.80146(a)-(d).

Miscellaneous Public Health Emergency Powers

Scattered throughout Michigan law are another handful of emergency powers that grant state officials the authority to act unilaterally. These powers are narrowly focused, permitting only limited and specific actions that may last for just a short period. Several of these powers reside in the Public Health Code or belong to the state health department.

A section of law regulating dry cleaners allows the state environmental department to issue an emergency order without the need to give notice or hold a hearing immediately.* This is permitted when the department determines "an emergency exists requiring immediate action to protect occupational or public health and safety."[131] The order would presumably apply only to a single dry cleaner, as the statute refers to the "person whom the order is directed."[132] That person may request a hearing, which the department must provide within 15 days. Such an order does not automatically expire, but it must be continued, modified or revoked within 30 days of the hearing.[133]

Another section of the state's health law empowers the environmental department to act unilaterally to control radiation in a specific instance. The scope of authority is very narrow, only permitting the department to withdraw the authorized use of a radiation machine for mammography.[134] This is triggered if the department determines the machine "seriously affects the health, safety, and welfare of individuals."[135] The department must hold a hearing within five days of issuing the order and must first inspect the machine before reauthorizing its use.[136]

The Public Health Code enables the health department to invoke emergency powers to limit the movement of and detain individuals it believes have a "substantial likelihood" to spread a "serious communicable disease."[137] In these situations, the department may issue the individual(s) a warning notice, requiring them to do what the department believes is necessary to prevent infections. These warnings may require the individual(s) to participate in education, counseling, medical tests or treatment programs.[138] The statute restricts these notices to named individuals, stating, " A warning notice shall be individual and specific and shall not be issued to a class of persons."[139]

The statute includes procedural requirements that the department must follow if it wishes to detain individuals or force them to comply with its orders. Specifically, the department first must petition a circuit court to hold a hearing involving the individual.[140] The department must also get permission from the courts to forcibly detain someone. In such cases, a hearing must be held within 72 hours of the beginning of the detainment, and any detention may not be extended for more than five days.[141]

Another emergency power afforded the state health department lets it unilaterally regulate a substance that it determines to be "an imminent danger to the health or lives of individuals in this state."[142] This statute is part of the Administrative Procedures Act, not the Public Health Code. It enables the department to skip the rulemaking process it normally must follow if it wishes to label a substance a "controlled" one and subject it to regulation. As with other emergency rules enabled

* These powers once belonged to the state department of health but were transferred to the environmental department in 2017. Gov. Rick Snyder, "Executive Order No. 2017-7" (State of Michigan, Oct. 5, 2017), https://perma.cc/G72W-S5RK.

by the APA, this labeling of a substance may last up to six months, and the department may renew the emergency labeling for another six months.[143]

Two other emergency powers aim to keep buildings and homes safe. The Housing Law of Michigan, enacted in 1917, allows the state health director to unilaterally order the evacuation of dwellings considered to be "infected with contagious diseases," "unfit for human habitation," "dangerous to life or health," or "for any cause."[144] While this last cause is a broad trigger, such an emergency evacuation may not last for more than 10 days.[145] The health director may also unilaterally order repairs to a building that is "dangerous or detrimental to life or health."[146] The statute is silent on how this would be enforced, but like many emergency powers in Michigan, it is unlikely that this one has ever been used.*

State law also provides emergency powers to deal with the threat of fire hazards. The state fire marshal possesses this power, but it is very narrow. It may be invoked if the marshal "determines that a fire hazard is imminently dangerous or menacing to human life."[147] But from there the matter is essentially turned over to the courts. The only thing the fire marshal is authorized to do is ask a circuit court to order the removal or abatement of the fire hazard.[148]

Most of the limited grants of emergency mentioned in this section are rarely, if ever, used. Some could be repealed with no impact on the state government's ability to protect public health. Because these powers include well-defined triggers, narrow scope of authorities, durational limits or procedural requirements, there is little concern for potential abuse.

Duplicative or Antiquated Emergency Powers

Lawmakers rarely make an effort to remove or repair irrelevant or incongruous statutes. The result is that the Michigan Compiled Laws corpus is peppered with antiquated, duplicative and even contradictory statutes. This problem plagues Michigan's emergency power laws, as nine of them are outdated or superfluous.

Redundant Emergency Powers Laws

Six emergency powers laws grant to state departments powers they already possess through the Administrative Procedures Act. While these statutes empower state agencies to act unilaterally, they contain the most limited scope of authorities of any emergency powers laws in Michigan. Four simply permit agencies to suspend a license they previously granted to a private business or individual. The other two grant state departments the power to issue emergency rules without a public hearing, a power also afforded through the APA.

All state agencies may unilaterally and immediately suspend a license that state law requires private entities to obtain before they engage in certain activities. The APA states: "If the agency finds that the public health, safety or welfare requires emergency action and incorporates this

* This conclusion is based on inquiries made to the Michigan Legislative Services Bureau and state departments. Aside from emergency rules issued under the APA and emergency orders made through governors' executive orders, there are no official state records of other emergency powers being used.

finding in its order, summary suspension of a license may be ordered effective on the date specified in the order."[149] Licensees have the opportunity to challenge this decision, but their license can be suspended immediately. A suspension may continue throughout those legal proceedings, which must "be promptly commenced."[150]

Despite this grant of power to all state agencies, four state laws appear to grant this same authority again to a handful of departments. The Department of Licensing and Regulatory Affairs may immediately suspend the license of a mobile home operator or dealer.[151] The director of the Department of Insurance and Financial Services may do the same for businesses and individuals engaged in debt management.[152] The statutes that bestow these powers contain an almost exact copy of the language used in the APA to grant them this same power. These statutes seem unnecessary.

The environmental department may do the same for landfill operators, if it believes a licensee is violating the law and its action "constitutes an emergency or poses an imminent risk to the public health or environment."[153] The health department can immediately suspend the license of a manufacturer or distributor of a controlled substance if it believes "an imminent danger to the public health or safety warrants this action."[154] Because the APA affords these departments this power, these grants of authority appear redundant.

Two other statutes seem to duplicate the APA's grant of emergency rulemaking power to state agencies. The Natural Resources and Environmental Protection Act authorizes a state official to issue unilateral "emergency orders" to administer the law on mineral wells.[155] How these orders would differ from emergency rules issued under the APA is not obvious. Similarly, a section of the Michigan Occupational Safety and Health Act permits the director of public health to issue an "emergency standard." Standards issued in this way appear identical to emergency rules permitted under the APA. The MIOSHA statute specifies that the state department must follow the APA's emergency rulemaking procedures, and the APA's definition of "rules" includes an agency's "standards."[156]

Three Antiquated Emergency Powers

The Emergency Insurance Legislation Act of 1933 declared an emergency and granted emergency powers to the Michigan commissioner of insurance during the Great Depression. It enabled the commissioner to "prescribe such limits or restrictions upon the disbursements, loans, investment of funds or other disposition of assets of [insurance] companies."[157] The statute, however, stipulated that these powers expired on March 30, 1935, more than 87 years ago.[158]

The legislation also authorizes the governor to proclaim a new emergency and invoke these emergency powers again. Although the trigger for such an emergency is broadly worded, there is no record of a governor using these powers.* The actions the 1933 Legislature envisioned for

* The trigger includes a "period of public calamity resulting in abnormal financial losses to and unforeseen and excessive disbursements by any insurance company, fraternal benefit society or association." The powers also may be triggered "during any financial emergency," or

these emergencies are unlikely to be relevant today, as new regulations and methods of operating have changed the financial and insurance industries over the last nine decades. This statute could easily be repealed.

Another similar statute that appears irrelevant to modern finance and banking is the Suspension of Business of Banks and Savings and Loan Associations Act of 1978. This law grants the Department of Financial and Insurance Services the power to "order a financial institution to close an office or offices."[159] The trigger for such action is "a condition or occurrence that has or may, directly or indirectly, interfere physically with the conduct of normal business operations of one or more offices of a financial institution, or which poses an imminent or existing threat to the safety and security of a person or property, or both." The statute was amended in 2006 to add "terrorist attack" as a potential cause of an emergency. It also was expanded to include credit unions.[160]

It is difficult to conceive of how this power would be needed or meaningful in the age of the internet. Closing a physical location where a bank or credit union operates would likely have little effect on these financial institutions. In addition, if some emergency condition affected just the physical offices of financial institutions, the Emergency Management Act would likely afford the governor the power to force those offices to close. Gov. Whitmer used this authority, in part, to force thousands of businesses to close in 2020.

A last emergency power that is unnecessary and could be repealed relates to hunting and fishing. A statute in the NREPA grants the director of the natural resource department the unilateral authority to immediately suspend the open season for hunting game animals and "regulate their taking or killing."[161] This power may be triggered if "any fish, game or fur-bearing animals, or game birds of any kind or species are in danger of depletion or extermination and require additional protection in any designated waters or area within the state."[162]

The voter-approved Proposal G of 1996 conflicts with this authority. It added a section to the NREPA that provides for regulating game animals in Michigan and gives that exclusive authority to the Michigan Natural Resources Commission.[163] This is a seven-member, bipartisan body appointed by the governor.[164] The NRC had exercised this authority previously, but it was temporarily transferred to the natural resources director by an executive order issued by Gov. John Engler in 1991.[165] Five years later, Proposal G restored this power to the NRC, rendering the director's emergency powers obsolete.

It is an act of good governance to regularly clean up Michigan statutes. Duplicative, redundant and conflicting laws create needless legal uncertainty. The public should have unambiguous knowledge about what behavior is prohibited and subject to state penalties. This is especially true for laws that empower unelected state officials to act unilaterally, such as emergency powers laws.

during "other similar emergencies, occurring as the result of financial disturbances in business generally, threatened or actual disaster to the banking and other financial institutions of the United States or of this state, and disruption of business and orderly business process resulting in such unusual demands upon the cash or other assets of insurance companies doing business in this state as to endanger the solvency of or threaten insolvency to any such companies and the consequences thereof." MCL § 550.2.

Conclusion

The state's response to the COVID-19 pandemic included an unprecedented use of emergency powers. Gov. Whitmer and her administration retained unilateral authority to regulate the daily activities and interactions of Michigan's 10 million residents for about 18 months. Emergency powers had never been used this expansively, and, unsurprisingly, their use generated considerable public controversy.

This experience also spurred research that led to this report. Improving the state's emergency power laws was not a priority, or even a consideration, for policymakers or state legal experts before 2020. In fact, few knew these powers are spread across Michigan law and grant governors and other state officials unilateral, lawmaking authority in a wide range of circumstances.

Emergency powers vary considerably from statute to statute. Some rely on ill-defined or vague terms about when they may be triggered, and they afford state officials broad discretion to grant themselves unilateral authority. Others are tightly controlled, specifying the precise conditions under which they may be used and enumerating the exact actions the executive branch may take. Some contain no durational limit, while others cause these powers to automatically expire after a certain number of days.

Now that these powers are identified, policymakers should consider reforming them. Many of these statutes are legally questionable because they delegate lawmaking authority to the executive branch without putting in place meaningful guardrails. Many lack safeguards to protect individuals from having their basic rights violated by a government official abusing these powers. Others are just poorly worded, creating opportunities for misuse. Still others are redundant or conflict with different state laws.

Effective reforms will need to be tailored specifically to each unique emergency powers law — there are no quick fixes here. Clarifying and improving these laws should make efforts to mitigate future threats more effective and give officials better guidance on how to legally use unilateral authority. Above all, reforms should aim to maintain the Michigan Constitution's requirement for a separation of powers within government, protecting individuals' rights and ensuring the rule of law.

Endnotes

1 Mich Const, Art. IV, § 22.

2 Mich Const, Art. IV, § 26.

3 Mich Const, Art. IV, § 27.

4 Mich Const, Art. IV § 33.

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9 MCL § 324.63417.

10 MCL § 324.63513.

11 MCL § 324.41302.

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14 MCL § 487.941.

15 MCL § 287.703a.

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17 MCL § 325.1015.

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30 MCL § 10.122(1)(a)-(d).

31 MCL § 325.1015(3).

32 MCL § 325.1015(3).

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35 MCL § 30.403(3), (4).

36 MCL § 10.83(3).

37 MCL § 30.403(3), (4).

38 MCL § 286.255.

39 MCL § 286.254.

40 MCL § 286.251.

41 MCL § 324.11519.

42 MCL § 324.31521(3).

43 MCL § 324.63513(2).

44 MCL § 280.424.

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