SB

75

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Date: 2-24-05

TO: Senator Gene Therriault
Chair Senate State Affairs Committee
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From: Patricia Senner FNP

Regarding: SB 75
Alaska Nurses Association Testimony

Pages: 3

Testimony of Patricia Senner MS, RN, ANP
Alaska Nurses Association
HB 95/ SB75
February 24, 2005

Since 9/11 and the outbreak of SARS in Asia, the Alaska Nurses Association has been involved in advocating for better disaster/disease outbreak planning. We were very pleased to see that the Department of Health and Social Services has taken steps in strengthening their legal authority to respond to these types of public health emergencies.

We have read this bill from two perspectives – that of a health care provider and that of the affected individuals. We feel that this bill adequately addresses the needs of both these interests.

There are some changes we would propose to the bill and questions we have about how some sections would interact with other existing laws. Our comments on these are being forwarded to the Committee for their consideration. There are sections of the bill I would like to discuss at this time.

There are three main types of public health emergencies that the Department may be called on to respond to – an outbreak of infectious disease, an incident where people are exposed to highly toxic substances, and a physical disaster such as an earthquake. Section 18.15.387 refers only to disease outbreaks, but then goes on to discuss decontamination efforts. We think this section should be expanded to refer to situations where individuals are exposed to highly toxic substances. In this later case, such an incident where individuals are exposed to radioactive materials, the Department may want to quarantine individuals, just as they would in the case of a disease outbreak.

Section 18.15.360 (4)(b) states that the Department may request information from and inspect health care records maintained by health care providers that identify individuals or characteristics of individuals with reportable diseases or other conditions of public health importance. Conditions of public health importance is very broadly defined. In past hearings testimony has been received expressing concern that the wording in this section gives the Department too broad an authority to inspect private health records. I would suggest separating this sentence from the rest of the paragraph and putting some more stringent requirements on under what conditions the Department has authority to inspect private health records. Under the current wording the Department would have authority to inspect many of our private health records because the increasing weight of the population is a current public health concern and many of us possess characteristics that the Department might be interested in related to this concern.

Section 18.15.3850 states, " An individual has the right to refuse treatment and may not be required to submit to involuntary treatment." We think that there needs to be a qualifier on this statement which states that if an individual refuses treatment then they have the responsibility to take measures avoid infecting others. For example, we do not

think that an individual with active TB should be allowed to refuse treatment and then go to public places and cough on non-infected individuals.

We have a legal qu .on regarding Section 18.15.385 (k) . This section states "all notices required to be served on an individual shall also be served on the parents or guardians of an individual who is an unemancipated minor; however parents or guardians of the minor do not have party status in the proceedings under this section." Our question is why don't the parents or guardians have party status?

The Alaska Nurses Association is very appreciative that the Department is being pro-active and putting into place the tools they need to respond appropriately to a public health disaster. The Alaska Nurses Association is willing to lend our support of helping in this type of planning.

PUBLIC HEALTH

PROTECTING AND PROMOTING THE HEALTH OF ALL ALASKANS

SB 75: An Act Relating to Public Health

Presentation to the Senate State Affairs Committee

February 24, 2005

Richard Mandsager, M.D., Director
Alaska Department of Health & Social Services
Division of Public Health

"Public Health is what we, as a society, do collectively to assure the conditions in which people can be healthy."

Institute of Medicine

PUBLIC HEALTH
PROTECTING AND PROMOTING THE HEALTH OF ALL ALASKANS

PUBLIC HEALTH IS NOT HEALTH CARE

- Focus on **Populations**, not individuals
- Focus on **Prevention**, not treatment
- **Government** plays a unique role – legal obligations to prevent disease, disability, injury, and illness among populations

Division of Public Health

Core Services

- Infectious Disease Control
- Chronic Disease Control
- Injury Prevention
- Respond to Disasters
- Assure Access to Quality Care
- Protect Against Environmental Health Hazards

PUBLIC HEALTH
PROTECTING AND PROMOTING THE HEALTH OF ALL ALASKANS

How Prepared are we for a Public Health Emergency?

- Strong disease surveillance systems
- Specialized emergency operations plans
- Enhanced communication protocols and systems
- New or enhanced laboratory testing capabilities
- Consultative expertise re: human health effects and remediation of chemical and radiological exposures
- Specialized training for public health and health care providers
- Planning and coordination with others (hospitals, emergency management, law enforcement and FBI, 1st Responders)

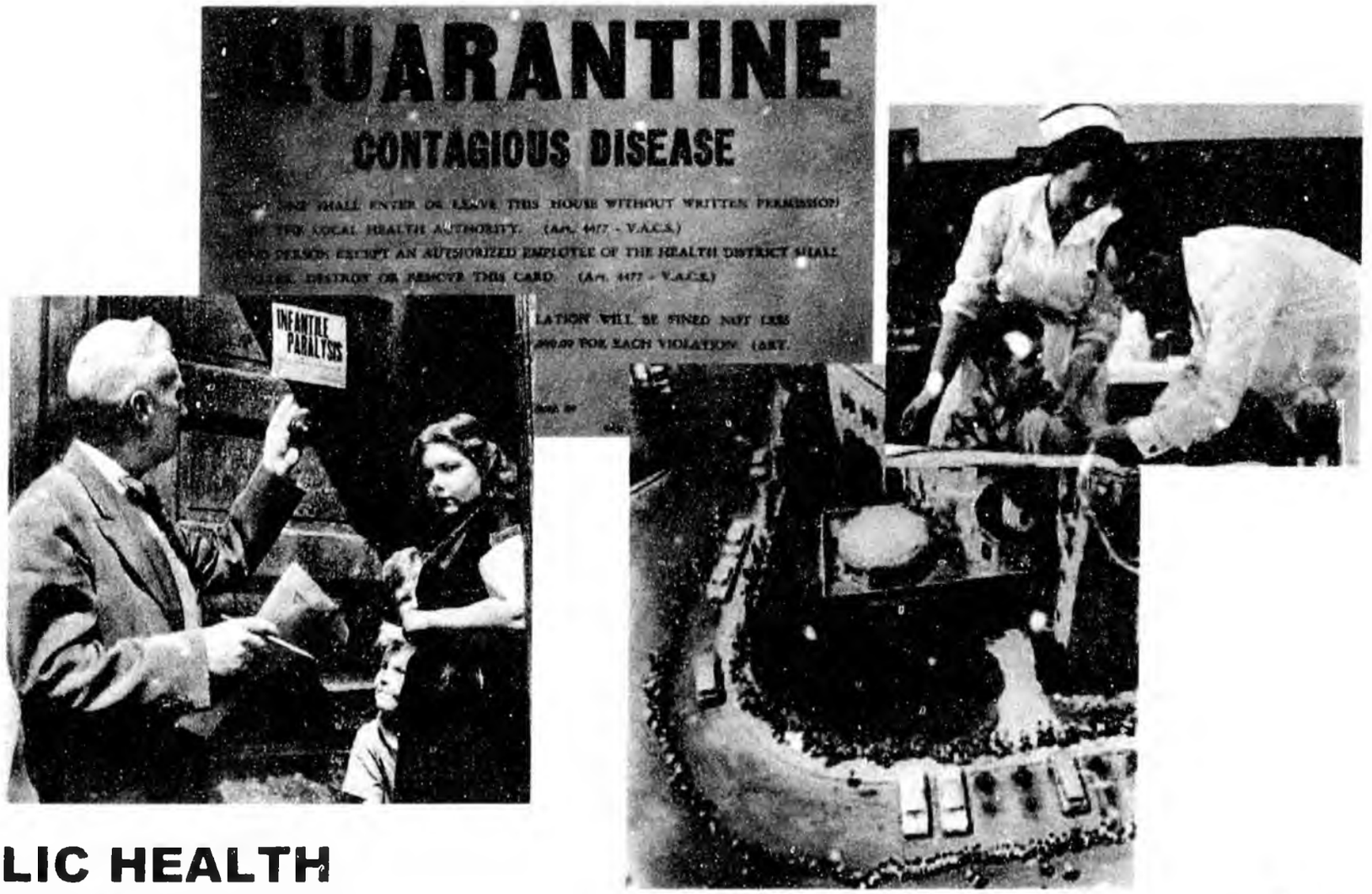
Preparedness Weaknesses

- Inadequate legal authorities (SB 75)
- Inadequate laboratory facility for virology (SB 73)
- Dependence on federal funds
- Insufficient staff capacity to allow time for both 1) response to existing priorities, and 2) training and exercises for disasters

Old Public Health Enemies

PUBLIC HEALTH
PROTECTING AND PROMOTING THE HEALTH OF ALL ALASKANS

Traditional Disease Control



PUBLIC HEALTH
PROTECTING AND PROMOTING THE HEALTH OF ALL ALASKANS

The Next SARS?

PUBLIC HEALTH
PROTECTING AND PROMOTING THE
HEALTH OF ALL ALASKANS

Alaska Public Health Law Reform Proposal

The Problem -- *Our laws don't protect us anymore*

- Alaska's public health laws are antiquated and layered – Alaska Law Review, 2000
- Alaska is the only state in the nation that does not have adequate statutory authority to quarantine – Trust for America's Health, 2004

1949: AS 18.05.010	Administration of Laws by the Department
1995: AS 18.15.120	Tuberculosis Control
2003: AS 18.15.350	SARS Control

PUBLIC HEALTH
PROTECTING AND PROMOTING THE HEALTH OF ALL ALASKANS

Alaska Public Health Law Reform Proposal

The Proposed Solution - Updated Laws that Provide:

- A statutory framework that supports the public health mission, services and role
- Clear authority for control of conditions of public health importance; and,
- Modern due process provisions for the protection of individual rights

SB 75: An Act Relating to Public Health

- Defines "Essential Public Health Services"
- Describes State's role in health protection and promotion
- Provides clear authority for disease control through:
  - Surveillance
  - Epidemiologic Investigation
  - Medical Treatment, Quarantine & Isolation
- Requires protection of individual rights - due process
- Strengthens requirements for confidentiality and data security

CSSB 75: An Act Relating to Public Health

I. Purpose/Intent (Sec. 1)

II. Administration of Public Health Laws by the Department (Sec. 4, 5, 7)

III. Public Health Authority and Powers (Sec. 8)

IV. Legal Representation and Court Powers
- a) Right of indigent person to counsel (Sec. 9)
- b) Judicial powers augmented (Sec. 10)
- c) Guardian ad litem responsibilities (Sec. 11)

V. General Provisions
- a) State Immunity (Sec. 2)
- b) Repeal and changes to citations of statutes (Sec. 3, 6, 12)
- c) Effective Date (Sec. 13)

CSSB 75: An Act Relating to Public Health

I Purpose/Intent (Sec. 1)

- To protect and promote the health of the citizens of this state to the greatest extent possible through the public health system
- Not intended to mandate provision of certain services or implementation of unfunded programs

II. Administration of Public Health Law by DHSS (Sec. 4, 5, and 7)

- Modernize and clarify department's public health powers
- Clarifies nature of mandated regulations for public health reporting and adds regulatory mandate for data security and confidentiality
- Adds definition of "conditions of public health importance"

III. Public Health Powers and Authority (Sec. 8)

- Prevention and control of conditions of public health importance
- Surveillance through data collection and public health reporting
- Epidemiological investigations
- Medical treatment
- Quarantine and isolation
- Public health disasters

SB 75: An Act Relating to Public Health

Balancing Individual Rights vs. Common Good

- Constitutional Constraints on Governmental Public Health Powers
- Constitutional Protections of Individual Rights
- Limitations Imposed by Provisions in Bill
- Due Process Provisions in Bill

SB 75: An Act Relating to Public Health

Balancing Individual Rights vs. Common Good

- Constitutional Constraints on Public Health Powers (Case Law):
  - Public health powers are constitutionally permissible only if they are exercised in conformity with four standards:
    - **Public Health Necessity** – government may act only in response to a demonstrable threat to the community; and
    - **Reasonable Means** – there must be a reasonable relationship between the public health intervention and the achievement of a legitimate public health objective; and
    - **Proportionality** – there must be a reasonable balance between the public good to be achieved and the degree of personal invasion; and,
    - **Harm Avoidance** – the control measure should not pose a health risk to its subject.

- Constitutional Protections of Individual Rights (Bill of Rights):
  - **1st Amendment:** Freedom of religion, speech, press, assembly, petition
  - **4th Amendment:** Freedom from unreasonable search and seizure
  - **5th Amendment:** Due process clause
  - **14th Amendment:** Bill of Rights applicable to states

SB 75: An Act Relating to Public Health

Balancing Individual Rights vs. Common Good

- Limitations placed on governmental public health powers in this bill:
  - The department must establish confidentiality and security standards in regulation for information and records received under this statute (AS 18.05.040 (a))
  - The department may not acquire identifiable health information without complying with provisions and regulations adopted under this statute (AS 18.15.360 (d))
  - Information confidentiality and security safeguards required (AS 18.15.365)
  - "Conditions of public health importance" limited to those that "can reasonably be expected to lead to adverse health effects in the community" (AS 18.05.070 (4); AS 18.15.390)
  - The department may require testing
    - only upon an order of a state medical officer, and only upon a finding that the individual has or may have been exposed to a contagious disease that poses a significant risk to the public health (AS 18.15.375(c)(2))
    - for the sole purpose of identifying a condition that 1) poses a threat to the public health, and 2) may be avoided, cured, alleviated, or made less contagious through public health intervention (AS 18.15.375 (c)(5))
  - A judicial officer may issue an order for testing of an individual against their will
    - Upon a showing of probable cause, supported by oath or affirmation, that the individual has or may have been exposed to a contagious disease that poses a significant risk to the public health (AS 18.15.375 (d)) [due process provisions: AS 18.15.375 (e)]
  - An individual has the right to refuse treatment and may not be required to submit to involuntary treatment (AS 18.15.380)

Continued on next slide

SB 75: An Act Relating to Public Health

Balancing Individual Rights vs. Common Good

- Limitations placed on governmental public health powers in this bill (Continued from Previous Slide):
  - The department must establish regulations regarding isolation and quarantine (AS 18.15.385(a))
  - The department shall isolate or quarantine by the least restrictive means necessary to prevent the spread of disease (AS 18.15. 385(b)(1))
  - The department shall regularly monitor health status of quarantined/isolated individuals, and shall immediately terminate an isolation and quarantine order when the subject poses no substantial risk of transmitting the disease to others (AS 18.15.385(b)(5))
  - The department shall obtain a court order for isolation/quarantine if the individual refuses, and must provide a affidavit signed by a state medical officer that the individual poses a substantial risk to public health (AS 18.15.385(d))
  - The department may issue an emergency administrative order for isolation/quarantine only from a state medical officer and only when there is probable cause to believe that delay in imposing isolation/quarantine would pose a clear and immediate threat to public health (AS 18.15.385(e))
  - The court may commit individual to isolation/quarantine only through finding by clear and convincing evidence that it is necessary to prevent or limit transmission to others of disease that poses a substantial risk to the public health (AS 18.15.385(h) & (l))
  - The department shall adopt regulations to protect the privacy rights of individuals subject to isolation/quarantine (AS 18.15.385(l))

SB 75: An Act Relating to Public Health

Balancing Individual Rights vs. Common Good

- Due process provisions in this bill
  - The department shall obtain an ex parte judicial order for testing an individual who objects to a testing order from the state medical officer (AS 18.15.375(c)(3))
  - An individual subject to an ex parte judicial order for testing may request a hearing to vacate the order (AS 18.15.375(e))
  - The department shall obtain a court order before quarantine/isolation of an individual who objects to quarantine/isolation (AS 18.15.385(d))
  - An individual served with an emergency administrative order of temporary quarantine/isolation has the right to a court hearing (AS 18.15.385(f))
  - An isolated/quarantined individual may apply to the court for termination of isolation/quarantine (AS 18.15.385(j))
  - An individual who is a respondent in proceedings under these statutory provisions has the right to be represented by counsel (AS 18.15.389)

SB 75: An Act Relating to Public Health

Two Amendments Proposed
to Bring CSSB 75 (HESS) in Alignment with CSHB 95 (HESS)

1. Deletes a provision that would have removed party status of parents of minors from court proceedings in situations when quarantine/isolation orders are being contested.

2. Addresses indirect court rule amendments made by certain provisions in the bill

State Quarantine Authority

Source: Trust For America's Health with analytic and research support from the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities.

49 states and D.C. have adequate statutory authority to quarantine in response to a hypothetical bioterrorism attack scenario

Alabama *	Indiana *	Montana *	Pennsylvania *
Arizona *	Iowa *	Nebraska	Rhode Island *
California	Kansas	Nevada *	South Carolina *
Colorado	Kentucky	New Hampshire *	South Dakota *
Connecticut *	Louisiana *	New Jersey	Tennessee *
Delaware *	Maine *	New Mexico *	Texas
D.C. *	Maryland *	New York	Utah
Florida *	Massachusetts *	North Carolina *	Vermont
Georgia *	Michigan *	North Dakota	Virginia *
Hawaii *	Minnesota *	Ohio *	Washington ^
Idaho *	Mississippi	Oklahoma *	West Virginia *
Illinois *	Missouri	Oregon	Wisconsin *
			Wyoming *

1 state does NOT have adequate statutory authority to quarantine in response to a hypothetical bioterrorism attack scenario

Alaska

* State has statutory quarantine powers that may be enhanced or capable of expedited performance during general or public health emergencies.

^ Washington state has regulatory vs. statutory quarantine authority.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 75
(S) Publish Date: 1/21/05
Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):

Title: RELATING TO PUBLIC HEALTH AND PUBLIC HEALTH EMERGENCIES

RDU: Public Health

Component: Public Health Admin Svcs

Sponsor: (RLS) BY REQUEST OF THE GOVERNOR

Requester: GOVERNOR

Component No. 292

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal: ☐

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

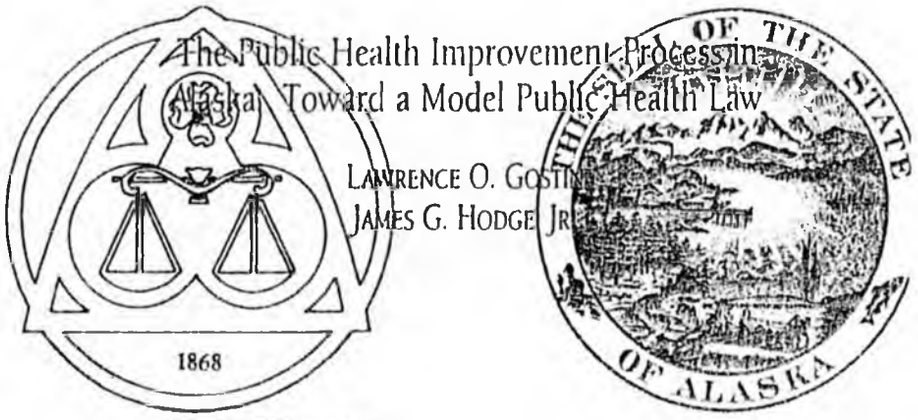
Passage of this legislation is not expected to have a budget impact on the Division of Public Health, as the bill simply clarifies legal authority and provides new due process provisions for programmatic activities already conducted by the Division. The bill does not add new functions or mandates to the Department of Health & Social Services' legal responsibilities.

Prepared by: Richard Mandsager, M.D. Phone 465-3090
Division: Public Health Date/Time 01/05/2005
Approved by: Joel S. Gilbertson, Commissioner Date 01/06/2005
Agency: Department of Health and Social Services

(Revised 9/23/2004 OMB)

COMMITTEE COPY

ALASKA LAW REVIEW



June 2000 ▪ *Volume XVII* ▪ *Number I*
Duke University School of Law

THE PUBLIC HEALTH IMPROVEMENT PROCESS IN ALASKA: TOWARD A MODEL PUBLIC HEALTH LAW

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This Article is substantially based on a report prepared by the authors for the Alaska Division of Public Health as part of Alaska's Public Health Improvement Process, supported by a state grant from the Robert Wood Johnson Foundation and individual grants from the W. K. Kellogg Foundation awarded to various Alaska communities. *See* Lawrence O. Gostin & James G. Hodge, Jr., *Reforming Alaska Public Health Law, A Report for the Alaska Public Health Improvement Process* (1999) (on file with authors). The Robert Wood Johnson and W. K. Kellogg Foundation's joint initiative, *Turning Point: Collaborating for a New Century in Public Health*, provided technical support for state and community public health partnerships. The Alaska Division of Public Health was awarded a *Turning Point* grant to conduct a statewide, collaborative study of the current public health system, and to develop and recommend strategies to strengthen the system. As part of this initiative, the authors' report assessed and reviewed laws supporting the public health system in Alaska. The report proposed reforms to improve both state public health laws and relationships among public health actors at the federal, state, local, and tribal levels of government.

The Article is also based in part on LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (forthcoming 2000); Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59 (1999).

The authors would like to thank Dr. Peter Nakamura, Director, Alaska Division of Public Health; Deb Erickson, who coordinated efforts at the Division; and Dr. John Middaugh, State Epidemiologist; as well as countless others who contributed directly and indirectly to the production of the report. They are also grateful to Lisa M. Matocvik, Ph.D., and Ahren Tryon (J.D. Candidates, Georgetown University Law Center) and Monique Nolan, (J.D./M.P.H. Candidate, Georgetown University Law Center and Johns Hopkins University) for their research assistance.

I. INTRODUCTION

The mission of public health [is] fulfilling society's interest in assuring conditions in which people can be healthy.[1]

Preserving the public health is among the most important goals of government, and law is essential in helping to achieve this goal. Public health law contemplates the responsibilities of individuals and the duties of government to act for the health of society. Laws define the jurisdiction of public health officials and specify the manner in which they may exercise their authority. Laws can also establish norms for healthy behavior and create the social conditions in which people can be healthy. Legislatures, courts, and administrative agencies serve as conduits for social debates on important public health issues within the legal language of rights, duties, and justice. As one public health lawyer has aptly stated, "[t]he field of public health . . . could not long exist in the manner in which we know it today except for its sound legal basis."[2] In a forthcoming book, we define the field of public health law as both the study of the legal powers and state duties necessary to assure the conditions of public health, and limitations on state power to constrain individuals' rights in the interests of community health.[3]

In its foundational 1988 text, *The Future of Public Health*, the Institute of Medicine ("IOM") agreed that law was essential for furthering public health, but questioned the soundness of public health law in the United States.[4] The IOM concluded that the United States "has lost sight of its public health goals and has allowed the system of public health activities to fall into disarray,"[5]

1. INSTITUTE OF MEDICINE, THE FUTURE OF PUBLIC HEALTH 7 (1988).

2. FRANK P. GRAD, PUBLIC HEALTH LAW MANUAL 4 (2d ed. 1990); *see also* Scott Burris, *Thoughts on the Law and the Public's Health*, 22 J.L. MED. & ETHICS 141 (1994); Lawrence O. Gostin, *The Future of Public Health Law*, 12 AM. J.L. & MED. 461, 464 (1986).

3. *See* LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (forthcoming 2000).

4. INSTITUTE OF MEDICINE, *supra* note 1, at 146-150.

5. *Id.* at 19; *see also* LAURIE GARRETT, THE COMING PLAGUE: NEWLY EMERGING DISEASES IN A WORLD OUT OF BALANCE 512 (1994) (claiming that the U.S. public health system exhibits levels of chaos and inaccuracy comparable to those of third world countries); Lawrence O. Gostin, *Securing Health or Just*

due partly to obsolete and inadequate state laws and regulations. Though its bleak view is not universally accepted,[6] the IOM further recommended that

> states review their public health statutes and make revisions necessary to accomplish the following two objectives: [i] clearly delineate the basic authority and responsibility entrusted to public health agencies, boards, and officials at the state and local levels and the relationships between them; and [ii] support a set of modern disease control measures that address contemporary health problems . . . , and incorporate due process safeguards (notice, hearings, administrative review, right to counsel, standards of evidence).[7]

In response to this challenge, some states have updated and revised their public health laws since 1988. Most, however, have not. In many states, public health law remains ripe for reform. Pursuant to a comprehensive survey of communicable disease law in the fifty states, we suggest existing state statutes are ineffective in responding to contemporary health threats for many reasons.[8] These statutes often (1) pre-date modern scientific and constitutional developments; (2) fail to equip public health officials with a range of flexible powers needed to control infectious disease; (3) lack adequate standards of privacy, due process, and risk assessment; and (4) are based on arbitrary disease classification schemes that no longer relate to modern disease threats or epidemiologic methods of infection control.[9]

The need for public health law reform is well-stated by the IOM and others. Yet, confusion regarding the field of public health law has confounded meaningful proposals for reform attempted by public health officials, state legislators, and the general

Health Care? The Effect of the Health Care System on the Health of America, 39 ST. LOUIS U. L.J. 7, 16-17 (1994) (claiming that an array of public health services, not simply personal medical services, reduces morbidity and premature mortality).

6. *See* Leonard Robins & Charles Backstrom, *The Role of State Health Departments in Formulating Policy: A Survey on the Case of AIDS*, 84 AM. J. PUB. HEALTH 905 (1994) (finding health agencies took leadership role in HIV policy).

7. INSTITUTE OF MEDICINE, *supra* note 1, at 10; *see, e.g.*, Centers for Disease Control & Prevention, *Public Health Core Functions--Alabama, Maryland, Mississippi, New Jersey, South Carolina, and Wisconsin 1993* 43 (Morbidity & Mortality Wkly. Rep. 13 1994) (concluding that existing public health law too often fails to support public health departments in carrying out their core functions). More broadly, the IOM criticized health departments' alleged failure to provide clear political leadership in the legislative responses to important issues, such as HIV. *See* INSTITUTE OF MEDICINE, *supra* note 1, at 4-5.

8. *See, e.g.*, Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59 (1999).

9. *See id.* at 101-18.

public in many states. To address this, we have conducted comprehensive public health law case studies in several states (e.g., New Hampshire, Virginia, and Oregon) in an attempt to facilitate the understanding of public health law, as well as to provide objective, scholarly recommendations for legal and institutional reform. These studies reveal vastly different legal structures for the public health systems within each of these jurisdictions. Our case study in Alaska revealed perhaps the most complex and interesting system of public health law, presenting creative opportunities for reform.

In this Article, we present the findings of our study on the improvement of public health law in Alaska. We examine and analyze the public health laws supporting the state's public health system. The fact that Alaska has attained statehood comparatively recently, and has a governing structure involving state, municipal, rural, and tribal entities presents unique opportunities for the State to improve its public health system and its supporting legal infrastructure.

Part II begins with a framework that examines public health as a distinct field of law and policy. It briefly reviews and defines public health law within the constitutional structure of the United States. The Constitution limits government power in two ways: (1) it divides federal power among three branches of government, and (2) it allocates power between the federal government and the states. The tripartite separation of powers protects individual liberties and the ideology of federalism protects state sovereignty. Although the Constitution does not obligate the federal or state government to act in the interests of public health, the federal government draws its expansive authority to act in the field of public health from specific, enumerated powers provided within the Constitution. These powers include the power to raise revenue for public health services and, through its Commerce power, to regulate, both directly and indirectly, private activities that endanger human health.

Principles of new federalism, however, challenge the extent to which federal powers may lawfully extend into areas of traditional state concern, such as public health. Pursuant to the Tenth Amendment, states retain their sovereign powers. State police powers - or the inherent authority of the state to protect, preserve, and promote the health, safety, morals, and general welfare of the public - represent the state's residual authority to act in the interests of the public health. Local governments, including counties or boroughs, municipalities, and special districts, share public health authority through specific delegations of state police power.

Part III examines the legal authority for public health in Alaska through a comprehensive description of the constitutional,

statutory, and administrative laws underlying public health practice in the state and among tribal jurisdications. Like the federal Constitution, the Alaska Constitution sets limits on the powers of the state while providing affirmative grants of governmental powers. The Alaska Constitution guarantees many individual rights which specifically authorize the state legislature to promote and protect the public health and public welfare.[10] Part III reviews an array of statutes enacted by the Alaska Legislature, charging various state and local governmental agencies and departments to regulate and implement traditional public health functions.

Most public health matters in Alaska are administered by one of two state agencies, the Department of Health and Social Services ("DHSS") and the Department of Environmental Conservation ("DEC"). DHSS is primarily responsible for the control of communicable diseases, the administration of public health care, and some public safety issues. The DEC is delegated the authority to regulate environmental threats to health, including public health nuisances.

Alaska's boroughs and cities are delegated various public health powers based on their particular statutory classification under state law. However, Alaska Native villages and tribal groups owe their legal existence, and many of their public health powers, to the federal government. Congress previously assumed direct responsibility for the provision of health care to tribal governments. More recently, Congress encouraged the direct involvement of tribal governments in planning and operating health programs. While the federal-tribal relationship is strong, the United States Supreme Court has confirmed that Alaska has primary jurisdiction over tribal lands.[11] Nevertheless, the extent of state influence over tribal governments is conditioned upon the recognition of a federal partnership with tribal governments. This dual recognition of tribal health authorities as federal partners and local governments raises questions concerning the responsibilities for the public health that these tribal governments share with state and other local governments.

Part IV discusses the benefits of a public health law improvement process and our proposals for reform. Despite political limitations of the legislative approach, legal reform may advance public health by (1) defining the purposes and objectives of public health; (2) authorizing and limiting public health actions within a permissible degree of local flexibility; (3) serving as a tool of prevention to create healthier conditions; and (4) facilitating the planning and coordination of governmental and non-governmental health activities. Many benefits could be achieved through a public health improvement process, including the following: updating antiquated laws; incorporating modern scientific understanding of diseases and unhealthy conditions; modernizing current standards; and, perhaps most importantly, clarifying the legal powers, duties, and relationships of various state, local, and tribal actors.

10. *See* ALASKA CONST. art. VII, § 4.

11. *See* Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 533 (1998).

Law reform in Alaska should express a clear vision for public health, promoting the best theories and practices in public health. Public health regulations should be based on uniform provisions that apply equally to all health threats. This would eliminate the unnecessary fragmentation of laws according to the type of disease or condition to be regulated. Public health interventions should be based on the degree of risk, the cost and efficacy of the response, and the burden on human rights. Authorities should be empowered to make decisions based upon the best available scientific evidence concerning the nature and extent of risks to the public health and have a wide range of powers to accomplish their mission. Implementing a graded series of flexible alternatives allows for the protection of the public health without devaluing individual rights. To further privacy protections, public health authorities should adhere to fundamental information privacy practices, which have been incorporated into our Model State Public Health Privacy Act.[12] These practices include: (1) providing justification for data collection; (2) sharing information about aggregate data collection by public health departments and its purposes; (3) eliminating secret data systems; (4) allowing persons to access data about themselves; (5) ensuring the reliability and accuracy of data; (6) attaching legally binding assurances of privacy to all personally identifiable information such as non-disclosure provisions; (7) establishing security protections for data; and (8) imposing penalties for unauthorized disclosures.

Finally, we recommend that the state's primary executive public health agencies, the DHSS and DEC, should formalize their channels of communication and coordination.

12. *See* Lawrence O. Gostin & James G. Hodge, Jr., *Model State Public Health Privacy Project* (last modified Oct. 8, 1999) <http://www.critpath.org/msphpa/privacy.htm>.

II. A FRAMEWORK FOR PUBLIC HEALTH LAW

Conceptualizing public health law is not easy. Lawmakers, judges, health officials, scholars, and others have often viewed public health law as being at the intersection of other disciplines, including health law, health care law, law and medicine, forensic medicine, environmental law, and bioethics. This Article will treat public health law as a distinct discipline. As one public health law treatise surmised in 1926

> [public health law] should not be confused with medical jurisprudence, which is concerned only in legal aspects of the application of medical and surgical knowledge to individuals.... [P]ublic health is not a branch of medicine, but a science in itself, to which, however, preventive medicine is an important contributor. Public health law is that branch of jurisprudence which treats of the application of common and statutory law to the principles of hygiene and sanitary science.[13]

Thus, while public health law is conceptually linked to the fields of law and medicine, and health care law, it is itself a distinct discipline susceptible to theoretical and practical differentiation from other disciplines at the nexus of law and health.[14] In this section, we briefly define public health law within a constitutional framework and demonstrate the various governmental responsibilities and powers relating to public health consistent with our definition.

A. Defining Public Health Law

Historically, public health has been associated with the control of communicable diseases and the improvement of unsanitary or unsafe conditions in the community.[15] Public health is actually more encompassing. Modern definitions of public health vary widely, ranging from the World Health Organization's utopian conception of the ideal state of physical and mental health[16] to definitions that merely list common public health practices.[17] The IOM has proposed one of the most influential contemporary definitions of public health, which, though simply stated, is quite accurate: "Public health is what we, as a society, do collectively to assure the conditions for people to be healthy."[18]

Building on this definition of public health, we define public health law as follows:

> the study of the legal powers and duties of the state to assure the conditions for people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population), and the limitations on the power of the state to constrain the autonomy, privacy, liberty, or other legally protected interests of individuals for protection or promotion of community health.[19]

From this definition, five essential characteristics distinguish public health law from the fields of medicine and law: (1) *Government*: Public health activities are the primary responsibility of government, rather than the private sector; (2) *Populations*: Public health focuses on the health of populations, rather than the clinical improvement of individual patients; (3) *Relationships*: Public health contemplates the relationship between the state and the population (or between the state and individuals who place themselves or the community at risk), rather than the relationship between the physician and patient; (4) *Services*: Public health deals with the provision of public health services, rather than personal medical services; and (5) *Coercion*: Public health possesses the power to coerce the individual for the protection of the community and, thus, does not rely on a near universal ethic of voluntarism. Although these broad parameters help distinguish public health law from other fields, it is necessary to further examine the concept of public health law through our constitutional system of government.

B. Constitutional Authority for Public Health Powers

The United States Constitution is the starting point for any analysis concerning the distribution of governmental powers. The Constitution divides power among the three branches of government (separation of powers); limits government power (to protect individual liberties); and allocates power among the federal government and the states (federalism).[20] In the realm of public health, the Constitution acts as both a fountain and a levee. It originates the flow of power to preserve the public health and it curbs that power to protect individual freedoms.[21]

13. JAMES A. TOBEY, PUBLIC HEALTH LAW: A MANUAL OF LAW FOR SANITARIANS 6-7 (1926).

14. *See* GOSTIN, *supra* note 3.

15. *See* TOBEY, *supra* note 13, at 3.

16. *See, e.g.*, LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC 27-30 (1997).

17. *See, e.g.*, CHARLES EDWARD ARMORY WINSLOW, THE EVOLUTION AND SIGNIFICANCE OF THE MODERN PUBLIC HEALTH CAMPAIGN (1923).

18. INSTITUTE OF MEDICINE, *supra* note 1, at 19.

19. GOSTIN, *supra* note 3.

20. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1-6 (1997).

21. *See* JUDITH AREEN ET AL., LAW, SCIENCE AND MEDICINE 520 (2d ed. 1996).

1. *Separation of Powers.* The Constitution separates the federal governmental powers into three branches: (1) the legislative branch is vested with the power to create laws; (2) the executive branch is vested with the power to enforce the laws; and (3) the judicial branch is vested with the power to interpret the laws. States have similar schemes of governance pursuant to their own constitutions. By separating the powers of government, the Constitution provides a system of checks and balances that is thought to reduce the possibility of government oppression.

The separation of powers doctrine is essential to the field of public health law, for each branch of government possesses a unique constitutional authority to create, enforce, or interpret health policy. The legislature creates health policy and allocates the necessary resources to effectuate it. Some contend, however, that legislatures are unable to balance and make complex public health decisions. Legislators may respond too quickly without sufficient fact-finding or consideration of all the implications, lack expertise in the health sciences, and be influenced by popular beliefs that may be inconsistent with public health objectives. Yet legislators remain politically accountable for their actions, which are balanced with competing claims.

The executive branch significantly impacts public health law through establishing health policy and regulations, in addition to enforcing existing public health laws. Executive agencies at the federal and state levels are legislatively charged not only with implementing legislation, but with establishing complex health regulations. Executive branch agencies are uniquely positioned to govern public health. They are created for the very purpose of advancing public health, can focus on public health problems for extended periods, and may possess significant expertise and resources to address these problems. Conversely, however, agency officials may focus too narrowly on single topics and may serve for long durations, inadvertently leading to stagnant policies and procedures, and complicity with the subjects of regulation.

Through legal interpretation, the judiciary exerts substantial control over public health policy by determining the boundaries of legislative and executive government power. Courts decide whether a public health statute is constitutional, whether agency action is authorized by legislation, whether agency officials have gathered sufficient evidence to support their actions, and whether government officials and private parties have acted negligently. The judicial branch has the independence and legal training to make thoughtful decisions about constitutional claims regarding such things as individual rights or federalism. Courts, however, may be less equipped to critically review the substance of health policy choices. Judges are often considered politically unaccountable if not subjected to elections, may be bound by the facts of a particular case, may be influenced by untested expert opinions, and may focus too intently on individual rights at the expense of communal claims to public health protection.

2. *Limited Powers.* A second constitutional function is to limit government power to protect individual liberties. Government actions undertaken to promote the communal good often infringe upon individual freedoms. Public health regulation and individual rights may directly conflict. Resolving the tension between population-based regulations and individual rights requires compromise. Thus, while the Constitution grants extensive powers to governments, it also addresses this trade-off through the declaration of individual rights that the government cannot infringe without some level of justification. The Bill of Rights, together with other constitutional provisions,[22] creates a zone of individual liberty, autonomy, privacy, and economic freedom that exists beyond the reach of the government. Public health law struggles to determine the point at which government authority to promote the population's health must yield to individual rights claims.

This tension is demonstrated in the 1905 United States Supreme Court opinion *Jacobson v. Massachusetts*.[23] In *Jacobson*, the Supreme Court considered a constitutional challenge to a general vaccination requirement for smallpox.[24] Massachusetts enacted a law empowering municipal boards of health to require the vaccination of inhabitants if necessary for the public health or safety.[25] The Cambridge Board of Health, under authority of this statute, adopted the following regulation: "Whereas, smallpox has been prevalent . . . in the city of Cambridge and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease . . . ; be it ordered, that all inhabitants of the city . . . be vaccinated."[26] Henning Jacobson refused the vaccination. After his conviction by the trial court, he was sentenced to pay a fine of

22. *See, e.g.*, U.S. CONST. art. I, §§ 9, 10 (federal and state government may not criminally punish conduct that was lawful when committed); *id.* art. I, § 10 (no state shall impair the obligation of contracts); *id.* art. IV, § 2 ("Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

23. 197 U.S. 11 (1905).

24. *Id.* at 12.

25. *Id.* at 12-13.

26. *Id.*

five dollars. The Massachusetts Supreme Judicial Court upheld the conviction, and the case was appealed to the United States Supreme Court.[27] Jacobson argued that "a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best."[28] He asserted that his constitutional liberty interests supported the natural rights to bodily integrity and decisional privacy.[29]

Rejecting Jacobson's appeal, the Supreme Court adopted a narrower view of individual liberty. The Court emphasized a more community-oriented philosophy in which citizens have duties to one another and to society as a whole. Justice Harlan, writing for the Court, stated:

> [T]he liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.[30]

Under a social compact theory, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[31] Justice Harlan concluded this theory is consistent with a state's traditional police powers which authorize an array of governmental action in the interests of public health, among other priorities.[32]

The legacy of *Jacobson* is its defense of police power regulation in support of a strong social welfare philosophy. However, the Court also recognized the limits of a broad police power. Utilizing state police powers in support of vaccination requirements or other public health initiatives is constitutionally permissible only if they are exercised in conformity with the following principles:

(a) *public health necessity* – Justice Harlan, in *Jacobson*, insisted that police powers must be based on the "necessities of the case" and could not be exercised in "an arbitrary, unreasonable

27. *See id.* at 14.

28. *Id.* at 26.

29. *See id.*

30. *Id.* at 26.

31. *Id.* at 27.

32. *Id.* Police powers refer to the broad power of a sovereign state to regulate matters affecting the health, safety, and general welfare of the public. *See, e.g.*, ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 3-4 (1904); James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309, 318-20 (1998).

manner" or go "beyond what was reasonably required for safety of the public;"[33]

(b) *reasonable means* – The *Jacobson* Court introduced means/ends test that required a reasonable relationship betw the public health intervention and the achievement of a legitim public health objective.[34] Even though the objective of the legi ture may be valid and beneficent, the methods adopted must h a "real or substantial relation" to protection of the public hea and cannot be "a plain, palpable invasion of rights;"[35]

(c) *proportionality* – Justice Harlan wrote in *Jacobson*, "t the police power of a State . . . may be exerted in such circu stances or by regulations so arbitrary and oppressive in partic cases as to justify the interference of the courts to prev wrong . . . injustice, oppression or absurd consequence."[36] Thu public health regulation may be unconstitutional if the intervent is gratuitously onerous or unfair; and

(d) *harm avoidance* – While those who pose a risk to community can be required to submit to compulsory measures, cluding vaccination for the common good, the measure it should not pose a health risk to its subject. Requiring a perso be immunized despite knowing the vaccination would cause h would be "cruel and inhuman in the last degree."[37] Jacobson fa to present medical evidence that he was not a "fit person" smallpox vaccination.[38]

Thus, while *Jacobson* stands firmly for the proposition t police powers authorize states to compel vaccination for the pu good, government power must be exercised reasonably to pass c stitutional scrutiny.

3. *Federalism*. Federalism, as a principle of law and governmental design,[39] attempts to distribute power appropriat

33. *Jacobson*, 197 U.S. at 28.

34. *See id.* at 28-29; *see also* JAMES A. TOBEY, PUBLIC HEALTH LAW 90 (2d 1939).

35. *Jacobson*, 197 U.S. at 31; *see also* Nebbia v. New York, 291 U.S. 502, (1933) (holding that public welfare regulation must not be "unreasonable, a trary or capricious, and the means selected shall have a real and substantial r tion to the object sought to be attained").

36. *Jacobson*, 197 U.S. at 38-39.

37. *See id.* at 39.

38. *Id.*

39. *See* Texas v. White, 74 U.S. 700, 725 (1868); *see also* WORKING GROUP FEDERALISM OF THE DOMESTIC POLICY COUNCIL, THE STATUS OF FEDERALISM AMERICA 5 (1986) ("[F]ederalism is a constitutionally based, structural theor government designed to ensure political freedom. . .").

among federal and state levels of government.[40] Pursuant to the United States Constitution, the federal government has certain limited powers to enact laws in areas where it has specific jurisdiction. To preserve the powers of the federal government from intrusion by the states, the Supremacy Clause[41] provides that federal laws and regulations override conflicting state laws via the doctrine of preemption.[42] State law is preempted by federal constitutional or statutory law, either by express provision,[43] by a conflict between federal and state law,[44] or by implication where Congress so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the states to supplement it."[45]

With the passage of the Tenth Amendment, states reserved their sovereign power over "all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State."[46] These powers, collectively known as police powers, give states broad jurisdiction to regulate matters affecting the health, safety, and general welfare of the public.[47]

The distinction between federal and state powers is not always predictable in application.[48] Even though the distribution of powers among governments was originally meant to be relatively clear,[49] federal and state government powers interact on a regular

40. *See, e.g.*, *The Court and Federalism*, WASH. POST, Jan. 14, 2000, at A26 ("The proper question [of federalism] is whether . . . policy issues [are being] addressed by the appropriate level of government, [not] which level is likely to deliver a particular favored outcome.").

41. *See* U.S. CONST. art. VI, cl. 2.

42. *See id.*

43. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

44. *See, e.g.*, Maryland v. Louisiana, 451 U.S. 725 (1981); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995).

45. Fidelity Fed. Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also* Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

46. Gregory v. Ashcroft, 501 U.S. 452 (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

47. *See supra* note 32 and accompanying text.

48. *See, e.g.*, New York v. United States, 505 U.S. 144, 155 (1992) (stating that "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases.").

49. *See, e.g.*, K.C. WHEARE, FEDERAL GOVERNMENT 2 (1947); *see also* Younger v. Harris, 401 U.S. 37, 44 (1971) (stating that federalism involves "a proper respect for state functions . . . [and] the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways").

basis. It is precisely at the point when these powers collide that federalism takes on many shades and gradations.[50]

Issues of federalism can be classified by two broad categories. The first category encompasses state intrusions into the federal sphere. These include instances where states seek to intrude on the constitutional authority of the federal government (e.g., enacting laws that interfere with congressional regulation of interstate commerce)[51] or fail to recognize federal supremacy or authority (e.g., attempting to impose taxes on federal goods).[52] Such examples of state intrusion into the federal sphere proliferated during the nation's early years as states tested the limits of their sovereign powers.

The second category includes federal intrusions into traditional state duties. Originally, federal legislation that involved areas traditionally left to the states was viewed as beyond Congress' jurisdiction and, therefore, did not trump state law.[53] However, the expansion of the federal government during the New Deal relaxed such traditional notions of federalism.[54] Arguments stemming from

50. *See, e.g.*, Alan R. Arkin, *Inconsistencies in Modern Federalism Jurisprudence*, 70 TUL. L. REV. 1569 (1996).

51. *See, e.g.*, South Carolina Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938) (upholding the constitutionality of a South Carolina law that prohibited trucks over 90 inches wide or weighing over 20,000 gross pounds on state highways despite infringement on interstate commerce).

52. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (invalidating Maryland's attempt to tax the issuance of bank notes by the newly created federal Bank of the United States).

53. States were considered essential to the functioning of government because they retained the majority of powers. *See* A REPORT OF THE WORKING GROUP ON FEDERALISM, *supra* note 39, at 10. So powerful were the states under the original balance of power among the national and state governments that Alexander Hamilton commented "there is greater probability of encroachments by the [states] upon the federal [government] than by the federal [government] upon the [states]." *Id.* at 9 (citing THE FEDERALIST NO. 31, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *see also* New York v. United States, 505 U.S. 144, 157 (1992) (stating that "the Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities" (emphasis added)).

54. *See, e.g.*, Daniel S. Herzfeld, Note, *Accountability and the Nondelegation of Unfunded Mandates: A Public Choice Analysis of the Supreme Court's Tenth Amendment Federalism Jurisprudence*, 7 GEO. MASON L. REV. 419 (1999).

federal intrusion over states typify, though not exclusively, modern debates in an era of *new federalism*.[55] Increasingly, federalism has been the focal point of political[56] and judicial issues. The United States Supreme Court has played a major role in setting a new frontier of federalism.[57] Beginning with the Court's 1976 decision in *National League of Cities v. Usery*,[58] new federalism cases have resulted in significant changes in the Court's jurisprudence. These changes include (1) adoption of a powerful rule against federal invasion of core state functions;[59] (2) presumption against application of federal statutes to state and local political processes;[60] (3) disdain for federal action that "commandeers" state governments into the service of federal regulatory purposes;[61] (4) rejection of federal claims brought by private parties against states[62] for overtime wages,[63] patent infringements,[64] engaging in false advertising,[65] and to resolve gambling disputes,[66] and (5) adoption of the "plain statement rule" that Congress must "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself,"[67] when its action may alter the balance of federalism.[68] Most recently, the Court opined that state employees cannot sue states for violations of the Federal Age Discrimination in Employment Act[69] because Congress exceeded its power under the Fourteenth Amendment to abrogate the state's immunity under

55. The term "new federalism" may have first been used by Donald E. Wilkes, Jr., in his article, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). *See* Richard C. Reuben, *The New Federalism*, ABA J., Apr. 1995, at 76-77 (the resurgence of federalism is partially the result of increased political efforts of the states to move toward greater autonomy from the federal government and the effects of such efforts on the political processes on Capitol Hill); *see also* Juliet Eilperin, *House GOP's Impact: Transforming an Institution*, WASH. POST, Jan. 4, 2000, at A4 (chronicling the failures of former House of Representatives Speaker, Newt Gingrich, Eilperin comments that "while Gingrich had once hoped to lead the country from the speaker's chair, some of the changes he set in motion may well diminish the legislative branch's power in the years to come by transferring power to state and local governments").

56. Although several state governors failed in their 1994 effort to organize a "Conference of States" to draft federal constitutional amendments in support of greater state rights, *see* William Claiborne, *Supreme Court Rulings Fuel Fervor of Federalists*, WASH. POST, June 28, 1999, at A2. Several bills have been introduced that would require it to consider federalism issues prior to the passage of legislation. *See* Ron Eckstein, *Federalism Bills Unify Usual Foes*, LEGAL TIMES, Oct. 18, 1999, at 1. In August 1999, President Clinton signed the second draft of his executive order concerning federalism. This initial draft of the order was roundly rejected by state and local government associations for its failure to reflect appropriately new federalism principles. *See* David S. Broder, *Federalism's New Framework*, WASH. POST, Aug. 5, 1999, at A21. The revised order disfavors federal preemptive laws or policies, requires executive officials to defer to states whenever possible in setting national standards, and features an enforcement mechanism against implementation of federal executive policies that lack a federalism "impact statement." *See id.*

57. *See* David S. Broder, *Challenge for the States*, WASH. POST, Aug. 10, 1999, at A19; *see also* Claiborne, *supra* note 56.

58. 426 U.S. 833 (1976) (holding Congress lacked the jurisdictional power under the Commerce Clause to regulate the wages and hours of public employees engaged in integral operations in areas of traditional governmental functions through the Fair Labor Standards Act); *see also* Robert H. Freilich & David G. Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 URB. LAW. 215 (1994).

59. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act of 1993 as beyond congressional authority under the 14th Amendment pursuant to a challenge based on the decision of a local zoning authority to deny a church a building permit); *see also* United States v. Lopez, 514 U.S. 549 (1995) (holding Congress lacked the commerce power to enact the Gun-Free School Zones Act of 1990, making criminal the knowing possession of a gun by a student while at school).

60. *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991).

61. *See* Printz v. United States, 521 U.S. 898 (1997) (declaring unconstitutional the federal requirement under the Brady Handgun Violence Prevention Act that state chief law enforcement officers temporarily conduct background checks on prospective handgun purchasers); New York v. United States, 505 U.S. 144 (1992). "Take title" incentive provisions of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 are constitutionally invalidated where they require states to (1) either regulate pursuant to Congress' directions or (2) take title to, and possession of, the radioactive waste generated in-state or become liable to waste generators for all damages from the state's failure to take the wastes. Both of these "options" are unconstitutional based on principles of federalism because Congress cannot require states to implement legislation according to federal directives nor "commandeer" states into the service of federal regulatory purposes. *See id.*

62. *See, e.g.*, Joan Biskupic, *Justices, 5-4, Strengthen State Rights*, WASH. POST, June 24, 1999, at A1.

63. *See* Alden v. Maine, 527 U.S. 706 (1999).

64. *See* Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999).

65. *See* College Sav. Bank v. Florida Prepaid Post-secondary Educ. Expense Bd., 527 U.S. 666 (1999).

66. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

67. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985).

68. *See* Gregory v. Ashroft, 501 U.S. 452, 469 (1991).

69. *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000).

the Eleventh Amendment[70] when it attempted to subject states to such suits.[71] The majority of these cases concern the second classification of federalism issues, when federal intrusion into predominantly state matters exceeds the limits of federal powers. However, new cases before the Court evince atypical federalism disputes where states and private parties have aggressively begun to challenge issues under the federal domain. For example, in its first term of the new century the Court will decide whether (1) states can impose environmental regulations on oil tankers that are stricter than federal law (which the Court recently concluded that states cannot);[72] (2) private parties can bring state personal injury claims against automobile manufacturers who failed to install airbags in the late 1980s despite preemptive federal legislation and regulations that allowed manufacturers to install either automatic seatbelts or airbags;[73] and (3) states can enforce state laws that prohibit state purchasing agreements with companies doing business in objectionable international locales (based on their authoritarian governments, human rights issues, or other criteria), in possible contravention of the federal constitutional power to regulate foreign affairs.[74]

By any account, new federalism has mobilized the Tenth Amendment as a vehicle for challenging federal statutes that compel state legislative or administrative action. As a result, some federal public health laws may be vulnerable to state challenges on Tenth Amendment grounds. For example, future challenges may include environmental regulations that direct states to adopt or enforce a federal regulatory scheme[75] or loosely preemptive federal

70. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

71. *See* Linda Greenhouse, *Age Bias Case in Supreme Court Opens a New Round of Federalism*, N.Y. TIMES, Oct. 14, 1999, at A25; *see also* Joan Biskupic, *Court Curbs Suits By State Workers; Continuing Pattern, 5-4 Ruling Bars Claims of Age Bias Under Federal Law*, WASH. POST, Jan. 12, 2000, at A11.

72. *See* International Ass'n of Indep. Tanker Owners v. Locke, 148 F.3d 1053 (9th Cir. 1998), *rev'd*, 120 S. Ct. 1135 (2000).

73. *See* Geier v. American Honda Motor Co., 166 F.3d 1236 (D.C. Ct. App. 1999), *cert. granted*, 120 S. Ct. 33 (1999).

74. *See* National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *cert. granted*, 120 S. Ct. 525 (1999); *see also* Joan Biskupic, *High Court to Review Mass. Law on Burma*, WASH. POST, Nov. 30, 1999, at A4; Linda Greenhouse, *Justices to Decide Foreign Policy Question in Massachusetts Boycott of Myanmar*, N.Y. TIMES, Nov. 30, 1999, at A20.

75. *See* New York v. United States, 505 U.S. 144 (1992).

laws[76] that invade core state concerns in public health. The following discussion explores the constitutional authority and exercise of public health powers of federal, state, and local governments.

a. *Federal Powers.* Before an Act of Congress is deemed constitutional, two questions must be asked: (1) does the Constitution affirmatively authorize Congress to act, and (2) does the exercise of that power improperly interfere with any constitutionally protected interest?[77]

In theory, the United States is a government of limited, defined powers. In reality, political and judicial expansion of federal powers through the doctrine of implied powers allows the federal government considerable authority to act in the interests of public health and safety. The federal government may employ all means reasonably appropriate to achieve the objectives of constitutionally enumerated national powers.[78] For public health purposes, the chief powers are the power to tax, spend, and regulate interstate commerce. These powers provide Congress with independent authority to raise revenue for public health services and to regulate, both directly and indirectly, private activities that endanger human health.

b. *State Police Powers.* Despite the broad federal presence in modern public health regulation, states have historically and contemporaneously had a predominant role in providing population-based health services. States still account for the majority of traditional spending for public health services, excluding personal medical services and the environment.[79] The Tenth Amendment of the federal Constitution reserves to the states all powers not otherwise given to the federal government nor prohibited to the states by the Constitution.[80]

The police power represents the state's authority to further a primary goal of all government: to promote the general welfare of society. Police powers can be generally defined as "[t]he inherent authority of the state (and, through delegation, local government) to enact laws and promulgate regulations to protect, preserve and

76. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991).

77. *See* James G. Hodge, Jr., *The Role of New Federalism & Public Health Law*, 12 J.L. & HEALTH 309, 311 (1998).

78. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323-24 (1819).

79. *See* INSTITUTE OF MEDICINE, *supra* note 1, at 178-83.

80. U.S. CONST. amend. X.

promote the health, safety, morals, and general welfare of the people."[81]

To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests--personal interests in liberty, autonomy, privacy, and association, as well as economic interests in freedom to contract and uses of property.[82] Police powers in the context of public health include all laws and regulations directly or indirectly intended to improve morbidity and mortality in the population. Police powers enable state and local governments to promote and preserve the public health in areas ranging from injury and disease prevention,[83] to sanitation and water and air pollution.[84]

c. *Local Powers.* In addition to the significant roles federal and state governments have concerning public health law in the constitutional system, local governments also have important public health interests. Public health officials in local governments, including counties (or boroughs), municipalities, and special districts, are often on the front line of public health dilemmas. They may be directly responsible for assembling public health surveillance data, implementing federal and state programs, administering federal or state public health laws, operating public health clinics, and setting public health policies for their specific populations.

To the degree local governments set local public health priorities, they do so pursuant to specific delegations of state police powers. Local governments in the constitutional system are recognized as subsidiaries of their state sovereigns. As a result, any powers local governments have to enact public health law or policies must be delegated from the state. Such delegation of power, which may be narrow or broad, provide local governments with a limited realm of authority, or "home rule," over public health matters of local concern within their jurisdiction. This delegation of power may be protected against withdrawal or infringement by state constitutions or statutes. Absent constitutionally--protected delegation of power to local governments, however, states may modify, clarify, preempt, or remove "home rule" powers of local government at will.

81. Lawrence O. Gostin & James G. Hodge, Jr., *Reforming Alaska Public Health Law, A Report for the Alaska Public Health Improvement Process* 3 (1999) (on file with authors).

82. *See* Hodge, *supra* note 77, at 318-30.

83. *See* TOM CHRISTOFFEL & STEPHEN P. TERET, PROTECTING THE PUBLIC: LEGAL ISSUES IN INJURY PREVENTION 25-28 (1993).

84. *See* 39 AM. JUR. 2D *Health* § 34 (1968).

Exercises of local authority in the interests of public health cannot extend beyond limited jurisdictional boundaries or conflict with or impair federal or state law. As a result, the role of local governments in public health law is largely limited by federal and state laws and regulations that local governments must adhere to in setting or implementing public health policies.

III. PUBLIC HEALTH LAW IN ALASKA

Having defined public health law and framed it within the context of the constitutional system of American government, we turn to an examination of public health law in Alaska.

Alaska's public health system is deeply complex, with intricate relationships among the federal government (including the Indian Health Service, Centers for Disease Control and Prevention, and the Environmental Protection Agency), state government (primarily the Alaska Department of Health and Social Services and Department of Environmental Conservation), local governments (including boroughs and municipalities), and tribal organizations. We cannot attempt to delineate all of the intricacies of these varied agencies and their roles in Alaska public health. Rather, we examine Alaska public health powers under the Alaska Constitution, state statutory law, municipal law, and tribal law, consistent with our definitional and conceptual approach.

A. The Alaska Constitution

Like the federal Constitution, the Alaska Constitution sets limits on the powers of the state while providing affirmative grants of governmental powers. The Alaska Constitution explicitly guarantees many of the same or similar guarantees of individual rights set forth in the federal Constitution. These rights include due process rights to life, liberty, and the pursuit of happiness;[85] equal protection;[86] freedom of religion[87] and speech;[88] and a prohibition against unreasonable searches and seizures.[89]

The Alaska Constitution also provides additional protections of individual rights through provisions not explicitly stated in the federal Constitution. Notable among these additional protections

85. *See* ALASKA CONST. art. I, §§ 1, 7.

86. *See* ALASKA CONST. art. I, § 3.

87. *See* ALASKA CONST. art. I, § 4.

88. *See* ALASKA CONST. art. I, § 5.

89. *See* ALASKA CONST. art. I, § 14.

in Alaska is an explicit constitutional right to privacy[90] pertaining to governmental intrusions. The scope of state privacy rights is largely undefined[91] and dependent on the circumstances.[92] Alaska courts have interpreted the state constitution to provide broader privacy protections than the federal constitution.[93] The right, however, is not absolute.[94] Provided government can show that an infringement of the right to privacy is justified by a legitimate and compelling governmental interest, government action is likely constitutional.[95]

Unlike the federal Constitution and most other state constitutions, the Alaska Constitution explicitly authorizes the state legislature to "provide for the promotion and protection of public health"[96] and "provide for public welfare."[97] While these provisions seemingly require the State legislature to act to protect public health and promote the public welfare, the degree and manner in which public health goals are accomplished are largely left to the discretion of the legislative body. As a result, Alaska public health law and regulations are defined by the State legislature.

Concerning the right to privacy, these provisions have been interpreted to establish a presumption of validity of traditional measures taken by government in the interests of public health.[98] Consequently, the constitutional right to privacy in Alaska does not undermine many legitimate public health activities, like disease surveillance, reporting of infectious diseases, the abatement and control of nuisances, and registration of persons who pose threats to the public health.[99] These privacy rights may, however, protect the privacy of individuals within their homes against unnecessary infringements by the State, even though such actions may arguably further public health objectives. In *Ravin v. State*, for example, the Alaska Supreme Court upheld the right of individuals to use marijuana in the privacy of their own homes without governmental interference in the form of criminal prosecutions.[100] The court subsequently rejected a similar claim concerning the personal use of cocaine within the home, finding a sufficiently close and substantial relationship between the criminalization of the more dangerous substance, cocaine, and the legitimate governmental purpose of preventing harm to individuals and the public health.[101]

Pursuant to the state constitutional right to privacy, the Alaska legislature has enacted laws to protect the confidentiality of personal medical and public health records.[102] Though the State has declared virtually all information held by state agencies and departments to be public records open to inspection, it specifically exempts from disclosure "medical and related public health records."[103] Health information privacy protections are often coupled with anti-discrimination protections that prohibit discrimination against individuals on account of their physical or mental disabilities.[104]

The Alaska Constitution also authorizes the legislature to organize the state into organized and unorganized boroughs[105] (similar to counties), and incorporated cities within these boroughs.[106] Boroughs and cities are delegated liberal "home rule" powers to exercise legislative powers not otherwise prohibited by or inconsistent with state law.[107] Statutory law enacted pursuant to this constitutional authorization further defines and classifies boroughs and cities,[108] and clarifies the extent of their home rule authority.[109]

90. *See* ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed.").
91. *See* Ravin v. State, 537 P.2d 494, 498 (Alaska 1975).
92. *See* State v. Glass, 583 P.2d 872 (Alaska 1978).
93. *See* Messerli v. State, 626 P.2d 81, 83 (Alaska 1980).
94. *See* State v. Erickson, 574 P.2d 1, 22 (Alaska 1978).
95. *See Messerli*, 626 P.2d at 84.
96. ALASKA CONST. art. VII, § 4.
97. *Id.* § 5.
98. *See* Ravin v. State, 537 P.2d 494, 510 (Alaska 1975).
99. *See* Rowe v. Hutton, 884 F. Supp. 1372 (D. Alaska 1994).
100. *See Ravin*, 537 P.2d at 510.

101. *See* State v. Erickson, 574 P.2d 1, 23 (Alaska 1978).
102. ALASKA STAT. § 9.25.120 (LEXIS 1997).
103. *Id.* § 9.25.120.
104. Although the federal Americans with Disabilities Act, 42 U.S.C. §§ 12101-12201 (1992), presents a solid foundation of anti-discrimination protection, Alaska has statutorily provided additional protections. The Alaska State Commission for Human Rights (within the Office of the Governor) is statutorily authorized to promulgate regulations consistent with the legislature's general prohibition of individual discrimination in employment, credit practices, places of public accommodation, or the sale, lease, or rental of real property against persons on the basis of race, religion, color, national origin, sex, age, physical or mental disability, marital status, pregnancy, or parenthood. ALASKA STAT. §18.80 (LEXIS 1997).
105. *See* ALASKA CONST. art. X, § 3.
106. *See id.* § 7.
107. *See id.* §§ 1, 10, 11.
108. ALASKA STAT. §§ 29.03 *et seq.* (LEXIS 1997).
109. *See infra* Part III.C.

B. Constitutional and Statutory Provisions of Public Health Law in Alaska

Pursuant to explicit constitutional authorization, the Alaska Legislature has enacted an array of statutes that generally authorize various state and local governmental agencies to regulate and carry-out traditional public health functions. Many of these statutes, and some significant state constitutional provisions, are summarized in the Table below.

TABLE OF ALASKA'S PUBLIC HEALTH LAWS[110]

Provision	Legal Citation	Brief Description of Citation
Right to Privacy	ALASKA CONST. art. I, § 22.	"The right of the people to privacy is recognized and shall not be infringed."
Promote Public Health	ALASKA CONST. art. VII, § 4.	"The legislature must provide for the promotion and protection of public health."
Public Welfare	ALASKA CONST. art. VII, § 5.	"The legislature shall provide for public welfare."
Public Health Records--exception to right of inspection	ALASKA STAT. § 9.25.120 (LEXIS 1999).	Every person has right to inspect public records in the state, unless prohibited by other provisions.
Education--Physical Exam and Immunization	§ 14.30.120 § 14.30.125	Physical exams shall be delivered to child's parent. School district shall require children attending school be immunized if ordered by the Commissioner of Health and Social Services.
Health and Personal Safety Education	§ 14.30.360	"Each state public school system shall be encouraged to initiate a program in health education for kindergarten through grade 12."

110. This Table presents an index of significant Alaska state public health laws in order of appearance among statutory titles in the State's official statutory reporter, ALASKA STATUTES (LEXIS 1999). It does not include references to federal laws, state administrative laws, tribal laws, local ordinances, or case law of public health significance in Alaska. For these reasons, this Table should not be viewed as a complete listing of Alaska public health laws, but rather as a guide to those Alaska constitutional and statutory laws which significantly relate to the regulation in the interests of public health.

Fish Health Inspections	§ 16.05.868	Fish health inspections shall be performed as necessary.
Department of Health and Social Services ("DHSS") Administration	§ 18.05.010	DHSS shall "administer the laws and regulations relating to the promotion and protection of the public health, control of communicable diseases," and maternal/fetal health.
DHSS--Reports	§ 18.05.020	DHSS shall prepare an annual report of activities.
Planned Parenthood	§ 18.05.035	DHSS shall distribute planned parenthood information.
Fetal Health Effects and Pregnancy	§ 18.05.037	DHSS shall make available information on fetal health effects during pregnancy for distribution to patients.
Public Health Regulations	§ 18.05.040(a)(1)	DHSS shall adopt regulations consistent with existing laws for diseases of public health significance.
Persons with Impairments	§ 18.05.044	DHSS shall maintain a registry of consenting persons with impairments.
Board of Health - Office of Planning and Research	§ 18.07.021	This office "shall administer the certificate of need program . . . and perform other functions."
Emergency Medical Services	§ 18.08.010	"The department is responsible for the development, implementation, and maintenance of a statewide comprehensive emergency medical services system . . . ."
Health Units and Districts (Districts, Local Health Board, Municipal Corporations, Native)	§§ 18.10.010 *et seq*	Establishes health units in unincorporated areas and designates consolidation into health districts.
Tuberculosis	§ 18.15.120	"DHSS may establish a comprehensive program for the control of tuberculosis in the state. . . ."
Blood Tests and Prenatal Blood Test	§ 18.15.150	A blood sample shall be taken for testing at a pregnant woman's first professional visit or within ten days thereafter.

Phenylketonuria ("PKU")	§ 18.15.200	A physician or nurse attending a delivery shall test the child for phenylketonuria.
Hospital Regulation	§ 18.20.010	Designed to provide for the development, establishment and enforcement of standards for the care and treatment of individuals in hospitals and related health care centers.
Nursing Facilities	§ 18.20.300	"[T]o ensure that the quality of care in nursing facilities in this state is maintained at a high standard in accordance with applicable state and federal law and regulations . . . ."
Patient Access to Records	§ 18.23.005	"[A] patient is entitled to inspect and copy any records . . . pertaining to the health care rendered to the patient."
Electronic Medical Records	§ 18.23.100	Health care providers may maintain and preserve medical records in an electronic format.
Department of Health and Social Services	§ 18.26.020	Creates Alaska medical facility authority to promote health and general welfare by finding means of financing medical facilities.
Community Health Aid Program	§ 18.28.010(c)(1)	Grant may be used for training primary community health aids.
Asbestos	§ 18.31.010	Coordinates efforts of state departments and agencies to abate asbestos health hazards in schools.
Public Accommodations	§ 18.35.010	Authorizes DHSS to maintain health standards in places of public accommodation.
Regulation of Public Smoking	§ 18.35.305	Designates places where smoking is prohibited.
Radioactive Materials	§ 18.45.030(1)	DHSS shall study the public health hazards of radioactive materials in the state.
Vital Statistics	§§ 18.50.010 *et seq.*	DHSS shall accumulate vital statistics.

Accident and Health Hazards; Accident Prevention	§ 18.60.010(b)	Authorizes a program to reduce the incidence of work-related accidents and health hazards in the state.
Employee Safety Education Programs	§ 18.60.066	Requires employers to conduct a safety education program for employees who may be exposed to toxic or hazardous substance or physical agent.
Council on Domestic Violence and Sexual Assault	§ 18.66.010	Provides for planning and coordination of services to victims of domestic violence and sexual assault.
State Commission for Human Rights	§ 18.80.050	Commission shall adopt regulations relating to discrimination because of physical or mental disability.
Mammogram Coverage	§ 21.42.375	Health care insurers shall cover low-dose mammography screenings.
Cervical and Prostate Cancer Detection	§ 21.42.395	Health care insurers shall cover the costs of cervical and prostate cancer screenings.
Local Air Quality Control Program	§ 29.35.055	Municipalities may establish a local air quality control program by ordinance.
Local Alcohol Regulation	§ 29.35.080	Municipalities may regulate the sale and consumption of alcoholic beverages.
Local Reporting of Hazardous Wastes	§ 29.35.500	Municipalities may create a program for the reporting of hazardous chemicals, materials, and wastes.
Inventories of Hazardous Materials	§ 29.35.530	Requires municipalities to inventory hazardous substances.
Hazardous Waste Information	§ 29.35.540	Information about hazardous wastes shall be made readily available to the public for inspecting and copying.
DHSS Duties	§ 44.29.020	DHSS shall administer state programs of public health and social services.

Department of Environmental Conservation ("DEC") – Declaration of Policy	§ 46.03.010	"[C]onserve, improve, and protect [Alaska's] natural resources and environment and control water, land, and air pollution, in order to enhance health, safety and welfare of the people of the state."
Alaska Environmental Plan	§ 46.03.040	DEC shall formulate and annually review a statewide environmental plan.
Hazardous Waste Reduction Matching Grants	§ 46.03.317	Establishes hazardous waste reduction grants.
Regulation of Pesticides and Broadcast Chemicals	§ 46.03.320	DEC may regulate the transporting, testing, inspection, packaging, and labeling of pesticides and chemicals.
Operation of Sewer and Water Facilities	§ 46.03.720	A person may not construct and operate a sewer system or treatment works without approval.
Pesticides; Oil Pollution	§§ 46.03.730-740	A person may not spray DDT or other commercial pesticides, or discharge oil products.
Water Nuisances	§ 46.03.800	A person may not befoul, pollute, or impair the quality of water used for domestic purposes.
Air and Land Nuisances	§ 46.03.810	A person may not publicly deposit any matter that would be "obnoxious or cause the spread of disease or in any way endanger the health of the community."
Definitions of DEC Terms.	§ 46.03.900	Defines air, water, soil, and other environmental terms.
Solid and Hazardous Waste Management Practices	§ 46.06.021	DEC shall promote waste source reduction, recycling of waste, and waste treatment and disposal to minimize threats to human health and environment.
Village Safe Water Act	§ 46.07.010	Establishes a program "to provide safe water and hygienic sewage disposal facilities in villages in the state."

Hazardous Substance Release Control	§ 46.09.010	Persons handling hazardous wastes must report releases to DEC and other appropriate public safety agencies.
Hazardous Substance Spill Technology Review Council	§ 46.13.100	Council shall assist in identification of containment and cleanup products and procedures.
State Air Quality Plan	§ 46.14.030	DEC shall act for the state in any state air quality control plan developed.
Publication of Records and Confidentialty	§ 47.05.020	DHSS may adopt regulations concerning records and the disclosure of such information.
Misuse of Public Assistance Records	§ 47.05.030	A person may not "solicit, disclose, receive, make use of, or authorize . . . the use of, a list of or names of or information concerning, persons applying for or receiving the assistance."
Public Policy---Children	§ 47.05.060	To secure for each child the care and guidance that will serve the moral, emotional, mental and physical welfare of the child and community.
Medical Assistance--Purpose	§ 47.07.010	"[T]he needy persons of this state receive uniform and high quality medical care, regardless of race, age, national origin, or economic standing."
Catastrophic Illness Assistance	§ 47.08.010	DHSS may reimburse providers of medical care for unpaid costs due to treatment of catastrophic illness.
Child Abuse and Neglect	§ 47.17.010	Requires the reporting of child abuse cases.
Developmentally Delayed Children - Early Intervention and Family Support Services	§ 47.20.060	Provides funding to certain children who exhibit or are at risk for developmental delays or disabilities.
Community Mental Health Services	§ 47.30.056	Establishes the Alaska Mental Health Trust Authority to ensure a comprehensive mental health program.

Alcoholism and Drug Abuse Treatment Act	§ 47.37.020	Organizes and administers treatment services for persons with alcohol and drug problems.
Payment Costs of Prenatal Services	§ 47.40.100	Requires DHSS to pay the cost of prenatal services that are not available from an existing state or federal program for pregnant women with social or economic difficulties.

As in most states, there are multiple state agencies in Alaska which regulate in the interests of public health. These agencies include the Department of Labor (which is primarily responsible for occupational safety and health); the Department of Commerce and Economic Development (which provides for licensure of physicians and nurses); and the Department of Public Safety (which provides support for victims of domestic violence and sexual assault).

Most traditional public health functions in Alaska are performed directly by one of two state agencies, the Department of Health and Social Services ("DHSS")[111] and the Department of Environmental Conservation ("DEC").[112] As summarized below, the respective duties and functions of these state agencies are distinguished by the general legislative intent underlying the agency's establishment. DHSS is primarily responsible for regulating public health matters related to the control of communicable diseases, administration of public health care, and some issues of public safety.[113] The DEC protects the environment and the state's natural resources by establishing regulations and inspecting premises where polluting activity occurs.[114]

1. *Department of Health and Social Services.* DHSS and its many divisions, including the Division of Public Health, are headed by the Commissioner of Health and Social Services.[115] Most

111. *See* ALASKA STAT. § 44.29.010 *et seq.* (LEXIS 1999); *see also Alaska Health and Social Services Online* (visited Mar. 30, 2000) <http://www.hss.state.ak.us>.

112. *See* ALASKA STAT. § 44.46.010 *et seq.* (LEXIS 1999); *see also Alaska Department of Environmental Conservation* (visited Mar. 30, 2000) <http://www.state.ak.us/dec>.

113. *See* ALASKA STAT. § 46.03.020 (LEXIS 1999).

114. *See id.*

115. *See id.* § 44.29.010 (LEXIS 1997); *see also Alaska Health and Social Services Online- Division of Public Health* (visited Mar. 30, 2000) <http://www.hss.state.ak.us/dph_home.htm>.

traditional public health duties and functions are broadly delegated to DHSS through loosely defined authorizations by the State Legislature.[116] DHSS is authorized to (1) "administer the laws and regulations relating to the promotion and protection of the public health"; (2) control communicable diseases; (3) conduct programs for the improvement of maternal and child health; and (4) perform "other duties provided by law."[117]

Public health duties of DHSS revolve around the administration of state public health regulations, programs, and initiatives concerning maternal and child health and welfare services;[118] preventive medical services;[119] public health nursing;[120] nutrition services;[121] health education;[122] public health laboratories;[123] mental health services;[124] management of state institutions (other than corrections facilities) and medical facilities;[125] the registration of persons with impairments;[126] and "general relief."[127]

Additional clarification of the public health functions of DHSS is legislatively set forth in subsequent sections of the Alaska Revised Statutes, primarily Title 18, "Health, Safety, and Housing."[128] Pursuant to Title 18, DHSS is authorized to oversee the following: (1) coordination and creation of a statewide emergency medical services system;[129] (2) establishment of a comprehensive program for the control of tuberculosis[130] and other infectious diseases including HIV/AIDS;[131] (3) accumulation of vital statistics;[132] (4)

116. *See* ALASKA STAT. § 44.29.010 (LEXIS 1999).

117. *Id.* § 18.05.010.

118. Including, for example, the provision of planned parenthood information, *see id.* § 18.05.035, licensing of child care facilities, *see id.* § 44.29.20(a)(14), registration of midwifery birth centers, *see id.* §18. 040(a)(10), and study of fetal alcohol effects. *See id.* § 18.05.037.

119. *See id.* § 44.29.20(a)(2).

120. *See id.* § 44.29.20(a)(3).

121. *See id.* § 44.29.20(a)(4).

122. *See id.* § 44.29.20(a)(6).

123. *See id.* § 18.05.040(8).

124. *See id.* § 44.29.20(a)(7).

125. *See id.* § 44.29.20(a)(9).

126. *See id.* § 18.05.044(a)-(c). The statute defines persons with impairments as those with a physical or mental condition that, if not otherwise corrected, materially limits individual activities or functioning.

127. *Id.* § 44.29.020(a)(13).

128. *See generally id.* § 18.

129. *See id.* § 18.08.

130. *See id.* §§ 18.15.120-149.

131. *See id.* § 18.15.310.

132. *See id.* § 18.50.

regulation of the quality of hospitals;[133] (5) monitoring of asbestos levels;[134] and the health effects of radioactive materials in the state;[135] and (6) coordination with the Alaska Department of Labor and other agencies for the prevention of occupational accidents and injuries and the promotion of housing safety.[136]

These and other public health duties of the Department are also accompanied by the legislative authorization to enact administrative regulations that more precisely define the scope and extent of these powers. These administrative regulations may have the binding force and effect of statutory law, but have less force than federal and state constitutional and statutory laws.

2. *Department of Environmental Conservation.* DEC is the state's primary environmental protection agency.[137] DEC has also been assigned responsibility for abating public health nuisances that are primarily environmental in nature.[138] Specific duties of DEC include the following: (1) coordinating and developing statewide environmental policies; (2) establishing standards regarding air, water, surface, and subcutaneous pollution;[139] (3) preventing public health nuisances;[140] (4) maintaining health standards in places of public accommodation (including the prohibition of smoking in certain public places);[141] and (5) regulating sanitary practices in the interest of public health, including setting sanitation standards for a variety of commercial businesses (*e.g.*, food handling and manufacturing establishments, industrial plants, barbers and hairdressers, restaurants, and bars) and noncommercial establishments (*e.g.*, schools and any "other similar establishments in which lack of sanitation may create a condition that causes disease").[142]

Various divisions within DEC are responsible for implementing programs consistent with these broad legislative criteria. The Division of Air and Water Quality monitors air and water pollution.[143] The Division of Environmental Health is charged with administering laws and regulations concerning, among other things, solid waste management, safe drinking water, environmental sanitation, food safety, and pesticide controls.[144] Through its Environmental Sanitation and Food Safety Program, this Division inspects more than 6,000 public facilities across the state to monitor food and public safety and may assist in epidemiological investigations of food- and water-borne contaminants.[145] The Division of Spill Prevention and Response regulates in areas of environmental contamination, including underground storage tanks.[146] Like DHSS, DEC has the authority to establish and enforce administrative regulations.[147]

133. *See id.* § 18.20.
134. *See id.* § 18.31.
135. *See id.* § 18.45.030(1).
136. *See id.* § 18.60.
137. *See id.* § 46.03.020.
138. *See* FRANK P. GRAD, PUBLIC HEALTH LAW MANUAL 16-17 (1990).
139. *See* ALASKA STAT. § 46.03.020(10) (LEXIS 1998).
140. *See id.*
141. *See id.* §§ 18.35.010-.365 (LEXIS 1998).
142. *Id.* § 44.46.020(5)(c).

C. Municipal/Local Adoption of Public Health Powers

Alaska's Constitution entrusts the legislature to enact laws governing the establishment and powers of the state's boroughs and cities. The state's seventeen incorporated boroughs are classified as either first, second, or third class.[148] Cities in the state may be designated as first or second class.[149] Boroughs or cities may be further classified. "Home rule municipalities" are local governments that have adopted a home rule charter.[150] These local governments have legislative powers not otherwise prohibited by state law or charter.[151] In addition, boroughs may be classified as "general law municipalities," which include unchartered boroughs or cities whose legislative powers must be specifically conferred by state law.[152]

While Alaska statutory law does not specifically define the relationship between the state and local governments concerning

143. *See Alaska Department of Environmental Conservation - Division of Air and Water Quality* (visited Apr. 14, 2000) <http://www.state.ak.us/local/akpages/ENV.CONSERV/dawq/dec_dawq.htm>.
144. *See Alaska Department of Environmental Conservation - Division of Environmental Health* (visited Apr. 14, 2000) <http://www.state.ak.us/dec/deh> (total public facilities mentioned under "Performance Measures").
145. *See id.*
146. *See Alaska Department of Environmental Conservation - Division of Spill Prevention and Response* (visited Apr. 14, 2000) <http://www.state.ak.us/dec/dspar/dec_dspr.htm>.
147. *See* ALASKA STAT. § 46.03.020(6)-(10).
148. *See id.* § 29.04.030.
149. *See id.*
150. *Id.* § 29.04.010.
151. *See id.*
152. *Id.* § 29.04.020.

public health responsibilities, the classification of these subsidiary governmental units is important when examining the degree of public health powers delegated to the local government. For example, first-class boroughs may proclaim area-wide regulations concerning water pollution, air pollution, animal control, and the licensing of day-care facilities, as well as any non-area-wide regulations not otherwise prohibited by state law.[153] Second-class boroughs may regulate in similar fashion on an area-wide basis, but are limited to defined subjects of regulation on a non-area-wide basis.[154] First- or second-class boroughs may acquire additional powers by holding an area-wide election.[155] In 1998, for example, residents of Kenai Peninsula Borough voted (albeit unsuccessfully) against allowing the local government to extend animal control policies to areas outside of the borough's cities.[156]

Third-class boroughs, which are the functional equivalent of special service districts in many states, lack any public health regulatory powers absent the power shared by first- and second-class boroughs to prevent the release of oil or other hazardous substances in the environment.[157] Only one third-class borough exists in the state.[158] No additional third-class boroughs may be created.[159] Similar delegations of home-rule powers apply to cities depending on whether they exist within or outside a borough.[160] Cities may also transfer their powers to the boroughs in which they exist.[161]

Alaska delegates certain public health functions to all municipalities, whether home rule or general law, borough or city. For example, any municipality may establish a local air quality control program;[162] regulate the sale and consumption of alcoholic beverages;[163] create a program for reporting hazardous chemicals, materials, or wastes;[164] take advantage of incentives in the form of state

153. *See id.* § 29.35.200.
154. *See id.* § 29.35.210.
155. *See id.* § 29.35.300.
156. *See* Heather A. Resz, *Animal Issues Goes to Voters*, PENINSULA CLARION, July 16, 1998, at A1 (on file with authors).
157. *See* ALASKA STAT. § 29.35.220 (LEXIS 1998).
158. *See* LOCAL BOUNDARY COMMISSION, LOCAL GOVERNMENT IN ALASKA 5 (1998) (last modified October 1998) <http://www.dced.state.ak.us/mra/Local_Gov_AK.pdf>.
159. *See* ALASKA STAT. §§ 29.05.031(b), 29.06.090(a) (LEXIS 1998).
160. *See id.* §§ 29.35.250, 260.
161. *See id.* § 29.35.310.
162. *See id.* § 29.35.055.
163. *See id.* § 29.35.080.
164. *See id.* § 29.35.500.

funds to establish health facilities and hospitals;[165] and receive grants of state funds to clean-up or prevent oil and hazardous substance spills.[166] Delegations do not include, however, traditional public health functions such as communicable disease control.

Antiquated state law also authorizes the creation of health units (defined as a community or settlement outside an incorporated city) and health districts (comprised of two or more contiguous health units).[167] These health units or districts are not assigned specific duties, other than to report to the Commissioner of Health and Social Services.[168] Despite their authorization under state law, DHSS reports that there are no functional health units or districts, as defined by law, in Alaska.[169]

D. Tribal Public Health Powers

Alaska Native villages predate statehood.[170] Their current legal existence and many of their public health powers derive from the federal government.[171] Congress has recognized the unique status of Alaska's Native and Indian tribal governments in the constitutional system of government in ways similar to its recognition of American Indian tribal governments outside Alaska.[172]

The federal government's relationship with the American Indians is the product of compromise. In the mid 1800's, American Indians executed treaties with the United States that turned over vast quantities of Indian land to federal control.[173] In return, American Indians were granted limited set-asides of land (reservations), were allowed to form sovereign tribal governments, and were to receive direct federal assistance.[174] When Russia sold the territory of Alaska to the United States in 1867, the treaty executing the exchange secured similar terms for Alaska Natives.[175] In

165. *See id.* § 29.60.120.
166. *See id.* § 29.60.500.
167. *See id.* §§ 18.10.010-050.
168. *See id.* § 18.10.050.
169. *See* Lawrence O. Gostin & James G. Hodge, Jr., *Reforming Alaska Public Health Law, A Report for the Alaska Public Health Improvement Process*, 23 (1999) (on file with authors).
170. *See A Brief History of Alaska Statehood (1867-1959)* (visited Apr. 12, 2000) <http://xroads.virginia.edu/~CAP/BARTLETT/49state.html>.
171. *See* DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 5 (1984).
172. *See id.*
173. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 63-66 (1988).
174. *See* AMERICAN INDIAN LAW DESKBOOK 15-16 (Conference of Western Attorneys General ed., 2d ed. 1988).
175. *See* CASE, *supra* note 171, at 67.

1971, the Alaska Native Claims Settlement Act ("ANCSA")[176] settled all land claims by Alaska Natives and transferred land to state-chartered Native corporations.[177]

Pursuant to the Snyder Act of 1921,[178] Congress directly assumed responsibility for the provision of health care to tribal governments.[179] Such federal assistance continues today through long-term commitments for comprehensive health services administered by the Indian Health Service ("IHS") of the federal DHHS, and to a lesser extent, the Bureau of Indian Affairs ("BIA").[180] Congress has legislatively strengthened its commitment to provide health care benefits to Alaska Natives through the Indian Self-Determination and Education Assistance Act of 1975[181] and the Indian Health Care Improvement Act of 1976.[182] Together these Acts clarified federal objectives for the provision of health-related services and encouraged the direct involvement of tribal governments in planning and operating health programs.[183]

In 1991, Congress began the IHS Tribal Self-Governance Demonstration Project.[184] This Project, which is scheduled to continue until 2006, specifically authorizes IHS and BIA to execute agreements (or compacts) with Alaska Natives and American Indians for the purpose of providing federal funds for health programs and facilities without significant federal oversight.[185] Under this law, general management and supervision of such programs and facilities is left to the tribal governments. In Alaska, many of these tribal groups collaborated to form the Alaska Tribal Health Compact ("ATHC"), which successfully negotiated a health services agreement with IHS.[186] As a result, the setting of public health goals and objectives has become a primary responsibility of local

176. *See* 43 U.S.C. §§ 1601-29 (1994).

177. *See* Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 524 (1998).

178. *See* 25 U.S.C. § 13 (1994).

179. *See* CASE, *supra* note 174, at 246-47.

180. *See* Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 401 (1997).

181. *See* Pub. L. 93-368, 88 Stat. 2206 (1975).

182. *See* Pub. L. 94-437, 90 Stat. 1400 (1976).

183. *See* Betty Pfefferbaum et al., *Learning How to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 AM. INDIAN L. REV. 365, 383-89 (1996).

184. *See* 25 U.S.C. § 450f (1994).

185. *See* Pfefferbaum et al., *supra* note 183, at 387.

186. *See* Nancy Pounds, *Native group ready to take over hospital management in January*, 23 ALASKA J. COM. 1 (1999).

tribal governments. This movement toward self-governance was further solidified with the congressional enactment of the Tribal Self-Governance Act of 1994.[187]

Village and group members of the ATHC receive their funds directly from IHS.[188] They can use the funds for specific health programs within their discretion, provided the spending is consistent with the general conditions for federal funding.[189] This flexibility allows local tribal governments to target and respond to differing health needs across their populations of which they are aware. Organizations like the Alaska Native Health Board[190] assist with community-wide planning of health services and needs.[191]

Despite their distinct existence and relationship with the federal government, Alaska Natives are also citizens of the state. In *Alaska v. Native Village of Venetie Tribal Government*,[192] the United States Supreme Court held that non-reservation tribal land allotted to Alaskan Natives through the Alaska Native Claims Settlement Act of 1971 was not "Indian country," and thus was not subject to direct federal jurisdiction and did not form a territorial basis for certain types of tribal jurisdiction related to the exercise of general governmental powers.[193] The state has civil and criminal jurisdiction over the villages and tribal lands of Alaska Natives.[194] Consequently, state law generally applies to these residents.

Although the Court's decision in *Venetie* confirmed that Alaska had primary jurisdiction over tribal lands, the extent of state powers remains conditioned on the recognition of the federal partnership with tribal governments.[195] Tribal health organizations are registered as state-chartered nonprofit institutions. However, to the extent that they originated as federally-sponsored entities, they have been treated by state authorities as federal facilities for certain purposes.[196] For example, in certain circumstances, health

187. *See* 25 U.S.C. § 450 (1994).

188. *See* Cook Inlet Treaty Tribes v. Shalala, 166 F.3d 986, 988 (9th Cir. 1999).

189. *See id.*

190. *See Alaska Native Health Board* (visited Mar. 30, 2000) <http://www.anhb.org>.

191. *See Alaska Native Health Board – All About ANHB* (visited Apr. 10, 2000) <http://www.anhb.org/sub/about.html>.

192. 522 U.S. 520 (1998).

193. *See id.* at 532.

194. *See* 18 U.S.C. §§ 1162, 1360 (1994).

195. *See generally Venetie*, 522 U.S. 520.

196. *See* Gostin & Hodge, *supra* note 169, at 25-26.

care employees of tribal affiliated health facilities have not been required to be licensed under state law.[197]

Less certain are the responsibilities these tribal governments share with state and local governments for the public health. Tribal governments undertake public health initiatives with their federal funds. Federal monies helped establish the Alaska Native Epidemiology Center, which surveys rates of disease and other health conditions among Alaska Natives.[198] Tribal governments are also entitled to apply for state public health grants. Tribal health facilities may treat residents other than Alaska Natives.[199] Disputes have arisen as to when and whether tribal governments must adhere to state public health initiatives and requirements. Though overall responsibility for public health should likely reside with the state, theoretical and practical issues complicate the achievement of purely state public health objectives where tribal organizations dispute state jurisdictional authority or where conflicts arise between local and tribal governments serving the same community.

IV. THE PUBLIC HEALTH LAW IMPROVEMENT PROCESS

Public health law contemplates the responsibilities of individuals and the duties of government to act for the health of society. As such, public health law serves as a foundation and a framework for public health activity. It should assure that public health agencies are fully capable of responding to current and potential public health threats. Unfortunately, existing public health laws too often fail to support health departments in carrying out their essential services and accomplishing their goals. Reform of the law can promote more effective decision-making and protect individual rights.

Before explaining why public health law improvement can yield many benefits, it is important to be candid about the limitations of reform. Public health problems may not be remedied primarily through law reform, but rather through better leadership and training, improved infrastructure for surveillance and epidemiological investigations, comprehensive counseling and health education, and innovative prevention strategies. In making policy, public health authorities must consider prevailing social values and

197. *See id.*

198. *See EpiCenter Home Page* (visited Apr. 12, 2000) <http://www.anhb.org/Web%20Site/Epidemiology/index.htm>.

199. *See* Rose L. Pfefferbaum et al., *Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices*, 21 AM. INDIAN L. REV. 211, 222 (1997).

respect multiple constituencies, including scientists, politicians, and community leaders. Despite these limitations, there are at least four possible roles for the law in advancing public health.

(1) *Law can define the objectives of public health and influence its policy agenda.* Public health statutes should establish the purposes, goals, and core functions of public health, the personnel and infrastructure realistically needed to perform these functions, and budgeting mechanisms to provide reliable levels of support. By doing so, the law can inform and influence the activities of government and the expectations of society about the scope and fundamental importance of public health. Courts give deference to statements of legislative intent and may permit a broad range of activities that are consistent with legislative objectives. No government program can be assured full funding during budgetary crises. However, structuring public health law to embrace defined functions, minimum infrastructure and personnel needs, and funding mechanisms can provide a yardstick for health departments and policy makers in the future.

(2) *Law can authorize and limit public health actions.* Public health law must provide broad authority for the exercise of public health powers and coextensively limit that authority where necessary for the protection of individual rights. In considering law reform, it is important to distinguish between duties and powers in public health. The legislature should impose duties on health departments[200] to initiate a broad range of activities relating, for example, to surveillance, communicable disease control, environmental protection, sanitation, and injury prevention. It is important that health officials retain *flexibility* in the powers used to achieve public health purposes. While providing for a flexible range of public health powers, the law must also place appropriate limits on those powers to protect human rights. This is best accomplished by adhering to certain strategies including the following: establishing clear criteria for the exercise of compulsory powers by requiring health authorities to use scientific evidence to demonstrate a significant risk to the public health; providing procedural due process for all individuals who face serious constraints on their liberty; and safeguarding the privacy of individuals and preventing or punishing invidious discrimination.

(3) *Law can serve as a tool of prevention.* Public health law is, and should remain, a tool of prevention. Public health law should

200. The term "health department" is used in the generic sense to include all public health functions carried out by the State, including those in the Department of Health and Social Services and those in the Department of Environmental Conservation.

use a wide variety of legal means to prevent injury and disease, as well as enhance health-promoting conditions for the people.

(4) *Law can facilitate planning and coordination of governmental and non-governmental health activities.* The private sector (*e.g.*, managed care and other health insurers, individual health care providers, and researchers) have an important role to play in assuring healthy conditions. The law can foster and encourage this role for the benefit of public health.

A. Benefits of a Public Health Law Improvement Process

Having observed the role of law in protecting and preserving the public health, we turn to our analysis of the potential benefits of legal reform of Alaska public health law. In Part B, we present our specific guidelines for legal reform. First, however, we summarize below some of the fund mental and structural dilemmas of Alaska public health law, as well as the benefits that can be achieved through a public health improvement process.[201]

1. *Updating Antiquated Laws.* Many of Alaska's public health enabling laws were enacted nearly fifty years ago before formal statehood. As such, they are old and antiquated. Like most public health laws in the United States, Alaska's statutes and regulations have been passed piecemeal in response to specific disease threats such as tuberculosis, sexually transmitted diseases, and HIV/AIDS. Thus, the law has developed, layer-upon-layer, from one time period to another. Discussions with public health authorities in Alaska pursuant to our case study revealed, at times, confusion about who has what public health powers and when to exercise those powers. Given the multiplicity and layering of laws and regulations concerning Alaska public health law, even the most expert lawyers have difficulty providing clear answers to public health officials about their authority to act. One major benefit of public health law reform would be to provide greater clarity about legal powers and duties.

Certainly, older laws are not necessarily bad laws. A well-written statute may remain efficacious for many decades. However, older laws are often outmoded in ways that directly reduce their efficacy and conformity to modern legal standards. Older laws may not reflect contemporary scientific understanding of disease, current medical treatments, or constitutional limits on the States' authority to restrict individual liberties.

201. *See, e.g.*, Gostin et al., *supra* note 8.

When the Alaska public health enabling laws were enacted, the scientific understanding of diseases was very different than it is today. Not surprisingly, public health laws from that era reflect a more limited understanding of disease and may lack a public health justification based on contemporary scientific knowledge. These laws also predate contemporary developments in constitutional law, disability discrimination law, health information privacy, and other modern legal requirements. At the constitutional level, the United States Supreme Court now has more exacting standards for equal protection of the laws, substantive due process, and procedural due process. Public health powers that affect liberty (*e.g.*, quarantine and directly observed therapy), privacy (*e.g.*, reporting and partner notification), and autonomy (*e.g.*, compulsory testing, immunization, or treatment) may undergo more careful scrutiny under the federal Constitution. At the same time, the federal Constitution may require more rigorous procedural safeguards before one may exercise compulsory powers.

Federal disability law may be construed to prohibit discrimination against persons because of a health deficiency, such as an infectious disease.[202] This may require health officials to adopt a standard of "significant risk" before resorting to compulsion. A significant risk may be defined as a direct threat "to the health or safety of others that cannot be eliminated by modification of policies, practices, or procedures."[203] Thus, under this standard, adverse treatment, such as a decision to use compulsory powers, would be permitted only if the person posed a significant risk to the health or safety of others. A significant risk regarding communicable diseases, for instance, would be determined through "an individualized assessment of the mode of transmission, probability of transmission, severity of the harm, and the duration of infectiousness."[204]

2. *Improving Dialogue.* Alaskans have engaged in passionate, systematic, and highly constructive conversations about the public health system. These conversations have occurred among various levels of government, public health officials, community representatives, and other interested individuals. Even though true legal reform is not accomplished, the dialogue process emanating from the state's public health improvement process is valuable in many ways. Careful thought has been put into the legal

202. *See* Lawrence O. Gostin et al., *Disability Discrimination In America*, 281 JAMA 745 (1999).

203. *Id.* at 746.

204. *Id.*

powers and duties of health officials. Concerns of the Alaskan people have been expressed and considered by senior health officials. Tensions concerning intergovernmental and tribal relationships have been aired. The willingness of multiple parties to reflect on public health improvement in Alaska has educated health authorities and communities about public health practice throughout the state.

Perhaps more importantly, the dialogue process has been an important first step in improving working relationships in public health throughout the state. As we examined during our case study, Alaska is unique in America for the depth and complexity of its governmental and non-governmental relationships between federal, state, tribal, and local officials.

Historically, the federal government has been intr.. tely involved in public health in Alaska. Federal investment was intended to develop the infrastructure of a relatively new state and, particularly, to fulfill the federal trust commitments made to Native Alaskans. As the Indian Health Service completes the transfer of health care responsibility to tribal authorities, federal involvement is decreasing, although there remains a need for strong relationships among federal, state, and tribal authorities.

State legislators and public health officials sometimes had markedly different understandings of the role of government within public health. Public health authorities frequently sought greater freedom to exercise their discretion in matters concerning the health of the community. They sometimes perceived legal requirements and the political process as impediments to a well-functioning health department and expressed concern and distrust over how legislators would approach public health law reform. Public health authorities also were concerned about funding and development of an adequate public health infrastructure. At the same time, legislators saw a need for clear criteria and procedures under which public health officials could operate. One prominent legislator in another state objected to "the notion that public health officials (despite being political appointees) make decisions that are scientific and good, and legislators make decisions that are political and bad."[205] The tone of conversations and the relative infrequency of prior high-level discussions suggest the need for more regular communications between public health authorities and legislators which are not merely in response to the latest political issue.

205. LAWRENCE O. GOSTIN ET AL., MILBANK MEMORIAL FUND, IMPROVING STATE LAW TO PREVENT AND TREAT INFECTIOUS DISEASE 6 (1998).

Given the size and diversity of the state, local dialogue on public health is critical in Alaska. Health officials at the state and local level have cordial and warm relationships and discuss public health issues regularly. A lack of regular communication between these authorities could carry serious implications for the public health. If, for example, the State had to discontinue a public health service because of budgetary constraints or otherwise, local governments should be made aware of the decision in order to prepare for their potential responsibility to provide these services. Otherwise temporary, serious gaps in public health services may occur.

Finally, the relationship between the state (and its subsidiary local governments) and tribal authorities is critically important to public health in Alaska. Since the tribes are responsible for many public health services, there exists a sort of concurrent authority (state and tribal) to protect the health of Natives. This requires careful and deliberate coordination. Without systematic coordination and ongoing discussion, occasional mistrust between the two entities arises. As a result, some efforts have been made to improve dialogue between state and tribal authorities. The Rural and Alaska Native Community and Public Health Advisory Group, for example, meets regularly to provide a forum for ongoing and deliberative discussions among state and tribal representatives. Yet there remain theoretical differences concerning the roles of the state and tribal authorities in public health.

From the perspective of some state officials, there is sometimes a need to intervene in Native communities to avert a public health threat. However, tribal communities view themselves as governments with jurisdiction over the land and its peoples. From their perspective, the State often fails to provide Natives with sufficient services such as clean water, sewage, and proper sanitation. These different theoretical visions of state and tribal authority can lead to mistrust and misunderstanding. For example, when a highly knowledgeable, senior-level individual representing Native Alaskans was asked during our case study if negotiations with the State would be useful, this person expressed the fear that negotiations with the State inevitably meant concession.

The rich diversity in Alaska is a unique strength. It is evident that all groups want the same thing - a vibrant public health program. While the ideals and work ethic of federal, state, tribes, municipal public health authorities, policymakers, and others are admirable, maintaining the lines of active communication is critical. Communication and coordination should be routine and ongoing, and not simply in response to public health crises.

B. Guidelines for Reforming Public Health Law in Alaska

As indicated earlier,[206] whether Alaska should reform its public health law remains open. Although the potential exists, law reform is not the inevitable result of the public health law improvement process. While there are many benefits of law reform, there are also risks. Once a bill is introduced in the legislature, it can become politicized. Enacted laws can tie the hands of public health officials. For this reason, many public health professionals emphasize the need for flexibility. Finally, once the relationships among various groups are delineated in legislation, great distrust could result. Despite these evident risks, we propose the following statutory guidelines for public health law reform, some of which directly relate to the benefits of a public health law improvement process in Alaska.

1. *Mission Statement: Essential Public Health Services.* Most state laws do not give clear authority for all of the essential public health services recommended by the Institute of Medicine and the federal Department of Health and Human Services ("DHSS").[207] Alaska's public health law, like other states, does not articulate a clear mission for public health, nor does Alaska law spell out core or essential public health services necessary for serving the state. Consequently, Alaska law reform should express a clear vision for public health. This vision should articulate the best theory and practice in public health and make a symbolic statement about assuring the conditions necessary for the health of the people. This does not just include personal medical services, but a rich array of services for disease and injury prevention, and health promotion.

2. *Avoid Separate Disease Classifications and Disease-Specific Laws.* The primary epidemiologic rationale for classifying diseases and treating them differently is to distinguish between modes of disease transmission. However, the origins of this differential treatment may be better explained by historical and political influences than by reasoned distinctions or thoughtful strategies. The result often creates different legal standards and procedures for different diseases depending on how they are classified. Public health law should be based on uniform provisions that apply equally to all health threats. Public health interventions should be based on the degree of risk, the cost and efficacy of the response,

206. *See supra* Part IV.A.

207. Kristine M. Gebbie & Inseon Huang, *Identification of Health Paradigm in Use in State Public Health Agencies*, Columbia Univ. School of Nursing, Center for Health Policy and Health Services Research (Oct. 28, 1997) (on file with authors).

and the burdens on human rights that cut across disease classifications.

Alaska public health law is a complicated amalgam, difficult for the public to comprehend and challenging for health officials to implement. A single set of standards and procedures would add needed clarity and coherence to legal regulation and might diminish politically motivated disputes about existing and newly emergent diseases.

3. *Base Public Health Decisions on the Best Scientific Evidence of Significant Risk.* In combatting public health threats, health officials need clear authority and flexibility to exercise powers, as well as sufficient guidance. Consequently, an effective and constitutionally sound Alaska law requires a rational and reliable way to assess risk and establish fair procedures. Alaska public health law should give public health authorities the power to make decisions based upon the best available scientific evidence. Public health officials should examine scientific evidence in the following areas: (a) what is the nature of the risk (*e.g.*, the mode of transmission)? (b) what is the probability that the risk will result in harm? (c) what potential severity of harm does the risk present? and (d) what is the duration of the health risk? Provided health officials act with a good foundation in science, they should be supported by public health law.

4. *Provide a Flexible Range of Powers for Public Health Authorities.* Good public health law should give health officials a wide and flexible range of powers to accomplish their mission. This would range from coercive measures such as isolation, licensure, removal, and nuisance abatement, to directly observed therapy, cease and desist orders, and requirements to attend courses for counseling, education, and treatment. It would also include a full range of powers for health promotion and education. By giving health officials a flexible and graded series of alternatives, public health can be protected and individual rights promoted.

Public health law must set forth and ensure fair procedures. The nature and extent of the process required depends upon several factors including: (a) the nature of the interests affected; (b) the risk of an erroneous decision; (c) the value of additional safeguards; and (d) the administrative burdens of additional procedures. Except in an emergency when rapid response is critical, public health law should assure a fair and open process for resolving disputes about the exercise of powers and authority.

5. *Data Protection: Public Health Data Needs and Privacy Considerations.* The collection, storage, maintenance, and use of vast amounts of information about the health of populations are among the core functions of public health. Surveillance is one of the most important duties of public health, permitting early identification of health threats, targeted delivery of prevention services, and links to treatment and other services.[208] Public health law must enable, encourage, and fund a strong public health information infrastructure.

The collection of large quantities of personally identifiable data, however, creates privacy concerns. Increasingly, health information is being stored in electronic form. Users can access this data more easily than ever before. A resulting tension between public health information and privacy is evident in emerging technologies often referred to as "telemedicine." Due to the size of Alaska and its remote rural populations, Alaska is at the forefront of telemedicine. This will require the State to meet challenges relating not only to privacy, but to issues of quality control, licensure, and liability.

Statutory provisions governing data collection and privacy must seek to satisfy two goals that at times conflict: ensuring up-to-date information for public health purposes and protecting that information from inappropriate disclosure. Balancing these competing goals can be accomplished only through the implementation of policies and practices consistent with set, statutory guidelines. These guidelines have been drafted within the context of our "Model State Public Health Privacy Project,"[209] sponsored by the Centers for Disease Control and Prevention and the Council of State and Territorial Epidemiologists. With the assistance of a multi-disciplinary panel of public health, privacy, and governmental experts, we have produced a model state public health privacy law, which, if passed, will codify privacy and security principles concerning the use and disclosure of public health information. The model act only concerns personally-identifiable data (because non-identifiable data pose no or minimal individual privacy concerns) and is based on the following broad principles:

(a) *Justification for Data Collection.* Public health authorities must justify their need for identifiable data, although they should have great flexibility in making this showing. Valid justifications would include: surveillance, disease monitoring, epidemiological (and related) research, preventing a public health risk, and providing services for the community, including interventions in avoiding and ameliorating public health threats.

(b) *Community Access to Information.* A community should be generally informed about aggregate data collection by public health departments and its purposes. Even where information is non-identifiable, people should generally be aware of the type of data collection undertaken by public health departments. Aggregate public health data should be made accessible by community members for virtually any purpose.

(c) *Fair Information Practices.* Fair information practices demand that no secret data systems exist, that persons have access to data about themselves, and that public health officials should ensure the reliability and accuracy of the data.

(d) *Privacy Assurances.* Legally binding assurances of privacy should attach to all personally-identifiable information. Public health officials should maintain confidentiality and ensure a secure data system. Unwarranted disclosures should be prohibited. This does not mean that public health officials should be restricted in essential health uses of data. Rather, they should have wide flexibility in using data for all important public health purposes. Thus, public health officials could share information across professional job descriptions and programs provided the information is necessary to achieve a valid public health purpose.

Penalties should exist for unauthorized disclosure for non-public health purposes. Legal protections should prevent unauthorized disclosure to commercial marketers, employers, insurers, law enforcement, and others who might use the information for inconsistent, unwarranted, discriminatory, or commercial purposes.

The model act permits all legitimate public health uses of data for the common good, but prohibits potentially discriminatory use of personal data. This gives public health authorities discretion to protect human health, and it gives communities a sense of fairness and privacy protection. The solution is not perfect. Conflicts will continue to arise. Yet the model act recognizes both public health and privacy interests, and seeks fair resolution in law.

6. *Improving Coordination Between the Department of Health and Social Services and the Department of Environmental Conservation.* DHSS and DEC share responsibility in Alaska for ensuring the public health. As a result of this dual system of public health responsibility, it is important that these agencies coordinate their efforts. Each requires the expertise and power held by the

208. *See, e.g.*, Lawrence O. Gostin & James G. Hodge, Jr., *The "Names Debate": The Case for National HIV Reporting in the United States*, 61 ALB. L. REV. 679, 689-724 (1998).

209. Lawrence O. Gostin & James G. Hodge, Jr., *Model State Public Health Privacy Project* (last modified Oct. 8, 1999) <http://www.critpath.org/msphpa/privacy.htm>.

other to fully accomplish the public health mission. Some public health functions undertaken by these agencies overlap to some degree. For example, the broad authority of DHSS to control public health diseases intersects with DEC's responsibility for monitoring and preventing food- and water-borne contaminants in the interests of public health. Some infectious diseases, such as hepatitis A and crypto sporidium, may be spread through contamination of food or wat r supplies, thus requiring potential action from both agencies to monitor and prevent their spread.

For the most part, this dual system of public health regulation works well. Each department performs its functions and draws from the considerable expertise within the department. Where one department has particular resources, it is usually willing to lend its expertise to the other. While dual responsibility will in some cases work to better the public health, conflicts of agency authority and action may arise should these agencies fail to communicate and coordinate their efforts toward accomplishing public health goals.

Surprisingly, Alaska public health law does not include formal procedures for the ongoing dialogue and sharing of information between these agencies. The State should impr ve coordination of public health services by establishing formal structures to promote communication and coordination between DHSS and DEC. This could include regular meeting times for high-level discussions, systematic coordination of complimentary functions, and planning for population-based public health services in the state. Stronger relationships, coordination, and dialogue between these two governmental entities, as well as others within the public health system in Alaska, would likely improve the public health.

V. CONCLUSION

Alaska is unique in many ways. It is a relatively new state, it has a distinct and highly innovative sense of community health, and many public and private groups in the state are intensely interested in public health. This p ov es an important opportunity to improve the public health system, including the public health law infrastructure. We have attempted in this Article to examine Alaskan public health law systematically and pr ide meaningful guidelines for legal reform. As recommended, some of these reforms may require statutory alteration, while others may emanate from the resolution of judicial cases or through administrative regulations. However, a major benefit of the public health law improvement process in Alaska may not be the guidelines themselves, but the process by which they are produced. Alaska public health officials have dedicated themselves to an intense process of education and inquiry. Alaska is tentatively developing Phase III of its public health law improvement process, which will include education, continued dialogue, dissemination, due deliberation, and possible implementation of public health reforms. The public health benefits to date have already been well worth their efforts. We recommend Phase III to ensure the continued progress of the Alaskan public health improvement process.

Christian Science Committee on Publication for Alaska

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To: Senator Gene Therriault, Chair
Members of the Senate State Affairs Committee

From: Beverly Smith, Christian Science Committee on Publication for Alaska

Date: February 24, 2005

RE: Senate Bill No. 75
An Act relating to public health and public health emergencies and disasters...

Thank you, Senator Therriault and members of the committee, for allowing me the opportunity to offer comments on this bill.

In my capacity as Christian Science Committee on Publication for Alaska, one of my roles is to watch for any legislative proposals that could erode the rights of Alaskans to pursue spiritual means for the prevention and cure of disease according to their religious beliefs, including Christian Science treatment and care.

After reviewing SB 75, the Christian Science Committee on Publication for Alaska respectfully requests that Senate Bill 75 be amended as follows:

In section 18.15.375 of the bill, **ADD** a new subsection (f) to read:

"Sec. 18.15.375. Epidemiological investigation. . . . (f) The provisions of this section do not apply to an individual who objects to the testing, examination or screening because of the individual's religious beliefs; provided, such individual may be subject to isolation or quarantine under the provisions of this Act."

EXPLANATION

The purpose of the amendment is to provide for those instances in which a person is unwilling to undergo medical testing, examination or screening because the person is relying on a religious non-medical method of treatment for his or her health and well-being.

Christian Science is one of the religious non-medical forms of treatment that relies on spiritual means through prayer to heal illness, injuries and other conditions. Christian Science has been systematically practiced, quietly and successfully, in many Alaska

families for a century, sometimes through many generations. The application of this religious non-medical method of healing does not involve any type of medical examination or screening. The experience of those practicing Christian Science is that this healing method has both preventative and curative effects.

The amendment recognizes an individual's right of self-determination, including the right to refuse medical testing, examination or screening; however, it also recognizes legitimate public health concerns by providing that a person who refuses medical testing, examination or screening because of religious beliefs may be subject to isolation or quarantine.

The amendment language is based on similarly worded provisions in Section 602 of The Model State Emergency Health Powers Act (revised December 21, 2001; the "Model Act"). The Model Act was prepared by The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities for the Centers for Disease Control (CDC) to assist Governors and State Legislatures and others in formulating emergency health powers plans..

We, therefore, respectfully request that the bill be amended as stated above.

I have attached to this memo Section 602 and related Sections of the Model State Emergency Health Powers Act for your perusal, as well as the statutes from a number of other states containing language similar to the amendment requested above. I believe you will find them helpful in considering the suggested amendment.

Thank you again for allowing me to present this proposed amendment today. I am happy to answer any questions you may have.

ARTICLE VI SPECIAL POWERS DURING A STATE OF PUBLIC HEALTH EMERGENCY: PROTECTION OF PERSONS

Section 601 **Protection of persons.** During a state of public health emergency, the public health authority shall use every available means to prevent the transmission of infectious disease and to ensure that all cases of contagious disease are subject to proper control and treatment.

Legislative History. In Section 601, the text immediately following the heading "Protection of individuals" was adapted from CAL. HEALTH & SAFETY CODE § 120575 (West 1996).

Section 602 **Medical examination and testing**. During a state of public health emergency the public health authority may perform physical examinations and/or tests as necessary for the diagnosis or treatment of individuals.

(a) Medical examinations or tests may be performed by any qualified person authorized to do so by the public health authority.
(b) Medical examinations or tests must not be such as are reasonably likely to lead to serious harm to the affected individual.
(c) The public health authority may isolate or quarantine, pursuant to Section 604, any person whose refusal of medical examination or testing results in uncertainty regarding whether he or she has been exposed to or is infected with a contagious or possibly contagious disease or otherwise poses a danger to public health.

Legislative History. Section 602 was adapted from CAL. HEALTH & SAFETY CODE § 120580 (West 1996 & Supp. 2001); CAL. HEALTH & SAFETY CODE § 120540 (West 1996); N.Y. COMP. CODES R. & REGS. tit. 10, § 2.5 (LEXIS through Oct. 12, 2001).

Section 603 **Vaccination and treatment**. During a state of public health emergency the public health authority may exercise the following emergency powers over persons as necessary to address the public health emergency–

(a) **Vaccination**. To vaccinate persons as protection against infectious disease and to prevent the spread of contagious or possibly contagious disease.
  (1) Vaccination may be performed by any qualified person authorized to do so by the public health authority.
  (2) A vaccine to be administered must not be such as is reasonably likely to lead to serious harm to the affected individual.
  (3) To prevent the spread of contagious or possibly contagious disease the public health authority may isolate or quarantine, pursuant to Section 604,

persons who are unable or unwilling for reasons of health, religion, or conscience to undergo vaccination pursuant to this Section.

(b) **Treatment.** To treat persons exposed to or infected with disease.
  (1) Treatment may be administered by any qualified person authorized to do so by the public health authority.
  (2) Treatment must not be such as is reasonably likely to lead to serious harm to the affected individual.
  (3) To prevent the spread of contagious or possibly contagious disease the public health authority may isolate or quarantine, pursuant to Section 604, persons who are unable or unwilling for reasons of health, religion, or conscience to undergo treatment pursuant to this Section.

Legislative History. Section 603 was adapted from CAL. HEALTH & SAFETY CODE §§ 120175, 120575, 120605 (West 1996); CAL. HEALTH & SAFETY CODE § 120580 (West 1996 & Supp. 2001).

Section 604 **Isolation and quarantine.**

(a) **Authorization.** During the public health emergency, the public health authority may isolate (consistent with the definition of "isolation" in Section 103(h)) or quarantine (consistent with the definition of quarantine in Section 103(o)) an individual or groups of individuals. This includes individuals or groups who have not been vaccinated, treated, tested, or examined pursuant to Sections 602 and 603. The public health authority may also establish and maintain places of isolation and quarantine, and set rules and make orders. Failure to obey these rules, orders, or provisions shall constitute a misdemeanor.

(b) **Conditions and principles.** The public health authority shall adhere to the following conditions and principles when isolating or quarantining individuals or groups of individuals:
  (1) Isolation and quarantine must be by the least restrictive means necessary to prevent the spread of a contagious or possibly contagious disease to others and may include, but are not limited to, confinement to private homes or other private and public premises.
  (2) Isolated individuals must be confined separately from quarantined individuals.
  (3) The health status of isolated and quarantined individuals must be monitored regularly to determine if they require isolation or quarantine.
  (4) If a quarantined individual subsequently becomes infected or is reasonably believed to have become infected with a contagious or possibly contagious disease he or she must promptly be removed to isolation.

(5) Isolated and quarantined individuals must be immediately released when they pose no substantial risk of transmitting a contagious or possibly contagious disease to others.

(6) The needs of persons isolated and quarantined shall be addressed in a systematic and competent fashion, including, but not limited to, providing adequate food, clothing, shelter, means of communication with those in isolation or quarantine and outside these settings, medication, and competent medical care.

(7) Premises used for isolation and quarantine shall be maintained in a safe and hygienic manner and be designed to minimize the likelihood of further transmission of infection or other harms to persons isolated and quarantined.

(8) To the extent possible, cultural and religious beliefs should be considered in addressing the needs of individuals, and establishing and maintaining isolation and quarantine premises.

(c) **Cooperation.** Persons subject to isolation or quarantine shall obey the public health authority's rules and orders; and shall not go beyond the isolation or quarantine premises. Failure to obey these provisions shall constitute a misdemeanor.

(d) **Entry into isolation or quarantine premises.**

(1) **Authorized entry**. The public health authority may authorize physicians, health care workers, or others access to individuals in isolation or quarantine as necessary to meet the needs of isolated or quarantined individuals.

(2) **Unauthorized entry**. No person, other than a person authorized by the public health authority, shall enter isolation or quarantine premises. Failure to obey this provision shall constitute a misdemeanor.

(3) **Potential isolation or quarantine**. Any person entering an isolation or quarantine premises with or without authorization of the public health authority may be isolated or quarantined pursuant to Section 604(a)(b).

Section 605 **Procedures for isolation and quarantine**. During a public health emergency, the isolation and quarantine of an individual or groups of individuals shall be undertaken in accordance with the following procedures.

(a) **Temporary isolation and quarantine without notice**.

(1) **Authorization**. The public health authority may temporarily isolate or quarantine an individual or groups of individuals through a written directive if delay in imposing the isolation or quarantine would significantly jeopardize the public health authority's ability to prevent or limit the transmission of a contagious or possibly contagious disease to others.

(2) **Content of directive**. The written directive shall specify the following: (i) the identity of the individual(s) or groups of individuals subject to isolation or quarantine; (ii) the premises subject to isolation or quarantine; (iii) the

date and time at which isolation or quarantine commences; (iv) the suspected contagious disease if known.; and (v) a copy of Article 6 and relevant definitions of this Act.

(3) **Copies.** A copy of the written directive shall be given to the individual to be isolated or quarantined or, if the order applies to a group of individuals and it is impractical to provide individual copies, it may be posted in a conspicuous place in the isolation or quarantine premises.

(4) **Petition for continued isolation or quarantine.** Within ten (10) days after issuing the written directive, the public health authority shall file a petition pursuant to Section 605(b) for a court order authorizing the continued isolation or quarantine of the isolated or quarantined individual or groups of individuals.

(b) **Isolation or quarantine with notice.**

(1) **Authorization.** The public health authority may make a written petition to the trial court for an order authorizing the isolation or quarantine of an individual or groups of individuals.

(2) **Content of petition.** A petition under subsection (b)(1) shall specify the following: (i) the identity of the individual(s) or groups of individuals subject to isolation or quarantine; (ii) the premises subject to isolation or quarantine; (iii) the date and time at which isolation or quarantine commences; (iv) the suspected contagious disease if known; (v) a statement of compliance with the conditions and principles for isolation and quarantine of Section 604(b); and (vi) a statement of the basis upon which isolation or quarantine is justified in compliance with this Article. The petition shall be accompanied by the sworn affidavit of the public health authority attesting to the facts asserted in the petition, together with any further information that may be relevant and material to the court's consideration.

(3) **Notice.** Notice to the individuals or groups of individuals identified in the petition shall be accomplished within twenty-four (24) hours in accordance with the rules of civil procedure.

(4) **Hearing.** A hearing must be held on any petition filed pursuant to this subsection within five (5) days of filing of the petition. In extraordinary circumstances and for good cause shown the public health authority may apply to continue the hearing date on a petition filed pursuant to this Section for up to ten (10) days, which continuance the court may grant in its discretion giving due regard to the rights of the affected individuals, the protection of the public's health, the severity of the emergency and the availability of necessary witnesses and evidence.

(5) **Order.** The court shall grant the petition if, by a preponderance of the evidence, isolation or quarantine is shown to be reasonably necessary to

prevent or limit the transmission of a contagious or possibly contagious disease to others.

(i) An order authorizing isolation or quarantine may do so for a period not to exceed thirty (30) days.

(ii) The order shall (a) identify the isolated or quarantined individuals or groups of individuals by name or shared or similar characteristics or circumstances; (b) specify factual findings warranting isolation or quarantine pursuant to this Act; (c) include any conditions necessary to ensure that isolation or quarantine is carried out within the stated purposes and restrictions of this Act; and (d) served on affected individuals or groups of individuals in accordance with the rules of civil procedure.

(6) **Continuances**. Prior to the expiration of an order issued pursuant to Section 605(b)(5), the public health authority may move to continue isolation or quarantine for additional periods not to exceed thirty (30) days each. The court shall consider the motion in accordance with standards set forth in Section 605(b)(5).

(c) **Relief from isolation and quarantine.**

(1) **Release**. An individual or group of individuals isolated or quarantined pursuant to this Act may apply to the trial court for an order to show cause why the individual or group of individuals should not be released. The court shall rule on the application to show cause within forty-eight (48) hours of its filing. If the court grants the application, the court shall schedule a hearing on the order to show cause within twenty-four (24) hours from issuance of the order to show cause. The issuance of an order to show cause shall not stay or enjoin an isolation or quarantine order.

(2) **Remedies for breach of conditions**. An individual or groups of individuals isolated or quarantined pursuant to this Act may request a hearing in the trial court for remedies regarding breaches to the conditions of isolation or quarantine. A request for a hearing shall not stay or enjoin an isolation or quarantine order.

(i) Upon receipt of a request under this subsection alleging extraordinary circumstances justifying the immediate granting of relief, the court shall fix a date for hearing on the matters alleged not more than twenty-four (24) hours from receipt of the request.

(ii) Otherwise, upon receipt of a request under this subsection the court shall fix a date for hearing on the matters alleged within five (5) days from receipt of the request.

(3) **Extensions**. In any proceedings brought for relief under this subsection, in extraordinary circumstances and for good cause shown the public health authority may move the court to extend the time for a hearing, which extension the court in its discretion may grant giving due regard to the rights

of the affected individuals, the protection of the public's health, the severity of the emergency and the availability of necessary witnesses and evidence.

(d) **Proceedings**. A record of the proceedings pursuant to this Section shall be made and retained. In the event that, given a state of public health emergency, parties can not personally appear before the court, proceedings may be conducted by their authorized representatives and be held via any means that allows all parties to fully participate.

(e) **Court to appoint counsel and consolidate claims.**

(1) **Appointment**. The court shall appoint counsel at state expense to represent individuals or groups of individuals who are or who are about to be isolated or quarantined pursuant to the provisions of this Act and who are not otherwise represented by counsel. Appointments shall be made in accordance with the procedures to be specified in the Public Health Emergency Plan and shall last throughout the duration of the isolation or quarantine of the individual or groups of individuals. The public health authority must provide adequate means of communication between such individuals or groups and their counsel.

(2) **Consolidation**. In any proceedings brought pursuant to this Section, to promote the fair and efficient operation of justice and having given due regard to the rights of the affected individuals, the protection of the public's health, the severity of the emergency and the availability of necessary witnesses and evidence, the court may order the consolidation of individual claims into group or claims where:

(i) the number of individuals involved or to be affected is so large as to render individual participation impractical;

(ii) there are questions of law or fact common to the individual claims or rights to be determined;

(iii) the group claims or rights to be determined are typical of the affected individuals' claims or rights; and

(iv) the entire group will be adequately represented in the consolidation.

Legislative History. Sections 604 and 605 were adapted from CAL. HEALTH & SAFETY CODE §§ 120130, 120225 (West 1996); N.H. REV. STAT. ANN. § 141-C:11 -14; CONN. GEN. STAT. ANN. § 19a-221 (West 1958).

Section 606 **Collection of laboratory specimens; performance of tests**. The public health authority may, for such period as the state of public health emergency exists, collect specimens and perform tests on living persons as provided in Section 602 and also upon deceased persons and any animal (living or deceased), and acquire any previously collected specimens or test results that are reasonable and necessary to respond to the public health emergency.

Arizona

ARIZONA REVISED STATUTES
TITLE 36. PUBLIC HEALTH AND SAFETY
CHAPTER 1. STATE AND LOCAL BOARDS AND DEPARTMENTS OF HEALTH
ARTICLE 4. LOCAL HEALTH DEPARTMENTS
§ 36-184. Boards of health of local health departments; organization; meetings; powers and duties.
"C. This article does not authorize a county health department or any of its officers or representatives to impose on any person any mode of treatment against that person's will, or any examination inconsistent with the creed or tenets of any religious denomination of which the person is an adherent, provided that the person complies with sanitary and quarantine laws, rules and regulations."
Cite as: **Ariz. Rev. Stat. § 36-184(C) (2004).**

Delaware

DELAWARE CODE ANNOTATED
TITLE 20. MILITARY AND CIVIL DEFENSE
PART II. CIVIL DEFENSE
CHAPTER 31. EMERGENCY MANAGEMENT
SUBCHAPTER V. PUBLIC HEALTH EMERGENCIES
§ 3138. Collection of laboratory specimens; performance of tests during public health emergency.
"During a state of emergency, the public health authority may, for such period as the state of emergency exists, collect specimens and perform tests . . . that are reasonable and necessary for emergency response. . . . (5) To prevent the spread of contagious or possibly contagious disease, the public health authority may isolate or quarantine, subject to § 3136 of this title, persons who are unable or unwilling for reasons of health, religion or conscience to undergo specimen collection or testing pursuant to this section."
Cite as: **Del. Code Ann. tit. 20 § 3138(5) (2004).**

Indiana

BURNS INDIANA STATUTES ANNOTATED
TITLE 10. STATE POLICE, CIVIL DEFENSE AND MILITARY AFFAIRS
ARTICLE 14. EMERGENCY MANAGEMENT
CHAPTER 3. EMERGENCY MANAGEMENT AND DISASTER LAW
§ 10-14-3-23. Exemptions -- Religious belief.
"This chapter may not be construed to compel a person, either on behalf of:
(1) the person;
(2) the person's child less than eighteen (18) years of age; or
(3) a protected person for whom the person acts as a guardian;

to submit to any physical examination, medical treatment, or immunization if the person, parent, or guardian relies in good faith on spiritual means or prayer to prevent or cure disease or suffering and objects to the treatment in writing."
Cite as: **Ind. Code Ann. § 10-14-3-23 (2004).**

Iowa

CODE OF IOWA 2003
TITLE IV. PUBLIC HEALTH
SUBTITLE 2. HEALTH-RELATED ACTIVITIES
CHAPTER 135. DEPARTMENT OF PUBLIC HEALTH
DIVISION XV. DISASTER PREPAREDNESS
§135.144 ADDITIONAL DUTIES OF THE DEPARTMENT RELATED TO A PUBLIC HEALTH DISASTER.
If a public health disaster exists, the department, in conjunction with the governor, may do any of the following: . . .
5. Order physical examinations and tests and collect specimens as necessary for the diagnosis or treatment of individuals, . . . The department may isolate or quarantine, pursuant to chapter 139A and the rules implementing chapter 139A and this division of this chapter, any individual whose refusal of medical examination or testing results in uncertainty regarding whether the individual has been exposed to or is infected with a communicable or potentially communicable disease or otherwise poses a danger to public health.
6. Vaccinate or order that individuals be vaccinated against an infectious disease . . . To prevent the spread of communicable or potentially communicable disease, the department may isolate or quarantine, pursuant to chapter 139A and the rules implementing chapter 139A and this division of this chapter, any person who is unable or unwilling to undergo vaccination pursuant to this subsection. . . ."
Cite as: **Iowa Code § 135.144(5)(6) (2003)**

Louisiana

LOUISIANA REVISED STATUTES
TITLE 29. MILITARY, NAVAL, AND VETERANS' AFFAIRS
CHAPTER 9. LOUISIANA HEALTH EMERGENCY POWERS ACT
§ 764 Public Health Emergency Plan
"A. Content. The Subcommittee on Chemical and Biological Terrorism of the Homeland Security Advisory Council shall, within twelve months of its appointment, deliver to the governor a plan for responding to a public health emergency, incorporating all applicable provisions of the State Operations Emergency Plan and including provisions or guidelines on the following: . . . (2) Tailoring the disaster emergency plan to include the unique aspects relevant to a public health emergency or bioterrorism incident, including, but not limited to: . . . (h) Provisions permitting persons for reasons of health, religion, or conscience to refuse medical examination or testing, vaccination, or medical treatment; provided, such persons may be subject to isolation or quarantine under the provisions of this Chapter."

Cite as: **La. Rev. Stat. Ann. 29:764(A)((2))((b)) (2004).**

Maryland

ANNOTATED CODE OF MARYLAND
ARTICLE 41. GOVERNOR -- EXECUTIVE AND ADMINISTRATIVE DEPARTMENTS
TITLE 2. EXECUTIVE DEPARTMENT -- GENERALLY
SUBTITLE 2. GOVERNOR'S EMERGENCY POWERS -- CATASTROPHIC HEALTH EMERGENCIES
§ 2-202. Governor's proclamation and order; duration of order; powers of Secretary of Health and Mental Hygiene; appeal.
"(c) Powers of Secretary of Health and Mental Hygiene. -- If a competent individual over the age of 18 refuses vaccination, medical examination, treatment, or testing under subsection (b) (4) of this section, the Secretary may require the individual to go to and remain in a place of isolation or quarantine until the Secretary determines that the individual no longer poses a substantial risk of transmitting the disease or condition to the publi "
Cite as: **Md. Ann. Code art. 41, § 2-202(c) (2002).**

Michigan

MICHIGAN COMPILED LAWS
CHAPTER HEALTH
PUBLIC HEALTH CODE
ARTICLE 5. PREVENTION AND CONTROL OF DISEASES, INFECTIONS, AND DISABILITIES
PART 51. GENERAL PROVISIONS
§ 333.5113. Objection to medical treatment, testing or examination based on religious beliefs; nonexemption from compliance with sanitation laws, regulations; reporting diseases.
"Sec. 5113. (1) Except as otherwise provided in part 52 1 and section 9123, 2 this article and articles 6 and 9 3 or the rules promulgated under those articles shall not be construed to require the medical treatment, testing, or examination of an individual who objects on the grounds that the medical treatment, testing, or examination violates the personal religious beliefs of the individual or of the parent, guardian, or person in loco parentis of a minor.
(2) This section does not exempt an individual from compliance with applicable laws, rules, or regulations regarding sanitation and the reporting of diseases as provided by this code."
Cite as: **Mich. Comp. Laws § 333.5113(1), (2) (2003).**

New Hampshire

NEW HAMPSHIRE REVISED STATUTES ANNOTATED
TITLE X. PUBLIC HEALTH
CHAPTER 141-C. COMMUNICABLE DISEASE
§ 141-C:14-a. Due Process.
". . . VII. Nothing in this chapter shall be construed to require the medical examination, medical treatment, or immunization of a person who objects, and no criminal penalties shall be imposed as a result. Notwithstanding this paragraph, such a person may be subject to isolation or quarantine for the minimum period necessary to protect the public health, as determined by the court in its decision following the hearing pursuant to this section."
Cite as: **N.H. Rev. Stat. Ann. § 141-C:14-a(VII) (2003).**

New Mexico

MICHIE'S ANNOTATED STATUTES OF NEW MEXICO
CHAPTER 12. MISCELLANEOUS PUBLIC AFFAIRS MATTERS
ARTICLE 10A. PUBLIC HEALTH EMERGENCY RESPONSE
§ 12-10A-8. Isolation or quarantine authorized; protection of a person isolated or quarantined.
"A. The secretary of health may isolate or quarantine a person as necessary during a public health emergency, using the procedures set forth in the Public Health Emergency Response Act [12-10A-1 to 12-10A-19 NMSA 1978]. . . . C. A person isolated or quarantined pursuant to the provisions of the Public Health Emergency Response Act [12-10A-1 NMSA 1978] has the right to refuse medical treatment, testing, physical or mental examination, vaccination, specimen collections and preventive treatment programs. A person who has been directed by the secretary of health to submit to medical procedures and protocols . . . and who refuses to submit to the procedures and protocols may be subject to continued isolation or quarantine pursuant to the provisions of the Public Health Emergency Response Act."
Cite as: **N.M. Stat. Ann. § 12-10A-8(C) (2005).**

Rhode Island

GENERAL LAWS OF RHODE ISLAND
TITLE 30. MILITARY AFFAIRS AND DEFENSE
CHAPTER 15. EMERGENCY MANAGEMENT
§ 30-15-9. Governor's responsibilities relating to disaster emergencies.
" . . . (e) In addition to any other powers conferred upon the governor by law, the governor may exercise the following powers, limited in scope and duration as is reasonably necessary for emergency response: . . . (16) Compel a person to submit to a physical examination and/or testing as necessary to diagnose or treat the person. . . . If the department of health is uncertain whether a person who refuses to undergo medical examination and/or testing may have been exposed to an infectious disease or otherwise

poses a danger to public health, the department of health may subject the individual to isolation or quarantine, pursuant to § 23-8-4."
Cite as: R.I. Gen Laws § 30-15-9(e)(16) (2004).

Utah

UTAH CODE ANNOTATED
TITLE 26A. LOCAL HEALTH AUTHORITIES
CHAPTER 1. LOCAL HEALTH DEPARTMENTS
PART 1. LOCAL HEALTH AUTHORITIES
§ 26A-1-124. Religious exemptions.
"This part does not authorize a local health department to impose on any person any mode of treatment inconsistent with the creed or tenets of any religious denomination of which the person is an adherent, provided the person complies with sanitary and quarantine laws, rules, and regulations."
Cite as: **Utah Code Ann. § 26A-1-124 (2003).**

Washington

ANNOTATED REVISED CODE OF WASHINGTON
TITLE 43. STATE GOVERNMENT--EXECUTIVE
CHAPTER 43.70. DEPARTMENT OF HEALTH
§ 43.70.210. Right of person to rely on prayer to alleviate ailments not abridged.
"Nothing in chapter 43.20 or 43.70 RCW, or RCW 43.70.120 shall be construed to abridge the right of any person to rely exclusively on spiritual means alone through prayer to alleviate human ailments, sickness or disease, in accordance with the tenets and practice of the Church of Christ, Scientist, nor shall anything in chapters 43.20, 43.70 RCW, or RCW 43.70.120 be deemed to prohibit a person so relying who is inflicted with a contagious or communicable disease from being isolated or quarantined in a private place of his own choice, provided, it is approved by the local health officer, and all laws, rules and regulations governing control, sanitation, isolation and quarantine are complied with."
Cite as: **Wash. Rev. Code Ann. § 43.70.210 (2004).**

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: SB 75
(S) Publish Date: 1/21/05
Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):

Title: RELATING TO PUBLIC HEALTH AND PUBLIC HEALTH EMERGENCIES

RDU: Public Health

Component: Public Health Admin Svcs

Sponsor: (RLS) BY REQUEST OF THE GOVERNOR

Requester: GOVERNOR

Component No. 292

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Passage of this legislation is not expected to have a budget impact on the Division of Public Health, as the bill simply clarifies legal authority and provides new due process provisions for programmatic activities already conducted by the Division. The bill does not add new functions or mandates to the Department of Health & Social Services' legal responsibilities.

Prepared by: Richard Mandsager, M.D. Phone 465-3090
Division: Public Health Date/Time 01/05/2005
Approved by: Joel S. Gilbertson, Commissioner Date 01/06/2005
Agency: Department of Health and Social Services

(Revised 9/23/2004 OMB)

COMMITTEE COPY

SB75

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 20, 2005

The Honorable Ben Stevens
President of the Senate
Alaska State Legislature
State Capitol, Room 111
Juneau, AK 99801-1182

Dear President Stevens:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to public health and public health emergencies and disasters; relating to duties of the public defender and Office of Public Aadvocacy regarding public health matters; relating to certain claims for public health matters; and making conforming amendments.

Alaska's disease control laws were originally adopted by the Territorial Legislature in 1949. Some changes have been made to the laws since statehood. However, the recent severe acute respiratory syndrome crisis demonstrated the need to modernize them. Alaska is no longer protected from world disease outbreaks by geographical isolation. Modern air links rapidly put Alaskans at risk from infectious diseases originating on the other side of the globe. In a recent study, Alaska was noted as the only state in the nation with inadequate legal authority to respond to a public health emergency.

The Department of Health and Social Services (department) routinely uses the traditional public health disease control tools of epidemiological surveillance and investigation, and historically has used isolation and quarantine to stop the spread of disease in the rare times it has been warranted. Today, new global health threats, coupled with heightened expectations in the modern American social and legal environment for protection of individual rights, require the department to have more clearly defined legal authorities to act to protect the public while protecting the due process rights of infected individuals. This bill would give the department the needed flexibility to protect Alaskans from public health threats. The department would be authorized to offer medication to infected individuals who wish to take it. However, the department would not have authority to force medication upon infected individuals.

COMMITTEE COPY

The bill also would provide for powers to deal with public health issues that could arise in a declared disaster emergency.

I urge your support of this important bill.

Sincerely yours,

Frank H. Murkowski
Governor

Enclosure

Sectional Analysis of CS SB 75 (HES) (Public Health)

(Prepared by the Department of Law and the Department of Health and Social Services, February 14, 2005)

HB 95/SB 75 would clarify the Department of Health and Social Services' legal authority to detect and respond to a public health threat, including the authority to conduct testing, screening, and examination of individuals, as well as quarantine and isolation powers with court authority; and the authority to collect relevant data; the Department's powers are augmented in conjunction with the Department of Military and Veterans' Affairs when the governor declares a condition of disaster emergency related to public health; and legal representation and court powers are clarified with respect to court proceedings related to conditions of public health importance.

I. Purpose and Intent (Section 1):

Sec. 1: Section 1 sets out the purpose and intent of the bill.

II. Changes to kinds of claims that may not be brought against the state or its agents, officers, or employees (Section 2):

Sec. 2: Types of damage: Section 2 adds acts or omissions related to isolation, quarantine, medical treatment, or other actions taken under the state's public health authority and power to a list of damages for which an action may not be brought against the state or its agents, officers, or employees.

III. Repeal of statutes and changes to citations of repealed statutes (Sections 3, 6, and 12):

Sec. 3: Section 3 deletes a citation to a statute that would be repealed by the bill regarding tuberculosis screening of public school employees.

Sec. 6: Section 6 renumbers citations to reflect statutes that would be repealed by the bill regarding registry of person with impairments.

Sec. 12: Section 12 repeals certain statutes regarding registry of persons with impairments and regarding tuberculosis and other disease control.

IV. Changes to general section regarding the Department of Health and Social Services' administration of public health laws (Sections 4, 5, and 7):

Sec. 4: Section 4 rewrites the section on the administration of public health laws to modernize and more clearly and accurately reflect the Department of Health and Social Services' public health powers.

Sec. 5: Section 5 clarifies the nature of the regulations the Department of Health and Social Services is charged with adopting as regards reporting of conditions of public health importance and confidentiality of information received under provisions regarding public health

authority and powers. It also limits the commissioner of Health and Social Services' authority to require that a dead body be embalmed to certain situations.

Sec. 7: Section 7 adds a definition of "condition of public health importance" to the chapter regarding the administration of public health laws.

V. Updates to the Department of Health and Social Services' public health powers and authority (Section 8):

Sec. 8: Section 8 adds new sections regarding the Department of Health and Social Services' public health authority and powers to the chapter dealing with disease control. These sections replace provisions for two disease-specific conditions (tuberculosis and SARS), repealed under sec. 12, and provide authority that is not specific to a particular disease. The new sections are described as follows:

- prevention and control of conditions of public health importance
- data collection
- requirement to maintain confidentiality of information obtained
- requirement to maintain list of reportable diseases
- power to conduct epidemiological investigation
- medical treatment powers and authority
- isolation and quarantine powers and authority
- powers in a public health disaster
- legal representation and guardian ad litems
- definitions

Section 8 also balances the state's public health powers with modernized due process provisions for protection of individual rights.

VI. Changes to legal representation and court powers (Sections 9-11):

Sec. 9: Section 9 amends the right of an indigent person to counsel to include when the person is subject to isolation, quarantine, testing, screening, or examination related to disease control. If eligible, such right to counsel may be provided by the Public Defender Agency.

Sec. 10: Section 10 gives magistrates and district court judges the power to issue orders related to testing, screening, and examination of individuals related to disease control.

Sec. 11: Section 11 expands the Office of Public Advocacy's responsibilities to include acting as guardian ad litem for individuals in court proceedings related to testing, screening, examination, isolation, and quarantine related to disease control.

VII. Effective date (Section 13):

Sec. 13: Section 13 sets out an immediate effective date for the bill.

ALASKA PUBLIC HEALTH ASSOCIATION

Committed To Advancing Alaska's Public Health Since 1978

SB 75 (S)STA Feb. 24,

In Support of SB 75 Public Health Disasters and Emergencies

Dear Chairman Therriault and members of the Senate State Affairs Committee:

Thank you for hearing SB 75 today and for the opportunity to offer public comment. As I am currently out of state, a representative will read my testimony for the record. My name is Marie Lavigne, I am honored to serve as the Executive Director of the Alaska Public Health Association, representing 220 members across Alaska who are deeply committed to developing sound public health policy to improve the health of all Alaskans.

We would like to thank the Murkowski administration for their leadership in developing SB 75, including Commissioner Joel Gilbertson, Division of Public Health Director Dr. Richard Mandsager, Deputy Director Deborah Erickson and the Attorney General's office. We've been honored to host public health law sessions at our Alaska Health Summit over the past several years and to have recommendations from our leadership included in this bill. Our members unanimously approved in 2003 a resolution in support of modernizing Alaska's public health statutes. Our governing Board has recently affirmed support for public health law reform in the framework of SB 75. We will continue to closely monitor SB 75 and its companion HB 95 this session.

Public health laws are vital during disasters and emergencies to assure the public's safety, and to respond to health threats ranging from bio-terrorism to emerging infectious diseases such as SARS, West Nile Virus and Avian Flu. However, Alaska's current statutes are inadequate, outdated and leave us vulnerable to modern health threats. With today's front page headlines quoting the Center for Disease Control and Prevention warning of the threat of a nearing global flu pandemic, time is of the essence for public health law reform.

As you are aware, preparing for a public health emergency is an essential public health function. Preparedness is going on *every day*, by reducing the spread of infectious disease and lessening the threat of an epidemic. So too, our public health laws need to be strong and ready *every day* to protect the public's health in times of threat. Despite planning and training, significant vulnerabilities in Alaska's public health preparedness remain.

The enabling statutes for public health (AS 18.05.010) were adopted in 1949, in the territorial days, with revisions in the mid 1990s for tuberculosis and in 2003 for SARS. Our laws pre-date modern scientific and constitutional developments. Nor do they support modern disease control measures to address today's health threats. As an example, Alaska remains the only state in the nation without clearly defined quarantine statutes. The Institute of Medicine's *Future of Public Health* found that US public health laws were in need of major revision and recommended all states review their public health laws to make revisions.

To be an effective tool, Alaska's public health laws *must* provide for a statutory framework that defines the mission, services and role for the Division of Public Health *and* clearly defines the legal powers and duties of the state *to assure* conditions for its people to be healthy. These laws *also* need to define the limitations on the state's powers to constrain the legally-protected interests of individuals *in the rare instances* when the needs to protect the community's health warrant it. This delicate balance outlined in SB 75 is of great concern to us.

Public health law reform is recommended in the *Healthy People 2010* initiative and *Healthy Alaskans 2010*, as a cornerstone for strengthening public health infrastructure. The Centers for Disease Control and Prevention further considers public health law reform one of its top ten priorities for improving public health outcomes.

Concurring with the conclusions of these respected experts that Alaska's statutes need revision in order to better meet the health needs of all Alaskans, the Alaska Public Health Association urges you to pass SB 75 out of Committee today and to make its passage a priority this session. Thank you.

P.O. Box 9-1825 Anchorage, AK 99509 907/332-1030 *e-mail:* publichealth@alaska.net www.alaskapublichealth.org

SB 75

Alaska Civil Liberties Union

An Affiliate of the American Civil Liberties Union
P. O. Box 201844, Anchorage, AK 99520-1844
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February 10, 2005

To: Rep. Peggy Wilson, Chair
Members of the House Health, Education and Social Services Committee
From: Michael W. Macleod-Ball, Executive Director

RE: House Bill No. 95
An Act relating to public health and public health emergencies and disasters . . .

Thank you, Rep. Wilson and members of the committee, for allowing me the opportunity to offer input on this important bill. I would also like to thank Dr. Mandsagar, who brought this bill to my attention a couple of weeks ago. He and I were unable to meet to discuss the bill before this past Monday, but I appreciate his effort to solicit the input of the Alaska Civil Liberties Union. It reflects the sincerity of his comments to the Senate committee yesterday when he spoke of the need to find a balance between the public health needs and our desire to preserve our individual freedoms under the US and Alaska Constitutions.

By its very nature, this bill contemplates that individual Alaskans will give up some of their personal freedoms and permit the government to intrude on their privacy in certain circumstances. We agree that under some of the dire circumstances cited by the administration that such restrictions may be appropriate. Our concern with this bill, however, is that – as drafted – it contemplates giving the government the right to quarantine and isolate individuals and to inspect and retain private medical records in circumstances not nearly so dire as the examples cited. We do not oppose the intent of this bill, rather we seek to limit the circumstances when the government can exercise these intrusions on our liberty and privacy solely to those dire emergencies that demand extraordinary government action to preserve our society. The Alaska Civil Liberties Union believes we can be both safe AND free. We have not presented a section-by-section analysis of this bill to the committee yet because Dr. Mandsagar has offered to meet with us to review our concerns with the bill. We are scheduled to meet tomorrow morning and thereafter I would hope to be able to provide you with some more detailed input. For purposes of today's hearing, I will speak for the most part in broader terms.

The bill outlines two broad areas for consideration: the substantive basis for action by the public health director and the procedure to be followed when that basis for action arises. Our concern is primarily with the former category: what circumstances must exist for the government to exercise the extraordinary powers available to it under this bill?

1) <u>The government's right to quarantine or isolate an individual against his or her will, or to access that individual's private medical records, should only exist in a narrow set of limited circumstances.</u>

As written, we believe the right to access identifiable private medical records, and to quarantine or isolate an individual against his or her will is too broad. The department's authority to access records or to quarantine or isolate derives from section 355 – page 7 of the bill. There it states that the department may use the powers set out in the bill "to prevent, control, or ameliorate conditions of public health importance or accomplish other essential public health services and functions." By our reading, that would give the department the right to impose a quarantine or isolation order on an individual, or to access private medical records, based on nothing more than routine administrative purposes. "Essential public health services and functions" is defined in section 390 (page 18) and includes a list of routine functions, which list is not unreasonable in any sense. However, that list of functions should NOT serve as the basis for the department's exercising its extraordinary authority to quarantine or isolate individuals against their will or to access their private medical records. Instead, that authority should not be triggered except in the most unusual circumstances.

We believe the other phrase – "conditions of public health importance" – is the key phrase here. If the definition of this phrase was very narrow so as to define extreme public health emergencies, then the department's right to use the quarantine and isolation authority would only be available in those extreme cases. Our concern, however, is that the definition of "conditions of public health importance" is rather broad. In section 390 (2), a condition of public health importance arises from a "threat to health that is identifiable on an individual or community level and can reasonably be expected to lead to adverse health effects in the community." By that standard, the department could trigger its ability to restrict individual liberty interests and to invade personal medical privacy in the event of a minor bug that runs through a community without endangering anyone's lives.

We do not believe that it is the intent of the department to interpret this bill in this fashion – but the fact remains that the language of the bill can reasonably and fairly be interpreted in this way as it stands. We would strongly recommend that the definition of "condition of public health importance" be narrowed to reflect only far more serious public health events, giving due consideration to the nature of the disease, the level of contagion, the means of transmission, and seriousness of the impact on individual patient.

We have similar concerns with several other definitions, which seem to us to be too broad for the government's need. All the definitions appear in section 390: "contagious disease", "disease outbreak", "epidemic", "infectious disease", "isolation", and "quarantine".

2) <u>The government should be required to affirmatively protect the privacy of identifiable medical records and to destroy such records when no longer needed to address a crisis.</u>

We also are concerned with the language surrounding the government's right to access and retain identifiable medical records. In Section 360(d), the statute contemplates issuance of regulations to govern the department's access to such private information. The only standard to limit the regulatory scheme is set forth in Section 365, which does mandate that such records be

held in confidence. We would prefer a more rigorous set of standards to govern the rulemaking process, including the following:

- A specific prohibition on the use of private medical records for any purpose other than those in connection with the disease outbreak that served to justify the collection of the record in the first place
- A specific prohibition on the disclosure of such information to anyone other than those public health officials involved in the disease outbreak
- The obligation to destroy copies of such records upon the conclusion of the crisis and to return originals to their source
- An affirmative statement that such records cannot be used in any civil or criminal proceeding without the individual's consent

3) The bill should contain affirmative protections that the affected individuals will not suffer negative impacts in their civil transactions or criminal proceedings due solely to the government's actions.

We also believe the law can be improved by adding affirmative protections for the individuals directly impacted by the quarantine, isolation, and medical records authority. We would like the bill to include the following assurances:

- That the quarantine, isolation or medical records access will have no impact on the individual's housing, employment, parental rights, or other civil rights
- That the action will have no impact on any civil or criminal proceedings involving the individual
- That the individual be compensated for any property taken or lost through the government's exercise of its authority
- That the action does not act to waive the doctor – patient confidentiality and imposes such a restriction on any medical professional who gains access to the information as a result of the government action (except as necessary to deal with the public health event)
- That no individual will bear any cost associated with challenging the government's exercise of its authority

4) The affected individual should have access to the legal system throughout the process and the restrictions imposed should be narrowly drawn.

We also have some concerns about the procedural regimen proposed. We appreciate the efforts of the department to provide a clear process and though our concerns are significant, it is clear that there is a process available to individuals whose rights have been restricted. Most of our concerns in the procedural area could be resolved by the following.

Alaska Civil Liberties Union

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HB/SB No. 75

Line-by-Line Bill Commentary

Prepared for

February 24, 2005

Bill Section	Provision at issue	Suggested change	Comments
Section 7 – amendment to AS 18.05.070; also Section 8 – new section 18.15.390(2)	"condition of public health importance" means a disease, syndrome, symptom, injury, or other threat to health that is identifiable on an individual or community level and can reasonably be expected to lead to adverse health effects in the community.	"condition of public health importance" means a disease, syndrome, symptom, injury, or other threat to health that is identifiable on an individual or community level and ~~can reasonably be expected to lead to adverse health effects in the community~~poses a substantial risk of unreasonable public exposure to a lethal condition giving due consideration to the nature of the disease, the level of contagion, and the means of transmission.	The sweeping power to access private medical records, or to isolate or quarantine individuals against their will is triggered in the original proposal by the existence of a "condition of public health importance". Such powers should only be available in narrow circumstances. The risk to the public should be significant as determined by the nature of the disease, and the likelihood of transmission.
Section 8 – new section 18.15.355(a)	(a) The department may use the powers and provisions set out in AS 18.15.355 - 18.15.390 to prevent, control, or ameliorate conditions of public health importance or accomplish other essential public health services and functions.	(a) The department may use the powers and provisions set out in AS 18.15.355 - 18.15.390 to prevent, control, or ameliorate conditions of public health importance ~~or accomplish other essential public health services and functions~~, but only so long as a condition of public health importance continues to exist.	The powers that the department is authorized to use are sweeping and include the right to access private medical records and to isolate or quarantine individuals against their will. The deleted language, if left in place, would give the department the right to exercise these powers in routine circumstances.
Section 8 – new section AS	(d) The department may not acquire identifiable health information without complying with the	(d) The department may not acquire or retain identifiable health information without complying with the provisions of AS	The department should only have access to confidential and identifiable medical records if necessary to a significant

Section	Provision at issue	Suggested change	Comments
		eliminate the condition of public health importance, and 4) there are reasonable grounds to believe the condition of public health importance will be magnified in severity or time without the testing, examination, or screening ~~poses a significant risk to the public's health~~....	
Section 8 – various new sections in AS 18.15.375 and elsewhere	All provisions permitting hearings to be held on an *ex parte* or orders to be issues without an opportunity to be heard.	Remove all references to "ex parte" hearings or orders.	There is no basis for permitting judicial proceedings relating to an individual's liberty interests without giving the affected individual the opportunity to be heard. Under the language proposed by the state, the individual would be aware of the department's efforts by presentation of the medical officer's order. No interest would be served by excluding him or her from the judicial proceeding.
Section 8 – new section AS 18.15.385 (a)	(a) The department may isolate or quarantine an individual or group of individuals in accordance with regulations adopted by the department consistent with the provisions of this section and other law.	(a) The department may isolate or quarantine an individual ~~or group of individuals~~ in accordance with regulations adopted by the department consistent with the provisions of this section and other law. Notwithstanding the foregoing, the isolation or quarantine of any individual is prohibited in the absence of a finding by a state medical officer, concurred in by a licensed medical doctor in the community in which the individual resides,	We are concerned that regulations adopted administratively may not hold as strict a line against isolation and quarantine as the statute mandates. This language tracks that related to mandatory testing above and establishes a minimum threshold to which regulations should adhere.

Section	Provision at issue	Suggested change	Comments
		that 1) a condition of public health importance exists, 2) it is more likely than not that the individual has been exposed to a contagious disease that serves as the basis for the condition of public health importance, 3) the proposed isolation or quarantine is necessary to a successful plan to eliminate the condition of public health importance, and 4) it is more likely than not that the condition of public health importance will be magnified in severity or time without the isolation or quarantine of the individual. If the circumstances of an existing condition of public health importance no longer meet the criteria for that designation, any individual isolated or quarantined in connection with that condition of public health importance shall be immediately released from isolation or quarantine.	
Section 8 – new section AS 18.15.385 (b)(1)	(1) isolation and quarantine shall be by the least restrictive means necessary to prevent the spread of a contagious or possible contagious disease or hazardous material to others; isolation and quarantine may include confinement to private homes or other private and public premises;	(1) isolation and quarantine shall be by the least restrictive means and for the shortest duration necessary to prevent the spread of a contagious ~~or possibly contagious disease or hazardous material to others~~that serves as the basis for the condition of public health importance; isolation and quarantine may include confinement to private homes or other private and public premises;	This section appeared to tie isolation and quarantine to a new and undefined standard. We hope to avoid confusion by keeping things all tied to the "condition of public health importance".

Section	Provision at issue	Suggested change	Comments
Section 8 – new section AS 18.15.385 (b)(5)	(5) the department shall immediately terminate an isolation and quarantine order when an individual poses no substantial risk of transmitting a contagious or possible contagious disease to others.	(5) ~~the department shall immediately terminate~~an individual subject to an isolation ~~and~~ or quarantine order shall be entitled to the immediate termination of that order if any of the conditions material to the issuance of the order no longer exist~~when an individual poses no substantial risk of transmitting a contagious or possible contagious disease to others~~.	It would be best to have a definite end date for each order, and compel the department to seek extension, rather than compel the individual seek termination of an open-ended order.
Section 8 – new section AS 18.15.385 (c)	.....Any individual entering isolation or quarantine premises with or without authorization of the department may be isolated or quarantined if needed to protect the public's health.	.....Any individual entering isolation or quarantine premises with or without authorization of the department may be isolated or quarantined ~~if needed to protect the public's health~~, but only in accordance with the requirements and standards for any other isolation or quarantine established under the laws of this State..	The deleted langua[illegible] would establish a different standard for those who enter the isolation or quarantine location.
Section 8 – new section AS 18.15.385 (d) (1) (E)	(E) that the individual poses a substantial risk to public health;	(E) that 1) a condition of public health importance exists, 2) it is more likely than not that the individual has been exposed to a contagious disease that serves as the basis for the condition of public health importance, 3) the proposed isolation or quarantine is necessary to a successful plan to eliminate the condition of public health importance, and 4) it is more likely than not that the condition of public health importance will be magnified in severity or time without the isolation or	"Substantial risk to public health" is a new and undefined term. It would be better to stick with the defined terms serving as the basis for the exercise of these powers and require that the state show that the required conditions exist.

Section	Provision at issue	Suggested change	Comments
		quarantine of the individual ~~that the individual poses a substantial risk to public health~~;	
Section 8 – new section AS 18.15.385 (d)	Add new subsection (d) (3)	(3) be accompanied by evidence proving that 1) a condition of public health importance exists, 2) it is more likely than not that the individual has been exposed to a contagious disease that serves as the basis for the condition of public health importance, 3) the proposed isolation or quarantine is necessary to a successful plan to eliminate the condition of public health importance, and 4) it is more likely than not that the condition of public health importance will be magnified in severity or time without the isolation or quarantine of the individual	This is the evidentiary requirement linked to the basis for authority.
Section 8 – new section AS 18.15.385 (e)	….a clear and immediate threat to the public health….	Uncertain….	We would propose deleting this section in favor or the prompt or emergency application of the previous sections. The proposed language in this section establishes a special category requiring immediate isolation without judicial overview. At the very least, there should be a specific definition of the phrase "clear and immediate threat to the public health" and it should be tied to the earlier definition of "condition of public health importance".

Section	Provision at issue	Suggested change	Comments
Section 8 – new section AS 18.15.385 (h)	…may commit the respondent to isolation or quarantine for not more than 30 days…that the isolation or quarantine is necessary to prevent or limit the transmission to others of a disease that poses a substantial risk to the public's health.	…may commit the respondent to isolation or quarantine for a specific time period not more than 30 days… that 1) a condition of public health importance exists, 2) it is more likely than not that the individual has been exposed to a contagious disease that serves as the basis for the condition of public health importance, 3) the proposed isolation or quarantine is necessary to a successful plan to eliminate the condition of public health importance, and 4) it is more likely than not that the condition of public health importance will be magnified in severity or time without the isolation or quarantine of the individual~~the isolation or quarantine is necessary to prevent or limit the transmission to others of a disease that poses a substantial risk to the public's health.~~	Because of the liberty interests involved, it's more appropriate for the state to make the case for a specific time period and then seek extension – rather than require the individual to seek a reduction of the order. The court's finding should match up with the conditions that have to exist in order for the state to exercise its authority.
Section 10 – new section AS 22.15.100 (12)	(12) to issue an ex parte testing, examination, or screening order…	(12) to issue ~~an~~ ex ~~parte~~ testing, examination, or screening order…	Eliminate authority for ex parte orders in this context.

Christian Science Committee on Publication for Alaska

P. O. Box 240976, Douglas, AK 99824
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Email: bevsmith@gci.net

To: Senator Gene Therriault, Chair
Members of the Senate State Affairs Committee

From: Beverly Smith, Christian Science Committee on Publication for Alaska

Date: February 24, 2005

RE: Senate Bill No. 75
An Act relating to public health and public health emergencies and disasters...

Thank you, Senator Therriault and members of the committee, for allowing me the opportunity to offer comments on this bill.

In my capacity as Christian Science Committee on Publication for Alaska, one of my roles is to watch for any legislative proposals that could erode the rights of Alaskans to pursue spiritual means for the prevention and cure of disease according to their religious beliefs, including Christian Science treatment and care.

After reviewing SB 75, the Christian Science Committee on Publication for Alaska respectfully requests that Senate Bill 75 be amended as follows:

In section 18.15.375 of the bill, **ADD** a new subsection (f) to read:

"Sec. 18.15.375. Epidemiological investigation. . . . (f) The provisions of this section do not apply to an individual who objects to the testing, examination or screening because of the individual's religious beliefs; provided, such individual may be subject to isolation or quarantine under the provisions of this Act."

EXPLANATION

The purpose of the amendment is to provide for those instances in which a person is unwilling to undergo medical testing, examination or screening because the person is relying on a religious non-medical method of treatment for his or her health and well-being.

Christian Science is one of the religious non-medical forms of treatment that relies on spiritual means through prayer to heal illness, injuries and other conditions. Christian Science has been systematically practiced, quietly and successfully, in many Alaska

families for a century, sometimes through many generations. The application of this religious non-medical method of healing does not involve any type of medical examination or screening. The experience of those practicing Christian Science is that this healing method has both preventative and curative effects.

The amendment recognizes an individual's right of self-determination, including the right to refuse medical testing, examination or screening; however, it also recognizes legitimate public health concerns by providing that a person who refuses medical testing, examination or screening because of religious beliefs may be subject to isolation or quarantine.

The amendment language is based on similarly worded provisions in Section 602 of The Model State Emergency Health Powers Act (revised December 21, 2001; the "Model Act"). The Model Act was prepared by The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities for the Centers for Disease Control (CDC) to assist Governors and State Legislatures and others in formulating emergency health powers plans..

We, therefore, respectfully request that the bill be amended as stated above.

I have attached to this memo Section 602 and related Sections of the Model State Emergency Health Powers Act for your perusal, as well as the statutes from a number of other states containing language similar to the amendment requested above. I believe you will find them helpful in considering the suggested amendment.

Thank you again for allowing me to present this proposed amendment today. I am happy to answer any questions you may have.

STATE OF ALASKA
DEPARTMENT of HEALTH & SOCIAL SERVICES
DIVISION of PUBLIC HEALTH

FRANK H. MURKOWSKI, GOVERNOR

OFFICE OF THE DIRECTOR
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February 15, 2005

The Honorable Gene Therriault
Alaska State Senate
Alaska State Capitol, Room 119
Juneau, AK 99801-1182

Re: CS SB 75, a bill relating to public health.

Dear Senator Therriault,

Enclosed are two proposed amendments to CS SB 75 for consideration by Senate State Affairs. These amendments were recently included in CS HB 95 (companion bill to SB 75) by House HESS.

The first proposed amendment deletes a provision that would have removed party status of parents of minors from court proceedings in situations when quarantine/isolation orders are being contested.

The second proposed amendment addresses indirect court rule amendments made by certain provisions in the bill.

Both amendments for the House bill were drafted by Jean Mischel in the Legal Services Office in Legislative Affairs. A copy of a memo from Ms. Mischel to Senator Dyson, bringing to his attention the need for the court rule amendment, is also enclosed.

Finally, an updated Sectional Analysis of CSSB 75 dated February 14, 2005 is also enclosed. Thank you for your consideration of this request. Please contact me at 465-3092 if you have any questions.

Sincerely,

Richard Mandsager, M.D.
Director, Division of Public Health

enclosures

24-GH1002\A.1
Mischel
2/10/05

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE WILSON

TO: HB 95

Page 1, line 4, following "**amendments;**":

Insert "**relating to the treatment and transportation of dead bodies;**"

Page 6, line 17, following "bodies;":

Insert "**, except that the commissioner may not require that a dead body be embalmed unless the body is known to carry a communicable disease or embalmment is otherwise required for the protection of the public health or for compliance with federal law**"

Page 15, line ~~16.~~ 13-14

Delete "minor; however, parents or guardians of the minor do not have party status in the proceedings under this section"

Insert "minor"

24-GH1002\A.2
Mischel
2/10/05

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE WILSON

TO: HB 95

Page 1, line 4, following "**amendments;**":

Insert "**amending Rules 4, 7, 8, 38, 40, 65, 72, and 77, Alaska Rules of Civil Procedure;**"

Page 24, following line 12:

Insert new bill sections to read:

"* **Sec. 12.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENTS. (a) AS 18.15.375(c)(3), (d), and (e) and 18.15.385(d) - (k), as added by sec. 8 of this Act, have the effect of amending Rules 4, 7, 8, and 77, Alaska Rules of Civil Procedure, relating to the form and timing of service of process, pleadings, and motions by adding special proceedings, timing, and pleading requirements for matters involving public health.

(b) AS 18.15.375(c)(3), (d), and (e) and 18.15.385(d) - (k), as added by sec. 8 of this Act, have the effect of amending Rule 38, Alaska Rules of Civil Procedure, relating to a right to a trial by jury, by requiring a court trial in matters involving public health.

(c) AS 18.15.375(c)(3), (d), and (e) and 18.15.385(d) - (k), as added by sec. 8 of this Act, have the effect of amending Rule 40, Alaska Rules of Civil Procedure, relating to the trial calendar and continuances, by requiring expedited hearings and specific standards for and timing of granting of continuances in matters involving public health.

(d) AS 18.15.375(c)(3), (d), and (e) and 18.15.385(d) - (k), as added by sec. 8 of this Act, have the effect of amending Rule 65, Alaska Rules of Civil Procedure, relating to injunctions, by allowing temporary and ex parte injunctions to be issued and by expediting the

procedures related to injunctive relief in matters involving public health.

(e) AS 18.15.387, as added by sec. 8 of this Act, has the effect of amending Rule 72, Alaska Rules of Civil Procedure, relating to eminent domain actions, by authorizing the Department of Health and Social Services to take immediate control over certain businesses and property in cases of public health disasters.

* Sec. 13. The uncodified law of the State of Alaska is amended by adding a new section to read:

TWO-THIRDS VOTE REQUIRED. AS 18.15.375(c)(3), (d), and (e), 18.15.385(d) - (k), and 18.15.387, as added by sec. 8 of this Act, take effect only if sec. 12 of this Act receives the two-thirds vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska."

Renumber the following bill sections accordingly.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 10, 2005

SUBJECT: Public Health - SB 75 (Work Order No. 24-GS1002\G)

TO: Senator Fred Dyson,
Chair of Senate Health, Education, and Social Services Committee
Attn: Jason Hooley

FROM: Jean M. Mischel
Legislative Counsel

Enclosed is the CS you requested for SB 75, which was reported from the Senate HESS committee yesterday. I want to alert you to a problem with this bill that involves a title change and should be corrected before the bill passes the senate.

Section 8 of the bill expands available pleadings and allows expedited and *ex parte* court hearings in matters involving public health and public health disasters. These changes, in my opinion, have the effect of indirectly amending a number of court rules. Court rule changes must be noted in the title and require a 2/3 majority vote.

In addition, several non-substantive editorial changes have been made to this bill at your request to conform to the 2005 legislative drafting manual.

If I may be of further assistance, please advise.

JMM:med
05-092.med

Enclosure