

The Ohio Department of Health defends legality of West Nile virus prevention measures.

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Dear Editor:

This letter is in response to an article by Terence Blair ("Mosquito Activities by Local Boards of Unlawful") that appeared in the November/December 2002 issue of the Ohio Journal of Environmental Health. Mr. Blair, a member of the Department of Computer Science at Kent State University; contends that the state's public health entities may not legally employ mosquito abatement as a response to an emerging public health threat. That contention is incorrect.

Mr. Blair bases his contention on his reading of the recent Ohio Supreme Court decision in *D.A.B.E., Inc. v. Toledo-Lucas County Board of Health* (2002), 96 Ohio St. 3d 250. Although he presents a long analysis of the *D.A.B.E.* decision, he either misunderstands or does not account for certain key parts of the decision. Specifically, Mr. Blair does not account for a key distinction made by the court.

In *D.A.B.E.*, the Ohio Supreme Court was asked whether "the Ohio Revised Code authorizes or delegates to a local board of health or general health district the authority to prohibit smoking in all public places...." In answering the question, the court made three fundamental points of law. First, administrative regulations "cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly." Second, the "General Assembly has not indicated any intent ... to vest local boards of health with unlimited authority to adopt regulations addressing all public-health concerns." Finally, "R.C. 3709.21 is a rule-enabling statute, not a provision granting substantive regulatory authority." In this context, Mr. Blair correctly understands the court's decision in that public health entities need a specific grant of regulatory authority before adopting substantive regulations. Mr. Blair overapplies this ruling, however. In making its decision, the court was careful to limit the decision to the specific question.

In its arguments to the court, the Toledo-Lucas County Board of Health asserted that any limit on the broad powers the board believed were "conferred by R.C. 3709.21 ... would constrain if not eviscerate their ability to respond effectively to new public-health threats as they arise." The court specifically found, however, that the board's "concerns [were] not well founded. While the Ohio Supreme Court concluded that the "authority conferred by R.C. 3709.21 is administrative and procedural [,]" the court nevertheless acknowledged that "R.C. 3709.21 contemplates that it may be necessary at times for local boards of health to act expeditiously to respond to any new health hazard or disease." To this end, the court observed, "the General Assembly has elsewhere delegated, through various provisions of R.C. Chapter 370, the authority to local boards of health to address epidemics and dangerous

communicable diseases" (see R.C. 3707.04 et. seq.). The court then concluded:

We grant that local boards of health are better situated than the General Assembly to protect the public health. That is one reason why R.C. 3709.21 does not burden local boards with restrictive guidelines or standards. Local boards need the flexibility to meet unforeseen public-health concerns and to promptly address any problems arising from previous orders and regulations. Moreover, local boards need the freedom to abate health hazards that are unique to their specific locations.

(D.A.B.E., Inc., 96 Ohio St.3d, at 261).

In his article, Mr. Blair suggests that "the definition of 'communicable disease' is that of a disease which is spread by direct human contact." Thus, Mr. Blair concludes, because West Nile virus is not communicated by person-to-person contact, public health entities cannot utilize mosquito abatement programs as a response to the emerging public health threat. The definition of "communicable disease" does not, however, restrict public health in the manner suggested by Mr. Blair. In fact, carried to its logical conclusion, Mr. Blair's argument would render public health programs powerless against such public health threats as bubonic plague, dengue fever, and anthrax. Clearly, this is not the situation.

The Ohio Supreme Court recognized the authority of public health programs to protect the public from threats to its health and to do so without restrictive guidelines or standards. The court's decision merely told local boards of health that their authority was not contained in R.C. 3709.21. Instead, such authority is found elsewhere in the Revised Code. It is important to note the following sections of the code: R.C. 3709.22 ("The board [of health] ... may take such steps as are necessary to protect the public health and to prevent disease"); R.C. 3701.13 (the Ohio Department of Health "may make special or standing orders or rules ... for preventing the spread of contagious or infectious diseases"); R.C. 3701.14 ("The director may make and execute orders necessary to protect the people against diseases of lower animals"). Contrary to Mr. Blair's contention, these statutes do not limit the response of the public health program to "communicable" diseases. When viewed in combination, these statutes actually support the mosquito abatement work of local public health entities.

The West Nile Virus Plan for the State of Ohio was developed by the Ohio West Nile Virus Workgroup as a partnership effort of the Ohio Department of Health, the Ohio Department of Agriculture, the Ohio Department of Natural Resources, Ohio State University, the Ohio Environmental Protection Agency, the Association of Ohio Health Commissioners, the Ohio Mosquito Control Association, the Ohio Environmental Health Association, and the U.S. Department of Agriculture. Mosquito abatement is an important part of this plan and has been endorsed by the workgroup. The primary goal of the plan is to protect the public's health by controlling the spread of the West Nile virus. Mr. Blair's assertions notwithstanding, the local health departments are an important element in achieving this goal.

Sincerely,

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