

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CONCERNED PASTORS FOR SOCIAL  
ACTION, et al.,

Case No. 16-10277

Plaintiffs,

Hon. David M. Lawson

v.

Mag. J. Stephanie Dawkins Davis

NICK A. KHOURI, et al.,

Defendants.

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**BRIEF OF *AMICUS CURIAE***  
**MICHIGAN ATTORNEY GENERAL BILL SCHUETTE,**  
**ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN**

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**I. INTEREST OF *AMICUS CURIAE* ATTORNEY GENERAL BILL SCHUETTE, ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN**

Michigan Attorney General Bill Schuette, on behalf of the People of the State of Michigan, respectfully offers this amici curiae brief to protect the public health and general welfare from ongoing harm stemming from the Flint Water Crisis. “The attorney general ... may, when in his own judgment the interests of the state require it, ... appear for the people of this state in any ... court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.” Michigan Compiled Laws 14.28. The Michigan Constitution, Art. IV, Section 51, provides: “The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern.” The Flint Water Crisis is a grave harm and threat to the public health and general welfare of the People of the State of Michigan, including but not limited to the substantial portion of the population exposed to the unsafe public water supply in Flint.

**II. THE FAILURE TO IMPLEMENT AND MAINTAIN OPTIMAL CORROSION CONTROL TREATMENT IN A MANNER THAT TRULY MINIMIZES THE RISK OF LEAD ENTERING END USERS' WATER SUPPLIES IS A GRAVE HARM AND THREAT TO THE PUBLIC HEALTH AND GENERAL WELFARE OF THE PEOPLE OF THE STATE OF MICHIGAN.**

The Safe Drinking Water Act requires the federal Environmental Protection Agency (EPA) to establish national primary drinking water regulations (NPDWRs) and maximum contaminant level goals (MCLGs) for contaminants that are or may be in public water systems and that may have any adverse effect on humans. 42 U.S.C. § 300g-1. In 1991, the EPA promulgated such standards with respect to lead and copper. Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26460-01 (June 7, 1991) (now codified at 40 C.F.R. Part 41, Subpart I).

MCLGs are public health goals, the level of a contaminant in drinking water at which there is no measurable risk to humans. 40 C.F.R. § 141.2. Maximum contaminant levels (MCLs) are enforceable standards that are derived from the MCLGs. For most contaminants, there is a numeric MCL, usually expressed as a concentration; for others, instead of a numeric MCL there is a treatment technique that the public water supply system must implement in order to lower the contaminant level to as close as possible to the MCLG. 42 U.S.C. § 300g-1.

The EPA promulgated the Lead and Copper Rule to protect human health “by reducing the lead and copper levels at consumers’ taps to as close to the

MCLG as is feasible.” Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26460-01 (June 7, 1991) (now codified at 40 C.F.R. Part 41, Subpart I). The EPA’s MCLG for lead is *zero*, due to the toxic effects of lead at any level. Rather than impose a numeric MCL, the SDWA scheme requires public water supply systems to implement a defined set of treatment techniques.

Lead can enter water sources as a result of corrosion of plumbing within a water distribution system. To prevent lead from entering via corrosion the distribution system and ultimately homes, schools, and other consumers of the public water supply, all water systems are required to “install and operate optimal corrosion control treatment.” 40 C.F.R. § 141.80(d)(1). “Optimal” corrosion control treatment “minimizes ... lead ... concentrations at users’ taps while insuring that the treatment does not cause the water system to violate any national primary drinking water regulations.” 40 C.F.R. § 141.2.

Although historically the lead pipes in Flint had been coated with water treated with orthophostate—an anti-corrosion additive—from Detroit, after Flint switched its water source to the Flint River, no orthophosphate was added to the water supply. The subsequent, and predictable, corrosion severely degraded the protective coating inside Flint’s lead pipes, and led to the release of high

concentrations of lead into Flint’s water supply and resulting exposure of Flint’s residents to unsafe lead levels.

The Defendants contend Flint’s water system is in compliance with the Lead and Copper Rule based upon data from recent months that reflect 90<sup>th</sup> percentile lead levels below the action level of 15 ppb. A large water system’s “compliance status,” however, is not dependent, “upon whether it meets the action levels.” 56 Fed. Reg. at 26,488. Compliance with the Lead and Copper Rule requires large water systems to implement and maintain “optimal” corrosion control treatment. 40 C.F.R. § 141.82(g). “Optimal” corrosion control treatment must “minimize” lead levels at users’ taps so that levels come as close as possible to the MCLG of zero. *Id.* at § 141.2. In furtherance of this requirement, all large systems must “evaluate whether they can further reduce their lead levels even if they are below the action levels.” 56 Fed. Reg. at 26,492. There is a requirement of large systems to “minimize” lead levels even if they are below the action level because there is no safe concentration of lead in a water supply.

Although there is no safe level of lead in a water supply, the Lead and Copper Rule’s 90<sup>th</sup> percentile calculation inherently permits exposure of up to 10 percent of households to unsafe lead levels that exceed the action level of 15 ppb. 40 C.F.R. § 141.80. The Rule explicitly provides that, “[t]he lead action level is exceeded if the concentration of lead in *more than* 10 percent of tap water samples

collected during any monitoring period... is greater than 0.015 mg/L [15 ppb].” *Id* (emphasis added). Thus, the Lead and Copper Rule is a compromise to public health, even under ideal circumstances, because it expressly permits exposure of up to ten percent of the population to lead levels that exceed the action level.

As the Michigan Department of Environmental Quality (MDEQ) warns in its Consumer Notice of Lead,

[L]ead can cause serious health problem [sic] if too much enters your body from drinking water or other sources. It can cause damage to the brain and kidneys, and it can interfere with the production of red blood cells that carry oxygen to all parts of your body. The greatest risk of lead exposure is to infants, young children, and pregnant women. Scientists have linked the effects on the brain with lower IQ in children. Adults with kidney problems and high blood pressure can be affected by low levels of lead more than healthy adults. Lead is stored in the bones, and can be released later in life. During pregnancy, the child receives lead from the mother’s bones, which may affect brain development.

*MDEQ’s Office of Drinking Water and Municipal Assistance*, “Lead and Copper Report and Consumer Notice of Lead Result Certificate for Community Water Supply.” Since Flint’s switch to the Flint River for its water supply in April 2014, the people of Flint have been exposed to dangerously high lead levels. “Soon after the switch, residents complained that their water was discolored and foul-smelling,” and, “reported health problems from drinking and bathing in the water, including skin rashes, hair loss, and vomiting.” Pls.’ Mot. for a Prelim. Inj. at 5.

Although Flint’s water system systematically used procedures designed to “underestimate the occurrence of lead – including directing residents to ‘pre-flush’ their taps by running the water for five minutes the night before drawing a water sample ... some samples still showed high levels of lead.” *Id.* at 6. Despite having knowledge of elevated lead levels, “in some residents’ tap water ... the System took no meaningful action to address these signs of lead contamination.” *Id.* In the summer of 2015, researchers “found that more than 10% of ... samples contained lead levels over 25 parts per billion (ppb)” – almost double the action level. *Id.* at 7. “On September 24, 2015, a local pediatrician released findings ... showing that the percentage of Flint children with elevated blood lead levels had nearly doubled since the ... switch to Flint River water.” *Id.*

Although Flint returned to receiving water from Lake Huron via Detroit’s water system in October 2015, the corrosivity of the untreated Flint River water that was used from April 2014 to October 2015 destroyed the protective phosphate coating that lined Flint’s pipes, allowing high concentrations of lead to leach into Flint’s water supply. Lead continues to leach into Flint’s water supply even after switching back to Lake Huron as its water supply source. As Flint’s population has already been exposed to high lead levels for almost three years, any further lead exposure creates an increased health risk, not only to those persons directly

affected but possibly to their descendants as well. The preliminary injunction is essential to prevent additional harms to the health of Flint's residents.

Furthermore, the MDEQ's interpretation of the Safe Drinking Water Act and the Lead and Copper Rule is flawed and these state agencies are not entitled to deference in interpreting Congressional statutes and federal rules. This is not a typical dispute about the interpretation of a regulation. MDEQ officials have been criminally indicted as a result of their flawed interpretation and improper implementation of the Lead and Copper Rule. Michael Prysby, a former engineer for MDEQ's Office of Drinking Water and Municipal Assistance (ODWMA), and Stephen Busch, a former district supervisor for ODWMA, both have been charged with misconduct in office, conspiracy to tamper with evidence, tampering with evidence, and treatment and monitoring violations of the Michigan Safe Drinking Water Act. Specifically, both Prysby and Busch manipulated monitoring reports that reflected elevated levels of lead in Flint's water supply, and failed to advise the city to implement corrosion control treatment. Liane-Shekter Smith, MDEQ's former head of the ODWMA, has also been charged with misconduct in office, as well as willful neglect of duty. Patrick Cook, a former employee of ODWMA, has also been charged with misconduct in office, conspiracy to engage in misconduct in office, and neglect of duty. Adam Rosenthal, also a former employee of

ODWMA, has been charged with misconduct in office, conspiracy to tamper with evidence, tampering with evidence and neglect.

MDEQ's flawed interpretation of "compliance" under the Lead and Copper Rule was previously rejected by the EPA as the Flint Water Crisis was unfolding. *See* Miguel Del Toral, "High Lead Levels in Flint, Michigan – Interim Report" (June 24, 2015) ("When the City of Flint switched to the Flint River as their water source on April 30, 2014 ... the City of Flint stopped providing treatment used to mitigate lead ... levels in the water. In accordance with the Lead and Copper Rule (LCR), all large systems (serving greater than 50,000 persons) are required to install and maintain corrosion control treatment for lead and copper.") In short, MDEQ has lost credibility in interpreting and administering the Lead and Copper Rule.

Moreover, MDEQ is not behaving as an impartial regulatory agency in this action. Instead, MDEQ is attempting to assist other state actors to avoid the mandates imposed by the injunction. The same agency whose employees conspired to defraud the public into believing Flint's water supply was safe and met Safe Drinking Water Act standards mandated by federal law, should not be looked to as

experts on interpreting and administering the Safe Drinking Water Act and its Lead and Copper Rule.<sup>1</sup>

### **III. A PRELIMINARY INJUNCTION IS NECESSARY TO PROTECT THE PUBLIC HEALTH AND GENERAL WELFARE OF THE PEOPLE OF THE STATE OF MICHIGAN.**

As is now known, after Flint switched its water supply source to the Flint River in April 2014, MDEQ officials wrongly advised the city that corrosion control treatment was unnecessary. As a result, the corrosive water from the Flint River severely damaged the protective phosphate coating inside the pipes, releasing lead into Flint's water supply. A new protective coating has not yet formed since Flint returned to receiving water from Detroit. Although Defendants contend the monitoring data from recent months reflect safe lead levels, lead is still leaching into Flint's water supply and continuing to expose Flint's residents to unsafe levels of lead. The preliminary injunction is crucial to protect the health of Flint residents, and to provide them with access to a safe source of water.

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<sup>1</sup> In addition, as detailed in Plaintiffs' brief, no deference is afforded to MDEQ's interpretation of the Safe Drinking Water Act because the statute provides for a private cause of action. In such situations, the judiciary must independently evaluate whether a party is liable. Pls.' Surreply in Opp'n to State Defs.' Mot. to Dissolve Prelim. Inj. or to Reconsider Denial of Stay Pending Appeal at 8. *See also, Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580, 586 (6th Cir. 2002) ("state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*." (quoting *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997))).

The preliminary injunction is necessary to protect the health of all of Flint's residents. The preliminary injunction requires Defendants verify that all households in Flint have a properly installed filter, and provide door-to-door bottled water delivery to those that do not have a properly installed filter, and inform residents of the risks of lead in drinking water. It is intended to provide a rough substitute for the essential service that municipal water systems must furnish: delivery of safe drinking water at the point of use. Currently, Flint residents are responsible for obtaining bottled water and filters themselves from various points of distribution throughout the city. However, some of Flint's residents may not have the ability to reach those points of distribution if they do not have access to a personal vehicle or the ability to use public transportation. "About 19% of Flint residents do not have access to a vehicle," and, "[a]lthough free public bus service is available, it can be challenging and inconvenient to use. Buses run infrequently (sometimes only once every 30 minutes), and bus stations may not be close to either the [points of distribution] or individuals' homes." Pls.' Mot. for a Prelim. Inj. at 27.

Furthermore, some of Flint's residents may not have the physical ability to carry the bottled water back to their home. Even if a resident can physically carry the water home, "picking up bottled water can be time-consuming" or "incompatible with work schedules." *Id.* There is a limit of one case of water per

household per day, which means “residents with large families lack access to sufficient amounts of water to meet their daily needs.” *Id.* Alternatively, the faucet filters currently distributed by Defendants, “do not fit on all residents’ faucets ... and instructions on how to install filters may be ‘difficult to understand’ ... Other residents’ filters have clogged, cracked, or broken after just one to two weeks.” *Id.* at 29. Therefore, the current efforts to provide Flint with alternative sources of clean drinking water have been insufficient, and the preliminary injunction is necessary to provide the vulnerable populations of Flint with safe drinking water.

Disolving the preliminary injunction would be a devastating blow to many of Flint’s residents, especially the most vulnerable populations: the sick, the elderly, families with young children, individuals with physical disabilities that make traveling to water distribution difficult. The cold winter months make obtaining water even more challenging. Michigan has more freshwater than any other state, and sits in the heart of the Great Lakes. Our residents should have clean safe water from their tap, and until government can do this job effectively, water must be delivered to their homes. The law requires it and our citizens deserve it.

### **CONCLUSION AND RELIEF REQUESTED**

The Flint Water Crisis is a grave harm and threat to the public health and general welfare of the People of the State of Michigan, including but not limited to the substantial portion of the population exposed to the unsafe public water supply

in Flint. The people of Flint need and deserve access to a safe water supply, and the Court was warranted and correct in its decision to award the Plaintiffs' request for preliminary injunctive relief.

Accordingly, *amicus curiae* Michigan Attorney General Bill Schuette respectfully urges this Court to deny Defendants' motion to dissolve the preliminary injunction.

Respectfully submitted,

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