

**The Flint Water Crisis, KWA and Strategic-Structural Racism: A Reply to Jeff Wright,
Genesee County Drain Commissioner and CEO Karegnondi Water Authority**

by

**Peter J. Hammer
Professor of Law and Director
Damon J. Keith Center for Civil Rights
Wayne State University Law School**

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Hearings on the Flint Water Crisis**

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I. Introduction

At the request of the Michigan Civil Rights Commission, I testified before the Commission on July 14, 2016, addressing “The Flint Water Crisis: History, Housing and Spatial-Structural Racism.” In preparing that testimony and reviewing thousands of emails regarding the Flint Water Crisis released by Governor Snyder, it became clear that there were serious additional questions regarding Flint’s participation in the Karegnondi Water Authority (KWA). These questions included the initial decision to approve Flint’s participation in the pipeline, the manipulation of state rules governing debt limits to permit the distressed city to issue \$85 million worth of bonds to finance its share of KWA construction, the corresponding neglect of how Flint would finance improvements in its Water Treatment Plant (WTP) made necessary by the KWA decision and the neglect of how Flint would finance anticipated higher costs of an interim water supply until the KWA pipeline was constructed. On July, 18, 2016, I submitted written testimony examining these issues: “The Flint Water Crisis, KWA and Strategic-Structural Racism.”

On November 22, 2016, Jeff Wright, who simultaneously occupies the elected position of Genesee County Drain Commissioner (GCDC) and also serves as CEO of KWA submitted written testimony to this Commission challenging certain aspects of my analysis: “The Flint Water Crisis, DWSD, and GLWA: Monopoly, Price Gouging, Corruption, and the Poisoning of a City.” This document is a reply to Mr. Wright’s testimony. Section two address questions of motivation. Section three outlines issues of methodology. Section four provides a “Water Rates 101” summary of the economics of Flint’s historic and prospective water rate structure to help assess Mr. Wright’s claims. Section five responds directly to specific assertions in Mr. Wright’s testimony. Section six concludes with a reprise of the significance of strategic-structural racism for understanding the dangers of Emergency Management and the implications of the Flint Water Crisis.

II. Motive

Mr. Wright raises questions about the motivation behind my testimony to the Commission. He asserts that my testimony is “ideologically driven,” that I have a “clear bias in favor of the [Detroit Water and Sewerage Department] DWSD” and that “Professor Hammer

accepts the DWSD mythology.”¹ In truth, when appropriate, I have been a critic of DWSD, the Great Lakes Water Authority (GLWA) and the leadership of the City of Detroit. I was the lead witness on behalf of the Detroit City Council in Governor Granholm’s removal proceedings of Mayor Kwame Kilpatrick. Among other issues, I was asked to present expert testimony as to whether the mayor’s actions were in the public interest or his own private interest. This question is not substantially different from the assessment of the motivations of KWA and state employees at the Department of Environmental Quality (DEQ) and the Department of Treasury (Treasury). Furthermore, I have been a leading critic of DWSD’s policy of residential water shutoffs without public health exceptions and an advocate for a water affordability plan. I was also a critic of the regionalization of DWSD and the creation of the GLWA, advocating for an alternative that would have been more favorable to the financial future of Detroit.

As Director of the Damon J. Keith Center for Civil Rights at Wayne State University Law School, I do have a stake in assessing social issues in Michigan from a perspective of racial equity and social justice. In this context, I have employed notions of Spatial, Structural and Strategic Racism as it affects issues ranging from the financing of Detroit Public Schools,² the Detroit Bankruptcy Plan of Adjustment,³ dynamics of inequality in Detroit⁴ and the Flint Water Crisis.

III. Methodology

The methodology employed in my written testimony is a standard document review of publically available reports, news accounts and Governor Snyder’s recently released emails. The intent was to shed light on the substantial opacity that still exists in the basic chronology of decision making concerning approval of KWA, the financing of the project, the decision to use the Flint River for drinking water and the slow governmental response to the tragedy. Frequently, an examination of contemporaneous documents provides a more accurate picture

¹ Mr. Wright asserts: “Professor Hammer’s testimony is ideologically driven.” Jeff Wright, *The Flint Water Crisis, DWSD, and GLWA: Monopoly, Price Gouging, Corruption, and the Poisoning of a City*, 26 (November 22, 2016) (hereinafter “Wright 2016”). “Professor Hammer accepts the DWSD mythology.” Id. at 26. “Instead of presenting facts, Professor Hammer provides a narrative to a world that exists only in his mind.” Id. at 30. Finally, Wright claims that I have a “clear bias in favor of DWSD” (Id. at 32) and that I have “sensationalized the Flint tragedy” for my own benefit. Id. at 35. It may be worth noting that my work in preparing and presenting oral testimony for the Commission, my written testimony to the Commission and this reply have been done entirely on a pro bono basis.

² Peter J. Hammer, *The Fate of the Detroit Public Schools: Governance, Finance and Competition*, 13 J. LAW IN SOCIETY 111 (2011).

³ Peter J. Hammer, *Dear Judge Rhodes: Evaluation of the Expert Report of Martha E.M. Kopacz Regarding the Feasibility of the City of Detroit Plan of Adjustment*, 17 J. LAW IN SOCIETY 19 (2015).

⁴ Peter J. Hammer, *Detroit 1967 and Today: Spatial Racism and Ongoing Cycles of Oppression*, (forthcoming 2017).

than a series of ex-post interviews. After the fact, actors have an incentive to shade their interpretations, particularly in the wake tragic, high profile events.

Both my oral and written testimony stressed the importance of developing a more sophisticated understanding of the role that race plays in our society. Towards this end, I examined the notions of express discrimination, unconscious bias, spatial, structural and strategic racism. Express discrimination in Flint clearly led to historic ghettoization inside the city, producing the near complete segregation of race, wealth and opportunity in the isolated neighborhoods of Floral Street and the St. John's street, a clear illustration of spatial racism.⁵ Structural racism examines the inter-institutional dynamics that produce and reproduce racially disparate outcomes over time. In my oral testimony, I traced the social reproduction of spatial racism inside the City of Flint in the 1920s-1960s to the regionalization of spatial racism that defines Flint and Genesee County today.⁶ This social, economic and racial segregation laid the seeds of a collapsing property market, declining tax base and demographic exodus that generated current conditions of municipal distress.⁷

These issues are all deeply interconnected. When properly understood, municipal distress in Michigan represents strong residual evidence of structural racism. Rather than understanding and addressing the root causes of structural racism embedded in municipal distress, however, Governor Snyder responded with a regime of Emergency Management. Given the root causes of municipal distress in structural racism, it is not surprising that Emergency Managers were imposed almost exclusively in predominately African-American cities and school districts. Not only was this extreme form of government intervention racially targeted, it was profoundly misguided from an economic and policy perspective. As recognized by the Task Force Final Report, Emergency Management has proven itself to be a dangerous social, political and economic tool.⁸

To this foundational analysis of structural racism is added the notion of strategic racism. Strategic racism is the intentional manipulation of the forces of intentional discrimination, unconscious bias and structural racism for public or private gain.⁹ One of the clearest historic

⁵ Peter J. Hammer, The Flint Water Crisis, KWA and Strategic-Structural Racism, 55 (July 18, 2016) (hereinafter "Hammer 2016"), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812171.

⁶ Id. at 58-63.

⁷ Id. at 63-64.

⁸ Id. at 35-37.

⁹ Mr. Wright is confused about the relationship between strategic racism and unconscious bias. Wright 2016 at 14-15. His primary intuition is correct. One cannot unconsciously engage in acts of strategic racism. It is an intentional action. He is mistaken, however, if he believes that one cannot strategically manipulate the unconscious beliefs and behaviors of others. In the non-racialize context of poker, players seek to identify and exploit the "tells" of their opponents, with their opponents being unaware of what is taking place. In the more racialized context of the

examples of strategic racism is “block busting” in residential real estate markets, a story with particular relevance to Flint.¹⁰ Real estate agents manipulate individual racism and the structural racism embedded in economic markets to get White homeowners to sell their homes in integrating neighborhoods at low prices, only to make a profit by selling those same homes at higher prices to incoming African-American homeowners, all while reinforcing patterns of residential segregation. Whether the realtor harbors racial animus or not, they are strategically manipulating the intentional, unconscious and structural racism embedded in real estate markets. Strategic racism is itself a real and dangerous force that must be better acknowledged and addressed.

In a different context, Ian Haney Lopez applies the notion of strategic racism to what he calls “dog whistle” politics, where politicians manipulate racialized beliefs about programs ranging from “welfare” to the “war on crime” to advance their own political objectives.¹¹ Politicians seeking to exploit the intentional and/or unconscious biases of others will contrast racialized notions of welfare cheats with the fate of honest, hardworking Americans. Racialized beliefs in the populace are strategically manipulated for the politician’s own gain. Similarly, Yale Philosophy Professor Jason Stanley extends the notion of strategic racism used in my testimony to this Commission as an illustration of “frontlash,” where ideological frames of “technocracy” and “settler colonialism” combine with the incentives of the financial system and municipal bond markets to fuel Michigan’s regime of Emergency Management and set the stage for the tragedy of the Flint Water Crisis.¹²

A useful mantra is that structural racism creates the vulnerability and strategic racism exploits the vulnerability. In terms of the Flint Water Crisis, structural racism created extreme vulnerability on the part of marginalized groups and ushered in the misguided regime of Emergency Management. As will be examined in greater detail in Section V, “A reply to Mr. Wright’s testimony,” strategic racism in Flint worked in various ways to exploit that vulnerability in furtherance of the private interests of KWA.

IV. Water Rates 101: A guide to Flint’s spiraling rate increases

Mr. Wright would have us believe that DWSD is the cause of all of the water problems in Flint and Genesee County. In truth, whether Flint purchased its wholesale supply of water from DWSD or KWA was just one of many challenges embedded in Flint’s highly dysfunctional

workforce, it is not difficult to trigger and exploit the biases of coworkers in hiring decisions, Board Room discussions or the course of ordinary business in furtherance of one’s own objectives.

¹⁰ Hammer 2016 at 58-60.

¹¹ Ian Haney López, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014).

¹² Jason Stanley, *The Emergency Manager: Strategic Racism, Technocracy, and the Poisoning of Flint’s Children*, THE GOOD SOCIETY (forthcoming 2017).

water rate structure. Understanding the bigger picture makes it easier to assess specific claims Mr. Wright makes concerning KWA and DSWD.

To begin with, DWSD rate setting is subject to state laws and regulations. This would not be apparent in reading Mr. Wright's testimony. For example, Mr. Wright asserts that "Detroit charges whatever Detroit felt like charging for drinking water, and our community was forced to pay whatever it cost."¹³ In truth, DWSD (like most public utilities) is highly regulated and is forbidden to make a profit. DWSD is required by state law to charge wholesale prices to its municipal customers that reflect the cost of delivery.¹⁴ Obviously, there can be disagreements as to how costs are defined and what rates are reasonable, but Mr. Wright, Flint and Genesee County always retained the right to challenge DWSD rates in court if they were excessive or unjustified.

It is true that DWSD wholesale rates increased over time and that these price increases were one of many stresses placed on Flint's water rates. The Department of Treasury commissioned a recent study by Raftelis Financial Consultants, "Flint Water Rate Analysis."¹⁵ According to RFC, DWSD Effective Rates to the City of Flint increased from \$12.72 in 2009 to \$19.88 in 2014. This is significant. At the same time, one must distinguish between wholesale and retail rates. During this same time frame, retail rates, as reflected in the typical Flint water bill, increased from \$27.17 in 2009 to \$59.37 in 2014. These retail rate increases far exceed the trend line of DWSD wholesale rates.

In terms of percentages, the City of Flint estimated that the costs associated with "water purchases" accounted for 29% of the 2013 Budget Allocation Water & Sewer Funds.¹⁶ While comparing Flint water rates in 2013 and 2017 increasingly runs the risk of comparing apples and oranges, RFC reports that costs of water supply will account for \$15.89 of the total \$53.84 typical monthly charge in 2017 (roughly 29.51% of the costs).¹⁷ While significant, it is clear that DWSD wholesale rates are only one piece of the larger rate puzzle.

RFC reports that as high as Flint retail water rates were in absolute levels, the rates were insufficient to cover all of Flint's water system costs, causing substantial deficits in the

¹³ Wright 2016 at 3. Similar statements can be found elsewhere in the testimony. "DWSD was a corrupt, unreliable water supplier, which would mercilessly gouge Flint and the County." Id. at 7. "DWSD has been proven itself to be a corrupt, inept, unreliable price gouging bureaucracy." Id. at 28.

¹⁴ An illustration of this fact will be seen in Section V. E., "The DWSD termination letter did not force Flint to leave DASD," where Treasury placed political pressure on DWSD to make sure that whatever interim rates DWSD charged Flint were cost-justified.

¹⁵ Raftelis Financial Consultants, FLINT WATER RATE ANALYSIS, (May 13, 2016) (hereinafter "RFC 2016").

¹⁶ City of Flint Water Forum, slide 5 (May 3, 2012).

¹⁷ RFC 2016 at 10.

Water Enterprise Fund. From 2011 to 2014, Emergency Managers in Flint ordered dramatic increases in Flint water rates from \$39.09 to \$53.84. These increases triggered substantial public outcry over the cost of water. This was the same time frame that political decisions were being made about KWA. Strategically, public blame for the unprecedented increases in water rates was manipulated and placed almost exclusively at the door of DWSD. The false impression that DWSD was solely responsible for Flint's higher water rates was then exploited by advocates of KWA.

The real story is more complicated. The RFC report examines Flint's historic rate structure. In addition to DWSD wholesale rates, RFC details three other leading drivers of Flint's water rates. "The Flint water system is largely a fixed cost operation, meaning the cost of providing water service to Flint customers does not vary significantly with the amount of water used."¹⁸ The next factor is a downward socio-economic spiral embedded in the same story of structural racism that resulted in Flint's municipal distress, as detailed in my testimony to the Commission. "The water system was built to serve 200,000 people, while the current population is less than half of that. Over time, as the population and industrial base of the City declined, City customers used less and less water, while costs continued to increase."¹⁹ The fixed costs of an aged and expensive infrastructure must be spread over fewer and fewer ratepayers, causing higher rates. This trend will continue and will only get worse.

The final historic cost factor identified by RFC is the maintenance of the Flint WTP itself. "Historically, Flint has been required to maintain its own treatment plant as back-up, in addition to purchasing water from DWSD. Due to the use of the treatment plant as back-up, the City has effectively been paying for two water sources."²⁰ The WTP has been an albatross around Flint's neck. Cities that have different types of backup systems have substantially lower water rates. "The Flint water utility has a total per customer O&M cost that is almost 45% higher than the next highest utility, Saginaw, MI. Flint also has higher per customer water supply and administrative costs than other surveyed utilities."²¹ The average Operating Cost per Customer in the RFC survey was \$44.05, Flint's Operating Cost per Customer was \$107.17.²²

¹⁸ Id at 16.

¹⁹ Id.

²⁰ Id.

²¹ Id. at 33.

²² The best thing that could have happened to Flint would have been the decommissioning of its WTP decades ago, along with the development of a cheaper backup water supply system. One of the greatest virtues of the Imlay City alternative proposed by DWSD and rejected by EM Kurtz was that it would have replaced the Flint WTP with a redundant DWSD pipeline. (Hammer at 18). EM Kurtz rejected that option "over concerns of owning and maintaining the 72" water main." (Treasury at 705/7971). I will use the same convention for citation to released emails and documents in this Reply as I used in my original Report. I will provide sufficient detail in the text for the reader to understand the context and provide a citation to the file name

There are additional cost factors associated with the aging infrastructure. Flint needs to purchase nearly twice as much water as it needs, because so much of its water is lost in transmission. “[T]he City has historically billed about 50 to 60 percent of what it purchased from DWSD. A common target for municipal utilities is closer to 90 percent (i.e. only 10 percent non-revenue). Ultimately, purchasing more water than is necessary to serve customers puts upward pressure on customer bills.”²³ Whether water is purchased from KWA or DWSD, Flint will have to purchase nearly twice as much as it needs until it addresses underlying infrastructure problems.

The totality of factors paints a grim picture for Flint water rates, past, present and future. There are deep structural problems many rooted in the same dynamics of structural racism triggering Flint’s broader municipal distress that the DWSD-KWA wholesale price dispute fails even remotely to address. RFC forecasts future rates under a scenario where Flint will begin to obtain all of its water from KWA in FY 2018. “The current typical bill is \$53.84 per month. Based on the information currently available the typical bill is projected to rise to \$110.11 per month by FY 2022.”²⁴ *Flint’s water rates, which are already astronomically high, will more than double in the next six years. The KWA pipeline fails to address any of these deeper structural issues.*

The methodology of structural racism employs a rich systems-based frame for analysis. A comparably deep systems understanding of Flint’s water problems and the political and racial environment in which they unfolded is necessary to untangle the factors that caused the Flint Water Crisis and the poisoning of an entire city.

V. A reply to Mr. Wright’s testimony

A lesson we teach future lawyers is that if you can control the frame, then you can control the outcome. One illustration of the power wielded by KWA was its ability to problematize the complex, interrelated issues structurally driving Flint’s higher water rates *exclusively as a matter of the wholesale price charged by DWSD*, with the pairwise comparative offer of KWA as the

and page number in the file where the document can be found. For example, the Treasury memo can be found in the file “Treasury” on page 705 of the 7971 page document – (Treasury at 705/7971). The website containing most Treasury files can be found at, Press Release: Gov. Rick Snyder releases additional batches of departmental emails and documents regarding Flint water crisis (June 21, 2016), available at http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-387125--,00.html. It is difficult for an educated lay person to imagine that the costs and trouble of maintaining a pipeline would have been any greater than the cost and difficulty of upgrading, operating and maintaining Flint’s aged WTP. The actual failings of the WTP now speak for themselves.

²³ RFC 2016 at 27.

²⁴ *Id.* at 44.

wholesale alternative.²⁵ This false frame ignored the problems inherent in the existence and maintenance of the aged WTP, it ignored the fixed cost nature of the entire infrastructure and the uncontrollable rate spiral triggered by a declining population base and endemic poverty embedded in the story of structural racism, and it ignored the fact that nearly half of the wholesale water purchased from whatever source would be lost through leaking pipes. The water experts at KWA and the GCDC had the power to define a frame that ignored all of these issues and focus exclusively on wholesale water rates in a manner that exploited historic tensions between the City of Flint and the City of Detroit. Little in this story is accidental.

A. KWA maintained an inappropriately close political relationship with DEQ

Mr. Wright claims that it not possible to establish that a relationship between government regulators and those being regulated is “inappropriately close” simply by conducting a document review.²⁶ At issue is the relationship between KWA Professional Engineer John C. O’Malia and regulators at DEQ.²⁷ Mr. Wright states that Mr. O’Malia was hired “by GCDC to do engineering and administrative (not political) work for what ultimately became the KWA project.”²⁸

Mr. Wright sets the appropriate standard for evaluation. Is the nature of the O’Malia-DEQ relationship defined by its engineering and administrative aspects or does it cross the line into the political? In doing the document review, I searched the released email files for references to KWA. One of the first emails I retrieved was the November 11, 2011, message John C. O’Malia sent to Liane Shekter Smith (DEQ). The message was not exclusively about engineering and administrative concerns. The short message stated: “The incumbent Flint Mayor was reelected so good news.”²⁹ I was not expecting KWA and DEQ to be discussing local Flint politics and commenting on whether developments were good or bad news, begging the real question good or bad news for whom. This is neither engineering nor administrative in nature and should be of no concern to DEQ.

²⁵ This dynamic can also be framed in terms of the knowledge-&-power construct outlined in my testimony. Hammer 2016 at 3-5. One definition of power is the ability to define reality. KWA possessed the political power to impose its understanding of reality on local, county and state policy makers. Once it controlled the frame, it controlled the outcome. Flint’s various EMs, DEQ, and Treasury failed completely to re-center the frame to address the full range of complex factors driving Flint’s water rates. The powerless voices of the lost residents of Flint were nowhere registered in this debate.

²⁶ Wright 2016 at 16.

²⁷ Hammer 2016 at 13-15.

²⁸ Wright 2016 at 16.

²⁹ The email from John C. O’Malia can be found in the file “DEQ11” on page 1362 of the 2147 page document – (DEQ11 1362/2147). The website containing most non-Treasury files can be found at, Gov. Rick Snyder releases departmental emails produced regarding Flint water crisis (Feb. 12, 2016), available at http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-376716--,00.html.

I then searched the files for references to Mr. O'Malia. This produced the January 3, 2012 memo.

MEMORANDUM

TO: Liane Shekter Smith, John O'Brien, and David Jansen

FROM: John C. O'Malia, P.E.

DATE: January 3, 2012

RE: KWA Status

It was good to talk to you regarding the status of KWA at the end of the year.

I am confirming our conversations as follows.

1. Mayor Walling, the incumbent, was re-elected. He is very much in favor of the KWA project and sits as Chairman of the KWA Board.
2. The Emergency Manager [EM], Mike Brown, was appointed by Governor Snyder. EM Brown formerly served as interim mayor of the City of Flint. He has expressed support for the KWA project.
3. EM has given powers back to Mayor and Council to make the decision on KWA as a precaution if the EM court challenge holds up. This will enable the Mayor and Council to approve the KWA agreement and not be challenged in court!
4. Expect Flint to approve KWA agreement January or February of 2012.
5. Would expect a meeting with MDEQ end of January or in February.

Will keep you posted on events as they develop. Look forward to working with you and staff Happy New Year.³⁰

Again, the contents of the memo cross the line from the engineering and administrative to the political, with references to the re-election of Mayor Walling, his position as Chairman of the KWA Board and his political support for the project. Similar observations can be made about the appointment of Emergency Manager Mike Brown and his alleged political support for the KWA project.

The most troubling aspect of the memo, however, was the strategic plan outlined by Mr. O'Malia for the Emergency Manager to use a City Council vote on KWA essentially as a legal insurance policy to protect the KWA. "EM has given powers back to Mayor and Council to

³⁰ DEQ12 578/2200.

make the decision on KWA as a precaution if the EM court challenge holds up. This will enable the Mayor and Council to approve the KWA agreement and not be challenged in court!” It is possible to be too clever by a half. In this case, punctuation matters. It would be inappropriate if the EM concocted this plan as an end around possible legal challenges to the EM statute. It would be substantially more inappropriate if the plan were jointly concocted by the EM and principals at KWA (including the newly re-elected Mayor of Flint and Chair of the KWA Board and KWA’s CEO, the Genesee County Drain Commissioner). To also have DEQ staff brought in on this conspiracy clearly crosses the line between communications concerning engineering and administrative matters into the realm of the inappropriately political.

Relations between KWA, the Flint EM, the Flint Mayor, GCDC and DEQ were highly politicized and did not reflect administrative business as usual. It is significant that other observers, employing different methodologies have come to similar conclusions. Relying on substantial interviews, as well as document review, the Flint Water Advisory Task Force Final Report called for a further investigation of KWA by an independent outside authority, specifically noting: “State and local officials repeatedly characterized Genesee County and Flint leadership, including Flint’s emergency managers, as adamant in their promotion of KWA and desire for independence from DWSD.”³¹

Similarly, after conducting substantial criminal investigations, the State Attorney General has indicted many DEQ officials. At the time my initial Report was drafted, that list included Stephen Busch (DEQ), Michael Prysby (DEQ) and Michael Glasgow (WTP).³² Since then, the names of Liane Shekter Smith (DEQ), recipient of the January 3, 2012, O’Malia Memo, and Pat Cook (DEQ) can also be added to the list.³³ Even since the submission of Mr. Wright’s Testimony, additional criminal indictments have been issued against Emergency Managers Darnell Earley and Gerald Ambrose and Flint city employees Howard Croft, Public Works Superintendent and Daugherty Johnson, Utilities Administrator.³⁴

³¹ Flint Water Advisory Task Force, FINAL REPORT, 59 (March 2016) (Commissioned by the Office of Governor Rick Snyder State of Michigan) (hereinafter “Task Force Report”), available at https://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf.

³² Hammer 2016 at 12-13.

³³ Amy Haimerl and Abby Goodnough, *6 More State Workers Charged in Flint Water Crisis*, NEW YORK TIMES (July 29, 2016), available at http://www.nytimes.com/2016/07/30/us/flint-michigan-water-crisis.html?_r=0.

³⁴ Brady Dennis, *Four more officials charged with felonies in Flint water crisis*, WASHINGTON POST (December 20, 2016), available at https://www.washingtonpost.com/news/energy-environment/wp/2016/12/20/four-more-officials-charged-with-felonies-in-flint-water-crisis/?utm_term=.0e1b8137c806.

There is substantial evidence in my Report and elsewhere to support the conclusion that relationships between these actors was highly politicized and inappropriately close. It was clear as of the drafting of the O'Malia memo that there was a "united front" on the part of KWA-Flint EM-Flint Mayor-GCDC-DEQ in support of KWA and that this united front would work together throughout the KWA approval process.³⁵

B. Flint City Council's vote approving KWA was a sham

It is significant that Mr. Wright never challenges the veracity of the O'Malia memo or the truthfulness of its contents. As of January 3, 2012, it was the stated position of the Flint EM and KWA (whose Chairman of the Board was the Mayor of Flint and whose CEO was the Genesee County Drain Commissioner) that approval of KWA would be sought by vote of the Flint City Council, so that if the EM law was successfully challenged in court, the KWA project would not be jeopardized.

In light of this reality, how can one interpret Mr. Wright's statements about the importance of returning democracy to the citizens of Flint to act with respect to KWA in his written testimony to this Commission and similar statements he made at the times of the City Council vote? "As Drain Commissioner I insisted that the City Council vote because I believed that the City's permanent water source should be decided by Flint's elected representatives."³⁶ Elsewhere he writes: "That vote that day was one of the few moments of true democracy Flint had during the EM reign."³⁷

³⁵ Mr. Wright raises two other objections in his testimony. First, he claims that it was wrong to characterize the KWA as a "done deal" at the time the January 3, 2012, O'Malia memo was drafted. Wright 2016 at 20. What my Report stated was that while the chronology defined in the memo was inaccurate, the playbook that was outlined and the sequence of events were correct. Hammer 2016 at 15. This is in fact what happened.

Mr. Wright's second objection was that KWA did not need Flint and that KWA would proceed regardless of Flint's participation. Although no citation to supporting documentation is provided, Mr. Wright alleges that Flint was informed of this fact on February 24, 2012. Wright 2016 at 18. As will be seen later, Flint's participation in KWA would affect the diameter of the pipeline and hence the capacity and profitability of the project. Moreover, there is an odd way in which those inside DEQ treated Genesee County's intent in this regard as secret inside information that they would not independently divulge to Flint, as if they were playing some type of game. (Email from Mike Prysby (DEQ) to Richard Benzie (DEQ), RE: Genesee County & Flint (June 13, 2012) ("Genesee County has mentioned to me verbally several times that they will proceed with KWA with or without Flint. They also indicated that the project could be scaled down. As far as I am aware the county has not gone public with this ... since this could be one of their trump cards they're not wanting to play prematurely (if they need to) depending on the long-term alternative Flint commits to.")) (DEQ12 857/2299) (ellipses and parentheses in original)).

³⁶ Wright 2016 at 32.

³⁷ Id. at 31.

Making public statements in favor of democracy and the importance of the City Council vote, while maintaining a private intent to use that same vote as a legal insurance policy to protect the KWA project, is a text book example of strategic behavior. There is an absolute disconnect between the public and private positions. The actor gets the public benefits of being viewed as supporting democracy, while privately benefiting from the KWA legal insurance policy.

Mr. Wright contends that this is not the case because the “law suit about the validity of the Emergency Manager law, mentioned in Mr. O’Malia’s January 3, 2013 memo, had been dismissed long before the vote was take.”³⁸ There is a way in which this statement is both technically true and outrageously misleading at the same time. The particular suit in question, *Brown v. Snyder*, was dismissed as moot because Michigan voters repealed the initial Emergency Manager law by public referendum on November 6, 2012.³⁹ When the lame duck legislature imposed a new emergency manager law in December 2012, everyone knew that new legal challenges were sure to follow. While the legal history of Michigan’s Emergency Manager law is complicated, there is no doubt that the legality of the law was highly contested at the time when the Flint City Council vote was taken in March 2013 and that KWA was in need of its insurance policy then more than ever.

Nowhere does Mr. Wright respond to the serious defects with the City Council vote outlined in my Report.⁴⁰ Neither the EM nor KWA provided Council with the background information, including the Tucker Young Report, necessary to make a fully informed decision. No effort was made to distinguish wholesale and retail rates in untangling Flint’s phenomenally high rate increases. The entire political blame for all rate increases was politically laid at the feet of DWSD. As detailed in “Water Rates 101” the real story is much more complicated, with wholesale rates being only one part of the puzzle. Finally, there was clear consternation and unease on the part of Council as to why Council was being consulted on this one issue in the EM regime and no others. The O’Malia Memo provides the answer to this question.

³⁸ Id. at 31-32.

³⁹ Governor Snyder’s initial Emergency Manager law, Public Act 4, was enacted in March 2011. In June 2011, a lawsuit was brought in state court challenging the law – *Brown v. Snyder*. *Brown, et al. v. Snyder, et al.*, Center for Constitutional Rights, available at <https://ccrjustice.org/home/what-we-do/our-cases/brown-et-al-v-snyder-et-al>. Michigan voters repealed Public Act 4 on November 6, 2012, rendering that case moot. The lame duck legislature approved and Governor Snyder signed the second Emergency Manager law, Public Act 476, in December 2012. That act was not scheduled to take effect until March 28, 2012. As everyone knew and expected, the same team of lawyers behind *Brown v. Snyder* filed suit on March 27, 2013, in *Phillips v. Snyder*, challenging the validity of Public Act 476. *Phillips, et al v. Snyder, et al*, Center for Constitutional Rights, available at <https://ccrjustice.org/home/what-we-do/our-cases/phillips-et-al-v-snyder-et-al#>.

⁴⁰ Hammer 2016 at 19-20.

Finally, Mr. Wright fails to address substantive evidence at the time illustrating how the City Council vote was just a charade. The Council approved the purchase of only 16 million gallons per day (MGD) from KWA, not the requested 18 MGD. Because the lower volume of water would require a reengineering of the entire pipeline and a reduction in KWA's capacity and profitability, the Flint EM Kurtz countermanded the City Council's democratic decision and issued an order for the purchase of the entire 18 MGD KWA request.⁴¹ It was KWA's interests driving these decisions and not the interests of the people of Flint. A democratically disabled community was being strategically exploited for private gain.

C. Treasury exercised inadequate oversight of KWA approval

The Michigan Department of Treasury, not the Genesee County Drain Commission, was the primary focus of my Report. In this regard, Mr. Wright mischaracterizes my conclusions. Mr. Wright states that my analysis ignored potential bias in the Tucker Young study and asserts that I "praised the study highly."⁴² He also alleges that I insisted decision makers "should have accepted Tucker Young's flawed work."⁴³ These claims are incorrect. To begin with, my testimony cited the Task Force Report acknowledging potential biases on the part of *all the engineering studies*, given each engineering firm's close connections to the respective parties.⁴⁴

My Report did not advocate on behalf of Tucker Young, but rather faulted Treasury for making a final decision to approve KWA in the absence of an independent, definitive economic analysis. "At this point, Treasury exhibited very little leadership and made few efforts to conduct further authoritative or independent assessments of the competing proposals."⁴⁵ This was a tremendous breach of the government's fiduciary duty in the shadow of the Emergency Management regime. "Abdicating his responsibility as the ultimate decision maker, Treasurer Dillion was not looking for the most defensible economic proposal for Flint residents."⁴⁶ The KWA approval process was not centered on the best interests and needs of the residents of Flint. "The decision was supposed to be about economics and not politics, but it was much more about politics than economics."⁴⁷ This remains my position today. The case for KWA simply had not been made on the merits and Treasury failed to exercise due diligence in its fiscal oversight of

⁴¹ Id. at 20.

⁴² Wright 2016 at 10.

⁴³ Id. at 11. Mr. Wright also makes numerous blanket assertions as to the cost effectiveness of the KWA proposal. Id. at 9-11. Unfortunately, he provides insufficient context and citation to the record in his testimony to permit evaluation of these claims.

⁴⁴ Hammer 2016 at 12 (citing Task Force Report at 5 ("Several firms, each with ties to the respective and effectively competing parties, issued conflicting studies as to the merit of KWA. Independent review was requested of MDEQ, an agency ill-equipped to render judgments regarding economic feasibility.")).

⁴⁵ Id. at 20.

⁴⁶ Id.

⁴⁷ Id.

the decision. “It is difficult to excuse Treasury’s failure to exercise separate, independent judgment in this matter.”⁴⁸

Mr. Wright further ignores and fails to respond to how public actors supporting the KWA pipeline manipulated the frames for economic analysis. EM Kurtz strategically eliminated options that were acknowledged by all parties as lower cost in order to stack the equation in favor of KWA.⁴⁹ This is unfortunate, because the real point of comparison was not the 100% KWA versus the 100% traditional DWSD options evaluated respectively by Tucker Young and Rowe Engineering. The more revealing proposals were those just beginning to emerge through the bargaining pressure being placed on DWSD. These proposals were beginning to break out of the misleading frame of examining only the DWSD-KWA wholesale cost of water and were beginning to examine the fuller range of factors discussed in “Water Rates 101” driving Flint’s higher water rates.

One alternative identified in the Tucker Young Report was the construction of a new redundant pipeline from Imlay City that would have permitted the decommissioning of Flint’s aged WTP. “The Report suggested that a ‘new’ fourth Imlay City option of building a parallel DWSD pipeline that could function as a backup supply, making the Flint WTP unnecessary, while spreading the capital costs through the entire DWSD rate base, might be the cheapest option of all.”⁵⁰ This alternative was also taken off the table by EM Kurtz.⁵¹

The other alternative was DWSD’s final, final offer. Little is publically written about this proposal because Governor Snyder imposed a media blackout on the negotiating parties. DWSD made its final proposal on April, 15, 2013, with EM Kurtz rejecting it out of hand almost upon receipt.⁵² After EM Kurtz’s rejection, the Governor called a meeting on April 19, 2013 of all the principals. DWSD was permitted to submit a more detailed counteroffer on April 24, 2013.⁵³ The proposal contained three primary components. The first was a reduction in present and long-term wholesale rates. According to DWSD: “The proposal herein offers Flint the immediate opportunity for a 45% reduction in the cost of water supply saves the Flint/Genesee region over \$900 million dollars as compared to the KWA alternative over the 30 year contract period.”⁵⁴ In terms of specifics, the new rates would entail a reduction in 2015 Flint rates of 45% from \$25.55 to \$14.18.⁵⁵

⁴⁸ Id. at 21.

⁴⁹ Id. at 18-19.

⁵⁰ Id. at 18.

⁵¹ Treasury 705/7971.

⁵² Hammer 2016 at 20.

⁵³ Treasury 445/7971.

⁵⁴ Treasury 447/7971.

⁵⁵ Treasury 460/7971.

The second component was greater participatory rights in DWSD decision making for Flint and Genesee County, with potential membership on the DWSD Board.⁵⁶ The third component was greater autonomy in the form of a new public-private partnership. “It is proposed that Flint would enter into a public/public partnership with DWSD that would reflect more input into and control over system investments and cost variables.”⁵⁷ Significantly, the proposal maintained the offer of a new backup water supply in the form of a redundant pipe from Imlay City discussed earlier that would have permitted the decommissioning of the Flint WTP.⁵⁸

EM Kurtz rejected this final offer on April 26, 2016, citing disagreements about cost comparisons, including the capital costs of the KWA project and concerns that aspects of the partnership were attempts to shift risk from DWSD to Flint and Genesee County.⁵⁹ That same day, Jones Day attorney and Detroit EM Kevyn Orr advisor, David G. Heiman, sent an email to Kevyn Orr, Andy Dillon (Treasury), Sue McCormick (DWSD) and Ken Buckfire concerning “DWSD Offer Evaluation,” commenting on the EM Kurtz rejection letter: “Kevyn—perhaps I am not knowledgeable enough on the specific facts here, but I find this to be a strange letter because he only attacks the calculations without offering his own assessment, proposing an alternative or threatening to pull out.”⁶⁰ This was all that was necessary, because politics was trumping economics and independent analysis.

Again, it does not appear that Treasury made any independent assessment of its own of the final DWSD proposal, nor any additional effort to mediate the clear tensions between Flint and DWSD. This is significant because within weeks, EM Kurtz was making decisions to move to the Flint River (not DWSD) as the interim source of Flint drinking water during KWA construction. Treasury did nothing to stop this. On June 19, 2013, EM Kurtz wrote Edward Koryzno (Treasury): “Due to contractual relations with the DWSD, Flint is investigating the possibility of placing the Flint Water Plant (FWP) into operation using the Flint River as a primary drinking water source for approximately two years and then converting to KWA delivered lake water when available.”⁶¹ Soon thereafter, Treasury approved EM Kurtz’s proposed sole source contract with LAN to start the engineering assessment of the Flint WTP.⁶²

D. State laws were manipulated to facilitate Flint’s bond financing for KWA

The special political treatment KWA was afforded in its initial approval was extended to assisting Flint circumvent state debt limits in order to finance its \$85 million share for KWA pipeline construction. The mechanism for this manipulation was an Administrative Consent

⁵⁶ Treasury 449/7971

⁵⁷ Treasury 448/7971.

⁵⁸ Treasury 448/7971.

⁵⁹ Treasury 481/7971.

⁶⁰ Treasury 487/7971.

⁶¹ Treasury 1063/7971.

⁶² Hammer 2016 at 24.

Order (ACO) relating to a lime sludge lagoon at the Flint WTP. Mr. Wright maintains: “The bond sale could not proceed because the Flint WTP could not legally operate and produce revenue without resolving the enforcement action [for lime sludge lagoon], not because the City lacked adequate bonding capacity.”⁶³ This explanation runs counter to all contemporaneous documents, including those from KWA’s own bond council.⁶⁴

On March 18, 2014, KWA’s bond lawyer, then Miller Canfield attorney Dan Massaron, sent an email to Gerald Ambrose with copies to Emergency Manager Darnell Earley and others. “As you know, the City of Flint has lived through a dramatic decline in property values and state revenue sharing. These declines have dramatically reduced its debt capacity under the Home Rule City Act.”⁶⁵ However, there was a loophole in the form of an Administrative Consent Order. “[I]f the KWA project is done to comply with an ACO, the debt associated with the project would not ‘count’ toward the City’s debt limit.”⁶⁶ The truth is that Flint would not have been able to issue the KWA bonds without the ACO.

What followed was truly remarkable. My Report details:

Rather than using an ACO as a tool to fix an existing regulatory violation, Flint-KWA-Treasury-DEQ started searching for a regulatory violation to justify an ACO, in order to bootstrap financing for the KWA, which was completely unrelated to the underlying regulatory violation justifying the ACO. After ping-ponging around different DEQ departments, the “violation” ultimately settled upon was a relatively minor and inexpensive problem with a lagoon at the Flint WTP's lime sludge facility.⁶⁷

If the ACO was only intended to remedy the violation at the lime sludge lagoon to bring the WTP into regulatory compliance, so the WTP could operate legally, so the KWA bonds could be issued, as Mt. Wright alleges, the ACO would have been limited to that discreet purpose – it was not. The ACO was drafted with the express intent of being broad enough to permit financing of Flint’s participation in KWA pipeline construction. On February 10, 2014, Flint environmental attorney Mike Robinson sent an email to Steve Busch (DEQ) concerning “ACO:” “Steve, I checked with the City’s bond counsel, here is the Language that we MUST include in the consent order so that the City can move forward on this.”⁶⁸ The proposed language purported to justify Flint’s participation in KWA as a necessary predicate to remedying the violation at the lime sludge lagoon. This is not just nonsense; it is what Jeremy Bentham would call “nonsense on stilts.” But it is worse than just nonsense, it is tragic. Linking the financing of the KWA

⁶³ Wright 2016 at 12.

⁶⁴ Hammer 2016 at 28.

⁶⁵ Treasury 2613/7971.

⁶⁶ Id.

⁶⁷ Hammer 2016 at 29.

⁶⁸ DEQ3 4057/4719 (emphasis in original).

pipeline to violations at the WTP effectively forced the City to rely on the WTP and the Flint River as the interim source of water supply during pipeline construction.

Mr. Wright characterized these claims about the ACO and KWA financing as “specious[.]”⁶⁹ Sadly, the analysis outlined in my report is strongly echoed in recent criminal indictments issued against former Flint Emergency Managers Darnell Earley and Gerald Ambrose.⁷⁰ The analysis starts with the basic fact that Flint had no money and no capacity to borrow additional funds for KWA.

Defendant AMBROSE, who at the time of the ACO, was the City’s financial advisor, further stated that at the time the ACO was executed, the City had no autonomous financial borrowing ability. As a City in receivership, the City of Flint did not have a credit rating. Rather, to borrow money the City was required to obtain approval of the Department of Treasury. Defendant AMBROSE stated that he and his colleagues had no reason to believe that the Department of Treasury would authorize any borrowing given the City’s financial situation at the time.⁷¹

According to the indictment, EM Earley twice sought Treasury approval to borrow money for KWA and was denied.

On two occasions, Defendant EARLEY applied for authorization from the Department of Treasury to allow the City to borrow funds to satisfy its portion of the KWA costs. However, the Department of Treasury denied Defendant EARLEY’s requests on February 21, 2014.⁷²

The strategic manipulation of state debt limits through the contrived ACO was essential for the KWA project to proceed. The State Attorney General labels the ACO a “sham transaction.”

Ultimately, FWTP’s lime sludge disposal facility was used as a premise for obtaining the funds needed to finance the City of Flint’s contribution to the KWA pipeline. Factually, this was a sham transaction designed under false pretenses to obtain money for the KWA.⁷³

⁶⁹ Wright 2016 at 12.

⁷⁰ *People v. Earley, et al*, Complaint and Warrant, State Attorney General Office of Independent Counsel Investigator’s Report, Request for Warrant (Attorney General Case No. 16-0003) (December 19, 2016) (hereinafter “*People v. Earley, et al*, Complaint and Warrant”), available at http://www.greatlakeslaw.org/Flint/People_v_Earley_et_al_Complaint_and_Warrant.pdf.

⁷¹ Id. at paragraph 32.

⁷² Id. at paragraph 20.

⁷³ Id. at paragraph 32.

The fraud runs even deeper. The indictment further maintains that issues at the lime sludge lagoon were being addressed and remedied even before the ACO was issued.⁷⁴ Contrary to Mr. Wright's assertion, this issue would not have prevented the WTP from legal operation.

Without DEQ and Treasury's complicity in strategically manipulating bond rules and manufacturing the "sweetheart" ACO, Flint would not have been able to issue bonds to pay for its participation in KWA pipeline construction. There are sins of commission and sins of omission. Significantly, while money for KWA pipeline construction was included in the ACO, no funds were sought in the ACO to make necessary upgrades to the WTP to or to assist Flint pay higher anticipated DWSD wholesale rates while the KWA pipeline was being constructed. No extraordinary financial efforts were made to help the residents of Flint.

E. The DWSD termination letter did not force Flint to leave DWSD

One of the biggest lies in the entire Flint Water Crisis is that the April 16, 2013, DWSD letter terminating its contract with Flint forced Flint to turn to the Flint River for drinking water. This letter has been used by different parties to mask their own internal agendas and to deny their own responsibility for the tragedy.

The DWSD letter did have a legal effect, it terminated the existing DWSD contract with Flint, which itself had expired on its own terms and was being extended on a year-to-year basis. The letter would also permit DWSD to charge higher rates after contract termination had taken effect for the interim period of KWA pipeline construction, but only to the extent those rates were cost-justified.

In fact, higher interim-DWSD rates in Flint had been anticipated by all parties during the entire KWA/DWSD deliberations. The Genesee County Drain Commission had offered to help Flint pay those higher DWSD rates, as well as the costs of necessary WTP upgrades, as inducements for Flint to join KWA. These promises were outlined in the same memo from Edward Koryzno (Treasury) to Eric Cline (Treasury) (February 15, 2013) that documented EM Kurtz's strategic removal of competing options favoring the KWA proposal. The memo states:

[A]t a January 28, 2013 meeting, County Drain Commissioner Wright indicated that Genesee County will permit Flint to participate in its revenue bond sale for KWA for Flint's 30% share of capacity in the KWA System *and for plant upgrades*. Given Flint's current financial situation, were this participation to occur, it will be a positive development for the City because it is likely Flint would have a very difficult time issuing bonds on the strength of its own credit rating. *The Drain Commissioner also indicated a willingness to discuss how KWA might mitigate the \$7- to \$8-million cost of*

⁷⁴ Id.

*the “premium” rate that would be charged to the City of Flint by DWSD for the City to purchase water while KWA was being constructed.*⁷⁵

As will be seen later, neither of these promises was honored.

Mr. Wright makes much of an April 16, 2014, email sent by DWSD Board President Jim Fausone indicating that DWSD will likely set new rates after the termination takes effect to account for all sunk costs.⁷⁶ The Fausone email was sent to Treasurer Andy Dillion, among others. What Mr. Wright does not reveal is that Treasurer Dillion immediately sought advice concerning the legal constraints that would limit potential DWSD rate increases.⁷⁷ Given that Emergency Managers were in place in both Flint and Detroit, Treasury had particularly strong power over DWSD. Valarie Brader in the Governor’s Office responded to Dillion’s request for advice stating: “All members of the board are mayoral appointees who serve at his pleasure, so in theory, KO [Kevin Orr] could even fire Fausone if he tried this.”⁷⁸ Treasury stayed on top of the problem. The real issue would be ensuring that DWSD rates were cost-justified. Treasury pressured DWSD Director Sue McCormick on the issue. In an April 24, 2013, letter to Treasurer Dillion she responded: “Please rest assure that DWSD’s computation will be in accordance with State Law which dictates that such rates will not result in a rate structure that would generate a profit for DWSD. Our intent is simply to compute the rates so that costs properly attributable to Flint and Genesee County will not be borne by the remaining DWSD water customers.”⁷⁹

Everybody knew that the DWSD termination letter would not prevent Flint or anyone else in Genesee County from getting water from DWSD after the existing contract expired. Perhaps most revealing, Mr. Wright knew this in his capacity as being charged for arranging water purchases from DWSD on behalf of Genesee County after the termination of the Flint contract.

Though Genesee County is technically no longer on Detroit's system, the Motor City has continued to provide water to the county. And Wright says Genesee has continued to pay the bills even without an official contract in place. “We don't have a contract with Detroit till this day,” he said. “We've been on the system since they terminated the contract in 2014. I believe that no judge and no public health official will let one community turn the water off to another community as long as they're paying the bills.”⁸⁰

⁷⁵ Treasury 707/7971 (emphasis added).

⁷⁶ Wright 2016 at 21.

⁷⁷ Treasury 424/7971.

⁷⁸ Treasury 423/7971.

⁷⁹ Treasury 490/7971.

⁸⁰ Kayla Ruble, “Smothering the Outcry”: The Inside Story of How the State of Michigan Poisoned Flint, VICE News (February 9, 2016) available at

Mr. Wright is correct. Responsibility for the decision to use the Flint River as an interim water supply must be borne by those who made those decisions and those who created the environment in which it was made. It cannot be displaced on DWSD.

F. The decision to use the Flint River was financially driven by the failure to arrange independent financing for WTP improvements and the additional money needed to pay higher interim DWDS rates

Mr. Wright's testimony before this Commission is noteworthy because it places the blame for the decision to use the Flint River almost exclusively on EM Kurtz and attributes the initial timing and motivation for the decision to Kurtz's anger over DWSD's termination letter of April 16, 2014.⁸¹ If Kurtz's animosity towards DWSD was intense enough to drive him to the Flint River, it calls into serious question his judgment on all matters relating to KWA approval. On Mr. Wright's own analysis, the decision to use the Flint River was economically irrational. According to Mr. Wright, upgrading the WTP for full-time treatment of the Flint River would cost \$50 million, which is substantially more than what was needed simply to upgrade the WTP to treat KWA raw water.⁸² The cost of WTP upgrades to safely treat the Flint River was much greater than the cost of upgrading the WTP to treat KWA raw water plus the costs of staying with DWSD and paying higher interim rates. Something else must be going on.

In my initial Report I stated that "there is yet no clear answer to the questions of *who* made the decision to use the Flint River as the interim source of drinking water or *when* the decision was made."⁸³ I still believe that is the case. Similarly, the full story is not yet known as to the extent of upgrades at the WTP before it started processing Flint River water for city residents.

A core failure leading to the Flint River Water Crisis was the myopic focus on comparing KWA-DWSD wholesale rates, without engaging in full cost accounting for all the expenses

<https://news.vice.com/article/smothering-the-outcry-the-inside-story-of-how-the-state-of-michigan-poisoned-flint-water-crisis>.

⁸¹ Wright 2016 at 23-24.

⁸² Id. at 13.

⁸³ Hammer 2016 at 22. One question is when the decision was made to use the Flint River as an interim source of drinking water. An equally important question is when that decision became irreversible. The real point at which the decision to use the Flint River became irreversible was the entry of the ACO and the issuing of the KWA bonds on the false premise that use of the Flint River was needed because of the DWSD termination letter and the need to upgrade the WTP. "The use of an ACO predicated on problems with the WTP in order to finance the KWA pipeline effectively obligated the City to use the Flint River as the interim source of drinking water during KWA construction." Id. at 30. The same sentiment is echoed in the recent criminal indictment. "The ACO was executed on March 20, 2014. Pursuant to the aforementioned ACO, the City of Flint was bound to the use of the Flint River as its interim water source." *People v. Earley, et al*, Complaint and Warrant, paragraph 28.

necessary to transition Flint from DWS to the KWA. At a minimum, full costs would include Flint's share of KWA pipeline construction, the costs associated with necessary upgrades to the WTP, and the costs of an interim water supply, such as the higher rates likely to be charged by DWS. Not only were the full costs of the KWA decision not accounted for, no effort was made to help Flint finance these costs, other than its share of KWA construction. KWA was approved, but the City of Flint was left holding the bag. This failing lies at the heart of the decision to turn to the Flint River as an interim source of drinking water.

It is important to note that each of these costs was known during the KWA deliberation process. Indeed, as stated earlier, when it was critical in obtaining Treasury approval of the KWA project, Mr. Wright stated his willingness to assist the City of Flint in obtaining financing for both the costs of additional WTP plant upgrades and the higher costs of DWS interim rates.

Responsibility must lie first with the various Emergency Managers and Treasury. They inexcusably considered the decision to approve Flint's participation in KWA without simultaneously considering how Flint would finance its obligations. All stakeholders were aware that Flint had no capacity to borrow money.⁸⁴ Treasury should have required the cost and ability to finance the KWA to be a central consideration and refused to approve the deal unless these basic questions could be answered. Moreover, Treasury should have required any financing decision to have included all cost, such as necessary upgrades to the WTP and the higher costs of an interim water supply. If Treasury had fulfilled these basic obligations, Flint would never have been forced to turn to the Flint River.

Other parties also bear responsibility. Mr. Wright is correct in his testimony and in his contemporaneous statements at the time that he, like everyone else, thought Flint would continue to purchase water from DWS.⁸⁵ Everyone also knew that additional upgrades at the WTP were necessary and that Flint would have to pay a premium in the form of higher DWS rates until the KWA pipeline was constructed. Again, there are sins of commission and sins of omission. I can find no evidence in the record that Mr. Wright made any effort to deliver on his financial promises to assist Flint pay these additional costs. We know that efforts were made to manipulate state debt limits through a sweetheart ACO, making sure that the costs of Flint's share of construction of the KWA pipeline was included in the scope of the ACO. No similar efforts were made to include the costs associated with upgrades at the WTP or to pay a higher interim rate for safe DWS water. If one is going to break the rules for pipeline construction, then why not break the rules for the full cost of KWA transition and to protect the democratically voiceless residents of Flint? If Mr. Wright is correct in his constant protestations that KWA

⁸⁴ Perhaps the most puzzling claim in Mr. Wright's testimony is his assertion that Flint has no financial water woes because it had \$50 million in the bank to pay for all necessary water expenditures. Wright 2016 at 14, 31. This claim is evaluated in detail in an Appendix to this Reply.

⁸⁵ Id. at 30.

would easily pay for itself, then it is even more inexcusable that these actions were not taken to fully protect the residents of Flint and their water supply during the transition period.

Even when it became clear that EM Kurtz and his successors were taking City to the Flint River, a decision that Mr. Wrights acknowledges now and at the time was inappropriate, there is no evidence in the record that he made any effort to intervene and challenge that decision. In particular, there is no evidence in the record of him stepping forward, as he had promised to do, to help Flint finance the higher costs of staying with DWSD.

So what actually happened at the WTP and how was it paid for? The nature and extent of WTP upgrades prior to beginning processing water from the Flint River are still not fully known. We do know that the spending on upgrades was nowhere near previous estimates on what it would take to safely treat river water.⁸⁶ We also know how the Emergency Managers paid for WTP upgrades in the absence of independent, external finance. The money that had previously been spent on safe DWSD water was cannibalized and diverted to the WTP.⁸⁷ But there were inherent limits in this strategy. Simply cannibalizing DWSD funds would provide nowhere near the funds that would be needed fully prepare the WTP deliver safe drinking water. In the end, only \$8 million was spent on the WTP before it started distributing water from the Flint River. “It is likely that this amount was spent, not because that was the amount required for safe use of the WTP, but that was the highest amount Flint could self-finance from diverted DSDW dollars.”⁸⁸

The latest criminal indictment against Emergency Managers Earley and Ambrose allude to the development of a 30-month plan to use the Flint River till the KWA pipeline is constructed.⁸⁹ Going to the Flint River was clearly a high risk strategy; a strategy made even more risky by consciously spending substantially less money than the experts stated was needed to make the WTP ready. The harder question is why the path of the 30-month plan was taken.

Many actors share the blame. Various Flint EMs, DEQ and Treasury were all instrumental in the decision to approve KWA and move away from DWSD. The same actors were critical in manipulating state bond rules to obtain financing for Flint’s participation in KWA construction, but not for WTP improvements or anticipated higher DWSD rates in the interim period. DEQ approval was necessary for the decision to use the Flint River as a full-time source of drinking water, even though insufficient funds were available to make the necessary WTP improvements. This was an incredibly dangerous strategy exposing the residents of Flint to substantial risk.

⁸⁶ Hammer 2016 at 33.

⁸⁷ Id. at 33, n. 130.

⁸⁸ Id.

⁸⁹ *People v. Earley, et al*, Complaint and Warrant, paragraph 18.

There is no simple or single explanation for how factors converge to produce such a result, but the displacement of democracy via Emergency Management, the inherent vulnerability of Flint's poor Black and White marginalized population, the municipal distress borne of decades of structural racism and the concentrated economic interests pushing for the KWA pipeline are all significant. The forces of structural and strategic racism converged and the residents of Flint suffered.

G. The State's slowness in detecting and responding to the emerging water crisis is directly tied to its complicity in the initial KWA approval and financing process

Too often, the story of initial KWA approval and the story of the slow acknowledgment of the emerging public health crisis in Flint are told separately. This is a mistake. The two episodes are continuing chapters of the same saga. Early on, KWA-Flint EMS-Flint Mayor-GCDC-DEQ formed a united front seeking KWA approval. This united front succeeded in gaining Treasury approval of the project and manipulated State rules governing debt limits to pay for it. No comparable effort was made to ensure that the City of Flint could obtain independent financing for its WTP upgrades or to pay higher DWSD interim rates for safe drinking water. Instead, the ACO that enabled KWA construction finance, in essence, cemented the requirement that Flint use both the WTP and the Flint River as its interim drinking water source.

What emerged was a risky "30-month strategy," where residents of Flint, without their say or democratic participation in the process, would be forced to drink water from the Flint River until construction of the KWA pipeline was completed. The recent criminal indictments further document how Emergency Managers elected to use the Flint River when they knew that water processed at the WTP was not safe to drink.

[Defendant Darnell Early is charged with] misconduct in office, an indictable offense at common law, during his tenure as the state-appointed emergency manager for the City of Flint, by intentionally misleading the citizens of Flint by falsely stating the Flint Water Treatment Plant was equipped to produce safe water, allowing the Flint Water Treatment plant to produce water to the public despite knowledge that the plant was not ready for use, allowing the City of Flint to enter into a contract that required interim use of the Flint Water treatment plant for 30 months with knowledge that the plant was not ready to produce safe water, authorizing dissemination of information to the general public that was false and misleading in regards to the safety and potability of the Flint River water.⁹⁰

While the City of Flint's financial participation in the KWA pipeline was deemed indispensable, the same could not be said for the lives and wellbeing of its residents. Flint lives could be and were gambled with.

⁹⁰ *People v. Earley, et al*, Complaint and Warrant, Count 3.

Once water from the Flint River started to flow into Flint homes, members of the “united front” started playing a game of defense. All of the parties, DEQ-Flint Emergency Managers-Treasury, had direct incentives to hide and cover up problems with the Flint River. They were complicit in the crisis from the beginning. DEQ, in particular, appears to have adopted a strategy to “run out the clock” in terms of environmental oversight, believing that all would be forgotten once the KWA pipeline was constructed and the River was no longer in play.

DEQ adopted a flawed and indefensible interpretation of the Lead Coper Rule (LCR) that committed it to engage in two six-month testing periods *before* taking any action with respect to the Flint River, including the recommendation of adding corrosion control.⁹¹ This makes no sense from the standpoint of protecting public safety, but it makes perfect sense if the intention is to run 12 months off of a 30 month clock. The same logic of delay and cover-up explains other findings of the Task Force Report. DEQ engaged in flawed sampling techniques, manipulated test results and refused to respond to in a timely fashion to complaints ranging from common citizens to experts at the Environmental Protection Agency (EPA).⁹²

These things do not happen accidentally. The misconduct through which government officials proceeded to deny and cover up public health problems, like Legionnaire’s disease, are directly tied to the impropriety through which KWA was initially approved and financed. The saga continued as public officials failed to respond quickly to the emerging crisis by shifting the City back to a readily available source of safe drinking water. Again, these sentiments are echoed in the criminal complaint

Defendants EARLEY and AMBROSE had knowledge of several failings of the FWTP including the plant’s inability to produce safe water. After being advised to switch back to treated water supplied by the Detroit Water and Sewerage Department (“DWSD”), Defendants EARLEY and AMBROSE failed to reconnect to DWSD, which caused the Flint citizens’ prolonged exposure to lead and Legionella bacteria.⁹³

The main reason cited by the Emergency Managers for the inability to switch back to DWSD was the absence of finances to pay for it. There was no money, because the money previous spent for DWSD water was now being used to pay for upgrades to the WTP. These funds were needed at the WTP because no independent financing was arranged for Flint to pay for WTP improvements and higher interim DWAD rates as part of the original Treasury-approved KWA deal and “sweetheart ACO” that raised \$285 million for Flint residents to pay for construction of the KWA pipeline.

⁹¹ Task Force Report at 27.

⁹² Id. at 27-28.

⁹³ *People v. Earley, et al*, Complaint and Warrant, paragraph 1.

Who was looking out for the best interests of the democratically voiceless residents of Flint? Who was advocating that Flint lives mattered? All Flint residents got were the residual risks of the 30-month strategy to use the Flint River for financial reasons contrived by others.

VI. Conclusion: Flint Spatial-Structural-Strategic Racism

As I told the Commission in my oral testimony – the past did not go anywhere. The past is deeply interconnected with the present, and the present to the future. Express racial discrimination embedded in housing discrimination historically ghettoized African American citizens inside Flint into economically and socially segregated neighborhood up until the 1970s. These patterns of spatial racism reproduced themselves at a regional level to produce comparable patterns of regional residential segregation today. This spatial racism has been compounded by decades of structural racism, further producing and reproducing racially desperate outcomes in Genesee County in terms of household wealth, health, education and opportunity.

Chronic municipal distress in Flint (and elsewhere) is a legacy of the forces of spatial-structural racism. But the story does not end here. Structural racism creates the vulnerability and strategic racism exploits it. The first form of exploitation for the residents of Flint was the Emergency Manager law itself and the displacement of democracy. The second form of exploitation was the formation of a “united front” consisting of KWA-Flint EMs-Flint Mayor-GCDC-DEQ ready to opportunistically push the KWA agenda, regardless of the real needs of the citizens of Flint. Flint had and continues to have serious issues with its water rate structure, very similar to the deeper problems of municipal distress, driven by the forces of structural racism. Rather than getting to the root causes of Flint spiraling water rates, however, the united front pushed a false frame where the entire problem was reduced to DWSD wholesale water rates. As a result, Flint residents will continue to see rapidly escalating water rates, even aside from the added costs of the Flint Water Crisis, even after the KWA pipeline is up and running. KWA did little to address the real structural problems.

The final form of exploitation may be the forfeiture provisions the City of Flint committed to in exchange for Genesee County guaranteeing Flint’s debt payment for the KWA bonds. As the headline reads: “Flint will ‘lose everything’ if it leaves KWA.”

The Karegnondi Water Authority, which would be stuck with Flint’s share of the debt, would seize the city’s water treatment plant and other assets, plus 25% of the city’s constitutional revenue-sharing payments from the state, Genesee County Board of Commissioners Chairman Jamie Curtis told the Free Press. Flint’s debt is “heavily, heavily secured,” and “they would lose everything they have,” Curtis said. According to a 2013 KWA financing contract signed by former Flint Mayor Dayne Walling, not only

can the KWA seize Flint water assets and revenue-sharing money in the event of a default, but it can “direct the local unit to make a tax levy to reimburse the authority.”⁹⁴

Genesee County and KWA has already used this leverage to make sure that Flint’s democratically elected and empowered mayor would not opt out of KWA and return permanently to DWSD. More troubling, reminiscent of predatory lending practiced for home mortgages, the RFC Report indicates that Flint’s water rate spiral will continue to get worse. It may be only a matter of time before the City forfeits on the KWA bonds and “lose[s] everything” to Genesee County.

It is difficult to imagine scenarios more rife with strategic and opportunistic exploitation of a vulnerable city. Could this cascading series of events have happened elsewhere?

When one recalls the criteria for strategic racism, it is easy to see how they apply in Flint. The decisions made by KWA, the Emergency Managers, DEQ, Treasury and others were not made in the best interest of the residents of Flint. There was a clear agenda on the parts of these actors to pursue the KWA pipeline, regardless of the needs and priorities of Flint. The residents of Flint were instrumentally used as means to be manipulated and not as ends in themselves. Decision making in DEQ and Treasury was not consistent and objective. DEQ flip-flopped on the question of the safety of the Flint River, depending on the strategic need to advocate for the KWA pipeline. To the extent that Emergency Management is supposed to be about the rigorous application of economic rules, the various Emergency Managers and Treasury failed in this role. Ultimate decisions regarding approval of the KWA pipeline were made for political, not economic reasons. All of this took place against the backdrop of the structural racism that defines the Flint economic crisis, the displacement of democracy and the express disempowerment of Flint residents. It is difficult to imagine the same sequence of events unfolding in Ann Arbor or Bloomfield Hills.⁹⁵

What happened in Flint is a real American tragedy that can only be understood (and addressed in a proper remedial fashion) if viewed through the lens of spatial-structural-strategic racism. The perspective that this Commission can bring to bear will be indispensable in this process.

⁹⁴ Paul Egan and Matthew Dolan, *Official: Flint will 'lose everything' if it leaves KWA*, DETROIT FREE PRESS (June 13, 2016), available at <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/06/11/official-flint-lose-everything-if-leaves-kwa/85662110/>.

⁹⁵ Hammer 2016 at 35.

**Appendix: No evidence can be found in support Mr. Wright’s
claim of \$50 million in the Flint Water Fund**

Perhaps the most puzzling claim in Mr. Wright’s testimony is the assertion that Flint has no financial water worries because it has \$50 million in the bank, ready and available to meet all of its water needs. “Flint had more than enough money to pay for the improvements in the water treatment plant. As previously noted, the City swore in Genesee County Circuit Court Case No. 14-103476-CZ, Shears v. Bingaman, 2015, that it has \$50 million in its enterprise fund in 2015.”⁹⁶

As cited in Mr. Wright’s testimony, it is nearly impossible to evaluate or verify this assertion. He does not state who made the claim, he does not cite which particular court filing the claim can be found in and he does not tell us how the court adjudicated this assertion. Moreover, Mr. Wright seems to be the only one who is aware of the existence of these funds. I could find no mention of these funds in my review of thousands of emails in the record. I cannot find mention of these funds in news accounts, except for a Michigan Radio interview of Mr. Wright, where the same assertion was made to deflect the reporter’s question concerning failures to independently finance needed improvements at the WTP.

Regarding how the city of Flint will pay for upgrades to its water treatment facilities, Wright told us, “the facts are there were \$42 million in their water and sewer reserves.” We tried to confirm the \$42 million reserve fund that Wright mentioned. We asked Flint’s utilities director, but she was not aware of the funds. We reached out to the current and former city finance directors, and the city of Flint spokesperson. They couldn’t immediately confirm the existence of the reserve fund. We’ll keep working on that.⁹⁷

It is true that there was a history, prior to Emergency Management, of the City raiding the water fund to pay general expenses. This was documented in the Treasury’s 2011 assessment of whether a financial emergency existed in Flint as a predicate to imposing an Emergency Manager. “From 2009 to 2011, Flint officials took about \$10 million from water service operations to pay for General city operations.”⁹⁸ By the end of 2011, the water fund had a deficit of \$9 million.⁹⁹

⁹⁶ Wright 2016 at 31. Elsewhere he writes: “In a 2015 filing in Case No. 14-103476-CZ Shears v. Bingaman, Genesee County Circuit Court (2015), the water fund balance exceeded \$50 million.” Id. at 14.

⁹⁷ Stateside staff, *Flint pipeline chief responds to critical report released this week*, MICHIGAN RADIO, available at <http://michiganradio.org/post/flint-pipeline-chief-responds-critical-report-released-week>.

⁹⁸ Tom Gantert, *Before Flint’s Lead Crisis, City Council Raided Money from “Water Fund,”* MICHIGAN CAPITOL CONFIDENTIAL (September 21, 2016), available at <https://www.michigancapitolconfidential.com/22795>.

⁹⁹ Id.

If Mr. Wright's claim were true, it would contradict multiple assessments and actions from 2011 to 2016 predicated on Flint's financially distressed condition and its basic inability to finance essential water infrastructure needs. The following is an illustrative list of these embedded contradictions:

- In 2012, Flint turned down essential projects to improve its water infrastructure, even though half of the loans would be forgiven, because it would not be feasible to pursue the bonding necessary to complete these projects.¹⁰⁰
- The January 2013 MDEQ Flint Water System - Water Distribution report indicates that DEQ had identified necessary upgrades and repairs to pumping stations and that construction permits were issued, but the projects did not proceed because of the city's current bond debt.¹⁰¹
- Flint did not have the capacity to obtain bond financing or to independently finance the estimated costs needed to upgrade the WTP to process Flint River water.¹⁰²
- Flint did not have sufficient money in its Water Fund to pay for increased DWSD rates to provide residents of Flint safe water during KWA construction.¹⁰³
- When the Flint City Council voted on March 23, 2015 "to do all thing necessary" to return Flint back to the safe water of DWSD, Emergency Manager Ambrose called the decision "incomprehensible," because the City lacked the resources.¹⁰⁴
- The 2016 Treasury commissioned RFC Report examined historic and future Flint water rates, but makes no reference to the existence of the \$50 million in the Water Fund. Instead, RFC assumes a story of ongoing financial distress and astronomical future rate increases in Flint.¹⁰⁵ The existence of an additional \$50 million dollars would substantially change all of its calculations concerning future rates.

If an additional \$50 million exists in the Flint Water Fund, apparently no one responsible for public decision making concerning the Flint water system from 2011 to the present seems to be aware of that fact.

¹⁰⁰ Hammer 2016 at 16.

¹⁰¹ Id.

¹⁰² Id. at 28.

¹⁰³ Id. at 33.

¹⁰⁴ Id. at 43.

¹⁰⁵ RFC 2016.