

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CONCERNED PASTORS FOR SOCIAL
ACTION, et al.,

Plaintiffs,

v.

NICK A. KHOURI, et al.,

Defendants.

Case No. 16-10277

Hon. David M. Lawson

Mag. J. Stephanie Dawkins Davis

**PLAINTIFFS' POST-HEARING BRIEF IN SUPPORT OF
MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

Defendants have repeatedly asserted that a preliminary injunction should not issue because it is an extraordinary remedy. But these are extraordinary circumstances. Tap water in Flint has not been safe to drink for more than two years. Defendants ignored the law that requires them to control for lead contamination, misled residents about the safety of their water, and then, instead of fulfilling residents' basic drinking water needs, put the burden on those same residents to "track[] water down day in and day out." Tr. 99:20-21 (Roper). Plaintiffs simply ask that Defendants ensure that every Flint household has either enough bottled water or a properly installed and maintained faucet filter. Defendants can provide this relief, but have not. As a result, Flint families continue to suffer severe and irreparable harm. Immediate judicial intervention is necessary.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits

Plaintiffs will likely succeed in showing that Flint's water system (the System) is not maintaining optimal corrosion control treatment as required by the Safe Drinking Water Act (the Act). *See* 40 C.F.R. §§ 141.80(d), 141.82(g). Corrosion control treatment is "[o]ptimal" when it "minimizes the lead [] concentrations at users' taps." 40 C.F.R. § 141.2; Tr. 234:06-21 (Feighner).¹ The

¹ In this brief, PX refers to Plaintiffs' hearing exhibits, SX to State Defendants'

City's water plant supervisor, JoLisa McDay, admitted in July that the System has not optimized its corrosion control treatment. McDay Dep. 81:04-06, ECF No. 68-13. And the chief of the Michigan Department of Environmental Quality's (MDEQ) drinking water office, Bryce Feighner, testified that unfiltered tap water in Flint remains unsafe because of elevated lead levels. *See* Tr. 270:04-06.

Whether the System is now exceeding the Act's 15 parts per billion (ppb) lead action level is immaterial. *See* Tr. 234:19-21 (Feighner). Compliance with the Act's corrosion control requirement does not depend on whether the action level is met. *See* 40 C.F.R. § 141.2 (defining optimal corrosion control treatment). And, in any event, the System exceeded the 15 ppb lead action level for the most recent six-month monitoring period, ending June 30, 2016. SX 30 at 1585.

Sampling data confirm that lead levels in Flint's drinking water have not been minimized. Tap water monitoring must show consistently downward trending and low lead levels at the 90th percentile to support a conclusion that a system is beginning to optimize its corrosion control treatment. Giammar Decl. ¶¶ 40-41, PX 4. The last four months of "extended" sentinel monitoring (from late May through August) show no such trend, with 90th percentile lead levels of 12, 15, 12, and 15 (or 14) ppb. Tr. 240:22–241:21 (Feighner); SX 22. Even if data from the earlier sentinel monitoring program (which involved a different sampling pool) are

hearing exhibits, CX to City Defendants' hearing exhibits, and Tr. to the hearing transcript.

included, there is no support for Mr. Feighner's testimony that lead levels in the System are declining. Tr. 217:12-24, 238:19-239:14 (Feighner). Calculations show that the earlier sentinel monitoring results from February to April 2016 (14, 13, 12, 10, and 10 ppb) were both lower than the results in the later extended sentinel monitoring and, for homes served by lead service lines, erratic (23, 15, 19, 13, and 20 ppb). Giammar Suppl. Decl. ¶¶ 4-10 & tbl.2, PX 26; *see also id.* updated tbl.1.²

Flint's 90th percentile lead levels remain elevated, ranging from 12 to 23 ppb since February. Tr. 240:22-241:21 (Feighner); Giammar Suppl. Decl. ¶¶ 4-10 & tbl.2. These levels are well above the 90th percentile levels (between 4 ppb and less than 2 ppb) historically achieved by the System, Giammar Decl. ¶ 25, and the values (around 2 ppb) presently maintained by Detroit, using the same source water. PX 383 at 3. Some Flint homes continue to see lead concentration spikes more than one hundred times the action level, and the percentage of homes with sampling results above 100 ppb remains steady. Tr. 235:12-236:7, 258:14-261:10 (Feighner); Giammar Suppl. Decl. ¶¶ 4-6, updated tbl.1; SX 22. This all indicates system instability and the presence of particulate lead. Giammar Suppl. Decl. ¶ 6.

² That a separate Virginia Tech sampling effort found declining lead levels, SX 27 at 1255, is hopeful, but hardly dispositive: That investigation included sites that were not served by lead service lines and did not contain lead plumbing, Giammar Suppl. Decl. ¶ 13, and were thus not approved for compliance monitoring under the Act, *id.* Moreover, even the most recent lead levels found by Virginia Tech are far above levels Flint reported in the past, *see id.* ¶¶ 12-14, indicating that lead levels are not minimized.

Defendants also have not refuted Plaintiffs' showing that the System is violating the Act's tap water monitoring requirements, 40 C.F.R. § 141.86(a)(3), (a)(8), (d). *See* Pls.' Br. 15-21, ECF No. 27. Ms. McDay conceded that the System is not complying with its monitoring obligations, McDay Dep. 71:16–72:20, 135:01–136:13, 144:07–145:17, and the System has not demonstrated any capacity to conduct compliance sampling on its own, Tr. 237:22–238:05 (Feighner describing monitoring by MDEQ, not the System); McDay Dep. 73:07-18 (same).³

II. Flint residents are suffering irreparable harm

Defendants' response efforts have not alleviated the exhausting struggle many in Flint face in trying to find alternative sources of safe drinking water. Residents, already “deeply shaken by the realization that [they] have been betrayed and deceived by [their] government,” Harris Decl. ¶ 20, PX 5, have been expected to “track[] water down day in and day out,” Tr. 99:20-21 (Roper). The burdens of doing so have “totally disrupted” their lives and sense of normalcy, Tr. 150:21-25 (Blake), and add worry and frustration to the lives of people who “already have a lot of suffering and pain,” Tr. 101:05-08 (Roper); *see also* Tr. 132:06-08 (Childress); Newsom Decl. ¶¶ 16, 23, PX 12; Pls.' Reply 5 & nn.3-4, ECF No. 68 (citing declarations). These harms are irreparable. *Cole v. ArvinMeritor, Inc.*, 516

³ The conclusory statements by state officials Larry Steckelberg and Frederick Headen opining that State Defendants do not operate the System are contradicted by documentary evidence. *See, e.g.*, PX 108, 127, 132-38, 140 (Treasury); PX 32-33, 65-66, 103, 139, 158 (Receivership Transition Advisory Board).

F. Supp. 2d 850, 876-77 (E.D. Mich. 2005); Pls.' Br. 34-35.

A. State-managed water distribution sites are inadequate

Many Flint residents are unable to pick up enough bottled water from distribution sites to meet their daily needs. Nearly one in five Flint households has no car. PX 115 at 3. Residents in these homes must walk long distances with heavy cases of water or lift those cases on and off buses, sometimes with young children in tow or with sick or elderly relatives left at home to care for themselves. *E.g.*, Tr. 92:5-14 (Roper), 126:05-25, 129:12-25 (Childress); Pls.' Reply 7 & n.9. These efforts are physically straining and unsustainable for many even in the short term, let alone for the duration of the crisis. *E.g.*, PX 142 at 7; Pls.' Reply 7 & n.9. Many residents must rely on the uncertain availability of friends and family to drive them to distribution sites or pay others to drive them to pick up water. Tr. 90:19–91:05, 96:12-18, 97:01-04 (Roper), 126:05–127:12 (Childress).

Not even having a vehicle ensures access to bottled water from the distribution sites. Conflicting work schedules and caregiving obligations make it difficult for some to travel to the sites during their hours of operation: noon to six on weekdays, and noon to eight on Saturdays. *See* Tr. 322:06-08 (Kelenske), 91:20–92:04 (Roper), 144:09-18 (Blake); Brady-Enerson Decl. ¶ 25, PX 19. Those with physical and mental disabilities and the elderly also struggle to get enough bottled water. *See* Burns Decl. ¶¶ 16-17, PX 20; Gains Decl. ¶¶ 17-18, PX 22.

B. Existing programs do not reach many in Flint who need home delivery of bottled water

Relief volunteers still routinely meet residents who need water deliveries to their homes, but are not receiving them. *See* Tr. 51:25–52:25 (Hood), 127:19–128:22 (Childress), 146:10-17 (Blake); *see also* Brady-Enerson Decl. ¶ 23; Ishmel Decl. ¶¶ 14, 16-17, PX 23. Although City Defendants argued in April that Plaintiffs’ requested relief would soon be mooted by a new water delivery program, Def. City of Flint’s Resp. to Pls.’ Mot. Prelim. Inj. 2-3, 9-10, ECF No. 42 (amended brief filed at ECF No. 81), months later, the City’s witness admitted that he did not know if the program had even begun making deliveries, Branch Dep. 33:01-04, ECF No. 68-11. City Defendants introduced no evidence at the hearing that this program is meeting the needs of Flint residents, and Plaintiffs’ witnesses’ testimony shows that it is not. *See* Tr. 51:25–52:08 (Hood), 146:10-17 (Blake).

The State’s Access and Functional Needs (AFN) delivery list is also inadequate. The list includes less than four percent of Flint’s active water customers, and there are no clear criteria for getting onto or being removed from the list. Tr. 306:04-20 (Kelenske); Kelenske Dep. 119:08–122:21, ECF No. 68-12; Tr. 94:23–95:04 (Roper) (describing resident efforts to opt in to AFN deliveries using the 211 helpline). Given that more than eighteen percent of Flint households have no car, and in light of the many other challenges residents face in traveling to distribution sites, *see supra* p. 5, the AFN list “addresses only a small part of the

access problem,” Reyes Decl. ¶ 15, PX 25; *see* Brady-Enerson Decl. ¶¶ 19-23.

AFN deliveries, moreover, may be insufficient even for residents on the list. The program does not deliver enough bottled water to meet some families’ needs, and it will not drop off water unless someone is home. Tr. 93:23–94:11 (Roper).

Although State Defendants claim that deliveries for those who need them are just a 211 call away, many residents have not received water they requested from 211. *See* Tr. 52: 09-25 (Hood), 94:12-16 (Roper); Newsom Decl. ¶ 11; *cf.* PX 142 at 6 (AARP data showing one-sixth of seniors “had called 211 but not gotten help”). As Ms. Childress explained, 211 staff “are very nice when you call them, but they just don’t come.” Tr. 135:07-08, 127:21-22, 128:11-22. After unsuccessful attempts to request delivery through 211, some residents have stopped calling. Pls.’ Reply 8. And, in a community where illiteracy is common and internet access limited, Tr. 95:23–96:02; 49:02–50:01 (Hood); PX 142 at 9 (forty-five percent of Flint seniors have no internet access), some residents still do not know that 211 is available to take delivery requests, *see* Tr. 94:17-19 (Roper); *cf.* Pls.’ Reply 8 n.10.

C. Filter-distribution efforts have not ensured that all Flint residents have reliable access to safe drinking water

The State’s distribution of faucet filters, without more, has not provided safe drinking water to Flint residents. Faucet filters effectively reduce lead levels only when properly installed and maintained. Tr. 252:21-24 (Feighner); SX 3 at 3, 6.

While the Michigan State Police claim to have confirmed delivery of a filter to

most homes in Flint, *see* Tr. 312:01-12 (Kelenske), Captain Kelenske conceded that “confirmed” delivery simply meant that a filter had been delivered, not that the filter was properly installed, maintained, or working, Tr. 331:20–332:19.

The evidence is undisputed that residents regularly struggle with installation and maintenance of these filters. Indeed, more than half of the homes visited by the local nonprofit Crossing Water did not have a working faucet filter installed. Tr. 47:14-21 (Hood).⁴ Some residents do not have a faucet filter at all. Tr. 41:24-25 (Hood); 257:3-6 (Feighner). Others have filters that do not fit their faucets.⁵ Tr. 42:16-19 (Hood), 98:07-10 (Roper); PX 361 at 415-417. Some faucets break when filters are installed. Tr. 130:03-09 (Childress), Tr. 153:05-08 (Blake). Many residents, particularly those with limited literacy, may struggle to understand filter instructions. Tr. 42:01-03 (Hood); Carravallah Decl. ¶ 11, PX 361. Some residents lack the hand strength or dexterity to remove the aerator from their faucet, which is necessary to install the filter. Tr. 37:04–38:07 (Hood); Carravallah Decl. ¶ 13.

⁴ Crossing Water’s records state that their response teams have met with residents in 482 Flint households (entries greater than 0 in “F2F Delivery Visits”). *See* PX 390 at 583. The records further provide that 249—or 52% —of those households had “filter problems.” *See id.* This total can be calculated by adding the 142 homes with an entry of “Yes” in the “Documented Filter Problem” column to the 168 homes to which response teams provided one or more filters (entries greater than 0 in “Filter” column), but not double-counting the 61 homes that meet both criteria (*i.e.*, 142+168-61=249).

⁵ There is no reliable evidence that the local plumbers union continues to replace residents’ faucets for free. City Exhibit K, an April printout of a website, lacks foundation. Tr. 364:10-20. Currently, the URL of that exhibit (flintplumber.org) states the plumbers’ program has been discontinued.

And even once a filter is installed, residents cannot be confident that their water will be safe. Filter “maintenance is the key,” and many filters in Flint are not properly maintained. Tr. 43:22-24 (Hood). Residents may not know or remember how often to change the filter cartridge, Tr. 97:16-18 (Roper), 257:07-24, 258:02-05 (Feighner); PX 390 at 567 (twelfth row down, “[r]eplaced filter whose light was red”); may have the wrong kind of replacement cartridge, Tr. 44:12-15 (Hood); may not know that the filter does not work without a cartridge, Tr. 44:16-18 (Hood), 258:06-10 (Feighner); PX 390 at 567 (ninth row from bottom, “filter did not have a cartridge in it”); or may run hot water through their filter, inadvertently damaging the cartridge, Tr. 44:08-15 (Hood); 97:19-24 (Roper).⁶

Defendants’ limited efforts to address residents’ ongoing filter problems have been belated and ineffectual. As of July, Captain Kelenske was unaware of any door-to-door filter-education programs run by the State. Tr. 334:05-15, 335:03-06. Although at the hearing Captain Kelenske referred to a recent MDEQ filter-education effort, State Defendants’ counsel conceded that the program is only now “ramping . . . up,” Tr. 20:19-20 (Murphy), and Captain Kelenske thought that the program had reached only a little more than one percent of Flint homes, Tr.

⁶ Pour-through pitcher filters distributed by the State, Tr. 341:16-25 (Kelenske), have not been proven to be a safe alternative for Flint residents struggling to install faucet filters. The EPA study relied on by MDEQ to support its public statement that filtered water is safe did not evaluate pitcher filters. Tr. 224:20–225:13, 262:02-04 (Feighner).

310:11-12 (Kelenske). The State’s ongoing failure to ensure residents know how to install, maintain, and use filters underscores why EPA regulations require that public water systems—not residents—take “responsibility . . . to operate and maintain” faucet filters when they seek an exemption from the Safe Drinking Water Act’s corrosion control requirements. 40 C.F.R. § 142.62(h).

The City’s and State’s efforts to provide Flint residents with alternative sources of safe drinking water have fallen far short of what this crisis demands.

III. The balance of the equities necessitates immediate judicial intervention

The hardships Flint residents face every day—their contaminated tap water, their struggle to carry bottled water home, their expected reliance on filters they lack training to install and maintain—are severe. The burdens Defendants would face if ordered to meet residents’ basic needs is, by contrast, relatively slight: the expenditure of funds Defendants already have to remedy a problem of their own design. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (discounting defendants’ “self-inflicted” harm when balancing the equities). Defendants, not the residents of Flint, should bear the consequences of their misconduct until a final judgment is reached.

A. Justice requires that Defendants remedy the harms they caused

Defendants caused this crisis when they attempted to cut costs by switching water sources and relying on a treatment plant that had not operated for decades,

without taking basic precautions to prevent corrosion of lead pipes. *See* PX 74 ¶¶ 43-46 (EPA Order); PX 127 at 7-8. Defendants then compounded the crisis by misleading residents into thinking their water was safe—not once, but repeatedly. *See* Pls.’ Br. 5-7. Residents “look[ed] [to] Government agencies to ensure that they had . . . clean water delivered to them, and even when they were told [the water] was okay, it wasn’t.” Tr. 323:12-14 (Kelenske).

Confronted with this public health emergency, volunteers have stepped forward to try to make sure all residents have safe water. But the volunteers’ efforts, however heroic, are unsustainable. *See* Pls.’ Br. 31-32; Pls.’ Reply 9-10. The ranks of volunteers are shrinking and, after months of relief work, even the most dedicated among them are physically and mentally burning out. Tr. 145:04-13 (Blake), 88:21–89:06 (Roper). Churches and nonprofits are sacrificing other priorities to focus on water-crisis relief. Tr. 148:03–149:23 (Blake), 67:24–68:01 (Hood); Pls.’ Reply 9-10. These volunteers are “not in the water business,” Tr. 152:24 (Blake), and “can’t reach everybody” in need, Tr. 53:06 (Hood).

Nearly a year after the City and State first acknowledged elevated lead levels in Flint’s drinking water, *see* PX 63, 65-66, and six months after Plaintiffs filed their preliminary injunction motion, Defendants still have not provided all Flint residents with sufficient amounts of bottled water or properly installed and maintained faucet filters. Although the State began to expand its filter-education

and -delivery efforts as the hearing on Plaintiffs' motion approached, there is no guarantee those projects will continue or be effective. Judicial intervention is needed now as volunteerism flags and public attention wanes, and no one knows for certain when Flint's tap water will be safe to drink again.

B. An opt-out bottled water delivery program for Flint homes is needed to ensure residents have access to safe drinking water

Plaintiffs request that the Court order regular delivery of bottled water to the homes of all System users, with the ability for households to opt out of the delivery program. Proposed Order ¶¶ 1-2 (attached as Ex. A); Tr. 11:07-14 (Chaudhary).⁷ Making delivery the default would ensure that no family in need is left without safe drinking water simply because the State lacks information about its needs, or applies unduly narrow eligibility criteria. *See supra* pp. 6-7. Households may opt out of delivery for any reason, including that they have a reliable source of bottled water or know how to maintain faucet filters and are comfortable drinking filtered water. This requested relief is consistent with EPA regulations, *see* 40 C.F.R. § 142.62(f)-(h); Pls.' Br. 39-40, and is the only way to ensure that *all* residents have safe drinking water as long as their unfiltered tap water remains unsafe.

⁷ Based on Flint's average household size of around 2.5 residents, *compare* PX 34 (population), *with* PX 115 (occupied housing units), each household should initially receive at least ten cases of water per week. *See* Proposed Order ¶ 2(a). Once a household is contacted and household size is confirmed, that home's deliveries should be adjusted to provide four cases per resident per week. *See id.* ¶ 2(c). Bottled water should be left at residences whether or not anyone is home at the time of delivery. *See id.* ¶ 2(e); Tr. 93:24-94:03 (Roper).

An opt-out approach would also encourage the State to improve and expand filter-installation and -maintenance programs. Faucet-filter education and assistance plays an important role in the continuing response effort, and State Defendants should ensure that MDEQ expeditiously implements the filter-education program it claims to be “ramping up” as a supplement to bottled water delivery. Tr. 99:14-17 (Roper); PX 126 at 2. But considering residents’ present difficulties with faucet filters, *see supra* pp. 7-10, and their distrust of faucet filters, PX 152 ¶ 5; Tr. 324:12-20 (Kelenske),⁸ a filters-only remedy is not viable right now. Nor would bottled water delivery materially slow the System’s recovery.⁹

C. Defendants can afford the proposed relief

Defendants can pay for Plaintiffs’ requested remedy. More than \$100 million of the State’s water-crisis-related appropriations remains unspent and apparently unencumbered, including approximately \$43 million already slated for “safe drinking water.” SX 28 at 1; Tr. 280:17-23 (McNeely).¹⁰ While the City’s

⁸ In addition, despite EPA’s recent assurances, some medical professionals in Flint continue to recommend that pregnant and nursing mothers, children under six, and those who have compromised immune systems drink only bottled water. Carravallah Decl. ¶¶ 4-6; PX 150.

⁹ Drinking and cooking make up only a small fraction of household water use. *See What Price for the Priceless?: Implementing the Justiciability of the Right to Water*, 120 Harv. L. Rev. 1067, 1067 n.2 (2007).

¹⁰ Of the more than \$200 million the State asserts was appropriated to respond to the Flint crisis, only about five percent has been used to purchase bottled water or ensure residents have faucet filters. *Compare* SX 28 at 1 (\$212 million in total

budget is more limited, it could underwrite at least a portion of the relief sought.

Flint finance officials' past representations to this Court that the City's Water Fund is on the verge of insolvency have repeatedly turned out to be exaggerated.

Compare Lundquist Decl. ¶ 5, PX 211 (April 2016 prediction of \$9 million deficit for fiscal year 2016), *and* Steele Decl. ¶ 5, PX 167 (June 2016 prediction of \$5.7 million deficit for fiscal year 2016), *with* Tr. 204:03-10 (Sabuda) (\$7.5 million surplus at the end of fiscal year 2016).

Nor is the State's cost estimate for the relief sought reliable. Captain Kelenske offered what was at best a vague and conclusory explanation of his \$8 million per month figure. Tr. 325:11-21, 353:05-22 (Kelenske). He gave no plausible reason why water delivery would require calling up the National Guard, Tr. 354:19–356:06 —“one of the most expensive resources . . . out there,” Tr. 326:10-13—other than that activating the Guard would be “easier,” Tr. 355:01. Easier does not mean essential: current deliveries are performed by Flint residents. Tr. 305:08-11. The State's estimate also failed to offset the cost of bottled water that otherwise would be given out at distribution sites, Tr. 352:12-20, and assumed that *none* of Flint's 33,000 active water customers would opt out, Tr. 353:23–354:11. The resulting projection was inflated.

“Flint Water Appropriations”), *with* Tr. 297:24–299:04 (McNeely) (around \$9 million spent on bottled water and filters). In any event, the State's total appropriations in response to the Flint water crisis are irrelevant to the narrow and critical relief Plaintiffs seek here.

D. The Court could tailor a remedy as appropriate

To the extent that the Court does not find the full relief sought by Plaintiffs warranted, it should tailor that relief. *See* Pls.’ Reply 14. For example, rather than a default of delivery absent opt out, the Court could require deliveries to all homes that meet clear, Court-established criteria. Such criteria should at least encompass all households with: (1) no working vehicle; (2) work schedules that conflict with state-run distribution site hours; (3) heads of households who are elderly, or have physical or mental disabilities; and (4) heads of households with caretaking or childcare responsibilities that would be disrupted by frequent departures to pick up water. *See id.* Qualifying households could be identified through a canvass, carried out as quickly as possible by an independent entity at Defendants’ expense. *See* Tr. 100:15-18 (Roper). Until a home is found *not* to meet any criterion for home delivery, however, it should receive bottled water delivery. *See supra* p. 12.

CONCLUSION

Flint residents struggle every day to get safe drinking water while their tap water remains contaminated. There would be a cost to Defendants to remedy this situation pending a final judgment, but that cost arises entirely from Defendants’ own violations of the law. The Court should issue a preliminary injunction.

Dated: September 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2016, I electronically filed Plaintiffs' Post-Hearing Brief in Support of Motion for a Preliminary Injunction with the Clerk of the Court using the ECF system.

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