

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Plaintiff,

No.

v.

HON.

CITY OF FLINT, a Michigan
municipal corporation,

MAG.

Defendant.

COMPLAINT

INTRODUCTION

The residents of the City of Flint (Flint) have experienced a well-documented series of problems over the past three years associated with a switch in drinking water sources that took place between April 2014 and October 2015. Since October 2015, Flint has obtained its water from the Great Lakes Water Authority (GLWA), which has proven to be safe, reliable, and protective of public health. The Mayor of Flint has negotiated an agreement to keep Flint residents on water supplied by GLWA on a long-term basis and at a reduced cost. Continued use of

that reliable source is necessary to ensure the protection of public health in Flint.

Despite proposing no other reasonable alternative, the Flint City Council has refused to approve the agreement negotiated by the Mayor. The City Council's failure to act will cause an imminent and substantial endangerment to public health in Flint. If the City Council actually takes action and proposes an alternative that would either change Flint's water source or require use of its water treatment plant, any such proposal will violate the settlement agreement in *Concerned Pastors v. Khouri*, No. 16-cv-10277-DLL-SDD.

Plaintiff Michigan Department of Environmental Quality (MDEQ) files this action to ensure that Flint residents have continued access to a safe and reliable drinking water source. For the reasons set forth below, MDEQ requests that this Court declare that the City Council's inaction will result in a violation of applicable law and that Flint must enter into the agreement to use finished water supplied by GLWA. There is simply no other option that will adequately protect the public health in Flint.

JURISDICTION

1. MDEQ seeks a declaration that the City Council's inaction and delay in entering into the agreement with GLWA violates applicable law. It further seeks injunctive relief requiring Flint to immediately enter into the agreement to continue to use GLWA as Flint's long-term water source. This action is necessary because the City Council's refusal to enter into the agreement will place the public health in significant jeopardy, which is a violation of both the Michigan Safe Drinking Water Act, Mich. Comp. Laws § 325.1001, *et. seq.*, and the federal Safe Drinking Water Act, 42 U.S.C. § 300f, *et. seq.*, including the United States Environmental Protection Agency's (USEPA) January 21, 2016 Emergency Administrative Order, as amended (USEPA Order). (Ex. 1, USEPA Order.)

2. The MDEQ is the primary enforcement agency for the federal Safe Drinking Water Act in the State of Michigan. *See* 42 U.S.C. § 300g-2; Mich. Comp. Laws § 325.1001, *et seq.*

3. The federal Safe Drinking Water Act expressly contemplates that this Court has jurisdiction over enforcement actions filed by states "to require compliance with" the Act. 42 U.S.C. § 300j-8(b)(1)(B).

4. Additionally, the Court has jurisdiction to enforce Michigan's Safe Drinking Water Act because the Michigan law was passed pursuant to Michigan's effort to gain primacy under the federal act. *See Molinary v. Powell Mountain Coal Co.*, 125 F.3d 231, 236–37 (4th Cir. 1997).

5. As set forth above, an actual controversy exists between MDEQ and Flint that requires this Court to declare their rights and other legal obligations. *See* 28 U.S.C. § 2201.

PARTIES AND VENUE

6. The Plaintiff is the MDEQ, which is responsible for enforcing the state and federal Safe Drinking Water Acts in the State of Michigan.

7. The Defendant is the City of Flint. Flint is the owner and operator of a public water supply that is subject to both the Michigan and federal Safe Drinking Water Acts and provides water to nearly 100,000 people.

8. Venue is proper in this Court because the City of Flint is located in the U.S. District Court's Southern Division of the Eastern District of Michigan. 28 U.S.C. § 1391(b)(1).

GENERAL ALLEGATIONS

Effect of Flint's decision to switch water supplies from Detroit Water and Sewerage Department to Karegnondi Water Authority

9. From approximately 1967 to April 2014, Flint purchased water from the Detroit Water and Sewerage Department (DWSD) for use by its residents. DWSD drew the water from Lake Huron, treated it, and shipped the water via pipeline to Flint for distribution. This treated water is also referred to as finished water.

10. In April 2013, Flint declared its intention to join the Karegnondi Water Authority (KWA) and eventually to discontinue purchasing water from DWSD. KWA intended to build a pipeline to transport raw water from Lake Huron to Flint and other municipalities. Flint planned to use its water treatment plant to treat the raw water before distribution.

11. As part of its agreement with KWA, Flint agreed to pay approximately 30% of the costs associated with building the pipeline. Flint is obligated to pay approximately \$85,000,000 to KWA to re-pay bonds issued to fund the KWA pipeline. Flint is also obligated to pay a share of KWA's annual fixed costs of operating the KWA water system.

12. Following Flint's announcement that it was joining KWA, DWSD notified Flint that it would stop providing finished drinking water to Flint residents beginning in April 2014.

13. Because the KWA pipeline was not scheduled to be completed for several years, Flint was going to draw water from the Flint River during the interim period and treat that water at its water treatment plant prior to distribution to its residents.

14. From April 27, 2014 until October 16, 2015, Flint used its water treatment plant to treat and distribute drinking water to its residents.

15. In 2014, Flint approached the Genesee County Drain Commission (GCDC) regarding the sale of the 72" pipeline Flint had previously used to receive water from DWSD, which it believed it would no longer need. On May 30, 2014, GCDC and Flint executed a Water Transmission Acquisition Agreement wherein GCDC agreed to purchase the pipeline and paid \$3,987,700.00 to Flint.

16. As a result of multiple factors, the drinking water distributed by Flint during the interim period following its departure

from DWSD water and before its planned connection to the KWA has been associated with multiple threats to the public health.

17. As a result of those threats, on October 16, 2015, Flint switched its drinking water source to GLWA, a new legal entity that leased and operated DWSD assets used to supply water to Flint.

18. To enable Flint to return to its previous water source, the GCDC licensed Flint to use the 72" pipeline on a temporary basis.

19. Absent any further agreement, on October 1, 2017, the license for that pipeline with the GCDC may be terminated in order to allow the pipeline to be used for other purposes by GCDC.

20. Flint currently obtains its finished water from GLWA at a cost of approximately \$14,100,000 per year. This does not include the bond payments for the KWA that Flint is committed to pay.

21. GLWA has proven to be a safe and reliable source of water.

USEPA's January 21, 2016 Emergency Administrative Order

22. On January 21, 2016, the USEPA issued its Order applicable to both MDEQ and Flint. The USEPA amended the Order on November 17, 2016. (Ex. 1.) The USEPA's Order arose out of the agency's determination that the drinking water situation in Flint posed

an imminent and substantial endangerment to public health.

(Ex. 1, ¶ 1.)

23. Before switching from GLWA to another water source, the USEPA Order requires Flint to complete extensive planning, testing, and studies of the new water source. As part of its planning, Flint must demonstrate that it has the technical, managerial, and financial capacity to operate its water supply in compliance with the state and federal Safe Drinking Water Acts. Finally, Flint must demonstrate that the necessary infrastructure upgrades, analysis, and testing have been completed to ensure a safe transition from its current water source.

(*Id.* at ¶ 60.)

24. The USEPA Order also requires Flint, before leaving GLWA, to demonstrate that it has a sufficient number of qualified and trained personnel to operate its water treatment plant. (*Id.* at ¶ 61.)

The imminent public health crisis threatening Flint's residents

25. Absent any further agreements Flint may no longer have access to the 72" pipeline that it has been using to obtain finished water from GLWA starting on October 1, 2017.

26. Even if Flint can continue to use the 72” pipeline after October 1, 2017, a short-term extension of its current agreement with GLWA will cost Flint residents considerably more. A three-month delay alone will cost more than \$1,800,000 in extra costs for Flint compared to the long-term deal. Additionally, ongoing construction by GCDC would need to be completed on time or GCDC will need the 72” pipeline for water supply services for its own customers and Flint may face multi-million dollar damage claims from GCDC. (Ex. 2, December 22, 2016 letter from GCDC Director O’Brien to Director Creagh.)

27. Flint has no other currently available source of water. Although it had joined the KWA, Flint never built the connector pipeline necessary to deliver raw water from KWA to the Flint water treatment plant.

28. Even if Flint managed to build a connector pipeline to obtain raw KWA water prior to October 1, 2017, Flint’s water treatment plant is not yet capable of treating that water. It will take approximately 3.5 years and between \$58,800,000 and \$67,900,000 to adequately prepare Flint’s water treatment plant to treat and deliver KWA water.

29. Flint has not conducted the extensive planning, testing and studies the USEPA Order requires them to complete prior to switching water sources. It is impossible for Flint to comply with those requirements by October 1, 2017.

30. Flint does not currently have the necessary, capable and qualified personnel required to perform the duties and obligations necessary to ensure its water supply will comply with state and federal law if it attempts to rely entirely on its water treatment plant.

31. Additionally, beginning October 1, 2017, even though Flint will not be receiving KWA water, it is contractually obligated to pay \$7,000,000 per year in bond debt associated with the cost of building the KWA pipeline and at least \$1,100,000 per year for KWA administrative costs.

32. Flint is also required under the SDWA to establish a back-up water supply.

33. If Flint were able to build or otherwise obtain access to a pipeline to obtain water from GLWA by October 1, 2017, without the long-term deal, Flint will continue paying approximately \$14,100,000 per year for that water in addition to its KWA obligations.

34. These additional and substantial expenses will put considerable burden on Flint's already depleted water fund, which is used to fund necessary maintenance and improvements to Flint's aging water distribution system.

35. As a result of this financial strain, despite the fact that Flint's residents already pay one of the highest water rates in Michigan, Flint's interim chief financial officer has projected that it will be necessary to increase the price charged to residents for water by over 40% in an attempt to keep its water fund solvent. Even if Flint raises its water prices to pay both GLWA and KWA expenses, its water fund is projected to be insolvent by June 2018 unless it significantly improves the rate at which fees are collected from its customers.

36. If Flint's water fund becomes insolvent, the public health will be in danger because Flint will not be able to adequately improve, repair, and maintain its water distribution system.

37. Flint's distribution system has not been properly improved or maintained for many years. If Flint devotes its water fund to improving its water treatment plant in anticipation of treating water

from any other source, it will have to divert funds from other priorities, notably improving its water distribution system.

38. Considerable investment in Flint's water distribution system is still necessary because leaving the system in its current state of disrepair threatens the public health.

Mayor Weaver negotiates an agreement to keep Flint on the Great Lakes Water Authority water

39. In order to protect public health in Flint, the State of Michigan, including MDEQ, worked closely with Flint's mayor, KWA, GCDC, and GLWA to find a solution that would ensure public health in four important ways:

- (1) Flint would not have to change water sources on October 1, 2017;
- (2) Flint's water fund would remain solvent—thus enabling Flint not only to continue providing services to its residents, but to focus on improving, repairing, and maintaining its water distribution system and not have to significantly raise the price of water for its residents;

- (3) this water source solution for Flint would allow KWA and GCDC to provide a safe water supply to their customers, including finished water backup not previously available; and
- (4) GLWA customers that do not currently have access to a finished water backup would have one. (Ex. 3, Statement of Principles—Long Term Water Delivery to the City of Flint.).

That agreement was publicly announced on April 18, 2017.

40. A crucial element of the agreement is the construction of a new 42” pipeline that will run parallel to the existing 72” pipeline for use by GCDC.

41. Providing a 42” pipeline for Genesee County will ensure that Flint can continue using the 72” pipeline. The 42” pipeline is intended to be constructed and operational by October 1, 2017.

42. Another crucial element of the agreement is that in exchange for making GLWA its long term water source, GLWA price will be set at a level that allows Flint to meet both its KWA and GLWA obligations for a combined price of approximately \$12,000,000 per year instead of the approximately \$21,000,000 per year Flint would otherwise be obligated to pay.

43. The agreement will help ensure that Flint's water fund remains solvent, and decreases the need for Flint to raise water prices. As a result, Flint can focus on improving, repairing, and maintaining its water distribution system instead of improving its water treatment plant. In addition, the agreement allows access by Flint water customers to a fund that can provide approximately \$55,000 per year, plus an additional \$117,000 for the first year only, to assist low income customers to pay their water bills.

44. The agreement involves five different government entities and has various elements that depend on one another. The agreement's success, including its potential to eliminate the pending threat to public health, depends on the City's willingness to enter into the agreement.

45. Recognizing the urgency of the situation and resulting threat to the public health if the City does not timely act, on May 22, 2017, Flint's Mayor recommended to the City Council that the City enter into the agreement.

46. Despite the urgency of the situation, Flint's City Council refused to approve the recommendation, citing a desire for additional

public input on the agreement. A previously provided extended time period for public input had already expired on May 20, 2017.

47. On June 15, 2017, MDEQ sent a letter to the City Council and Mayor Weaver requesting that the City Council take action to either approve the agreement or to make a new proposal that would be both reasonable and ensure that Flint could timely comply with the requirements of the state and federal law. (Ex. 4, June 15, 2017 letter from Director Grether to City Council President Nelson and Mayor Weaver.)

48. MDEQ also warned Flint that its failure to act will place the public health at risk and violate the applicable Safe Drinking Water Acts, including the USEPA Order. As such, MDEQ advised that if the City Council failed to act or make a reasonable alternative proposal, it would request that the Michigan Department of Attorney General initiate legal action against Flint.

49. On June 23, 2017, notice was provided to Flint that, among other things, any attempt by the City Council to force a change in the water source will violate the settlement agreement in *Concerned*

Pastors v. Khouri, No. 16-cv-10277-DLL-SDD. (Ex. 5, June 23, 2017 letter from AAG Kuhl to City Administrator Jones and Mr. Kim.)

50. Following additional public review and comment, Flint's administration again presented the final agreement to the City Council on June 23, 2017. (Ex. 6, Resolution to Approve Master Agreement and Exhibit A only.) The City Council again refused to approve the agreement, stating it would postpone taking action for two more weeks. The City Council did not offer an alternative to the agreement but at least one council member continues to propose that the water treatment plant be operated to supply water to Flint residents. The City Council did approve a short-term contract for water supply with GLWA until September 30, 2017.

51. In fact, Flint's refusal to enter into the agreement will result in failure to adequately protect Flint's public health.

Count I: Violation of the Michigan Safe Drinking Water Act

52. The allegations above are incorporated here.

53. MDEQ has "power and control over public water supplies and suppliers of water" in Michigan. Mich. Comp. Laws § 325.1003. Accordingly, MDEQ has broad authority to "evaluate the adequacy of" a

water system “to protect the public health,” including whether a system “has the technical, financial, and managerial capacity to meet all requirements” of the Michigan Safe Drinking Water Act and its associated rules. Mich. Comp. Laws § 325.1004(2).

54. “When considered necessary for the protection of public health, [MDEQ] shall notify a supplier of the need to make changes in operations . . . as necessary to produce and distribute an adequate quantity of water meeting the state drinking water standards.” Mich. Comp. Laws § 325.1015(1).

55. MDEQ notified the City Council on June 15, 2017 of the need, so as to ensure the protection of public health, to either approve the agreement to obtain finished water from GLWA or to propose a reasonable alternative to obtain drinking water from some other source that will comply with state and federal law.

56. The City Council has refused to either approve the agreement or to propose another reasonable alternative.

57. The agreement negotiated by Mayor Weaver to ensure a long-term supply of finished water from GLWA is therefore the only option that will protect the public health in Flint, ensure the future

financial viability of Flint's water fund, and promote needed investment in Flint's water distribution system.

58. Flint does not have the technical, financial, and managerial capacity available to ensure that use of any other water source will adequately protect the public health.

59. As a result, MDEQ seeks an order from this Court that the City Council's failure to act will put the public health at risk and threaten the financial viability of the water supply. As a result, Flint is required by the Safe Drinking Water Act to enter into the agreement negotiated by Mayor Weaver to make GLWA its long-term water source.

Count II: Violation of the federal Safe Drinking Water Act

60. The allegations above are incorporated here.

61. As the primary enforcement agency, MDEQ has the prerogative to take enforcement action under 42 U.S.C. § 300g-3(a) to seek an order from this Court "as the protection of public health may require," 42 U.S.C. § 300g-3(b).

62. Paragraph 60 of the USEPA Order forbids Flint from switching water sources away from GLWA until it can demonstrate to MDEQ that it has the "technical, managerial and financial capacity to

operate its [system with a new water source] in compliance with [Safe Drinking Water Act] . . . and that necessary infrastructure upgrades, analysis, and testing have been completed to ensure a safe transition.”

63. Both the USEPA in a letter dated May 24, 2017 (Ex. 7, May 24, 2017 letter from Acting Regional Administrator Kaplan to City Councilwoman Fields.) and MDEQ on June 15, 2017 (Ex. 4) notified Flint that it will not be possible for Flint to switch water sources on October 1, 2017 in a way that complies with the USEPA Order.

64. Paragraph 61 of the USEPA Order also requires Flint to demonstrate to MDEQ that it has the “necessary, capable and qualified personnel” required to ensure that its water treatment plant can comply with the Safe Drinking Water Act.

65. Flint does not have a sufficient number of qualified personnel at its water treatment plant to operate the plant in compliance with the Safe Drinking Water Act.

66. Certain City Council members continue to propose that the water treatment plant be operated to supply water to Flint residents.

67. The agreement negotiated by Mayor Weaver to ensure a long-term supply of finished water from GLWA is the only option that

will be protective of public health in Flint, ensure the future financial viability of Flint's water fund, and promote investment in Flint's water distribution system.

68. Despite months to consider the agreement, the City Council has refused to either approve the agreement or to propose another reasonable alternative.

69. Flint does not have the technical, financial, and managerial capacity available to ensure that use of any other water source will be adequate to protect the public health.

70. MDEQ seeks an order from this Court that bars Flint from changing water sources because it has not complied with Paragraphs 60 and 61 of the USEPA's Order.

71. MDEQ also seeks an order from this Court that the City Council's failure to act will put the public health at risk, and therefore, Flint is required by the Safe Drinking Water Act to enter into the agreement negotiated by Mayor Weaver to make GLWA its long-term water source.

REQUEST FOR RELIEF

MDEQ requests the following relief from the Court:

- a. a finding that the City Council's failure to act has put the public health at risk in violation of the state and federal Safe Drinking Water Acts and the City Council has a duty to act in this matter;
- b. an order that, as a result of the risk to public health and threat to the financial viability of the water supply caused by the inaction of the City Council, Flint is required by the state and federal Safe Drinking Water Acts to enter into the agreement negotiated by Mayor Weaver to remain on finished water supplied by GLWA;
- c. an order that Flint cannot change water sources because it has not complied with Paragraphs 60 and 61 of the USEPA's Order; and,
- d. an order for all such other relief the Court deems equitable.

Respectfully submitted,

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Dated: June 28, 2017