STATE OF MICHIGAN
IN THE COURT OF CLAIMS

ANGEL GUYTON, individually and as next friend of three minor children, G.S., G.A., and G.D.; KATIE LYNN REYKJALIN, individually and as next friend of one minor child, U.N.P.; JENNIFER JANSSEN-ROGERS, and BROOKE ROSENBAUM, all on behalf of themselves and all others similarly situated,

Plaintiffs,

v

THE MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, & ENERGY (EGLE) and ERIC OSWALD, in his official capacity as Director of EGLE's Drinking Water and Environmental Health Division (DWEHD),

Defendants.

No. 2021-000246-MM

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BRIEF IN SUPPORT OF DEFENDANTS' 03/31/2022 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(7)

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INTRODUCTION

The Michigan Department of Environment, Great Lakes, and Energy (EGLE) proactively protected public health in Benton Harbor. When Benton Harbor unexpectedly experienced an action level exceedance for lead in its water, EGLE went beyond the minimum requirements of the law to ensure that the City of Benton Harbor (City) installed corrosion control treatment *years* in advance of when the treatment was required to be installed. And because it was uncertain how long it would take for the treatment to take effect, EGLE helped ensure that filters were available to all residents in Benton Harbor free of cost in the meantime. EGLE also required the City to promptly notify the public of potential lead in the system and to provide educational materials to every user of its system. EGLE repeatedly consulted with the U.S. Environmental Protection Agency (EPA) on its regulatory decisions in Benton Harbor and even helped the City obtain a $5.6 million grant from the EPA to jumpstart its removal of lead service lines and other protective measures.

Plaintiffs' allegations directly contradict public knowledge and records and are not presumed true. The allegations are an attempt to manufacture legal claims that do not exist. Plaintiffs know that EGLE is immune to their tort claims, so they attempt to avoid EGLE's immunity by claiming that their alleged tort claims have taken on a constitutional dimension. They have not. The federal judiciary has strived for decades to ensure that the federal constitution does not become "a font of tort law." *Paul v Davis*, 424 US 693, 701 (1976). This Court should do the same with the Michigan Constitution and dismiss Plaintiffs' thinly veiled tort claims.

STATEMENT OF FACTS

Michigan's Safe Drinking Water Act

Michigan passed its Safe Drinking Water Act in 1976, and it is generally known as Act 399. MCL 325.1001 et seq. Act 399 gives EGLE "regulatory oversight for all public water supplies, including approximately 1,400 community water supplies and 10,000 noncommunity water supplies."[1] But EGLE does not operate water systems. Operation is left to those defined as a "supplier of water," which is a "a person who owns or operates a public water supply." MCL 325.1002(t). The most common supplier of water is a local or regional governmental entity, such as, in this case, the City of Benton Harbor.

As the supplier of water for most of the Benton Harbor's residents, the City was responsible for, among other things, maintaining its waterworks system, MCL 325.1004; hiring appropriate staff to operate the system, MCL 325.1009; and sampling and treating its water to ensure compliance with public health standards, MCL 325.1007. EGLE, on the other hand, was responsible for regulatory oversight and enforcement, including the promulgation of rules that set water standards and established guidelines for safely operating water systems. MCL 325.1005. Among the promulgated rules is a collection of rules commonly known as the Lead and Copper Rule (LCR). Mich Admin Code, R 325.10604f, 10410, 10710a, and 10710d.

The LCR requires suppliers of water to monitor their systems for lead by collecting tap water samples from residents over the course of a six-month period.

[1] https://www.michigan.gov/egle/0,9429,7-135-3313_3675---,00.html.

Mich Admin Code, R 325.10710a(4). The supplier then determines the amount of lead in each sample to the parts per billion (ppb). If the supplier collected 100 samples, then it would put the sample results into a list, assigning "1" to the sample with the lowest ppb of lead, and "100" to the sample with the highest ppb of lead. To identify the "ninetieth percentile" of lead, the supplier multiplies the number of samples by 0.9 and locates the ppb of the sample assigned as the answer to that equation. Mich Admin Code, R 325.10604f(c)(ii) & (iii). So, for 100 samples, the ninetieth percentile of lead for that water supply would be the ppb of lead for the sample assigned as "90."

Though the goal in Michigan is to eliminate all lead in all drinking water, because of the large number of lead pipes in water systems all around the State, it is not possible to reach that goal immediately. EGLE amended the LCR recently to require all water suppliers, over time, to remove all lead service lines from their systems. Mich Admin Code, R 325.10604f(6). In the meantime, the LCR uses an "action level" to protect the public health in the event excessive lead from pipes and fixtures leaches into drinking water. If a supply's ninetieth percentile for lead is 15 ppb or less, then the LCR does not require the supply to take additional action. Mich Admin Code, R 325.10604f(2)(b)(i). But if a supply's ninetieth percentile for lead is more than 15 ppb, then it must take "action" to protect the public health, such as educate the public, change its treatment protocol, and move more quickly to replace lead service lines. Mich Admin Code, R 325.10401a, 10604f(2)(e)(i), and

10604f(5). Simply having an "action level exceedance" (ALE) is not a violation of the LCR, but failure to take the required action would be a violation.

The LCR is a compliance floor. Suppliers of water are free to voluntarily do more than is required by the LCR to protect against lead. And Act 399 authorizes EGLE to require that suppliers of water do more than is required by the LCR when "considered necessary for protection of the public health." MCL 325.1015(1).

Benton Harbor's water system operated for decades without an ALE.

Benton Harbor gets it water from Lake Michigan. (Compl, ¶ 33.) In the decades leading up to the summer of 2018, the City had been testing for lead, but had never had an ALE. (Ex 3, 10/24/2018 Public Advisory; Compl, ¶ 61.) If lead is in drinking water, it generally comes from lead contained in the service line connecting the building to the water main, or from lead in the fixtures within the building. (Compl, ¶ 39.) But just because a water system includes lead components does not mean that excessive lead will leach into drinking water. Contrary to Plaintiffs' allegation, it is not true that excessive lead will leach into drinking water unless the supplier adds a corrosion control additive to the water. (Compl., ¶ 41; Ex 64, Onan Aff, ¶ 6.) Many suppliers of water in Michigan have lead components in their system, do not add a corrosion control additive, but still do not have lead exceedances in their water samples because the system's water chemistry effectively keeps excessive lead from leaching into the water. (Ex 64, Onan Aff, ¶ 6.)

Benton Harbor's water system had its first ALE in 2018.

Plaintiffs' allegations that EGLE somehow knew that Benton Harbor's water chemistry would result in an ALE—prior to the City's sampling results showing an ALE—are false and do not make sense. (Compl, ¶¶ 41–43.) Indeed, several water systems analogous to Benton Harbor's system, such as Muskegon and Holland, have not experienced an ALE for lead even though they also have lead components, use Lake Michigan as a source, and use a treatment protocol that does not include a corrosion control additive. (Ex 64, Onan Aff, ¶ 6.)

EGLE first learned that Benton Harbor's water chemistry did not adequately protect against lead when the City's water sample results revealed that information. There had been no change of treatment or water source of any other change in Benton Harbor that had made EGLE expect that it would have an ALE for lead. (Ex 64, Onan Aff, ¶ 5.) The City first emailed its sample results to EGLE staff on October 10, 2018. (*Id.*) As Plaintiffs allege, the ninetieth percentile of the samples from the summer of 2018 showed 22 ppb, which required the City to take action to protect the public health. (Compl, ¶ 52.)

EGLE moved swiftly to protect the public health by requiring the City to educate its residents and install corrosion control treatment on an accelerated schedule.

On October 15, 2018, two different EGLE employees contacted the City to advise it both on how to protect the health of the individuals whose homes had returned high results, and how to educate all Benton Harbor residents about the dangers of lead in water. (Ex 64, Onan Aff, ¶ 7.) By October 18, 2018, EGLE

hosted a meeting with staff from the Department of Health and Human Services (DHHS) and the Berrien County Health Department to discuss public education and messaging about lead, and to connect the Berrien County Health Department with EGLE staff with expertise in testing for lead in school drinking water. (Ex 64, Onan Aff, ¶ 8.) EGLE then worked collaboratively with the Department of Health and Human Services, the Berrien County Health Department, and the City to draft the formal notification letter from EGLE that would notify the City of its high lead level and spell out the actions the City would be required to take for the protection of public health. (Ex 64, Onan Aff, ¶ 9.) In the course of these collaborations, the City assured EGLE that it would provide an alternative water source to its residents. (*Id*.) On October 22, 2018, EGLE formally notified the City of the ALE. (Ex 1, 10/22/2018 ALE Notification.)

EGLE, in its October 22, 2018 letter, ordered the City to issue an advisory to the public within three business days, and to then follow up by sending educational materials directly "to all consumers" of the system. (Ex 1, 10/22/2018 ALE Notification.) The City did both things. On October 24, 2018, it issued a public health advisory, and six days later mailed the advisory to approximately 4,600 addresses on the water system. (Ex 3, 10/24/2018 Public Advisory; Ex 7, 12/7/2018 PA Certification.) Also on October 24, 2018, the City held a press conference, which was reported in the local newspaper under the following headline: "Too much lead in Benton Harbor water, Officials hold press conference today to inform residents." (Ex 2, 10/24/2018 Article.) Then, on November 29, 2018, the City mailed

educational materials to every consumer of the water system, titled "IMPORTANT INFORMATION ABOUT LEAD IN YOUR DRINKING WATER," with the following admonition: "All the Drinking Water Customers of the City of Benton Harbor, please open and read this Notice." (Ex 5, 11/29/2018 Public Education; Ex 8, 12/7/2018 PE Certification.) The City also submitted the educational materials to "every television station . . . radio station . . . and local paper . . . available in BH City." (Ex 8, 12/7/2018 PE Certification.) It posted the information on its website, began printing a message about high lead levels on the City's water bills, and promptly partnered with the Berrien County Health Department to reach vulnerable populations. (*Id.*) The City submitted signed certifications to EGLE confirming that it had provided the public education required by the LCR. (Ex 7, 12/7/2018 PA Certification; Ex 8, 12/7/2018 PE Certification.)

In addition to informing and educating the public, the City was required to "recommend optimal corrosion control treatment within 6 months after the end of the monitoring period during which it exceeds 1 of the action levels." Mich Admin Code, R 325.10604f(2)(e)(i). Since the City's monitoring period ended on September 30, 2018, it had until March 30, 2019 to recommend a new treatment protocol. Even so, EGLE encouraged the City to act much more quickly "to protect public health." (Ex 64, Onan Aff, ¶ 10.) EGLE had previously given the City a grant to identify and replace lead service lines in Benton Harbor, but EGLE authorized the City to use some of that grant money to also implement a new treatment protocol to address its ALE. (Ex 64, Onan Aff, ¶ 11.)

The City contracted with Elhorn Engineering, which in turn provided water from Benton Harbor's system to Carus, a company that manufactured water treatment chemicals. (Ex 64, Onan Aff, ¶ 12; Ex 13, 2/25/2019 Permit.) Carus then evaluated the water and recommended a corrosion treatment specific to Benton Harbor's water chemistry. (*Id.*) That is the proposal Mike Enlow with Elhorn Engineering made to the City on November 21, 2018, which the City submitted to EGLE as its recommended "optimal corrosion control treatment" under Rule 325.10604f(2)(e)(i). (Ex 4, 11/21/2018 Elhorn and Carus Proposal.) The City recommended a "70/30 ortho/poly blend, which is a blend with an emphasis on corrosion control," at an "applied dosage rate" of "1.0 as PO4," or 1.0 mg/L. (*Id.*) The City also proposed to "install corrosion [coupon] racks to monitor and verify performance results are optimal." (*Id.*) EGLE had the option to "either approve the corrosion control treatment option recommended by the supply or . . . designate alternative corrosion control treatment." Mich Admin Code, R 325.10604f(3)(d). EGLE had "12 months" after September 30, 2018 to make a decision. Mich Admin Code, R 325.10604f(2)(e)(ii).

In January 2019, EGLE learned that the City was not fulfilling its commitment to provide alternative water to its residents. (Ex 9, 1/9/2019 Email; Ex 10, 1/14/2019 Internal Memo; Ex 64, Onan Aff, ¶ 14.) Not only that, but the City's water superintendent, Mike O'Malley, was advising residents that they did not need filters and was sending mixed and incorrect messages about the water. (Compl, ¶ 103; Ex 9 1/9/2019 Email; Ex 10, 1/14/2019 Internal Memo.) EGLE, therefore,

partnered with DHHS and the Berrien County Health Department to correct the messaging from the City and to help ensure filters were made available free of charge to all residents of Benton Harbor. (Ex 58, 11/3/2021 Letter to Senator McBroom, p 9; Ex 24, 11/26/2019 Letter to GLELC, p 1; Ex 64, Onan Aff, ¶¶ 15–16.)

In February 2019, EGLE met with the City and Elhorn to discuss the City's recommended treatment. (Ex 64, Onan Aff, ¶ 17; Ex 11, 2/22/2019 Email 0000751.) EGLE staff recommended that the City add more than 1.0 mg/L of the ortho/poly blend, and the City agreed, but would not agree to go any higher than 1.5 mg/L because Mr. O'Malley and Mr. Enlow were concerned that "the poly portion of the blend may be too high and counterproductive above this amount." (Ex 11, Feb 2019 Email Chain, p 0000751.) When the City formally submitted its permit application, it requested approval to apply the treatment at 1.5 mg/L. (Ex 13, 2/25/2019 Permit.)

Plaintiffs are correct that one EGLE employee, Brian Thurston, raised concerns that the proposed dosage level was still not high enough. (Compl, ¶ 68.) But Plaintiffs' characterizations of Mr. Thurston's concerns are inaccurate. Mr. Thurston recognized that there may have bene additional information he did not have "that addresses my concerns." (Ex 11, 2/22/2019 Email 0000751.) Indeed, one colleague responded that the "coupon test" Elhorn planned to perform would provide data on whether the dosage should be adjusted in the future. (*Id.*) The colleagues within EGLE had a conference call on February 22, 2019 to determine how to proceed with Benton Harbor's application. (Ex 12, 2/22/2019 Email

0000777.) During the call, Mr. Thurston's concerns were resolved by the recognition that Benton Harbor would perform a "coupon study" after installation of its requested dosage to help determine whether the dose should be adjusted. (*Id.*) No one had any reason to believe that approving the City's recommendation would make the water chemistry more corrosive, and all agreed that it would "only provide benefit." (Ex 64, Onan Aff, ¶ 18.)

EGLE did more than deliberate internally. It also consulted with the EPA to determine if it had any concerns with the City's recommendation, and the EPA did not raise any concerns. (Ex 6, 12/3/2018 EPA Email; Ex 14, 2/26/2019 Email 0001081; Ex 65, Oswald Aff, ¶¶ 4–5.)

EGLE therefore decided to "approve the corrosion control treatment option recommended by the supply" under Rule 325.10604f(3)(d), and on February 25, 2019, it issued the City a permit to implement its recommended treatment protocol. (Ex 13, 2/25/2019 Permit.) By moving so quickly, EGLE had acted more than eight months faster than the minimum requirement of the LCR. Mich Admin Code, R 325.10604f(2)(e)(ii). It is clear why EGLE staff were in such a hurry. As one employee noted when transmitting the approved permit application to the City, the "sooner this feed system is installed, the sooner public health protection is improved." (Ex 14, 2/26/2019 Email 0001081.) EGLE staff than reported their actions to the EPA, explaining that this "is the first step to get some benefit from phosphate." (*Id.*)

Under the LCR, the City had "12 months after the department designate[d] the treatment," or February 25, 2020, to "install" the treatment. Mich Admin Code, R 325.10604f(2)(e)(iv). But EGLE urged the City to act much quicker in order to protect the public health. (Ex 64, Onan Aff, ¶ 19.)

EGLE used an administrative consent order to address additional challenges and require the City to propose a corrosion control study.

Lead was not the only concern in the City's water system. As Plaintiffs allege, the City entered into an administrative consent order (ACO) with EGLE on March 5, 2019 to address several issues with the management of the system. (Compl, ¶ 62.) But contrary to Plaintiffs' allegations, the consent order is not the result only of the City's ALE for lead. It was the result of a survey EGLE had previously performed of the City's water system, in which EGLE identified several deficiencies that the City needed to fix. (Ex 15, 3/5/2019 ACO.) Nonetheless, EGLE also used the ACO to address the City's lead issues by requiring that the City submit a proposal to do a comprehensive corrosion control treatment study by the end of April 2019. (Ex 15, 3/5/2019 ACO, section 2.6.)[2] EGLE could have required the study in accordance with the "treatment steps" in Rule 325.10604f(2)(e) as part of identifying a treatment protocol, but as noted above, EGLE instead chose to accept the City's initial recommendation for treatment.

[2] EGLE had also required a proposal as one of the conditions to the February 25, 2019 permit, but instead decided to use the March 5, 2019 ACO to require the proposal. (Ex 13, 2/25/2019 Permit; Ex 64, Onan Aff, ¶ 20.)

This nuance is important because it means that the deadlines related to a potential study in Rule 325.10604f(2)(e), which Plaintiffs extensively discuss, simply did not apply. (Ex 64, Onan Aff, ¶ 20.) Instead, EGLE used its broad authority under Rule 325.10604f(1)(m)[3] to require Benton Harbor to propose the study and used the ACO—not the "treatment steps"—to establish the deadlines for doing so. (Ex 64, Onan Aff, ¶ 20.)[4]

EGLE took additional measures to protect the public health by requiring the City to significantly increase the number of tap water samples.

As Plaintiffs correctly allege, the City started feeding corrosion control treatment into its water system on March 25, 2019. (Compl, ¶ 68.) Contrary to Plaintiffs' allegation that EGLE had somehow taken over the City's water operations, it was the City that announced this achievement to EGLE. (Ex 16, 3/27/2019 Email.) The City's water manager acknowledged that EGLE staff "did tons of work to help us get this going," but concluded that "Elhorn Engineering is our go-to Contractor for Corrosion Control. They will continue to work with us to evaluate the treatment and make adjustments as needed." (*Id*.)

Importantly, EGLE also required the City to gather significantly more samples from users' taps than would be required if the City had not discovered excessive lead in its system. (Ex 1, 10/22/2018 ALE Notification; Ex 64, Onan Aff, ¶

[3] Rule 325.10604f(1)(m) does not reference the "treatment steps" in Rule 325.10604f(2)(e).

[4] Notably, even if the "treatment steps" deadlines *did* apply, EGLE met its obligations under the LCR by repeatedly requiring Benton Harbor to perform a study, even if the City struggled to comply.

22.) The City repeatedly requested to be able to gather fewer samples—40 rather than 60—but EGLE repeatedly insisted that it was more important for the City to gather as much data as possible to determine the effectiveness of the corrosion control treatment. (See, e.g., Ex 23, 11/20/2019 Email; Ex 19, 6/13/2019 Email.)

In accordance with the ACO's requirement to submit a proposal for a corrosion control study by the end of April 2019, on April 23, 2019, the City submitted to EGLE a "Corrosion Control Treatment Plan & Study Proposal" prepared by Elhorn. (Ex 17, 4/23/2019 Proposal). EGLE staff discussed the proposal with the City and Elhorn and suggested that with some adjustments, it would be "acceptable" for the City to collect the data proposed by the plan. (Ex 18, 4/30/2019 Email.) Importantly, however—as Plaintiffs correctly allege (Compl, ¶ 74)—EGLE did not deem the proposal as sufficient under Rule 10604f(3)(c). (Ex 64, Onan Aff, ¶ 23.)

Plaintiffs allege that the City's installation of its initial corrosion control treatment on March 25, 2019 caused lead levels in the City's water to rise. (Compl, ¶¶ 73, 82.) But that is not correct. As the City's initial treatment began to take effect, the percentage of water samples with excessive lead levels *decreased*, as demonstrated on the attached graphic. (Ex 59, 12/2021 Percentage of Samples; Ex 64, Onan Aff, ¶ 25.) It is correct that in 2019 the ninetieth percentile of samples went up slightly. But that is best explained by the dramatic increase in the number of water samples the City was required to collect. As part of EGLE's amendments to the LCR, beginning in 2019, the City could no longer collect only first-liter, first-

draw samples from resident's taps, it also had to collect the fifth-liter sample. (Ex 64, Onan Aff, ¶ 26.) The City went from collecting only first-liter-draw samples from 30 locations during the 2018 period, resulting in 30 datapoints, to collecting both first-liter-draw and fifth-liter-draw samples from 46 locations during the first half of 2019, and 39 locations during the second half of 2019, resulting in 170 datapoints. (Ex 64, Onan Aff, ¶ 26; Ex 60, Sample Results.)

By looking harder for lead in its water, the City shed light on the extent of its *existing* problem—which is precisely what the amendments to the LCR were meant to accomplish. (Ex 58, 11/3/2021 Letter to Senator McBroom, pp 5–6.) Indeed, the result of the LCR's more stringent monitoring requirements that took effect in 2019 is that EGLE had identified "approximately 50 different community water supplies," like Benton Harbor, with ALEs for lead. (*Id*.) As EGLE explained, the reason for amending the LCR was to "better identify problems and spur more urgent action," and the rule is "having the desired effect." (*Id*.)

For the six-month period from January to June 2019, the ninetieth percentile for lead sampling in Benton Harbor was 27 ppb, exceeding the 15-ppb action level. (Ex 21, 7/24/2019 ALE Notification.) Like the October 2018 exceedance, EGLE required the City to issue public notification and educational materials to Benton Harbor's water users. (Ex 20, 07/2019 Public Education Materials.) The local paper reported on the materials with the headline: "Public advisory issued for lead in BH drinking water, Free water filters still available to residents through BH Health Department." (Ex 22, 7/28/2019 News Article.)

EGLE addressed concerns that were raised by providing additional information and escalating enforcement action.

Plaintiffs refer to a November 2019 exchange of letters with the Great Lakes Environmental Law Center, and incorrectly allege that EGLE 1) dismissed a request that the State take steps to mitigate residents' exposure to lead while the City's treatment took effect and 2) had falsely claimed that the treatment was starting to take effect. (Compl, ¶¶ 78–80.) It is true that the Great Lakes Environmental Center called for the delivery of water filters and other mitigating measures. (Compl, ¶ 79.) But as EGLE's response confirmed, DHHS had already partnered with the Berrien County Health Department to not only fulfill the "requirements to inform the public of risks of lead in drinking water," but also, as described above, "to provide and distribute point of use filters that are third-party certified to remove lead from drinking water." (Ex 24, 11/26/2019 Letter to GLELC.) At the time of EGLE's letter, "about 2,500 filters [had] been distributed and replacement cartridges [were] being distributed daily from the [Berrien County Health Department] office." (*Id*, p 1.) Additionally, EGLE's statement that the City's treatment was "effectively reducing corrosion rates" in the City's water system was not "without evidence" as Plaintiffs incorrectly allege. (Compl, ¶ 80.) As EGLE explained, the data supporting that statement came from the "results" produced by "the initial coupon study that Elhorn Engineering performed." (Ex 24, 11/26/2019 Letter to GLELC, p 2.) And EGLE explained that it was planning to analyze *more* data from the City, including "additional data from coupon tests and water tap sampling, as well as water quality parameter sampling." (*Id.*)

Finally, EGLE did not "dismiss" the concerns raised by the Great Lakes Environmental Law Center, as Plaintiffs incorrectly allege. (Compl, ¶ 80.) Instead, EGLE directly responded to each of the Center's concerns, and it invited the Center "to meet in person or via conference call to discuss corrosion control strategies not only for the city of Benton Harbor, but across the state." (Ex 24, 11/26/2019 Letter to GLELC, p 3.) The Center took EGLE up on the offer, and they met on December 20, 2019. (Ex 27, 12/20/2019 GLELC Meeting Notice.)

Also in December 2019, the City's water system operator, Mr. O'Malley, asked for a fourth extension of the "flow meter" deadline in the March 8, 2019 ACO. (Ex 26, 12/20/2019 Email 0006017.) Mr. O'Malley strongly disagreed with the requirement, thought it was "arbitrary," and requested that EGLE remove it from the ACO. (*Id*.) The extension request prompted a discussion among EGLE colleagues about the City's "pattern" of requesting extensions. (Ex 25, 12/20/2019 EGLE Email.) Mr. Bolf expressed the problem as follows:

> We feel caught between a rock in a hard place. If we take the usual course of action to achieve compliance including escalated enforcement and stipulated penalties, the city may not be willing or able to pay, it will corrode our commitment to work cooperatively, and it still may not be effective. However, if we continue the pattern of allowing them to miss deadlines and request extensions, then the water system remains vulnerable and we are potentially culpable if a problem occurs. Both scenarios have EJ ramifications. Furthermore, we continue to have a difficult time communicating with the city mainly due to the operator in charge. [Ex 25, 12/20/2019 EGLE Email.]

Eric Oswald, one of Mr. Bolf's supervisors, acknowledged the concern and suggested an internal meeting. (Ex 25, 12/20/2019 EGLE Email.) In the meantime,

EGLE staff sought to travel to Benton Harbor to meet with Mr. O'Malley. (Ex 26, 12/20/2019 Email 0006017.)

Plaintiffs take Mr. Bolf's comments out of context and incorrectly allege that the City's response to its ALE for lead had been to chronically miss deadlines and that EGLE accepted "culpability" for the City's shortcomings. (Compl, ¶ 9.) But as explained above, both EGLE and the City had complied with the LCR on an accelerated schedule: EGLE had accepted the City's recommendation more than eight months sooner than required, and the City installed its recommended treatment eleven months sooner than required. As discussed below, the concern raised by Mr. Bolf is partly what led EGLE to amend the ACO with the City in the spring of 2020 with additional deadlines, and fine the City $500.

For the six-month period from July to December 2019, the ninetieth percentile for lead sampling in Benton Harbor was 32 ppb, exceeding the 15-ppb action level. (Ex 29, 1/16/2020 ALE Notification.) Like the previous two exceedances, EGLE required the City to issue public notification and educational materials to the Benton Harbor's water users. (Ex 28, 1/2020 Public Education Materials.) The local paper reported the materials with the headline: "BH residents again warned about possible lead in water." (Ex 30, 1/22/2020 News Article.)

EGLE designated a new treatment protocol for the City, again required the City to propose a corrosion control study, and helped the City obtain a $5.6 million grant from the U.S. EPA.

EGLE staff were concerned that even though monitoring results from the City showed that a lower percentage of samples were testing positive for lead, those

that did test positive were still too high. (Ex 64, Onan Aff, ¶ 27.) EGLE staff met with City representatives on January 15, 2020 to discuss the matter. (Ex 32, 2/13/2020 Letter, p 1.) EGLE staff also consulted with the EPA on what to do. (Ex 65, Oswald Aff, ¶ 7.) Not only that, EGLE consulted with Cornwell Engineering, a renowned corrosion control firm, to discuss what to do. (Ex 64, Onan Aff, ¶ 28.)

After significant consultation and deliberation, on February 13, 2020, EGLE relied on its broad authority under MCL 325.1015(1), Rule 325.10604f(2)(c), and Rule 325.10604f(3)(h) to designate a new treatment protocol for the City. (Ex 32, 2/13/2020 Letter.) The new treatment was to change the chemical from a "70%/30% ortho/poly-phosphate to a product with a minimum of 90% orthophosphate," and to achieve "a minimum of 3.0 mg/L orthophosphate (as phosphate) residual" in the system, an increase from the previous 1.5 mg/L requirement. (*Id*.) EGLE explained the "reason for this change is . . . to quickly put into place treatment that will more efficiently lower corrosion rates in the distribution system for greater protection of public health." (*Id*, p 2.) EGLE noted that its designation was "based on corrosion control treatment studies and analyses of documented analogous treatment systems with other water supplies of similar source water chemistry." (*Id*.)

The letter further directed the City to submit "a corrosion control study proposal following the requirements of Rule 325.10604f(3)(c)" that "must focus on identifying optimum corrosion control treatment for the City's water system." (Ex 32, 2/13/2020 Letter, p 2.) EGLE explained the need for the full study even though it had just designated an optimal treatment under Rule 10604f(3)(d): "The above

phosphate treatment strategy is intended to provide immediate improvement of corrosion protection in the distribution system but, without further study, it is not certain to be the optimum treatment strategy." (*Id.*) The LCR authorizes EGLE to require a full study at any time to reevaluate treatment, even if EGLE had already designated an optimal treatment. Mich Admin Code, R 325.10604f(1)(m).[5]

Plaintiffs isolate a single comment from one of the EGLE employees involved in EGLE's collaboration on the February 13, 2020 letter, Bob London, to imply that EGLE acted contrary to the recommendations of its professional staff. (Compl, ¶ 85.) But a review of the actual emails—rather than Plaintiffs' cherry-picked sentences—shows that Mr. London not only "concur[red] with the treatment designation," but also explained that the language that was ultimately used in the final draft of the letter "addresse[d] my concerns" about directing the nature of the study. (Ex 31, 2/7/2020 Email.) Plaintiffs plainly have access to these emails because they were released to the public[6] and Plaintiffs quote from them, but they do so only selectively and out of context.

Plaintiffs correctly allege that the City continued to struggle to propose a corrosion control study that would comply with Rule 325.10604f(3)(c). (Compl, ¶¶ 91–92.) On March 25, 2020, EGLE sent the mayor of Benton Harbor a proposed

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[5] As noted above, the deadlines imposed by Rule 325.10604f(2)(e) do not apply to studies ordered under Rule 325.10604f(1)(m), and EGLE complied with its obligations even if they did.

[6] All internal documents cited in this brief are available on the website of EGLE's Office of the Clean Water Public Advocate: https://www.michigan.gov/cleanwater/0,9779,7-411-98113_99988_109059---,00.html.

amended ACO to "address the remaining items" that the City had still not completed from the original March 8, 2019 order. (Ex 33, 3/25/2020 Email.) Notably, the "flow meter" issue that sparked the December 2019 comments from Mr. Bolf that Plaintiffs focused on in paragraph nine of their complaint had been *resolved* by the time EGLE sent the March 2020 letter. (Ex 33, 3/25/2020 Email, "Exhibit A" to draft ACO.) And the letter included a provision fining the City $500 for its failure to comply with the existing ACO, which was one of the ways to address the "rock and a hard place" concerns Mr. Bolf raised. (Compl, ¶ 9; Ex 25 12/20/2019 EGLE Email; Ex 65, Oswald Aff, ¶ 6.)

As for the corrosion control study, even though the City had technically satisfied the ACO's requirement by submitting a proposal prior to the April 30, 2019 deadline (Ex 33, 3/25/2020 Email, "Exhibit A" to draft ACO), EGLE had never considered that proposal satisfactory under the LCR (Ex 64, Onan Aff, ¶, 23.) So, EGLE included a requirement in the amended ACO that the City hire a third-party consultant to propose a study no later than September 30, 2020 (Ex 33, 3/25/2020 Email, ¶ 2.18.)

For the six-month period from January to June 2020, the ninetieth percentile for lead sampling in Benton Harbor was 23 ppb, exceeding the 15-ppb action level. (Ex 38, 7/15/2020 ALE Notification.) Like the previous exceedances, EGLE required the City to issue public notification and educational materials to the Benton Harbor's water users. (Ex 37, 7/2020 Public Education Materials.) The local paper

reported the materials with the headline: "Some Benton Harbor homes still recording high lead levels." (Ex 39, 7/22/2020 News Article.)

Recognizing the City's need for additional funds to address lead, EGLE notified the City of a grant opportunity with the EPA. On May 29, 2020, with extensive support from EGLE staff, the City submitted an application for a $14,842,995 grant from the EPA to replace lead service lines in Benton Harbor. (Ex 35, 5/29/2020 EPA Grant Application; Ex 63, Sarkipato Aff, ¶ 5.) EGLE's director sent a letter to the EPA strongly supporting the City and asking that EPA grant the application. (Ex 36, 6/18/2020 Letter of Support.) EPA ultimately granted the application and awarded the City $5,557,000. (Ex 47, 6/7/2021 EPA Grant Agreement.)

In July 2020, the EPA, as part of its oversight responsibilities, confirmed that EGLE had required "corrective actions" in Benton Harbor, and that EGLE was sufficiently requiring the City "to continue [corrosion control treatment] steps as required by the federal LCR and make progress to identify and address the root cause" of the lead exceedance." (Ex 40, 7/29/2020 EPA Correspondence.)

On August 5, 2020, the City finally signed the amended ACO that EGLE had proposed in March 2020. (Ex 41, 8/7/2020 Amended ACO.)

The City replaced its water system operator and operations improved.

In November 2020, EGLE began the process of revoking the license for the City's operator in charge, Mike O'Malley. (Ex 42, 11/5/2020 Letter and Memo.) Plaintiffs incorrectly allege that EGLE revoked the license of the operator in charge

of the City's water system because he raised "concerns" about EGLE's February 13, 2020 letter. (Compl, ¶¶ 86–87.) That is not correct. A copy of the email to which Plaintiffs refer is attached. (Ex 34, 5/1/2020 Email.) Mr. O'Malley is the same operator who resisted EGLE's recommendations that the initial orthophosphate dosage be higher. (Ex 11, 2/22/2019 Email 0000751.) And he is the same operator who strongly and repeatedly resisted collecting additional tap water samples to monitor the effectiveness of his initial treatment recommendation. (Ex 23, 11/20/2019 Email.) He also insisted that provisions of the ACO were "arbitrary" and demanded they be removed from the order. (Ex 26, 12/20/2019 Email 0006017.) He is also the person who apparently was sending mixed messages about lead and advising residents that they did not need to use water filters. (Compl, ¶ 103; Ex 9 1/9/2019 Email; Ex 64, Onan Aff, ¶ 16.) There were many additional problems with Mr. O'Malley's judgment, including his refusal to provide needed data to EGLE about the tap water monitoring he was performing, which is why EGLE ultimately revoked his license. (Ex 42, 11/5/2020 Letter and Memo.)

The City put Mr. O'Malley on administrative leave on November 5, 2020, and by November 6, 2020 the City hired the engineering firm F&V Operations to take Mr. O'Malley's place. (Ex 63, Sarkipato Aff, ¶ 5.) Mr. O'Malley's implementation of EGLE's February 13, 2020 treatment designation was sporadic (Ex 34, 5/1/2020 Email), but F&V was willing and able to fully implement the treatment (Ex 63, Sarkipato Aff, ¶ 6).

For the six-month period from July to December 2020, the ninetieth percentile for lead sampling in Benton Harbor was 24 parts per billion, exceeding the 15 parts per billion action level. (Ex 44, 2/4/2021 ALE Notification.) Like the previous exceedances, EGLE required the City to issue public notification and educational materials to the Benton Harbor's water users. (Ex 43, 1/2021 Public Education Materials.) The local paper reported the materials with the headline: "Benton Harbor issues another public advisory about lead in drinking water." (Ex 45, 2/10/2021 News Article.)

Plaintiffs correctly allege that on March 26, 2021, EGLE issued a press release announcing the creation of the Benton Harbor Water Outreach Task Force. (Compl, ¶ 108.) Contrary to Plaintiffs' allegation, that release does not "deceptively" omit discussion of the lead levels in Benton Harbor's water supply (Ex 46, 3/26/2021 Press Release.) It noted that "[e]levated lead levels were first discovered in Benton Harbor during routine testing in 2018 and residents were advised how to protect themselves by taking actions ranging from running their water in the mornings prior to first use to obtaining a lead reducing water filter," and explained that the "Berrien County Health Department has been providing free filters to residents with funding from [DHHS]." (*Id*.) The release further directed readers to the website https://www.michigan.gov/mileadsafe/. (*Id*.) The release also announced that Benton Harbor would be the first community in Michigan to benefit from the "Focus on Water initiative" in which approximately "100 Benton Harbor

residents" would "receive free in-home plumbing repairs . . . and faucet fixtures." (*Id.*)

For the six-month period from January to June 2021, the ninetieth percentile for lead sampling in Benton Harbor was 24 ppb, exceeding the 15 parts per billion action level. (Ex 49, 8/3/2021 ALE Notification.) Like the previous exceedances, EGLE required the City to issue public notification and educational materials to the Benton Harbor's water users. (Ex 48, 7/2021 Public Education Materials.) The local paper again reported on the materials, noting: "Benton Harbor water advisory issued for lead." (Ex 50, 8/10/2021 News Article.)

With F&V having the expertise and willingness to implement EGLE's designated February 2020 treatment, the City finally began to consistently hit its treatment target by May 2021. (Ex 63, Sarkipato Aff, ¶ 6.) For the six-month period from July to December 2021, the ninetieth percentile for lead sampling in Benton Harbor decreased to 15 parts per billion, so it no longer exceeded the action level. (Ex 61, 12/15/2021 Press Release.) But as explained above, neither the City nor EGLE had that information until December 2021, the end of the monitoring period. During that six-month window while samples were being collected and analyzed, many events occurred.

Both EGLE and the Governor took additional measures to support Benton Harbor.

On September 8, 2021, Governor Whitmer—with support from Benton Harbor's mayor—asked the Legislature to approve $20 million in support for

Benton Harbor in addition to the $5.6 million grant the EPA had awarded and another $3 million that EGLE was planning to give the City. (Ex 51, 9/8/2021 Press Release.) The Governor also issued a fact sheet summarizing EGLE's efforts up to that point to assist Benton Harbor. (Ex 52, 9/8/2021 State Efforts.)

On September 9, 2021, a Benton Harbor community organization and others submitted a petition to the U.S. EPA, explaining their belief that EGLE had not done enough to help Benton Harbor. (Ex 53, 9/9/2021 EPA Petition.) Specifically, the petition raised concerns that the filters that had been distributed for years to Benton Harbor residents may not have been effective against lead and asked the EPA to order the provision of bottled water. (Ex 53, 9/9/2021 EPA Petition, p 25.) Those concerns were later confirmed to be unfounded.[7]

By September 22, 2021, EGLE ramped up its efforts even more in Benton Harbor, including the provision of requested bottled water and several other measures. (Ex 54, 9/22/2021 News Article; Ex 55, 9/30/2021 Press Release.) The next month, Governor Whitmer also took significant steps to assist Benton Harbor, particularly to ensure that the City had sufficient funds and support to promptly replace all lead service lines in Benton Harbor. (Ex 56, 10/14/2021 Press Release; Ex 57, 10/19/2021 Press Release.)

Notably, the September 9, 2021 petition to the EPA was a precondition for those community organizations to file suit against the City in federal court under

[7] EPA performed the requested testing on the filters used in Benton Harbor and announced on March 3, 2022 that the filters are effective. https://www.epa.gov/mi/benton-harbor-michigan-drinking-water-study-results.

the federal Safe Drinking Water Act to seek injunctive relief. See 42 USC 300j-8. The organizations did not file suit.

On December 21, 2021 EGLE designated optimal water quality parameters for Benton Harbor as required under Rule 10604f(2)(e)(v). (Ex 62, 12/21/2021 Letter.)

On December 29, 2021—after EGLE announced that Benton Harbor was no longer under an active ALE for lead—Plaintiffs filed this lawsuit. As explained below, the suit must be dismissed.

LEGAL STANDARD

When adjudicating motions under MCR 2.116(C)(7), this Court "must" consider any documents submitted by the movant—not just the pleadings—and accept as true only well-pleaded allegations in the complaint that are not contradicted by the documents. *Maiden v Rozwood*, 461 Mich 109, 119 (1999); MCR 2.116(G)(5).

ARGUMENT

I. Plaintiffs cannot seek relief against Director Oswald personally.

Plaintiffs purport to sue Eric Oswald, though in his "official capacity." (Compl, ¶ 18.) Accordingly, their suit against Director Oswald "is no different from a suit against the State itself," and "cannot result in individual liability." *Mays v Snyder*, 323 Mich App 1, 88 (2018). In other words, if Director Oswald were to leave state employment, this lawsuit would not follow him. He is a "nominal party

defendant[]." *Id.* If at any time Plaintiffs indicate an intent to pursue Director Oswald personally for their constitutional tort or inverse condemnation claims, he reserves the right to seek immediate dismissal of such claims against him. That is because the Michigan Supreme Court has unequivocally held that persons cannot pursue Michigan constitutional tort claims against "an individual government employee." *Jones v Powell*, 462 Mich 329, 335 (2000). It is equally well-settled that individual government employees cannot be liable for inverse condemnation claims. Such claims arise when the government has abused its power of eminent domain. *Peterman v State Dep't of Nat. Res*, 446 Mich 177, 187–88 (1994). Since individuals do not have the power of eminent domain, it is not possible for individuals to abuse that power. See, e.g., *Vicory v Walton*, 730 F2d 466, 467 (CA 6, 1984).

II. The facts of this case do not support a constitutional tort claim.

In 1987, the Michigan Supreme Court—in a short memorandum opinion—held that a "claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith v Dep't of Pub Health*, 428 Mich 540, 544 (1987). In other words, in the "appropriate" case, "governmental immunity is not available in a state court action . . .where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution." *Id.* One of the concurring opinions, written by Justice Boyle, has since been recognized by the Court of Appeals as the best guide for discussing a constitutional tort. *Marlin v City of Detroit*, 205 Mich App 335, 337 (1994) ("[W]e find the observations of Justice Boyle in *Smith* to be helpful in

providing a framework in which to decide this case."); *Reid v State of Michigan*, 239 Mich App 621, 628 (2000) ("Justice Boyle's extensive analysis of this issue has generally been utilized by this Court."). And the Michigan Supreme Court adopted parts of Justice Boyle's opinion as precedent. *Jones*, 462 Mich at 337. Accordingly, Justice Boyle's opinion should guide this Court's analysis.

The "first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is, obviously, to establish the constitutional violation itself." *Smith*, 428 Mich at 648 (Boyle, J). Yet, "liability should only be imposed on the state in cases where a state 'custom or policy' mandated the official or the employee's actions." *Id.* at 642; see also *Carlton v Dep't of Corr*, 215 Mich App 490, 505 (1996). Thus, it is from Justice Boyle's opinion that the Court of Appeals has determined that "a plaintiff must show that the state action at issue (1) deprived the plaintiff of a substantive constitutional right and (2) was executed pursuant to an official custom or policy." *Mays*, 323 Mich App at 57 (citation omitted). Yet even if those elements are satisfied, the Court *still* must determine that it is appropriate to judicially create a damage remedy against the State. *Mays*, 323 Mich App at 65–66.

According to Justice Boyle, "statutory immunity [under MCL 691.1407(1)] would continue to bar suit for cases" where a plaintiff cannot satisfy those requirements. *Smith*, 428 Mich at 643 (Boyle, J). For example, in *Jones v Sherman*, 243 Mich App 611 (2000), the Court of Appeals recognized that statutory immunity continued to bar a so-called "constitutional tort" suit that did not satisfy

the prerequisites for bringing such a claim. *Id*. at 613–614. And in *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537 (2004), the Court of Appeals recognized that "[g]overnmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the Michigan Constitution." *Id*. 546–547 (citation omitted). But the Court held that the claim asserted by the plaintiffs, though clothed in constitutional language, sounded in tort, so it was "barred by governmental immunity." *Id*. at 556. See also *Rusha v Dep't of Corr*, 307 Mich App 300, 311–312 (2014) (though plaintiff asserted a constitutional tort, the State moved under MCR 2.116(c)(7), and plaintiff still had to satisfy the procedural prerequisites for avoiding the State's immunity).

In this case, Plaintiffs style Count I of their complaint as a constitutional tort, alleging that EGLE violated their substantive due process right to bodily integrity. Yet, Plaintiffs' allegations do not even support a basic negligence theory. *Wood v City of Detroit*, 323 Mich App 416, 424 (2018) (alleging, with the "benefit of hindsight" that the government "could have done more" does not satisfy the negligence standard). So, Plaintiffs cannot possibly demonstrate a violation of their constitutional right to bodily integrity. Accordingly, EGLE's "immunity" continues to "bar" Plaintiffs' suit. *Smith*, 428 Mich at 643 (Boyle, J).

A. This lawsuit is not comparable to the Flint Water Crisis and Plaintiffs cannot satisfy the elements of a bodily integrity claim under the Michigan Constitution.

The leading case on a bodily integrity claim under the due process clause of the Michigan Constitution is *Mays v Snyder*, 323 Mich App 1 (2018).[8] The *Mays* case arose out of the Flint Water Crisis, and Plaintiffs insist that their factual allegations cannot be distinguished from the Flint Water Crisis in any meaningful way. (Compl, ¶¶ 1–2.) That is not correct at all. The following table contrasts the facts alleged in *Mays* with the facts of this case:

The facts assumed true in *Mays*[9]	**The facts of this case**
The City of Flint was under the control of an "administrative officer of the state" because of emergency management. *Mays*, 323 Mich App at 50.	The City of Benton Harbor was a self-governing municipality not under emergency management.
The State "physically" switched Flint's water source to the Flint River even though it knew of the river's "hazardous properties," and that "Flint's water treatment system was inadequate" to manage those properties. *Mays*, 323 Mich App at 60–61.	Benton Harbor did not change water sources and the City owns and operates its own water treatment plant and delivery system.
After receiving "information suggesting that the water supply directed to Plaintiffs' homes was contaminated with . . . dangerously high levels of toxic lead," the State "intentionally concealed scientific data and made false assurances to the public regarding the	EGLE repeatedly required the City to provide educational materials to the public. (See pp 5–7, 14–15, 17, 21, 23–24 above.) And when it learned that the City was not providing alternative water supplies to its residents, EGLE promptly partnered with state and local

[8] Plaintiffs cite one of the Michigan Supreme Court's opinions in *Mays v Governor of Mich*, 506 Mich 157 (2020). (See, e.g., Compl, ¶ 162.) But since that it a nonbinding plurality opinion, it is more appropriate to cite the Court of Appeals' precedential majority opinion.

[9] The facts in *Mays* had to be assumed true because the Court used the standard under MCR 2.116(C)(8). *Mays*, 323 Mich App at 56.

safety of the Flint River water." *Mays*, 323 Mich App at 61–62. The State's actions resulted in the "intentional poisoning of the water users of Flint." *Id*. at 61.	health agencies to make them available free of charge to all Benton Harbor residents. (See pp 5, 8–9, 15 above.) When Benton Harbor residents raised concerns with the EPA about the effectiveness of filters and asked instead for bottled water, the State provided bottled water to residents. (See p 25 above.)
The State did not require Flint to treat the Flint River with a "a corrosion control additive." *Mays*, 323 Mich App at 21.	EGLE required the City to begin adding corrosion control treatment within months of the City's action level exceedance, and *years* sooner than what was required by the LCR. (See p 10 above.)

B. Contrary to facts assumed true in the Flint Water Crisis, EGLE proactively took measures to protect the public health in Benton Harbor.

The primary focus of Plaintiffs' complaint is that EGLE did not do enough to require the City to perform a corrosion control study prior to implementing treatment. (Compl, ¶¶ 68–80, 91–100.) Plaintiffs apparently insist that EGLE should not have approved the City's treatment recommendation and instead required it to first perform a comprehensive corrosion control study as part of "treatment steps" in the LCR. (Compl, ¶¶ 52–60.) But if EGLE had taken Plaintiffs' preferred course, then the LCR would have allowed the City to wait much, much longer before installing corrosion control treatment. The City would not have had to complete the study until March 8, 2020. Mich Admin Code, R 325.10604f(2)(e)(iii). And then, EGLE would not have been required to "designate optimal corrosion control treatment" until six months after the City completed the study. *Id*. If the City had completed the study on time (which was not guaranteed),

then at the earliest, EGLE would have been required to designate a treatment no later than September 8, 2020. And even then, the City would not have been required to *install* the treatment for 12 months following that designation. Mich Admin Code, R 325.10604f(2)(e)(iv). That means that if the City had completed Plaintiffs' preferred study on time, then the City would not have even been required to install treatment until September 8, 2021.

Fortunately, the LCR does not mandate that EGLE take that course. Instead, in the interest of public health, EGLE exercised its discretion under the LCR to accept the City's recommended treatment rather than require a study first. As a result, Benton Harbor began adding the initial corrosion control treatment its engineer had recommended to its water system on March 25, 2019—more than 2.5 years *sooner* than the scenario preferred by Plaintiffs. (Compl, ¶ 68.) Plaintiffs' argument that EGLE could have avoided violating their constitutional rights had it not allowed the City to install a corrosion control treatment for more than *two more years* is simply baffling.

As explained above, EGLE staff was anxious that the City install treatment as soon as possible rather than wait for years, noting that the "sooner this feed system is installed, the sooner public health protection is improved." (Ex 14, 2/26/2019 Email 0001081.) Moreover, EGLE's decision was not made in a vacuum. EGLE knew that corrosion control using orthophosphates was effective in other municipalities that drew their water from the same source and had similar systems to that of Benton Harbor. (Ex 64, Onan Aff, ¶ 13.)

Even with the accelerated timeline, EGLE knew that it would take time for the corrosion control treatment to take effect. (Ex 64, Onan Aff, ¶ 24.) So, as explained above, EGLE ensured that the City performed the public education required by the law to inform residents of the potential lead in their drinking water and how to avoid it, and it also helped ensure that water filters were widely available at no cost to all residents. (See pp 5–9 above.) Further, EGLE believed that the treatment may have needed to be adjusted over time, so it ensured that additional data would be collected by requiring the City to significantly increase the number of tap water samples it took and requiring the City to perform the coupon study recommended by its consulting engineer. (See pp 5–13 above.) During 2019, the data suggested that the treatment was starting to take effect because the percentage of water samples with high lead had decreased and the coupon data showed that the water was less corrosive. (See pp 15–16 above.)

But still, EGLE believed the treatment was not acting quickly enough. So, rather than wait for the City to finally perform a comprehensive corrosion control study (which the City continued to delay), EGLE directed the City to adjust its treatment protocol on February 13, 2020. (See pp 18–19 above.) Again, EGLE consulted with the EPA before doing so, and the EPA did not raise any concerns. (Ex 65, Oswald Aff, ¶ 7.) It took time before the City consistently implemented the protocol. (Ex 63, Sarkipato Aff ¶ 6.) But once the City terminated the employment of its water operator and contracted with a private firm to operate its water system, the protocol was successfully implemented. (*Id*.) As explained above, starting in

July 2021, Benton Harbor's water lead levels decreased below the action level. (See p 24 above.) If Plaintiffs had had their way, the City would not have even *installed* corrosion control treatment by that time.

C. EGLE's regulatory decisions did not violate Plaintiffs' bodily integrity.

Plaintiffs cannot possibly satisfy the basic elements of a bodily integrity claim outlined by the Court of Appeals. *Mays*, 323 Mich App at 58–62. The first element is that a plaintiff must show "an egregious, nonconsensual entry into the body." *Id.* at 60 (citation omitted). Examples of such entries are when "individuals are subject to dangerous or invasive procedures," such as nonconsensual stomach pumping or being beaten to death. *Id.* at 59–60 (citations omitted). The second element is that a person must show that the entry was the result of the government's "exercise of power without any legitimate governmental objective." *Id.* at 60 (citation omitted). The final element is that a person must establish not just a government's illegitimate nonconsensual entry into their body, but that the entry is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 60 (citation omitted). To satisfy this element, the government's conduct must be "intended to injure in some way unjustifiable by any government interest," or at the very least, the government must "know" of "an excessive risk" to the person's "health or safety," but "disregard" that risk such that the government acted with "deliberate indifference." *Id.* at 61 (citations omitted). Those elements are not satisfied here.

1. Plaintiffs do not demonstrate an egregious, nonconsensual entry into their bodies.

Plaintiffs allege that EGLE failed to "inform[] the public about the [lead] it knew [was] flowing through the system" and so none of them knew "they were consuming lead contaminated water and did not consent to having their home or bodies invaded by lead contaminated water." (Compl, ¶¶ 6, 123, 128, 133, 139.) Yet, the multi-year public education efforts performed by the City—as required by the LCR and EGLE—are exhaustively documented, as explained above. Plaintiffs' allegation that residents "of Benton Harbor literally received state-sanctioned propaganda telling them how to feed lead-contaminated water to their babies" is, frankly, nonsense. (Compl, ¶ 105.) The City repeatedly advised residents to use bottled or filtered water to prepare baby formula. (Exs 3, 20, 28, 37, 43, 48.) And EGLE and other entities immediately corrected the incorrect information being disseminated by the City's water superintendent. (Exs 9, 10, and 64, Onan Aff, ¶ 16.) Considering the mountain of evidence to the contrary, the Court cannot assume it to be true that EGLE did not require the City to "inform[] the public" about lead. *Maiden*, 461 Mich at 119.

Plaintiffs also allege that the water in their homes or business was "lead contaminated" and they "consumed" it. (Compl, ¶¶ 122, 127, 132, 138.) But there is no indication that Plaintiffs ever tested the water in their homes or business prior to the date they filed their lawsuit, even though testing had been freely available in Benton Harbor for years. (Ex 64, Onan Aff, ¶ 31.) This evidence contradicts Plaintiffs' allegations that their homes and business had water that was "lead

contaminated," so this Court must not assume the truth of those allegations. *Maiden*, 461 Mich at 119. Additionally, Plaintiff Katie Lynn Reykjalin, who allegedly lives at 1682 Colfax Ave, does not even receive water from Benton Harbor's water system. (Ex 64, Onan Aff, ¶32.) So, she cannot possibly have a claim based on Benton Harbor's water.

Importantly, simply because a water system has an ALE for lead does not mean that lead is entering every building on the system. In Benton Harbor, for example, the vast majority of tap water samples collected by the City came back as either "non-detect" for lead or well below the 15 ppb action level. (Ex 60, Sample Results.) Additionally, sampled water is required to be more stagnant than it typically would in an ordinary household to identify "worst case" scenarios. (Ex 64, Onan Aff, ¶ 26.) Moreover, according to the EPA, a variety of factors, such as the condition of a building's pipes, the composition of plumbing fixtures, water temperature, and others determine "the extent to which lead enters the water" from pipes.[10] So, it is not correct for Plaintiffs to argue that just because the samples at Benton Harbor's ninetieth percentile exceeded 15 ppb, it must have meant that *all* homes in Benton Harbor—including those routinely using toilets, showers, and washing machines—had high water lead levels. (Ex 64, Onan Aff, ¶ 26.)

[10] https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#getinto.

Without the benefit of their allegations that are contradicted by evidence, Plaintiffs' fail to satisfy even the first element of a "bodily integrity" claim. That failure is fatal to their claims.

2. EGLE did not cause the alleged invasion of Plaintiffs' bodily integrity.

As noted above, the key facts assumed true in *Mays* were that the State operated the City's water system, choose to switch to the Flint River as a water source knowing that it would contaminate Flint's drinking water with lead, and actively tried to keep people from learning about the lead in their water. *Mays*, 323 Mich App at 60–62. That was the basis for the Court of Appeals' conclusion that the "nonconsensual entry of contaminated and toxic water" into the Plaintiffs' bodies was the "direct result of" the State's actions. *Id.* at 261. And the Court determined that it could "conceive of no legitimate governmental objective for this violation of plaintiffs' bodily integrity." *Id.*

Here, even if Plaintiffs *could* demonstrate that an invasion of their bodily integrity occurred (they cannot), the invasion could not possibly have been the direct result of EGLE's actions. The City operated its own water system, and EGLE did nothing to contaminate the system with lead. The City's own, routine testing of its water discovered the high lead levels. Once that exceedance was discovered, EGLE acted swiftly. EGLE not only ensured that that the public was notified and filters were made available at no cost to all Benton Harbor residents, but also took additional steps to protect public health by ordering the City to do *even more* than

the minimal requirements of the LCR and implement corrosion control treatment right away. (See pp 5–10 above.) Plaintiffs cannot plausibly argue that EGLE had "no legitimate governmental objective" for taking these public health measures.

3. EGLE's regulatory actions do not "shock the conscience."

EGLE required the City to install corrosion control on an accelerated timeline without the City completing a comprehensive study beforehand. The LCR does not mandate that a study be performed first and EGLE had a public health interest in getting treatment installed quickly. See Mich Admin Code, R 325.10604f(2)(e)(ii) (EGLE "may" require the study before installation of treatment). EGLE's decision to move forward without a comprehensive study was not "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Mays*, 323 Mich App at 60. There is certainly no indication in Plaintiffs' complaint or otherwise that EGLE "intended to injure" the Benton Harbor's residents. *Id*. Nor was EGLE "deliberately indifferent" to residents' health. *Id*. at 60–61. Specifically, to "shock the conscience" based on "deliberate indifference," EGLE must have been "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," and then "draw the inference," and then "act in a manner demonstrating reckless or callous indifference toward" an individual's "rights." *Ewolski v City of Brunswick*, 287 F3d 492, 513 (CA 6, 2002) (citations omitted). The facts in this case cannot possibly satisfy the exacting standard. When the City failed to adequately provide alternative water to its residents, EGLE worked with state and local health departments to ensure filters were available and required the

City to issue public educational materials to each user of the system. EGLE's proactive effort to ensure the City implemented treatment as quickly as possible demonstrated *a dedication to the public health*—the exact opposite of deliberate indifference.

D. No EGLE policy mandated the violation of Plaintiffs' bodily integrity.

As explained above, even if Plaintiffs could satisfy the elements of a bodily integrity claim, that would not be enough for a constitutional tort under the Michigan Constitution. Plaintiffs would also have to show that a custom or policy "mandated" the violation of their constitutional rights. *Mays*, 323 Mich App at 63, citing *Carlton*, 215 Mich App at 505. The requirement comes from Justice Boyle's holding that the "state's liability should be limited to those cases in which the state's liability would, but for the Eleventh Amendment, render it liable under the 42 U.S.C. 1983 standard for local governments articulated in *Monell v. New York City Dep't of Social Services,* 436 U.S. 658 . . . (1978)." *Smith*, 428 Mich at 642 (Boyle, J).

In *Mays*, the *Monell* standard was satisfied because the Court concluded, based on the facts it assumed were true, that there was "a coordinated effort involving various state officials" including "the Governor, the State Treasurer, the emergency managers, and other state officials, including officials employed by the DEQ" to "resist a return to the Detroit water distribution system, to downplay and discredit accurate information . . . regarding lead in the water supply and . . . in the

bloodstreams of Flint's children, and to continue to reassure the Flint water users that the water was safe and not contaminated with lead." *Mays*, 323 Mich App at 64–65. In other cases, the *Monell* standard was satisfied when the person responsible for establishing a county's policies for how deputy sheriffs served capiases commanded deputy sheriffs to violate a specific person's Fourth Amendment rights. *Pembaur v City of Cincinnati*, 475 US 469, 485 (1986). Or when a police department's policy required its officers to use an "investigative tactic" that "violated a person's Fourth Amendment rights." *Johnson v Vanderkooi*, 502 Mich 751, 776 (2018).

The facts in this case do not compare in the slightest. The City, not an emergency manager, operated the City's water system. Plaintiffs do not allege that the City was using an unsafe water source or that EGLE had any role in approving a water switch that never happened. EGLE's effort to get treatment in place, help provide filters and education, and help the City obtain grant funding to start replacing its lead service lines, were all efforts to *protect* Plaintiffs' health, not injure it. Plaintiffs cannot even demonstrate a violation of their bodily integrity, let alone that EGLE somehow "mandated" that violation.

E. A judicially created damage remedy is not appropriate in this case.

Even if Plaintiffs could demonstrate a violation of their bodily integrity mandated by an EGLE policy, they would still need to demonstrate that it would be appropriate for this Court to infer the damage remedy they request. To perform the

analysis, this Court considers "the weight of various factors," including "(1) the existence and clarity of the constitutional violation itself, (2) the degree of specificity of the constitutional protection, (3) support for the propriety of a judicially inferred damage remedy in any text, history, and previous interpretations of the specific provision, (4) the availability of another remedy, and (5) various other factors militating for or against a judicially inferred damage remedy." *Mays*, 323 Mich App at 65–66 (citations omitted).

The first factor is not satisfied here because Plaintiffs cannot demonstrate a violation of their bodily integrity, as explained above. See *Mays*, 323 Mich App at 66 (first factor satisfied if a constitutional violation is demonstrated). And the *Mays* majority already determined that the second and third factors are not satisfied when a claim is based on the substantive due process right to bodily integrity. *Id.* The fourth factor is satisfied under the *Mays* court rationale, however, because Plaintiffs have sued EGLE for damages, and they cannot sue EGLE for damages under a tort theory in state court or under any theory in federal court.[11] *Mays*, 323 Mich App at 67–68. The only "other" factor the court in *Mays* identified was "the degree of outrageousness of the state actors' conduct as alleged by plaintiffs," and ruled that the factor "weighs considerably in favor of recognizing a remedy." *Id.* at 72 (citation omitted). As noted above, the contrast between the Flint Water Crisis

[11] EGLE does not concede that the Court of Appeals correctly decided that the fourth factor is satisfied simply because a person cannot directly sue EGLE for damages in other courts, but it recognizes that the holding is binding on this Court. EGLE preserves its right to challenge the *Mays* analysis of that factor on appeal if necessary.

and this case is stark, so this factor does not apply. Accordingly, four of the five factors that inform whether this Court should create a damage remedy weigh *against* the creation of the remedy, making it inappropriate for the Court to do so.

III. Plaintiffs' "inverse condemnation" claim does not arise from the Takings Clause of the Michigan Constitution.

Plaintiffs allege that EGLE "took" their property because of "the physical invasion of corrosive, lead-contaminated water into their properties." (Compl, ¶ 173.) As noted, one Plaintiff is not even on Benton Harbor's water system, and there is no evidence that any of the other Plaintiffs have tested the water in their homes or business. (Ex 64, Onan Aff, ¶¶ 31–32.) That evidence contradicts their threshold allegations, so this Court does not assume it true that "lead-contaminated water" has invaded Plaintiffs' homes or business. *Maiden*, 461 Mich at 119. That defeats Plaintiffs' so-called "inverse condemnation" claims. But the claims suffer from additional, and equally fatal flaws, including that the claims are tort claims cloaked in constitutional language to which EGLE remains immune.

A. EGLE is immune to tort claims that are merely cloaked in constitutional language.

Like a constitutional tort, an inverse condemnation claim is a cause of action by which a person can seek monetary relief against the State based on a constitutional violation. Also like a constitutional tort, statutory immunity continues to apply to such claims when they are just ordinary tort claims disguised in constitutional language. If a governmental defendant believes a property

damage claim arises in tort rather than from the language of the Takings Clause, then it is standard practice to use a motion under MCR 2.116(C)(7) to attack the "inverse condemnation" claim as a failure to plead in avoidance of governmental immunity. For example, in *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264 (2009), the governmental party filed a motion under MCR 2.116(C)(7), submitted an affidavit contradicting the complaint, and argued that the plaintiff's so-called inverse condemnation claim was a tort claim to which the governmental party was immune. *Id*. at 274. The trial court granted the motion, and the Court of Appeals agreed that "the doctrine of governmental immunity barred" the plaintiff's so-called inverse condemnation claim. *Id*. at 295–296. See also *Hinojosa*, 263 Mich App at 548 (governmental party attacked an inverse condemnation claim under MCR 2.116(C)(7) asserting its immunity, and court agreed, holding that claim was still "barred by governmental immunity"); *Attorney General v Ankersen*, 148 Mich App 524, 558 (1986) (court held that a so-called inverse condemnation claim continued to be "barred by governmental immunity").

A bona fide inverse condemnation claim can only arise if the government has "taken" private property "for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. An inverse condemnation claim is "distinct" from a tort claim for damages, and the two "should not be confused" with one another. *Peterman*, 446 Mich at 206–207 (1994). That is because "Michigan is a 'taking' state rather than a 'taking or damaging'

state." *Hart v City of Detroit*, 416 Mich 488, 500 (1982). Damage to property is not enough to justify a claim under the Takings Clause. Instead, as the Michigan Supreme Court put it, an inverse condemnation claim is to recover for a "de facto taking when the state fails to utilize the appropriate legal mechanisms to condemn property for public use." *Peterman*, 446 Mich at 187–188.

B. EGLE did not put Plaintiffs' property to a public use.

If the government uses its eminent domain power to take private property and put it to a public use, it must pay "just compensation" to the owner of the private property "in a manner prescribed by law." Const 1963, art 10, § 2. The "manner prescribed by law" that regulates the government's use of its power of eminent domain is the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 et seq. *Michigan Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 576 (2006) (the "ultimate purpose" of the UCPA "is to ensure the guarantee of just compensation found in" the Constitution). The UCPA requires that if "property is to be acquired by an agency through the exercise of its power of eminent domain, the agency shall commence a condemnation action for that purpose." MCL 213.52(2).

For over a hundred years, when Michigan courts have recognized that a government unlawfully put private property to a "public use," it has been because the government implemented a public project of some kind. See, e.g., *Ashley v City of Port Huron*, 35 Mich 296 (1877) (city's construction of sewer); *Allen v City of Detroit*, 167 Mich 464 (1911) (city construction of a fire station); *City of Big Rapids v*

Big Rapids Furniture Mfg Co, 210 Mich 158 (1920) (city construction of a road); *Thom v State*, 376 Mich 608 (1965) (state construction of highway); *Peterman*, 446 Mich at 188 (state construction of boat launch); *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116 (2004) (city expansion of its airport); *Wiggins v City of Burton*, 291 Mich App 532 (2011) (city construction of drain); *Mays v Governor of Mich*, 506 Mich 157 (2020) (state operation of local water system).

Occasionally, a person attempts to assert an inverse condemnation claim not because the government agency was implementing a government project, but because the agency *regulated* a third party that allegedly damaged the person's property. In a well-established line of cases, the Court of Appeals has held that the government's regulation of third parties—even regulation that is allegedly negligent—does not take private property for a "public use" in the constitutional sense, and that such claims arise, if at all, only in tort.

In *Attorney General v Ankersen*, 148 Mich App 524 (1986), for example, the DNR had issued a license to a company that claimed it could safely dispose of hazardous waste. *Id*. at 534. Over the course of several years, the company failed to comply with licenses and enforcement notices from the DNR. The DNR repeatedly inspected the property and found that the number of barrels of untreated hazardous waste increased from hundreds to thousands as the company failed to dispose of them properly. *Id*. at 534–535. Based on assurances from the company, the DNR renewed the company's license "in spite of the repeated violations." *Id*. at 535. Eventually, the property was deeply polluted and the DNR

finally turned its enforcement attention to the owners of the property. *Id*. at 542. The owners failed to clean up their property, and the DNR filed a lawsuit against the property owners and many others to force the remediation of the site. *Id*.

The property owners, however, filed a counterclaim against the DNR, alleging that the DNR had inversely condemned the property in violation of the Takings Clause by allowing the noncompliant operator to continue operating for so long. *Ankersen*, 148 Mich App at 532. The property owners alleged that a "situation was allowed to begin, fostered by, acceded to, complied with and generally approved by the Department of Natural Resources to the extent that it in effect [became] a party to the entire incident." *Id*. at 543. Like Plaintiffs' allegations in this case, the plaintiffs in that case alleged "that the granting of licenses and subsequent failures to supervise and regulate the disposal operations at [the property] proximately caused a loss of use and value in the property and constituted a 'taking.'" *Id*. at 560–561.

The Court of Appeals rejected the theory that alleged negligent regulation of a third party could put the person's property to a "public use" under the Takings Clause. Although the Court noted that "the evidence may show that the DNR was negligent in licensing [the company] in the first place and in not moving sooner to compel compliance," *id*. at 545, it concluded "that 'control' of the property means more than issuing a permit or regulating an activity on the property," *id*. at 560, citing *Disappearing Lakes Association v Dep't of Natural Resources*, 121 Mich App 61 (1984). The DNR had not put the plaintiffs' property to a "public use" simply by

regulating the third party that operated on the property, even if DNR regulated negligently, so it could not have been "taken" in the constitutional sense. *Id*. at 561–562. Because the property owners' claim that their property had been taken for a public use was just a tort claim for negligence, this Court agreed with the trial court that the inverse condemnation claim continued to be barred by governmental immunity. *Id*. at 558.

The Court of Appeals has relied on *Ankersen* for more than 30 years to consistently reject regulation-as-public-use allegations in property damage cases. In *Hinojosa v Department of Natural Resources*, 263 Mich App 537 (2004), the State acquired a building not to implement some project, but simply because "no one redeemed it following a tax sale." *Id*. at 539. The building caught fire and damaged the plaintiffs' homes. *Id*. The plaintiffs filed suit, alleging an inverse condemnation claim against the DNR. But both the trial court and the Court of Appeals dismissed the claim. The Court held that even though the claim was styled as inverse condemnation, the plaintiff had, "at most, alleged negligent failure to abate a nuisance," so the claim was still "barred by governmental immunity." *Id*. at 548. The Court cited *Ankerson*, reaffirming that "the state's action of licensing a person or corporation to conduct a private business 'cannot be regarded as a taking of private property by the government for public use.'" *Id*. at 549–550.

In *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264 (2009), the City of Bloomfield Hills approved a third party's home construction plan that was meant to allow water to drain away from their

neighbor's property. *Id.* at 267–268. During construction, the third party did not follow the plan, the result being that water was channeled onto their neighbors' property. But the City still issued the third party a permit to occupy their newly constructed home "[d]espite this alleged deviation from the approved plan." *Id.* at 268. The neighbor filed an inverse condemnation claim against the City, but the Court of Appeals rejected the claim, citing both *Ankersen* and *Hinojosa*. *Id.* at 295. The Court again reaffirmed "that the state's licensing of a person or corporation to conduct a private business could not be regarded as a taking of private property for public use," and that "the state's alleged misfeasance in licensing and supervising" of a third party cannot be the basis of a taking claim. *Id.* See also *Long v Liquor Control Commission*, 322 Mich App 60 (2017), citing *Ankersen* and *Marilyn Froling Revocable Living Trust* and holding that giving a license to a third party cannot form the basis of an inverse condemnation claim.

The *Ankersen* line of cases applies just as strongly to this case where the third-party entity EGLE regulated was a city rather than a private business. The analysis from those cases does not change just because Benton Harbor is a governmental entity. EGLE regulates both public and private water suppliers. MCL 325.1002(m) and (t). Nothing about the reasoning used in the *Ankersen* line of cases would require that those cases would apply to EGLE's regulation of a *private* third party but not a *public* third party.

In this case, Plaintiffs allege an "inverse condemnation" claim, but if EGLE had filed a condemnation action under the UCPA, what would have been the basis

of the action and what would have been the relief it sought? That hypothetical question highlights the fact that EGLE was not undertaking some type of public project that required the use of Plaintiffs' property or that somehow ended up sweeping Plaintiffs' property into its scope, such as the construction of a boat launch, road, school, or airport. Instead, Plaintiffs' allegations are based on EGLE's regulation of the City (a third party), and Plaintiffs' theory that EGLE did not do a good enough job of forcing the City to operate its water system in the way Plaintiffs would have preferred. That is the precise type of "regulation-of-third-party-as-inverse-condemnation" theory that Michigan courts have emphatically rejected for decades.

Plaintiffs will undoubtedly cite *Mays v Governor of Mich*, 506 Mich 157 (2020), but that case does not help them. The Michigan Supreme Court in *Mays* decided the inverse condemnation issue using the standard under MCR 2.116(C)(8) and accepted as true that there was no meaningful distinction between the State and Flint because Flint was operated by an emergency manager who reported to the State. *Mays*, 506 Mich at 174–175. By collapsing the distinction, the Court put the State into Flint's shoes as the operator of the city's water system that changed Flint's water source as a cost saving measure knowing it would damage property, declined to treat the new water source, and took the residents' property as part of that cost-saving endeavor. *Id*. As the Court of Appeals put it when it distinguished *Ankerson* from the Flint Water Crisis, "plaintiffs have not alleged any failure to regulate or supervise; instead, plaintiffs have alleged an affirmative act of switching

the water source with knowledge that such a decision could result in substantial harm." *Mays*, 323 Mich App at 81.

In contrast here, the City owned and operated its own water treatment system. And EGLE did not allegedly switch Benton Harbor's water source from a benign source to a corrosive one that EGLE knew would damage Plaintiffs' property. The *Mays* case simply does not apply to this case. Plaintiffs vaguely allege that EGLE had taken over the City's treatment decisions. (Compl, ¶¶ 63–68.) But the evidence shows that EGLE—in consultation with EPA—approved the City's treatment recommendation that the City received from its private consultant, which was an ordinary exercise of EGLE's regulatory function. (See pp 7–10 above.) EGLE remains immune to Plaintiffs' so-called "inverse condemnation" claim.

C. EGLE did not abuse its eminent domain power in actions specifically directed toward Plaintiffs' property.

Another requirement for an inverse condemnation claim is that a plaintiff demonstrate that the government agency took "some action" that was "specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Mays*, 323 Mich App at 79 (citation omitted). But the *Ankersen* line of cases also rejected the argument that regulating *a third party's* property is specifically directed at the plaintiff's property. In *Ankersen*, the Court held that "the state's alleged misfeasance in licensing and supervising the operation does not constitute 'affirmative actions directly aimed at the property,'" and thus "cannot be found to constitute a 'taking.'" *Ankersen*, 148 Mich App at 562 (citation omitted).

Similarly, the Court held in *Hinojosa* that the allegation that DNR knew about the fire danger its building posed to the neighbors but allowed the building to continue to exist was *not* sufficient to show "that the state took affirmative action directed at *plaintiffs'* properties." *Hinojosa*, 263 Mich App at 550 (emphasis added), citing *Ankersen*, 148 Mich App at 562. Again, in *Marilyn Froling Revocable Trust*, the Court held that the city's refusal to construct a drainage system and approval of a person's construction plans that caused flooding was not the type of "affirmative action by the city directly aimed at the Frolings' property" that could constitute an inverse condemnation claim. *Marilyn Froling Revocable Living Trust*, 283 Mich App at 296, citing *Ankersen*, 148 Mich App at 562 and *Hinojosa*, 263 Mich App at 550. And in *Long*, the Court rejected the argument that issuing a license to a nearby property owner was an "affirmative action by the [government] aimed directly at [plaintiff's] property." *Long*, 322 Mich App at 73, citing, *Marilyn Froling Revocable Living Trust*, 283 Mich App at 295.

In short, even if Plaintiffs *could* show that EGLE's regulation of Benton Harbor's water system had somehow put their properties to a "public use," their claims still fail as a matter of law because those regulatory actions against the *third-party city* cannot constitute "affirmative acts aimed directly" at *Plaintiffs' properties*.

D. EGLE's regulatory actions were not the substantial cause of the alleged decline of their property value.

Another requirement for Plaintiffs' inverse condemnation claim is that EGLE's "actions" must have been "a substantial cause of the decline of the property's value." *Mays*, 506 Mich at 174 (citation omitted). To satisfy this standard, the alleged diminution of the value of Plaintiffs' property must have been, at a minimum, "the natural and direct result" of EGLE's actions. *Peterman*, 446 Mich at 191. Plaintiffs cannot possibly satisfy that standard. As noted above, the heart of Plaintiffs' allegations against EGLE are that it ordered Benton Harbor to install corrosion control treatment right away without first requiring the City to perform a comprehensive corrosion control study. But also, as explained above, Plaintiffs' preferred alternative would have been to allow the City to delay installing actual treatment for *years* while the study was underway. High lead levels in Benton Harbor's water system preexisted EGLE's involvement, and if EGLE had allowed the City to forgo the installation of treatment for years, how would that have kept the preexisting lead in the water supply from allegedly entering Plaintiffs' property? Plaintiffs' causation theory does not make sense, and further illustrates that their claim for property damages does not arise from the plain language of the Takings Clause.

CONCLUSION AND RELIEF REQUESTED

The evidence tells the real story in this case. It shows that EGLE went beyond minimum legal requirements to act quickly and effectively protect the public health. Plaintiffs' allegations to the contrary are not presumed true, and Plaintiffs fail to give their tort claims the constitutional dimension that could potentially avoid EGLE's immunity. Accordingly, EGLE requests that the Court dismiss Plaintiffs' suit in its entirety, along with any relief the Court considers appropriate.

Respectfully submitted,

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