UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONCERNED PASTORS FOR SOCIAL ACTION; MELISSA MAYS; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; and NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Plaintiffs,

v

NICK A. KHOURI, in his official capacity as Secretary of Treasury of the State of Michigan; FREDERICK HEADEN, in his official capacity as Chairperson of the Flint Receivership Transition Advisory Board; MICHAEL A. TOWNSEND, in his official capacity as Member of the Flint Receivership Transition Advisory Board; DAVID MCGHEE, in his official capacity as Member of the Flint Receivership Transition Advisory Board; MICHAEL A. FINNEY, in his official capacity as Member of the Flint Receivership Transition Advisory Board; BEVERLY WALKER-GRIFFEA, in her official capacity as Member of the Flint Receivership Transition Advisory Board; NATASHA HENDERSON, in her official capacity as City Administrator; and CITY OF FLINT;

Defendants.
_____/

No. 16-cv-10277

HON. DAVID M. LAWSON

MAG. STEPHANIE DAWKINS DAVIS

DEFENDANTS STATE TREASURER'S AND MEMBERS OF THE FLINT RECEIVERSHIP TRANSITION ADVISORY BOARD'S EMERGENCY MOTION FOR STAY PENDING APPEAL

ACTION REQUESTED BY NOVEMBER 21, 2016

DEFENDANTS STATE TREASURER'S AND MEMBERS OF THE FLINT RECEIVERSHIP TRANSITION ADVISORY BOARD'S EMERGENCY MOTION FOR STAY PENDING APPEAL

1. Defendants State Treasurer and members of the Flint Receivership Transition Advisory Board (State Defendants), by counsel, respectfully request that this Court stay the November 10, 2016 preliminary injunction (Doc #96) pending an appeal.

2. A stay of the injunction is warranted because the State Defendants are likely to prevail on the merits of their appeal, neither Plaintiffs nor the residents of Flint will be irreparably harmed by a stay, and the public interest strongly favors a stay.

3. Emergency consideration of this motion is required because the injunction places an immediate, insurmountable, burden on the State of Michigan and is directed at the State Defendants, who lack the authority to ensure compliance.

4. Concurrence in this motion was sought, there was a conference between the attorneys via email in which State Defendants explained the nature of the motion, and concurrence was denied on November 16, 2016.

WHEREFORE, the State defendants respectfully request that this Court stay the November 10, 2016 preliminary injunction (Doc #96) pending an appeal.

/s/ Nathan A. Gambill
Richard S. Kuhl (P42042)
Nathan A. Gambill (P75506)
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Michael F. Murphy (P29213)
Joshua O. Booth (P53847)
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Dated: November 17, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERNSOUTHERN DIVISION

CONCERNED PASTORS FOR SOCIAL ACTION; MELISSA MAYS; AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN; and NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Plaintiffs,

v

NICK A. KHOURI, in his official capacity as Secretary of Treasury of the State of Michigan; FREDERICK HEADEN, in his official capacity as Chairperson of the Flint Receivership Transition Advisory Board; MICHAEL A. TOWNSEND, in his official capacity as Member of the Flint Receivership Transition Advisory Board; DAVID MCGHEE, in his official capacity as Member of the Flint Receivership Transition Advisory Board; MICHAEL A. FINNEY, in his official capacity as Member of the Flint Receivership Transition Advisory Board; BEVERLY WALKER-GRIFFEA, in her official capacity as Member of the Flint Receivership Transition Advisory Board; NATASHA HENDERSON, in her official capacity as City Administrator; and CITY OF FLINT;

Defendants.
_____/

No. 16-cv-10277

HON. DAVID M. LAWSON

MAG. STEPHANIE DAWKINS DAVIS

BRIEF IN SUPPORT OF DEFENDANTS STATE TREASURER'S AND MEMBERS OF THE FLINT RECEIVERSHIP TRANSITION ADVISORY BOARD'S EMERGENCY MOTION FOR STAY PENDING APPEAL

ACTION REQUESTED BY NOVEMBER 21, 2016

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Should the November 10, 2016 preliminary injunction be stayed pending appeal?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 244 (6th Cir. 2006)

Roth v. Bank of the Commonwealth, 583 F.2d 527, 539 (6th Cir. 1978).

Kallstrom v. City of Columbus, 136 F.3d 1055, 1068 (6th Cir. 1998)

INTRODUCTION

One thing is clear in this case: Plaintiffs, the State of Michigan, and this Court all share a common goal of ensuring that the residents of the City of Flint have access to safe drinking water. As established at the hearing on Plaintiffs' motion, and in the Court's own words, the State of Michigan has made "significant," "substantial," and "commendable" efforts to achieve that goal. (Opinion and Order, Doc #96, Pg ID 6311, 6314, 6318.) The State already intended to continue those efforts even in the absence of the preliminary injunction. But the preliminary injunction increases the scope of the State's emergency response to an unnecessary and insurmountable degree, particularly in light of the injunction's time constraints. Rather than preserve the status quo, the preliminary injunction directly mandates significant changes that will require a tremendous expenditure of taxpayer funds—without even requiring Plaintiffs to provide security that ensures the taxpayers will be made whole in the event State Defendants have been wrongfully enjoined. The required injunction far exceeds what is necessary to ensure Flint residents have access to safe drinking water.

STATEMENT OF FACTS

The facts of this case are familiar to this Court and will be recounted as necessary in the Argument section.

ARGUMENT

I. The Court's preliminary injunction should be immediately stayed pending appeal.

In *Coalition to Defend Affirmative Action v. Granholm*, the Sixth Circuit set out the familiar standard for a stay pending appeal:

> [W]e consider "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." All four factors are not prerequisites but are interconnected considerations that must be balanced together. [473 F.3d 237, 244 (6th Cir. 2006) (citations omitted).]

Here, all of these interconnected considerations counsel in favor of the Court staying the preliminary injunction.

A. The State Defendants are likely to succeed on appeal.

The State Defendants will appeal this Court's injunction, and it is likely that the appeal will be successful for at least four reasons. First, the Treasurer and members of the RTAB are not "operators" of the Flint

water system; second, the Eleventh Amendment prohibits the remedial relief Plaintiffs seek because Plaintiffs failed to demonstrate an ongoing violation of the Safe Drinking Water Act (SWDA); third, the injunction is overbroad and unsupported by reliable evidence; and fourth, the Court failed to comply with the security requirement of Rule 65(c).

1. The Treasurer and individual members of the RTAB are not "operators" of the Flint water system.

To be subject to the SDWA, the Treasurer and members of the RTAB must be "operators" of the Flint water system. See generally, 42 U.S.C. § 300f(5). In order to justify the ruling that these defendants are operators, the Court improperly imputed the past actions of the emergency managers to the RTAB and Treasurer and equated the RTAB's financial oversight with the ability to ensure compliance with the SDWA. (Opinion and Order, Doc. 96, Pg ID 6302–6306.) But as the Court acknowledged, emergency managers are only authorized to act "for and in the place . . . of the local government." (*Id.*, Pg ID 6302, quoting Mich. Comp. Laws § 141.1549(2).) For this reason, Michigan's Court of Appeals has ruled that an act of an emergency manager is not an act of the Governor. *Kincaid v City of Flint*, 874 N.W.2d 193, 201–

202 (Mich. Ct. App. 2015).[1] The Sixth Circuit also recently confirmed that emergency managers are local actors. *Phillips v. Snyder*, 836 F.3d 707, 715–716 (6th Cir. 2016) (holding that there is no constitutional right that local officials, such as emergency managers, are elected).

The fact that neither the Treasurer nor the RTAB members have the authority to take, or even direct, the steps necessary to comply with the injunction, let alone the SDWA, further shows that the State Defendants are not operators. The sworn statements of Fred Headen and Larry Steckelberg confirm that neither the Flint RTAB nor the Treasurer took any action to test or monitor the Flint water system, advise the system how to comply with the SDWA, or otherwise ensure the system's compliance with the SDWA. The statements also confirm that neither the State Treasurer nor the RTAB members have the

[1] The Michigan Court of Claims recently ruled that emergency managers operated as officers of the state while executing their responsibilities. *Mays v. Snyder,* No. 16-000017 (Mich. Ct. Cl., October 26, 2016). This holding contradicts a 2015 opinion of the Michigan Court of Claims which held the opposite: that acts of emergency managers cannot be imputed to the State. *Pillar v. State of Michigan*, No. 13-000164 (Mich. Ct. Cl., September 22, 2015.) Regardless, the October 26, 2016 opinion is not binding on Michigan courts, let alone this court, and an appeal of that decision is pending.

ability to comply with the preliminary injunction, such as ordering the Michigan State Police, Michigan Department of Environmental Quality, or State Legislature to take any particular action. (Affidavit and Declaration submitted to the Court on August 29, 2016 in compliance with the Court's August 18, 2016 order.) Plaintiffs have presented no evidence, and cite no law, to contradict these sworn statements.

Moreover, neither the Treasurer nor any individual member of the RTAB can affirmatively make remediation decisions or direct the expenditure or allocation of the "State's" resources. They lack the authority to spend any money not appropriated by the Legislature, or spend any appropriated money for a purpose other than that for which it was allocated. Mich. Const, art. IX. § 17 ("No money shall be paid out of the state treasury except in pursuance of appropriations made by law.")

2. The Eleventh Amendment prohibits the relief Plaintiffs seek.

Regardless of whether State Defendants are "operators" under the SDWA, the citizen-suit provision upon which Plaintiffs rely only authorizes suits to proceed "to the extent permitted by the eleventh

amendment to the Constitution." 42 U.S.C. 300j-8(a)(1)(B). State Defendants are likely to prevail on this issue on appeal.

It is well-settled that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . . ." *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). Thus, Plaintiffs must demonstrate, at the very least, an ongoing violation of federal law to benefit from the *Ex parte Young* exception to the Eleventh Amendment. *Id.*

Plaintiffs' motion for a preliminary injunction alleges two ongoing violations of the SDWA: (1) failure to comply with the monitoring requirements; and (2) failure to maintain optimum corrosion control treatment. The Court found that both these requirements continue to be violated. (Opinion and Order, Doc. 96, Pg ID 6295–6301.) But on appeal, it is likely that the Sixth Circuit will disagree.

In regard to the monitoring requirements, the Court concluded that "defendants do not contest this argument," (*id.*, Pg ID 6298), but that is not accurate. Bryce Feighner, the Chief of MDEQ's Office of Drinking Water and Municipal Assistance, testified at length about the

current monitoring efforts, the confirmation that the monitoring sites comply with the requirements of the Lead and Copper Rule, and the U.S. EPA's involvement in this intense monitoring. (9/14/16 Hearing Tr., pp 216–220.) Because of this monitoring, the City, State, and U.S. EPA have learned that the lead content in Flint's drinking water has been below the 15 ppb action level for many months: May, June, July, and August of 2016. (*Id.*, pp 218-219.) The latest monitoring results from testing done in September show that the level is 9 ppb.[2] The Sixth Circuit is not likely to hold that the record supports the Court's conclusion that "[t]he defendants have not offered contrary evidence" to contradict Plaintiffs' monitoring allegations. (Opinion and Order, Doc. 96, Pg ID 6301.)

In regard to the corrosion control requirements, the Court's conclusion that it is "beyond dispute," that there is an ongoing violation of those requirements (Opinion and Order, Doc. 96, Pg ID 6298) is based on a legal error. The Court concluded that the action level of 15 ppb for lead is a "maximum contaminant level." (*Id.*, Pg ID 95.) That is not

[2] Monitoring results are posted publically on www.michigan.gov/flintwater.

accurate. It is an "action level." 40 C.F.R. § 141.80(c)(1). Unlike exceeding a maximum contaminant level, exceeding this action level does not violate the SDWA. Instead, it triggers other requirements for the water supplier to minimize exposure to lead in drinking water, including: water-quality-parameter monitoring, corrosion-control treatment, source-water monitoring and treatment, public education, and lead-service-line replacement. 40 C.F.R. §§ 141.81, 84-85. The City of Flint exceeded the action level during its first six-month testing period of 2016. (9/14/16 Hearing Tr., p. 219.) Accordingly, the Michigan Department of Environmental Quality ordered it to take certain actions, including the replacement of lead pipes. (*Id.*, pp. 220–221.) Furthermore, the City has been treating its water to control for corrosiveness for over a year. (*Id.*, p. 214.)

Contrary to the Court's interpretation, the lead levels do not need to be reduced to a certain, pre-determined level in order to comply with the corrosion control treatment responsibilities. Regardless, as noted above, the treatment has been working because monitoring results show that Flint's water system has been below the action level since at least May 2016 and is currently at 9 ppb. Again, the Sixth Circuit is

not likely to agree that the record supports the Court's conclusion that there is an ongoing violation of the corrosion control requirements.

3. The Court's finding of irreparable harm to all Flint water users is unsupported by the evidence, and thus the injunction is overbroad.

Injunctive relief should be no broader than necessary to remedy the harm at issue. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1068 (6th Cir. 1998). Here, the Court's injunction goes well beyond the scope of any injunctive relief that would be warranted by the evidence presented at the hearing.

For example, the Court recognized that filtered water is safe to drink, and that 90% of homes and 99.7% percent of apartments have water filters. (Opinion and Order, Doc. 96, Pg ID 6311.) Captain Kelenske testified that not only are water and filters widely available at the nine official points of distribution in the City, but also at 42 to 43 other locations throughout the City. (9/14/16 Hearing Tr., p 319.) Moreover, as the Court acknowledged, the emergency relief coordinators maintain a list of homebound or other individuals who need regular deliveries; that list is regularly supplemented as additional people call

in to ask for assistance. (Opinion and Order, Doc. 96, Pg ID 6315–6316); (9/14/16 Hearing Tr., pp 303-305.)

The Court concluded that notwithstanding the massive and ongoing relief efforts, "credible anecdotal evidence" showed that "several households" and "some residents" struggled to get access to drinking water. (Opinion and Order, Doc. 96, Pg ID 6313–6319.) The Court relied primarily on declarations that are four months old, and vague hearsay testimony, to conclude that irreparable harm to *all*—as opposed to some—Flint residents is not merely possible, but "likely." (*Id.*, Pg ID 6319.) And notwithstanding the fact that Plaintiffs waited 177 days from the time they filed their complaint to even reply to State Defendants' timely response to their delayed motion for a preliminary injunction, and the Court's opinion did not issue until nearly two months after the hearing, the Court determined that there is an "immediate danger to Flint residents." (*Id.*, Pg ID 6324.) The Sixth Circuit is unlikely to agree that, under these circumstances, the Court's extraordinary use of an already extraordinary remedy was lawful.

There is simply no basis in the record to support granting injunctive relief to each and every person in each and every household

in Flint. Further, even to the extent the record supported the door-to-door delivery of bottled water to any Flint resident, there does not appear to be any evidence in the record to support the Court's unexplained determination that *each* resident requires four cases of bottled water *per week*.

To the extent the Court was persuaded by the anecdotal evidence, the more proportionate order would have been to require Plaintiffs to provide the addresses of the people they had located who were struggling to obtain access to water—something Plaintiffs have refused to do. (9/14/16 Hearing Tr., p 308.) Had the Court simply required Plaintiffs to provide the addresses of the small group of people the Court concluded were struggling to get access to water, those people could have been provided with immediate relief. For example, Plaintiffs had refused to provide the address of Ms. Childress so relief could be provided to her. When she finally provided the address herself while on the stand, state responders visited her home within hours—by the time Captain Kelenske took the stand to testify. (*Id.*)

In light of the overbreadth of the injunctive relief granted, these Defendants are likely to succeed on appeal. Therefore, this Court should stay its injunction.

4. The injunction fails to comply with Rule 65(c).

A preliminary injunction may be issued "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). While the Court may ultimately determine that a bond is not required, the Court must still exercise that discretion and consider the propriety of a bond. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 539 (6th Cir. 1978). Here, the Court failed to make that determination. And that failure is significant in light of the millions of dollars in additional costs the taxpayers will incur in order to comply with the injunction. Unlike traditional scenarios in which a preliminary injunction simply preserves the status quo, this injunction is directly calculated to drastically expand the current relief efforts and require the expenditure of tens of millions of dollars. Plaintiffs should have been required to

post security to ensure that the taxpayers are made whole in the event it is determined that the Court's injunction is not lawful.

Since the Court failed to fulfill its obligations under Rule 65, the Treasurer and members of the RTAB are likely to succeed on appeal. In sum, State Defendants are likely to succeed on the merits of their appeal and the injunction should therefore be stayed.

B. Neither Plaintiffs nor the residents of Flint will be irreparably harmed by a stay of the injunction.

As noted above, in finding an immediate risk of irreparable harm to the entire City, the Court relied upon anecdotal evidence that "at least some residents have struggled to obtain the water they need to sustain themselves," and then went on to suggest that "[w]ith the colder winter months approaching, it is reasonable to conclude that the difficulties will only worsen." (Opinion and Order, Doc. 96, Pg ID 6320.) That Plaintiffs have, anecdotally, shown that some residents may be inconvenienced, does not equate to a showing of irreparable harm to the entire City. And the inference that the situation will actually get worse is unfounded speculation, particularly in light of the ongoing, concerted, and significant progress being made (independent of the injunction) to

ensure that every single household in the City of Flint has access to safe drinking water.

C. The public interest in a stay is strong.

Finally, a stay of the injunction will significantly benefit the public interest in at least four ways.

First, the response to Flint involves much more than providing bottled water and filters. It includes, among other things, fruits and vegetables, food-bank support, and other nutrition assistance to Flint children; provision of mental health services; provision of school nurses; and lead-abatement programming. (Ex. A, 11/16/2016 Declaration of Jacques McNeely.) The Court makes the unsupported assumption that $100 million is currently available to spend in order to comply with the injunction. (Opinion and Order, Doc. 96, Pg ID 6321.) That is not accurate. If the appropriated funds for Flint relief are redirected solely to comply with the Court's order, some of the broader relief efforts will be left without funding. (Ex. A, 11/16/2016 Declaration of Jacques McNeely.) It is in the public's interest to continue those broader relief efforts rather than end them in an effort to deliver four cases of bottled water per week to every resident of Flint.

Second, and significantly, delivering a massive amount of bottled water to each Flint resident is almost certain to slow the recovery of Flint's water system by significantly decreasing the amount of water moving through Flint's water system. The Court concluded that "[t]here is no evidence that an injunction will necessarily halt or delay restoration of Flint's water system." (Opinion and Order, Doc #96, Pg ID 6323.) But that is not accurate. Mr. Feighner explained in detail that a decrease in water use would not only slow the recoating of the system's pipes by the orthophosphate, but allow lead particulate to remain in the system. (9/14/16 Hearing Tr., pp 227–228.) A stay of the injunction would benefit the public for this reason alone.

Third, complying with the Court's order could add an additional 4.7 million plastic bottles to Flint's recycling system *each week*. (Ex. B, 11/16/2016 Declaration of Captain Kelenske.) This would likely create a severe and unnecessary strain on both the City and the environment.

Fourth, both the Michigan State Police and the Michigan Department of Environmental Quality estimate that to carry out the Court's order would require a remarkable expenditure of taxpayer funds. The Court's speculation that what it has ordered "may be far

less drastic than the defendants believe" because of the "water distribution mechanism [already] in place" is not correct. (Opinion and Order, Doc. 96, Pg ID 6324.)

The scope of door-to-door delivery the Court ordered has no known precedent. (Ex. B, 11/16/2016 Declaration of Captain Kelenske.) According to Captain Kelenske, who is well-qualified and supported by professional staff who specialize in emergency response, the State would need to deliver approximately 395,000 cases of water per week to meet the Court's requirement. This is a *five-fold* increase over the approximately 78,000 cases that are currently distributed per week both through home delivery and through the dozens of distribution sites throughout the City. (Ex. B, 11/16/2016 Declaration of Captain Kelenske.) To accomplish this task, the State would need to obtain 137 additional trucks. (*Id.*) That will require 137 additional qualified drivers, not to mention additional delivery and warehouse personnel. (*Id.*) On the topic of warehouses, the State Emergency Operations Center operating in Flint does not have the "warehouse capacity, supply, or distribution mechanisms in place to support distribution of water to every resident on the Flint Water System." (*Id.*) The current

warehouse capacity is approximately 2.2 million liters of water. To store enough water to make regular deliveries to each Flint resident would require a capacity of approximately 11.4 million liters of water. It is not clear that finding such a large warehouse is even possible. (*Id.*)

The conservative estimate of how much this kind of delivery program would cost is approximately $10.5 million per month in taxpayer dollars. (*Id.*) As noted above, the available appropriations cannot simply be rerouted without putting existing relief efforts at risk. Complying with the Court's order would require additional appropriations.

In regards to the door-to-door filter education program the Court ordered, as Captain Kelenske testified, MDEQ has already launched a CORE program as of July 2016 in which teams of trained personnel go to each household in Flint. (9/14/16 Hearing Tr., p 309.) The MDEQ is working to expand the CORE program into a sustainable, long-term program by forging stronger partnerships with the City, Genesee County, and non-profit groups. It is a crucial to include Flint residents on CORE teams in order for them to be successful, but it is challenging to find residents with the necessary qualifications. (Ex. C, 11/16/2016

Declaration of George Krisztian.) For this reason, the CORE program currently has approximately 26 employees. (*Id.*) To comply with the Court's order in the tight timeframe the Court provided would require at least 54 teams, working eight-hour shifts, seven days a week. (*Id.*) So that those teams could work in shifts, it would require hiring at least 134 additional people. (*Id.*) To mobilize this many qualified teams so quickly would require teams made up of one state employee and one Flint resident, rather than two Flint residents. (*Id.*) The estimated cost just for the state employees alone, and the provision of state vehicles, would be approximately $955,971 per month.

Additionally, the estimated cost of printing and mailing out the notices the Court ordered is approximately $20,000 each instance. (*Id.*) Again, the available appropriations cannot simply be rerouted without putting existing relief efforts at risk. Complying with the Court's order would require additional and significant appropriations.

It is in the public's interest to spare taxpayers this great expense while the injunction is appealed, especially in the absence of security from Plaintiffs that will ensure the taxpayers are made whole in the likely event that the Court of Appeals reverses the Court's order.

RELIEF REQUESTED

The Treasurer and members of the RTAB respectfully request that this Court grant their emergency motion and stay the Court's November 10, 2016 preliminary injunction pending appeal.

Respectfully submitted,

/s/ Nathan A. Gambill
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Dated: November 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2016, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

Respectfully submitted,

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