

November 16, 2015

By Certified Mail, Return Receipt Requested

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**Re: Notice of Intent to Sue Under the Safe Drinking Water Act, 42 U.S.C.
§ 300j-8(b)(1)(a), for Failure to Control Lead in Drinking Water in Flint,
Michigan, and Failure to Assist Michigan Schools with Lead Testing and
Remediation**

We write on behalf of Concerned Pastors for Social Action, Melissa Mays, the
American Civil Liberties Union of Michigan (ACLU of Michigan), and the Natural

Resources Defense Council (NRDC), nonprofit citizens' organizations and individuals working to secure safe drinking water for the residents of Flint, Michigan. Since April 2014, the City of Flint and Michigan state officials have failed to monitor and control for lead in Flint's drinking water, and to maintain a program to assist Michigan schools with lead testing and remediation, in violation of the Safe Drinking Water Act, 42 U.S.C. § 300f et seq. This letter provides notice pursuant to 42 U.S.C. § 300j-8(b)(1)(a) that we intend to sue the City of Flint; Rick Snyder, Governor of Michigan; Dan Wyant, Director of Michigan Department of Environmental Quality; Nick A. Khouri, Treasurer of Michigan; Frederick Headen, Chairperson of the Flint Receivership Transition Advisory Board (Board); Brian Larkin, David McGhee, Robert McMahan, and Beverly Walker-Griffea, Members, RTAB; and Natasha Henderson, Flint City Administrator, if these violations are not remedied within sixty days.¹

Concerned Pastors for Social Action is an association of religious leaders from more than thirty churches and ministries in the Flint area that has advocated for the rights of the underserved for nearly fifty years. Melissa Mays is a Flint resident whose family has suffered from serious health problems as a result of the City's failure to provide safe drinking water. The ACLU of Michigan works in courts, legislatures, and communities to preserve the protections that our laws guarantee to all citizens. NRDC is a national membership organization committed to protecting public health and the environment and to reducing the exposure of all communities to toxic chemicals. These groups and individuals continue to be harmed by the violations of the Safe Drinking Water Act by the City and Michigan state officials, detailed below.

I. City and State officials have exposed and continue to expose Flint residents to dangerous amounts of lead in drinking water

A. The City, Emergency Manager, and State Treasurer chose the Flint River as a primary drinking-water source

In the fall of 2011, Michigan Governor Rick Snyder declared a financial emergency in the City of Flint and appointed an emergency manager to take control of the City's operations and finances.² Flint Mayor Dayne Walling and the City Council were stripped of all authority except as specifically allowed by the Emergency Manager, and the City was placed in state receivership.³ Under Michigan's Local Financial Stability and Choice Act, an

¹ These individuals are noticed in their official capacities.

² See Mich. Comp. Laws § 141.1549; Letter from Gov. Rick Snyder to Mayor Dayne Walling and Flint City Council (Nov. 8, 2011), http://www.michigan.gov/documents/treasury/Flint-GovernorsDetermination-11-8-11_417435_7.pdf (attached as Ex. 1); Dawson Bell, *Governor names Flint native as city's emergency financial manager*, Detroit Free Press, Nov. 30, 2011, <http://www.freep.com/article/20111130/NEWS06/111300370/Governor-names-Flint-native-city-s-emergency-financial-manager> (attached as Ex. 2).

³ Mich. Comp. Laws § 141.1549(2).

Emergency Manager has “broad powers” to “rectify the financial emergency and to assure fiscal accountability of the local government.”⁴

While under control of the Emergency Manager, the City faced decisions about the future of its drinking-water supply. For fifty years, the City had purchased drinking water from the Detroit Water and Sewerage Department (Detroit), which sources water from Lake Huron.⁵ In response to rising water rates charged by Detroit, in March 2013, the City Council voted to join the Karegnondi Water Authority (KWA), a newly formed municipal water supply system. The KWA was planning to build a pipeline to distribute water directly from Lake Huron to mid-Michigan communities, including Genesee County, where Flint is located.⁶ The City Council’s vote did not become effective until several weeks later, after both the Emergency Manager and State Treasurer approved the decision.⁷

The City’s contract with Detroit was set to expire in April 2014, at least eighteen months before the KWA pipeline was scheduled to be completed.⁸ Faced with a year-and-a-half gap in the City’s water supply, the Emergency Manager declined to negotiate a short-term contract with Detroit and decided instead to use the Flint River as a primary drinking-water source.⁹ The City had previously explored—and rejected—the Flint River as a primary drinking-water source. This is because the Flint Water Treatment Plant would have required fifty million dollars in upgrades to treat the river water and “produce finished water in conformance with the current federal and state drinking water regulations.”¹⁰

⁴ *Id.*

⁵ See Dominic Adams, *Closing the valve on history: Flint cuts water flow from Detroit after nearly 50 years*, Michigan Live, Apr. 25, 2014, <http://www.mlive.com/news/flint/index.ssf/2014/04/closing-the-valve-on-history-f.html> (attached as Ex. 3).

⁶ Steve Carmody, *Flint opting to get its future tap water from Lake Huron*, Michigan Radio, Mar. 25, 2013, <http://michiganradio.org/post/flint-opting-get-its-future-tap-water-lake-huron#stream/> (attached as Ex. 4); Karegnondi Water Authority, About, <http://www.karegnondi.com/#!/about/c20r9> (last visited Nov. 13, 2015) (attached as Ex. 5).

⁷ See Mich. Comp. Laws § 141.1552(1)(g), (3); Emergency Manager, Resolution to Purchase Capacity from Karegnondi Water Authority (adopted Mar. 29, 2013) (attached as Ex. 6); Letter from Andy Dillon, State Treasurer, to Edward Kurtz, Emergency Manager (Apr. 11, 2013) (authorizing Emergency Manager to enter into contract with KWA) (attached as Ex. 7).

⁸ Sarah Schuch, *KWA pipeline work continues as Flint water lead concerns rise*, Michigan Live, Sept. 25, 2015, <http://www.mlive.com/news/flint/index.ssf/2015/09/kwa-pipeline-projected-to-be-c.html> (attached as Ex. 8); see Ron Fonger, *Detroit gives notice: It’s terminating water contract covering Flint, Genesee County in one year*, Michigan Live, Apr. 19, 2013, <http://www.mlive.com/news/flint/index.ssf/2013/04/detroit-gives-notice-its-termi.html> (attached as Ex. 9).

⁹ Letter from Darnell Earley, Emergency Manager, to Sue McCormick, Detroit Water & Sewer Dep’t (Mar. 7, 2014) (explaining that the City “has actively pursued using the Flint River as a temporary water source” instead of accepting Detroit’s offer to provide water to the City) (attached as Ex. 10).

¹⁰ Cost of Service Study (2011), Appendix 8 to Analysis of the Flint River as a Permanent Water Supply for the City of Flint, <http://www.scribd.com/doc/64382181/Analysis-of-the-Flint-River-as-a-Permanent-Water-Supply-for-the-City-of-Flint-July-2011-Appendices-1-to-8> (attached as Ex. 11);

Under the Safe Drinking Water Act's Lead and Copper Rule, Flint's water system could not use the Flint River as a water source without first obtaining approval from the Michigan Department of Environmental Quality (MDEQ). The Lead and Copper Rule required MDEQ to approve both the City's proposed addition of a new water source (the Flint River) and the long-term change in water treatment (from treatment through Detroit's water plant to treatment at the Flint Water Treatment Plant).¹¹ In April 2014, MDEQ approved the switch to river water.¹² The City immediately began pumping Flint River water through the City's distribution pipes and into residents' taps.

B. Dangerous lead contamination results from the City's switch to river water

In the twenty months following the switch in water sources, residents' drinking water has been at times cloudy, discolored, and foul-smelling.¹³ Residents reported that they have experienced hair loss, skin rashes, and vomiting after drinking the water.¹⁴ In the summer of 2014, the City was forced to issue several boil-water notices after tap water tested positive for total coliform bacteria.¹⁵ The City's subsequent treatment of the water to kill disease-carrying pathogens resulted in elevated levels of total trihalomethanes, a disinfection byproduct that can cause serious health problems, including an increased risk of cancer.¹⁶

see also Kristin Longley, *Water pipeline v. Flint River: City of Flint studying its drinking water options*, Michigan Live, Jan. 22, 2011, http://www.mlive.com/news/flint/index.ssf/2011/01/water_pipeline_vs_flint_river.html (attached as Ex. 12); Dominic Adams, *Flint River now an option for drinking water following Detroit's termination of contract*, Michigan Live, July 23, 2013, http://www.mlive.com/news/flint/index.ssf/2013/07/city_readying_water_plant_to_t.html (quoting city officials' explanation for rejecting use of Flint River: "upgrades to Flint's water plant would be too expensive, the river didn't provide enough capacity to serve Flint residents' water needs and the Michigan Department of Environmental Quality would not allow it") (attached as Ex. 13).

¹¹ 40 C.F.R. § 141.90(a)(3); *see also id.* § 141.81(a)-(b).

¹² *See* Adams, *Closing the valve on history*, *supra* note 5 (Ex. 3).

¹³ *See* Curt Guyette, *In Flint, Michigan, Overpriced Water is Causing People's Skin to Erupt in Rashes and Hair to Fall Out*, The Nation, July 16, 2015, <http://www.thenation.com/article/in-flint-michigan-overpriced-water-is-causing-peoples-skin-to-erupt-and-hair-to-fall-out/> (attached as Ex. 14); Wenonah Hauter, *Flint's Brown Water Blues*, Huffington Post, July 10, 2015, http://www.huffingtonpost.com/wenonah-hauter/flints-brown-water-blues_b_7765132.html (attached as Ex. 15).

¹⁴ Laura Gottesdiener, *Flint, Mich., residents find state water control hard to swallow*, Al Jazeera America, Apr. 3, 2015, <http://america.aljazeera.com/articles/2015/4/3/flint-residents-find-state-water-control-hard-to-swallow.html> (attached as Ex. 16).

¹⁵ Ron Fonger, *Flint issues boil water advisory for section of the city after positive test result for total coliform bacteria*, Michigan Live, Sept. 5, 2014, http://www.mlive.com/news/flint/index.ssf/2014/09/flint_issues_boil_water_adviso.html (attached as Ex. 17).

¹⁶ Robin Erb, *Who wants to drink Flint's water?*, Detroit Free Press, Jan. 23, 2015, <http://www.freep.com/story/news/local/michigan/2015/01/22/water-woes-latest-hit-flint/22193291/> (attached as Ex. 18); Mich. Dep't of Env'tl. Quality, Violation Notice—Maximum Contaminant Level for Total Trihalomethanes (Dec. 16, 2014) (attached as Ex. 19); U.S. EPA, Basic Information about Disinfection Byproducts in Drinking Water, <http://water.epa.gov/drink/contaminants/basicinform>

Because Flint River water is also highly corrosive, dangerous amounts of lead began to leach out of pipes and into the City's drinking water.¹⁷ Lead in drinking water occurs primarily from corrosion of pipes and other plumbing materials that contain lead or lead solder.¹⁸ The Lead and Copper Rule requires water systems to manage lead levels by controlling corrosion, which is often accomplished by adding corrosion-inhibiting chemicals.¹⁹ Water systems must implement and maintain an "optimal" corrosion-control treatment program that "minimizes the lead . . . concentrations at users' taps."²⁰

Flint did not consider how to control the corrosivity of the river water before switching water sources, nor did MDEQ require the City to implement any corrosion-control measures. Rather, beginning in April 2014, the City did not use any form of treatment to control corrosion.²¹ The City waited until after its residents were drinking the river water to assess whether it posed a risk of increased lead exposure. MDEQ endorsed this approach. In June 2014, Flint's water system initiated the first of two six-month monitoring periods to test tap water for lead under the Lead and Copper Rule; the second six-month period ran from January to June 2015.²² During these monitoring periods, the water system used flawed testing methods that appear to have been designed to underreport the lead content of residents' drinking water.²³

[ation/disinfectionbyproducts.cfm](#) (last updated Dec. 13, 2013) (attached as Ex. 20); *see also* 40 C.F.R. § 141.64(b).

¹⁷ Marc Edwards, *Test Update: Flint River water 19X more corrosive than Detroit water for Lead Solder; Now What?*, Flint Water Study (Sept. 11, 2015), <http://flintwaterstudy.org/2015/09/test-update-flint-river-water-19x-more-corrosive-than-detroit-water-for-lead-solder-now-what/> (attached as Ex. 21); Marc Edwards, *Flint River water is very corrosive to lead, and causing lead contamination in homes*, Flint Water Study (Sept. 2, 2015), <http://flintwaterstudy.org/2015/09/flint-rivers-water-is-very-corrosive-to-lead-and-causing-lead-contamination-in-homes/> (attached as Ex. 22). The river water is so corrosive that in October 2014, a local GM engine plant decided to switch back to Lake Huron water to avoid damage to equipment at the plant from corrosion. Brianna Owczarzak, *GM says no to Flint water*, WNEM, Oct. 14, 2014, <http://www.wnem.com/story/26785625/gm-says-no-to-flint-water> (attached as Ex. 23).

¹⁸ *See* Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26,460, 26,464 (June 7, 1991).

¹⁹ *See* 40 C.F.R. § 141.82.

²⁰ *Id.* §§ 141.2; 141.80(d).

²¹ *See* Email from Pat Cook, MDEQ, to Miguel Del Toral, U.S. EPA (Apr. 24, 2015) (attached as Ex. 24).

²² *See* 40 C.F.R. § 141.86; Email from Pat Cook, *supra* note 21 (Ex. 24).

²³ *See infra* pp. 11-13.

Flint's monitoring data showed that some residents' water contained lead at concentrations above the federal "action level" of 15 parts per billion (ppb).²⁴ These high lead levels put residents at risk of a broad array of serious, irreversible health effects, including cognitive impairment, kidney damage, and increased blood pressure.²⁵ When the Environmental Protection Agency (EPA) learned of these high lead sampling results in February 2015, it notified MDEQ officials that the sampling results raised significant concerns about corrosion from lead pipes in Flint's distribution system.²⁶ Nonetheless, throughout the monitoring periods, the City and MDEQ maintained that these high lead levels were isolated and that the data, taken together, demonstrated Flint's compliance with the Lead and Copper Rule.²⁷

C. Community advocacy and independent testing prompt long past due response from City and State officials

As the City concluded its second six-month round of sampling in July 2015, and notified some Flint residents of elevated lead levels in their tap water, the community became increasingly concerned. A small coalition of local groups, including Water You Fighting For and Concerned Pastors for Social Action, began working with researchers at Virginia Tech to conduct their own lead sampling of Flint's water. The Virginia Tech scientists found that ten percent of the more than 250 samples collected from Flint residences had lead levels of 25 ppb or more, well above the federal action level for lead.²⁸ Several samples exceeded 100 ppb, and one sample exceeded 1000 ppb.²⁹ Though aware of

²⁴ See Mich. Dep't of Env'tl. Quality, Lead and Copper Report and Consumer Notice of Lead Result Certificate for Community Water Supply (Aug. 20, 2015) (showing six samples with lead levels over the action level) (attached as Ex. 25); 40 C.F.R. § 141.80(c)(1).

²⁵ See, e.g., U.S. EPA, Integrated Science Assessment for Lead tbl.ES-1 (June 2013) (attached as Ex. 26); U.S. EPA, Basic Information About Lead in Drinking Water, <http://water.epa.gov/drink/contaminants/basicinformation/lead.cfm> (last updated June 26, 2015) (explaining that "[i]nfants and children who drink water containing lead in excess of the action level could experience delays in their physical or mental development," and that "[a]dults who drink this water over many years could develop kidney problems or high blood pressure") (attached as Ex. 27); see also National Ambient Air Quality Standards for Lead, 80 Fed. Reg. 278, 290 (Jan. 5, 2015).

²⁶ See, e.g., Email from Jennifer Crooks, U.S. EPA, to Stephen Busch, MDEQ, and Mike Prysby, MDEQ (Feb. 26, 2015) (attached as Ex. 28).

²⁷ See Nancy Kaffer, *MDEQ e-mails show stunning indifference to Flint peril*, Detroit Free Press, Oct. 22, 2015, <http://www.freep.com/story/opinion/columnists/nancy-kaffer/2015/10/21/indifference-characterized-state-approach-flint-water/74289430/> (attached as Ex. 29).

²⁸ *Flint Town Hall Meeting Presentation and Distribution of lead results across Flint by ward and zip codes*, Flint Water Study, Sept. 16, 2015, <http://flintwaterstudy.org/2015/09/distribution-of-lead-results-across-flint-by-ward-and-zip-codes/> (attached as Ex. 30); Ron Fonger, *Virginia Tech professor says Flint's tests for lead in water can't be trusted*, Michigan Live, Sept. 15, 2015, http://www.mlive.com/news/flint/index.ssf/2015/09/virginia_tech_researcher_says.html (attached as Ex. 31).

²⁹ Marc Edwards et al., *Lead testing results for water sampled by residents*, Flint Water Study, Sept. 28, 2015, <http://flintwaterstudy.org/information-for-flint-residents/results-for-citizen-testing-for-lead-300-kits/> (attached as Ex. 32).

the Virginia Tech sampling results, MDEQ officials continued to insist that Flint's water was safe to drink.³⁰

In September 2015, a medical study conducted by a local pediatrician confirmed the kinds of adverse health impacts that residents had voiced concern about for months: the rate of Flint children with elevated blood lead levels had nearly doubled since the City changed its drinking-water source.³¹ State officials and the Governor reacted by “downplay[ing] and in some cases attempt[ing] to discredit” the pediatrician’s findings, and dismissing citizen concerns as “near-hysteri[cal].”³²

Subsequent testing by MDEQ revealed that at least four schools in Flint had lead levels in their drinking water above the federal action level.³³ At Freeman Elementary School, water tested had lead levels over 100 ppb, more than six times the federal action level.³⁴ This increase in lead exposure is particularly dangerous in Flint, a community where residents are already at higher risk of elevated blood lead levels and lead poisoning. Michigan ranks fifth worst in the country for harmful exposures to lead.³⁵ Low income is a risk factor for lead poisoning, and more than a third of families in Flint live below the poverty level, three times the national average.³⁶ Children in Flint also face high risk of lead

³⁰ Ron Fonger, *Feds sending in experts to help Flint keep lead out of water*, Michigan Live, Sept. 10, 2015, http://www.mlive.com/news/flint/index.ssf/2015/09/university_researchers_dont_dr.html (attached as Ex. 33).

³¹ *Pediatric Lead Exposure in Flint, MI: Concerns from the Medical Community* (PowerPoint Presentation) (presented on Sept. 24, 2015), available at <http://flintwaterstudy.org/2015/09/pediatric-lead-exposure-presentation-from-hurley-medical-center-doctors-concerning-flint-mi/> (attached as Ex. 34).

³² *Study suggests Flint's water causing increased lead poisoning*, Michigan Radio, Sept. 28, 2015, <http://michiganradio.org/post/study-suggests-flints-water-causing-increased-lead-poisoning#stream/0> (attached as Ex. 35); Ron Fonger, *State says data shows no link to Flint River, elevated lead in blood*, Michigan Live, Sept. 24, 2015, http://www.mlive.com/news/flint/index.ssf/2015/09/state_says_its_data_shows_no_c.html (attached as Ex. 36); *Did this Michigan Town Poison its Children?*, U.S. News & World Report, Sept. 24, 2015, <http://www.usnews.com/news/articles/2015/09/25/flint-michigan-children-show-high-levels-of-lead-in-blood> (attached as Ex. 37).

³³ Steve Carmody, *Four Flint schools have high lead levels in their water*, Michigan Radio, Oct. 8, 2015, <http://michiganradio.org/post/four-flint-schools-have-high-lead-levels-their-water> (attached as Ex. 38).

³⁴ *Id.*

³⁵ Ctrs. for Disease Control & Prevention, *Public Health in Action: Lead Poisoning Prevention in Michigan* (last updated Feb. 4, 2013), http://www.cdc.gov/nceh/information/healthy_homes_lead.htm (attached as Ex. 39).

³⁶ 2009-2013 American Community Survey 5-Year Estimates, 2013, available at <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (enter “Flint, MI” in the box under “Community Facts,” click on “Income” on left-side bar, then click “Selected Economic Characteristics” under “2013 American Community Survey”) (table attached as Ex. 40 compares data from Flint, Michigan, to Michigan and the United States).

exposure from lead-paint dust, as nearly ninety percent of Flint's housing stock was built before 1978 (when the federal ban on high-lead paint went into effect).³⁷

Finally, in late September 2015, the City abandoned its assertions that Flint's drinking water was safe. Nearly seven months after the City first saw dangerously high levels of lead in some residents' water, Flint issued a drinking-water advisory and called for state financial assistance to switch the water system back to Detroit's supply.³⁸ Two weeks later, Governor Snyder requested six million dollars from the state legislature to reconnect the Flint water system to Detroit.³⁹ With additional funding from the City and a private foundation, the switch was completed in mid-October.⁴⁰

Following the switch back to Detroit water, some government officials began to ask questions about what went wrong in the course of Flint's change in water sources.⁴¹ Governor Snyder created a task force to review water management and testing in Flint,⁴² and EPA established its own task force "to provide the Agency's technical expertise through regular conversations" with the City and MDEQ.⁴³ Governor Snyder has also announced

³⁷ 2012 Annual Data Report on Blood Lead Levels of Children in Michigan 26 (Apr. 30, 2013), https://www.michigan.gov/documents/mdch/2012AnnualDataReportOnBloodLeadLevels_419508_7.pdf (attached as Ex. 41); Am. Cancer Soc'y, *Lead, Lead in the Environment*, <http://www.cancer.org/cancer/cancercauses/othercarcinogens/athome/lead> (last updated May 27, 2014) (explaining that lead paint is a "major" source of exposure) (attached as Ex. 42); Maj. Thomas F. Zimmerman, *The Regulation of Lead-Based Paint in Air Force Housing*, 44 A.F. L. Rev. 169, 174-75 (1998).

³⁸ *City of Flint Issues Lead Advisory*, City of Flint, Sept. 25, 2015, <https://www.cityofflint.com/2015/09/25/city-of-flint-issues-lead-advisory/> (attached as Ex. 43); Steve Carmody, *Flint officials exploring return to Detroit water*, Michigan Radio, Sept. 28, 2015, <http://michiganradio.org/post/flint-officials-exploring-return-detroit-water#stream/0> (attached as Ex. 44).

³⁹ John Wisely, *Snyder announces \$12 million plan to fix Flint water*, Detroit Free Press, Oct. 8, 2015, <http://www.freep.com/story/news/local/michigan/2015/10/08/snyder-flint-water-reconnect/73567778/> (attached as Ex. 45).

⁴⁰ Amanda Emery, *Flint reconnects to Detroit water, may take 3 weeks to clear all pipes*, Michigan Live, Oct. 16, 2015, http://www.mlive.com/news/flint/index.ssf/2015/10/flint_reconnecting_to_detroit.html (attached as Ex. 46).

⁴¹ *E.g.*, Letter from Sen. Jim Ananich, Mich. Senate Minority Leader, to Susan Hedman, U.S. EPA, and Gina McCarthy, U.S. EPA (Oct. 21, 2015) (attached as Ex. 47); Letter from Rep. Daniel Kildee, U.S. Congressman, to Gina McCarthy, U.S. EPA (Oct. 21, 2015) (attached as Ex. 48).

⁴² Press Release, Gov. Rick Snyder, *Gov. Rick Snyder announces Flint Water Task Force to review state, federal and municipal actions, offer recommendations* (Oct. 21, 2015), http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-367761--,00.html (attached as Ex. 49).

⁴³ Press Release, U.S. EPA, *EPA Establishes Safe Drinking Water Task Force to Provide Technical Expertise to MDEQ and City of Flint* (Oct. 16, 2015), <http://yosemite.epa.gov/opa/admpress.nsf/0/A92DE629DB86E66685257EE000579593> (attached as Ex. 50).

plans to launch an “education campaign soon to help schools statewide learn how to get their water tested” for lead.⁴⁴

Despite this proliferation of task forces and campaigns, neither the City nor MDEQ has announced changes in the City’s lead monitoring practices in the wake of Flint’s public-health crisis. Rather, Flint and MDEQ have maintained that these practices are accurate and adequate, despite the near certainty that they are underrepresenting lead contamination in many of Flint’s high-risk homes.

II. City and State officials are in violation of the Safe Drinking Water Act’s Lead and Copper Rule

The Safe Drinking Water Act (the Act) authorizes citizens to sue any governmental entity “who is alleged to be in violation of any requirement” under the statute.⁴⁵ These requirements include the national primary drinking-water regulations for lead and copper set forth in the Lead and Copper Rule.⁴⁶ The Lead and Copper Rule obligates water systems to monitor and control for lead in drinking water.⁴⁷

Since April 2014, Flint’s water system has failed to comply with the Lead and Copper Rule’s requirements for monitoring water for lead, notifying the public of tap-water monitoring results, reporting monitoring results to MDEQ, and controlling corrosion from lead pipes.⁴⁸ These violations systematically result in the City’s underestimating lead levels in its drinking water, masking a public-health crisis. The violations are ongoing and likely to recur in the future: Flint’s water system presently is obligated to monitor for lead every six months, and there is no indication that Flint has changed or disavowed its inadequate approach to monitoring.⁴⁹

⁴⁴ See Lori Higgins, *Michigan to launch lead education effort statewide*, Detroit Free Press, Oct. 13, 2015, <http://www.freep.com/story/news/local/michigan/2015/10/13/lead-water-flint-michigan-testing/73871480/> (attached as Ex. 51).

⁴⁵ 42 U.S.C. § 300j-8(a)(1).

⁴⁶ See *id.* § 300g-1(b)(1)(A); 40 C.F.R. § 141.80(a)(1).

⁴⁷ See, e.g., 40 C.F.R. § 141.86.

⁴⁸ Flint’s water system is subject to the requirements of the Lead and Copper Rule because it is a “community water system” not otherwise exempted from the regulations. 40 C.F.R. §§ 141.80(a)(1), 141.2.

⁴⁹ See *Tamaska v. City of Bluff City*, 26 F. App’x 482, 485 (6th Cir. 2002) (citing *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 171–72 (4th Cir.1988)). A water system is required to monitor tap water for lead every six months if it (1) exceeds the action level for any monitoring period, or (2) “fails to operate at or above the minimum value or within the range of values for the water quality parameters specified by the State ... for more than 9 days in any six-month period.” 40 C.F.R. § 141.86(d)(4)(vi)(B). Flint’s water system failed to maintain applicable values of orthophosphate and/or pH designated as the optimal water quality parameters by MDEQ. In addition, had the water system conducted monitoring in compliance with the Lead and Copper Rule during the January to June 2015 period, it likely would have exceeded the lead action level.

Under the Act, a “supplier of water” is “any person who owns or operates a public water system.”⁵⁰ The City of Flint owns Flint’s water system.⁵¹ Upon information and belief, the State officials administering Flint’s receivership and the City presently operate Flint’s water system. As discussed above, Flint’s Emergency Manager exercised the authority of the local government in the place of Flint’s mayor and city council. The Emergency Manager managed the water system and conducted its affairs, including making the decision to use the Flint River as a primary drinking-water source.⁵² In April 2015, Governor Snyder removed the Emergency Manager and appointed a Receivership Transition Advisory Board to oversee the City’s affairs until the receivership is terminated.⁵³ The Board has control over the City’s budget, and must approve all decisions adopted by the City Council.⁵⁴ The Michigan Local Financial Stability and Choice Act requires the State Treasurer to sit on a receivership transition advisory board for any municipality for which the governor appoints such a board, and Governor Snyder has appointed the State Treasurer (or his designee) to chair Flint’s Board.⁵⁵ The City Administrator reports to the Board, manages the City’s daily administrative operations, and directs City department heads in carrying out the daily activities of the City.⁵⁶ To date, the City remains in receivership, and its actions remain subject to approval of the Board.⁵⁷

Accordingly, the City of Flint; Governor Snyder; Dan Wyant, Director of MDEQ; Nick A. Khouri, Treasurer of Michigan; Frederick Headen, Chairperson of the Flint Receivership Transition Advisory Board; Brian Larkin, David McGhee, Robert McMahan,

⁵⁰ 42 U.S.C. § 300f(5).

⁵¹ See City of Flint, Water System Update, Sept. 2015, <https://www.cityofflint.com/wp-content/uploads/City-Council-Water-Presentation-9-14-2015.pdf> (attached as Ex. 52).

⁵² See *United States v. Twp. of Brighton*, 153 F.3d 307, 314 (6th Cir. 1998) (defining “operator” for purposes of CERCLA as an entity that “performed some affirmative acts,” such as “directing the workings, managing, or conducting the affairs” of a facility) (internal quotation marks and alterations omitted); cf. *United States v. Alisal Water Corp.*, 114 F. Supp. 2d 927, 938 (N.D. Cal. 2000) (applying case law discussing CERCLA “operator” liability to the Safe Drinking Water Act context).

⁵³ Mich. Comp. Laws § 141.1563(1); Press Release, Gov. Rick Snyder, *Gov. Rick Snyder: City of Flint ready to move forward as financial emergency resolved*, Apr. 29, 2015, http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-353433--,00.html (attached as Ex. 53); Emergency Manager Order 20 ¶¶ 4.a.6, 4.a.7 (adopted Apr. 25, 2015), <https://www.cityofflint.com/wp-content/uploads/Order-No.-20.pdf> (attached as Ex. 54).

⁵⁴ Emergency Manager Order 20 ¶¶ 4.a.6, 4.a.7, *supra* note 53 (Ex. 54).

⁵⁵ See Mich. Comp. Laws § 141.1563(2); Letter from Gov. Rick Snyder to Hon. Ruth Johnson, Mich. Sec’y of State (Apr. 29, 2015), http://michigan.gov/documents/treasury/Flint_RTAB_Appointments_488251_7.pdf (attached as Ex. 55).

⁵⁶ Emergency Manager Order 3 ¶¶ 4-6, 25 (adopted Apr. 10, 2015), <https://www.cityofflint.com/wp-content/uploads/Order-No.-3.pdf> (attached as Ex. 56). The City Administrator was appointed by the Emergency Manager and can be removed only with the Board’s consent.

⁵⁷ *Id.*

and Beverly Walker-Griffea, Members of the Board; and Natasha Henderson, Flint City Administrator, are responsible for the violations of the Act by Flint's water system which have endangered and will continue to endanger the health of Flint's residents.

A. Flint's water system is in violation of the Lead and Copper Rule's tap-water monitoring, reporting, and notification requirements

The Lead and Copper Rule requires water systems to identify a pool of sampling sites prior to the commencement of a monitoring period.⁵⁸ This requirement is designed to target residences at high risk of lead contamination in drinking water, such as homes served by lead service lines.⁵⁹ In violation of the Rule, Flint's water system does not select sampling sites for lead monitoring based on a pre-established sampling pool. For Flint's most recent completed monitoring period, January–June 2015, the Director of the City's Department of Public Works admitted that Flint “thr[ew] bottles out everywhere just to collect as many [samples] as we can, to try and hit our number.”⁶⁰ Similarly, email correspondence shows that the City has, during several monitoring periods, asked its own employees to submit tap-water samples, without regard to whether the employees were part of a pre-selected sampling pool.⁶¹

Under the Lead and Copper Rule, water systems that contain lead service lines also must draw fifty percent of their tap-water samples from sites served by a lead service line.⁶² Flint's water system does not comply with this requirement. The water system reported to MDEQ that all the sample sites it used during the January–June 2015 monitoring period were residences served by lead service lines.⁶³ Flint's Utilities Administrator, however, admitted that he was not able to verify that all homes sampled were served by lead service lines.⁶⁴ This is because City records concerning the locations of lead service lines in the distribution system are stored on 45,000 paper notecards. Flint began converting these notecards into an electronic spreadsheet this fall, well after the January–June 2015 monitoring period.⁶⁵

⁵⁸ See 40 C.F.R. § 141.86(a).

⁵⁹ *Id.*

⁶⁰ See ACLU of Michigan, *Thirst for Truth: Who's to Blame for Flint Water Crisis?*, <https://www.youtube.com/watch?t=9&v=LTO9irD2f0Y> (posted Sept. 23, 2015).

⁶¹ Email from Michael Glasgow, Flint Utilities Adm'r, to Flint municipal staff (June 1, 2015) (attached as Ex. 57).

⁶² 40 C.F.R. § 141.86(a)(8).

⁶³ See, e.g., City of Flint, Lead and Copper Report and Consumer Notice of Lead Result Certificate for Community Water Supply (July 28, 2015) [hereinafter July 28 Report] (attached as Ex. 58).

⁶⁴ See ACLU of Michigan, *Thirst for Truth: Who's to Blame for Flint Water Crisis?*, *supra* note 60.

⁶⁵ See Ron Fonger, *Flint data on lead water lines stored on 45,000 index cards*, Michigan Live, Oct. 1, 2015, http://www.mlive.com/news/flint/index.ssf/2015/10/flint_official_says_data_on_lo.html (attached as Ex. 59).

Flint's water system has also failed to sample the same sites across monitoring periods or document the reasons for declining to sample the same sites, as the Lead and Copper Rule requires.⁶⁶ Sampling new sites from one monitoring period to the next is permitted only if a site "is no longer accessible" to the water system or "no longer fits the requirements of a priority site."⁶⁷ Records show that in the January–June 2015 monitoring period, Flint's water system retested only thirteen of the one hundred sites it sampled in the previous monitoring period.⁶⁸ It did not provide the required explanation for these departures from the previous monitoring period's sampling sites.⁶⁹ Upon information and belief, Flint's water system concentrated its monitoring in areas where it anticipated low lead levels, due to recent infrastructure improvements, and selectively retested sites that had previously yielded low lead levels. Such selective sampling violates the Lead and Copper Rule's intention that water systems "do not use only those sampling locations with the lowest lead or copper levels."⁷⁰

Flint's instructions to residents for the collection of tap-water samples also violate the Lead and Copper Rule. The Rule allows residents to collect the tap-water samples used to monitor lead in drinking water, so long as the water system instructs residents of the sampling procedures required by the regulations.⁷¹ Tap-water samples must be "first-draw samples," meaning that the sample must be collected after water in the tap has stood motionless in the plumbing system for at least six hours.⁷² Flint's instructions direct residents to flush their taps for five minutes prior to letting the water sit for the six required hours. This "pre-flushing" has been shown to "result in the minimization of lead capture and significant underestimation of lead levels in drinking water."⁷³ The water system's pre-flush instruction "negates the intent of the [Lead and Copper Rule] to collect compliance

⁶⁶ 40 C.F.R. § 141.86(b)(4).

⁶⁷ U.S. EPA, *Lead and Copper Rule Monitoring and Reporting Guidance for Public Water Systems* 25 (Mar. 2010), <http://water.epa.gov/lawsregs/rulesregs/sdwa/lcr/upload/Revised-Lead-and-Copper-Rule-Monitoring-and-Reporting-Guidance-for-Public-Water-Systems.pdf> (attached as Ex. 60).

⁶⁸ See July 28 Report, *supra* note 63 (reporting that the same sample sites were not used) (Ex. 58); see also Curt Guyette, *Lead Astray: An ACLU of Michigan investigation has found a stream of irregularities in Flint's water tests*, Michigan Democracy Watch Blog, Sept. 14, 2015, <http://aclumich.org/democracywatch/index.php/entry/lead-astray-an-aclu-of-michigan-investigation-has-found-a-stream-of-irregularities-in-flint-s-water-tests> (attached as Ex. 61).

⁶⁹ 40 C.F.R. § 141.90(a)(1)(v).

⁷⁰ U.S. EPA, *Lead and Copper Rule Monitoring and Reporting Guidance for Public Water Systems*, *supra* note 67, at 25 (Ex. 60).

⁷¹ 40 C.F.R. § 141.86(b)(2).

⁷² *Id.* §§ 141.2, 141.86(b)(2).

⁷³ Mem. from Miguel Del Toral, U.S. EPA, to Thomas Poy, U.S. EPA, at 2 (June 24, 2015) (attached as Ex. 62).

samples under ‘worst-case’ conditions,”⁷⁴ and goes “against the intent of the monitoring protocol, since it changes the normal water use of the homeowners in the sample.”⁷⁵

Flint’s water system is violating the Lead and Copper Rule’s reporting requirements by representing to MDEQ that Flint’s monitoring practices are in compliance with the Rule. The City’s water system did not provide documentation to MDEQ justifying its selection of new sample sites in the January–June 2015 monitoring period, and, upon information and belief, is not accurately reporting information concerning whether sampled sites meet required regulatory criteria.⁷⁶

The Lead and Copper Rule also requires Flint’s water system to notify each resident whose tap water was sampled of the lead results.⁷⁷ Upon information and belief, Flint has failed and continues to fail to properly notify all residents whose tap water was tested for lead of the individual monitoring results.

B. Flint’s water system has failed to maintain optimal corrosion-control treatment

The Lead and Copper Rule required all large public water systems, including Flint’s water system, to install an “optimal corrosion control treatment” program by January 1, 1997.⁷⁸ After a system has optimized its corrosion-control treatment, the regulations require the system to “continue to operate and maintain optimal corrosion control treatment.”⁷⁹ Since April 2014, Flint’s water system has not maintained an optimal corrosion-control treatment program. Historically, the water system complied with the corrosion-control requirements by purchasing treated water from Detroit. When Flint switched its water source to the Flint River in April 2014, it did nothing to treat the Flint River water to control corrosion. This failure to maintain optimized corrosion control violates the Lead and Copper Rule.

Although Flint’s water system has resumed its purchase of treated water from Detroit, it has not disavowed its erroneous interpretation of the Lead and Copper Rule’s corrosion-control requirements. Nor has it committed to maintaining optimized corrosion control when it switches water sources again this summer to the KWA pipeline. Flint’s water system’s failure to maintain an optimized corrosion-control treatment program is likely to recur in the future.

⁷⁴ *Id.*

⁷⁵ Letter from Cynthia Dougherty, U.S. EPA, to Ralph Scott, Alliance for Healthy Homes (Sept. 12, 2008) (attached as Ex. 63).

⁷⁶ *See* 40 C.F.R. § 191.90(a)(1)(i), (a)(1)(v); *supra* pp. 11-12.

⁷⁷ 40 C.F.R. § 141.85(d)(1).

⁷⁸ *Id.* § 141.81(d)(4).

⁷⁹ *Id.* § 141.82(g).

III. The State of Michigan's failure to maintain a schools testing and remediation program violates the Safe Drinking Water Act

The Act requires each state to establish a program “to assist” schools and day care centers in “testing for, and remedying, lead contamination in drinking water.”⁸⁰ Test results must be made available at schools, with notification to parents and teachers.⁸¹ Michigan, upon information and belief, does not maintain a program for school lead testing, remediation, and notification.⁸² Accordingly, Governor Snyder and MDEQ Director Wyant are presently in violation of the Act's schools provision.⁸³

IV. Intent to Sue

The City of Flint and Michigan state officials have been and continue to be in violation of the Lead and Copper Rule's requirements for monitoring and sampling tap water for lead, notifying the public of and reporting to the State tap-water monitoring results, and corrosion control. Governor Snyder and MDEQ Director Dan Wyant are in violation of the Act's requirement to maintain a program to assist Michigan schools with testing and remediating lead in school drinking water. These violations are likely to continue and to recur in the future absent a judicial decree ordering City and State officials to comply with the Act. If the City of Flint and the Michigan state officials identified above fail to cure their noncompliance with the Act within sixty days, Concerned Pastors for Social Action, Melissa Mays, ACLU of Michigan, and NRDC will file suit in federal district court seeking declaratory relief, injunctive relief, and litigation costs, as appropriate.

The name, address, and telephone number of each person giving notice pursuant to this letter are:

Concerned Pastors for Social Action
2200 Forrest Hill
Flint, MI 48504
(810) 394-6787
Attention: Pastor Allen Overton

⁸⁰ 42 U.S.C. § 300j-24(d)(1).

⁸¹ *Id.* § 300j-24(d)(2).

⁸² Although MDEQ recently announced “an education campaign” to help Michigan schools learn how to test their water for lead, MDEQ has yet to release the details of this effort, including whether it will offer the kind of assistance with testing, remediation, and notification contemplated by the Safe Drinking Water Act. *See Higgins, Michigan to launch lead education effort statewide, supra* note 44 (Ex. 51).

⁸³ MDEQ has primary enforcement authority in Michigan for the Safe Drinking Water Act. *See* MDEQ, Drinking Water, http://www.michigan.gov/deq/0,4561,7-135-3313_3675---,00.html (last visited Nov. 13, 2015) (attached as Ex. 64).

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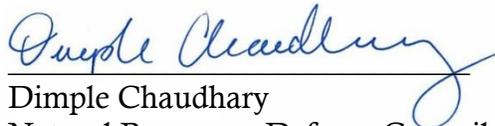
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(313) 578-6814
Attention: Michael Steinberg

Natural Resources Defense Council
1152 15th Street, NW, Suite 300
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Attention: Dimple Chaudhary

Do not hesitate to contact us if you would like to discuss this matter.

Respectfully,

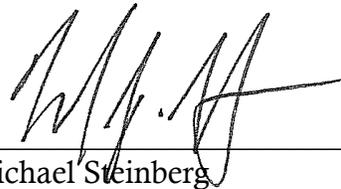


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