

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

BRENDA BROWN, et al.,

Plaintiffs,

v

GOVERNOR RICK SNYDER, et al.,

Defendants.

Case No.

Judge:

Michigan Court of Claims Case No.
17-291-MZ

JOINT NOTICE OF REMOVAL

Date: February 28, 2018

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INTRODUCTION

Defendants Daniel Wyant, Bradley Wurfel, Liane Shekter Smith, Adam Rosenthal, Stephen Busch, Patrick Cook, and Michael Prysby (“MDEQ Defendants”), by and through their respective counsel, hereby remove this action from the Michigan Court of Claims to the United States District Court for the Eastern District of Michigan pursuant to 28 U.S.C. §§ 1441, 1442 and 1446. In support of this Notice of Removal, the MDEQ Defendants state as follows:

BACKGROUND

1. The original complaint was filed on November 2, 2017, in the Michigan Court of Claims. (**Exhibit A**).
2. MDEQ Defendants accepted service on January 31, 2018.
3. MDEQ Defendants are present or former employees of the Michigan Department of Environmental Quality (“MDEQ”) and are being sued for alleged actions and omissions that the United States Environmental Protection Agency (“USEPA”) would otherwise have had to perform. Their alleged actions and omissions were further taken pursuant to the direction, guidance, oversight, and control of USEPA.
4. Defendant Cook was a Water Treatment Specialist assigned to the MDEQ’s Lansing Community Drinking Water Unit. Defendant Prysby was the District 11 Engineer for the MDEQ's Office of Drinking Water and Municipal

Assistance. Defendant Rosenthal was a water quality analyst for the MDEQ. Defendant Shekter-Smith was Chief of MDEQ's Office of Drinking Water and Municipal Assistance. Defendant Busch was the MDEQ's Office of Drinking Water and Municipal Assistance Lansing District Supervisor. Defendant Wyant was the MDEQ's Director. Defendant Wurfel was MDEQ's Director of Communications.

5. The Complaint alleges an unconstitutional taking of property in violation of the Michigan Constitution against MDEQ Defendants and all other Defendants based on Defendants "deliberately substituting safe drinking water with a known toxic alternative and their continued decision not to use anti-corrosive agents to prevent the foreseeable deterioration and/or destruction of the Plaintiffs' water service lines." (Exhibit A, ¶227).

6. Plaintiffs also allege that, in addition to lead, they were exposed to legionella (Ex. A, ¶¶ 11, 78, 79, 111, 113, 116, 119, 123, 130, 131, 139, 197, 201, 203), high levels of trihalomethanes (TTHM) (Ex. A, ¶¶ 76, 77, 78, 87, 108, 109, 113), and other contaminants due to the alleged actions of all Defendants. (Ex. A, ¶¶ 74, 81, 113).

7. Corrosion control requirements, testing requirements, and the safety of water in terms of lead, bacteria, and other contaminant levels are governed by the federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f *et seq.*,

USEPA's Surface Water Treatment Rule ("SWTR"), 40 C.F.R. Part 141 Subpart H, and the Lead and Copper Rule ("LCR"), 40 C.F.R. Part 141 Subpart I.

8. As more fully described below, Plaintiffs' claims are removable to this Court under the federal officer removal statute (28 U.S.C. § 1442) and, alternatively, under the substantial federal question doctrine (28 U.S.C. § 1441).

9. In accordance with 28 U.S.C. § 1446(d), a notice of filing this Joint Notice of Removal and a copy of this Notice of Removal are being filed with the Michigan Court of Claims. A copy of both notices will be served upon Plaintiffs.

10. Copies of all process, pleadings, and orders received by Removing Defendants are attached. (**Exhibit B**).

11. By removing this action, MDEQ Defendants do not waive any defenses, objections, or motions available under state or federal law.

SDWA AND LCR BACKGROUND

12. The SDWA was passed by Congress in 1974 to establish a comprehensive federal program governing drinking water in the United States and directed USEPA to promulgate national primary drinking water standards and to regulate public water systems. See 42 U.S.C. § 300f, *et seq.*

13. The SDWA authorized USEPA to establish a "joint Federal-State system for assuring compliance" with the promulgated drinking water standards. H.R. Report No. 93-1185, at 1.

14. Under the SDWA, USEPA works jointly with states "on a continuous, ongoing basis" to administer and enforce drinking water regulations.¹

15. USEPA promulgated numerous regulations concerning not only lead and copper, but also total coliform, disinfectants and disinfection byproducts, arsenic, synthetic organic and inorganic chemicals, volatile organic compounds, inorganics, fluoride, and radionuclides. See, e.g. 40 C.F.R. §§ 141.1-141.861.

16. The SDWA authorizes USEPA to delegate primary enforcement responsibility for public drinking water systems to states where USEPA determines, inter alia, that the state: (1) has adopted drinking water regulations that are no less stringent than the national primary drinking water regulations promulgated by USEPA; (2) has adopted and is implementing adequate procedures for the enforcement of such State regulations, including conducting such monitoring and making such inspection as required by USEPA; and (3) will keep such records and make such reports with respect to its activities as required by USEPA. See 42 U.S.C. § 300g-2; see also 40 C.F.R. §§ 142.10 and 142.11. Section 1445 of the SDWA also authorizes the USEPA to enter and inspect water supplies to determine whether the water supply is in compliance with the SDWA.

¹ See generally USEPA's Safe Drinking Water Act (SDWA) Resources and FAQs, **Exhibit C**.

17. USEPA first granted the Michigan Department of Public Health (later assumed by MDEQ) primary enforcement responsibility over the regulation of Michigan's public drinking water systems in 1977. 42 Fed. Reg. 44835 (Sept. 7, 1977). The State of Michigan entered into an Agreement with USEPA in 1978 regarding primary enforcement obligations under the SDWA.²

18. Each time USEPA amends the SDWA, SWTR, or LCR, Michigan must make corresponding changes to its Safe Drinking Water Program. Each revision to the state drinking water program in response to new or revised federal regulations, including those regulations which relate to lead and copper, requires MDEQ to submit a request to USEPA Administrator for approval of the program revision. See 40 C.F.R. §§ 142.12(a)(1) and 142.16(d). And, before approving the revisions, USEPA must publish notice and provide an opportunity for a public hearing. See 40 C.F.R. § 142.13.³

19. USEPA is responsible for implementing the SDWA, SWTR, and LCR in Michigan absent the MDEQ's primacy obligations under the SDWA. See 40

² **Exhibit D**, Primacy Agreements.

³ **Exhibit D**, Primacy Agreements.

C.F.R. § 142.171(a)(2). In fact, USEPA is responsible for enforcing and administering the SDWA, SWTR, and LCR in Wyoming and Washington D.C.⁴

20. The SDWA, however, reserves tremendous oversight authority to the USEPA, including mandatory USEPA intervention in the form of notifications, advice, technical assistance, conference calls, and, failing timely and sufficient state action, enforceable orders and inspections to bring water systems into compliance with federal standards. See 42 U.S.C. § 300g-3; see also 40 C.F.R. §§ 141.82(i), 141.83(b)(7), 142.19, 142.30, and 142.34.

21. By way of example, each state with primary enforcement responsibility is required to submit to USEPA detailed quarterly and annual reports regarding the regulation of public drinking water systems including detailed information regarding each system's compliance with the treatment techniques for lead and copper. See 40 C.F.R. §§ 142.15 and 142.19. All of these reports are

⁴ See <https://safewater.zendesk.com/hc/en-us/articles/211400468-Section-1413-of-the-Safe-Drinking-Water-Act-allows-EPA-to-award-primary-enforcement-responsibility-i-e-primacy-for-the-Public-Water-System-Supervision-PWSS-program-to-states-and-tribes-Which-states-and-tribes-have-primacy-for-the-PWSS-program->

publicly available, and USEPA is required to, at least annually, review each state's submittals for compliance with USEPA requirements. 40 C.F.R. § 142.17(a)(1).⁵

22. Beyond these reporting requirements, USEPA guides, directs, oversees, and consults with MDEQ regarding drinking water issues that arise.⁶

23. Michigan receives a substantial amount of funding from USEPA for administering and enforcing the SDWA and LCR on USEPA's behalf.⁷ In fact, the salaries of Mr. Cook and Mr. Rosenthal have been paid in part by USEPA funding.⁸

24. If USEPA determines that a state no longer meets its requirements, the USEPA is required to initiate proceedings to withdraw primacy approval. See 40 C.F.R. § 142.17(a)(2). If USEPA believes a state has abused its discretion in making corrosion control or source water treatment determinations in a substantial number of cases, or in cases affecting a substantial population, USEPA may issue

⁵ **Exhibit E**, USEPA Annual Summaries and MDEQ PWSS Program Evaluation.

⁶ See emails between USEPA and MDEQ (**Exhibit F** and **Exhibit G**). These documents were previously released by USEPA and MDEQ pursuant to FOIA requests and are publicly available.

⁷ See **Exhibit I**, MDEQ Funding Documents.

⁸ **Exhibit I**, p. 7.

an order establishing federal treatment requirements for a public water system. See 40 C.F.R. § 142.19(a).

25. By way of even further example, whenever USEPA finds that a public water system is not in compliance with any primary drinking water regulation, USEPA “shall provide advice and technical assistance to such State and public water system as may be appropriate to bring the system into compliance by the earliest feasible time.” 40 C.F.R. § 142.30.

26. Specifically regarding lead and copper, USEPA, in 1991, promulgated national primary drinking water regulations (“NPDWRs”) for controlling lead and copper in public drinking water. 56 Fed. Reg. 26460 (June 7, 1991). These regulations are known as the “Lead and Copper Rule” or “LCR” and are found at 40 C.F.R. § 141.80, et seq. USEPA has since amended the LCR several times, most notably in 2000 and 2007. See, e.g., 65 Fed. Reg. 1950 (Jan. 12, 2000); 72 Fed. Reg. 57782 (Oct. 10, 2007).

27. USEPA’s LCR applies to public water systems such as the City of Flint. See 40 C.F.R. § 141.80(a). Generally speaking, it requires those water systems to monitor the levels of lead and copper at consumers’ taps and, under a number of different circumstances, requires those systems to employ various treatment techniques such as corrosion control treatment, source water treatment,

lead service line replacement, and public education. 40 C.F.R. § 141.80(b) – (h).⁹ MDEQ and MDEQ Defendants are responsible for enforcing these regulations in Michigan, a task USEPA personnel would otherwise be required to perform.

28. Recognizing the complexity and ambiguity of the LCR, USEPA’s commentary to its 2007 amendments to the LCR states that USEPA will provide guidance to help systems identify source water changes that could impact optimal corrosion control. 72 Fed. Reg. 57782, 57789 (Oct. 10, 2007). USEPA has responded to this mandate by issuing at least eleven major guidance documents, directing all aspects of a state’s implementation of the LCR:

- Lead and Copper Rule Guidance Manual: Volume I: Monitoring (Sept. 1991);
- Lead and Copper Rule Guidance Manual: Volume II: Corrosion Control Treatment (EPA 811-B-92-002) (Sept. 1992);
- Guidance Manual for Selecting Lead and Copper Control Strategies (Jan. 1997);

⁹ Numerous scholars and practitioners have characterized the LCR as complex and recognized that many of its provisions are confusing and ambiguous. Most recently, USEPA and its Office of General Counsel determined, after several months of review, that “there are differing possible interpretations of the LCR with respect to how the rule’s optimal corrosion control treatment procedures” applied to Flint’s water system. (**Exhibit I**, Grevatt Memorandum).

- How to Determine Compliance with Optimal Water Quality Parameters as Revised by the Lead and Copper Minor Revisions (EPA 815-R-99-019) (Feb. 2001);
- Lead and Copper Monitoring and Reporting Guidance for Public Water Systems, EPA-816-R-02-009 (Feb. 2002);
- Lead in Drinking Water Regulation: Public Education Guidance for Community Water Systems, EPA 816-R-02-010 (June 2002);
- Revised Guidance Manual for Selecting Lead and Copper Control Strategies (March 2003);
- Lead and Copper Rule: 2007 Short-Term Regulatory Revisions and Clarifications; State Implementation Guidance, EPA 816-R-08-009 (June 2008);
- Implementing the Lead Public Education Provision of the Lead and Copper Rule: A Guide for Community Water Systems (June 2008);
- Lead and Copper Rule: Monitoring and Reporting Guidance for Public Water Systems, EPA 816-R-10-004 (March 2010); and
- Optimal Corrosion Control Treatment Evaluation Technical Recommendations for Primacy Agencies and Public Water Systems (March 2016).

29. Similar to the LCR, USEPA also promulgated NPDWRs in 1989 for controlling microorganisms, disinfectants, and inorganic and organic materials in drinking water. 54 Fed. Reg. 27527 (June 1989). These regulations are collectively known as the SWTR and are found at 40 C.F.R. § 141.70 et seq. USEPA amended the SWTR several times and has enacted supplemental rules, such as the Interim Enhanced Surface Water Treatment Rule (1998), the Filter Backwash Recycling

Rule (June 2001), and the Long Term 2 Enhanced Surface Water Treatment Rule (January 2006).

30. The SWTR applies to public water systems such as the City of Flint. 40 C.F.R. § 141.70. It requires public water systems to employ particular treatment techniques, source water treatment, source water monitoring of contaminants, and public education related to microorganisms and bacteria present in drinking water, including fecal coliform, total coliform, legionella, trihalomethanes, and disinfectant byproducts. It also requires MDEQ to enforce these regulations through issuing violations to public water systems like the City of Flint, and requiring public notification of violations. See 40 C.F.R. 141.23-24 (public notification rule); 40 C.F.R. 141.21(g)(1) (total coliform); 40 C.F.R. 141.63(b) (fecal positive repeat sample); 40 C.F.R. 141.21(g)(2) (coliform monitoring); 40 C.F.R. 141.30(d) (TTHM); 40 C.F.R. 141.133(b)(1) (MCL for TTHM); 40 C.F.R. 141.33 (Maximum Residual Disinfectant Level for chlorine).

31. Legionella is regulated under the SDWA pursuant to the SWTR. 40 C.F.R. § 141.70(a). While legionella is not regulated pursuant to a Maximum Contaminant Level, as is the case for lead, it has a Maximum Contaminant Level Goal of zero. USEPA's SWTR requires water systems using a surface water source, such as the City of Flint's use of the Flint River, to employ certain treatment techniques to eliminate cryptosporidium and giardia bacteria, and these

same treatment techniques remove legionella. 40 C.F.R. § 141.70. The rules also require public water systems to maintain a detectable disinfection residual throughout the entire distribution system to ensure sufficient treatment for the removal of these pathogens. 40 C.F.R. § 141.72. MDEQ and MDEQ Defendants are responsible for enforcing these regulations in Michigan, a duty USEPA personnel would otherwise be required to perform.

32. Integral to the SWTRs is the Disinfectants and Disinfection Byproducts Rule (DBPR), established in 1998. 40 C.F.R. §141.131; 40 C.F.R. §§ 141.64-65. The DBPR regulates the amount of disinfectants in drinking water that are used to inactivate pathogens such as legionella¹⁰ and applies to community water systems that add a disinfectant to the drinking water during any part of the treatment process. 40 C.F.R. § 141.131; 40 C.F.R. §§ 141.64-65. The DBPR provides for maximum contaminant levels for total trihalomethanes (TTHM), in addition to other disinfectants. 40 C.F.R. §141.64. The maximum contaminant level for TTHM is calculated based on the Location Running Annual Average. 40 C.F.R. § 141.64. MDEQ and MDEQ Defendants are responsible for enforcing

¹⁰ For a full explanation of the DBPRs, see USEPA's guidance on The Stage 1 Disinfectants and Disinfection Byproducts Rule, <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=200025FL.txt>.

these regulations in Michigan, a task USEPA personnel would otherwise be required to perform.

33. USEPA has issued at least ten major guidance documents related to the SWTR, directing all aspects of a state's implementation of the SWTR:

- Interim Enhanced Surface Water Treatment Rule Implementation Guidance, EPA 816-R-01-011 (June 2001)
- Long Term 1 Enhanced Surface Water Treatment Rule Implementation Guidance, EPA 816-R-04-008 (August 2004)
- Long Term 2 Enhanced Surface Water Treatment Rule Implementation Guidance, EPA 816-R-07-006 (August 2007)
- Guidance Manual for Conducting Sanitary Surveys of Public Water Systems, EPA 815-R-99-016 (April 1999)
- Implementation Guidance for the Filter Backwash Recycling Rule, EPA 816-R-04-006 (June 2004)
- Alternative Disinfectants and Oxidants Guidance Manual, EPA 815-R-99-014 (April 1999)
- Disinfection Profiling and Benchmarking Guidance Manual, EPA 815-R-99-013 (August 1999)
- Enhanced Coagulation and Enhanced Precipitative Softening Guidance Manual, EPA 815-R-99-012 (May 1999)
- Guidance Manual for Compliance with the Interim Enhanced Surface Water Treatment Rule: Turbidity Provisions, EPA 815-R-99-010 (April 1999)
- Microbial and Disinfection Byproduct Rules Simultaneous Compliance Guidance Manual, EPA 815-R-99-015 (August 1999).

34. USEPA also has the right to audit state drinking water programs and issue orders directing specific actions, as necessary. See 40 C.F.R. § 142.19.

REMOVAL PURSUANT TO 28 U.S.C. § 1442

35. The federal officer removal statute permits a defendant to remove a state-court action brought against “any [federal] agency or any [federal] officer (or any person acting under that officer) . . . for or relating to any act under color of such office” 28 U.S.C. § 1442.

36. Federal officer removal statutes “are to be liberally construed.” *Colorado v. Symes*, 286 U.S. 510, 517 (1932). “The federal officer removal statute is not ‘narrow’ or ‘limited.’ At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law.” *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) (quoting *Willingham v. Morgan*, 396 U.S. 402, 407 (1969)); see also Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545.

37. A defendant who is not a federal officer or federal agency must satisfy three elements to remove under the federal officer statute: (1) the defendant is a person acting under a federal officer or agency; (2) the defendant performed the actions for which the defendant is being sued under the direction of a federal officer or agency; and (3) the defendant has raised a colorable federal defense. See,

e.g., *Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010) (citation omitted); *Mesa v. California*, 489 U.S. 121, 138-39 (1989).

38. In this case, MDEQ Defendants satisfy all three elements of the federal officer removal statute.¹¹

I. MDEQ DEFENDANTS ARE PERSONS THAT WERE ACTING UNDER THE USEPA.

39. MDEQ Defendants are “persons,” 1 U.S.C. § 1, whose authority to regulate Michigan’s public drinking water systems is derived from the SDWA, SWTR, LCR, and other USEPA regulations, and whose enforcement of the

¹¹ MDEQ Defendants previously removed other Flint water cases pursuant to the federal officer removal statute and the substantial federal question doctrine. Some of those cases are currently in various stages of appeal, including *Mays v. City of Flint*, 871 F.3d 437 (6th Cir. 2017) (rehearing denied), which in a 2-1 split decision the Sixth Circuit Court of Appeals affirmed the district court’s decision that federal officer removal was not available to MDEQ Defendants. These Defendants filed a petition for writ of certiorari to the United States Supreme Court in the *Mays* case on February 13, 2018, regarding this issue. *Patrick Cook v. Melissa Mays*, No. 17-1144 (U.S. S. Ct.) MDEQ Defendants also are currently awaiting the Sixth Circuit’s decision in *Nappier, et al. v. Snyder, et al.* Case No. 17-1401 (6th Circuit), which is an appeal of the district court’s decision related to federal officer removal. In addition, these Defendants have appealed a remand decision in *Waid, et al. v. City of Flint, et al.*, No. 18-1155 (6th Circuit). **These Defendants must remove this case in order to preserve their asserted right to removal because removal would otherwise be barred by the strict 30-day timeframe for removing actions provided in 28 U.S.C. § 1446.**

SDWA, SWTR, and LCR with respect to Michigan's public water systems occurs under USEPA's direction, control, and close supervision.

40. The "acting under" requirement is satisfied by establishing that the nonfederal official performed the actions for which he or she is being sued "under color of federal office." 28 U.S.C. § 1442.

41. The "acting under" requirement is satisfied when an individual's assistance to the federal agency goes beyond simple compliance with the law and fulfills basic governmental tasks. *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 153-154 (2007).

42. A formal delegation of legal authority to undertake obligations on a federal agency's behalf also satisfies the "acting under" requirement. *Id.*

43. Additionally, the "acting under" requirement is satisfied by performing tasks that the federal agency itself would otherwise have to perform. *Id.* at 154.

44. MDEQ Defendants' actions in enforcing the SDWA, SWTR, and LCR throughout Michigan, including in Flint, is undertaken on USEPA's behalf; in the absence of MDEQ regulating public water systems and enforcing the SDWA, SWTR, and LCR, USEPA would be legally required to perform these tasks itself.

45. USEPA was in a position superior to MDEQ and MDEQ Defendants, since it retained authority under the SDWA to direct, order, and oversee MDEQ's actions.

46. MDEQ Defendants administered and enforced the SDWA, SWTR, and LCR's detailed monitoring, testing, sampling, and notification requirements in overseeing the Flint water system not only on USEPA's behalf, but also pursuant to USEPA's oversight, direction, and control.

47. MDEQ Defendants were not tasked with merely complying with the SDWA, SWTR, and LCR, like the defendants in *Watson*, but were instead responsible for enforcing the SDWA, SWTR, and LCR on behalf of USEPA. USEPA delegated the legal authority to MDEQ to issue violations of the SDWA, SWTR, and LCR to public water systems, and require public notifications of violations.

48. MDEQ Defendants also oversaw and enforced the SWTR and DBPR, including treatment, monitoring, and enforcement of the regulations governing pathogens like legionella and disinfectant byproducts like TTHM, with direction and oversight from USEPA.¹²

¹² **Exhibit F**, pp. 6, 13-14, 15-16, 19, 36, 38-39, 41, 43, 52-55, 84, 107-111, 113-118, 120-122, 133-135, 147-154; **Exhibit G**, pp. 3-4, 34-35, 71, 108.

49. Plaintiffs' Complaint both specifically and implicitly¹³ alleges that MDEQ Defendants had duties to Plaintiffs based on the federal SDWA, SWTR, and LCR standards, regulations, monitoring, and testing requirements that were purportedly not followed and give rise to Plaintiffs' claims.

50. The federal nature of MDEQ Defendants' conduct here is bolstered by the fact that MDEQ's drinking water program is funded in large part by federal dollars due to the SDWA enforcement obligations.¹⁴

51. USEPA provided MDEQ Defendants with oversight, guidance, and control related to a variety of issues in Flint, including without limitation the implementation of corrosion control once elevated levels of lead were discovered in Flint's drinking water.¹⁵

52. Each time USEPA delegated legal authority to MDEQ to implement an aspect of the SDWA, SWTR, or LCR, USEPA indicated a "hope [that] the ties between our offices will continue to be strengthened as we implement new public health protection regulations" or that the "continued support of your staff to

¹³ **Exhibit A** ¶¶ 3, 11, 53, 61, 62, 66, 68, 69, 70, 74, 76, 77, 78, 79, 81, 84, 85, 86, 87, 88, 98, 102, 103, 108, 109, 111, 113, 116, 119, 123, 125, 126, 127, 128, 130, 131, 133, 138, 139, 141, 145, 156, 159, 178, 196, 197, 201, 203, 207, 215, 227.

¹⁴ **Exhibit H**, MDEQ Funding Documents.

¹⁵ See **Exhibits F and G**.

implement the public water supply supervision program in this state is appreciated."¹⁶

53. USEPA controls MDEQ's responsibilities under the SDWA, SWTR, and LCR. For example, the USEPA Public Water System Supervision Program Final Report of August 30, 2010, noted that USEPA granted MDEQ permission to disinvest in certain primacy activities due to budgetary constraints while dictating which duties under the SDWA MDEQ must continue to carry out.¹⁷

54. USEPA's extensive direction, control, and oversight of MDEQ is memorialized in part, and without limitation, in the correspondence and communication between USEPA and MDEQ as it assisted the state agency in carrying out the USEPA's obligations under the SDWA, SWTR, and LCR. This direction and control existed prior to the Flint water controversy but intensified in response to drinking water quality concerns after Flint began using the Flint River as a water source. As the correspondence demonstrates, USEPA Region 5 was actively involved in directing MDEQ's decisions and responses in Flint, including monitoring, treatment, and the implementation of corrosion control.¹⁸

¹⁶ **Exhibit E.**

¹⁷ **Exhibit E.**

¹⁸ **Exhibit F and G.**

55. USEPA is also actively involved in providing guidance, direction, and oversight whenever an enforcement action is taken by MDEQ to remedy a SDWA or LCR violation or when concerns short of a violation arise, such as the concerns surrounding Flint's drinking water in 2014-2015.¹⁹

56. MDEQ Defendants are, therefore, properly characterized as USEPA's agents, acting under USEPA's direction and control to assist with implementing and enforcing the federal SDWA, SWTR, and LCR, including the corresponding guidance documents for these regulations. Furthermore, the Removing Defendants' alleged actions and inactions in this case were not only taken pursuant to USEPA's LCR, guidance documents, training manuals, quarterly and annual reviews, but they were also guided by repeated written and verbal dialogue with a number of USEPA officers who advised and oversaw the Removing Defendants' state-based regulation of the Flint water system.²⁰

57. Beyond this active supervision and direction of MDEQ, USEPA had the authority to order MDEQ to take specific actions pursuant to the SDWA, a

¹⁹ **Exhibit F and G.**

²⁰ **Exhibit F and G.**

power which USEPA exercised through its Emergency Administrative Order (“EAO”) issued in January 2016.²¹

II. MDEQ DEFENDANTS ARE BEING SUED “FOR OR RELATING TO ACTS” UNDERTAKEN ON BEHALF OF USEPA AND PURSUANT TO USEPA GUIDANCE AND DIRECTION.

58. The federal officer removal statute requires a defendant to show that he or she is being sued for or related to the acts they performed at the direction of a federal officer or agency. *Bennett*, 607 F.3d at 1088.

59. Defendants need not present an airtight case on the merits in order to show the required causal connection. *Jefferson County v. Acker*, 527 U.S. 423, 432 (1999). Rather, the United States Supreme Court has indicated that “[t]he hurdle erected by this requirement is quite low.” *Isaacson v. Dow Chem. Co.*, 517 F.3d. 129, 137 (2d Cir. 2008) (citing *Maryland v. Soper*, 270 U.S. 9 (1926) (“[i]t is enough that [the federal officer's] acts or his presence at the place in performance of his official duty constitute[s] the basis” for the lawsuit).

60. The allegations in MDEQ Defendants’ Notice of Removal should be accepted as true and construed in the light most favorable to removal. “Although the principle of limited federal court jurisdiction ordinarily compels [district courts] to resolve any doubts about removal in favor of remand,... courts have not

²¹ See 42 U.S.C. § 300i and **Exhibit J**, USEPA EAO.

applied that tiebreaker when it comes to the federal officer removal statute in light of its broad reach." *Zeringue v. Crane Co.*, 846 F.3d 785, 789 (5th Cir. 2017) (citing *Watson v. Philip Morris*, 551 U.S. 142, 151 (2007)). A notice of removal pursuant to Section 1442 need not "meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint" in order to entitle the defendant to removal. *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199-200 (4th Cir. 2008).

61. The crux of this case is the federally-created statutory right to safe drinking water, the LCR regulations, the SWTR regulations, federal delegation of SDWA enforcement and administration to MDEQ Defendants, and the actions MDEQ Defendants took under these federal regulations while administering and enforcing the SDWA. These are all tasks "for" or "related to" MDEQ Defendants' duties under color of federal office, tasks USEPA would have to perform in the absence of delegating these duties to the MDEQ, and tasks undertaken under USEPA's guidance, direction, and control.

62. Any allegations that the MDEQ Defendants acted in error, inappropriately, or in contravention of USEPA do not bar removal of this action to federal court:

[T]he Supreme Court has held that, in a civil suit such as this, it is sufficient for the defendant to show that his relationship to the plaintiff "derived solely from [his] official duties."... If the question raised by the plaintiff is whether

the defendant was engaged in “some kind of frolic,” or acting in contravention of his official duties, the parties will have their opportunity to present their versions of the facts to a federal court.

Magnin v. Teledyne Continental Motors, 91 F.3d 1427-28 (11th Cir. 1996) (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)).

63. USEPA provided MDEQ direction regarding, inter alia, Boil Water Advisories, how to address increased levels of trihalomethanes, and Flint's initial lead and copper monitoring periods, all of which are implicated by Plaintiffs' Complaint.²²

64. USEPA continued to monitor, oversee, and provide guidance to MDEQ Defendants in their enforcement of the SDWA, SWTR, and LCR in 2014 and 2015.²³ USEPA actively provided ongoing guidance, oversight, and direction to MDEQ in an effort to determine the root cause of the water lead levels and the best way to address these issues throughout 2015.²⁴

65. After Flint decided to switch its primary water source, Flint conducted two six month rounds of lead and copper sampling, as permitted by the LCR, to determine what, if any, corrosion control was appropriate. Flint's first six month

²² **Exhibit F**, pp. 32-33, 108-110, 133-136.

²³ **Exhibit G**, pp. 133-136.

²⁴ **Exhibit G**, pp. 24-29, 124-126.

round of lead and copper monitoring in December 2014 resulted in a 90th percentile lead level of 6 parts per billion (ppb), which is below the federal action level for lead of 15 ppb. 40 C.F.R. § 141.81.

66. Subsequently, USEPA expressed concern regarding Flint's water lead levels at consumers' taps after discovering high lead levels in one Flint home in February 2015.

67. Perhaps most pertinent to Plaintiffs' Complaint, the alleged delay in implementing corrosion control after allegedly high lead levels came to light in one Flint home in February 2015 was at the direction and under the supervision of USEPA.

68. On February 27, 2015, Jennifer Crooks, USEPA Region V Michigan Program Manager, directed MDEQ Defendants to consult with USEPA experts regarding Flint's public water system after high lead levels were observed in one Flint home. MDEQ was directed to conduct further review but not directed to alter corrosion control.²⁵

²⁵ **Exhibit F**, pp. 15-19.

69. From February 2015 through June 2015, USEPA continued to guide and direct what treatment or actions were required in Flint, and USEPA officials again visited Flint related to its drinking water program.²⁶

70. During a conference call in June 2015, USEPA told MDEQ Defendants that conducting a corrosion control study did not make sense and that simply adding phosphates to address corrosion may be premature.²⁷ USEPA's direction to MDEQ was to utilize USEPA technical assistance and comprehensively look at Flint's water quality before making any treatment recommendation; again, USEPA's direction was to delay implementing corrosion control until the proper method and amount of treatment could be determined.

71. On August 31, 2015, USEPA and MDEQ staff "brainstormed on strategic next steps" as USEPA oversaw actions to address Flint's lead corrosion concerns, including development of public education programs, gathering information for further drinking water treatment, providing USEPA's experts to Flint, and development of an MDEQ-USEPA joint team of experts to help Flint

²⁶ **Exhibit F**, pp. 128-129.

²⁷ **Exhibit F**, pp. 112-116, 149-154.

address its drinking water concerns.²⁸ These efforts included methods for identifying and replacing lead service lines in Flint.²⁹

72. Following the August 31, 2015, conference call, USEPA Region V Michigan Program Manager Crooks directed MDEQ to provide public education to Flint residents and not to simply add orthophosphates without first studying the water quality and existing distribution system conditions to determine proper corrosion control.³⁰ USEPA's direction was to use USEPA experts and review Flint's situation holistically, rather than immediately implement corrosion control.

73. In September 2015, MDEQ was instructed to consult and work under USEPA drinking water experts Michael Schock and Darren Lytle, in addition to Crooks.³¹

74. USEPA personnel were integral members of the Flint Technical Advisory Committee, which recommended in early October 2015 that Flint switch

²⁸ **Exhibit F**, pp. 155-156. Even in this USEPA summary of discussions with MDEQ regarding corrosion control plans, USEPA official Crooks reported that "[e]veryone at the meeting agreed that Flint is in compliance with the Safe Drinking Water Act action level for lead."

²⁹ **Exhibit F**, pp. 36-39.

³⁰ **Exhibit F**, pp. 34-35.

³¹ **Exhibit F**, p. 30.

back to purchasing treated water from the Great Lakes Water Authority.³² All the plans to switch water sources were submitted to USEPA for approval by USEPA experts.³³

75. USEPA closely oversaw and directed MDEQ in analyzing Flint's water and then in formulating an optimization plan to address Flint's lead levels and enforce the SDWA on USEPA's behalf.³⁴

76. On October 30, 2015, MDEQ Defendant Prysby directed Flint to take specific steps to address corrosion control upon the water switch pursuant to a letter approved by USEPA that was the product of USEPA's review, direction, and guidance for addressing Flint's water quality issues.³⁵ Prior to this October 30, 2015, letter, USEPA's specific direction to MDEQ was to continue studying the situation, consult with USEPA experts, and not implement corrosion control immediately.

³² **Exhibit K**, Flint Technical Advisory Task Force Emails.

³³ **Exhibit F**, pp. 34-35.

³⁴ **Exhibit F**, pp. 34-51.

³⁵ **Exhibit F**, pp. 36-40, 43-49.

77. As Plaintiffs' claims of continuing damages are tied to this delayed implementation of corrosion control at USEPA's specific direction, MDEQ Defendants satisfy the "causal connection" requirement for federal officer removal.

78. USEPA controlled, guided, and directed the MDEQ's response to water quality issues, the corrosion control plans, addressing legionella concerns, and Flint's switch of water sources in 2015.

79. Three months later, under pressure for faster action to address lead, USEPA exercised its authority under the SDWA to exert the agency's ultimate control over MDEQ's administration and enforcement of the federal statute by issuing its EAO in January 2016.³⁶

80. The EAO was later amended on November 17, 2016.³⁷ Since January 21, 2016, MDEQ has acted under the specific direction of USEPA pursuant to the USEPA EAO, including monthly operation reports, weekly conference calls, and weekly status reports to USEPA summarizing MDEQ's enforcement actions taken pursuant to the EAO.³⁸ MDEQ has even filed a lawsuit against the City of Flint in order to enforce the EAO, SDWA, and LCR in Flint.

³⁶ **Exhibit J.**

³⁷ **Exhibit L**, Amended EAO.

³⁸ See **Exhibit M** for sample weekly reports and MDEQ-USEPA correspondence regarding MDEQ enforcement of the Amended EAO in Flint. See

81. Additionally, the causal connection requirement for federal officer removal can be met when strict adherence to government regulations or specifications compelled the conduct on which the suit is based. *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 399-400 (5th Cir. 1998).

82. The right to safe drinking water is a federal statutory right created by the federal SDWA, with the federal LCR specifically addressing the treatment and requirements related to lead and legionella. In the absence of the SDWA and LCR, there would be no requirements to monitor lead levels—or monitor or treat water to remove any other contaminants—in drinking water.

83. All water systems are required to install and operate optimal corrosion control treatment as that term is defined at 40 C.F.R. § 141.2. Compliance with the optimal corrosion control treatment requirement can be satisfied through an acceptable demonstration via monitoring that the system is optimized, or through actual treatment steps and maintenance of an optimized corrosion control treatment as set forth in 40 C.F.R. § 141.81.

84. Since Flint had not previously been treating water at its Water Treatment Plant prior to the water source switch, there was no corrosion control

also USEPA June 3, 2016 letter regarding USEPA direction provided “for many months” in Flint, attached as **Exhibit N**.

treatment for Flint to “continue to operate and maintain,” so based on the LCR regulations and prior MDEQ practices (as directed and overseen by USEPA since 1991), Flint was required to undergo an initial lead monitoring period of two six month rounds of sampling to determine whether and, if required, what corrosion control was necessary for Flint River water. This was an acceptable option under the LCR. 40 C.F.R. § 141.81.

85. USEPA has agreed that the LCR’s optimized corrosion control requirements, as applied to Flint, were ambiguous.³⁹

86. Plaintiffs’ claims also are in part based on MDEQ Defendants’ strict adherence to the SWTR and SDWA regulations governing TTHM, as Plaintiffs fault MDEQ Defendants for not disclosing high levels of TTHM prior to December 2014. However, strict adherence to the SDWA regulations dictated that no SDWA violation occurred until December 2014, when the local running average exceeded the permissible TTHM levels under the SDWA.⁴⁰ *Anderson v. Hackett*, 646 F. Supp. 2d 1041, 1052 (SD Ill. 2009) (“Section 1442(a)(1) authorizes removal of an entire case, even though only one of its controversies might involve a federal officer or agency”)(citations omitted)).

³⁹ **Exhibit I**, Gravatt Memorandum.

⁴⁰ See **Exhibit F**, pp. 13-14, 52-55, 108-110, and 113-115.

87. As demonstrated above, the SDWA and LCR required MDEQ Defendants to act in the way they did related to a myriad of matters, including TTHM, general monitoring which included detection and treatment of bacteria (which is also effective for legionella), and water lead level analysis. MDEQ Defendants have a right to present their version of the facts to a federal, not a state, court.

88. Plaintiffs may argue that the SDWA and LCR did not require MDEQ to monitor and oversee Flint's public water system in the way that it did. The United State Supreme Court has held that "[t]o assert that a federal statute does not impose certain obligations whose alleged existence forms the basis of a civil suit is to rely on the statute in just the same way as asserting that the statute does impose other obligations that may shield the federal officer against civil suits; both are equally defensive and equally based in federal law." *Mesa*, 489 U.S. at 130.

89. Plaintiffs' claims are that MDEQ Defendants allegedly failed to properly monitor Flint's compliance with the SDWA, SWTR, and LCR and enforce the SDWA, SWTR, and LCR, resulting in drinking water quality concerns and damages. All of these alleged actions are directly tied to (a) MDEQ Defendants' conduct to enforce these federal regulations that USEPA monitored, supervised, and directed, and (b) MDEQ's adherence to the SDWA SWTR, and

LCR's regulations in administering and enforcing the federal regulations in USEPA's stead.

90. Plaintiffs' claims are inextricably intertwined with the construction, interpretation, and effect of the SDWA, SWTR, and the LCR. If these Defendants establish that these federal laws and regulations were not violated, Plaintiffs' claims against these Defendants are defeated.

91. Plaintiffs' claims depend on a question of federal law, primarily whether these Defendants complied with the SDWA, SWTR, and LCR during their oversight of the Flint public water system. There are no alternative theories supporting their claims that do not implicate the SDWA, SWTR, and/or LCR, as the MDEQ Defendants are being sued for carrying out tasks USEPA would otherwise be required to perform.

III. REMOVING DEFENDANTS HAVE RAISED A COLORABLE FEDERAL DEFENSE.

92. The final requirement under the federal officer removal statute is that the defendant raises a colorable federal defense. *Bennett*, 607 F.3d at 1085. This requirement recognizes that one of the most important reasons for removal is to have the validity of federal defenses tried in a federal court. *Willingham v. Morgan*, 395 U.S. at 407.

93. A defendant is not required to virtually win the case before removal will be permitted. *Jefferson County v. Acker*, 527 U.S. at 431. A reasonable federal defense argument, even if ultimately rejected, is sufficient to satisfy the colorable federal defense requirement of 28 U.S.C. § 1442. *Id.*

94. MDEQ Defendants have colorable federal defenses including but not limited to the following: preemption of Plaintiffs' claims by the SDWA (*Matoon v. Pittsfield*, 980 F.2d 1 (1st Cir. 1992))⁴¹; absolute immunity (*Butz v. Economou*, 438 U.S. 478 (1978)); and qualified immunity (*Phillips v. Roane County*, 534 F.3d 531, 538 (6th Cir. 2008)) (holding that government officials sued in their individual capacity can be shielded from liability by qualified immunity).

95. Moreover, Plaintiffs' claims would necessarily fail if MDEQ Defendants are able to show that they complied with their delegated obligations under the federal SDWA. See, e.g., *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996).

96. For federal officer removal, it is only important that there is a basis for removal of at least one claim by at least one defendant. *Am. Sys. Consulting, Inc. v.*

⁴¹ This defense was denied in the Sixth Circuit's opinion in *Boler v. Earley*, 865 F.3d 391 (2017), which is currently the subject of multiple petitions for certiorari to the United States Supreme Court, docketed as case no. 17-901, including a petition by MDEQ Defendants.

Devier, 514 F.Supp. 2d 1001, 1009 (S.D. Ohio 2007). Although some MDEQ Defendants may have a stronger claim that their actions were directed by USEPA officials or were dictated by detailed federal SDWA regulations, MDEQ Defendants submit that at least one of them satisfies the requirements for removing this action to federal court pursuant to 28 U.S.C. § 1442.

97. Venue is proper in this district under 28 U.S.C. § 1442(a), because the Michigan Court of Claims, Court of Appeals District 1, is located in the Eastern District of Michigan, Southern Division.

98. For all the above reasons, removal is proper under 28 U.S.C. § 1442.

REMOVAL PURSUANT TO 28 U.S.C. § 1441

99. The substantial federal question doctrine provides that “a state law cause of action may actually arise under federal law, even though Congress has not created a private right of action, if the vindication of the right under state law depends on the validity, construction, or effect of federal law.” *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 565 (6th Cir. 2007) (internal citations omitted).

100. Under the substantial federal question doctrine, federal jurisdiction exists when a “state-law claim necessarily raises a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing a congressionally approved balance of federal and state judicial responsibilities.”

Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing, 545 U.S. 308, 314 (2005).

101. At the heart of Plaintiffs' Complaint are allegations that the drinking water provided to Flint residents was not safe and did not meet federal water quality standards, specifically standards related to lead. These and other Defendants were allegedly grossly negligent; committed assault and battery; and inflicted emotional distress by failing to require, ensure, implement, and advise the public regarding compliance with federal water quality standards and corrosion control requirements.

102. As set forth above, the SDWA governs drinking water quality and provides detailed regulations related to water quality standards, monitoring, and testing and treatment requirements, including for bacteria such as legionella. The LCR specifically regulates lead in drinking water and provides detailed standards, monitoring, and testing protocols related to lead in drinking water.

103. Plaintiffs' Complaint contains specific and implicit allegations⁴² that these MDEQ Defendants (along with other Defendants and actors) had duties to

⁴² **Exhibit A**, ¶¶ 3, 11, 53, 61, 62, 66, 68, 69, 70, 74, 76, 77, 78, 79, 81, 84, 85, 86, 87, 88, 98, 102, 103, 108, 109, 111, 113, 116, 119, 123, 125, 126, 127, 128, 130, 131, 133, 138, 139, 141, 145, 156, 159, 178, 196, 197, 201, 203, 207, 215, 227.

Plaintiffs based on the federal SDWA, SWTR, and LCR standards, regulations, monitoring, and testing requirements that were purportedly not followed and give rise to Plaintiffs' various causes of action.

104. Plaintiffs' claims are inextricably intertwined with the construction, interpretation, and effect of the SDWA, SWTR, and the LCR. If these and other Defendants establish that these federal laws and regulations were not violated, Plaintiffs' claims against these Removing Defendants are defeated.

105. Plaintiffs' claims depend on a question of federal law, primarily whether these MDEQ Defendants complied with the SDWA, SWTR, and LCR during their oversight of the Flint water system. There are no alternative theories supporting gross negligence that do not implicate the SDWA, SWTR, and/or LCR, as the MDEQ Defendants are being sued for carrying out USEPA's duty, as delegated to MDEQ Defendants, to ensure that public water systems such as Flint comply with the SDWA and LCR.

106. This is not a garden variety state law tort action that merely references a federal law or statute. This litigation stems from a unique situation involving individual governmental defendants implementing federal lead regulations, and

removal of this action will not open the door to removal of a vast number of purely state law claims.

107. Whether these and other Defendants violated the SDWA, SWTR, and LCR is disputed. USEPA admitted that the LCR is ambiguous and subject to different possible interpretations and constructions when applied to this particular situation. The Director of USEPA's Office of Drinking Water wrote a memo to the EPA's Regional Water Division Directors on November 3, 2015, stating: "After reviewing the rule with our Office of General Counsel, it appears that there are differing possible interpretations of the LCR with respect to how the rule's optimal corrosion control treatment procedures apply to this situation, which may have led to some uncertainty with respect to the Flint water system."⁴³

108. There is a substantial need for uniform interpretation of the SDWA and LCR as it applies to Flint, and the other 155,000 public water systems subject to the SDWA and LCR, that provide water to almost all Americans across the United States.

109. As the Court pointed out in *Harding-Wright v. D.C. Water and Sewer Auth.*, 350 F. Supp. 2d 102, 107 (D.D.C. 2005), "federal jurisdiction over a state law claim is appropriate when necessary to protect against inconsistent

⁴³ **Exhibit I**, Grevatt Memorandum.

interpretation of a federal statutory regime.” There is a substantial federal interest in resolving the disputed interpretations and effect of the SDWA and LCR to ensure accurate, consistent application of the federal statutes and regulations across the nation and across the various lawsuits relating to Flint's drinking water.

110. This Court’s exercise of jurisdiction over this case will not disturb a congressionally approved balance of federal and state judicial responsibilities. Congress has placed the regulation of drinking water within the federal realm through promulgation of the SDWA and via USEPA’s federal oversight, direction, and authority over the SDWA regulatory scheme.

111. Venue is proper in this district under 28 U.S.C. § 1441, because the Michigan Court of Claims, Court of Appeals District 1, is located in the Eastern District of Michigan, Southern Division.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, MDEQ Defendants Patrick Cook, Michael Prysby, Adam Rosenthal, Liane Shekter-Smith, Stephen Busch, Daniel Wyant, and Bradley Wurfel, respectfully request that this action proceed in this Court as an action properly removed.

Dated: February 28, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I directed Wendy Paul to electronically file the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record.

Dated: February 28, 2018

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