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COURT OF CLAIMS

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, as County Agent for the County of Oakland; GREAT LAKES WATER AUTHORITY; CITY OF DETROIT, by and through its Water and Sewerage Department; and CITY OF LIVONIA,

Plaintiffs,

v.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

Honorable Christopher M. Murray

Case 2018-000259-MZ

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PROPOSED BRIEF OF AMICI CURIAE ENVIRONMENTAL GROUPS IN SUPPORT OF DEFENDANT'S 02/01/2019 MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)

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INTEREST OF AMICI CURIAE

The Great Lakes Environmental Law Center and the Natural Resources Defense Council (collectively, "Environmental Groups") share a strong interest in defending the Lead and Copper Rule ("LCR") against the claims pleaded by Plaintiffs. Environmental Groups participated fully in the rulemaking process before the Michigan Department of Environmental Quality ("MDEQ") and advocated for the adoption of several elements of the LCR that Plaintiffs challenge here—and for even more health-protective standards than those promulgated by MDEQ. As explained herein, full and prompt implementation of the LCR is necessary to decrease the severe and indisputable dangers of lead in Michigan drinking water. As organizations committed to the total elimination of lead from Michigan's water supply, and with decades of experience working on lead in drinking water, Environmental Groups are well situated to explain why this Court should uphold the LCR and grant summary disposition to the State. The arguments in this amicus brief are based on the record now before the Court and adjudicative facts amenable to judicial notice, *see* MRE 201, and the brief addresses only issues raised by the State's motion and the response and reply thereto.[1]

SUMMARY OF ARGUMENT

No amount of lead exposure is safe for humans, especially for children, who are both more susceptible to lead poisoning and more likely to suffer a range of serious health consequences. In recognition of the danger of lead in drinking water—a danger recently and tragically underscored by the Flint Water Crisis—the Michigan Legislature has ordered MDEQ to establish standards for lead in drinking water that protect public health. The LCR takes two important steps toward that

[1] Environmental Groups have not yet moved to intervene in this action to defend the LCR because the Court of Claims lacks statutory subject-matter jurisdiction over non-state defendants. *See* MCL 600.6419; *Council of Orgs. & Others for Educ. About Parochiaid v. State*, 321 Mich. App. 456, 464–68 (2017). Should this action proceed to a different forum, Environmental Groups reserve their right to intervene consistent with applicable law.

goal: it lowers the "lead action level" from 15 parts per billion ("ppb") to 12 ppb, and it requires removal and replacement of all lead service lines in Michigan waterworks systems irrespective of whether the lines traverse private property. Both steps are reasonable and reasonably explained.

First, MDEQ properly finalized a lower lead action level to take effect in 2025. An action level is not a health-based standard; a truly health-based standard would remove all traces of lead from the water supply. But action levels help to reduce lead exposure in the interim by triggering corrosion control, source-water treatment, and lead-service-line removal obligations when levels of lead in drinking water are especially high. Lowering the action level to 12 ppb—still too high, but better than 15 ppb—will inevitably and substantially decrease lead exposure and the resultant health effects on water users, most notably infants and young children. Plaintiffs' assertion that a lower lead action level has no public-health benefit is frivolous, and their speculation that a more protective lead standard will meaningfully exacerbate phosphorus pollution is unfounded.

Second, the LCR's requirement that *all* lead service lines within Michigan water systems be removed and replaced, not just *parts* of those lines, is nothing short of a legal imperative given MDEQ's unambiguous statutory duty to protect public health. Lead service lines are the primary culprit of lead contamination in drinking water, and requiring their removal is necessary to fulfill the purpose of the Michigan Safe Drinking Water Act. Partial replacement of lead service lines is not merely insufficient to protect public health; it is counterproductive, as numerous studies have shown. When only part of a service line is replaced, the remainder of the original line is physically disturbed. If the original line contains lead, the disturbance can increase the concentration of lead in drinking water dramatically, by both dislodging lead particles and accelerating corrosion at the interface of old and new lines. The LCR's mandate to replace the full length of lead service lines is therefore not just sound policy; it is the only practicable way for MDEQ to carry out the statute.

Plaintiffs wisely do not dispute the reasonableness of a regulatory mandate to replace all leaded segments of a service line; indeed, they purport to be committed to that goal. Nor do they dispute that it would be most efficient and cost-effective for *public water supplies*—which have exclusive ownership and control over large swaths of lead service lines—to replace all segments of lines within their water systems. But Plaintiffs claim that public water supplies lack statutory and constitutional authority to replace service-line segments that traverse private property.

Plaintiffs are wrong. The Michigan Safe Drinking Water Act unambiguously gives public water supplies control over service lines in their distribution systems underneath private property for purposes of ensuring drinking-water safety. And the Michigan Constitution does not prohibit public water supplies from doing work on such lines, as Plaintiffs themselves obliquely concede. Once those arguments are rejected, Plaintiffs are left complaining about how to fund service-line replacement. But the LCR addressed that exact complaint by affording public water supplies *two decades* to replace lines and additional flexibility if even that extended period proves insufficient. In any event, how Plaintiffs may decide to fund their compliance with the LCR is irrelevant to this Court's review of MDEQ's rulemaking under the Michigan Administrative Procedures Act.

ARGUMENT

In the interest of brevity, this amicus brief focuses on two questions central to the Court's resolution of the State's motion for summary disposition. First, whether MDEQ acted arbitrarily or capriciously by lowering Michigan's lead action level from 15 ppb to 12 ppb starting in 2025. Second, whether MDEQ acted arbitrarily or capriciously, or somehow exceeded its statutory or constitutional authority, by requiring removal and replacement of lead service lines that traverse private property. The answer to both questions is "no."

I. MDEQ’s decision to lower the “lead action level” was not arbitrary or capricious.

The Michigan Safe Drinking Water Act (“MSDWA”) directs MDEQ to establish “drinking water standards … the attainment and maintenance of which are necessary to protect the public health.” MCL 325.1005(1)(b). It is undisputed in this case that “the maximum level of [lead] in drinking water at which no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety,” 40 C.F.R. § 141.2, is “**zero**,” *id.* § 141.51(b) (emphasis added). Accordingly, MDEQ’s polestar must be wholesale elimination of lead from all the waterworks systems that serve the citizens of Michigan.

Historically, MDEQ has taken its cue in this area from the U.S. Environmental Protection Agency (“EPA”), which decided in 1991 not to set a health-based standard for lead in drinking water under the federal Safe Drinking Water Act, but rather to prescribe a “treatment technique” that included an “action level” above which “corrosion control treatment, source water treatment, lead service line replacement, and public education … are triggered.” 40 C.F.R. § 141.80(b). Rather than proactively *eliminate* the sources of lead in water systems, treatment techniques like these aim to merely *decrease* the rate at which lead particles are released into drinking water. EPA justified its approach with a finding that the “establishment of any one ‘feasible’ level as the sole determinant of [water] systems’ compliance” with federal law was “not technically justifiable.” *Maximum Contaminant Level Goals & National Primary Drinking Water Regulations for Lead & Copper*, 56 Fed. Reg. 26,460, 26,476 (June 7, 1991). EPA used “available data” in 1991 to find that, even after applying “optimal” corrosion controls, a majority of the Nation’s water systems would exceed an action level of 10 ppb but not an action level of 15 ppb.[2] 56 Fed. Reg. at 26,491.

[2] Under both federal and state law governing lead action levels, the compliance of a large water system like those that Plaintiffs own or operate is assessed by periodically sampling “a pool of targeted sampling sites,” 40 C.F.R. § 141.86(a)(1), and asking whether “the ‘90th percentile’ lead level” exceeds the specified concentration, *id.* § 141.80(c)(1). *See also* Mich. Admin. Code R.

Both affordability and effectiveness of corrosion inhibitors have improved substantially over the past 28 years, and EPA has recognized that its 15-ppb standard is "in urgent need of an overhaul." State's Exh. O, at 3. But a revision has yet to materialize. Foreseeing this possibility, Congress preserved the States' authority to establish their own drinking-water standards for water systems within their borders "that are no less stringent than the … regulations … promulgated by the [EPA]." 42 U.S.C. § 300g-2(a)(1). The MSDWA, in turn, delegates the power to establish those standards to MDEQ. Unlike the federal Safe Drinking Water Act, which requires EPA to "tak[e] cost into consideration," *id.* § 300g-1(b)(4)(D), the MSDWA focuses solely on imposing whatever standards are "necessary to protect the public health," MCL 325.1005(1)(b).

Environmental Groups thus urged MDEQ to establish a health-based standard in the LCR reflecting the best available science. That science shows that even the lowest measurable levels of lead in the blood can harm human health. State's Exh. C, at 7. Young children are particularly vulnerable to lead exposure from drinking water because, pound for pound, they consume more liquid and absorb lead at a greater rate than adults. State's Exh. O, at 17. Even low lead exposure levels in children have been linked to impaired neurodevelopment, including altered behavior and lower intelligence quotients. State's Exh. B, at 4; Exh. O, at 3. Infants are the single "group most likely to be affected by water [lead] levels via consumption of baby formula reconstituted with tap water." State's Exh. B, at 7. For similar reasons, pregnant women and nursing mothers are at special risk given their propensity to transmit lead to fetuses and infants. State's Exh. C, at 5.

Despite the incontrovertible evidence of severe health impacts at the lowest levels of lead exposure, MDEQ did not establish a health-based standard in the LCR. But MDEQ at least took

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325.10604f(1)(c). A system thus can comply with a 15 ppb lead action level notwithstanding that lead concentrations exceed that level in nearly 10 percent of samples drawn during a given period.

an important step toward addressing the risk that lead in drinking water poses to public health by modestly lowering the action level from the antiquated federal level of 15 ppb to 12 ppb, starting in 2025.[3] *See* Mich. Admin. Code R. ("Rule") 325.10604f(1)(c). As one comparative example, the American Academy of Pediatrics has recommended that lead levels in school water fountains not exceed 1 ppb—93.3% below Michigan's extant action level and 91.7% below the new standard to take effect in 2025. "Prevention of Childhood Lead Toxicity," *Pediatrics* 138:1, at 11 (July 2016).

Plaintiffs baldly assert that the new 12-ppb action level imposed by the LCR will have "no known health benefit" as compared to the extant 15-ppb level. Pls. Resp. at 22. But Plaintiffs do not and cannot dispute that the adverse health impacts of lead exposure strictly increase with the amount of lead ingested. It stands to reason, then, that a lower action level will reduce the health consequences of exposure to lead in drinking water for the general population—and particularly for vulnerable subpopulations—by increasing the frequency with which water systems will use the treatment techniques that the LCR prescribes upon exceedance of the action level. Plaintiffs do not, and cannot, contend that treatment techniques applied to reduce lead levels have no health benefits. *Cf.* Pls. Resp. at 4 (observing that the City of Flint's failure to "apply corrosion control treatment" during the Flint Water Crisis "result[ed] in lead … exposures"); Compl. ¶ 79 (stating that "strengthening provisions for corrosion control" will "protect the public health").

Next, Plaintiffs theorize that "there may actually be health risks associated with" a 12-ppb lead action level "because of increased phosphor[us] in the water from increased water supplies utilizing water treatment." Pls. Resp. at 22. That theory is flawed. To the extent Plaintiffs refer to phosphorus in the drinking water in the public water supply itself, they neglect to mention that the

[3] Proposed *amicus curiae* Natural Resources Defense Council advocated that, if MDEQ would not agree to adopt a health-based standard, the agency should reduce the lead action level further (to 5 ppb) and faster (by 2021) than MDEQ had proposed. *See* NRDC Comments, at 2.

LCR does not require water systems to use phosphorus-containing compounds to inhibit corrosion. Plus, a water supply that utilizes such compounds must monitor levels of phosphorus in drinking water, Rule 325.10604f(3)(c)(iii)(G); a phosphorus concentration that was high enough to raise health concerns surely would prompt the system to switch to a different inhibitor. To the extent Plaintiffs conjure an indirect effect of phosphorus-containing inhibitors on contaminant levels in surface water, their claim is erroneous. The additional quantity, if any, of phosphorus required to reduce lead levels in the 90th percentile of samples in the water supply from 15 ppb to 12 ppb is vanishingly small as compared to phosphorus loads from other sources like agricultural runoff.

For the foregoing reasons, and the reasons stated in the State's motion and reply, MDEQ should be granted summary disposition on Plaintiffs' unfounded claim that the LCR's post-2025 reduction in lead action level from 15 ppb to 12 ppb was arbitrary and capricious.

II. MDEQ's decision to mandate replacement of all lead service lines was not arbitrary, capricious, or in excess of constitutional or statutory authority.

The Legislature has given MDEQ "power and control over public water supplies," MCL 325.1003(3), to carry out the agency's duty to set drinking-water standards for lead requisite "to protect the public health," MCL 325.1005(1)(b). As previously discussed, any truly health-based standard would fully eliminate lead from the water supply. And that means eliminating lead from all facets of water-delivery infrastructure. Plaintiffs purport to be "fully and seriously committed to … removal of all lead pipes from the State." Pls. Resp. at 1. Yet Plaintiffs wrongly argue that a regulatory mandate for such removal is unjustified and unlawful.

Even with the best corrosion-control treatments, it is impossible for a public water supply to eliminate leaching and sloughing of lead from aging service lines. The rates at which service lines release lead into water systems vary based on flow rate, water-quality variations, seasonal variations in temperature, or external physical disturbances. State's Exh. B, at 11. Because public

water supplies cannot control all those variables, the only viable solution to protect public health is to remove and replace all lead piping. The LCR thus codifies the *only* reasonable approach to the problem by mandating the removal of "the entire lead service line." Rule 325.10604f(6)(e).

Plaintiffs suggest that MDEQ should have been satisfied with only partial lead service-line replacement, up to the point at which the line enters onto private property. *See* Pls. Resp. at 22–36. Before explaining why Plaintiffs are wrong on the law, it is worth emphasizing the fundamental problem with their preferred approach: Partial replacements of lead service lines not only fail to "reliably reduce drinking water lead levels in the short term, … and potentially even longer"; such replacements are "frequently associated with short-term elevated drinking water lead levels …, suggesting the potential for harm, rather than benefit." State's Exh. B, at 23. The reason for that counterintuitive result is that the very act of replacing one end of the service line physically disturbs the other end of the line. *See id.* at 10. If that other end is a lead pipe, the disturbance can destabilize the lead walls of the pipe and temporarily spike lead levels in the water system. *Ibid.* Furthermore, fusing lead and copper pipe (copper pipe being the most common replacement pipe substituted for lead pipe) results in galvanic corrosion, a chemical reaction that causes even more lead to be released into the system. *Ibid.* Partial lead service-line replacements thus are far worse than an insufficient response to the danger of lead in drinking water; they are a counterproductive response that MDEQ quite reasonably sought to avoid in the LCR.

Plaintiffs dispute MDEQ's authority to order removal of lead service lines that traverse private property. But MDEQ's statutory "power and control over public water supplies," MCL 325.1003(3), unambiguously extends to those lead service lines. The term "public water supply" includes any "waterworks system" serving multiple living units that does not "consist[ ] *solely* of customer site piping." MCL 325.1002(p) (emphasis added). Customer-site piping "means an

underground piping system owned or controlled by the customer that conveys water from the customer service connection to … points of use on lands owned or controlled by the customer." MCL 325.1002(f). In other words, the inclusion of privately owned or controlled "pipelines and appurtenances," MCL 325.1002(x), within a water supply does not defeat its "public" character unless the system is *entirely* "owned or controlled by the customer," MCL 325.1002(f).

The MSDWA therefore grants MDEQ "power and control" over even *privately* owned drinking-water infrastructure where such power and control is needed to achieve the Act's goals. That makes eminent sense because "water quality within the distribution system," MCL 325.1005(1)(a), may be impaired by *any part* of the system, including any service lines that are privately owned. *See ibid.* (directing MDEQ to issue rules governing the "design," "construction," "operati[on]," and "maint[enance]" of "all or a part of the waterworks system"). The problem of lead in drinking water is a case in point: "[T]he most significant source of lead in drinking water [is] leaded pipes that extend from the water main underneath the street to the residence." State's Exh. O, at 4. *See also Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1269 (D.C. Cir. 1994). To fulfill its mandate to eliminate lead from the water supply, or even come close to fulfilling that mandate, MDEQ must order the removal and replacement of lead service lines on private land.

Plaintiffs next contend that public water supplies cannot expend monies on lead service lines on private land without violating provisions of the Michigan Constitution or the Revenue Bond Act. But, as just discussed, the MSDWA brings those service lines within the auspices of public water supplies for purposes of ensuring the public health. *See also* Rule 325.10604f(6)(d) (adopting a rebuttable presumption that a water system "control[s] the entire service line"). *Cf. Am. Water Works*, 40 F.3d at 1274 (reviewing an EPA rule that established a similar presumption, and vacating that rule solely on procedural grounds). Replacement of those service lines thus serves a

compelling "public purpose," "as provided by law," Mich. Const. art. VII, § 26, just as Plaintiffs' other operations on private property serve a constitutionally permissible public purpose. *E.g.*, Pls. Resp. at 20 (noting that the Detroit Water and Sewerage Department frequently "repair[s] leaks on the customer's private side of the line"). *See generally Sch. Dist. of City of Pontiac v. City of Auburn Hills*, 185 Mich. App. 25, 28 (1990) (confirming the "liberal interpretation of the public purpose doctrine" in Article VII, § 26); *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich. 93, 119 (1988) (observing that Article VII, § 26, "is an exception to the general rule of [Article IX], § 18, governing the lending of credit by municipalities").

Still, Plaintiffs protest that LCR's mandate to replace lead service lines must be unlawful because it will cost them too much. As the State's motion explains, the locus of that cost burden is a political question, not a legal one. More to the point, however, claims concerning the amount and nature of the LCR's costs are misplaced in this forum. It is well settled that this Court lacks subject-matter jurisdiction to decide issues like whether a water user's bill is a "fee" or a "tax," *see* Pls. Resp. at 24, or whether a public water supply provides a "free service" when it replaces customer-site piping, *id.* at 28. Such issues can be raised, if at all, only in a challenge under the Headlee Amendment, *see* Mich. Const. art. IX, §§ 25–33, which this Court cannot entertain. *See City of Riverview v. State*, 292 Mich. App. 516, 522 (2011).

Thus, whatever the costs of the LCR's lead service-line replacement mandate (and they are far less than Plaintiffs suggest), this Court cannot credit Plaintiffs' collateral attack on the LCR.

CONCLUSION

This Court should grant the State's motion for summary disposition under MCR 2.116(C).

Respectfully submitted,

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