Sara E. Imperiale
Nancy S. Marks, *PHV*
Margaret T. Hsieh, *PHV*
Michelle A. Newman, *PHV*
Natural Resources Defense Council
40 W 20th Street, Floor 11
New York, New York 10011
Tel: 212-727-2700

Jerome L. Epstein, *PHV*
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
Tel: 202-717-8234

Claire Woods, *PHV*
Natural Resources Defense Council
1314 Second Street
Santa Monica, California 90401
Tel: 310-434-2300

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEWARK EDUCATION WORKERS CAUCUS and NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiffs, v. CITY OF NEWARK, RAS BARAKA, in his official capacity as Mayor of the City of Newark, NEWARK DEPARTMENT OF WATER AND SEWER UTILITIES, KAREEM ADEEM, in his official capacity as Director of the Newark Department of Water and Sewer Utilities, and CATHERINE R. McCABE, in her official capacity as Commissioner of the New Jersey Department of Environmental Protection, Defendants.	Case No. 2:18-cv-11025 **Judge Esther Salas** **Magistrate Judge Cathy L. Waldor** [PROPOSED] **SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

INTRODUCTION

1. Newark has neglected its water system for years. Its claim that corrosion control treatment just stopped working through no one's fault, and that Newark is no different than dozens of cities throughout the country, does not stand up to the facts. Newark has a long history of mismanaging its residents' drinking water, including significantly reducing pH levels, leading to astronomical lead levels that far surpass the levels recorded for nearly every large city in America. The City and State Defendants inexcusably missed warning sign after warning sign, year after year. Newark's extraordinarily high lead levels, still unresolved, were a crisis waiting to happen.

2. The recent announcements of high-level plans to expedite lead service line replacements and assist residents with proper use of water filters are welcome and long overdue—but are far from being implemented. These plans should have been initiated years ago, *before* infants and small children were exposed to excessive levels of lead in their formula and drinking water. Because the effects of lead on the human body are cumulative, vulnerable residents continue to be irreparably injured, week after week, year after year.

3. When Plaintiffs are afforded discovery, we will better understand all of the actions and inaction that led to the present crisis, why so many red flags were ignored, and why little action was taken in 2016 when Newark had

evidence of elevated lead levels in its schools' drinking water. But it is clear that the Defendants mismanaged and neglected the water system and failed to heed multiple warnings years ago. The result has been extensive exposure of Newark's children to a potent neurotoxin. This is a story of active mismanagement, neglect, and missed opportunities to protect the City's most vulnerable residents.

4. Newark residents began raising concerns about lead in their drinking water more than three years ago. In the spring of 2016, thirty Newark public schools and three additional student spaces were found to have elevated levels of lead in their water fountains, water coolers, bathroom faucets, and other water outlets. Those schools subsequently disconnected accessible water outlets from the City's water supply. The schools eventually reconnected to City water after committing to replace equipment and install filters at certain water outlets. Despite those commitments, the school system's 2016-2017 reporting showed that lead levels remained elevated at multiple school water fountains.

5. In 2016, in the face of this canary-in-the-coal-mine school data, Newark could have acted urgently to test drinking water from a proper sample of homes and distribute water filters, along with robust instructions on their proper use, to provide residents with interim protection. Newark instead took a

defensive posture, treating a public health crisis as one of public relations, falsely assuring residents that "the water system in Newark is still safe, it's still drinkable," and repeatedly giving other false or confusing assurances to residents.

6. During both monitoring periods in 2017, Newark's water system exceeded the 15 parts per billion federal action level for lead. Throughout 2017, more than 10 percent of drinking water samples taken by the City were nearly double the action level, exceeding 26.7 parts per billion systemwide. Neither City nor State regulators acted with requisite urgency, including failing to require prompt replacement of lead service lines, resulting in prolonged and dangerously high lead exposures to infants, children, and other vulnerable residents.

7. Lead levels soared in 2018.[1] During the second monitoring period of 2018, from July 1 to December 31, 2018, Newark reported lead levels of 47.9 parts per billion at the 90th percentile. Water in some homes tested at 250 parts per billion and higher. These extraordinarily high levels continued through the first six-month monitoring period of 2019, with reported lead levels of 57 parts per billion at the 90th percentile, nearly *four times* the federal

[1] To be precise, *reported* lead levels soared in 2018. It is likely that high lead levels went undetected for several years before then, due to improper sampling by the City, as described below.

action level, and far above the levels reported for all but one comparably sized city in the country.

8. The lead crisis in Newark did not arise out of the blue, even back in 2016 when the school data came to light. An engineering firm's report exposed years of mismanagement and neglect of the water system.

9. Plaintiffs tried to sound the alarm in 2017 through correspondence and requests for meetings with City officials. But Newark continued its pattern of denial and inaction, leaving Plaintiffs no choice but to file this lawsuit. From a year before this case was filed through the present, Plaintiffs have always preferred to partner with the City to tackle this public health crisis. The City has preferred to litigate, attack the messengers, and invest in media damage control, at a cost of hundreds of thousands of dollars that could have been better spent on timely lead service line replacement and robust filter distribution and education.

10. Because lead's impacts on the human body are cumulative, Defendants' failure to replace lead service lines more promptly, maintain optimal corrosion control treatment, and implement an effective filter distribution program have exposed Newark's children to excessive levels of lead that are linked to irreversible and devastating effects. Multiple studies have shown that money invested in the prevention of lead exposure pays for

itself many times over, similar to how vaccines greatly reduce future health care costs.

11. There is no safe level of lead exposure, and no safe level of lead in children's blood. The federal Environmental Protection Agency (EPA), Centers for Disease Control and Prevention, World Health Organization, and American Academy of Pediatrics all agree on those points. The federal action level is a regulatory trigger for water systems to take certain actions. It is decidedly *not* a health-based standard: lead levels well *below* 15 parts per billion have been shown to cause devastating and permanent harm.

12. Dangerously high lead levels in the City's drinking water continue to this day. The second monitoring period of 2019 began on July 1 and remains in progress. The New Jersey Department of Environmental Protection's (NJDEP) website as of October 24, 2019, reported Newark's lead levels at 37 parts per billion at the 90th percentile, still far above the levels reported for virtually every other comparably sized or larger city. The website also shows astronomical lead levels in some residents' homes—1,420 parts per billion and 1,350 parts per billion—during this time. The City's own collection of sampling data since July 1, 2019, shows samples at 9,140 parts per billion, 2,730 parts per billion, 842 parts per billion, 440 parts per billion, 281 parts per billion, and many more well above the action level.

13. To make matters worse, the City apparently still does not know the scope of the problem because it has failed to fully identify how many and which service lines contain lead, and has failed to properly monitor lead levels at Newark residents' taps. Just this month—more than two years after this crisis came to light—the City presented data during a council meeting showing several thousand more lead service lines than had previously been estimated in each ward, including in the East Ward.

14. Newark's high lead levels are a direct result of Defendants' violations of federal law. For example, the law requires the City to maintain optimal corrosion control treatment to prevent water from corroding lead service lines, plumbing, and fixtures, and leaching into residents' drinking water. For years, Newark has flouted that requirement (including by drastically lowering pH levels, as described below), placing thousands of residents in harm's way.

15. The harmful and cumulative effects of lead exposure in Newark will not be addressed until government officials comply with federal law and properly treat Newark's water to control corrosion of lead pipes and plumbing, set and comply with water quality parameters, follow required procedures to account for materials within the water-distribution system, and complete robust sampling across the city. The City must also properly educate the public

about the high lead levels and the steps residents should take to protect themselves (including clarifying inconsistent instructions about faucet flushing throughout this crisis), replace lead service lines expeditiously as promised, and take other steps to comply with the Safe Drinking Water Act and its implementing regulations, the Lead and Copper Rule, and to address the cumulative harm caused by both past and ongoing violations.

16. Plaintiffs are citizens' groups whose members teach in Newark's public schools, live in homes served by Newark's water system, and/or attend school in Newark. Plaintiffs bring this suit on behalf of their members to ensure that the water they drink in Newark will no longer threaten their health and their families' health, and to address the serious health risks they face due to Defendants' conduct.

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction over this action pursuant to the Safe Drinking Water Act, 42 U.S.C. § 300j-8(a), and the federal-question jurisdiction statute, 28 U.S.C. § 1331. The Court may award Plaintiffs all necessary injunctive relief pursuant to the Safe Drinking Water Act, 42 U.S.C. § 300j-8(a), (e), and declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02.

18. Venue is proper in this district under 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district, in Newark, New Jersey.

19. Plaintiffs have provided Defendants, the Administrator of the EPA, and the New Jersey Attorney General with at least sixty days' written notice of the violations of law alleged here in the form and manner required by the Safe Drinking Water Act. 42 U.S.C. § 300j-8(b); 40 C.F.R. §§ 135.11–135.13. A copy of Plaintiffs' April 24, 2018, notice letter is attached as Exhibit A to this Second Amended Complaint. A copy of Plaintiffs' August 23, 2018, notice letter is attached as Exhibit B to this Second Amended Complaint.

20. Neither the Administrator of the EPA, the U.S. Attorney General, nor the State of New Jersey has commenced and diligently prosecuted a civil action in a court of the United States to require compliance with the requirements Plaintiffs allege Defendants are violating. 42 U.S.C. § 300j-8(b)(1)(B).

THE PARTIES

21. Plaintiffs are two organizations: Newark Education Workers Caucus (NEW Caucus) and Natural Resources Defense Council, Inc. (NRDC).

22. Plaintiff NEW Caucus is an association of educators who teach in Newark public schools and, in some cases, live in Newark. NEW Caucus's mission is to unify Newark's educators in support of social justice initiatives in Newark, both for educators and for their students and students' families. NEW Caucus has approximately twenty members.

23. Plaintiff NRDC is an international, nonprofit environmental organization. NRDC engages in research, advocacy, and litigation to protect public health and reduce the exposure of all communities to toxic substances. NRDC's work includes advocacy aimed at ensuring that communities across the country have access to safe and affordable drinking water that is free from dangerous contaminants. Founded in 1970, NRDC has more than 375,000 members nationwide, including more than 10,000 members who reside in New Jersey, and over 25 who live in Newark. NRDC is incorporated under the laws of New York and is headquartered at 40 West 20th Street, New York, New York 10011.

24. NEW Caucus and NRDC bring this action on behalf of their members. Members of these organizations and their families live, work, teach, purchase and consume food and drink, recreate, attend houses of worship, and go to school in buildings that are served by Newark's water system.

25. Members of NEW Caucus and NRDC are irreparably harmed, and will continue to be irreparably harmed, by Defendants' violations of the Safe Drinking Water Act unless this Court grants the requested relief. These members are and will continue to be irreparably harmed because they have an increased risk of exposure to elevated levels of lead in drinking water, which can cause irreversible developmental damage, among other harms. While developmental damage can arise from a variety of factors and contaminants, there is a direct relationship between elevated levels of lead in drinking water and developmental harm, among other adverse health effects. Members of NEW Caucus suffer from additional harm because their jobs as educators are made more difficult by the increased incidence of behavioral and developmental health problems associated with childhood lead exposure.

26. Elevated levels of lead have been found in drinking water in homes and schools throughout Newark. Members of NEW Caucus and NRDC are reasonably fearful of exposure to lead from their drinking water. They are concerned about their health and the health of their children, including potential long-term developmental problems.

27. Because of these members' reasonable concerns about lead exposure, many of them use bottled or filtered water at school and in their homes to minimize their risk. NEW Caucus teachers are particularly

concerned about whether their students have access to bottled or filtered water. Members of these organizations would prefer to use unfiltered tap water that they purchase from the water system, rather than having to incur additional costs and inconvenience to use bottled or filtered water. Some members who live in Newark have installed filters in their homes. However, maintenance of these filters requires knowledge of proper use, diligence in replacing cartridges, and time and/or expense to acquire new filters and cartridges. If not used, replaced, and maintained regularly and properly, the filters will stop working. Additionally, the City of Newark and federal officials have reported that in some cases filters are not effective to adequately remove lead from the city's drinking water.

28. Members of NEW Caucus and NRDC are harmed because of these and other actions they are taking on behalf of themselves, their students, and their families to counteract the risks posed by Newark's water. Their injuries will be redressed by an order requiring Defendants to comply with the Safe Drinking Water Act and to provide protections, outlined below, until the risks are eliminated. Such an order will enable members to make informed decisions about whether their tap water is safe to drink and will remediate the dangerous conditions and health risks that they are exposed to as a result of

Defendants' past and continued non-compliance with the Lead and Copper Rule.

29. Defendant City of Newark is an owner and an operator of Newark's water system, which is a "public water system" as defined by the Safe Drinking Water Act. 42 U.S.C. § 300f(4); 40 C.F.R. § 141.2. A public water system is a system that provides drinking water through pipes to at least twenty-five people, and includes water collection, treatment, storage, and distribution facilities. 42 U.S.C. § 300f(4); 40 C.F.R. § 141.2. As an owner and operator of a public water system, the City is also a "supplier of water." 42 U.S.C. § 300f(5); 40 C.F.R. § 141.2. The City of Newark's water system is a large system because it serves more than 50,000 people. 40 C.F.R. §§ 141.2, 141.81(a)(1).

30. Defendant Newark Department of Water and Sewer Utilities is also an owner and an operator of the water system, which is a "public water system" as defined by the Safe Drinking Water Act. 42 U.S.C. § 300f(4); 40 C.F.R. § 141.2. As an owner and operator of a public water system, the Department of Water and Sewer Utilities is also a "supplier of water." 42 U.S.C. § 300f(5); 40 C.F.R. § 141.2.

31. Defendant Ras Baraka is sued in his official capacity as the Mayor of Newark. He directs and supervises the day-to-day operations of the City,

including the operations of the water system. Defendant Baraka is an operator of the water system within the meaning of the Safe Drinking Water Act.

32. Defendant Kareem Adeem is sued in his official capacity as the Director of the Newark Department of Water and Sewer Utilities. He directs and supervises the day-to-day operations of the water system. Defendant Adeem is an operator of the water system within the meaning of the Safe Drinking Water Act. Mr. Adeem is not a professional engineer.

33. Plaintiffs may refer to all City Defendants collectively as the City or Newark in subsequent paragraphs.

34. Defendant Catherine R. McCabe is sued in her official capacity as the Commissioner of NJDEP. She directs and supervises the day-to-day operations of NJDEP. EPA has delegated authority to NJDEP to act as the primacy agency for the enforcement of the Safe Drinking Water Act in New Jersey. 44 Fed. Reg. 69,003 (Nov. 30, 1979). As Commissioner, Defendant McCabe is responsible for overseeing NJDEP's compliance with the Safe Drinking Water Act and the Lead and Copper Rule. Defendant McCabe may be referred to alternately below as NJDEP or the State.

THE SAFE DRINKING WATER ACT

35. The Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-27, is the federal law that protects the public from harmful contaminants in its drinking

water. The Act charges EPA with issuing regulations to implement its requirements. *Id.* § 300g-1.

36. EPA issued the Lead and Copper Rule to address the Act's mandate to owners and operators of public water systems to control for lead. 40 C.F.R. §§ 141.80–141.91. Owners and operators of public water systems must test their water for specified contaminants, treat the water to control for those contaminants, and provide certain reports and notices to customers and regulators, among other requirements. *See, e.g.*, 40 U.S.C. § 300g-1; 40 C.F.R. §§ 141.80–141.91. Each of these steps is essential to reducing lead levels in tap water and informing the public about the health risks posed by its drinking water.

37. New Jersey has been delegated primary responsibility for ensuring that public water systems within the state comply with the Act's requirements. *See* 44 Fed. Reg. at 69,003. NJDEP is responsible for enforcing the Safe Drinking Water Act in New Jersey. *Id.* EPA is charged with enforcing the Act's requirements if states fail to do so. 42 U.S.C. § 300g-3(a)(1).

38. EPA promulgated the Lead and Copper Rule in 1991. *See* 56 Fed. Reg. 26,460 (June 7, 1991). The Lead and Copper Rule includes requirements for public water systems to treat drinking water to control the leaching of lead from pipes and solder. *See* 40 C.F.R. § 141.80(b), (d).

39. The standard set by the Lead and Copper Rule generally requires water systems to install and maintain optimal corrosion control to reduce corrosion of lead pipes and solder and the leaching of lead into drinking water. *See id.* § 141.81(d). Corrosion control treatment often involves adding chemicals, such as phosphates, to the water to reduce the water's corrosivity and control its effect on leaded pipes, solder, and plumbing. Corrosive water can corrode leaded pipes, solder, and plumbing, causing lead to leach into the water that is delivered to residents' taps.

40. The Lead and Copper Rule required large water systems to conduct initial monitoring and complete corrosion control studies in 1993 and 1994, respectively. *Id.* § 141.81(d)(1), (2). Large water systems were then required to install optimal corrosion control treatment by January 1, 1997. *Id.* § 141.81(d)(4).

41. "[O]ptimal corrosion control treatment" is defined as the treatment that minimizes lead concentrations in consumers' tap water, while insuring that the treatment does not cause the system to violate any other national drinking water regulations. *Id.* § 141.2. To adequately optimize corrosion control treatment, a system must minimize lead concentrations to the maximum extent feasible. *See id.*; 56 Fed. Reg. at 26,491.

42. To be optimal, corrosion control treatment cannot cause violations of, among other national drinking water regulations, the Surface Water Treatment Rule, 54 Fed. Reg. 27,486 (June 29, 1989), and the Interim Enhanced Surface Water Treatment Rule, 62 Fed. Reg. 59,486 (Nov. 3, 1997) (together, Surface Water Treatment Rules), which require water systems to apply treatment techniques to protect against microbial pathogens.

43. Nor can corrosion control treatment be deemed optimal if it causes violations of the Stage 1 and Stage 2 Disinfectant and Disinfection Byproducts Rules, *see* 63 Fed. Reg. 69,390 (Dec. 16, 1998); 71 Fed. Reg. 388 (Jan. 4, 2006). These rules require water systems to control levels of disinfectants and harmful disinfection byproducts by keeping them under "maximum contaminant levels" and in compliance with all national primary drinking water regulations, 42 U.S.C. §300g-1, without compromising a water system's control of microbial pathogens.

44. The Lead and Copper Rule required states to review the installation of optimal corrosion control treatment by large water systems and "to designate optimal water quality control parameters" by July 1, 1998. 40 C.F.R. § 141.81(d)(6); *see id*. § 141.82(f). Optimal water quality parameters are values for physical and chemical characteristics, such as pH, alkalinity, and the

concentration of the corrosion inhibitor used, that reflect optimal corrosion control treatment for a water system. *See id.* §§ 141.82(f), 141.87(b)–(d).

45. One parameter that states were required to designate was "[a] minimum value or a range of values for pH measured at each entry point to the distribution system." *Id.* § 141.82(f)(1).

46. Another parameter that states were required to designate was "[a] minimum pH value, measured in all tap samples. Such value shall be equal to or greater than 7.0, unless the State determines that meeting a pH level of 7.0 is not technologically feasible or is not necessary for the system to optimize corrosion control . . . ." *Id.* § 141.82(f)(2).

47. Water pH influences other water quality parameters, such as buffer capacity, alkalinity, and oxidation reduction potential.

48. Large water systems were required to "continue to operate and maintain optimal corrosion control treatment, including maintaining water quality parameters at or above minimum values or within ranges designated by the State." *Id.* § 141.82(g); *see id.* § 141.81(d)(7).

49. When optimal corrosion control treatment is not operated and maintained, water can corrode the pipes through which it flows, increasing the amount of lead that enters drinking water. Corrosive water can irreversibly

damage water pipes, making them more susceptible to further leaching of lead. That is what happened here.

50. The Lead and Copper Rule requires water systems to take tap water samples to test the amount of lead in the water system. *Id.* § 141.86. The samples must be taken from sites that are part of a pre-determined sampling pool. *Id.* § 141.86(a)(1). The sampling pool must consist of those homes that have the highest risk of lead contamination in their drinking water, called Tier 1 sampling sites, where sufficient Tier 1 sites are available in a water system. *Id.* § 141.86(a)(3)–(5).

51. Tier 1 sampling sites are single-family structures that either contain lead pipes, contain copper pipes with lead solder installed after 1982, or are served by a lead service line. *Id.* § 141.86(a)(3).

52. Before beginning sampling, water systems must evaluate the materials within the system to identify a sampling pool that includes sufficient Tier 1 sites. *Id.* § 141.86(a)(1).

53. Water systems must also draw 50 percent of samples from sites with lead pipes, or copper pipes with lead solder. *Id.* § 141.86(a)(8).

54. In addition, water systems must sample the same sites across monitoring periods. *Id.* § 141.86(b)(4). Sampling different sites from one monitoring period to the next is permitted only if the water system cannot gain

entry to the original sites to collect follow-up samples. *Id.* Any replacement site must meet the same targeting criteria and lie within reasonable proximity of the original sampling site. *Id.*

55. Large water systems that serve more than 100,000 people, like Newark's system, must initially conduct tap water monitoring during two consecutive six-month monitoring periods each year. *Id.* § 141.86(c)–(d)(1)(i). During each six-month period, large water systems must collect at least 100 samples from Tier 1 sampling sites, where sufficient Tier 1 sites are available. *Id.* § 141.86(c). Large water systems may reduce the frequency of sampling, and the number of samples collected, only after meeting certain criteria, and receiving approval from the state. *Id.* § 141.86(d)(4).

56. Each time a water system completes a six-month monitoring period, it must calculate whether more than 10 percent of the samples collected during that period have a lead concentration greater than 15 parts per billion. *See id.* §§ 141.80(c), 141.90(a)(1)(iv).

57. When more than 10 percent of tap water samples collected by a water system in a six-month monitoring period exceed this 15 parts per billion threshold, known as the "lead action level," the water system must take additional steps to protect its customers from lead exposure. *Id.* §§ 141.84(a), 141.85–141.86; 56 Fed. Reg. at 26,478.

58. A water system that has a lead action level exceedance after installing corrosion control must prepare a lead service line inventory identifying the number of lead service lines in the distribution system at the time of the exceedance. 40 C.F.R. §§ 141.84(a)–(b)(1), 141.90(e)(1). Written documentation of this inventory is due to the state within 12 months after the end of the monitoring period in which the water system triggers an action level exceedance. *Id*. § 141.90(e)(1).

59. A water system that has a lead action level exceedance after installing corrosion control must annually replace at least seven percent of lead service lines in the distribution system with pipes and solder that are lead free. *Id.* § 141.84(a)–(b)(1); *see also id*. § 141.43(a)(1). Written documentation of these replacements, together with a schedule for completing the replacement requirement, is due to the state within 12 months after the end of the monitoring period in which the water system triggers an action level exceedance. *Id*. § 141.90(e)(1)–(2).

60. A water system that has a lead action level exceedance must conduct additional monitoring of the system's source water to determine whether additional treatment is needed, *id.* §§ 141.83, 141.88(b), and conduct additional tap water monitoring, *id.* § 141.86(d)(4)(vi)(B).

61. A water system that has a lead action level exceedance must educate the public about the risks of lead exposure and ways consumers can reduce their exposure to lead in drinking water. *Id.* § 141.85(b).

62. A water system that has a lead action level exceedance must offer to sample the tap water of any customer who requests sampling. *Id.* § 141.85(c).

63. In addition, a water system must notify customers of the individual results of tap water samples collected from their homes. *Id.* § 141.85(d)(1)–(2).

64. A water system must also report detailed information about its tap water monitoring to the state. *Id.* § 141.90.

FACTS

The harmful effects of lead

65. Lead is a toxic metal that can harm many of the body's functions and organs, and is particularly damaging to the human brain and nervous system.

66. Lead passes easily from a pregnant woman to her developing fetus, which can cause premature birth, low birthweight, and damage to the developing brain. In addition, lead can pass from nursing mothers to their babies through breast milk. Babies can also be exposed to lead if lead-

contaminated water is used to mix their baby formula. Infants who rely on formula may receive more than 85 percent of their exposure to lead from drinking water.

67. Young children and their developing brains are especially vulnerable to the harmful effects of lead. Children can be harmed by only a few months of exposure to lead in drinking water. Even low levels of lead exposure during childhood have been linked to damage to the central and peripheral nervous systems, learning disabilities, shorter stature, impaired hearing, and impaired formation and function of blood cells. Such exposure can result in reduced IQ scores; poorer academic performance; developmental delays; Attention Deficit and Hyperactivity Disorder, known as ADHD; and other behavioral and learning problems. Some of these effects are irreversible, while others may be mitigated, but not eliminated, through aggressive intervention.

68. In addition, exposure to lead harms adults, including by causing nerve disorders, decreased kidney function, reproductive problems, and gastrointestinal damage. Adults exposed to lead may also suffer from muscle and joint pain, memory and concentration problems, and high blood pressure.

69. After lead enters the bloodstream, it is distributed throughout the body, in a manner that is similar to iron and calcium. Lead settles in bones, where it interferes with the production of blood cells and the absorption of

calcium. Calcium is necessary for muscle and nerve function, and for bone growth in children. Lead may remain stored in bones for years, where it can later be re-released into the bloodstream during times of physiological change, including stress, pregnancy, lactation, broken bones, and advanced age.

70. Children and adults who have been exposed to lead may not immediately show symptoms. The effects of exposure may not appear for years, even long after measures of lead in blood have decreased.

71. There is no identified safe level of lead in blood.

72. The adverse health effects of lead are cumulative. Past exposure to lead can cause harm years later.

Lead in drinking water

73. Water sources vary in their chemical properties. When water displays certain characteristics, including acidity, it is considered corrosive.

74. Corrosive water causes metals to leach and/or flake from metallic objects at a high rate. This can cause lead contained in pipes, plumbing, and the solder joining pipes to contaminate drinking water at significant levels. *See* 56 Fed. Reg. at 26,463–66. This leaching can continue indefinitely. *Id.* at 26,466.

75. Lead usually enters the water after it leaves the water system's treatment plant, as it travels through lead pipes towards consumers' homes. *Id.* at 26,471. Because of that, it cannot be removed at the plant, in the manner that other chemicals are removed from water. *Id.*

76. The amount of lead that leaches into drinking water depends on the corrosivity of the source water. *Id.* at 26,466.

77. Over the past several decades, drinking water has been identified as a significant source of lead exposure, as regulation has reduced the risk of lead exposure from other sources such as lead paint and leaded gasoline.

78. There is a quantitatively consistent relationship between blood lead levels in infants, children, and adults and lead in drinking water. According to one study, even a 1 part per billion increase in lead in water can result in a 35 percent increase in blood lead levels after only 150 days of exposure. Similarly, another study found that an increase in lead in water from 0.5 parts per billion to 15 parts per billion was associated with a greater than 10 percent increase in the number of children with blood lead levels over 10 micrograms per deciliter. Irreversible harm can occur in children with blood lead levels far below 10 micrograms per deciliter. In still another study that took into account blood, dust, and soil samples, while lead-contaminated house dust was the major source of lead intake during early childhood,

children whose tap water contained 5 or more parts per billion of lead had a 20 percent increase in blood lead levels.

79. Infants are especially vulnerable to lead-contaminated drinking water because their primary interaction with their environment is what they drink. Infants who are not yet crawling are much less likely to ingest lead through dust and soil. Infants can absorb about 50 percent of the water-soluble lead that they ingest. Young children also have a greater risk of exposure from lead-contaminated water because, proportionally by weight, they drink more water than older children and adults.

80. Again, there is no identified safe level of lead in drinking water, for children or adults.

The Newark water system

81. Newark's water system provides drinking water to approximately 290,000 residents, as well as to many others who work and attend school in Newark. Newark's water system also sells drinking water to approximately seven other water systems in New Jersey. According to NJDEP, Newark's water system has approximately 36,402 residential service connections in Newark, which are points where household and building plumbing connect to the City's main water distribution pipes.

82. According to the City, at least 18,720 of Newark's 36,000-plus residential service connections rely on lead service lines to connect to the main water distribution pipes. But NJDEP has estimated that 22,100 of Newark's residential service connections use lead service lines. Based on these estimates, Newark has between approximately 18,720 and 22,100 lead service lines. The actual number may be even higher, because the composition of at least hundreds of service lines remains "unknown" and still needs to be characterized.

83. Newark is comprised of two water service areas, the Pequannock and the Wanaque. The two service areas are regulated as a single water system, under a single Public Water System identification number, NJ0714001. The two service areas are regulated under a single "Water System Name," Newark Water Department.

84. The Pequannock service area provides water to the western part of the City, including the West, South, and parts of the North and Central Wards, as well as to wholesale customers outside of Newark in Pequannock Township, Township of Belleville, Township of Bloomfield, and Township of East Orange. The water that is delivered to the Pequannock service area undergoes treatment at the Pequannock Water Treatment Plant, located in West Milford, New Jersey.

85. The City of Newark owns and operates the Pequannock Water Treatment Plant. The City of Newark owns and operates the distribution system that services the Pequannock service area in the City of Newark.

86. The Wanaque service area provides water to the eastern part of the City, including the East Ward and parts of the North and Central Wards. The water that is delivered to the Wanaque service area undergoes treatment at the Wanaque Water Treatment Plant, in Wanaque, New Jersey. Together, the City of Newark and approximately twelve other member municipalities own the North Jersey District Water Supply Commission (NJDWSC), which owns the Wanaque Water Treatment Plant. The City of Newark receives between 40 and 50 percent of the water produced by NJDWSC, a greater share than any other municipality.

87. The City of Newark owns, operates, and maintains the distribution system that services the Wanaque service area within the City of Newark.

88. The entire water distribution system located within the City of Newark, including the Pequannock and Wanaque service areas, is owned and operated by the City of Newark. Defendant Director Adeem manages the daily operations of the distribution system, including maintenance and repairs.

The history of mismanagement and neglect of Newark's water system

89. Defendants' claims that lead levels in Newark's water skyrocketed through no fault of their own ring hollow in light of the many red flags they ignored over the years. Newark officials failed to heed the clear warning from elevated lead levels in schools' drinking water and other data they knew or should have known about indicating service-area-specific action level exceedances in 2014 and 2015. Nor were these the first warning signs. NJDEP also should have been on high alert given the documented history of long-time mismanagement of the Newark water system, some of which is discussed below.

90. The true levels of lead in Newark's water did not start becoming clear until 2016, after an EPA audit that found deficiencies in NJDEP's implementation of the Lead and Copper Rule, prompting NJDEP to direct large water systems like Newark to properly conduct sampling under the Rule. Since implementing new sampling procedures, Newark has consistently reported lead action level exceedances during every monitoring period, starting with the first monitoring period in 2017. Although NJDEP has issued notices of non-compliance in response to these exceedances and taken other modest steps well after residents began being exposed to elevated lead levels, NJDEP has never treated the emerging health crisis with the urgency it merits.

91. A May 2016 report prepared for Newark by H2M Associates, Inc., describes the system's long-time state of disrepair: dated and nonfunctioning equipment; turbidity filters blanketed by a thick "surface crust"; failures to conduct routine instrument calibration and maintenance; poorly maintained communications systems; leaking drain valves; a feed system unable to apply the lime dosage necessary to adequately adjust the water's pH levels; and a rate of "unaccounted for" water loss of 33 percent—that is, a loss of about a third of the water flowing through the distribution system, likely through leaks due to exterior corrosion, and other pipe and distribution system failures.

92. H2M Associates also documented serial issues with the water system's day-to-day operational management, including an unlicensed superintendent; inadequate staff numbers; poor technological controls; insufficient engineering expertise; a chain of command that "is not as clearly defined or delegated as needed"; limited accountability; widespread "employee friction"; and deficient direct supervision and control "frequently resulting in unaccomplished required tasks."

93. In 2016, H2M Associates recommended that the City take proactive steps to upgrade the Pequannock Water Treatment Plant. The plan recommended by H2M Associates involved a four-phase process, including,

among other things, installing new equipment and refurbishing the plant's turbidity filters. Upon information and belief, the City has not taken the steps necessary to complete those upgrades within the recommended timeline. pH variability (as described below) will likely continue, with resulting inadequate corrosion control, until all improvements have been made.

94. These dire conditions have led to Newark's numerous Safe Drinking Water Act violations, including repeated violations of the Lead and Copper Rule, the Stage 2 Disinfectants and Disinfection Byproducts Rules, and the Interim Enhanced Surface Water Treatment Rule, which have resulted in unsafe drinking water for those who live, work, and drink water in Newark.

95. In 1992 and 1993, initial monitoring required by the newly promulgated Lead and Copper Rule showed that there were unsafe levels of lead in Newark's drinking water. Newark exceeded the lead action level for the first two consecutive six-month monitoring periods.

96. In June 1994, Newark completed a Corrosion Control Optimization Study. The 1994 study recommended the use of sodium silicate as a corrosion control treatment for the Pequannock service area. While the 1994 study did not explicitly recommend a final pH range, it noted that the pH level maintained during the study ranged from 8.5 to 9. Additionally, the City's study noted that "the pH within the distribution system has a major

impact on corrosion control." pH is a measure of the acidity of the water; a lower pH means more acidity, which increases corrosion. Throughout the 1990s, the Pequannock pH remained around 8.5.

97. In approximately 2002, the City lowered the Pequannock service area pH to a range of approximately 8.0 to 8.3.

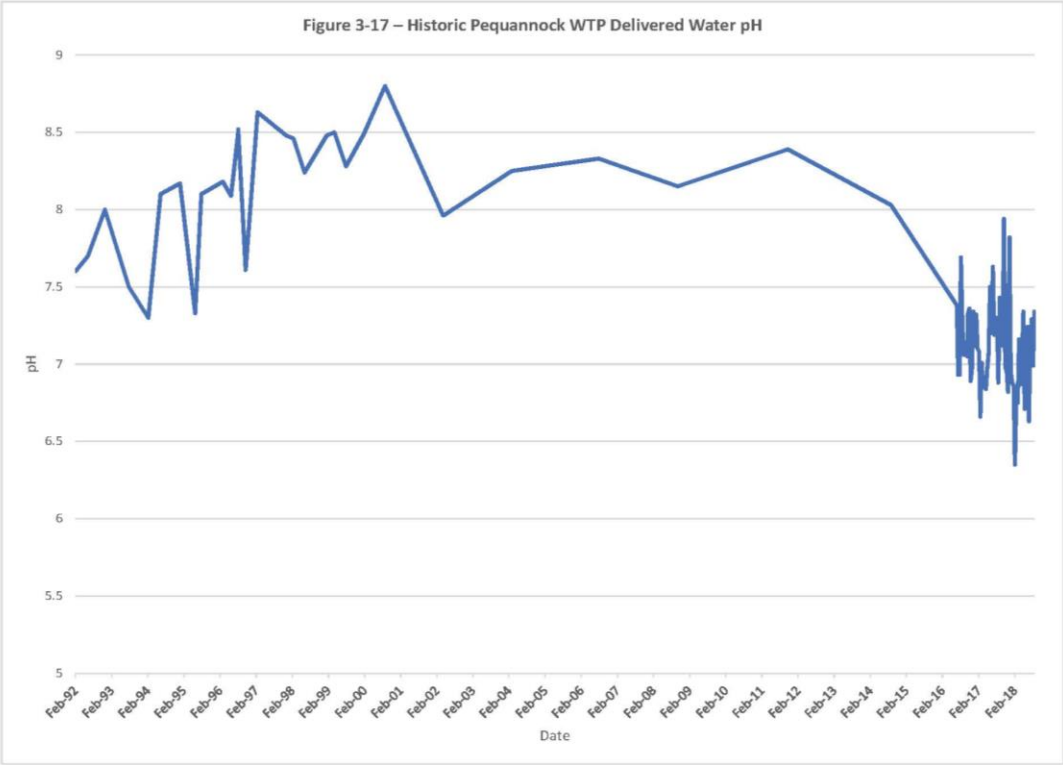
98. In 2012 or 2013, Newark began decreasing pH in order to reduce the formation of total trihalomethane contaminants (TTHM), a category of disinfection byproducts—a short-cut method to avoid exceeding maximum contaminant levels under the Stage 2 Disinfectants and Disinfection Byproducts Rules. Newark's consultant, CDM Smith, concluded that "the reason for the decrease in pH is due to Newark's efforts to reduce disinfection byproduct formation and improve primary disinfection at the Pequannock" Water Treatment Plant.

99. In 2013, Newark again lowered the Pequannock pH levels to 8.0 or below.

100. Newark also appears to have added inappropriate doses of chlorine to its system. In 2015 and 2016, Newark received several notices of non-compliance for chlorine and related disinfection byproduct exceedances.

101. Over the following years, partially in response to multiple violations of the TTHM maximum contaminant level,[2] Newark lowered Pequannock pH levels even further, from an average of 7.26 in 2015, to 7.04 in 2016, to 7.00 in 2017, and to 6.72 in the time between January and August of 2018.

102. According to CDM Smith, "pH has fluctuated substantially for the delivered water from the Pequannock [water treatment plant] between 1992 and 2018," as shown in the figure below:



[2] TTHM are monitored on a quarterly basis, and Newark violated the maximum contaminant level for TTHM during the compliance periods ending September 30, 2015; December 31, 2015; March 31, 2016; and June 30, 2016.

103. Water with lower pH is more acidic, and acidic water is corrosive to lead pipes, solder, and plumbing. Newark's lowering of the system's pH levels increased the corrosiveness of the Pequannock system's water, and thus increased the amount of lead released by lead service lines, solder, and plumbing into residents' drinking water.

104. NJDEP has recognized that "[d]ecreasing pH in a distribution system can lead to unstable and low disinfection residuals, as seen in [data provided by Newark]." Low disinfectant residual levels can in turn lead to microbially induced corrosion and increased lead releases into Newark's drinking water.

105. NJDEP concluded that "corrosion control was no longer working, which may be due to adjustments in the pH made at [Newark's] Pequannock Treatment Plant to address disinfection by-product violations."

106. Indeed, Newark failed to procure and maintain the equipment necessary to avoid extreme variations in pH, and to maintain corrosion control. In addition to the downward trend in pH over a period of years, Newark experienced daily and hourly fluctuations in pH. Maintaining stable and consistent pH is necessary to achieve optimal corrosion control treatment.

107. For example, CDM Smith reported that "[i]n the month of July 2018, daily pH at the Valley Road Rechlorination Station fluctuated between

pH 6.29 and 7.65. This is an extreme variation in pH values over a 31-day period. Furthermore, the pH range throughout [Newark's] distribution system is even more extreme than the values measured at the distribution system [point of entry]."

108. Newark further mismanaged pH levels by operating an undersized lime feed system that did not have adequate capacity to feed enough lime to support a pH above 7.0 to 7.2; failing to install rotary airlocks necessary to avoid overfeeding lime; and failing to install drain lines to discard water with inappropriate pH levels, forcing that water into the distribution system.

109. In addition, on information and belief, the City's mismanagement of the water system and failure to follow the Lead and Copper Rule's sampling requirements masked Newark's lead issues in the drinking water for years in advance of the reported action level exceedances. An EPA employee stated that EPA does not know when lead levels became elevated in Newark, recognizing that the elevated lead levels may be tied to pH changes going back to 2014 and were obscured by Newark's failure to properly sample sufficient Tier 1 sites.

110. In 2014, according to the City's Annual Water Quality Report, over 10 percent of the tap water samples from the Wanaque service area had lead levels exceeding 19.3 parts per billion.

111. For the 2013-2015 monitoring period, CDM Smith reported that 12 percent of the tap water samples from the Pequannock service area exceeded 15 parts per billion—in other words, the Pequannock service area, if treated as a separate system, would have exceeded the federal lead action level.

112. On September 11, 2015, NJDEP sent a letter to the water system asking it to notify NJDEP if the water system did not have a record of previously established optimal water quality parameters.

113. On October 20, 2015, the water system replied, stating that "we do not have any documentation of O[ptimal] W[ater] Q[uality] P[arameters] established by NJDEP." On November 13, 2015, NJDEP responded confirming that the water system did not have water quality parameter values for optimal corrosion control.

114. In March 2016, 30 schools within the Newark Public School district (Newark Public Schools) recorded lead levels above the 15 parts per billion action level. Newark Public Schools receives water from the same water system that provides drinking water to Newark homes and businesses.

115. In March 2016, after lead was found in Newark's schools, Defendant Baraka stated that "the water system in Newark is still safe, it's still drinkable." Later that month, Defendant Baraka told residents "[t]here is nothing wrong with Newark's water."

116. Many Newark schools disconnected water outlets used for drinking and cooking from the City's water system, shut off water fountains, and posted "do not drink" notices. Additionally, Newark Public Schools announced a plan to replace lead plumbing equipment and service lines for and/or install water filters on all water fountains with elevated levels of lead. According to its plan, after completing these and other steps, Newark Public Schools would reconnect the affected schools to the City water supply.

117. Newark Public Schools received, and continues to receive, drinking water from the City of Newark. In 2017, Newark Public Schools reported lead at levels of 15.4 parts per billion in accessible, non-decommissioned water outlets at certain schools, including elementary schools. Newark Public Schools reported much higher levels of lead—as high as 820 parts per billion in 2017, 36 parts per billion in 2018, and 313 parts per billion in 2019—in water outlets the district claims are not accessible to children or have signage posted indicating that the water source is for handwashing only.

118. On July 12, 2016, NJDEP sent Defendant Newark Department of Water and Sewer Utilities a letter indicating that NJDEP "is reevaluating the steps that have been taken to ensure that community water systems comply with the Lead and Copper Rule." As part of that reevaluation, NJDEP

required Newark's water system to complete a 100-sample round of monitoring for lead every six months (as opposed to 50 samples every three years), in accordance with the Lead and Copper Rule.

119. On August 24, 2016, NJDEP determined that Newark had violated its duty under 40 C.F.R. § 141.152 to timely provide a Consumer Confidence Report which must include, among other things, "information on detected contaminants," including lead and disinfection byproducts. 40 C.F.R. § 141.153(d).

120. On January 25, 2017, NJDEP determined that Newark had failed to comply with its obligation under the Lead and Copper Rule to monitor for water quality parameters during the monitoring period from July 1, 2016, to December 31, 2017.

121. In January 2017, the water system began monitoring for lead on a six-month schedule. During the first six-month monitoring period, from January 1 until June 30, 2017, at least 22 percent of the drinking water samples exceeded the 15 parts per billion federal action level and 10 percent of the drinking water samples exceeded 27 parts per billion, resulting in an action level exceedance under the Lead and Copper Rule. Certain individual homes tested at much higher concentrations, with at least six Newark homes testing above 50 parts per billion, and one testing at 127 parts per billion.

122. On July 11, 2017, NJDEP issued a notice of non-compliance to Newark under the Lead and Copper Rule. Among other instances of non-compliance, the notice stated that between January 1 and June 30, 2017, Newark exceeded the 15 parts per billion federal action level for lead in drinking water. As a result of that action level exceedance, NJDEP required the City to take certain steps to address Newark's high lead levels.

123. Newark was required to submit a lead service line inventory within 60 days of NJDEP's notice of non-compliance, that is, by approximately September 11, 2017. Newark did not submit its lead service line inventory by that deadline.

124. After learning that the City triggered a lead action level exceedance on June 30, 2017, Plaintiffs' counsel began requesting information on the high lead levels in Newark's drinking water through Open Public Records Act (OPRA) requests and attempted on several occasions to express to the City the serious nature of the lead contamination. On September 13, 2017, counsel for Plaintiffs and a coalition of New Jersey and Newark community organizations sent a letter to City Defendants demanding that the City take specific steps to address the lead in Newark's drinking water and requesting a meeting with City officials. Later that month, Plaintiffs' counsel began corresponding with representatives of the Newark Department of Water and

Sewer Utilities about the high levels of lead and Defendants' failure to respond to Plaintiffs' OPRA requests. Plaintiffs' counsel met with City representatives on October 27, 2017.

125. Newark's water exceeded the lead action level again in the second six-month monitoring period of 2017. Between July 1 and December 31, 2017, 10 percent of the water system's samples exceeded 26.7 parts per billion, with 13 addresses above 30 parts per billion and four addresses above 50 parts per billion. At the close of the second 2017 monitoring period, more than 18 percent of the tap water samples taken exceeded 15 parts per billion.

126. The first page of Newark's 2017 Water Quality Report stated that "the City of Newark's water is not only safe to use and drink but that it is some of the best water in the State of New Jersey."

127. On January 23, 2018, NJDEP issued a second notice of non-compliance to Newark under the Lead and Copper Rule. The notice stated that between July 1 and December 31, 2017, Newark again exceeded the 15 parts per billion federal action level for lead in drinking water. NJDEP required Newark to take certain steps to address the high lead levels, including many of the same steps that the City was obligated to complete pursuant to NJDEP's first notice of non-compliance.

128. Newark's water samples exceeded the lead action level again during the first monitoring period of 2018. Between January 1 and June 30, 2018, more than 10 percent of the water system's samples exceeded 17.6 parts per billion, with at least eight samples testing above 30 parts per billion, and one sample reaching 182 parts per billion.

129. Plaintiffs' outreach to the City to discuss the reported lead levels continued to be unsuccessful. Between November 2017 and April 2018, City Defendants refused to meaningfully discuss Plaintiffs' requests for information about the causes of the lead action level exceedances and City Defendants' violations of the Safe Drinking Water Act and the Lead and Copper Rule.

130. In late 2017 or early 2018, the water system's licensed operator for both treatment and distribution, Andrew Pappachen, submitted his resignation or otherwise ceased to be employed by the water system.

131. On February 22, 2018, CDM Smith sent an email to City officials, including Defendant Director Adeem, stating that corrosion treatment "has not been effective for [the] Pequannock" service area.

132. As part of the continuing pattern of mismanagement, it became clear in March 2018 that Newark was making fundamental calculation mistakes. Newark was miscalculating "CT compliance" at the Pequannock Water Treatment Plant. CT refers to the product of the concentration of a

disinfectant, in this case chlorine, and the contact time with the water being disinfected. According to an environmental and laboratory services firm Newark had retained, "[t]he treatment plant was utilizing the average flow instead of peak hourly flow and the maximum chlorine residual instead of the daily minimum chlorine residual."

133. Upon discovering these fundamental errors, the plant operator immediately increased chlorine dosages. However, according to NJDEP, the deficient disinfection could have caused microbially induced corrosion of leaded materials in the distribution system. The previously deficient chlorine concentrations due to the plant operator errors may thus have exacerbated the release of lead into Newark's drinking water.

134. On April 24, 2018, Plaintiffs submitted a 60-day notice of intent to sue to all Defendants, pursuant to the Safe Drinking Water Act. This letter finally prompted immediate action by the City—to attack the messenger. On or around April 26, 2018, City Defendants issued several public statements, including a telephonic robocall to Newark residents, stating:

> NEWARK'S WATER IS ABSOLUTELY SAFE TO DRINK...
>
> An organization has made absolutely and outrageously false statements about Newark's water. The truth is that the water supplied by the City is safe to drink. Our water fully complies with federal and state regulations.

> The City's water is NOT contaminated with lead. The only high lead readings were taken inside older 1 and 2 family homes that have lead pipes leading from the city's pure water into those homes. The city is helping those homeowners to replace their pipes.
>
> Our water is safe. In fact Newark has some of the best water in the State of New Jersey. We will keep you informed every step of the way. Again, Newark's water meets all federal and state standards, and this issue is confined to a limited number of homes with lead service lines.

135. This statement gave residents a false impression that it was safe to drink water without a filter, and was false or misleading in numerous other respects. Among other things, for many residents Newark's water was not, in fact, safe to drink. And the problem was and is not limited to homes with lead service lines—homes with lead in their indoor plumbing and fixtures also are affected when inadequately treated corrosive water releases lead into their tap water. Moreover, Newark was grossly exceeding the federal lead action level and in violation of numerous provisions of the Lead and Copper Rule, as described herein.

136. Two months later, the City again incorrectly stated in a press release on its website that the lead issue "is confined to a limited number of homes with lead service lines."

137. On June 26, 2018, after the expiration of the 60-day notice period and lack of response from the City, Plaintiffs filed the complaint in this case.

138. On July 6, 2018, Newark provided NRDC with a partial lead service line inventory. This partial inventory had significant gaps. It failed to identify whether at least 5,175 buildings in the City's database are served by lead service lines.

139. On July 16, 2018, NJDEP issued a third consecutive notice of non-compliance to Newark under the Lead and Copper Rule. The notice stated that between January 1 and June 30, 2018, Newark again exceeded the 15 parts per billion federal action level for lead in drinking water. Accordingly, NJDEP required Newark to take certain steps to address the high lead levels, including many of the same steps that NJDEP had already required of Newark under the previous notices of non-compliance.

140. In August 2018, Plaintiffs filed a motion for a preliminary injunction, asking the Court to require the City to provide bottled water or water filters certified to remove lead to the City's most vulnerable residents.

141. Sometime in the latter half of 2018, Newark made repairs to the lime feed system at the Pequannock Water Treatment Plant, which were designed to stabilize low and fluctuating pH and thereby help to address lead corrosion. Although NJDEP had warned Newark that "[w]hile any adjustments are implemented to stabilize the pH in the Pequannock Gradient, simultaneous compliance must be maintained with all other applicable rules

(e.g., EPA's Stage 1 and Stage 2 Disinfectants and Disinfection Byproducts Rules . . .)," Newark failed to take steps to ensure simultaneous compliance. The increase in pH resulting from the repairs to Newark's lime feed system likely accelerated the formation of disinfection byproducts because Newark failed to take adequate steps to prevent this foreseeable consequence. During the second quarter of 2018, starting April 2018, the levels of HAA5, another group of disinfection byproducts monitored on a quarterly basis, skyrocketed.

142. In September 2018, Newark again violated the federal maximum contaminant level for HAA5.

143. In approximately October 2018, the City received preliminary results from a Lead and Copper Rule Corrosion Control Study that the City had commissioned from CDM Smith. *See* CDM Smith, City of Newark Lead and Copper Rule Corrosion Control Study, ECF No. 67-1. As part of its analysis, CDM Smith had taken additional samples of Newark's drinking water. These samples corroborated the high lead levels found in the tap samples taken during the six-month monitoring periods to assess the City's compliance with the Lead and Copper Rule.

144. CDM Smith took samples based on procedures that differ from the procedures that govern the City's tap sampling under the Lead and Copper Rule. In particular, a tap sample that is used to assess the City's compliance

with the Lead and Copper Rule must be a first-draw sample, meaning that it consists of an increment of water (here, one liter) that has stood motionless in the plumbing pipes for at least six hours and is collected without flushing the tap. *See* 40 C.F.R. §§ 141.2, 141.86(b)(2). In other words, a first-draw sample consists of the first increment of water that comes out of a tap after the tap has not been used for six hours.

145. CDM Smith took samples in half-liter rather than one-liter increments. In addition, CDM Smith took not only first-draw samples, but also subsequent samples that came out of taps after the first draw. These subsequent samples allowed CDM Smith to assess lead levels in water that had been resting further from the tap and closer to lead service lines. Comparing successive samples taken from the same tap, CDM Smith found that, in at least some instances, the highest lead levels occurred in samples of water that had been resting in or near lead services lines. One such sequential sample tested at 399 parts per billion of lead.

146. CDM Smith's sequential samples suggest that some Newark residents may be exposed to lead levels that are even higher than the levels found in the tap samples that have been used to measure the City's compliance with the Lead and Copper Rule. This is because residents may, after a tap has been left unused for some time, draw more than one liter of water, or may

flush the tap before drawing water for use, thereby using their water in a way that reflects the circumstances of sequential sampling more than first-draw sampling, and taking water that has been resting in, or closer to, a lead service line.

147. CDM Smith concluded, among other things, that "[u]pon review of the City of Newark's historic compliance sampling results, it was observed that the compliance sampling program did not proportionally represent both Pequannock-supplied areas and Wanaque-supplied areas in each sampling round. For example, in some sampling rounds, only [parts of Newark] served by [the] Pequannock were sampled, and in other rounds, only [parts of Newark] served by [the] Wanaque were sampled. This would influence [the City's] ability to identify clear data trends, such as increasing lead levels in the system" over time.

148. CDM Smith's 2018 Lead Frequency Analysis for Newark noted that lead "samples taken during [periods prior to 2015] were either concentrated in areas outside of the Pequannock service area or not representative of the Pequannock service area as a whole." This same conclusion also held true for the Wanaque service area.

149. Indeed, during EPA's review of Newark's draft corrosion control report in October 2018, an EPA staffer noted that "[t]he sampling sites have

moved around through zones in the system that have different water qualities and different treatments. It's hard to characterize lead release . . . throughout a water system by taking small numbers of samples that don't capture the LSL [lead service line] source CCT [corrosion control treatment] effectiveness." Moreover, these samples "don't consistently represent the different CCT and different CCT performance throughout [the system], over time." The EPA staffer wrote "we really don't know if the silicate treatment ever worked." He concluded based on these and other issues that the lead problems had been occurring for an "unknown number of years."

150. In October 2018, CDM Smith also advised the City that residents should use point-of-use filters to minimize lead exposure: "Filters are recommended over promoting flushing of premise plumbing since, at this time, the [protective] scales [on the inside of lead pipes] are unstable and can be easily disturbed potentially releasing particulate lead during flushing."

151. In October 2018, long after the warnings from the school drinking water data and NRDC's 2017 outreach efforts and warnings, the City found that "immediate actions" were needed "to protect the health, safety and welfare of the City of Newark's 285,000 residents," and announced plans to provide PUR brand water filters to certain residents.

152. As part of these plans, the City publicly instructed, "[F]or properties with lead service lines in the Pequannock service area, the standard practice of flushing tap water prior to use is *not* considered effective for reducing exposure to lead in drinking water. Residents are advised to *not* flush their home water lines by running tap water as it could increase lead levels" (emphasis added). The City qualified that "flushing the water tap is an effective step to reduce lead levels in drinking water in those homes with lead plumbing and without a lead service line," but provided unqualified instructions to all others *not* to flush.

153. This instruction was confusing. Throughout 2017 the City repeatedly made inconsistent public statements on its website and in the annual Water Quality Report, recommending that some residents flush their faucets, sometimes for 15-30 seconds, sometimes for 30 seconds to 2 minutes, or sometimes without any specific recommended time period.

154. Further compounding the confusion, the City made robocalls on August 11, 2019, instructing residents in the Pequannock service area with lead service lines to flush their taps for 5 minutes before using water. But a brochure from the City from August 30, 2019, retained a version of the former instruction to flush for 15-30 seconds if a household did not have a lead service line and *not* to flush in cases where a household does have a lead service line.

Thus, the City simultaneously instructed residents in the Pequannock service area with lead service lines both to flush and not to flush.

155. Even as the City announced that failed corrosion treatment necessitated the use of filters in October 2018, officials falsely announced that "Newark's water has always been the best and safest water in the state and probably in the country for that matter."

156. In the same month, Defendant Baraka stated that the "East Ward, parts of the North, parts of the South, and parts of the Central [are] *not affected by this at all*." (emphasis added). Defendant Baraka also incorrectly told residents that the "East Ward does not show any elevated levels of lead in their water system."

157. For most of 2018, the City's website promised residents that "NEWARK'S WATER IS ABSOLUTELY SAFE TO DRINK," thus creating a false sense of security among residents and exacerbating the cumulative health and developmental effects for residents who continued to ingest drinking water with elevated levels of lead without a properly functioning filter.

158. In November and December 2018, Newark violated the turbidity limits in the Interim Enhanced Surface Water Treatment Rule. Turbidity is an indicator of a water system's filtration performance, and high turbidity may

indicate that microbial contaminants have not been removed by filtration. Turbidity can also interfere with the effectiveness of disinfection. Newark's violations were far in excess of federal limits.

159. Newark's repeated turbidity exceedances are caused by inadequate and malfunctioning filters at the Pequannock treatment plant.

160. In December 2018, Plaintiffs filed an emergency motion, asking the Court to require Newark to expand its filter program to the Wanaque service area.

161. In December 2018, Newark again violated the federal maximum contaminant level for the disinfection byproduct HAA5.

162. Newark again exceeded the lead action level in the second six-month monitoring period of 2018, reporting lead levels of 47.9 parts per billion at the 90th percentile. On January 24, 2019, NJDEP issued a fourth consecutive notice of non-compliance to Newark for exceeding the action level during the second monitoring period of 2018.

163. As recently as January 2019, Defendant Baraka stated that "Newark has some of the best water in the state, in the country," and "Newark has great water."

164. Also in January 2019, Defendant Baraka appealed to President Trump for assistance, describing the City's water crisis as "a true emergency

that puts millions of our citizens at risk: The decaying infrastructure of our water systems . . . has created a crisis in Newark . . . . Dangerously high levels of lead are entering homes and our children's blood . . . [and] any level of lead can damage the developing brains of young children."

165. Because Newark's water filter program was inadequate to protect residents from the City's lead-contaminated water, Plaintiffs filed a motion in February 2019 identifying the myriad obstacles residents face in obtaining and properly installing and operating filters obtained from the City. Plaintiffs asked this Court to require the City to deliver bottled water to those most at risk or, in the alternative, to order major improvements to the City's existing water filter program, including implementation of a robust in-home installation and education program.

166. On March 29, 2019, the City and NJDEP entered into a Supplemental Consent Agreement and Order (SCAO). The City's filter program remains deficient despite the SCAO. For example, although the SCAO states that residents who "are having filter difficulties" would be "eligible for assistance," the SCAO does not require the City to notify residents of this putative right to assistance. NJDEP did not require, and the City did not institute, a door-to-door filter instruction program despite residents' serious problems with filter installation, use, and maintenance.

167. Eight months after Plaintiffs filed their motion on the filter program, the need for that and other relief persists. Plaintiffs continue to receive information from members and residents identifying numerous problems experienced regarding the City's response to the lead crisis.

168. For example, residents have received scant guidance or follow up from the City when attempting to receive water testing or lead service line replacements. Residents have reported a lack of communication and/or misleading information from the City about the replacement program, both before replacements occur and about necessary steps residents should take to protect themselves in the months after such replacements.

169. Residents have reported being turned away from City centers providing bottled water, filters, and testing, even where the City's website listed an address as eligible and/or having a lead service line. Many residents have resorted to buying or otherwise securing bottled water, filters, and cartridges, and water testing on their own. Significant barriers prevent many residents from benefiting meaningfully from City programs that purportedly offer protection from lead exposure. These barriers remain particularly formidable for non-English speakers and low-literacy residents.

170. Many residents have also regularly recounted their lack of trust in and anger towards the City, both in the information it provides and the availability of services like water testing.

171. Defendants were on notice at least as early as Plaintiffs' February 2019 filing—and should have been aware much earlier by exercising even minimal care and diligence—that many residents who had filters were not being protected from excessive lead exposure because of improper installation, maintenance, or use of those filters. Rather than acting with requisite urgency to protect vulnerable residents, the City responded by using its funds to hire a consultant who has frequently worked for chemical, metals, and tobacco companies, to downplay the health risks of lead exposure and attack the study that had demonstrated substantial problems with installation, maintenance, and use of filters. Defendants could have spent those or other litigation funds to conduct their own study of filter use if they actually in good faith doubted the results of Plaintiffs' study of filter misuse, but Plaintiffs are unaware of the City's or NJDEP's having done so.

172. The City's failure to respond to warnings of shortcomings in its filter program extended lead exposure of infants, small children, and pregnant mothers for many additional months, when residents mistakenly believed they were being protected by filters. To this day, Defendants have not rolled out a

robust program to ensure residents are properly installing and using filters, despite Plaintiffs' warnings long ago of the need for such a program.

173. In the meantime, lead levels in the Wanaque service area continued to rise in early 2019 because of ill-treated water blending from the higher-pressure Pequannock service area into the Wanaque service area through open valves and/or gates that connected the two service areas. As of April 2019, water in the Wanaque exceeded the 15 parts per billion action level, reaching 23 parts per billion at the 90th percentile.

174. Orthophosphate—the chemical used to prevent corrosion of lead pipes in the Wanaque—was too diluted, and in some cases undetectable, in the areas where Pequannock water blended into the Wanaque. As a result, orthophosphate concentrations in the blended portions of the Wanaque service area consistently fell far below the amount recommended by EPA, and that proposed by Newark, to adequately control corrosion.

175. Orthophosphate dilution in the Wanaque was likely occurring because section gates and valves between the two service areas were open, allowing water to flow from the Pequannock service area to the Wanaque service area. As of May 2016, Newark's consultant, CDM Smith, had reported that "many section gates are either in an open or partially open position, transferring Pequannock supply to the Wanaque," and "recommended that

these valves are inspected and exercised as part of a greater system-wide program." The flow from the Pequannock to the Wanaque was not intermittent; rather, it had been ongoing for years before the gates were apparently closed in early 2019.

176. Newark did not produce any documentation of inspections or closures of section and/or division gates until the eve of the August 2019 preliminary injunction hearing—despite Plaintiffs' repeated requests for exactly such documentation via formal discovery requests sent back in December 2018 and repeatedly discussed in early and mid-2019.

177. Before 2019, Newark did not have an inspection program to ensure that division gates were closed and valves were properly functioning. Between November 2018 and January 2019, Newark made some effort to inspect and close division gates between the Pequannock and Wanaque service areas that were in an open or partially open position. The City has conceded that several division gates were discovered in an open or partially open position during this inspection, across an unknown area for an unknown period of time.

178. In March 2019, Newark again violated the federal maximum contaminant level for HAA5, as well as for TTHM.

179. In early 2019, at least three Newark residents were diagnosed with Legionnaires' disease. Three weeks later, officials in neighboring Union County, which may indirectly purchase water from Newark, announced that five people had died from Legionnaires' disease, with more than twenty infected across the county. And back in 2018, Legionella bacteria was found in nine schools in West Orange, which also may indirectly purchase water from Newark, and at least two cases were reported in 2018 at a hotel near Newark airport.

180. Legionnaires' disease can occur when people inhale small water droplets that contain Legionella bacteria. Water systems are required to treat their water with disinfectants—like chlorine—to ensure that bacteria like Legionella does not grow in the water system and spread. But changes to a water system's disinfection treatment process can cause the bacteria to proliferate in the system.

181. Newark's reoccurring disinfection byproducts violations signal that the water system's disinfection process is not working as it should. Water systems that experience disinfection byproducts exceedances, like Newark's system, may ramp back chlorine dosing to abate excess disinfection byproducts; doing so can help to create an environment for the proliferation of Legionella bacteria.

182. In March 2019, Newark initiated a lead service line replacement program that required residents to pay up to $1,000 for safe water, a cost many Newark residents cannot afford.

183. In May 2019, Newark began to add orthophosphate to the water delivered to the Pequannock service area.

184. According to Defendant Commissioner McCabe, it will take two six-month monitoring periods to determine whether the orthophosphate will be deemed effective in optimally controlling lead in drinking water in the Pequannock service area. Nevertheless, the City has already made public statements suggesting the treatment is effective, such as in a July 2019 Water Department letter to business community leaders, which stated that the "corrosion control improvements . . . have already proven effective."

185. In June 2019, Newark again violated the federal maximum contaminant level for the disinfection byproducts HAA5 and TTHM.

186. During the first six-month monitoring period of 2019, Newark reported lead levels at 57 parts per billion at the 90th percentile, nearly four times the 15 parts per billion federal action level for lead. On August 9, 2019, NJDEP issued a fifth consecutive notice of non-compliance to Newark for exceeding the action level during this monitoring period.

187. On August 10, 2019, Newark officials announced that testing had revealed that the PUR water filters the City had been distributing may not be effectively removing lead. While the issue was being investigated, Newark provided bottled water to a subset of residents.

188. Later that month, Newark officials announced a new plan to expedite replacement of all lead service lines in the City. According to Defendant Baraka, the City intends to replace approximately 18,000 lead services lines within the next 24 to 30 months.

189. On August 20, 2019, NJDEP issued a Notice of Non-Compliance to Newark for violating its requirement under 40 C.F.R. § 141.152 "to prepare a Consumer Confidence Report annually, containing the previous year's data, and submit it to both their customers and the Department by July 1." A Consumer Confidence Report must include, among other things, "information on detected contaminants," including lead and disinfection byproducts. *Id.* § 141.153(d).

190. Between July and September 2019, Newark again violated the federal maximum contaminant level for the disinfection byproduct HAA5.

191. In September 2019, Newark made an announcement indicating that 97 to 99 percent of the PUR water filters were, in fact, effective in limiting

lead below 10 parts per billion. Plaintiffs have requested but not yet received the data from the sampling and testing of the filters.

192. NJDEP stated that Pequannock residents should flush their water before filtering to "increase[] assurance that lead will be removed to below 10 ppb." NJDEP specified that the length of time that residents should flush their water depends on whether they have a lead service line, and if so, how long the service line is. For homes with lead services lines, NJDEP recommended 5 minutes of flushing; for homes with "larger front yards, where the lead service lines may be over 75 ft," NJDEP recommended 10 minutes of flushing; and for homes without lead services lines, NJDEP recommended less than a minute of flushing.

193. Flushing increases water use, thereby increasing the water bills that Newark residents must pay. The costs of flushing are thus borne by Newark's residents, even though it is Defendants' failures to comply with the Lead and Copper Rule that have given rise to the need for flushing.

194. In September 2019, Defendant McCabe also announced that NJDEP would be funding a Community Assistance Program "that will bring together City and volunteer resources to provide residents with filter installation, educational materials, and drinking water sampling when requested."

195. Plaintiffs have requested, both informally and through formal OPRA requests filed September 27, 2019, that the City and NJDEP provide additional information regarding the proposed Community Assistance Program. No additional information has yet been provided.

196. In October 2019, Newark ceased the bottled water program, except with respect to a narrow subset of residents.

197. The high lead levels in Newark's drinking water, and continued injury to Plaintiffs' members and Newark residents, have been caused by Defendants' failure to comply with the Safe Drinking Water Act's requirements, as implemented through the Lead and Copper Rule. The duration and extent of Newark residents' exposure to excessive lead levels are caused by Defendants' violations of the Rule, years of neglect, mismanagement and oversight, and failure to timely and adequately protect residents once their exposure began.

Requests for public records

198. As stated above, Plaintiff NRDC has sought information about the high lead levels in Newark's drinking water and the causes of those levels through several OPRA requests directed to the City and the State of New Jersey starting in July 2017. The records would help shed light on the severity

of lead contamination in Newark's drinking water and the actions Newark and the State have or have not taken to address non-compliance with the Safe Drinking Water Act and the Lead and Copper Rule.

199. Ultimately, the City of Newark has provided limited records in response to NRDC's requests. Newark initially failed to produce many of the public records requested in NRDC's OPRA requests, forcing NRDC to file a complaint and order to show cause in the Superior Court of New Jersey, Essex County, to obtain access to those requested public records. Compl., *Nat. Res. Def. Council v. City of Newark et al.*, No. ESX-L-002906-18 (N.J. Super. Ct. filed Apr. 24, 2018). After a hearing on June 22, 2018, the Honorable Judge Beacham found that the City of Newark had violated OPRA by failing to comply with statutory timelines, failing to produce responsive records, unlawfully redacting government records, and failing to state the specific bases for the unlawful withholdings. Court Order, *Nat. Res. Def. Council v. City of Newark et al.*, No. ESX-L-002906-18 (N.J. Super. Ct. June 25, 2018). The Court ordered the City to produce the requested records within 20 days. *Id.*

200. The City failed to comply fully with the Court's order, however, and after two motions for enforcement of the order, and two orders granting enforcement, *see* Court Orders, *Nat. Res. Def. Council v. City of Newark et al.*, No.

ESX-L-002906-18 (N.J. Super. Ct. Aug. 3, 2018 & Sept. 28, 2018), the City produced the final category of outstanding documents in November 2018.

201. A nearly identical pattern of delay and withholding followed another OPRA request NRDC submitted to the City on July 13, 2018, requesting additional records pertaining to the high lead levels in the City's water. In December 2018, NRDC filed suit against Newark for its deficient response to the July 13, 2018, request. NRDC also sought willful violation penalties.

202. In April 2019, Newark asked the New Jersey Superior Court to order a stay of NRDC's OPRA requests during the pendency of the federal litigation. The Honorable Judge Stecher denied Newark's motion and ordered Newark to produce all outstanding records within 30 days. The judge declined to rule on the question of whether willful violation penalties should issue at that time.

203. For the paragraphs below, Plaintiffs incorporate the allegations in paragraphs 17 through 202 above.

<u>The City is violating the Lead and Copper Rule's requirement to maintain optimal corrosion control treatment</u>

204. The Lead and Copper Rule requires the water system to, among other things, "continue to operate and maintain optimal corrosion control

treatment." 40 C.F.R. § 141.82(g). For the reasons stated above, City Defendants have not done so.

205. Newark claims that it installed corrosion control treatment in 1997 when it began adding sodium silicate to the water leaving the Pequannock treatment plant.

206. If corrosion control treatment was in fact installed in 1997, it is not clear whether it was *ever* optimal, or even effective, in reducing lead concentrations. In February 2018, Newark's consultant CDM Smith concluded that, "the addition of sodium silicate in 1997 for [corrosion control] treatment was ineffective in lowering the lead levels."

207. Even if the addition of sodium silicate was originally effective in reducing lead levels, however, Newark failed to maintain optimal treatment. As described above, Newark lowered pH levels of the water leaving the Pequannock treatment plant over a period of years, beginning in approximately 2013. Newark also permitted extreme pH fluctuations to occur on a daily and hourly basis.

208. Water's pH, a measure of how acidic or basic the water is, affects how quickly the water will corrode metal pipes, solder, and plumbing. To maintain optimized corrosion control treatment, water systems must maintain

adequately high pH and minimize variations in pH to avoid increased corrosion of lead pipes, solder, and plumbing.

209. Low pH (acidic water) and fluctuating pH compromise the effectiveness of corrosion control treatment. Even a 1-point pH change can greatly increase the corrosion of lead materials, increasing lead levels at residents' taps by orders of magnitude. For example, lead levels can increase from 34 parts per billion at a pH of 8.0, to 172 parts per billion at a pH of 7.0, to 2,600 parts per billion at a pH of 6.0. The pH of the finished water from the Pequannock treatment plant has been extremely variable, with a large range of 6.0 to 8.8 for the period of 2015 to 2018. A water system with such variable pH levels has not maintained optimal corrosion control treatment.

210. Corrosion control treatment does not normally "lose effectiveness" without some action, or inaction, by the water system's operators.

211. The water system has failed to maintain adequate treatment of its source water with appropriate pH-controlling and corrosion-inhibiting chemicals to minimize the amount of lead leaching from the water system's pipes and solder.

212. In addition, the water system may have failed to maintain adequately high pH levels to ensure adequate disinfection; this may have led to

microbially induced corrosion, contributing further to lead releases into Newark's drinking water.

213. City Defendants' failure to maintain adequate corrosion control treatment has caused lead service lines, pipes, and plumbing within the City to corrode, and leach and/or flake off lead into drinking water, directly and irreparably harming Plaintiffs' members and Newark residents at large.

214. The City has been on notice that it does not have optimized corrosion control treatment since at least mid-2017.

215. NJDEP's July 11, 2017, notice of non-compliance to the City Department of Water and Sewer Utilities concluded that the "Newark Water Department is deemed to no longer have optimized corrosion control treatment." NJDEP's January 23, 2018, and July 16, 2018, notices of non-compliance indicated that Newark still had not optimized corrosion control treatment.

216. In February 2018, the City's consultant CDM Smith informed City officials by email that corrosion treatment "has not been effective for [the] Pequannock" service area.

217. In September or October 2018, the City received CDM Smith's draft Lead and Copper Rule Corrosion Control Study, which "show[ed] that the corrosion control in the Pequannock service area is no longer effective"

and "recommended that the City implement new corrosion control measures to inhibit the release of lead into the drinking water."

218. The water system has not minimized the concentration of lead at users' taps, as required by the Lead and Copper Rule. *See* 40 C.F.R. § 141.2 (definition of "[o]ptimal corrosion control treatment"). The high levels of lead in Newark's drinking water further support the determination that Newark has failed, and continues to fail, to optimize corrosion control treatment. The water system has violated, and continues to violate, the Lead and Copper Rule's requirement to maintain optimal corrosion control treatment. *Id.* §§ 141.80(d)(1), 141.82(g).

219. The water system's failure to maintain optimal corrosion control has thus caused, and continues to cause, dangerous levels of lead to enter the drinking water coming out of Newark residents' taps.

220. In addition, the water system has not been operating corrosion control treatment that is "optimal" within the meaning of the Lead and Copper Rule, which defines that term as "corrosion control treatment that minimizes the lead and copper concentrations at users' taps while insuring that the treatment does not cause the water system to violate any national primary drinking water regulations." 40 C.F.R. § 141.2. The corrosion control treatment Newark's system has been using has been linked to violations of

other national drinking water regulations, including the Stage 2 Disinfection and Disinfection Byproducts Rules.

The City is violating the Lead and Copper Rule's requirement to evaluate the materials within the system

221. The Lead and Copper Rule requires Newark to perform a materials evaluation before beginning monitoring for lead under the Lead and Copper Rule by January 1, 1992. *Id.* § 141.86(a), (d)(1).

222. The materials evaluation must describe the "construction materials . . . present in the[] distribution system," including the presence of "[l]ead from piping, solder, caulking, interior lining of distribution mains, alloys and home plumbing[;] . . . [c]opper from piping and alloys, service lines, and home plumbing[;] . . . [g]alvanized piping, service lines, and home plumbing[;] . . . [and f]errous piping materials such as cast iron and steel." *Id.* § 141.42(d); *see also id.* § 141.86(a)(2).

223. A key purpose of the materials evaluation is to identify a pool of targeted sampling sites that is sufficiently large to ensure the water system can collect the number and type of samples required under the Lead and Copper Rule. *Id.* § 141.86(a)(1), (c).

224. NRDC has requested, but has not received, evidence demonstrating that the water system has completed a materials evaluation that meets the Lead and Copper Rule's requirements.

225. NJDEP's statements provide further evidence that no such evaluation was completed in compliance with federal rules. In response to NRDC's request for documentation of Newark's materials evaluation, NJDEP stated that "materials evaluations and sampling plans were not submitted [by the City] to NJDEP following the Lead and Copper Rule effective date."

226. In response to NRDC's request for documentation of Newark's materials evaluation, the City initially declined to produce records showing that Newark had conducted a materials evaluation. On April 25, 2018, the day after receiving Plaintiffs' notice of intent to sue and NRDC's OPRA complaint, Newark reported to Plaintiffs that a materials evaluation did, in fact, exist and committed to producing that evaluation to Plaintiffs by April 27, 2018. Newark never produced the materials evaluation, however, suggesting that—contrary to its representation otherwise—it had never completed the evaluation.

227. Indeed, in its motion to dismiss NRDC's OPRA complaint, Newark admitted that it does not have a materials evaluation. Defs.' Br. in Supp. of Mot. to Dismiss at 5, *Nat. Res. Def. Council v. City of Newark et al.*, No.

ESX-L-002906-18 (N.J. Super. Ct. June 1, 2018). Subsequently, Newark stated it had completed a materials evaluation, but again has failed to provide any such evidence to NRDC. Defs.' Reply in Supp. of Mot. to Dismiss at 2, *Nat. Res. Def. Council v. City of Newark et al.*, No. ESX-L-002906-18 (N.J. Super. Ct. June 13, 2018).

228. NRDC has continuously renewed its request for a materials evaluation, but, to this date, has not received one from the City. In light of the sequence of events described above, the City would have by now produced a materials evaluation if it existed.

The City violated the Lead and Copper Rule's monitoring requirements

229. The Lead and Copper Rule requires water systems to monitor for lead in household tap water. 40 C.F.R. § 141.86. Monitoring for lead at consumers' taps is necessary to measure lead levels in drinking water. This is because lead enters the water after it leaves the water system's treatment plant, as it travels through lead pipes or plumbing towards consumers' homes.

230. The Lead and Copper Rule's tap water monitoring requirements are designed to prioritize testing for lead in homes that are most at risk for elevated lead levels. Homes are at high risk if they contain lead plumbing or solder, or if they are served by lead service lines. 56 Fed. Reg. at 26,514; *see* 40

C.F.R. § 141.86(a)(3). Service lines are pipes that connect household plumbing to the main water distribution pipe in the street. In older water distribution systems, such as Newark's water system, these service lines often are made of lead.

231. Monitoring at high-risk homes is critical to ensuring that elevated lead levels in drinking water are detected, because lead is not distributed uniformly throughout a water system. 56 Fed. Reg. at 26,514. Instead, lead can dissolve or small lead pieces may flake and break away from a lead service line and travel into a customer's home without spreading evenly throughout the water in the distribution system. These lead pieces can result in intermittent but large spikes in the water's lead levels. Even a single sample showing elevated levels of lead indicates that these dangerous lead pieces may be present more widely in the system.

232. Targeting high-risk homes thus makes it more likely that a water system will detect whether lead is flaking off or leaching from the water system's pipes or solder. Such targeting also helps water systems and regulators determine whether a system has minimized lead levels in drinking water by operating an optimized corrosion control treatment program. *Id.*

233. Before a water system begins monitoring for lead at household taps, it must identify a pool of targeted sampling sites. 40 C.F.R.

§ 141.86(a)(1). The sampling pool must consist of Tier 1 sites, which are homes that have a high risk of lead contamination, to the extent sufficient Tier 1 sites are available anywhere within the entire distribution system. *See id.* § 141.86(a)(3)–(8).

234. Newark was required to collect a set of at least 100 tap water samples twice each year. *Id.* § 141.86(c), (d)(1). Newark has sufficient Tier 1 sites to fill its entire sampling pool with Tier 1 sites. Therefore, Newark was required to take each of these 100 samples from a Tier 1 sampling site. *See id.* § 141.86(a)(3)–(4).

235. During the first six-month monitoring period of 2017, Newark had 131 Tier 1 sites within its sampling pool, but it collected samples from only 40 Tier 1 sites. During the second six-month monitoring period of 2017, Newark reported collecting samples from 88 Tier 1 sites. During the first six-month monitoring period of 2018, Newark reported collecting samples from 93 Tier 1 sites. In each of these three monitoring periods, Newark filled its 100-sample quota with sites that are not Tier 1 sampling sites, and thus are less likely to show lead contamination.

236. Newark's inadequate sampling procedures likely pre-date 2017. Upon information and belief, Newark did not sample sufficient Tier 1 sites prior to 2017. Newark's consultant, CDM Smith, concluded that "[u]pon

review of the City of Newark's historic compliance sampling over the last 20+ years, it is not clear if all homes selected for sampling in some years [] were confirmed as sites with lead service lines (i.e. Tier 1 sites)" and that "it has not been confirmed if the historic sample sites were Tier 1 sites at the time of each sampling round."

237. However, from at least 2017 to June 2018, Newark obscured the severity of its lead problem by filling its 100-sample quota with sites that are less likely to show elevated lead levels. This dilution of sampling results with lower priority sites that are less likely to have elevated lead levels suggests that the City routinely underestimated its lead levels.

238. On September 27, 2019, NRDC submitted OPRA requests to Newark and NJDEP requesting "[t]he City of Newark's most recent or currently operational Lead and Copper Rule Sampling Plan, including all exhibits and attachments," as well as "[t]he City of Newark's most recent or currently operational Lead and Copper Sampling Pool, including the addresses of each sampling site within the sampling pool. This request includes a request for all BWSE-18 spreadsheets submitted by the City of Newark to NJDEP in the past twelve months." A BWSE-18 spreadsheet is the form required by NJDEP for reporting lead and copper sampling results.

239. If Newark has come into compliance with its duty to fill its sampling pool with 100 Tier 1 sites, Newark and/or NJDEP should possess documents responsive to these requests, including BWSE-18 spreadsheets, that demonstrate Newark's compliance. Neither Newark or NJDEP has produced any such documentation to date.

The City is in violation of the Lead and Copper Rule's requirement to draw 50 percent of its samples from sites with lead plumbing

240. The Lead and Copper Rule requires Newark to collect and test 50 percent of its tap water samples from sites with lead pipes, or copper pipes with lead solder. *See* 40 C.F.R. § 141.86(a)(8). This helps to identify lead contamination from lead-containing indoor pipes, solder, and fixtures where corrosive water may cause lead to be released into the tap water.

241. During the first monitoring period of 2017, the City took only approximately 31 percent of Newark's drinking water samples from sites in the City's sampling pool that contain lead pipes, or copper pipes with lead solder. Similarly, in the second 2017 monitoring period, the City took only approximately 27 percent of the samples from the City's sampling pool from sites that contain lead pipes, or copper pipes with lead solder. In the first monitoring period of 2018, the City took only approximately 29 percent of the

samples from the City's sampling pool from sites that contain lead pipes, or copper pipes with lead solder.

242. Newark has failed to draw 50 percent of samples from sites containing lead pipes, or copper pipes with lead solder, as required by the Lead and Copper Rule. *See id.*

243. On September 27, 2019, NRDC submitted OPRA requests to Newark and NJDEP requesting "[t]he City of Newark's most recent or currently operational Lead and Copper Rule Sampling Plan, including all exhibits and attachments," as well as "[t]he City of Newark's most recent or currently operational Lead and Copper Sampling Pool, including the addresses of each sampling site within the sampling pool. This request includes a request for all BWSE-18 spreadsheets submitted by the City of Newark to NJDEP in the past twelve months."

244. To date, neither Newark nor NJDEP has produced any documentation that Newark has begun drawing 50 percent of its tap water samples from sites containing lead pipes, or copper pipes with lead solder.

<u>The City is in violation of the Lead and Copper Rule's requirement to sample the same or similar sites across monitoring periods</u>

245. The Lead and Copper Rule requires water systems to sample the same sites across monitoring periods. 40 C.F.R. § 141.86(b)(4). Sampling new

sites from one monitoring period to the next is permitted only if the water system cannot gain entry to the original sampling sites. *Id.* If the system samples new sites, the replacement sites must meet the same targeting criteria and must lie within "reasonable proximity" of the original sites. *Id.*

246. Chemical and physical characteristics of the water in a system (which may affect lead levels) can vary substantially across short distances. Samples taken more than a mile apart have a good chance of exhibiting such variation.

247. At least 20 sites from the first monitoring period in 2017 were not re-sampled during the second monitoring period. In addition, Newark submitted forms to NJDEP reporting that seven of the replacement sites were located more than a mile from the original sites. According to the reported data, one replacement site was located approximately 4.8 miles from the original site; another was reportedly located 10 miles from the original site.

248. On information and belief, Newark did not replace all sites sampled in the first 2017 monitoring period with sites lying within "reasonable proximity" of the original sampling sites, as required by the Lead and Copper Rule. *See id.*

249. On September 27, 2019, NRDC submitted OPRA requests to Newark and NJDEP requesting "[a]ll records demonstrating any changes, or

proposed changes, to the sampling sites within the City of Newark's Lead and Copper Rule sampling pool in the past twelve months, including all BWSE-56 forms submitted by the City of Newark to NJDEP during that time period." BWSE-56 forms reflect changes in sampling sites.

250. Neither Newark nor NJDEP has produced any documentation to date that it has come into compliance with its duty to sample the same or similar sites across monitoring periods.

The City is violating the Lead and Copper Rule's requirement to complete a lead service line inventory

251. The Lead and Copper Rule requires a water system that fails to meet the lead action level after installing corrosion control to prepare a lead service line inventory, which identifies the "initial number" of lead service lines in the distribution system. 40 C.F.R. § 141.84(a)–(b)(1). The "initial number" is the number of lead service lines in the distribution system "at the time the system exceeds the lead action level." *Id.* § 141.90(e)(1).

252. Written documentation of a water system's lead service line inventory is due to the state 12 months after the end of the monitoring period in which the water system triggers an action level exceedance. *Id.*

253. The City was required to submit documentation to NJDEP identifying the initial number of lead service lines in the City's distribution system by June 30, 2018, 12 months after the City's lead action level exceedance during the monitoring period ending June 30, 2017.

254. Newark's partial inventory of lead service lines, which the City provided to NRDC on July 6, 2018, fails to identify whether at least 5,175 total buildings in the City's database are serviced by lead service lines.

255. On July 25, 2018, the City and NJDEP entered into a Compliance Agreement and Order (CAO) regarding abatement of lead in the City's drinking water. *See* Notice of Mot. to Dismiss Compl., Ex. E, ECF No. 15-6.

256. The CAO stated that Newark failed to characterize the service line materials of 5,119 service connections. *Id.* at 10. In addition, the CAO stated that the City was "making assumptions" about the service line materials for certain service connections based upon the age of service installation. *Id.*

257. The CAO memorialized Newark's representation that the outstanding 5,119 service connections "will be evaluated during the course of a . . . project that is expected to take several years." *Id.* As of October 2019, the composition of at least hundreds of service lines remains "unknown" and needs to be characterized.

258. Newark failed and, on information and belief, has continued to fail, to prepare a complete lead service line inventory identifying the initial number of lead service lines in its distribution system as required by the Lead and Copper Rule. 40 C.F.R. §§ 141.84(b)(1), 141.90(e)(1).

The City is violating the Lead and Copper Rule's requirement to annually replace seven percent of lead service lines in its distribution system within 12 months after its first action level exceedance

259. The Lead and Copper Rule requires a water system that fails to meet the lead action level after installing corrosion control to annually replace at least seven percent of lead service lines in the distribution system with pipes and solder that are lead-free. *See id.* §§ 141.84(a)–(b)(1), 141.90(e)(1); *see also* § 141.43.

260. Upon failing to meet the lead action level during the first monitoring period in 2017, the City has been required to annually replace at least seven percent of the lead service lines in its distribution system.

261. Written documentation of the mandatory lead service line replacements is due to the state no later than twelve months after the end of the monitoring period in which the water system triggers an action level exceedance. *Id.* § 141.90(e)(2).

262. Newark was required to submit documentation to NJDEP demonstrating compliance with the Lead and Copper Rule's lead service line replacement requirement by June 30, 2018, twelve months after the City's lead action level exceedance during the monitoring period ending June 30, 2017.

263. In its July 11, 2017, notice of non-compliance to Newark, NJDEP instructed that "[l]ead service line replacement shall commence immediately in accordance with [40 C.F.R. § 141.84]." Subsequently, in its January 23, 2018, notice of non-compliance, NJDEP directed that "[l]ead service line replacement must continue in accordance with [40 C.F.R. § 141.84]."

264. In email correspondence between Newark and NJDEP, Newark stated that the City had not replaced any of the City's lead service lines as of May 2018. In June 2018, NJDEP officials similarly represented to attorneys for Plaintiffs during a telephone conversation that Newark had not broken ground on a single lead service line replacement.

265. In its July 16, 2018, notice of non-compliance to Newark, NJDEP reiterated that "Lead Service Line (LSL) replacement must continue in accordance with [40 C.F.R. § 141.84.]"

266. NRDC has requested, but has not received, public records demonstrating that the water system has replaced seven percent of the City's lead service lines for each year it has exceeded the federal action level.

267. On October 2, 2018, the City represented that it expected to complete the first phase of its lead service line replacement project within one year. The City also expressed its hope to start work in November 2018.

268. It was not until March 2019 that the City formally announced plans to commence a lead service replacement program.

269. The City reports that it has replaced 1,707 lead service lines as of October 24, 2019, which is far short of the number that the Lead and Copper Rule required it to replace by June 30, 2019.

270. The City of Newark has violated, and continues to violate, its obligation to annually replace seven percent of lead service lines in its distribution system following the City's lead action level exceedance during the monitoring period ending June 30, 2017.

The City is violating the Lead and Copper Rule's requirement to complete public education, including timely providing all required information and documentation to the public

271. The Lead and Copper Rule requires water systems to notify each "bill paying customer[]" with printed materials containing specified language when a water system exceeds the lead action level during a monitoring period. 40 C.F.R. § 141.85.

272. These public education materials must include specific information about the health effects of lead, provide guidance on protecting against lead exposure, and advise customers how to get their tap water tested for lead, among other requirements. *Id.* § 141.85(a)(1).

273. The required public education materials must also be provided to residents through a variety of delivery methods. *See id.* § 141.85(b).

274. Correspondence between the City and NJDEP shows that Newark failed to notify at least 200, and as many as 20,000, service account holders about its action level exceedance for the monitoring period ending June 30, 2017, in violation of the Lead and Copper Rule.

275. City Defendants admit that they "failed to comply with the billing notice public education requirements in the last quarter of the [sic] 2017 and the first quarter of 2018."

276. For the period starting in September 2018, Newark failed to submit required public education certification forms, failed to provide a copy of the water public education notice, and failed to demonstrate that it had contacted local health agencies and provided written information to Women, Infants, and Children and Head Start Programs. As a result of these failures, Newark received yet another notice of non-compliance for its public education violations on February 28, 2019.

277. On August 9, 2019, NJDEP issued yet another notice of non-compliance to Newark, this time for failing to provide to the public all information that was known to Newark through a press release including the then-recommendation not to flush in the Pequannock.

278. The City of Newark has failed and, on information and belief, is continuing to fail, to meet the Lead and Copper Rule's requirement to provide the required public education materials to all bill paying customers through all mandatory delivery methods. *See id.* § 141.85.

The Commissioner of NJDEP is violating the Lead and Copper Rule's requirement to designate optimal water quality parameters

279. The Lead and Copper Rule required NJDEP to designate optimal water quality parameters for Newark by July 1, 1998. *Id.* § 141.81(d)(6).

280. NJDEP was required to review all water samples submitted by the water system and "designate . . . water quality control parameters . . . that the State determines to reflect optimal corrosion control treatment for the system." *Id.* § 141.82(f).

281. NJDEP was required to notify the water system "in writing of these determinations and explain the basis for its decisions." *Id.*

282. NJDEP's obligation to designate optimal water quality parameters for the water system is ongoing. It exists "both before and after the system installs optimal corrosion control treatment." *Id.*

283. NJDEP does not have any records documenting its designation of optimal water quality parameters for the City of Newark. The City of Newark has informed NJDEP that it does not have any documentation of optimal water quality parameters established by NJDEP. On information and belief, NJDEP has not designated optimal water quality parameters for the water system.

284. On information and belief, Defendant McCabe, acting in her official capacity as the Commissioner of NJDEP, is in violation of her obligation to designate water quality parameters for the water system.

Notices of intent to sue under the Safe Drinking Water Act

285. On April 24, 2018, Plaintiffs submitted a notice of intent to sue describing the First, Fourth, Fifth, and Eighth claims alleged herein. *See* 42 U.S.C. § 300j-8(b). Plaintiffs contacted all Defendants on May 1, 2018, to request a meeting to discuss the notice of intent to sue, but did not receive a response from any Defendant.

286. On June 12, 2018, Plaintiffs again contacted Defendants to request a meeting to discuss the April 24, 2018, notice of intent to sue. A representative of City Defendants indicated that a written response to Plaintiffs' notice of intent to sue would be provided before the close of the notice period. Plaintiffs did not receive a written response to the notice of intent to sue from City Defendants.

287. On June 21, 2018, Plaintiffs and representatives of Defendant Catherine McCabe, Commissioner of NJDEP, participated in a telephone conference regarding Plaintiffs' notice of intent to sue. On June 25, 2018, after the close of the 60-day notice period, Plaintiffs received a letter, submitted on behalf of NJDEP, which summarily states that "the requirements in the [L]ead and [C]opper [R]ule triggered by Newark's lead action level exceedances have been met." NJDEP's letter does not, however, provide sufficient evidence to establish that the water system and NJDEP were and are not continuing to violate the Lead and Copper Rule, as alleged in Plaintiffs' notices of intent to sue and this pleading.

288. On August 23, 2018, Plaintiffs submitted a supplemental notice of intent to sue describing the Second, Third, Sixth, and Seventh claims alleged herein. *See* 42 U.S.C. § 300j-8(b).

FIRST CLAIM FOR RELIEF
(Violation of the Safe Drinking Water Act's requirement to complete a materials evaluation, 40 C.F.R. §§ 141.86, 141.42)

289. Plaintiffs incorporate by reference all of the preceding paragraphs.

290. City Defendants have violated and continue to violate the Safe Drinking Water Act and its implementing regulations by failing to complete a materials evaluation. 40 C.F.R. §§ 141.86, 141.42(d).

SECOND CLAIM FOR RELIEF
(Violation of the Safe Drinking Water Act's requirement to draw 50 percent of its samples from sites with lead plumbing, 40 C.F.R. § 141.86)

291. Plaintiffs incorporate by reference all of the preceding paragraphs.

292. City Defendants have violated and continue to violate the Safe Drinking Water Act and its implementing regulations by failing to comply with the Act's requirement to draw 50 percent of the City's samples from sites with lead pipes, or copper pipes with lead solder. 40 C.F.R. § 141.86(a)(8).

THIRD CLAIM FOR RELIEF
(Violation of the Safe Drinking Water Act's requirement to sample the same or similar sites across monitoring periods, 40 C.F.R. § 141.86)

293. Plaintiffs incorporate by reference all of the preceding paragraphs.

294. City Defendants have violated and continue to violate the Safe Drinking Water Act and its implementing regulations by failing to comply with the Act's requirement to either sample the same sites, or to replace inaccessible former sampling sites with new sites lying within "reasonable

proximity" of the original sites, across successive monitoring periods, as required by the Lead and Copper Rule. 40 C.F.R. § 141.86(b)(4).

FOURTH CLAIM FOR RELIEF
(Violation of the Safe Drinking Water Act's requirement to operate and maintain optimal corrosion control treatment, 40 C.F.R. §§ 141.2, 141.81, 141.82)

295. Plaintiffs incorporate by reference all of the preceding paragraphs.

296. City Defendants have violated and continue to violate the Safe Drinking Water Act and its implementing regulations by failing to operate and maintain optimal corrosion control treatment. 40 C.F.R. §§ 141.2, 141.81(d)(7), 141.82(g).

FIFTH CLAIM FOR RELIEF
(Violation of the Safe Drinking Water Act's requirement to complete public education, 40 C.F.R. § 141.85)

297. Plaintiffs incorporate by reference all of the preceding paragraphs.

298. City Defendants have violated and continue to violate the Safe Drinking Water Act and its implementing regulations by failing to provide public education materials to each bill paying customer through all required delivery methods. 40 C.F.R. § 141.85.

SIXTH CLAIM FOR RELIEF
(Violation of the Safe Drinking Water Act's requirement to complete a lead service line inventory, 40 C.F.R. §§ 141.84, 141.90)

299. Plaintiffs incorporate by reference all of the preceding paragraphs.

300. City Defendants have violated and continue to violate the Safe Drinking Water Act and its implementing regulations by failing to complete a lead service line inventory identifying the initial number of lead service lines in the City's distribution system. 40 C.F.R. §§ 141.84(a)–(b)(1), 141.90(e)(1).

SEVENTH CLAIM FOR RELIEF
(Violation of the Safe Drinking Water Act's requirement to annually replace seven percent of lead service lines, 40 C.F.R. §§ 141.84, 141.90)

301. Plaintiffs incorporate by reference all of the preceding paragraphs.

302. City Defendants have violated and continue to violate the Safe Drinking Water Act and its implementing regulations by failing to annually replace seven percent of lead service lines in its distribution system within 12 months after its first action level exceedance. 40 C.F.R. §§ 141.84(a)–(b)(1), 141.90(e)(2).

EIGHTH CLAIM FOR RELIEF
(Violation of the Safe Drinking Water Act's requirement to designate optimal water quality parameters, 40 C.F.R. §§ 141.81, 141.82)

303. Plaintiffs incorporate by reference all of the preceding paragraphs.

304. Defendant Catherine McCabe, acting in her official capacity as Commissioner of NJDEP, has violated and continues to violate the Safe Drinking Water Act and its implementing regulations by failing to designate optimal water quality parameters for the City of Newark. 40 C.F.R. §§ 141.81(d)(6), 141.82(f).

REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment against Defendants as follows:

A. Declaring that all Defendants are in violation of their obligations under the Safe Drinking Water Act and its implementing regulations;

B. Enjoining all Defendants from ongoing and future violations of the Safe Drinking Water Act and its implementing regulations, including but not limited to the treatment, monitoring, reporting, and notification requirements of the Lead and Copper Rule;

C. Ordering that Defendants take all such actions as may be necessary, and all such actions as the Court may deem appropriate, to remedy these violations, comply with the Safe Drinking Water Act and its implementing regulations, and mitigate the harm caused by Defendants' violations of the Lead and Copper Rule's treatment, monitoring, reporting, and notification requirements;

D. Ordering that Defendants promptly complete full replacement of all lead service lines in the water system at no cost to customers of the water system, including replacement of those portions of the lead service lines that are located under private property, unless the water system is unable, after making reasonable efforts, to obtain permission from the

owner of the property after notifying the owner and offering to replace the portion of the line under the owner's property at the water system's expense;

E. Granting appropriate equitable relief to mitigate the health and medical risks and harm resulting from Defendants' violations, including but not limited to delivery of bottled water and/or water filters, replacement of lead service lines on an accelerated timetable, and implementation of a robust door-to-door instructional program on the proper installation, use, and maintenance of filters;

F. Awarding Plaintiffs their reasonable costs and attorneys' fees; and

G. Granting such other and further relief as the Court deems just and proper.

Dated: October 25, 2019

Respectfully submitted,

/s/ Sara E. Imperiale
Sara E. Imperiale
Nancy S. Marks, *PHV*
Margaret T. Hsieh, *PHV*
Michelle A. Newman, *PHV*
Natural Resources Defense Council
40 W 20th Street, Floor 11
New York, New York 10011
Tel: 212-727-2700

Claire Woods, *PHV*
Natural Resources Defense Council
1314 Second Street
Santa Monica, California 90401
Tel: 310-434-2300

Jerome L. Epstein, *PHV*
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
Tel: 202-717-8234

Exhibit A

April 24, 2018

By Certified Mail, Return Receipt Requested

City of Newark
Att: Mayor Ras J. Baraka
City Hall, 920 Broad Street
Newark, New Jersey 07102
311newark@ci.newark.nj.us

Mayor Ras J. Baraka
City Hall, 920 Broad Street
Newark, New Jersey 07102
barakara@ci.newark.nj.us

City of Newark
Department of Water and Sewer Utilities
Att: Director Andrea Hall Adebowale
920 Broad Street Room B-31F
Newark, New Jersey 07102
waterandsewer@ci.newark.nj.us

Director Andrea Hall Adebowale
920 Broad Street Room B-31F
Newark, New Jersey 07102
adebowalea@ci.newark.nj.us

Acting Commissioner Catherine R. McCabe
New Jersey Department of Environmental Protection
401 E State Street, Fl. 7, East Wing
Trenton, New Jersey 08625
Catherine.McCabe@dep.nj.gov

Re: Notice of Intent to Sue under the Safe Drinking Water Act, 42 U.S.C. § 300j-8(b)(1)(a) for failure to comply with regulations for the control of lead in drinking water in Newark, New Jersey

We write on behalf of the Newark Education Workers Caucus (NEW Caucus) and the Natural Resources Defense Council (NRDC), nonprofit citizens' organizations concerned about the elevated levels of lead in the City of Newark's drinking water, and the effects those levels have on residents' health. This letter provides notice under 42 U.S.C. § 300j-8(b)(1)(a) that NEW Caucus and NRDC intend to sue the City of Newark, Mayor Ras J. Baraka, the Newark Department of Water and Sewer Utilities, and Director Andrea Hall Adebowale for their continuing failure to comply with the Lead and Copper Rule's requirements for controlling corrosion from lead pipes, monitoring tap water for lead, providing notification to customers, and completing a materials evaluation with a lead service line inventory, in violation of the Safe Drinking Water Act.[1] Additionally, we intend to sue Acting Commissioner of the New Jersey Department of Environmental Protection (NJDEP), Catherine R. McCabe, for NJDEP's continuing failure to designate optimal corrosion control treatment and optimal water quality parameters, in violation of the Safe Drinking Water Act and the Lead and Copper Rule.[2] We

[1] 42 U.S.C. § 300f *et seq.*; 40 C.F.R. § 141.80 *et seq.*

[2] 42 U.S.C. § 300f *et seq.*; 40 C.F.R. § 141.80 *et seq.*

intend to sue the above-described entities and officials if the violations described in this letter are not remedied within sixty days.[3]

NEW Caucus is an association of educators who teach in Newark's public schools, some of whom are Newark residents. New Caucus is dedicated to ensuring children's safety and capacity for learning. NRDC is a national membership organization, with members in Newark, committed to defending public health and the environment, and to protecting communities from exposure to toxic chemicals. These groups continue to be harmed by the City of Newark and NJDEP's violations of the Safe Drinking Water Act's Lead and Copper Rule, as detailed below.

I. Newark residents are exposed to dangerous levels of lead in the City's drinking water

The levels of lead in the City of Newark's drinking water are among the highest recorded by a large water system in the United States in recent years.[4] In March 2016, NJDEP released a statement indicating that thirty schools recorded lead levels above the 15 parts per billion federal action level.[5] This news prompted many schools to disconnect from the City water supply, shut off water fountains and post "do not drink" notices.[6] While Newark's schools have now reconnected to the City's water supply, Newark's recent drinking water test results show that the City's residents remain at risk. For two consecutive six-month monitoring periods in 2017, Newark's self-reported lead levels reached at least 26.7 parts per billion at the 90th percentile of water samples collected.[7] These levels far exceed the 15 parts per billion federal action level set by the U.S. Environmental Protection Agency.[8]

---

[3] Mayor Ras J. Baraka, Director Andrea Hall Adebowale, and Acting Commissioner Catherine R. McCabe are each noticed in their official capacities.

[4] U.S. Envtl. Prot. Agency, Safe Drinking Water Info. Sys., *Federal Reports Advanced Search*, https://ofmpub.epa.gov/apex/sfdw/f?p=108:20035:::NO::: (select "Lead ALE Samples" under "Choose a report" and ">50,000" under "Population Served Categories") (last accessed April 15, 2018) (attached as Ex. 1) (showing Newark's lead levels are among the highest out of systems serving over fifty thousand people, in the past three years).

[5] News Release, N.J. Dep't Envtl. Prot., Joint Release from DEP and Newark Public Schools on Temporary Use of Alternate Water Sources After Elevated Levels of Lead Found in Recent District Testing (Mar. 9, 2016), http://www.nj.gov/dep/newsrel/2016/16_0012.htm (attached as Ex. 2).

[6] Karen Yi, *Drinking Water at These 9 Newark Schools Will Return in April After Lead Crisis*, NJ.com (Mar. 30, 2017, 11:25 AM), http://www.nj.com/essex/index.ssf/2017/03/newark_schools_lead_update.html (attached as Ex. 3); *see also* Emma Brown, *Newark Turns off Water at 30 Schools After Tests Show Elevated Lead Levels*, Wash. Post (Mar. 10, 2016), https://www.washingtonpost.com/news/education/wp/2016/03/10/newark-turns-off-water-at-30-schools-after-tests-show-elevated-lead-levels/ (attached as Ex. 4).

[7] N.J. Dep't Envtl. Prot., Drinking Water Watch, *Lead/Copper Summaries*, https://www9.state.nj.us/DEP_WaterWatch_public/index.jsp (enter "0714001" for PWSID and click "Search," then click "NJ0714001," then click "Lead/Copper" under "Chemical Results") (last accessed April 15, 2018) (attached as Ex. 5).

[8] 40 C.F.R. § 141.80(c)(1).

In the first six months of 2017, over twenty-two percent of drinking water samples across the City of Newark exceeded 15 parts per billion.[9] In that same period, the City's drinking water reached 27 parts per billion of lead at the 90th percentile of samples collected.[10] In other words, ten percent of samples collected exceeded 27 parts per billion of lead, almost doubling the federal action level.[11] At certain individual homes, lead levels reached much higher concentrations. For example, six Newark addresses tested above 50 parts per billion and one address tested at 137 parts per billion.[12] In response to Newark's elevated lead levels, NJDEP notified Andrea Hall Adebowale, Director of the Newark Department of Water and Sewer Utilities on July 11, 2017 that Newark exceeded the federal lead action level, and was not in compliance with the Lead and Copper Rule.[13]

Newark's elevated lead levels have not abated, notwithstanding NJDEP's July 11, 2017, notice of non-compliance. In December 2017, at the close of the second six-month monitoring period of 2017, the City's drinking water reached 26.7 parts per billion at the 90th percentile.[14] Many samples exceeded that high level, with 13 addresses testing above 30 parts per billion, and four addresses testing above 50 parts per billion.[15] On January 23, 2018, NJDEP issued a second notice of non-compliance to the City relating to the City's failure to comply with the Lead and Copper Rule.[16]

The high levels of lead in Newark's drinking water put the City's residents at risk of serious and irreversible health effects. According to the U.S. Environmental Protection Agency, "low levels of exposure [to lead] have been linked to damage to the central and peripheral

---

[9] *See* N.J. Dep't Envtl. Prot., Drinking Water Watch, *Lead/Copper Results for Monitoring Period: 01/01/2017 – 06/30/2017*, https://www9.state.nj.us/DEP_WaterWatch_public/index.jsp (enter "0714001" for PWSID and click "Search," then click "NJ0714001," then click "Lead/Copper" under "Chemical Results," then click "01/01/2017 – 06/30/2017") (last accessed April 15, 2018) (attached as Ex. 6) (showing twenty-nine samples with lead levels over the action level).

[10] N.J. Dep't Envtl. Prot., *Lead/Copper Summaries*, *supra* note 7 (Ex. 5).

[11] *Id.*

[12] N.J. Dep't Envtl. Prot., *Lead/Copper Results for Monitoring Period: 01/01/2017 – 06/30/2017*, *supra* note 9 (Ex. 6).

[13] Letter from Felicia Fieo, Section Chief, Bureau of Safe Drinking Water, N.J. Dep't Envtl. Prot., to Newark Water Dep't (July 11, 2017) (attached as Ex. 7).

[14] New Jersey Dep't Envtl. Prot., Drinking Water Watch, *Lead/Copper Results for Monitoring Period: 07/01/2017 – 12/31/2017*, https://www9.state.nj.us/DEP_WaterWatch_public/index.jsp (enter "0714001" for PWSID and click "Search," then click "NJ0714001," then click "Lead/Copper" under "Chemical Results," then click "07/01/2017 – 12/31/2017") (last accessed April 15, 2018) (attached as Ex. 8) (showing twenty-eight samples with lead levels over the action level).

[15] *Id.*

[16] Letter from Felicia Fieo, Section Chief, Bureau of Safe Drinking Water, N.J. Dep't Envtl. Prot., to Newark Water Dep't (Jan. 23, 2018) (attached as Ex. 9).

nervous system, learning disabilities, shorter stature, impaired hearing, and impaired formation and function of blood cells."[17] Exposure to low levels of lead early in life has "been found to affect behavior and intelligence," according to the Centers for Disease Control and Prevention.[18] The World Health Organization has found that the effects of lead exposure are typically irreparable.[19] "Because the human brain has little capacity for repair, these effects are untreatable and irreversible. They cause diminution in brain function and reduction in achievement that last throughout life."[20]

Lead exposure is also associated with reproductive and kidney problems in otherwise healthy adults.[21] Exposure to lead is associated with miscarriages in pregnant women, as well as fertility issues, cardiovascular and kidney effects, cognitive dysfunction, and elevated blood pressure.[22] For both children and adults, the U.S. Environmental Protection Agency, the Center for Diseases Control and Prevention, and the American Academy of Pediatrics maintain that there is no safe level of lead exposure.[23]

The high lead levels in Newark's drinking water are especially concerning because they compound long-standing community concerns about Newark children's exposure to toxic levels of lead. Exposure to lead from multiple sources presents a cumulative toxicological threat to

---

[17] U.S. Envtl. Prot. Agency, *Basic Information About Lead in Drinking Water*, https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water (last updated Mar. 30, 2018) (attached as Ex. 10); *see also* U.S. Envtl. Prot. Agency, *Integrated Science Assessment for Lead* lxxxiii-lxxxvii tbl.ES-1 (2013) (attached as Ex. 11); National Ambient Air Quality Standards for Lead, 80 Fed. Reg. 278, 290 (Jan. 5, 2015) (attached as Ex. 12).

[18] U.S. Ctrs. for Disease Control & Prevention, *Lead: Information for Workers: Health Problems Caused by Lead*, www.cdc.gov/niosh/topics/lead/health.html (last updated Apr. 19, 2017) (attached as Ex. 13).

[19] World Health Org., *Childhood Lead Poisoning* 12 (2010) (attached as Ex. 14).

[20] *Id.*

[21] U.S. Envtl. Prot. Agency, *supra* note 17 (Ex. 10).

[22] U.S. Dep't of Health & Human Servs., Nat'l Toxicology Program, Health Effects of Low-Level Lead xvii (2012), https://ntp.niehs.nih.gov/ntp/ohat/lead/final/monographhealtheffectslowlevellead_newissn_508.pdf (attached as Ex. 15).

[23] Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26,460, 26,467 (June 7, 1991) (attached as Ex. 16); U.S. Ctrs. for Disease Control & Prevention, *Water*, https://www.cdc.gov/nceh/lead/tips/water.htm (last updated Feb. 18, 2016) (attached as Ex. 17) ("CDC reiterates . . . : because no safe blood level has been identified for young children, all sources of lead exposure for children should be controlled or eliminated. Lead concentrations in drinking water should be below the EPA action level of 15 parts per billion."); Am. Acad. of Pediatrics, *With No Amount of Lead Exposure Safe for Children, American Academy of Pediatrics Calls For Stricter Regulations* (June 20, 2016), https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/With-No-Amount-of-Lead-Exposure-Safe-for-Children,-American-Academy-of-Pediatrics-Calls-For-Stricter-Regulations.aspx (attached as Ex. 18).

children and adults.[24] For example, older cities, like Newark, have a high proportion of housing built before 1978, when the federal government prohibited consumer uses of lead-containing paint.[25] Thus, many Newark residents may be exposed to lead through multiple sources, including through their drinking water and because of lead paint in their homes. A 2016 study showed that elevated blood lead levels affect Newark children at a rate three times greater than children in the State of New Jersey overall.[26]

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

The Safe Drinking Water Act authorizes citizens to sue any governmental entity "who is alleged to be in violation of any requirement" under the statute.[27] These requirements include national primary drinking water regulations for lead and copper set forth in the Lead and Copper Rule.[28] The Lead and Copper Rule obligates water systems to monitor and control for lead in drinking water.[29]

NEW Caucus and NRDC intend to allege that the City of Newark and the Newark Department of Water and Sewer Utilities; and Mayor Ras J. Baraka, Director Andrea Hall Adebowale, and Acting Commissioner Catherine R. McCabe, all acting in their official capacities, violated, and are continuing to violate, the Lead and Copper Rule's requirements for controlling lead in drinking water, as described below.

A. The City's violation of the Lead and Copper Rule's sampling requirements

Under the Lead and Copper Rule, water systems are required to identify a pool of sampling sites prior to commencing sampling.[30] Large water systems serving over 50,000 people, like Newark, must collect and test at least 100 tap water samples during each six-month

---

[24] U.S. Ctrs. for Disease Control and Prevention, Preventing Lead Poisoning in Young Children: Chapter 3, https://www.cdc.gov/nceh/lead/publications/books/plpyc/chapter3.htm (1991) ("Lead entering the body from different sources and through different pathways presents a combined toxicological threat . . . Multiple, low-level inputs of lead can result in significant aggregate exposure.") (attached as Ex. 19).

[25] U.S. Env't Prot. Agc'y, Protect Your Family From Exposures to Lead, https://www.epa.gov/lead/protect-your-family-exposures-lead (last updated Aug. 30, 2017) (attached as Ex. 20).

[26] Jessica Mazzola, Largest Blood Lead Study Yet Finds 'Concern' in Newark Kids, NJ.com (June 22, 2016), http://www.nj.com/essex/index.ssf/2016/06/largest_study_ever_of_kids_blood_lead_levels_revea.html (attached as Ex. 21).

[27] 42 U.S.C. § 300j-8(a)(1).

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

[29] *See, e.g.*, 40 C.F.R. § 141.86.

[30] *See id.* § 141.86(a).

monitoring period.[31] Water systems must prioritize testing of sites that are most at risk for elevated lead levels, called Tier 1 sites.[32] In meeting the 100-tap-water-sample requirement, water systems must first sample available Tier 1 sites.[33] Systems may use lower priority Tier 2 or Tier 3 sites to meet the 100-sample quota only if they do not have sufficient Tier 1 sites.[34]

Newark has impermissibly sampled lower-priority sites that are less likely to have high lead concentrations, masking the extent of lead in the City's drinking water. During the first six-month monitoring period of 2017, Newark's water system listed at least 131 Tier 1 sites in its sampling pool. However, sampling site certification forms show that it sampled only 40 Tier 1 sites.[35] Newark's insufficient sampling of high-risk sites continued in the second monitoring period of 2017. Between July and December 2017, Newark sampled only 88 Tier 1 sites. A series of exchanges between the Newark Department of Water and Sewer Utilities and NJDEP reveal that Newark had repeatedly failed to submit lead sampling plans and certifications forms in compliance with the Lead and Copper Rule in the past.[36]

The City's dilution of its sampling pool with Tier 2 and Tier 3 sites calls into question the reliability of its measured levels of lead, and suggests that the City may be routinely underestimating lead levels in drinking water. This violation is continuing and is likely to recur.

---

[31] *Id.* § 141.86(c).

[32] *Id.* § 141.86(a)(3).

[33] *Id.*

[34] *Id.* § 141.86(a)(4), (5).

[35] Lead and Copper Sampling Pool Certification for Newark Water System, Form BWSE-14, certified by Andrea Hall Adebowale & Andrew Pappachen (Sept. 12-14, 2016) (attached as Ex. 22) (showing only 40 Tier 1 sites, and 112 Tier 2 and Tier 3 sites, out of a total of 152 sites); *see also* Email from Andrew Pappachen, Dir. of Pub. Works for the City of Newark, to Michael Bleicher, Bureau of Water Sys. Eng'g., N.J. Dep't Envtl. Prot. (July 20, 2017) (attached as Ex. 23) ("Fw: BWSE15 Forms September 2016 NJDEP Submission (152 Sites) and Customer Request (1/1/17 – 6/30/17) . . . Mike: Forwarded are the copies of the BWSE15 forms created for all the samples collected from 1/1/2017 till 6/30/2017.").

[36] *See, e.g.*, Letter from Kathleen Burkhard, Bureau of Water Sys. Eng'g, N.J. Dep't Envtl. Prot., to Andrea Hall Adebowale, Dir., Newark Water Dep't 1-2 (Nov. 2, 2016) (attached as Ex. 24) (stating that Newark's September 2016 Lead and Copper sampling plan "remains deficient" and asking the Newark Department of Water and Sewer Utilities to "provide full documentation as to how [it] has exhausted all of its Tier 1 and 2 sites, allowing for Tier 3 sites to be incorporated into the sampling pool."); Letter from Kathleen Burkhard, Bureau of Water Sys. Eng'g., N.J. Dep't Envtl. Prot. to Andrea Hall Adebowale, Dir., Newark Water Dep't 1 (May 25, 2016) (attached as Ex. 25) (identifying "several deficiencies" with Newark's April 2016 Lead and Copper Sampling Plan, Sample Site Selection Certification Form, and Sampling Site Materials Evaluation forms).

B. The City's violation of the requirement to install optimal corrosion control treatment

Under the Lead and Copper Rule, all water systems must install optimal corrosion control treatment.[37] The Lead and Copper Rule defines "optimal" corrosion control treatment as treatment that "minimizes" lead levels at users' taps.[38] This is often accomplished by adding corrosion-inhibiting chemicals to the water. The Lead and Copper Rule sets forth specific steps and deadlines that must be followed to achieve installation of optimal corrosion control treatment, including the requirement to "install optimal corrosion control treatment . . . by January 1, 1997."[39]

Upon information and belief, Newark did not meet the initial January 1, 1997, deadline for the installation of optimal corrosion control treatment, and still has not installed optimal corrosion control treatment. This violation is continuing and likely to recur.

C. The City's violation of the requirement to maintain optimal corrosion control treatment

Under the Lead and Copper Rule, all water systems must "operate and maintain optimal corrosion control treatment."[40] To adequately maintain optimal corrosion control treatment, a system must minimize lead concentrations to the maximum extent feasible.[41] NJDEP has found that the "Newark Water Department is deemed to no longer have optimized corrosion control treatment."[42] Additionally, Newark's substantial and sustained action level exceedances show that the City's efforts to control corrosion are inadequate.[43] Upon information and belief, the City of Newark has failed, and is continuing to fail, to meet this requirement.

D. The City's violation of the requirement to complete public education

Under the Lead and Copper Rule, Newark is required to notify each "bill paying customer" with printed materials containing specified language when samples collected in a

---

[37] 40 C.F.R. §§ 141.2; 141.80(d).

[38] *Id.*

[39] *Id.* § 141.81(d).

[40] *Id.* § 141.81(b).

[41] *See id.* § 141.2; Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26,460, 26,491 (June 7, 1991).

[42] Letter from Felicia Fieo to Andrea Hall Adebowale, *supra* note 13, at 3 (Ex. 7).

[43] An action level exceedance is indicative of a water system's failure to optimize corrosion control treatment. However, to adequately optimize corrosion control treatment, a system must minimize lead concentrations to the maximum extent feasible. *See* 40 C.F.R. § 141.2; 56 Fed. Reg. at 26,491. Thus, a system that tests below the 15 parts per billion action level, but that does not have low, stable, lead levels, has still failed to optimize corrosion control treatment.

monitoring period exceed the lead action level.[44] These public education materials must include information about the health effects of lead and advise customers on how to get water tested for lead.[45] Email correspondence between the City and NJDEP show that Newark failed to notify at least two hundred, and as many as 20,000, service account holders about its July 2017 action level exceedance, in violation of the Lead and Copper Rule.[46] The City of Newark has failed and, upon information and belief, is continuing to fail, to meet this requirement.

E. The City's violation of the requirement to complete a materials evaluation, including an inventory of its lead service lines

The Lead and Copper Rule requires water systems to perform a materials evaluation before beginning lead and copper tap monitoring.[47] As part of that evaluation, each water system must "identify the initial number of lead service lines in its distribution system."[48] The U.S. Environmental Protection Agency requested that NJDEP ensure that water systems in New Jersey, particularly large water systems like Newark, post the "materials inventory that systems were required to complete under the [Lead and Copper Rule], including the locations of lead service lines" on the water system's website.[49]

NRDC has requested copies of Newark's materials evaluation and lead service line inventory from Newark and NJDEP, through the New Jersey Open Public Records Act. Newark has not produced its materials evaluation or lead service line inventory in response to NRDC's requests. Instead, Newark has stated that a report on its lead service lines is not available, but that it is providing NJDEP with updates.[50] Likewise, NJDEP stated its "understanding that

---

[44] 40 C.F.R. § 141.85(b)(2)(i).

[45] *Id.* § 141.85(a)(1).

[46] Email from Michael Bleicher, Bureau of Water Sys. Eng'g., N.J. Dep't Envtl. Prot., to Andrew Pappachen, Dir. of Pub. Works for the City of Newark (Sept. 18, 2017) (attached as Ex. 26) (raising a query about a mismatch between the number of Newark public education postal receipts received by NJDEP (23,590) and the number of service connections (57,616)); Email from Andrea Hall Adebowale, Dir., Newark Water Dep't, to Michael Bleicher, Bureau of Water Sys. Eng'g., N.J. Dep't Envtl. Prot. (Sept. 21, 2017) (attached as Ex. 27) (claiming that Newark has only 37,000 service accounts); Email from Andrew Pappachen, Dir. of Pub. Works for the City of Newark, to Michael Bleicher, Bureau of Water Sys. Eng'g., N.J. Dep't Envtl. Prot. (Sept. 21, 2017) (attached as Ex. 28) (stating that a total of 36,800 public education notices were mailed by Newark in response to the July 2017 lead action level exceedance); N.J. Dep't Envtl. Prot., Newark Water Dep't, Drinking Water Watch, *Water System Information*, https://www9.state.nj.us/DEP_WaterWatch_public/index.jsp (enter "0714001" for PWSID and click "Search," then click "NJ0714001") (last accessed April 15, 2018) (attached as Ex. 29) (showing a total of 57,616 service connections).

[47] 40 C.F.R. §§ 141.86(a), 141.42(d).

[48] *Id.* § 141.84(b)(1).

[49] Letter from Joel Beauvais, Dep. Asst. Admin., U.S. Envtl. Prot. Agency, to Commissioner Bob Martin, N.J. Dep't Envtl. Prot. (February 29, 2016) (attached as Ex. 30).

[50] Email from Tiffany Stewart, Newark Dept. of Water and Sewer Util., to Claire Woods, Natural Resources Defense Council (April 13, 2017) (attached as Ex. 31).

materials evaluations and sampling plans were not submitted [by the City] to NJDEP following the Lead and Copper Rule effective date."[51] Any materials evaluations that were submitted by the City of Newark did not address all requirements under the Lead and Copper Rule, including the requirement to prepare a lead service line inventory. Thus, upon information and belief, Newark is in violation of the requirement to complete a materials evaluation, including the preparation of a lead service line inventory.

F. Acting Commissioner of NJDEP's failure to designate optimal corrosion control treatment for the City in violation of the Lead and Copper Rule

Under the Lead and Copper Rule, NJDEP was required to "either approve the corrosion control treatment option recommended by the system, or designate alternative corrosion control treatment(s)" by January 1, 1995.[52] NJDEP was required to provide notice of its decision on optimal corrosion control treatment in writing and explain the basis for its determination.[53]

In a November 16, 2017, email to NRDC, NJDEP's records custodian admitted that NJDEP was not in possession of any records documenting its designation of optimal corrosion control treatment designation for the City of Newark.[54] On information and belief, NJDEP is in violation of its obligation to designate optimal corrosion control treatment for Newark.

G. Acting Commissioner of NJDEP's failure to designate optimal water quality parameters for the City in violation of the Lead and Copper Rule

The Lead and Copper Rule requires states to designate optimal values for water quality indicators, known as "parameters," both before and after installation of optimal corrosion control.[55] These parameters include optimal pH levels, and optimal levels of corrosion-inhibiting chemicals, such as silicate and orthophosphate, for the system.[56] According to guidance from the U.S. Environmental Protection Agency, optimal water quality parameters are measured to determine whether a system is operating its corrosion control treatment at a level that most effectively minimizes the lead and copper concentrations at users' taps.[57]

---

[51] Letter from Ryan Atkinson, N.J. Atty. Gen. Office, to Susan Kraham, Columbia Environmental Law Clinic (April 6, 2018) (attached as Ex. 32).

[52] 40 C.F.R. §§ 141.81(d)(2); 141.82(d)(1).

[53] *Id.* § 141.82(d)(2).

[54] Email from Matt Coefer, Chief Records Custodian, N.J. Dep't Envtl. Prot., to Mekela Panditharatne, Nat. Res. Def. Council (Nov. 16, 2017) (attached as Ex. 33).

[55] 40 C.F.R § 141.82(f); *see also id.* § 141.81(d)(6).

[56] *Id.* § 141.82(f).

[57] *Id.* (directing states to designate parameters they "determine[] to reflect optimal corrosion control treatment for the system"); *id.* § 141.2 (defining "optimal corrosion control treatment" as "treatment that minimizes the lead and copper concentrations at users' taps"). *See also* U.S. Envtl. Prot. Agency, *Optimal Corrosion Control Treatment Evaluation Technical Recommendations for Primacy Agencies and Public Water Systems*

NJDEP has not designated optimal water quality parameter values for the City of Newark. In September 2015, NJDEP requested that Newark provide documentation of any "previously established OWQPs [optimal water quality parameters]."[58] Newark responded that the system had no such records.[59] In an email to NRDC on November 16, 2017, NJDEP's records custodian stated that neither NJDEP nor the City of Newark were in possession of any documents containing an optimal water quality parameter designation by NJDEP.[60]

III. Intent to Sue

The City of Newark, the Newark Department of Water and Sewer Utilities, and City of Newark officials have violated, and continue to violate, the Lead and Copper Rule's requirements for proper corrosion control, monitoring and sampling tap water for lead, public education, and preparation of a materials evaluation with a lead service line inventory. State of New Jersey official Catherine R. McCabe has violated, and continues to violate, the Lead and Copper Rule's requirement that NJDEP designate optimal corrosion control treatment and optimal water quality parameters for the City of Newark. These violations are likely to continue or recur in the future absent a judicial decree ordering City and State officials to comply with the Safe Drinking Water Act.

If the City and State officials identified above fail to cure their noncompliance with the Act within sixty days, NEW Caucus 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 entity giving notice pursuant to this letter are:

Newark Education Workers Caucus
Attn: Branden Rippey
75 Fairview Avenue, No. 40
Jersey City, New Jersey 07304
Tel: 201-988-9708

Natural Resources Defense Council
Attn: Claire Woods
111 Sutter Street, Fl. 21
San Francisco, California 94104
Tel: 415-875-6143

---

app. A, at A-4 (2016), https://www.epa.gov/sites/production/files/2016-03/documents/occtmarch2016.pdf (attached as Ex. 34).

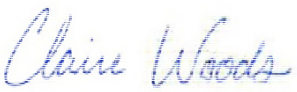
[58] Letter from Diane E. Zalaskus, Bureau Chief, Bureau of Water Sys. Eng'g., New Jersey Dep't Envtl. Prot., to Andrew Pappachen, Dir. of Pub. Works for the City of Newark 1 (Sept. 11, 2015) (attached as Ex. 35).

[59] Letter from Andrew Pappachen, Dir. of Pub. Works for the City of Newark, to Diane E. Zalaskus, Bureau Chief, Bureau of Water Sys. Eng'g., N.J. Dep't Envtl. Prot. 1 (Oct. 20, 2015) (attached as Ex. 36).

[60] Email from Matt Coefer to Mekela Panditharatne, *supra* note 54, at 1 (Ex. 33).

We ask that the noticed entities let us know within the notice period of any documents or other evidence that would tend to disprove the claims described in this letter. Please contact us if you would like to discuss this matter.

Respectfully,



Claire Woods
Natural Resources Defense Council, Inc.
111 Sutter Street, Fl. 21
San Francisco, California 94104
Tel: 415-875-6143

Sara E. Imperiale
Nancy S. Marks
Margaret Hsieh
Natural Resources Defense Council, Inc.
40 W 20th Street, Fl. 11
New York, New York 10011
Tel: 212-727-2700

Mekela Panditharatne
Natural Resources Defense Council, Inc.
1152 15th Street NW, Ste. 300
Washington, DC 20005
Tel: 202-289-6868

cc: Administrator Scott Pruitt
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

Regional Administrator Peter D. Lopez
U.S Environmental Protection Agency, Region 2
Ted Weiss Federal Building
290 Broadway
New York, New York 10007

Governor Philip D. Murphy
Office of the Governor
P.O. Box 001
Trenton, New Jersey 08625

Attorney General Gurbir S. Grewal
Office of the Attorney General
RJ Hughes Justice Complex
25 Market Street, Box 080
Trenton, New Jersey 08625-0080

Exhibit B

August 23, 2018

By Email and Certified Mail, Return Receipt Requested

City of Newark
Newark Mayor Ras J. Baraka
Newark Department of Water and Sewer Utilities,
Department of Water and Sewer Utilities Director Andrea Hall Adebowale
C/O Michael G. Murphy
Beveridge & Diamond
477 Madison Avenue, Fl. 15
New York, New York 10002-5835
mmurphy@bdlaw.com

Re: Supplemental Notice of Intent to Sue under the Safe Drinking Water Act, 42 U.S.C. § 300j-8(b)(1)(A), for failure to comply with regulations for the control of lead in drinking water in Newark, New Jersey

We write on behalf of the Newark Education Workers Caucus (NEW Caucus) and the Natural Resources Defense Council (NRDC), collectively Plaintiffs. Plaintiffs are nonprofit citizens' organizations concerned about the elevated levels of lead in the City of Newark's (City or Newark) drinking water, and the effects those levels have on residents' health.

On April 24, 2018, Plaintiffs provided notice under 42 U.S.C. § 300j-8(b)(1)(A) of our intent to sue the City of Newark, Mayor Ras J. Baraka, the Newark Department of Water and Sewer Utilities, Director Andrea Hall Adebowale, and the Commissioner of the New Jersey Department of Environmental Protection (NJDEP), Catherine R. McCabe, for their continuing violations of the Safe Drinking Water Act and the Lead and Copper Rule.[1] On June 26, 2018, NEW Caucus and NRDC filed a complaint in the District of New Jersey, alleging each of the claims described in our April 24, 2018, notice letter. *See Newark Educ. Workers Caucus et al. v. City of Newark et al.*, 18-cv-11025-KSH-CLW, ECF No. 1.

With this letter, NEW Caucus and NRDC provide notice of our intent to amend the existing complaint to add four additional claims against the City of Newark, Mayor Ras Baraka, the Newark Department of Water and Sewer Utilities, and Director Andrea Hall Adebowale.[2] We intend to seek to amend the complaint to add these four additional claims if the violations described in this letter are not remedied within sixty days.

---

[1] Plaintiffs incorporate by reference the background information, factual allegations, and attachments contained in and appended to Plaintiffs' April 24, 2018, notice letter, a copy of which is attached, as Exhibit A.

[2] Mayor Ras J. Baraka and Director Andrea Hall Adebowale are noticed in their official capacities.

A. Newark residents continue to be exposed to dangerous levels of lead in the City's drinking water

Plaintiffs' April 24, 2018, notice letter contained detailed information concerning high levels of lead in Newark's drinking water, including a discussion of Newark's drinking water sampling results taken between January 2017 and early April 2018. As noted in Plaintiffs' April 2018 notice letter, for two consecutive six-month monitoring periods in 2017, Newark's self-reported lead levels reached at least 26.7 parts per billion at the 90th percentile of water samples collected.[3] Since then, and as detailed in the complaint, the high levels of lead in the City's drinking water have continued. Between January and June 2018, more than 10 percent of the City's drinking water samples exceeded 17.6 parts per billion for lead, with at least 8 sampling results testing above 30 parts per billion, and one result reaching 182 parts per billion.[4] On or around June 27, 2018, NJDEP issued a third consecutive notice of non-compliance to Newark for exceeding the federal lead action level of 15 parts per billion.[5]

The City's elevated lead levels show no sign of abatement. Since July 1, 2018, more than half of the City's reported drinking water samples have exceeded 15 parts per billion, with eleven homes above 30 parts per billion, and at least one residential sample reaching as high as 250 parts per billion, more than 16 times the action level.[6] On July 20, 2018, the City and NJDEP entered into a Compliance Agreement and Order, which purports to authorize extensions to regulatory deadlines, allows for incomplete submission of mandatory documentation, excuses the City from paying for required infrastructure improvements, and sets a protracted schedule for the abatement of lead contamination in the City's drinking water. *See* Compliance Agreement and Order, ECF No. 15-6 (attached as Exhibit B). As described in Plaintiffs' April 24, 2018, notice of intent to sue and the complaint, the high

---

[3] Drinking Water Watch, N.J. Dep't Envtl. Prot., *Lead/Copper Summaries,* https://www9.state.nj.us/DEP_WaterWatch_public/index.jsp (enter "0714001" for PWSID and click "Search," then click "NJ0714001," then click "Lead/Copper" under "Chemical Results") (last accessed August 22, 2018).

[4] Drinking Water Watch, N.J. Dep't Envtl. Prot., *Lead/Copper Summaries,* https://www9.state.nj.us/DEP_WaterWatch_public/index.jsp (enter "0714001" for PWSID and click "Search," then click "NJ0714001," then click "Lead/Copper" under "Chemical Results," then click "01/01/2018—06/30/2018" under "Monitoring Period") (last accessed August 22, 2018).

[5] *See* Drinking Water Watch, N.J. Dep't Envtl. Prot., *Violation Details*, https://www9.state.nj.us/DEP_WaterWatch_public/JSP/Violation.jsp?tinwsys=127&tmnviol=271787 (last accessed August 22, 2018).

[6] Drinking Water Watch, N.J. Dep't Envtl. Prot., *Lead/Copper Summaries,* https://www9.state.nj.us/DEP_WaterWatch_public/index.jsp (enter "0714001" for PWSID and click "Search," then click "NJ0714001," then click "Lead/Copper" under "Chemical Results," then click "07/01/2018—12/31/2018" under "Monitoring Period") (last accessed August 22, 2018).

levels of lead in Newark's drinking water continue to put the City's residents at risk of serious and irreversible health effects.

B. City's additional violations of the Safe Drinking Water Act's Lead and Copper Rule

The Safe Drinking Water Act authorizes citizens to sue any governmental entity "who is alleged to be in violation of any requirement" under the statute.[7] These requirements include national primary drinking water regulations for lead and copper set forth in the Lead and Copper Rule.[8] The Lead and Copper Rule obligates water systems to monitor and control for lead in drinking water.[9]

NEW Caucus and NRDC intend to allege that the City of Newark and the Newark Department of Water and Sewer Utilities, and Mayor Ras J. Baraka and Director Andrea Hall Adebowale, acting in their official capacities, violated, and are continuing to violate, the Lead and Copper Rule's requirements for controlling lead in drinking water, as described below.

1. The City has violated the Lead and Copper Rule's requirement to draw 50 percent of its samples from sites with lead plumbing

The Lead and Copper Rule requires Newark to collect and test 50 percent of its samples from sites that contain lead pipes, or copper pipes with lead solder.[10] This requirement is necessary to ensure that water systems test locations that are most at risk for elevated lead levels in drinking water. Based on sampling information provided by NJDEP, in both six-month monitoring periods in 2017, Newark failed to sample sufficient sites containing lead pipes, or copper pipes with lead solder, to meet the 50 percent requirement.

In the first monitoring period of 2017, only approximately 31 percent of Newark's drinking water samples taken from sites in the City's sampling pool contain lead pipes, or copper pipes with lead solder. Similarly, in the second monitoring period of 2017, only approximately 27 percent of the samples taken from the City's sampling pool were collected from sites that contain lead pipes, or copper pipes with lead solder. In the first monitoring period of 2018, only approximately 29 percent of drinking water samples taken from the City's sampling pool were from sites that contain lead pipes, or copper pipes with lead solder. Thus, during each of the last three six-month monitoring periods, Newark failed to draw 50 percent of samples from sites containing lead pipes, or copper pipes with lead solder.

---

[7] 42 U.S.C. § 300j-8(a)(1).

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

[9] *See, e.g.*, 40 C.F.R. § 141.86.

[10] *Id.* § 141.86(a)(8).

2. The City has violated the Lead and Copper Rule's requirement to sample the same or similar sites across monitoring periods

Under the Lead and Copper Rule, water systems must sample the same sites across monitoring periods.[11] Sampling new sites from one monitoring period to the next is permitted only if "the water system cannot gain entry to a sampling site in order to collect a follow-up tap sample."[12] If the system samples new sites, the replacement site must meet the same targeting criteria and must lie within reasonable proximity of the original site.[13]

A comparison of the sites sampled in the first monitoring period of 2017 against those sampled in the second monitoring period of 2017 reveals that at least 20 sites from the first monitoring period were not re-sampled in the second monitoring period. Of those sites, at least thirteen of the replacement sites used in the second monitoring period were taken from homes that were not within reasonable proximity of the original sampling sites. Thus, Newark did not replace all sites sampled in the first monitoring period with sites lying within "reasonable proximity" of the original sampling sites, as required by the Lead and Copper Rule.[14]

3. The City has violated the Lead and Copper Rule's requirement to replace seven percent of lead service lines in its distribution system within 12 months after its first action level exceedance

The Lead and Copper Rule requires large water systems that fail to meet the lead action level to annually replace at least seven percent of lead service lines in the distribution system.[15] Written documentation showing that the system has replaced at least seven percent of lead service lines is due to the state "no later" than 12 months after the end of the monitoring period in which the water system triggers an action level exceedance.[16]

Newark was required to submit documentation to NJDEP demonstrating compliance with the Lead and Copper Rule's lead service line replacement requirement by June 30, 2018, 12 months after the monitoring period closed on June 30, 2017, with the City

---

[11] *Id.* § 141.86(b)(4).

[12] *Id.*; *see also* U.S. EPA, *Lead and Copper Rule Monitoring and Reporting Guidance for Public Water Systems* 25 (Mar. 2010), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100DP2P.txt (instructing that the same sampling sites must be used unless an original site "is no longer accessible" or "no longer fits the requirements of a priority site").

[13] 40 C.F.R. § 141.86(b)(4).

[14] This violation appears to have continued into 2018. However, Plaintiffs have not yet received complete location information from Newark or NJDEP for all sites that were sampled during the first monitoring period of 2018.

[15] 40 C.F.R. § 141.84.

[16] *Id.* § 141.90(e)(2).

in lead action level exceedance.[17] That deadline has now passed. NRDC has requested copies of such documentation from Newark and NJDEP through the New Jersey Open Public Records Act. Neither Newark nor NJDEP has produced records showing that Newark has replaced the requisite number of lines. Additionally, in June 2018, NJDEP officials represented to attorneys for Plaintiffs during a telephone conversation that Newark had not broken ground on a single lead service line replacement. Upon information and belief, Newark is in violation of its obligation to replace seven percent of the City's lead service lines in accordance with the Lead and Copper Rule.

4. The City has violated the Lead and Copper Rule's requirement to complete a lead service line inventory

The Lead and Copper Rule requires large water systems that fail to meet the lead action level to prepare a lead service line inventory, which shall "identify the initial number of lead service lines" in the distribution system.[18] The "initial number" is the number of lead service lines in the distribution system "at the time that the system exceeds the action level."[19] Written documentation of water systems' lead service line inventory is due to the state 12 months after the end of the monitoring period in which the water system triggers an action level exceedance.[20]

Under the Lead and Copper Rule, Newark was required to submit documentation to NJDEP identifying the initial number of lead service lines in the City's distribution system by June 30, 2018, 12 months after the City's June 2017 lead action level exceedance.[21] Newark's inventory of lead service lines, provided by the City to NRDC on July 6, 2018, fails to identify whether at least 5,175 total buildings in the City's database are served by lead service lines.[22] NJDEP has similarly stated that Newark failed to characterize the service line materials of at least 5,119 service connections, and for certain others is "making

[17] *Id.*

[18] *Id.* § 141.84(b)(1).

[19] *Id.* § 141.90(e)(1).

[20] *Id.*

[21] After Newark's June 2017 lead action level exceedance, NJDEP issued a notice of non-compliance, which required Newark to "submit a list of all lead service lines in the water system" by September 11, 2017. *See* April 24, 2018 Notice of Intent to Sue, Exhibit 7. NJDEP and Newark apparently agreed to several extensions to that initial deadline and, despite NRDC's public records act requests starting in August 2017, a partial inventory was not produced to NRDC until July 6, 2018.

[22] Lead Service Line Inventory, City of Newark (July 2018) (attached as Exhibit C) (listing 5,119 buildings as having service lines with "[u]nknown material and [installation] date" and 56 buildings as having service lines with "[u]nknown material, [installation] date prior to 1953").

assumptions based upon the age of service installation."[23] Newark and NJDEP agreed that the outstanding 5,000-plus service connections "will be evaluated during the course of a . . . project that is expected to take several years."[24] Therefore, the City of Newark has failed, and is continuing to fail, to identify the number of lead service lines in its distribution system, as required by the Lead and Copper Rule.

C. Intent to Sue

In addition to the violations already alleged in Plaintiffs' complaint, the City of Newark, the Newark Department of Water and Sewer Utilities, and City officials have violated, and continue to violate, the Lead and Copper Rule's requirements to take at least 50 percent of samples from sites containing lead pipes or copper pipes with lead solder, to sample the same sites across monitoring periods, to complete an inventory of the lead service lines in the City's distribution system, and to replace at least seven percent of those lead service lines within 12 months of its first action level exceedance. These violations are likely to continue or recur in the future absent a judicial decree ordering City officials to comply with the Safe Drinking Water Act.

If the City officials identified above fail to cure their noncompliance with the Act within sixty days, NEW Caucus and NRDC will seek to file an amended complaint in federal district court seeking declaratory relief, injunctive relief, and litigation costs, as appropriate.

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

Newark Education Workers Caucus
Attn: Branden Rippey
75 Fairview Avenue, No. 40
Jersey City, New Jersey 07304
Tel: 201-988-9708

Natural Resources Defense Council
Attn: Claire Woods
111 Sutter Street, Fl. 21
San Francisco, California 94104
Tel: 415-875-6143

[23] Compliance Agreement and Order, NEA 180001-0714001, N.J. Dep't Envtl. Prot. 10 (July 2018) (attached as Exhibit B).

[24] *Id.*

We ask that the noticed entities let us know within the notice period of any documents or other evidence that would tend to disprove the claims described in this letter. Please contact us if you would like to discuss this matter.

Respectfully,

Claire Woods

Claire Woods
Natural Resources Defense Council, Inc.
111 Sutter Street, Fl. 21
San Francisco, California 94104
Tel: 415-875-6143
cwoods@nrdc.org

Sara E. Imperiale
Nancy S. Marks
Daniel Carpenter-Gold
Natural Resources Defense Council, Inc.
40 W 20th Street, Fl. 11
New York, New York 10011
Tel: 212-727-2700
simperiale@nrdc.org
nmarks@nrdc.org
dgold@nrdc.org

Mekela Panditharatne
Natural Resources Defense Council, Inc.
1152 15th Street NW, Ste. 300
Washington, DC 20005
Tel: 202-289-6868
mpanditharatne@nrdc.org

cc: Acting Administrator Andrew Wheeler
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

Regional Administrator Peter D. Lopez
U.S Environmental Protection Agency, Region 2

Ted Weiss Federal Building
290 Broadway
New York, New York 10007

Governor Philip D. Murphy
Office of the Governor
P.O. Box 001
Trenton, New Jersey 08625

Attorney General Gurbir S. Grewal
Office of the Attorney General
RJ Hughes Justice Complex
25 Market Street, Box 080
Trenton, New Jersey 08625-0080

Commissioner of New Jersey Department of Environmental Protection
Catherine R. McCabe
C/O Andrew Reese
Office of the Attorney General
RJ Hughes Justice Complex
25 Market Street, Box 080
Trenton, New Jersey 08625-0080
andrew.reese@law.njoag.gov

Kristen Heinzerling (by email)
Kristen.Heinzerling@law.njoag.gov

Eric L. Klein (by email)
eklein@bdlaw.com

Bina Reddy (by email)
breddy@bdlaw.com

John S. Guttman (by email)
jguttmann@bdlaw.com