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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** Motion date: January 21, 2020 **PLAINTIFFS' OPPOSITION TO CITY DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

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INTRODUCTION

For at least three years, Newark residents have been exposed to dangerous levels of lead in their drinking water. *See* Second Am. Compl. for Injunctive and Declaratory Relief ¶¶ 6-7, ECF No. 281 (SAC). During the last monitoring period, the 90th percentile level for lead at residents' taps soared to nearly four times the federal lead action level—exceeding the levels reported for all but one comparably sized city in the country. *Id.* ¶ 7. Although five months had passed since the City installed a new corrosion control treatment, as of late October, the 90th percentile level for lead was still more than double the action level. *Compare* ECF No. 286-9, *with* SAC ¶ 12.

Lead is toxic, and even exposure at low levels can cause irreversible damage to the developing brain, among other serious health effects. SAC ¶¶ 65-69. Because the effects of lead are cumulative, *id.* ¶ 72, prolonged exposure to the high lead levels in Newark's drinking water is likely to have devasting effects on residents for years to come.

Newark's filter program has failed to protect many residents. *See id.* ¶¶ 10, 27, 157, 165, 166, 171, 172. In the recent study of City-distributed filters conducted by Newark in coordination with the New Jersey Department of Environmental Protection (NJDEP) and EPA, 25 percent of filters in the sampling pool were deemed "not viable for use in the study due to improper

installation and maintenance by homeowners." ECF No. 294-1 at 2. A 25-percent incidence of misuse means that *thousands* of residents have been left without adequate protection from lead in their drinking water.

Ten months ago, Plaintiffs warned the City about this problem, based on direct interactions with residents on the ground. *See* SAC ¶¶ 167-71. Rather than provide the door-to-door assistance needed to ensure effective filter use, the City attacked Plaintiffs' evidence—evidence that the City's own study now confirms. This failure to adequately protect Newark residents belies the City's assurance that further harm has been averted under the State's watchful eye.

The City also bears direct responsibility for causing this crisis in the first place. The Safe Drinking Water Act (Act), as implemented by the Lead and Copper Rule (Rule), requires all water systems to "operate optimal corrosion control treatment," 40 C.F.R. § 141.80(d)(1), and instructs large systems like Newark to complete a seven-step treatment process to do so, *see id.* § 141.81(a)(1), (d). "Optimal" treatment is not, as the City insists, an amorphous ideal. The Rule defines it precisely as "the 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." *Id.* § 141.2.

Plaintiffs have stated a valid claim that the City has failed to comply

with the Rule's optimal-treatment requirement and associated seven-step treatment process. As Plaintiffs allege in Claim Four, the City has been in non-compliance for years. Most saliently, the extreme lead levels in Newark homes sustain an overwhelming inference that the City's treatment has failed to "minimize the lead . . . concentrations at users' taps," *id.*, as "optimal" treatment must do. The City misreads the Rule when it insists that Plaintiffs can plead non-compliance *only* by alleging "excursions" of State-designated water quality parameters. If that were true, the City would never have to comply with the Rule's optimal-treatment mandate—and Newark residents could always be subject to unsafe lead levels—so long as the State fails to designate water quality parameters. The State's failure to do so does not give the City a free pass to violate the Rule's optimal-treatment mandate.

The State's designation of a new orthophosphate-based treatment does not render Claim Four moot. The City's argument that the new designation "reset" the City's deadline for operating optimal treatment relies on a section of the Rule that is *facially inapplicable* to Newark. The new designation does not suspend the City's ongoing duty to maintain optimal treatment.

Nor should the Court prematurely rule on the appropriate measure of relief for the City's violations. The Court has broad equitable discretion to remedy those violations. It may order the City not only to comply with the

law, but also to mitigate the harms caused by the City's failures to comply. The Court has ample discretion to tailor its remedy to suit the circumstances. For example, until lead levels have been substantially and consistently reduced, the Court may order door-to-door filter education to ensure that 25 percent of eligible residents are no longer left behind. It can also order the City to comply with the existing Supplemental Compliance Agreement and Order (SCAO), ECF No. 285-3, thus making that administrative order, otherwise subject to change at any time, enforceable by this Court. It is premature to consider what relief may be needed as the existing remedial measures continue to unfold.

Ultimately, the City's motion to dismiss is long on rhetoric and short on legal support. *See* Mem. in Supp. of Newark's Mot. to Dismiss, ECF No. 285-1 (City MTD). The Court should deny the motion.

LEGAL FRAMEWORK

I. The Safe Drinking Water Act

The Act is designed to protect the public from harmful contaminants in drinking water. *See* 42 U.S.C. §§ 300f–300j-27. It vests EPA with the authority to promulgate national regulations to "prevent known or anticipated adverse effects on the health of persons to the extent feasible." *Id.* § 300g-1(b)(7)(A). EPA delegated primary enforcement responsibility for public water systems in New Jersey to NJDEP. *See* 44 Fed. Reg. 69,003 (Nov. 30, 1979).

The Act includes a citizen suit provision that authorizes "any person" to commence a civil action against "any person . . . who is alleged to be in violation of any requirement" of the Act. 42 U.S.C. § 300j-8(a)(1). Congress placed only two constraints on such actions. First, a person must give 60 days' notice of a violation to EPA, any alleged violator, and the State in which the violation occurs. *Id*. § 300j-8(b)(1)(A). Second, no citizen suit may be brought if EPA, the U.S. Attorney General, or the State "has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance" with the same requirement. *Id*. § 300j-8(b)(1)(B).

II. The Lead and Copper Rule

EPA's regulations for controlling lead in drinking water are set forth in the Rule. *See* 40 C.F.R. §§ 141.80-141.91. The Rule's objective is "to provide maximum human health protection by reducing the lead . . . at consumers' taps to as close to [zero] as is feasible." 56 Fed. Reg. 26,460, 26,478 (June 7, 1991). To that end, EPA's regulations include requirements for corrosion control treatment, lead service line replacement, public education, and monitoring, among other things. *See* 40 C.F.R. § 141.80(d), (f), (g), (h). Some of those requirements are triggered when lead levels "in more than 10 percent of tap water samples collected during any monitoring period" exceed the "lead action level" of 15 parts per billion. *Id*. § 141.80(b), (c)(1), (f), (g). Plaintiffs

summarize below the requirements underlying Claim Four (optimal corrosion control treatment) and Claim Seven (lead service line replacement).

A. Optimal corrosion control treatment

Section 141.80(d) contains the Rule's core requirement for corrosion control treatment. *Id.* § 141.80(d). This provision has two interrelated parts. First, § 141.80(d)(1) provides that "[a]ll water systems shall install and operate optimal corrosion control treatment as defined in § 141.2." *Id.* § 141.80(d)(1). Section 141.2 defines "optimal corrosion control treatment" as "the 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." *Id.* § 141.2.

Second, § 141.80(d)(2) states that a "system that complies with the applicable corrosion control treatment requirements specified by the State" under two other sections of the Rule—§§ 141.81 and 141.82—"shall be deemed in compliance" with § 141.80(d)(1)'s optimal-treatment mandate. *Id.* § 141.80(d)(2). In other words, so long as a system completes the requirements prescribed under those two other sections, that system will *also* be deemed compliant with § 141.80's optimal-treatment mandate—even if the system is operating treatment that is not strictly "optimal" under § 141.2.

The first of those two other sections, § 141.81, identifies multiple

"pathways" through which a system may be deemed in compliance with the Rule's optimal-treatment mandate. *See id.* § 141.81(b)(1)-(3), (d), (e); 65 Fed. Reg. 1950, 1957 (Jan. 12, 2000). The second of those sections, § 141.82, fleshes out the requirements for completing each of the § 141.81 pathways. *See* 40 C.F.R. § 141.82. As summarized below, only three of the § 141.81 pathways are available to large water systems like Newark. *See id.* § 141.81(b)(2)-(3), (d).

First, under § 141.81(b)(2), "[a]ny water system may be deemed by the State to have optimized corrosion control treatment if the system demonstrates to the satisfaction of the State that it has conducted activities equivalent to the corrosion control steps applicable to such system under this section." *Id.* § 141.81(b)(2); *see also* 65 Fed. Reg. at 1958 (explaining that § 141.81(b)(2) "applies only to those water systems that completed corrosion control steps equivalent to those specified in § 141.81(d) or (e) before the effective date of the [Rule]"). If a system satisfies this test, then the State "shall specify the water quality control parameters representing optimal corrosion control," and the system "shall operate in compliance with the State-designated optimal water quality control parameters." 40 C.F.R. § 141.81(b)(2). Defendants do not claim that the City qualifies for this pathway to compliance.

Second, under § 141.81(b)(3), "[a]ny water system is deemed to have optimized corrosion control" if it submits tap water monitoring results that

demonstrate for two consecutive 6-month monitoring periods "that the difference between the 90th percentile tap water lead level . . . and the highest *source* water lead concentration is less than [5 parts per billion]."[1] *Id.* § 141.81(b)(3) (emphasis added); *see id.* § 141.89(a)(1)(ii). Defendants do not claim that the City qualifies for this compliance pathway either.

That leaves the City with the third, and most commonly traveled, § 141.81 pathway: the seven-step treatment process set forth in § 141.81(d). *See* EPA, Optimal Corrosion Control Treatment Evaluation Technical Recommendations for Primacy Agencies and Public Water Systems 50 & n.26 (2016), https://www.epa.gov/sites/production/files/2019-07/documents/occtmarch2016updated.pdf. Given Newark's ineligibility for § 141.81(b)(2) and (b)(3), the City and State were required to finish the steps that § 141.81(d) assigned to them—and to do so by the indicated deadlines, which ranged from 1993 to 1998. *See* 40 C.F.R. § 141.81(a), (a)(1), (d).

Pursuant to the § 141.81(d) process, a system must first complete monitoring and studies, which then inform a state's duty to designate optimal treatment. *See id.* § 141.81(d)(1)-(3). The system must then install the

[1] To illustrate, if the highest lead level measured in source water (which has not touched lead service lines, plumbing, or fixtures) is 1 part per billion, this means that a system would qualify for the § 141.81(b)(3) pathway only if its 90th percentile tap water lead level were less than 6 parts per billion.

State-designated treatment and complete follow-up sampling to assess seasonal impacts on efficacy and ensure that the treatment has stabilized. *See id.* § 141.81(d)(4)-(5); 56 Fed. Reg. at 26,495. Next, Step 6 provides that the State "shall review installation of treatment and designate optimal water quality control parameters." 40 C.F.R. §§ 141.81(d)(6), 141.82(f). Water quality parameters influence the corrosivity of water and are thus critical to ensuring that treatment minimizes lead. *See* 56 Fed. Reg. at 26,466, 26,481. Thereafter, Step 7 mandates that the system perform the ongoing duty of "continu[ing] 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." 40 C.F.R. § 141.82(g); *see id.* § 141.81(d)(7). No Defendant claims that all seven steps were ever completed for Newark.

In sum, for a large system like Newark, "[c]ompliance with the corrosion control portion of the [Rule] is determined by whether [the] system has successfully demonstrated that it optimized corrosion control *and* has completed the steps outlined [in § 141.81(d) by the specified dates]." 56 Fed. Reg. at 26,480 (emphasis added). Completion of the full § 141.81(d) process, including ongoing performance of Step 7, suffices to demonstrate that a system has optimized corrosion control. *See* 40 C.F.R. § 141.80(d)(2).

B. Lead service line replacement

Any system that exceeds the lead action level after installing optimal corrosion control treatment must annually replace at least seven percent of the lead service lines in its distribution system with lead-free pipes and solder. *Id.* § 141.84(a), (b)(1); *see id.* § 141.43. EPA set this schedule based on its belief "that it is necessary to accelerate the rate at which systems would otherwise replace lead service lines in order to ensure that public health will be adequately protected." 56 Fed. Reg. at 26,508.

A system must pay for replacing a lead service line unless a resident owns any part of the line. 40 C.F.R. § 141.84(d). When that exception occurs, "the system shall notify the owner of the line" and "offer to replace the owner's portion of the line." *Id.* Next, the City must replace the privately owned line, or part thereof, unless the owner does not accept the City's offer of replacement or will not cover costs that the City refuses to subsidize. *See id.*

STANDARD OF REVIEW

A complaint survives a Rule 12(b)(6) motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* Fed. R. Civ. P. 12(b)(6). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] court must 'accept as true all of the allegations contained in a complaint,' [and] make all reasonable inferences in favor of the plaintiff." *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co.*, 839 F.3d 242, 256 (3d Cir. 2016) (quoting *Iqbal*, 556 U.S. at 678).[2]

ARGUMENT

I. Claim Four withstands the City's motion because it is adequately pled, sufficiently noticed, and judicially redressable

A. Plaintiffs state a viable claim that the City has not been operating optimal corrosion control treatment

"Where the language of a regulation is plain and unambiguous, [the court] need not inquire further." *McCann v. Unum Provident*, 907 F.3d 130, 144 (3d Cir. 2018). The Rule unambiguously states that water systems "shall operate optimal corrosion control treatment as defined in § 141.2." 40 C.F.R. § 141.80(d)(1). By its plain terms, this is a binding mandate. *See Dessouki v. Att'y Gen. of United States*, 915 F.3d 964, 966 (3d Cir. 2019) ("[T]he word 'shall' imposes a mandatory requirement."). Because Plaintiffs allege a valid claim that the City has failed to comply with this mandate, *see* SAC ¶¶ 218, 220, as

[2] In addition to moving to dismiss Claims 4 and 6 under Rule 12(b)(6), the City moves to dismiss Claim 4 as moot under Rule 12(b)(1). The City "bears a heavy burden to show the case is moot." *Seneca Res. Corp. v. Twp. of Highland*, 863 F.3d 245, 254 (3d Cir. 2017).

well as its duty to complete the Rule's seven-step treatment process for large systems, *see id.* ¶¶ 29, 48, 204, 296, the Court should deny the City's motion to dismiss Claim Four. *See generally id.* ¶¶ 1, 3, 4, 6-8, 12, 14, 89-197, 204-20, 295-96 (setting forth additional allegations pertinent to Claim Four).

1. The City cannot be "deemed in compliance" with the Rule's optimal-treatment requirement

Plaintiffs adequately allege that the City cannot be "deemed in compliance," 40 C.F.R. § 141.80(d)(2), with the Rule's optimal-treatment mandate. A large system may be deemed compliant with that mandate by completing one of three pathways, set forth in § 141.81(b)(2), (b)(3), and (d). 40 C.F.R. § 141.80; *see id.* § 141.81(b)(2), (b)(3), (d); *supra* Legal Framework II.A. Because the City has never claimed that it completed the § 141.81(b)(2) or (b)(3) pathways, only the § 141.81(d) pathway is relevant here; that pathway requires a system to install and maintain optimal treatment pursuant to a seven-step process. *See* 40 C.F.R. § 141.81(a)(1), (d). Plaintiffs allege, and no Defendant denies, that the City has never completed the § 141.81(d) pathway.

i. Plaintiffs allege that the City has not satisfied Step 7 of the § 141.81(d) pathway

Step 7 of § 141.81(d), as fleshed out by § 141.82(g), imposes an ongoing requirement that a system "operate and maintain optimal corrosion control treatment, including maintaining water quality parameters at or above

minimum values or within ranges designated by the State." 40 C.F.R. § 141.82(g); *see id.* § 141.81(d)(7). This duty accrued over two decades ago, in 1998. *See id.* § 141.81(d)(6), (7).

Here, Plaintiffs allege that the City has not been—and *cannot* have been—performing Step 7, because the State never complied with its duty to designate water quality parameters under Step 6. *See* SAC ¶¶ 279-84, 303-04. Accordingly, the City has not been "compl[ying] with the applicable corrosion control treatment requirements specified by the State under §§ 141.81 and 141.82" and cannot be "deemed in compliance" with § 141.80(d)(1)'s optimal treatment mandate.[3] *Id.* § 141.80(d)(2).

Significantly, Plaintiffs need not allege "excursions" from

[3] For a system seeking to complete the § 141.81(d) pathway, there are two "applicable corrosion control treatment requirements specified by the State." 40 C.F.R. § 141.80(d)(2). First, under Step 3, the State must specify a "treatment"—a term that the Rule uses narrowly here to refer to one of three options listed under § 141.82(c)(1), such as "[t]he addition of a phosphate or silicate based corrosion inhibitor." *Id.* § 141.82(c)(1)(iii); *see id.* §§ 141.81(d)(3), 141.82(d). Second, under Step 6, the State must specify water quality parameters. *See id.* §§ 141.81(d)(6), 141.82(f); *see also* EPA, Optimal Corrosion Control Treatment Evaluation Technical Recommendations for Primacy Agencies and Public Water Systems, *supra*, at A-6 (explaining that water quality parameters include "pH, temperature, conductive, alkalinity, calcium, orthophosphate, and silica"; and help "determine what levels of [corrosion control treatment] work best for the system and whether this treatment is being properly operated and maintained over time"). A system must comply with *both* State-designated "treatment" and State-designated "water quality parameters" to be deemed compliant with the Rule's optimal-treatment mandate. *See id.* §§ 141.81(d)(4), (7), 141.82(e), (g).

State-designated water quality parameters to allege that the City has not been performing Step 7. *Contra* City MTD 1-2, 3-6, 7-12. While establishing such "excursions" is *one* way of showing non-compliance, it is not the only way.

A system can be deemed compliant with § 141.80(d)(1)'s optimal-treatment requirement only if it has complied with State-specified requirements under §§ 141.81 and 141.82—requirements that include maintaining designated treatment within designated water quality parameters. *See* 40 C.F.R. §§ 141.80(d)(2); 141.81(d)(7), 141.82(g). If the system has not complied with such requirements, it may be because the system attempted to maintain treatment within State-designated parameters but failed (i.e., had too many excursions), or because the State never designated any parameters to begin with. *Either* is enough to preclude the system from being deemed compliant with the Rule's optimal-treatment mandate.

By analogy, suppose an attorney can be admitted to a state bar only if she has passed a bar examination. If the attorney has not passed the bar examination, it may be because she took the examination but scored too low, or because the examination was not timely administered. *Either* is enough to preclude the attorney's admission to the state bar.

The City's insistence that Plaintiffs had to allege "excursions" from non-existent State-designated parameters is nonsensical and would lead to

absurd results. As an example, suppose the State designated the following treatment for Newark in 1995: sodium silicate at a dosage of 8 parts per billion. Suppose the City consistently administered the required silicate dosage but the State never designated water quality parameters despite the Rule's 1998 deadline, *see id.* § 141.81(d)(6). Suppose the City then lowered its pH to 1, causing extremely high lead levels in Newark's drinking water, and resulting in severe and widespread lead poisoning among residents.[4] According to the City's disingenuous reasoning, the City must nonetheless be deemed in compliance with the Rule's requirement to operate "optimal" corrosion control treatment simply because it is adding silicate while not violating water quality parameters that do not exist. The Rule must be construed to avoid this absurd result. *See In re Kaiser Aluminum Corp.*, 456 F.3d 328, 338 (3d Cir. 2006).[5]

Ultimately, the State's failure to designate water quality parameters does not excuse the City from compliance with the Rule's optimal-treatment requirement. Rather, the State's failure to designate such parameters eliminates the City's § 141.81(d) pathway to compliance with § 141.80(d)(1).

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[4] Even a 1-point pH change can greatly amplify lead corrosion, thereby "increasing lead levels at residents' taps by orders of magnitude." SAC ¶ 209.

[5] The Third Circuit relies on "well-established principles of statutory interpretation" to interpret regulations. *Bonkowski v. Oberg Indus., Inc.*, 787 F.3d 190, 199 (3d Cir. 2015).

ii. "Impossibility" is not a viable defense for the City's failure to operate optimal treatment

To the extent the City is suggesting that it should be excused from complying with the Rule's mandate to maintain "optimal" corrosion control treatment because the State never set water quality parameters, the Court should reject this untenable suggestion.

First, compliance with State-designated water quality parameters under § 141.81(d)(7), as detailed in § 141.82(g), is only one way to be deemed in compliance with the Rule's optimal-treatment mandate. *See supra* Legal Framework II.A. The City has other ways to comply with the Rule.

Second, even if completion of § 141.81(d)'s seven-step treatment process presented the only pathway to compliance, the Act's text and purpose foreclose a defense based on impossibility. The text of the Rule does not create such a defense, and the Court should not infer one. *See Rotkiske v. Klemm*, 589 U.S. ___, ___, 2019 WL 6703563, at *4 (U.S. Dec. 10, 2019) ("It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts. . . . To do so is not a construction of a statute, but, in effect, an enlargement of it by the court." (alteration in original) (internal citation and quotation marks omitted)).

As with analogous statutes intended to protect public health, Congress designed a scheme that makes a responsible party bear the burden of its

non-compliance, whatever the reason. *See*, *e.g.*, *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 175 (3d Cir. 2004) (strict liability under the Clean Water Act); *United States v. Dell'Aquilla, Enters. & Subsidiaries*, 150 F.3d 329, 332 (3d Cir. 1998) (strict liability under the Clean Air Act); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992) (strict liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)); *United States v. Crown Roll Leaf, Inc.*, No. 88-831, 1988 U.S. Dist. LEXIS 15785, at *18 (D.N.J. Oct. 21, 1988) (strict liability under the civil violation provisions of the Resource Conservation and Recovery Act (RCRA)).

Under this type of regime, the City's "[e]xcuses are irrelevant" to its liability. *United States v. City of Hoboken*, 675 F. Supp. 189, 198 (D.N.J. 1987). The reason is simple: Congress has "determined that protection of the public health and the environment [are] paramount." *United States v. Vineland Chem. Co.*, No. CIV. A. 86-1936, 1990 WL 157509, at *10 (D.N.J. Apr. 30, 1990) (internal quotation marks omitted) (explaining the purpose of strict liability in RCRA case), *aff'd*, 931 F.2d 52 (3d Cir. 1991); *see also Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 768 (D.C. Cir. 1992) (discussing the Act's health-protective purpose). The Act's strict liability scheme ensures that the costs of non-compliance fall on the City, not the people Congress intended to protect.

Moreover, the City does not claim that it pressed the State to designate

parameters after the State's deadline elapsed in 1998. *See* 40 C.F.R. § 141.81(d)(6). Nor does the City claim that it petitioned EPA to do so given the State's failures, or that it sued to force the State to undertake this non-discretionary duty. *See* 42 U.S.C. § 300j-8(a) (permitting "any person" to file suit); *id*. § 300f(12) (defining "any person" to include a municipality). The City is therefore not entitled to raise an impossibility defense. *See, e.g.*, *City of Hoboken*, 675 F. Supp. at 198-99 (faulting the defendant city for not explaining why it was "impossible to procure" the county agency's permission to build a sewage plant needed to bring the city into compliance with its Clean Water Act permit); *see also Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1013 (3d Cir. 1988) (holding that EPA's failure to finalize a draft permit that would have authorized exceedances of the Clean Water Act "does not give [the defendant] a license to pollute indefinitely"); *cf. United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 866 (7th Cir. 1994) (rejecting the defendant's claim of impossibility of compliance with an EPA-mandated schedule where the defendant could have "complained earlier about the restrictive time schedule" and worked with EPA to modify it (internal quotation marks omitted)).

The City's shared responsibility for its failure to complete the § 141.81(d) pathway confirms that the City cannot avail itself of an "impossibility" defense and be "deemed in compliance," 40 C.F.R. § 141.80(d)(2), with the Rule's

optimal-treatment mandate.

2. The City is not in actual compliance with the Rule's requirement to operate "optimal" treatment

In addition, Plaintiffs adequately allege that the City has not actually been complying with § 140.80(d)(1)'s mandate to "operate optimal corrosion control treatment as defined in § 141.2," *id.* § 141.80(d)(1), by minimizing lead levels while avoiding violations of other drinking water regulations, *see id.* § 141.2; SAC ¶¶ 218, 220.

i. Plaintiffs allege that the City's treatment deviates from the Rule's mandate to operate "optimal" treatment as defined in § 141.2

Accepting Plaintiffs' allegations as true, there are alarmingly high lead levels in Newark's tap samples—far exceeding the federal lead action level. *See id.* ¶¶ 6-7. These elevated levels create more than a "reasonable inference," *Iqbal*, 556 U.S. at 678, that the City's treatment has not "minimize[d] the lead . . . concentrations at users' taps," 40 C.F.R. § 141.2, which is part of how the Rule defines "optimal" treatment. Indeed, the lead action level "reflects EPA's assessment of a level that is generally representative of effective corrosion control treatment." 56 Fed. Reg. at 26,490.[6]

[6] *See also* II EPA, Lead and Copper Rule Guidance Manual: Corrosion Control Treatment § 5.1.1 (1992) ("The primary goal of corrosion control optimization is to achieve and maintain compliance with the lead and copper [action

Plaintiffs also allege additional facts that support this claim. Starting around 2013 and continuing for several years, Newark "lowered pH levels of the water leaving the Pequannock treatment plant" and also "permitted extreme pH fluctuations to occur on a daily and hourly basis." SAC ¶ 207. Newark's failures to maintain a sufficiently high and stable pH caused lead service components within its distribution system to corrode, releasing dangerously high levels of lead. *See id.* ¶¶ 6-12; 208-13. Compounding these failures, operator errors at the Pequannock treatment plant led to inadequate chlorine disinfection, which may have facilitated the growth of microbes that further corroded lead materials in the system. *See id.* ¶¶ 104, 133, 212.

Although Newark thereafter raised chlorine dosages and repaired infrastructure, it failed to ensure simultaneous compliance with other drinking water regulations. Most conspicuously, "[t]he increase in pH resulting from the repairs to Newark's lime feed system likely accelerated the formation of disinfection byproducts," *id.* ¶ 141, leading to repeated exceedances of federal

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levels]."); *id.* § 5.3.1 (noting that "treatment has been optimized" when it "provid[es] the maximum corrosion protection possible"). Even Newark's consultant recognized that exceedance of the action level is an "indicator . . . that corrosion control treatment is likely not optimized." CDM Smith, Filter Results Report – Final at 1-3 (2019), *available at* https://static1.squarespace.com/static/5ad5e03312b13f2c50381204/t/5dd70e112421805afa68ebd9/1574374964737/Newark+Point-of-Use+Filter+Study+-+Aug-Sept+2019+Final.pdf. That said, compliance with the action level is not alone dispositive of whether treatment is optimal. *See* 56 Fed. Reg. at 26,488.

limits for haloacetic acids and trihalomethanes under the Stage 1 and Stage 2 Disinfection Byproducts Rules, *see id.* ¶¶ 141-42, 161, 181, 185, 190. These allegations sustain a "reasonable inference," *Iqbal*, 556 U.S. at 678, that Newark's corrosion control treatment has "cause[d] the water system to violate" another "national primary drinking water regulation[]," 40 C.F.R. § 141.2—and thus has not been "optimal" under § 141.2's express language.

ii. The Rule's definition of "optimal" treatment is part of a judicially enforceable standard

The City does not deny that Newark's corrosion control treatment fails to meet § 141.2's definition of "optimal" treatment. Indeed, *the State and the City's own consultant have so concluded*, and the City has admitted as much. *See* SAC ¶ 215 (quoting NJDEP's conclusion that "Newark Water Department is deemed to no longer have optimized corrosion control treatment"); *id.* ¶ 216 ("[T]he City's consultant CDM Smith informed City officials by email that corrosion treatment 'has not been effective for [the] Pequannock' service area." (second alteration in original)); ECF No. 114-1 at 35 (recognizing that Newark is in the process of "re-optimizing corrosion control treatment").

Rather, the City appears to argue that § 141.80(d)(1)'s express mandate—that systems operate "optimal" treatment in accordance with the Rule's definition of that term—has no independent legal force. *See* City MTD 3

(denying that deviation of a system's treatment "from the peak or 'optimal,' state becomes a facial violation of the rule"). In effect, the City seeks to collapse the two-part structure of § 141.80(d), which first articulates the Rule's core optimal-treatment requirement and then provides that systems may be deemed in compliance with that mandate by completing any of the pathways set forth in §§ 141.81 and 141.82. The City's reading excises the Rule's independent requirement that all systems "operate optimal corrosion control treatment," leaving only a requirement that all systems comply with the requirements set forth in §§ 141.81 and 141.82. By reducing § 141.80(d)(1)'s optimal-treatment mandate to a nullity, this reading founders against the "well known canon of statutory construction that courts should construe statutory language to avoid interpretations that would render any phrase superfluous." *United States v. Cooper*, 396 F.3d 308, 312 (3d Cir. 2005).

The City next contends that the Court lacks the power and competence to adjudicate compliance with "something so vague," as a requirement to operate "optimal" treatment. City MTD 12. But the Rule's definition of this term is not, as the City represents, "a vague, qualitative 'optimal' standard of [Plaintiffs'] own devising that is nowhere to be found in the Lead and Copper Rule." *Id.* at 10. Rather, it is a specific standard that EPA set out in plain language in the Rule's text. *See* 40 C.F.R. § 141.80(d)(1) (requiring systems to

operate optimal treatment "as defined in § 141.2").

The City further asserts that expert testimony may be needed to apply this qualitative standard in the Rule, as if that were a legitimate reason to disregard the Rule's plain meaning. *See* City MTD 5. But courts routinely depend on expert testimony to determine whether qualitative standards have been met. For example, courts do so when assessing whether a chemical creates a substantial "endangerment" to public health, *see, e.g.*, *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 263-64 (3d Cir. 2005); and whether a medical professional exercised the "duty of care" owed to patients, *see, e.g.*, *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 579 (3d Cir. 2003); *see also PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 715-16 (1994) (disagreeing with the argument that water quality standards in the form of "narrative statements" are "too open ended, and that the [Clean Water] Act only contemplates enforcement of the more specific and objective 'criteria'"). The judiciary is fully capable of considering expert evidence, if it is needed, on the efficacy of corrosion control treatment, and the optimal-treatment standard is far more specific than many liability standards that courts routinely apply.

Nor should the Court credit the City's doomsday prediction that enforcement of § 140.80(d)(1) would open the floodgates to "broad historical inquisitions of any city, based on mere qualitative disagreements about

whether the water chemistry in that city is truly 'optimal.'" City MTD 11-12. In addition to ignoring the Rule's definition of "optimal" treatment, the City implies that Newark is no different from most other cities. Nothing could be further from the truth. There are not hundreds or even dozens of large cities with such high lead levels—levels that have surpassed those reported for all but one other large American city. *See* SAC ¶ 7. Nor, to Plaintiffs' knowledge, are there dozens of other large systems that have grossly mismanaged corrosion control treatment and neglected infrastructure as the City has done, year after year. The City's unsupported floodgates argument should not divert the Court's attention from this unique and long-lasting public-health catastrophe.

B. Plaintiffs provided adequate notice for Claim Four

"Notice regarding an alleged violation of any requirement prescribed . . . under the Act shall include sufficient information to permit the recipient to identify the specific requirement alleged to have been violated . . . [and] the activity alleged to constitute a violation." 40 C.F.R. § 135.12(a). The City insists that Plaintiffs' notice letter failed to provide sufficient information because Plaintiffs did not "identif[y] the 'parameter'—pH—that they now allege as a violation in Claim Four," City MTD 14.

But inappropriate pH levels do not constitute the underlying violation, as the City well knows. Plaintiffs do not allege that the City violated the Rule by

straying from any specific State-designated parameter for pH; as noted above, the State never set any such parameters. Instead, Plaintiffs allege that the City failed to comply with the Rule's requirement to operate "optimal" treatment under § 141.80(d) by minimizing *lead* concentrations while avoiding violations of other drinking water regulations. *See* SAC ¶¶ 218, 220. Relatedly, Plaintiffs allege that the City has failed to complete § 141.81(d)'s seven-step treatment process, which is mandatory for large systems like Newark. *See id.* ¶¶ 29, 48, 204, 218, 296; *supra* Legal Framework II.A.

The City's reliance on *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239 (3d Cir. 1995), a case about the Clean Water Act, is misplaced. *See* City MTD 13-14. "A discharge violation" under that statute "involves the release of a pollutant," *id.* at 1241, that exceeds "*discharge limits* . . . for designated parameters," *id.* at 1242 (emphasis added); *see also id.* at 1241-42 (explaining that "each parameter [is] defined as a particular attribute of a discharge," such as "the quantity, discharge rate, or concentration of the pollutant allowed by the permit"). Accordingly, the Clean Water Act's notice provision required the *Hercules* plaintiffs "to identify the specific . . . *limitation[s]* . . . alleged to have been violated," 40 C.F.R. § 135.3(a) (emphasis added).

By contrast, the Safe Drinking Water Act requires only that a notice include "the specific *requirement[s]* alleged to have been violated." *Id.* § 135.12

(emphasis added). Here, Plaintiffs allege that the City has not been complying with the Rule's "specific requirement[s]," *id.*, to "operate optimal corrosion control treatment as defined in § 141.2," *id.* § 141.80(d)(1), *see* SAC ¶¶ 218, 220; and to complete § 141.81(d)'s seven-step treatment process culminating in the maintenance of optimal treatment, *see* 40 C.F.R. § 141.81(a)(1), (d)(7); SAC ¶¶ 29, 48, 204, 218, 296.

To apprise the City of this claim, NRDC stated in its 60-day notice letter that "all water systems must operate and maintain optimal corrosion control treatment" and that the City "has failed, and is continuing to fail, to meet this requirement." ECF No. 281 at 99 (internal quotation marks omitted). NRDC's letter specified that the City was failing to "control[] corrosion from lead pipes." *Id.* at 93. The letter pointed to the alarmingly high levels of lead in Newark's water, *see id.* at 94-95, as evidence that the City was not in actual compliance with the Rule's requirement to "minimize lead concentrations to the maximum extent feasible," *id.* at 99. In addition, NRDC cited NJDEP's notice that Newark was no longer deemed in compliance with this duty. *See id.* at 99 & n.42. NRDC thereby provided "sufficient information" to allow the City to "identify the specific requirement alleged to have been violated" and the "activity alleged to constitute [the] violation," 40 C.F.R. § 135.12(a). *Contra* City MTD 12-14. Nothing more was needed.

Because Plaintiffs provided adequate notice of Claim Four, no further notice was required when Plaintiffs included new facts in their Second Amended Complaint regarding the City's mismanagement of Newark's pH levels, which simply provided additional background for Plaintiffs' *existing* claim regarding the City's failure to optimize corrosion control treatment for lead. *See Hercules*, 50 F.3d at 1247 ("The regulation does not require that the citizen identify every detail of a violation.").

C. Claim Four is not moot

The City is wrong that the State's designation of a new corrosion control treatment for Newark moots Plaintiffs' claim that the City has failed to operate optimal treatment. *See* City MTD 1 & n.2, 2, 6, 16-22. The State's designation of a new treatment[7] does not change the fact that the City has *never* fully complied with § 141.81(d)'s seven-step treatment process—and that until the City does so, it cannot be deemed in compliance with the Rule's mandate to operate optimal treatment. *See* 40 C.F.R. § 141.80(d)(1), (2). The Court may order the City not only to discharge this unfulfilled duty, but also to remedy the significant harms caused by the City's decades-long failure to do so.

[7] Section 141.82(h) authorized the State to "modify" its previous designation of silicate-based treatment under Step 3 of § 141.81. 40 C.F.R. § 141.82(h). But § 141.82(h) is inapplicable to the State's unfulfilled duty to designate water quality parameters; the State cannot "modify" parameters it never designated.

1. The State lacks the authority to "reset" the deadline for operating optimal corrosion control treatment

The City contends that it is complying with the Rule's optimal-treatment requirement because the State "reset" § 141.81(d)'s corrosion-control deadlines by prescribing new deadlines in the SCAO. City MTD 16-17. This contention is premised on the State's purported legal authority to override § 141.81(d)'s deadlines. But the City does not identify any source for this authority.

The City's bloated footnote on this dispositive issue fails to identify any legitimate basis for the State's professed resetting of § 141.81(d)'s deadlines:

> Because the 1990s-era deadlines [set by EPA in § 141.81(d)] are now passed, [NJ]DEP is now using the *intervals* described in § 141.81**(e)** for small and medium-sized systems to describe the steps Newark needs to take, even though Newark is a large system. . . . DEP has the right to do this as part of its right to require systems to repeat steps . . . . *Id.*, § 141.81(c) ("The State may require a system to repeat treatment steps previously completed by the system where the State determines that this is necessary[.]").

City MTD 17 n.10. The City cites § 141.81(c)—and only § 141.81(c)—to support the proposition that the State has the "right" to override § 141.81(d)'s deadlines. *See id.* Section 141.81(c), however, applies *only* to "[a]ny small or medium-size water system." 40 C.F.R. § 141.81(c). *Thus, the only authority the City cites does not, on its face, apply to a large system like Newark.*[8]

[8] The State offers an alternative, but equally erroneous, explanation for why it has the legal authority to reset the deadlines in § 141.81(d). *See* ECF No. 286-1

The State may not override the Rule's requirements by administrative fiat. Even the SCAO does not purport to do so. *See* ECF No. 285-3 at ¶ 67 ("This SCAO shall not relieve Newark from . . . complying with . . . all applicable statutes, codes, rule[s], regulations and orders . . . ."). The SCAO's enforcement schedule is simply a means to facilitate completion of § 141.81(d)'s seven-step treatment process—and thereby bring Newark into belated compliance with § 140.80(d)(1)'s optimal-treatment mandate. The Court retains the power to enforce that mandate. *See, e.g.*, *Pub. Interest Research Grp. of N.J., Inc. v. Rice*, 774 F. Supp. 317, 327-28 (D.N.J. 1991) (ordering the defendant to attempt compliance with its Clean Water Act permit, notwithstanding an administrative consent order between EPA and the defendant purporting to postpone the 1989 deadline for complying with the permit until 1994); *accord Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1114, 1119-20 (9th Cir. 1996); *Or. State Pub. Interest Research Grp., Inc. v. Pac. Coast Seafoods Co.*, 361 F. Supp. 2d 1232, 1236, 1243 (D. Or. 2005); *Frilling v. Vill. of Anna*, 924 F. Supp. 821, 844 (S.D. Ohio 1996); *compare* Emergency Administrative Order at ¶ 59, Ex. 1 to State Defs.' MTD, *Concerned Pastors for Soc. Action v. Khouri*, No. 16-10277 (E.D. Mich. Mar. 7, 2016), ECF

(citing 40 C.F.R. §§ 141.81(b)(3)(v), 141.81(e)). Plaintiffs respond to that explanation in their separate opposition to the State's motion to dismiss.

No. 23-2 (requiring City and State defendants in Flint case to come up with a schedule for reviewing and revising as needed "designated optimal corrosion control and water quality parameters"), *with Concerned Pastors for Soc. Action v. Khouri*, 217 F. Supp. 3d 960, 966, 980-81 (E.D. Mich. 2016) (concluding that "[i]t appears beyond dispute" that the City of Flint was in violation of the Rule's corrosion control requirements, and granting preliminary relief).

If the SCAO's schedule supplanted the schedule EPA set in § 141.81(d), then the City and State could avoid liability for missing § 141.81(d)'s deadlines simply by amending the SCAO's deadlines. *Cf. Rice*, 774 F. Supp. at 326 (observing that "nothing prevents defendant and the EPA from agreeing to put off the deadline for compliance" set forth in an administrative consent order). Taken to its logical conclusion, the City's argument means that Defendants could indefinitely postpone the City's duty to operate optimal corrosion control treatment; Defendants could extend the City's deadline for maintaining the new orthophosphate treatment within State-designated water quality parameters from October 2021, *see* City MTD 18, to five, ten, or even one hundred years later, and the Court would be powerless to intervene.

This result cannot be reconciled with the Act's citizen suit provision, which authorizes this Court to restrain "any" violation of the Act, 42 U.S.C. § 300j-8(a)(1), unless EPA, the U.S. Attorney General, "or the State has

commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with such requirement," *id.* § 300j-8(b)(1)(B). As this provision makes clear, the State cannot oust this Court's jurisdiction through mere administrative action. That the State has ordered the City to maintain optimal corrosion control treatment by October 2021, *see* City MTD 18, therefore does not moot Plaintiffs' claim that the City has yet to operate such treatment as required by §§ 141.80(d)(1), 141.81(d)(7), and 141.82(g).

2. The Court is empowered to remedy the City's failure to operate optimal corrosion control treatment

Contrary to the City's argument, it is neither too early nor too late for this Court to enforce the City's duty to maintain optimal treatment. *Contra* City MTD 18. While the State's designation of a new orthophosphate treatment for Newark may change the *details and scope* of any remedy that the Court chooses to order, it does not affect the Court's *power* to order such a remedy.

This case is like *Rice*, in which plaintiffs brought a citizen suit under the Clean Water Act challenging the Air Force's violations of effluent limits in its permit. 774 F. Supp. at 318-19. Although the permit had taken effect in 1989, *see id.* at 319, the Air Force's existing wastewater treatment plant was inadequate to enable compliance, *see id.* at 325. The Air Force and EPA thus entered into an administrative consent order which provided a construction

schedule for a new plant, set relaxed effluent limits to be met in the interim, and deferred the deadline for complying with the 1989 permit until completion of the new treatment plant in 1994. *See id*. at 325-27.

Notwithstanding the administrative consent order, the court concluded that it was "required to order the defendant to attempt to comply with the standards that are set in the 1989 permit." *Id*. at 326. Significantly, this meant that the Air Force had an ongoing duty to comply with the 1989 permit despite the impossibility of doing so using its existing wastewater treatment plant, and even though it could not fully comply with that permit until construction for the new wastewater treatment plant was finished. *See id.* at 325-26.

Here, similarly, the City has an ongoing duty to comply with § 141.80(d)(1)'s mandate to operate optimal treatment, even if it cannot fully comply with § 141.80(d)(1) until the seven-step treatment process has been completed using the new orthophosphate treatment. Just because the specific vehicle needed to achieve compliance is not completed yet—whether it is a new wastewater treatment plant or a new corrosion control treatment regime—does not mean that a court cannot, in the meantime, order compliance with the underlying duty or compel relief to mitigate ongoing harm.

A case is moot only "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU*, 567 U.S. 298,

307 (2012) (internal quotations marks omitted); *see Del. Riverkeeper Network v. Sec'y Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 374 (3d Cir. 2016). "When a court can fashion some form of meaningful relief or impose at least one of the remedies enumerated by the [plaintiff], even if it only partially redresses the grievances of the prevailing party, the case is not moot." *Del. Riverkeeper Network*, 833 F.3d at 374 (internal quotations marks omitted). The Court's ability to fashion effective remedies suffices to overcome mootness "even if the remedies were not initially requested in the pleadings." *Isidor Paiewonsky Assocs. v. Sharp Props.*, 998 F.2d 145, 151 (3d Cir. 1993).

The Court may grant effective relief for Claim Four. For example, the Court could, as part of a final order, require the City to comply with the SCAO's deadlines for completing the § 141.81(d) process for the new orthophosphate treatment, just as the *Rice* court ordered the Air Force to comply with the administrative consent order's deadline for building the new treatment plant. *See* 774 F. Supp. at 329. Such an order would cement the schedule in the SCAO and prevent Defendants from further delaying compliance by amending that document. Because "some form" of relief is available, Claim Four is not moot. *Del. Riverkeeper Network*, 833 F.3d at 374.[9]

[9] As discussed below, the Court could also order the City to redress the severe harm to Newark residents caused by the City's longstanding failure to operate

The doctrine of voluntary cessation, *see* City MTD 21-22, is inapplicable because the City has yet to cease the unlawful conduct alleged here: failure to operate optimal corrosion control treatment and complete § 141.81(d)'s seven-step treatment process. The only way the City can cease its non-compliance is to operate optimal treatment and complete the § 141.81(d) process, but even Defendants do not claim that has been done.

For a similar reason, the City's November 19, 2019, letter to this Court has no bearing on Claim Four. The City quotes EPA's proposed revision to the Rule for the proposition that the Rule currently contains "no requirement for systems to re-optimize" corrosion control treatment. Notice of Suppl. Authority for Newark's Mot. to Dismiss, ECF No. 291 at 1 (quoting 84 Fed. Reg. 61,684, 61,687 (proposed Nov. 13, 2019)). But the quoted language relates only to systems that have *already* been "deemed" compliant with the Rule's optimal-treatment requirement *by completing the § 141.81(d) process* (by operating State-designated treatment within State-designated water quality parameters, *see* 40 C.F.R. §§ 141.81(d)(7), 141.82(g)), and thereafter exceed the lead action level. *See* 84 Fed. Reg. at 61,687 (stating that "[s]ystems must operate [corrosion control treatment] to meet any Primacy Agency-designated

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optimal corrosion control treatment. *See infra* Argument III. This, too, means that Claim 4 is not moot. *Contra* City MTD 20-21.

[optimal water quality parameters] that define optimal CCT" *before* stating that "[t]here is no requirement for systems to re-optimize").[10] Re-optimization is irrelevant here, as the City's treatment has never been "deemed" optimal under § 141.80(d)(2) in the first place.

II. Claim Seven states a viable claim that the City failed to replace lead service lines; Plaintiffs need not allege City ownership of those lines

Plaintiffs adequately allege that the City has violated § 141.84's mandate to annually replace at least seven percent of Newark's lead service lines. *See* 40 C.F.R. § 141.81(a), (b); SAC ¶¶ 259-70; 301-02. The City objects that "Plaintiffs fail to plead that *Newark owns* the lead service lines" under § 141.84(d). City MTD 15. But the City misapprehends the burden of persuasion on this issue. Non-ownership of lead service lines is an affirmative defense and, as such, the City "must plead it in [it]s answer and not raise it by way of Motion to Dismiss," *Immunomedics, Inc. v. Roger Williams Med. Ctr.*, No. 15-4526 (JLL), 2017 WL 58580, at *9 (D.N.J. Jan. 4, 2017); *see In re Tower Air, Inc.*, 416 F.3d 229, 242 (3d Cir. 2005).

It is axiomatic that "[w]hen a proviso . . . carves an exception out of the body of a [law,] . . . those who set up such exception must prove it." *Meacham*

[10] The proposed Rule is discussing large systems that "were required to install treatment by January 1, 1997," 84 Fed. Reg. at 61,687, which refers to those large systems seeking to be deemed compliant through the § 141.81(d) pathway. *See* 40 C.F.R. § 141.81(d)(4).

v. Knolls Atomic Power Lab., 554 U.S. 84, 91 (2008) (internal citation omitted). Non-ownership of lead service lines creates an exception to the rule that requires a system like Newark to replace, as a matter of course, seven percent of those lines annually. *Compare* 40 C.F.R. § 141.84(a), (b)(1), *with id.* § 141.84(d). If the City seeks shelter in the non-ownership exception, *it* bears the burden of making that case.

The informational disparities here mandate this result, too. Insofar as facts regarding LSL ownership "lie peculiarly in the knowledge of [the City], [it] has the burden of proving the issue." *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 365 (3d Cir. 2015) (internal citation omitted). The City tacitly acknowledges as much. *See* City MTD at 15 (asserting that "*Newark* will prove [non-ownership] on summary judgment or at trial" (emphasis added)). It makes little sense to force Plaintiffs to allege facts to foreclose an exception to the rule when there appear to be no statutes, rules, or ordinances supporting the City's assertion that homeowners own service lines. *See Evankavitch*, 793 F.3d at 365-66; *see also Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002) (explaining that a party with "all or most of the relevant information" or "a unique nexus" with an issue must "affirmatively rais[e]" it (quoting 5 Wright & Miller, Fed. Prac. & Proc. § 1271 (2001 Supp.))).

Policy considerations also require allocating the burden to the City. *See*

Evankavitch, 793 F.3d at 366-67 (explaining that courts should consider a statute's objectives when assigning burdens). Congress enacted the Act "for the protection of public health," *Nat'l Wildlife Fed'n*, 980 F.2d at 768, and included a citizen-suit provision to effectuate this goal, 42 U.S.C. § 300j-8. The Act's purpose is served by making non-ownership an affirmative defense; forcing citizens to plead ownership based on information beyond their control hinders removal of lead service lines at the rate needed "to ensure that public health will be adequately protected." 56 Fed. Reg. at 26,507; *see Evankavitch*, 793 F.3d at 367 (explaining that duty to construe remedial statutes broadly militates against placing burden on plaintiff).[11]

The City asks the Court to frustrate congressional purpose by forcing Plaintiffs to allege ownership even though the *City* claims to have the evidence needed to avail itself of the non-ownership exception. Precedent, policy, and prudence oblige the Court to reject this request.

III. The Court should deny the City's motion to preemptively limit the Court's full equitable power to fashion relief at the appropriate time

The City's motion to strike two elements of Plaintiffs' prayer for relief is

[11] In fact, the City's burden extends beyond asserting non-ownership. To successfully invoke § 141.84(d) as an affirmative defense to Claim Seven, the City must plead all elements of that defense. The City must also allege that it "offer[ed] to replace" any lead services lines, or portions thereof, under private ownership, 40 C.F.R. § 141.84(d), and that private owners refused to give consent or provide payment for that replacement.

inapt, both because it is does not satisfy Federal Rule of Civil Procedure 12(f) and because it prematurely seeks to constrain the Court's equitable discretion. Rule 12(f) allows a court to "strike from a pleading . . . redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "Disfavored by the court, a motion to strike will generally be denied unless the allegations confuse the issues or are not related to the controversy and may ultimately cause prejudice to one of the parties." *Signature Bank v. Check-X-Change, LLC*, No. 12-2802(ES), 2013 WL 3286154, at *2 (D.N.J. June 27, 2013) (Salas, J.). The City appears to argue that Plaintiffs' requested relief is "impertinent" and "not related to the controversy" because it purportedly exceeds the Court's equitable authority under the Act. *See* City MTD 25-26.

But even the City acknowledges that the Court has "vast" equitable powers. *Id.* at 23. Those powers enable the Court to order the City to alleviate harm to Newark's residents from lead exposures stemming from years of legal lapses. As discussed below, absent an unambiguous congressional limitation, which is not present here, district courts retain expansive discretion to provide relief for statutory violations, *including remedies that would not otherwise have been required by statute or regulation*.

Whether and how these powers should be deployed, however, depend on the facts and law as determined at the close of the litigation. *See Signature*

Bank, 2013 WL 3286154, at *2-3 (confirming that a motion to strike is neither intended to preclude development of a factual record nor to "afford an opportunity to determine disputed and substantial issues of law," because those questions should be determined after "discovery and a hearing on the merits"). Plaintiffs' ultimate request for relief will be informed by the situation on the ground at the time relief is awarded. The Court should ignore the City's conjecture as to what it might eventually be required to do. *See* City MTD 23-24. If the City substantially lives up to its claims of addressing the lead crisis, the Court may have a smaller role to play in mitigating ongoing harm. In the meantime, the City's premature efforts to truncate the Court's discretion are improper, and the Court should deny the City's motion to strike.[12]

A. Courts have broad remedial powers unless Congress explicitly limits their traditional equitable discretion

The Supreme Court has long held that district courts retain their full equitable powers unless Congress explicitly limits them. Where a defendant's statutory violations have caused injury, courts may wield "the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell*

[12] The Court should also ignore the City's efforts to distract the Court from the particulars of this lawsuit—aimed squarely at correcting the harms in Newark from Defendants' violations of the Act—by referencing NRDC's broader policy goals to address lead problems nationwide. *See* City MTD 23-25. That NRDC seeks *additional* regulatory mandates does not bear on the Court's power to redress the City's violations of *current* regulatory mandates.

v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 291-92 (1960). When, as here, the public interest is at stake, such authority "assume[s] an even broader and more flexible character." *Id.* at 291 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). "[T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Porter*, 328 U.S. at 398).

The Third Circuit has embraced the Supreme Court's "expansive" view of a court's equitable powers in a case, like this one, where the statute did not specifically authorize a court to impose equitable remedies. *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 223 (3d Cir. 2005). In *Lane Labs*, the underlying statute granted the district court jurisdiction only "to restrain violations" of the act. *Id.* (quoting 21 U.S.C. § 332(a)). Nonetheless, the court upheld an equitable remedy of restitution, which was not provided for in the statute. *Id.* at 223-30. The court recognized that "when a statutory provision gives the courts power to 'enforce prohibitions' contained in a regulation or statute, Congress will be deemed to have granted as much equitable authority as is necessary to further the underlying purposes and policies of the statute." *Id.* at 225.

The Court should reject the City's attempt to distinguish *Lane Labs*. *See* City MTD 31-33. First, the City attempts to portray this lawsuit as a "private

controversy," rather than an action in the public interest. *Id.* at 32. But unlike the plaintiffs in *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996), who sought to recover past cleanup costs under RCRA, *see* City MTD 32-33, Plaintiffs here do not seek private damages. Rather, Plaintiffs "effectively stand in the shoes of the [government]." *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 74 (3d Cir. 1990) (describing the role of plaintiffs in a Clean Water Act citizen suit). "As private attorneys general, citizens constitute a special category of plaintiffs who ensure that companies comply with the Act even when the government's limited resources prevent it from bringing an enforcement action." *NRDC v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 503 (3d Cir. 1993) (discussing policies underlying Clean Water Act citizen suits); *see also Student Pub. Interest Research Grp. of N.J., Inc. v. P.D. Oil & Chem. Storage, Inc.*, 627 F. Supp. 1074, 1085 (D.N.J. 1986) (similar).

Second, the City argues that *Lane Labs* does not apply here because the restitution order in that case was not a "'huge' cost." City MTD 32. Notwithstanding the City's breathless characterizations throughout its brief of the "massive" relief requested in this case, however, the scope of relief is not yet before the Court, and future costs are speculative at this time. Indeed, several possible forms of relief should result in little or no additional cost: providing door-to-door filter installation help, which the City claims it has

received funding for and is planning, but which is not guaranteed absent a court order; adhering to a lead-service-line replacement timeline the City has already announced and purportedly secured funding for, but which is not contained in a court order either; and ongoing sharing of information relating to sampling, testing, and lead-service-line replacement, among other things.

Finally, the City invokes *Lane Labs*' discussion of *Meghrig* to argue that the Rule's existing enforcement provisions and remedial schemes preclude the remedies Plaintiffs seek. *See* City MTD 32-33. But the analogy is inapt; the Supreme Court explained that Congress explicitly provided for the remedy demanded by the *Meghrig* plaintiffs when it later enacted CERCLA, which would have been unnecessary had RCRA already authorized that remedy. *See Lane Labs,* 427 F.3d at 230. Here, in contrast, there is no statutory or regulatory scheme, enacted after the Act, that authorizes the contested relief—and hence no basis for inferring that this relief is unavailable under the Act.

B. The Third Circuit has not narrowed the Court's equitable discretion

The City claims that the Third Circuit has since narrowed the traditional equitable powers of a district court to remedy harms in a case such as this one, citing *United States v. EME Homer City Generation, LP*, 727 F.3d 274 (3d Cir. 2013). *See* City MTD 26-28. The City is mistaken.

In *EME Homer City*, the Third Circuit considered claims against former owners of a power plant that failed, years before the case was filed, to obtain a Clean Air Act permit for a plant modification. *See* 727 F.3d at 281-83. The court narrowly held that "[t]he text of the Clean Air Act does not authorize an injunction against *former owners and operators* for a *wholly past . . . violation*, even if that violation causes ongoing harm." *Id.* at 291 (emphases added).

That holding is distinguishable for two reasons. First, the City has at all relevant times been the owner and operator of the water system. And the Third Circuit did note that EPA can seek injunctions for past violations against a former owner that still owns a plant. *See id.* at 289. Second, the City is currently in violation of a continuing duty to operate and maintain optimal corrosion control treatment; the violations are not "wholly past," *id.* at 291.[13]

Furthermore, the court explicitly disclaimed any notion that it was articulating a more universal limit on a court's injunctive powers: "Because we base our conclusion solely on the statutory text of the Clean Air Act, we express no opinion on the District Court's conclusion that mandatory

[13] The critical time for determining whether there is an ongoing violation is when a claim is first alleged in a complaint. *See Bldg. & Const. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 151 (2d Cir. 2006) (construing Federal Rule of Civil Procedure 15(c)); *Hackensack Riverkeeper, Inc. v. Del. Otsego Corp.*, No. CIV.A. 05-4806(DRD), 2007 WL 1147048, at *3 (D.N.J. Apr. 17, 2007).

injunctions are not available in general to remedy ongoing harm from wholly past violations." *Id.* at 291 n.19. Thus, *EME Homer City* does not bear at all on the scope of the Court's powers in this case to order equitable relief against the City, against which Plaintiffs have alleged ongoing violations.

C. The Act does not limit the Court's equitable discretion

Congress included nothing in the Safe Drinking Water Act that restricts a district court's equitable powers to impose obligations beyond those required by the Rule. The Act's citizen suit provision is broad, allowing citizen "enforcement" of "any requirement" of the Act. 42 U.S.C. § 300j-8(a), (a)(1). That the Act empowers this Court only to "enforce" statutory requirements, *id.* § 300j-8(a), does not impinge on the Court's equitable powers to further the health-protective purposes of the Act. *See, e.g.*, *Concerned Pastors for Soc. Action v. Khouri*, 844 F.3d 546, 549-50 (6th Cir. 2016) (upholding an equitable remedy of door-to-door delivery of bottled water which would not have been required under the Rule absent a violation);[14] *see also Lane Labs*, 427 F.3d at 225 (holding that equitable relief is available under a statute that grants the court authority only to enforce prohibitions).

What would a clear congressional restriction of a court's equitable

[14] It is immaterial that the court ordered this relief as part of a preliminary, as opposed to permanent, injunction. *See Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 215 n.9 (3d Cir. 2014). *Contra* City MTD 34-35.

powers look like? Examples of statutes explicitly curtailing district courts' equitable authority are the Norris-LaGuardia Act, 29 U.S.C. § 101 ("No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . . ."), the Prison Litigation Reform Act, 18 U.S.C. § 3626(a) ("The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."), and the Federal Deposit Insurance Corporation Act, 12 U.S.C. § 1821(j) ("[N]o court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.").

The explicit restrictions in these *statutory* provisions stand in stark contrast to the *regulatory* provisions that the City claims preclude the remedies that Plaintiffs seek. *Compare Weinberger*, 456 U.S. at 313 (explaining that equitable jurisdiction may be limited only by clear *legislative* command), *with* City MTD 35-39 (claiming that the *Rule* limits the Court's equitable powers). The City cites no authority to support its suggestion that an agency can wield its executive power to constrain a Court's equitable discretion.

And even if EPA could do so through the Rule, it did not do so here. In contrast to the explicit proscriptions from the three statutes cited above, the Rule does not clearly bar a court from ordering a system to deliver bottled water or provide filters. *Contra* City MTD 38. Nor does it unambiguously prohibit a court from ordering a system to pay for replacing privately owned lead service lines or portions thereof. *Contra* City MTD 35-36. Just because the Rule does not *require* such remedies does not mean the Act *prohibits* them. Moreover, a court may order remedial actions that not only go beyond what is required to ensure compliance, but that might even be precluded absent statutory violations. *See, e.g.*, *United States v. Ironworkers Local 86*, 443 F.2d 544, 552-54 (9th Cir. 1971) (upholding an order requiring race-conscious hiring practices to remedy Title VII violations, even though the act's anti-preferential treatment provision would have barred such practices absent the violations).

The Act's citizen suit provision mirrors that of the Clean Water Act, *compare* 42 U.S.C. § 300j-8(a), *with* 33 U.S.C. § 1365(a), and citizen suits under the Clean Water Act confirm that courts authorized only to "enforce" statutory requirements may order defendants to take actions that the statute does not otherwise require. *See United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003) (confirming a district court's discretion to order defendants to restore wetlands, even though the court's remedy for failure to obtain a permit

required defendants to do more than what would have been lawful in the first place); *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me.,* 339 F.3d 23, 29-31 (1st Cir. 2003) (holding that the district court had equitable authority to order mitigation of harm from a defendant's violations of its Clean Water Act permit, even if that mitigation went beyond a subsequent permit); *NRDC v. Sw. Marine, Inc.*, 236 F.3d 985, 999-1000 (9th Cir. 2000) (holding that a district court's "enforcement" of statutory mandates includes the power to order additional remedies beyond applicable permit requirements for harms stemming from violations).

The City tries to distinguish these cases, contending that they authorized "small-bore injunctions," City MTD 34, rather than the "radical and exorbitant," *id*. at 33, remedies the City speculates Plaintiffs will ultimately seek. But the principles are identical despite potential differences in scale.

D. EPA's emergency powers do not strip citizens of their right to relief under the citizen suit provision of the Act

EPA's emergency powers under a separate section of the Act do not impinge on this Court's authority to grant equitable relief in a properly commenced citizen suit. *See* City MTD 28-31. As discussed above, Congress would have had to make such a constraint explicit. It did not. That EPA is authorized to impose administrative remedies or file its own lawsuit for

injunctive relief is irrelevant. In fact, Congress contemplated simultaneous EPA and citizen actions by providing that only a diligently prosecuted civil action in federal court addressing violations may bar a citizen suit for those same violations. 42 U.S.C. § 300j-8(b)(1)(B). Thus, a citizen suit does not constitute a usurpation of EPA's emergency powers.

The district court in *Concerned Pastors* exercised its equitable discretion under the Act to order door-to-door delivery of bottled water, notwithstanding the provision for EPA's emergency powers. *See* 844 F.3d at 549-50. Further, the Clean Water Act contains a similar "emergency powers" provision for EPA to address "imminent and substantial endangerment." 33 U.S.C. § 1364(a). Despite that provision, as discussed above, the First, Fourth, and Ninth Circuits have held that courts retain equitable authority under the citizen suit provision to order remedies beyond mere "enforcement" of statutory and regulatory requirements. Plaintiffs here do not seek "EPA remedies." City MTD 30. They seek equitable remedies available to citizen plaintiffs under Congress's grant of power to award such relief.

United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968 (2d Cir. 1984), is inapposite. *See* City MTD 29-30. In *Hooker*, plaintiff groups sought to intervene in an action brought by the United States under the emergency powers provision of the Act. 749 F.2d at 969-71; *see* 42 U.S.C. § 300i. In

affirming the district court's denial of intervention as of right under Federal Rule of Civil Procedure 24(a)(2), the Second Circuit explained that there is a high bar for intervention in such emergency actions, which "are not suits to enforce established regulatory standards." 749 F.2d at 988. By contrast, the groups *would* have been permitted to intervene in an EPA action to enforce the Act's requirements. *See id.* at 981. Here, Plaintiffs seek to enforce the Act's requirements, and do so through their own, properly commenced citizen suit. *Hooker* does not bear on what remedies Plaintiffs may seek.

E. It is premature to preclude relief that may be warranted after additional factual development

Where a "motion to strike requires further development of the factual record, the Court should deny it." *McInerney v. Moyer Lumber & Hardware, Inc.*, 244 F. Supp. 2d 393, 402 (E.D. Pa. 2002) (denying motion to strike a punitive-damages request that was based on a company's size, where relevant facts did not yet exist in the record). "[A]ny injunction a court issues must be commensurate with the wrong it is crafted to remedy," *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 369 F.3d 293, 307 (3d Cir. 2004), and what the extent of ongoing harm from the City's violations will be at the close of litigation is still unknown.

In addition, the City restates its earlier argument that Plaintiffs' request

for lead service line replacement is unlawful under the Rule, 40 C.F.R. § 141.84(d), because the service lines are privately owned. *See supra* Argument II. But the question of ownership must also await development of the evidence of record, and it is improper to strike a request for permanent injunctive relief before a final merits determination is made "at the end of litigation." *Singleton v. Medearis*, No. 09-CV-1423, 2009 WL 3497773, at *7 (E.D. Pa. Oct. 28, 2009); *see Aoki v. Benihana, Inc.*, 839 F. Supp. 2d 759, 767 (D. Del. 2012).

IV. A stay and abstention are not warranted

The City cites no legal authority for its argument that the Court should abstain and dismiss or stay this case. Instead, it references only a prior brief. *See* City MTD 39. If the City is permitted to rely on its prior briefing of a motion no longer pending, Plaintiffs likewise incorporate by reference a previously submitted brief. *See* Pls.' Opp'n to City Defs.' Mot. to Dismiss the First Am. Compl. at 25-40, ECF No. 135. Plaintiffs also briefly respond to each of the City's arguments below.

First, the City asserts that Plaintiffs' allegations are "almost entirely in the past." City MTD 40. But the City's long history of past violations is not a basis for abstention. The City cites no authority to support its argument that the Court should abstain from adjudicating long-standing violations, and no such authority exists. *See also Student Pub. Interest Research Grp. of N.J., Inc. v.*

Ga.-Pac. Corp., 615 F. Supp. 1419, 1426 (D.N.J. 1985) ("The nature and extent of past violations are good indicators of a defendant's future behavior.").

Second, the City asserts that Plaintiffs' non-corrosion-control claims are "extraordinarily minor." City MTD 40. But the City cites no authority establishing that supposedly "minor" claims warrant abstention. And, again, no such authority exists. Furthermore, the centrality of the City's corrosion control violations does not mean that its other violations are insignificant. Sampling-related violations (Claims One, Two, and Three) have likely caused the City routinely to underreport the true levels of lead in its drinking water. *See* SAC ¶¶ 109, 237. Violations relating to lead service lines (Claims Six and Seven) mean that the City has not been replacing lines on the schedule EPA determined was necessary "to ensure that public health will be adequately protected," 56 Fed. Reg. at 26,507. And violations of public education requirements (Claim Five) have reduced the likelihood that residents "will take some action to reduce [their] exposure" to lead in their drinking water. *Id*. at 26,501. These consequences are hardly trivial. *Contra* City MTD 39-40.

Third, the City argues that any judicial relief would interfere with the existing administrative consent orders and "DEP's day-to-day work."[15] City

[15] Rather than interfering with NJDEP's enforcement activities, the Court's involvement appears to have prompted some of those activities. For example,

MTD 40 (emphasis omitted). But the Act's citizen suit provision expressly empowers federal courts to enforce any violation of the Act absent diligent prosecution by the federal or state government of "a civil action in a court of the United States to require compliance." 42 U.S.C. § 300j-8(b)(1)(B). The SCAO and NJDEP's daily work come nowhere close to meeting this bar.

In addition, even without a citizen suit provision weighing heavily against abstention, the Supreme Court and Third Circuit have held that abstention is inappropriate unless administrative procedures allow plaintiffs to "trigger and participate in" the relevant agency process. *Rosado v. Wyman*, 397 U.S. 397, 406 (1970); *accord Cheyney State Coll. Faculty v. Hufstedler*, 703 F.2d 732, 737 (3d Cir. 1983). Here, Plaintiffs had no opportunity for involvement in the negotiations leading to the SCAO; nor does NJDEP allow Plaintiffs to participate in its day-to-day oversight over Newark. It would be error for the Court to abstain under these circumstances.

Furthermore, abstention would be particularly inapposite here, where the State itself shares culpability for Newark's lead crisis by blatantly violating its own duties under the Rule. *See Am. Lung Ass'n of N.J. v. Kean*, 871 F.2d 319,

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the original Compliance Order and Agreement was finalized less than two weeks before the State filed its first motion to dismiss. *Compare* ECF No. 15-6 at 17, *with* ECF No. 15-1. And the SCAO was finalized on the very day that the City filed its opposition to Plaintiffs' motion for a preliminary injunction. *Compare* ECF No. 180-17 at 21, *with* ECF No. 179.

328 n.7 (3d Cir. 1989) (concluding that, where an agency was itself a defendant, deferring to agency's judgment "would effectively defeat" the statutory provisions "that allow for judicial oversight of agency action (or inaction)"); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981) (similar); SAC ¶¶ 279-84, 303-04 (alleging that the State is in continuing violation of its duty to designate water quality parameters for Newark—a duty that the Rule required the State to complete over two decades ago, in 1998), and has displayed alarming ignorance of the governing law, *see supra* note 8.

Where a federal statute "provides for citizen suits except under specific enumerated circumstances, none of which apply," abstention would amount to "an end run around" the Act, except in "truly . . . exception[al]" cases. *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 694-95 (3d Cir. 2011) (internal quotation marks omitted); *accord Interfaith Cmty. Org. Inc. v. PPG Indus., Inc.*, 702 F. Supp. 2d 295, 311 (D.N.J. 2010); *see also Rotkiske*, 2019 WL 6703563, at *4 (cautioning that courts may not enlarge statutes by reading in provisions that do not exist). Courts have routinely adjudicated citizen suits notwithstanding the concurrent involvement of regulating agencies and the simultaneous existence of administrative consent orders. *See* Argument I.C.1 (citing cases). There are no truly exceptional circumstances that warrant abstention here.

CONCLUSION

For the foregoing reasons, the Could should deny the City's motion.

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Respectfully submitted,

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