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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 DEFENDANT McCABE'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

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INTRODUCTION

Newark's years-long drinking water crisis continues. Lead levels remain dangerously high at residents' taps, with the 90th percentile level at more than double the federal lead action level. Pls.' Second Am. Compl. ¶ 12, ECF No. 281 (SAC) (37 parts per billion as of October 24, 2019). Elevated levels of lead in drinking water are a significant source of lead exposure. *Id.* ¶¶ 77-80. Lead is well understood to damage the human brain and nervous system, and is particularly hazardous to fetuses, babies, and young children. *See id.* ¶¶ 65-71. The adverse health effects of lead are cumulative, and past exposure may cause harm years later. *Id.* ¶ 72.

In the absence of an effective filter education program, long urged by Plaintiffs to make sure residents know how to install, use, and maintain their water filters, the City's program to provide water filters has failed to protect many residents. SAC ¶¶ 10, 27, 157, 165-66, 171-172. City consultant CDM Smith and the U.S. Environmental Protection Agency (EPA) report that a full 25 percent of the point-of-use filters the City recently analyzed for efficacy were excluded from the study because they were improperly installed or maintained—just as Plaintiffs had warned ten months ago. *See* Letter from Lopez to McCabe and Baraka 2 (Nov. 22, 2019), ECF No. 294-1 (EPA Letter);

SAC ¶ 171.[1] This Court is empowered to order relief against all Defendants to mitigate the ongoing harm to the City's residents—particularly pregnant women and children—stemming from years of violations of the Lead and Copper Rule and residents' resulting exposure to sky-high lead levels.

Under the federal Safe Drinking Water Act (the Act) and the Lead and Copper Rule implementing the Act (the Rule), Defendant McCabe (the Commissioner) shares responsibility with Defendants City of Newark, Baraka, Newark Department of Water and Sewer Utilities, and Adeem (City Defendants) for ensuring optimal corrosion control treatment of Newark's water to prevent lead contamination. The Commissioner acknowledges that her Department "was *required* to designate water quality control parameters by July 1, 1998" under the Rule. Br. in Supp. of Comm'r's Mot. to Dismiss Second Am. Compl., ECF No. 286-1 (State MTD), at 2 (emphasis added) (citing 40 C.F.R. § 141.81(d)(6)). These parameters are essential for assessing and maintaining optimal corrosion control treatment. But the Commissioner

[1] CDM Smith's finding that 25 percent of filters examined had been misused was made after Plaintiffs filed their Second Amended Complaint. Plaintiffs do not rely on this fact for purposes of the instant motion, but note it as background. The Second Amended Complaint already includes allegations regarding the harm from widespread filter misuse; CDM Smith's findings confirm those allegations.

and her predecessors failed to do so, SAC ¶¶ 279-84, contributing to the crisis. Failure to meet this uncontested obligation underlies Plaintiffs' claim against the Commissioner.[2]

The Commissioner argues first that she is categorically immune from suit. But binding legal precedent permits a citizen suit against a state regulator like the Commissioner where she has violated a regulation's clear command and where a statute's citizen-suit provision does not distinguish between a state regulator and other persons who violate the Act.

She further contends that her ongoing liability for failing to designate optimal water quality control parameters has been extinguished because Newark's exceedance of the lead action level triggered a mandatory new corrosion-control schedule—one that defers her duty to designate those parameters until a future date. The Commissioner misreads the plain language of the Rule. As Plaintiffs explain below, the process the Commissioner claims she must now follow applies only to water systems where the infrastructure adds no detectable amount of lead to drinking water, an exemption that cannot

[2] While Plaintiffs name the Commissioner for purposes of this lawsuit, the Rule's obligations are written to bind "the State," which all parties understand to mean the New Jersey Department of Environmental Protection headed by the Commissioner.

apply to Newark. Nor do the Commissioner's self-serving consent agreements with the City insulate her (or City Defendants) from liability, just as such orders would not bar this citizen suit in the first instance. *See* 42 U.S.C. § 300j-8(b)(1)(B) (providing that only a diligently prosecuted suit in federal court for the same violations can preclude a citizen suit).

The Court may compel the Commissioner to fulfill her duty to designate optimal water quality control parameters for Newark—a duty now more than two decades overdue—even if she cannot do so right away. The Court may also exercise its broad equitable powers to fashion relief to mitigate the enduring injury caused by the Commissioner's and the City's violations. The Commissioner's continued failure to designate optimal water quality control parameters, coupled with the City's breaches of its separate obligations to operate optimal corrosion control, has harmed—and continues to harm—Newark residents. Finally, the scope of equitable relief and questions of how the Court can tailor that relief can be addressed at trial based on an updated evidentiary record. The Commissioner's motion to dismiss—an attempt to escape any responsibility following decades of violating the Rule—should be denied.

STATUTORY AND REGULATORY BACKGROUND

The Safe Drinking Water Act contains a citizen-suit provision that authorizes suit by "any person," "against any person," for any "violation of any requirement prescribed by or under [the Act]," with 60 days' notice. 42 U.S.C. § 300j-8(a)(1). The word "person" expressly includes "officers . . . of any . . . State," *id.* § 300f(12), and "any . . . governmental instrumentality or agency," *id.* § 300j-8(a)(1). The Rule sets forth "requirement[s] prescribed . . . under" the Act, *id.*, since it is "the national primary drinking water regulation[] for lead and copper," 40 C.F.R. § 141.80(a)(1), promulgated pursuant to the Act, 42 U.S.C. § 300g-1(b)(1)(B). The Commissioner's violations of the Rule are thus actionable under the plain language of the Act's citizen-suit provision.

At its core, the Rule requires water systems to "install and operate optimal corrosion control treatment as defined in § 141.2." 40 C.F.R. § 141.80(d)(1). To help large water systems[3] achieve compliance with the optimal-treatment mandate in § 141.80(d)(1), § 141.81 contains two explicit

[3] The City of Newark's water system is a large system because it serves more than 50,000 people. SAC ¶ 29 (citing 40 C.F.R. §§ 141.2, 141.81(a)(1)).

mandates directed at states.[4] First, by January 1, 1995, the Rule required states to designate "optimal corrosion control treatment(s)" for large systems. 40 C.F.R. § 141.81(d)(3).[5] Second, by July 1, 1998, the Rule required states to designate "optimal water quality control parameters" for the same systems. *Id.* § 141.81(d)(6).[6] The Rule prioritizes careful analysis and proper designation of water quality parameters to protect a water system's users from lead exposure. *See, e.g.*, Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26,460 (June 7, 1991) (explaining that "the corrosivity of water to lead is influenced by water quality parameters," *id.* at 26,466, and that water quality parameter sampling is "necessary to determine the effectiveness of corrosion control treatment and to

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[4] Although § 141.81 identifies three pathways through which a large system may achieve compliance with the optimal-treatment mandate—subsections (b)(2), (b)(3) and (d)—only one pathway is applicable in this case: the seven-step treatment process required by § 141.81(d). The two state mandates described below arise under that provision. *See also infra* Part II.B.2.

[5] Optimal corrosion control treatment must "minimize[] the lead . . . concentrations at users' taps while insuring that the treatment does not cause the water system to violate any national primary drinking water regulations." *See* 40 C.F.R. § 141.2.

[6] Optimal water quality control 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* 40 C.F.R. §§ 141.82(f), 141.87(b)-(d); SAC ¶ 44.

determine whether additional adjustments in treatment are necessary or feasible," *id.* at 26,527).

As the Commissioner concedes, State MTD 2, she was required to satisfy the steps and schedule set forth in 40 C.F.R. § 141.81(d). But the Commissioner now purports to be bound by the process in another part of the Rule that is inapplicable here. State MTD 2, 4-9, 26-30 (relying on 40 C.F.R. § 141.81(b)(3)(v), (e)). That process applies only to water systems that have qualified for a narrow exception to the ordinary steps for corrosion control treatment required by § 141.81(d), because they demonstrated *before* going through that process that the tap water in their systems at the 90th percentile is effectively the same as their highest source water lead level. Newark is not such a system. As discussed *infra* Part II.B.2, since Newark did not qualify for that exception, the provision relied upon by the Commissioner is inapposite. In any event, the Rule nowhere provides that the requirements of that misapplied provision—or any other requirements—supersede a state's continuing obligation under 40 C.F.R. § 141.81(d)(6) to have long ago designated optimal water quality control parameters.

FACTUAL AND PROCEDURAL BACKGROUND

The Rule required the Commissioner to designate optimal water quality control parameters by July 1, 1998. SAC ¶¶ 44, 279-80 (citing 40 C.F.R. §§ 141.81(d)(6), 141.82(f)). Any such determination must have been in writing and supplied to City Defendants. *Id.* ¶ 281 (citing 40 C.F.R. § 141.82(f)). Neither the Commissioner nor City Defendants have any record of a designation. *Id.* ¶¶ 113, 283. In fact, the Commissioner asked City Defendants for evidence of a designation as early as 2015; City Defendants replied that they "do not have any documentation" of any designation. *Id.* ¶ 113.[7]

This Court is already aware of the long history behind Newark's enduring lead crisis; a brief summary follows. In 2016, Newark's public schools began to report extremely high levels of lead at their taps and fountains *Id.* ¶¶ 4, 114. Later that year, the Commissioner ordered City Defendants to increase the frequency of residential drinking-water sampling by moving from a three-year monitoring period to a six-month monitoring period. *Id.* ¶ 118. The new sampling regime quickly revealed widespread, severe lead contamination in Newark's drinking water. In the first half of 2017, the 90th-

[7] Without a record of such designation, Defendants could not fulfill the Rule's obligations to track compliance with water quality parameters and thus optimal corrosion control treatment. *See* 40 C.F.R. §§ 141.82(g),141.87(d).

percentile result was 27 parts per billion, almost twice the federal action level of 15 parts per billion set by EPA. *Id.* ¶ 121. These levels have remained extremely high, well exceeding the Rule's lead action level for every monitoring period since. *Id.* ¶¶ 125, 128, 162, 186. Lead concentrations at individual taps have been reported at hundreds, and even thousands, of parts per billion in first-draw sampling. *Id.* ¶¶ 7, 12. Sequential sampling—which captures lead levels in the plumbing upstream from a residence's tap—has found lead concentrations as high as 399 parts per billion. *Id.* ¶ 145. The City's consultants have confirmed that the City's corrosion control treatment has failed, *id.* ¶¶ 206, 216-17, and the State likewise found, beginning with a notice in July 2017, that the City was not operating optimal corrosion control treatment, *id.* ¶ 215. As a result, Newark residents have endured years of exposure to dangerously high lead levels in their drinking water, up through the most recently completed monitoring period. *Id.* ¶ 12.

STANDARD OF REVIEW

In reviewing a motion to dismiss, courts must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Orange v. Starion Energy PA,*

Inc., 711 F. App'x 681, 682 (3d Cir. 2017) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)).[8] While a claim for relief must be "plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), allegations may not be excluded as conclusory unless they are no more than "formulaic recitation[s] of the elements of a . . . claim." *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 789 (3d Cir. 2016) (ellipsis in original) (quoting *Iqbal*, 556 U.S. at 681). "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." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. The Commissioner is not immune from Safe Drinking Water Act citizen suits

The Commissioner is properly named as a defendant in this citizen suit. The Commissioner has had a legal duty to designate optimal water quality control parameters for Newark's water system since 1998. 40 C.F.R. §§ 141.81(d)(6), 141.82(f). Neither the Commissioner nor her predecessors

[8] Although the Commissioner concedes that this Court should look only at the allegations in the pleadings, State MTD 11, her motion to dismiss frequently resembles a motion for summary judgment, replete with factual assertions nowhere to be found in the pleadings. *See, e.g.*, *id.* at 3, 4 & n.4.

have fulfilled this obligation. SAC ¶¶ 279-84. The Commissioner has therefore "[f]ail[ed] to comply with the applicable requirements" of the Rule, 40 C.F.R. § 141.80(k), which constitutes a violation of a "requirement prescribed . . . under" the Safe Drinking Water Act. 42 U.S.C. § 300j-8(a)(1).

The Commissioner contends that she "cannot be 'in violation' of any requirements under the [Rule]," State MTD 14 (quoting 42 U.S.C. § 300j-8(a)(1)), either because the Rule imposes no requirements on her, or because the word "violation" does not apply to the Commissioner's failure to abide by federal law. Both arguments are wrong.

A. The Rule creates binding obligations for the Commissioner

The plain language of the Rule refutes the Commissioner's argument that she is not bound by the Rule's requirements to make designations. In interpreting federal regulations, courts "look to well-established principles of statutory interpretation." *Bonkowski v. Oberg Indus., Inc.*, 787 F.3d 190, 199 (3d Cir. 2015). The starting point for interpretation is "the language" itself, construed in accordance with its "ordinary or natural meaning." *Id.* (citations omitted).

The Rule clearly states that any "[f]ailure to comply" with its requirements "shall constitute a violation" of the Rule. 40 C.F.R. § 141.80(k).

The Rule draws no distinction between states' independent obligation to designate optimal water quality control parameters, and water systems' obligation to implement those designations. Both states' and water systems' duties are expressed with the mandatory "shall," and they appear side-by-side in the Rule. *Compare, e.g.*, *id.* § 141.81(d)(2) ("The system shall complete corrosion control studies . . . by July 1, 1994."), *with id.* § 141.81(d)(6) ("The State shall . . . designate optimal water quality control parameters . . . by July 1, 1998."); *see also Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty . . . .").

The preamble to the Rule confirms that states are required to designate parameters. *See, e.g.*, 56 Fed. Reg. at 26,481 (describing steps that water systems and state agencies are "required" to take); *see also Conn. Gen. Life Ins. Co. v. Comm'r*, 177 F.3d 136, 145 (3d Cir. 1999) (noting that the preamble to a regulation may be used as an aid in determining the meaning of a regulation). Indeed, the Commissioner herself concedes that "[t]he *State* was *required* to designate water quality control parameters by July 1, 1998," citing the Rule. State MTD 2 (emphasis added).

The Commissioner attempts to muddy this clear requirement by arguing that the reach of the Rule is limited to the water systems it oversees. State

MTD 13-14. The Commissioner argues that, since the definition of drinking-water regulations in the Act provides that they "appl[y] to public water systems," such regulations cannot also apply to states. *Id.* (quoting 42 U.S.C. § 300f(1)(A)). But the Rule clearly does apply to states, since it creates specific mandates for them. *E.g.*, 40 C.F.R. § 141.81(d)(3), (d)(6), (e)(4), (e)(7). The Rule "applies to public water systems" in that it governs provision of drinking water to the public from systems of a certain size. *See* 42 U.S.C. § 300f(4) (defining "public water system" as "a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals"). That the Rule requires a role for states in ensuring the provision of safe water is perfectly consistent with the notion that the Rule applies to public water systems. The Commissioner's contrary reading cannot be reconciled with the many express ("The State *shall* . . . .) obligations contained in § 141.81. Nor does the Commissioner contend that the Rule, as explicitly written, exceeds Congress's delegation of power to EPA.

Further, this would be an odd place for Congress to hide a blanket exemption from drinking-water regulations for states. *See Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018) ("A definition does not

provide an exception, but instead gives meaning to a term—and Congress well knows the difference between those two functions."). In any case, Congress has not done so; the cited provision does not create any restrictions, but merely identifies what is meant in the Act by the term "national primary drinking water regulations." 42 U.S.C. § 300f(1)(A). "The statute says what it says—or perhaps better put here, does not say what it does not say." *Cyan*, 138 S. Ct. at 1069. In short, notwithstanding her assertion that "[t]he LCR only prescribes binding requirements on water systems," State MTD 13, the Commissioner got it right eleven pages earlier when she acknowledged the Rule "required" the State to designate water quality parameters, *id*. at 2.

Treating the requirements for states as discretionary and unenforceable would also defeat a primary purpose of Congress in enacting the Act. The legislative history of the Act confirms that one of the main problems Congress sought to address was the lack of state action to protect the public from unsafe drinking water, which was resulting in widespread tap water contamination. *See, e.g.*, H.R. Rep. No. 93-1185 at 5-7 (1974) (noting the lack of state inspections, technical assistance, enforceable state standards, and enforcement).

B. The word "violation" encompasses the Commissioner's failures under the Rule and the Act

1. The plain language of the Act makes state officials like the Commissioner subject to suit

The Act's citizen-suit provision explicitly contemplates that states are proper defendants. Under the provision, "any person may commence a civil action . . . against *any person* (including (A) the United States, and (B) any other governmental instrumentality or agency *to the extent permitted by the eleventh amendment to the Constitution*) who is alleged to be in violation of any requirement prescribed by or under this subchapter . . . ." 42 U.S.C. § 300j-8(a) (emphasis added). The Eleventh Amendment applies to states, but not to "political subdivisions of a state, such as counties and municipalities." *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 813 (3d Cir. 1991) (Alito, J.). "By including the terms 'any person' and 'to the extent permitted by the Eleventh Amendment,' . . . Congress clearly meant to allow private citizens to use this provision as a means of private enforcement against state officials within the limits of the Eleventh Amendment." *Clean Air Council v. Mallory*, 226 F. Supp. 2d 705, 714 (E.D. Pa. 2002) (interpreting Clean Air Act citizen-suit provision); *accord Am. Lung Ass'n of N.J. v. Kean*, 871 F.2d 319, 324 (3d Cir. 1989) (interpreting Clean Air Act citizen-suit provision and explaining that

"the statute makes it clear that state agencies can be defendants in a citizens suit"); *see also Strahan v. Coxe*, 127 F.3d 155, 166 (1st Cir. 1997) ("The very fact that Congress has limited its authorization to suits allowed by the Eleventh Amendment reinforces the conclusion that Congress clearly envisioned that a citizen could seek an injunction against a state's violations of the [Endangered Species Act].").

2. The Commissioner has violated her own substantive obligations under the Act and the Rule

The Commissioner misreads Plaintiffs' claim by asserting that Plaintiffs only "name the Commissioner as a Defendant in her role as the regulator of the Newark water system." State MTD 13. In fact, Plaintiffs allege that the Commissioner has failed to meet *her own affirmative obligations* under the Act. While the Commissioner may "administer[]" some portions of the Act with regard to New Jersey's water systems, *id.* at 14, the obligation at issue in this suit places her in the same position as any other entity subject to citizen enforcement of the Act. 40 C.F.R. § 141.81(d). It is not unusual for a government entity to be considered a regulator under certain circumstances but a regulated entity under others. *See Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1079 (9th Cir. 2001) (explaining that although the Fish and Wildlife Service "could not be sued for maladministration of the [Endangered

Species Act] under 16 U.S.C. § 1540(g)(1)(A), . . . citizen suits are a permissible means to enforce the substantive provisions of the ESA against regulated parties—including government agencies like the [Service] in its role as the action agency"). The Commissioner's continuing violation of her designation obligation is therefore a "violation" of the Act in the most straightforward sense of the term.

3. The Third Circuit authorizes citizen suits against regulators

Even if the Commissioner's obligation implicates her role as regulator, the Third Circuit authorizes citizen suits against state officials who fail to comply with requirements that directly apply to them in their capacity as regulators. In *American Lung Ass'n of New Jersey v. Kean*, the Third Circuit held that a state agency may be subject to a citizen suit under a similar provision of the Clean Air Act. 871 F.2d at 324-25. The citizen-suit provision at issue there provided for suit against anyone in violation of "an emission standard or limitation." 42 U.S.C. § 7604(a)(1). "Emission standard or limitation," in turn, included New Jersey's obligations to take regulatory action, *Kean*, 871 F.2d at 325, the same type of duty the Commissioner claims is at issue here, State MTD 23. The Court in *Kean* explicitly rejected the argument that New Jersey could not be subject to a citizen suit "in its capacity as a *regulator*, rather than

in its capacity as polluter." *Kean*, 871 F.2d at 324. The Court found that the plain language controlled: "Where the language of the statute is clear, only 'the most extraordinary showing of contrary intentions' justif[ies] altering the plain meaning of a statute." *Id.* at 325 (alteration in original) (quoting *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988)).

Two years later, in *Delaware Valley Citizens Council for Clean Air v. Davis*, the Third Circuit reversed the district court's dismissal of a citizen suit against Pennsylvania alleging that the state failed to impose certain "emission control measures" required by its state implementation plan. 932 F.2d 256, 267 (3d Cir. 1991). The Third Circuit reiterated that the Clean Air Act's citizen-suit provision "does allow the district courts to consider citizens suits seeking to police plan violations." *Id.* As in *Kean* and *Davis*, because the Rule imposes requirements on the Commissioner that she has not fulfilled, the Commissioner has "violated" those requirements and is subject to suit.

4. Plaintiffs' claim is consistent with *Bennett v. Spear*

The Commissioner argues that *Bennett v. Spear*, 520 U.S. 154 (1997), either overruled *Kean* sub silentio, *see* State MTD 19-20 & n.7, or else provides the controlling interpretation of the Act, *id.* at 22. In *Bennett*, the Supreme Court held that the Endangered Species Act's citizen-suit provision, 16 U.S.C.

§ 1540(g)(1)(A), permitted suits against the Secretary of the Interior to compel nondiscretionary action, but did not otherwise permit suits against the Secretary of the Interior for his conduct "implementing or enforcing the ESA." 520 U.S. at 173. But *Bennett*'s reasons for not allowing claims for violation of regulatory duties by a federal official do not apply here because federal officials and state officials are not similarly situated.

Bennett relied on three key points, none of which applies here. First, the Supreme Court explained that allowing the Secretary of the Interior to be held liable for any "violation" under the Endangered Species Act's citizen-suit provision was "simply incompatible with the existence of [16 U.S.C.] § 1540(g)(1)(C), which expressly authorizes suit against the Secretary, but only to compel him to perform a nondiscretionary duty under § 1533." 520 U.S. at 173. The non-discretionary duty provision "would be superfluous—and, worse still, its careful limitation to § 1533 would be nullified"—if the citizen-suit provision "permitted suit against the Secretary for *any* 'violation' of the ESA." *Id*. That conflict with an express statutory provision is absent in this case.

The Safe Drinking Water Act's analogous non-discretionary duty provision, which authorizes suits against the EPA Administrator based on failure to perform a non-discretionary duty, 42 U.S.C. § 300j-8(a)(2), would

not be rendered "superfluous" or "nullified" by authorizing citizen suits against the *Commissioner*, because that provision does not apply to the Commissioner in the first instance. Thus, the "cardinal principle of statutory construction" applied in *Bennett*—to "give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section"—simply does not come into play here. 520 U.S. at 173 (quoting *United States v. Menasche*, 348 U.S. 528, 538 (1955)). And again, the plain language of the Act's citizen-suit provision expressly contemplates states as proper defendants because it refers to the Eleventh Amendment, *which could apply only to states. See Clean Air Council v. Mallory*, 226 F. Supp. 2d at 714.

Second, the *Bennett* Court noted that "interpreting the term 'violation' to include any errors on the part of the Secretary in administering the ESA would effect a wholesale abrogation of the APA's 'final agency action' requirement." 520 U.S. at 174. That consequence is also absent in this case. The Administrative Procedure Act is irrelevant, and Plaintiffs' suit is not subject to that statute's restrictions, because the Commissioner is not a federal agency. *See* 5 U.S.C. § 551(1) (defining "agency" as used in the APA to cover only "authorit[ies] of the Government of the United States").

Third, under the Endangered Species Act, the existence of a "violation" triggers various administrative penalties and criminal sanctions, including imprisonment. The Supreme Court expressed concern that if the Secretary could be in "violation" of that statute, it would expose the Fish and Wildlife Service and its employees to undue penalties. *Bennett*, 520 U.S. at 173-74. That is not the case here. The Safe Drinking Water Act contains no equivalent criminal sanctions for violations of drinking water regulations. And no federal agency or other person has authority to apply civil penalties for "violations" of the Act, except against a water system that "does not comply" with drinking water standards, 42 U.S.C. § 300g-3(a) & (b)(1), or, in the case of an EPA enforcement action brought *at the request of a state*, for failure to comply with specific provisions of the Act not relevant here, *id.* § 300g-3(b)(2). Thus, there is no risk that the Commissioner may be arrested or penalized for failing to undertake her regulatory obligations under the Rule.

5. The out-of-circuit caselaw cited by the Commissioner is also inapplicable

The Commissioner also cites *Sierra Club v. Korleski*, an out-of-circuit case that relied on *Bennett* to hold that the Clean Air Act's citizen-suit provision did not permit "citizen suits against state regulators *qua* regulators."681 F.3d 342, 351 (6th Cir. 2012). But *Korleski* is also inapposite.

First, *Korleski* is contrary to the Third Circuit's decision in *American Lung Ass'n v. Kean*. In *Kean*, the Third Circuit explicitly held that a state regulator may be subject to a citizen suit. Thus, to the extent that the Clean Air Act is analogous to the Safe Drinking Water Act, the Commissioner's argument is foreclosed by binding Third Circuit precedent. *Kean* held that courts "do have jurisdiction under [the Clean Air Act] to adjudicate citizens' suits against the state in its regulatory capacity." 871 F.2d at 324-25; *see also Conservation Law Found. v. Fed. Highway Admin.*, 24 F.3d 1465, 1477 (1st Cir. 1994) (permitting suit against state defendants for drafting transportation plan allegedly in violation of the Clean Air Act); *Friends of the Earth v. Carey*, 535 F.2d 165, 178 (2d Cir. 1976) (finding "beyond challenge" court's jurisdiction over "claim that [New York] State is in default in implementing" the Clean Air Act);

Second, even without *Kean*, *Korleski*'s reasoning is distinguishable. The Sixth Circuit in *Korleski* follows *Bennett*'s logic, focusing on the use of the word "violation" in other areas of the statute and the risk that citizen suits could circumvent restrictions that otherwise protect regulatory agencies. *See* 681 F.3d at 347-49. The Sixth Circuit acknowledged that two of the three reasons in *Bennett* did not directly apply in an action against a state agency. *Id.* at 348 (noting that "the first of the three reasons cited in *Bennett* [relating to a separate

provision for suing a federal agency] does not strongly support either party here"); *id.* at 349 (reasoning in *Bennett* regarding "'abrogation of the [Administrative Procedure Act]'s final agency action requirement[]' . . . does not itself apply here, since a state agency's actions are not reviewable under the APA." (quoting *Bennett*, 520 U.S. at 174)). Nonetheless, relying on the final reason, the Sixth Circuit noted that the Clean Air Act, like the Endangered Species Act, allows the federal government to assess large civil fines for "violations" based solely on an administrative hearing and creates criminal liability for knowing "violations." *Id.* at 349 (citing 42 U.S.C. § 7413(c)(1), (d)(1)(A)). The Safe Drinking Water Act, however, creates no such risk for state agencies. As discussed above, except for specific types of "violations" applicable only to public water systems and not at issue here, the federal government may not use the Act to impose civil or criminal penalties for "violations" against state agencies. 42 U.S.C. § 300g-3(b).

The *Korleski* court also stressed that, although the APA does not apply to state agency actions, allowing citizen suits would frustrate the Clean Air Act's requirement that administrative enforcement actions seeking similar relief require an eighteen-month delay. 681 F.3d at 350. There is no equivalent in the Safe Drinking Water Act. The Commissioner instead argues that the presence

of an EPA administrative enforcement mechanism to address a State's failure to designate water quality parameters indicates that citizens may not sue to achieve the same relief. State MTD 24 (citing 40 C.F.R. § 142.19). But the Act's citizen-suit provision explicitly allows a citizen suit to go forward in the face of federal or state administrative action, barring suit only if the government files and diligently prosecutes a civil action for the same violations in federal court. 42 U.S.C. § 300j-8(b)(1)(B). As the Third Circuit has long recognized, citizen suits and administrative enforcement are meant to operate in tandem. *See Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979) ("Congress intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternate enforcement mechanism.").[9]

Finally, *Legal Environmental Action Foundation v. Pegues*, 717 F. Supp. 784 (M.D. Ala. 1989), cannot support the Commissioner's arguments because it arises in a different context. In *Pegues*, the plaintiff sought to block the State of Alabama from issuing a discharge permit that allegedly failed to comply with the Clean Water Act. *Id.* at 788. The plaintiff did not argue that Alabama

[9] The distinction drawn by the Sixth Circuit between "violation" and "deficiency" in the Clean Air Act, *Korleski*, 681 F.3d at 352, is irrelevant here because the Safe Drinking Water Act has no equivalent to "deficiency."

failed to fulfill a regulatory requirement that directly applied to the State, as Plaintiffs do here. Moreover, the analysis in *Pegues* is limited because the plaintiffs in that case never identified a cause of action; the district court gave them the courtesy of briefly considering each possible cause of action before dismissing the case. *See id.* at 787 ("Although plaintiff sues under [33 U.S.C.] § 1370, the Court notes that this section does not specifically authorize suits by private citizens."). The *Pegues* court simply observed that the only provisions that might have applied are typically used against polluters for permit violations and that it found no reason to deviate from this approach. *Id.* at 787-88. *Pegues* therefore has no precedential or persuasive authority in this case.

6. *Kean* remains good law in the Third Circuit

The Commissioner asks this Court to ignore the Third Circuit's decision in *Kean*, but none of her reasons are persuasive. *Kean* provides precedential authority in this case and remains good law.

First, the Commissioner points to language in *Korleski*, which dismissed *Kean* as having "merely assumed, without discussing, that a state failure to regulate is a 'violation' . . . under the Act." State MTD 19 (quoting *Korleski*, 681 F.3d at 352). But the Third Circuit deserves more credit. First, *Kean* reviewed a decision by the District of New Jersey finding that "New Jersey

ha[d] *violated* [the regulation] by failing to take the steps described earlier," and that the State was therefore liable under the Clean Air Act. *Am. Lung Ass'n of N.J. v. Kean*, 670 F. Supp. 1285, 1291-92 (D.N.J. 1987) (emphasis added). The Third Circuit acknowledged this finding in upholding it. *Kean*, 871 F.2d at 324 ("Since NJDEP is a government agency in violation of an emission standard, the district court concluded that the language of [the Clean Air Act] 'clearly provides this court with jurisdiction . . . .'"). Second, the Third Circuit itself considered the question of whether failure to regulate constitutes a "violation," and it rejected the argument that "the Clean Air Act does not give the district court jurisdiction to entertain suits by citizens against the state in its capacity *as regulator*, rather than its capacity as polluter." *Id.* at 324-25.

The Commissioner's additional arguments for distinguishing *Kean* fare no better. She asserts that *Kean* construed the Clean Air Act, which "is not analogous to the [Safe Drinking Water Act]," State MTD 20, because it "does not contain . . . language . . . that limits the primary drinking water regulations' applicability to public water systems," *id.* at 21. But that reasoning is contradicted by her reliance on *Korleski*, which is itself a Clean Air Act case, and *Bennett*, an Endangered Species Act case. Her follow-on argument that *Kean* "explicitly limited its ruling" to the particular language of the Clean Air

Act, *id.*, misreads the Third Circuit's opinion: the *Kean* court declined to follow a D.C. Circuit case, *Citizens Ass'n of Georgetown v. Washington*, 535 F.2d 1318 (D.C. Cir. 1976) (per curiam), because the applicability of *that* case was limited by a subsequent amendment to the Clean Air Act. *Kean*, 871 F.2d at 324 ("*Georgetown* is a pre-1977 case, construing the pre-1977 statute . . . . The D.C. case thus does not speak to the jurisdictional issue in this case."). And in any event, if *Korleski* provides persuasive authority in interpreting the Act, *Kean* provides precedential authority. *See Vujosevic v. Rafferty*, 844 F.2d 1023, 1030 n.4 (3d Cir. 1988) ("It is, of course, patent that a district court does not have the discretion to disregard controlling precedent simply because it disagrees with the reasoning behind such precedent.").

Finally, the Commissioner implies that *Bennett* abrogated *Kean*. *See* State MTD 19-20 & n.7. But district courts in this Circuit have continued to permit suits against state officials for violating their regulatory duties, confirming that *Kean* remains good law in this Circuit. *See Clean Air Council, Inc. v. McGinty*, No. 06-00741, 2006 WL 2715205, at *4 (E.D. Pa. Sept. 22, 2006) (same Clean Air Act provision allows "citizen suits seeking to police plan violations when specific measures requiring state action . . . are not undertaken by the state"); *Clean Air Council v. Mallory*, 226 F. Supp. 2d at 714 ("By including the terms

'any person' and 'to the extent permitted by the Eleventh Amendment,' this Court finds that Congress clearly meant to allow private citizens to use this provision as a means of private enforcement against state officials within the limits of the Eleventh Amendment."); *Citizens for Pa.'s Future v. Mallory*, No. CIV.A. 02-798, 2002 WL 31845880, at *12 (E.D. Pa. Dec. 18, 2002) ("[T]he Court finds that Plaintiff has properly brought a claim [against Pennsylvania] under the [Clean Air Act]'s citizen suit provision to enforce the Pennsylvania SIP[] . . . .").

7. The Act's legislative history does not support the Commissioner's claim to immunity from citizen suit

The Commissioner's appeal to legislative history is similarly unavailing. The Commissioner argues merely that the legislative history contains "no mention of actions against state regulators" and "does not indicate that Congress intended to provide a cause of action against . . . regulators." State MTD 24-25. Such "silence in the legislative history . . . cannot defeat the better reading of the text and statutory context." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018). Indeed, *Kean* considered and rejected nearly the same argument in the context of the Clean Air Act. 871 F.2d at 325 ("Where the language of the statute is clear, only the most extraordinary showing of contrary intentions justifies altering the plain meaning of a statute." (internal

quotation marks, citation, and alteration omitted)). At the same time, the Commissioner acknowledges that the legislative history creates a cause of action "against *violators* of national primary drinking water standards." State MTD 24 (emphasis added) (quoting S. Rep. No. 93-231, at 17 (1973)). This statement simply underlines the statutory language: if the Commissioner is "in violation" of the Rule, she is subject to suit under the Act. 42 U.S.C. § 300j-8(a)(1).

The Commissioner shares City Defendants' obligation to take specified actions by specified dates. *See* 40 C.F.R. § 141.81(d). The language of the Act suffices to show a cause of action for Plaintiffs' claims, and if analogous caselaw is to be used, *Kean* controls. The decisions in *Bennett*, *Korleski*, and *Pegues* turned on characteristics of their respective statutes that are not present in the Act. *Kean*, while interpreting the same statute as *Korleski*, considered aspects of the Clean Air Act that *do* correspond to the Act: the fact that "the statute makes it clear that state agencies can be defendants in a citizens suit," 871 F.2d at 324; the fact that "there is no contrary indication in the legislative history," *id.* at 325; and the fact that the statute's "explicit language . . . permit[ted] th[e] suit," *id.* And as in *Kean*, permitting citizens to sue states to make sure they fulfill their regulatory requirements advances congressional

goals embodied in the Act. *Id. Kean* is therefore the most relevant case, and its holding—simply that citizen suits should be permitted where they are authorized by the plain language of the statute—prevails here.

II. Plaintiffs have stated a claim on which relief can be granted

Plaintiffs allege the facts necessary to support their claim against the Commissioner. *Contra* State MTD 26-27 (citing *Iqbal*, 556 U.S. at 681). The Commissioner may not excuse herself from her unqualified obligations under the Rule by reference to the City's failures. *Contra id.* at 27-28. Moreover, the Commissioner's contention that she and the City are locked into an immutable process insulated from Court intervention relies on a blatant misreading of the Rule. The fact remains that the Commissioner has never designated optimal water quality control parameters for the City. Finally, regardless of the current status of the process to bring the City into compliance, the Court may require the Commissioner to remedy the effects of her past and ongoing failures to fulfill her obligations under the Rule.

A. Plaintiffs plead sufficient facts to support their claims against the Commissioner

Plaintiffs satisfy the pleading standards of *Iqbal* and *Twombly* where, as here, they allege "enough facts to state a claim to relief that is plausible on its face." *Beyer v. Borough*, 428 F. App'x 149, 152 (3d Cir. 2011) (quoting *Twombly*,

550 U.S. at 570). Plaintiffs' Second Amended Complaint recites ample facts to satisfy this standard.

Plaintiffs specifically allege that the Commissioner failed to designate optimal water quality parameters for Newark's water system, as required by the Rule. SAC ¶¶ 44-46 (setting out the Commissioner's obligation); *id.* ¶¶ 112-13 (confirming no designation of optimal water quality parameters); *id.* ¶¶ 279-84 (describing basis for Plaintiffs' allegation). As the Complaint explains, the Rule sets forth mandatory corrosion control treatment steps and deadlines for large water systems and states. *Id.* ¶¶ 44-46 (citing 40 C.F.R. §§ 141.81(d), 141.82(f)). The Commissioner failed to "designate optimal water quality parameters" that would ensure the effectiveness of the system's corrosion control treatment by July 1, 1998, and to notify the system in writing of her designation and explain its basis. *Id.* ¶¶ 279-84 (citing 40 C.F.R. §§ 141.81(d)(6), 141.82(f)).

Plaintiffs set out specific factual allegations in support of these claims: that the Commissioner possesses no records documenting any designation of water quality parameters, that the City of Newark has informed the Commissioner that it does not have any documentation of any designation of water quality parameters, and that the Commissioner wrote to the City

confirming that the City does not have optimal water quality parameters for optimal corrosion control. *Id.* ¶¶ 112-13, 283. These allegations, far from being "conclusory assertion[s]," State MTD 27, "allow[] the [C]ourt to draw the reasonable inference that the [Commissioner] is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

B. Plaintiffs have stated a claim under the Lead and Copper Rule that is not displaced by administrative actions

The Commissioner does not deny that her office has never, to this day, designated optimal water quality control parameters for the Newark water system. Instead, the Commissioner argues that, because of the Newark water system's June 2017 action level exceedance, she is not required to designate water quality parameters "at this time." *See* State MTD 26-30. In doing so, the Commissioner mischaracterizes the Rule's requirements, and invites the Court to find, ironically, that the water system's lead action level *exceedances* somehow excuse the Commissioner from decades-long, continuing noncompliance with the Rule.

1. The Commissioner's obligations are ongoing

The plain language of the Rule, which unambiguously sets out the Commissioner's independent legal obligations, is at odds with the Commissioner's argument that these obligations do not apply "at this time."

Nowhere in the text of the Rule does a water system's subsequent lead action level exceedance displace a state's continuing obligations to make designations under the Rule. *See generally* 40 C.F.R. §§ 141.81, 141.82.

The regulatory history of the Rule confirms the importance and inflexibility of the July 1, 1998, deadline. *See id.* § 141.81(d)(6). EPA explains in the preamble to the Rule that "to assure timely implementation of treatment," it is including a "schedule for evaluation and implementation of treatment" in the Rule itself, rather than allowing states to establish those schedules. 56 Fed. Reg. at 26,488. Indeed, EPA finds that "the success of this rule depends largely on the States' timely review and approval of . . . operating parameters for [water] systems." *Id.* at 26,535. And a water system's compliance with designated water quality control parameters must be tracked every six months as a measure of its operation of optimal corrosion control treatment. 40 C.F.R. §§ 141.82(g), 141.87(d). There is no basis in the Rule for the Commissioner to relieve herself of her ongoing duty to designate optimal water quality control parameters.

2. The Commissioner relies on an inapplicable section of the Rule to excuse noncompliance

The Commissioner argues throughout her brief that the City's recent lead action level exceedances compel her to adopt a new schedule—prescribed,

she says, by the Rule itself—for compliance with the Rule. This mandate, she contends, exonerates her from past and ongoing violations of the Rule's unambiguous deadline to designate optimal water quality control parameters, and leaves no room for court intervention. *See* State MTD 2-9, 26-30 (citing, inter alia, 40 C.F.R. § 141.81(b)(3)(v)). But the portion of the Rule relied on by the Commissioner is, on its face, inapplicable to the City and cannot be used as an agency shield.

Understanding why this is so requires a deeper dive into the Rule. First, no one disputes that all Defendants were required to comply with the process set out in 40 C.F.R. § 141.81(d), which prescribes seven deadlines for large water systems to be deemed in compliance with the optimal corrosion control treatment requirement in the Rule. And, in fact, it appears that the City and the Commissioner embarked on that process, SAC ¶ 205, but never completed it. It is undisputed that the Commissioner has never performed Step 6—designation of optimal water quality control parameters—which was to have been completed by July 1, 1998. *See* 40 C.F.R. §§ 141.81(d)(6), 141.82(f).

The Rule contains a limited alternative to the usual seven-step process that does not apply here. A water system must go through that seven-step process "unless it is deemed to have optimized corrosion control under

paragraph (b)(2) or (b)(3) of this section." *Id.* § 141.81(a)(1). Those provisions, in turn, apply only to two exceptional instances.

First, under (b)(2), a system may be deemed to have optimized corrosion control if it has "demonstrate[d] to the satisfaction of the State" and the State has made the written determination that the system "has conducted activities equivalent to the corrosion control steps" otherwise required by the Rule. *Id.* § 141.81(b)(2); *see also* 65 Fed. Reg. 1950, 1958 (Jan. 12, 2000) (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]"). But even under that exception (which does not apply to Newark), the State "shall specify the water quality control parameters representing optimal corrosion control in accordance with § 141.82(f)"—precisely what the Commissioner failed to do here. 40 C.F.R. § 141.81(b)(2).

The other alternative to going through the seven-step process, (b)(3), is confined to large water systems that demonstrated that their distribution infrastructure introduced relatively low levels of lead to their tap water. *See* 40 C.F.R. § 141.81(b)(3). Specifically, to qualify for this exemption, Newark would have had to establish, for two consecutive six-month periods, that 90 percent of the system's tap-water samples were within 5 parts per billion of its

"highest *source*-water" sample. *Id.* § 141.81(b)(3) (emphasis added). The Commissioner does not argue that Newark even requested this exemption, much less attempt to establish that such a showing has been made. Instead, Newark and the Commissioner began, but failed to complete, the required seven-step process specified under § 141.81(d) to optimize corrosion control treatment. *See* SAC ¶ 205. So this narrow exemption does not apply either.

If—and only if—the Newark water system had originally qualified for the low-lead (b)(3) exception (comparing tap water to source water), then a *later* determination that the City "is no longer deemed to have optimized corrosion control *under this paragraph*" would have triggered the process set forth in 40 C.F.R. § 141.81(e) that the Commissioner now claims she must follow. *Id.* § 141.81(b)(3)(v) (emphasis added).

In other words, the exception the Commissioner tries to invoke is inapplicable because Newark was *not* a system that previously showed that its system added only relatively low amounts of lead under § 141.81(b)(3). Had Newark demonstrated that it was such a system at the time the Rule was promulgated, neither the City nor the Commissioner would have been subject to the process and the deadlines in § 141.81(d), because the City would have *already* been deemed to have optimized corrosion control without the need to

go through the seven steps. If such a system *later* fell out of optimal corrosion control, it would then need to go through—for the first time—the similar process set forth in § 141.81(e) to optimize corrosion control. *See id.* § 141.81(b)(3)(v) ("Any system triggered into corrosion control because it is no longer deemed to have optimized corrosion control under this paragraph shall implement corrosion control treatment in accordance with the deadlines in paragraph (e) of this section."); 65 Fed. Reg. at 1960 (confirming that (b)(3) systems that were never subject to the deadlines in the original seven-step process must comply with the deadlines in 40 C.F.R. § 141.81(e)). Newark is not such a system.

Of course, the Commissioner may issue administrative enforcement orders that adopt the process and deadlines contained in § 141.81(e). But she cannot claim, as she does throughout her brief, that there is no role for the Court because the Rule *requires* her to follow that process with those deadlines. Why does this matter? Because the Commissioner's discretionary consent orders alone may not be sufficient to compel the City to achieve optimal corrosion control treatment without prolonged delay, or otherwise require the City to comply with the Rule. For example, there is nothing to prevent the Commissioner from extending deadlines, which she has done before, *see, e.g.*,

Supp. Compliance Agreement and Order ¶¶ 5, 12-14, 33 (March 29, 2019), ECF No. 180-17 (SCAO), to the continued detriment of Newark's residents. As explained further below, the Court may order both relief that cements the Commissioner's current schedule (should the Court agree it is adequate) and further equitable relief to mitigate the harms from all Defendants' chronic failures to comply with the Rule.

C. The Commissioner may be subject to equitable remedies related to replacement of lead service lines

The Commissioner asks the Court to "dismiss" a "count for relief" related to the replacement of the City's lead service lines.[10] State MTD 32. As explained in more detail below, even if the Rule does not require the Commissioner to replace lead service lines, the Court has equitable discretion to order appropriate relief against the Commissioner related to that remedy and others.[11]

[10] The Commissioner's attack on Plaintiffs' Prayer for Relief does not articulate a "failure to state a claim upon which relief can be granted" under Fed. R. Civ. P. 12(b)(6). Rather, it is a premature plea to limit the equitable relief the Court may ultimately grant.

[11] The Rule *does* envision a role for the Commissioner in overseeing and expediting lead service line replacements. *See, e.g.*, 40 C.F.R. § 141.84(a), (e).

III. Plaintiffs' claim against the Commissioner is neither moot nor unripe because the Court may order relief now to address harm from violations of the Rule

The Commissioner cannot sustain the "heavy" burden of showing Plaintiffs' claim against her is moot. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (internal quotation marks omitted). 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, 397 (2012) (internal quotation marks omitted); *accord 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 [plaintiff], the case is not moot." (internal quotation marks omitted)). The ability of the court to fashion effective remedies is sufficient to overcome mootness "even if the remedies were not initially requested in the pleadings." *Isidor Paiewonsky Assocs. v. Sharp Prop.*, 998 F.2d 145, 151 (3d Cir. 1993).

This Court may order meaningful relief against the Commissioner in two ways: both by compelling her to designate optimal water quality control parameters on a particular schedule, and by providing for equitable relief to

mitigate the harm to Newark's residents stemming from her violations of the Act, as magnified by the City's failures.

A. The Court may order the Commissioner to designate optimal water quality control parameters

The Court may order the Commissioner to comply with the Rule by designating optimal water quality control parameters on a particular schedule, whether or not it is the same schedule the Commissioner claims to be following. The Commissioner purports to bind this Court to the schedule it contends is required by the Rule. State MTD 32-33. But, as discussed *supra* Part II.B.2, that schedule is of the Commissioner's own making, not compelled by the Rule. And even if the Court decides to adopt the Commissioner's current schedule as provided in the SCAO, without modification, that in itself is meaningful relief that can help ensure the schedule is actually implemented within those deadlines and not further delayed. *See Pub. Interest Research Grp. of New Jersey, Inc. v. Rice*, 774 F. Supp. 317 (D.N.J. 1991). In *Rice*, a Clean Water Act defendant had entered into an administrative "Order on Consent" with EPA, requiring defendant to complete construction of a new treatment plant on a particular schedule. *Id.* at 319. The Court issued an injunction that included an "order that defendant complete construction of the new plant according to the compliance schedule set forth in . . . the Order on Consent."

Id. at 329. So, here, the Court could cement the agreed-upon schedule through an injunction.

Nor is the Commissioner relieved of her obligations by the EPA guidance she cites, giving the State the option to require its own corrosion control schedule following lead action level exceedances. *See* State MTD 33. That guidance does not contemplate the situation here where the State itself—having failed to designate optimal water quality control parameters—shares responsibility for the water system's never having completed the process set forth by the Rule under 40 C.F.R. § 141.81(d) for installing and operating optimal corrosion control treatment.

B. The Court may order equitable remedies, beyond those required for statutory compliance, to mitigate harm from both past and ongoing violations

The Court has broad remedial options based on its traditional equitable powers. 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 under the Act or the Rule. These equitable powers are fully retained under statutes, like the Act, that authorize a court only to restrain statutory violations, without authorizing additional relief.

This principle is well established. Where a defendant's statutory violations have caused injury, courts may wield "the historic power of equity to provide complete relief in light of statutory purposes." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (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. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (internal quotation marks omitted).

The Third Circuit has embraced the Supreme Court's "expansive" view of a court's equitable powers. *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.* at 226 (quoting 21 U.S.C. § 332(a)). The court upheld an equitable remedy of restitution, which was not provided for in the statute. *Id.* at 223-26, 236. The court reaffirmed 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 (citing *Mitchell*, 361 U.S. at 291-92).

Thus, that the Act empowers this Court simply to "enforce" statutory requirements, 42 U.S.C. § 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) (rejecting motion to stay an equitable remedy of door-to-door delivery of bottled water that was not required by the Rule). Cases under the similarly worded citizen-suit provision of the Clean Water Act, *see* 33 U.S.C. § 1365(a), confirm this core tenet, requiring defendants found liable for violations under that statute to take actions they were not otherwise obligated to take under the regulatory provisions of that statute. *See United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003) (affirming 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 required by the Clean Water Act 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, once a defendant

violated the Clean Water Act, the district court had equitable authority to impose requirements to mitigate the harm caused by those violations, even if those requirements went beyond a subsequent permit); *NRDC v. Sw. Marine, Inc.*, 236 F.3d 985, 999-1001 (9th Cir. 2000) (holding that a district court's "enforcement" of statutory mandates includes the power to order additional remedies for harms stemming from violations).

Here, the Court may ultimately order the Commissioner to take actions aimed at relieving some of the burdens placed on Newark's residents from years of exposure to excessive levels of lead in their drinking water. These could be related to, for example, improved resident education about proper filter use or risks from lead service lines, support for expedited lead service line replacement and interim protections from lead exposure, or enhanced information-sharing with Plaintiffs. *See, e.g.*, *Rice*, 774 F. Supp. at 331 (requiring Clean Water Act defendant to send all monitoring results directly to citizen plaintiffs for four years); *Student Pub. Interest Research Grp. of N.J., Inc. v. Ga.-Pac. Corp.*, 615 F. Supp. 1419, 1428-29 (D.N.J. 1985) (refusing, as a matter of law, to strike Clean Water Act citizen plaintiffs' requests for equitable relief to permit them to do their own effluent sampling and to order defendant to submit reports directly to them, citing *Mitchell* and *Porter*). That the Rule does

not require the Commissioner to replace lead service lines does not bar equitable relief related to their replacement. *Cf.* State MTD 31-32. The Court has broad discretion to fashion a remedy. *See, e.g.*, *United States v. Ameren Mo.*, No. 4:11-cv-77-RWS, 2019 WL 4751941, *75-77 (E.D. Mo. Sept. 30, 2019) (ordering an air polluter to control emissions at a non-violating plant to help mitigate violations from a different plant that did violate the Clean Air Act), *appeal docketed*, No. 19-3220 (8th Cir. Oct. 11, 2019).

In any event, it would be improper to dismiss Plaintiffs' claim against the Commissioner based on speculation about what form of equitable relief the Court might ultimately determine is appropriate. *See Ga.-Pac.*, 615 F. Supp. at 1429. At the remedy stage, the Court can take into account and balance all of the factors required for issuance of an injunction. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). In the meantime, since the Court retains the ability to grant some form of relief to Plaintiffs, the claim against the Commissioner may not be dismissed for mootness.[12]

[12] The Commissioner's related argument that Plaintiffs' claim lacks ripeness, State MTD 34-35, depends entirely on her misguided contention that the Court may not intervene until Defendants complete the process the Commissioner herself came up with. *See supra* Part II.B.2. The Commissioner is liable *now* for *never* having designated optimal water quality parameters for Newark. And, as also noted above, the Court could impose meaningful remedies before the completion of that process, for example, by ordering the Commissioner to

IV. A declaratory judgment is appropriate alongside independent claims for non-declaratory relief

Finally, the Commissioner asks the Court to reject Plaintiffs' request for declaratory relief against the Commissioner. State MTD 35-37. The Commissioner cites the wrong standard for deciding this question; under the correct standard, declaratory relief is appropriate.

When a party seeks both declaratory and non-declaratory relief, as do Plaintiffs, the Third Circuit directs district courts to "determine whether the legal claims are independent of the declaratory claims." *Rarick v. Federated Serv. Ins. Co.*, 852 F.3d 223, 229 (3d Cir. 2017). If the legal claims are independent—that is, if the non-declaratory relief requested does not depend on a grant of declaratory relief—the district court's discretion is controlled by the "virtually unflagging obligation" of federal courts to exercise their jurisdiction. *Id.* (quoting *Col. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). A court may refuse to hear a declaratory claim only if the legal claim is dependent on it. *Id.*

Plaintiffs' claim against the Commissioner is independent of Plaintiffs' request for declaratory relief because "[it is] alone sufficient to invoke the

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comply with the schedule she developed, rather than leaving her the discretion to extend or discard her voluntary self-imposed deadlines.

court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief." *Id.* at 228 (quoting *R.R. Street & Co. v. Vulcan Materials Co.*, 569 F.3d 711, 716-17 (7th Cir. 2009)). Plaintiffs allege that the Commissioner has failed to designate optimal water quality parameters for the Newark water system, in violation of the obligations set forth in the Act and the Rule. That claim is actionable under the Act's citizen-suit provision. *See supra* Parts I, II. Because the claim can be adjudicated without the requested declaratory relief, it is independent, and this Court should also entertain Plaintiffs' declaratory relief claim. *Rarick*, 852 F.3d at 228 ("When the legal claims are independent, courts generally will not decline the declaratory judgment action in order to avoid piecemeal litigation.").

The cases the Commissioner cites are inapposite. In *United States v. Pennsylvania*, the Third Circuit was asked to determine whether the United States, seeking *only* declaratory relief, was "entitled to a declaratory judgment in federal court . . . even though identical issues have been raised in a parallel state court action." 923 F.2d 1071, 1073 (3d Cir. 1991). No parallel state-court action exists here, and Plaintiffs' complaint requests both declaratory and non-declaratory relief. Similarly, *Surrick v. Killion*, 449 F.3d 520 (3d Cir. 2006), does not control, because it, too, was solely a declaratory judgment action. *Id.* at

524. Rather, the independent-claims test is the proper standard under which this Court should consider Plaintiffs' declaratory claims.

CONCLUSION

The Commissioner never designated optimal water quality control parameters for Newark's drinking water, as required under the Rule and the Act. This significant lapse, along with City Defendants' violations, has caused Newark residents to be exposed, for years, to dangerously high lead levels in their drinking water. The Commissioner's ongoing violation is actionable, and Plaintiffs have pleaded specific facts to support their allegations. The Commissioner has not shown that the Court lacks the authority to order her to comply with the Rule's mandate. Further, it would be improper to limit now the Court's power to grant equitable relief in the future. Plaintiffs therefore respectfully urge the Court to deny the Commissioner's motion to dismiss.

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Respectfully submitted,

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