

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONCERNED PASTORS FOR SOCIAL
ACTION, MELISSA MAYS, AMERICAN
CIVIL LIBERTIES UNION OF MICHIGAN,
and NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Plaintiffs,

v.

Case Number 16-10277
Honorable David M. Lawson

NICK A. KHOURI, FREDERICK HEADEN,
MICHAEL A. TOWNSEND, JOEL
FERGUSON, MICHAEL A. FINNEY,
SYLVESTER JONES, and CITY OF FLINT,

Defendants.

ORDER AMENDING SETTLEMENT AGREEMENT

The Court has reviewed the Stipulation and Notice filed by the parties (ECF No. 207). Based on the Stipulation, and for good cause shown, it is hereby **ORDERED** that: The Stipulation is approved, and the Settlement Agreement (ECF No. 147-1), as previously amended, is further amended as follows:

1. **Submission of 2019 Excavation List.** On or before February 19, 2019, Plaintiffs shall provide the City and State with a list of addresses for excavation in 2019. This list shall constitute the **2019 Excavation List**. The 2019 Excavation List will consist of addresses of occupied residential homes in Flint with the highest likelihood of having lead or galvanized steel service lines, based on the predictive model developed by Dr. Eric Schwartz at the University of Michigan and Dr. Jacob Abernethy at the Georgia Institute of Technology. The 2019 Excavation List shall also include any addresses at which the City has conducted an excavation identifying a lead or galvanized steel service line, but at which no service line replacement has been completed.

Plaintiffs shall coordinate with the City's FAST Start office on acceptable formatting for the List and other logistical details by February 15, 2019. Based on the model's December 2018 predictions, the parties anticipate that the number of addresses on the 2019 Excavation List will be no more than 5,200. On or before February 19, 2019, Plaintiffs shall also provide the City and State with the full data output of the Schwartz and Abernethy model.

2. **Program manager's compliance plan.** All requests for proposals the City issues and contracts the City enters relating to program management, excavation, service line replacement, or restoration work relating to Phase VI of the FAST Start Program (Phase VI) shall incorporate and be consistent with the terms of this Stipulation. After the City has awarded a contract to a program manager for Phase VI and that contract has been approved by City Council, and no later than 14 days prior to starting excavations and service line replacements as part of Phase VI, Plaintiffs, the City, the State, and the program manager for Phase VI shall participate in an in-person meeting to discuss the City's plans to comply with the terms of this Stipulation and with Paragraphs 8-20, 34-36, and 38-39 of the Settlement Agreement. No later than 72 hours prior to the in-person meeting, the City shall provide Plaintiffs with a written compliance plan, describing in detail the processes that the program manager and the City will employ to achieve compliance with this stipulation and with Paragraphs 8-20, 34-36, and 38-39 of the Settlement Agreement.

3. **Prioritization of excavations and service line replacements at addresses on 2019 Excavation List and Model Update List.** For all work conducted after March 1, 2019, the City will **first** conduct excavations and service line replacements (where lead and galvanized steel service lines are identified) at addresses on the 2019 Excavation List and the Model Update List (defined in Paragraph 9 below), except as provided in Paragraph 4 below. The City shall complete

excavations and service line replacements, as defined in Paragraphs 8 and 10-12 of the Settlement Agreement, for all addresses on the 2019 Excavation List and the Model Update List before it conducts any excavations or service line replacements at any other addresses in Flint. By January 1, 2020, the City shall have conducted excavations at all addresses on the 2019 Excavation List and the Model Update List and completed replacements at all households where lead and/or galvanized steel service lines are discovered. The City may use, in its discretion, any available excavation method listed under sections 4.1.1 *et seq.* of the AWWA Standard for Replacement and Flushing of Lead Service Lines (ANSI/AWWA C810-17) to conduct the excavations under this Stipulation. The work described in this Paragraph will be conducted in accordance with Paragraphs 8-18, 34-36, and 38-39 of the Settlement Agreement.

4. **Excavations at Additional Addresses.** The City may conduct excavations at up to a total of 200 addresses not on the 2019 Excavation List or the Model Update List (the “Additional Addresses”). The City may conduct excavations and service line replacements at Additional Addresses only if (1) the address is on the same block as an address already on the 2019 Excavation List or the Model Update List, and the excavation of that home’s service line is necessary to take advantage of economies of scale; (2) service line replacement at the address is necessary to repair a broken service line that poses an immediate threat to public health; or (3) the address has been identified by Michigan’s State Historic Preservation Office as requiring a professional archaeologist to monitor the excavation and replacement work at the address. The City shall keep a list of these Additional Addresses, including the information described in Paragraph 6, items (i), (ii), and (v) below.

5. If, prior to completion of excavations and service line replacements at all addresses on the 2019 Excavation List and the Model Update List, the City conducts an excavation or service

line replacement at an address not on those Lists after it has exhausted the 200 Additional Addresses permitted under Paragraph 4 above, the State shall not be required to reimburse the City for the costs of conducting such excavations and replacements.

6. **Submission of monthly status reports.** The City shall provide Plaintiffs and the State with monthly reports. The City shall provide the first monthly report on the 28th day of the month in 2019 when excavations begin, and then on the 28th day of each month thereafter. If the 28th day of the month falls on a day that is not a business day, then the City shall submit its report on the first business day after the 28th. These reports shall include:

(i) all addresses where a service line was excavated or replaced during the reporting period (as determined after quality assurance/quality control processing has been completed by the City), including a designation of whether the address was an Additional Address or an address on the 2019 Excavation List or Model Update List. For each Additional Address, the City shall indicate which of the criteria in Paragraph 4 above the Additional Address meets. This list shall reflect all work completed as of the 7th day of the month in which the Report is submitted;

(ii) for each address in (i) above, the date of excavation and/or service line replacement, the material(s) of the service line confirmed or discovered; whether any portion of the service line was replaced; and if any portion of the service line was replaced, a description of which portion was replaced (i.e., both, public only, or private only);

(iii) the total amount of monies approved for payment by the City for excavation and service line replacement work (including but not limited to contractor costs for excavations, service line replacements, and site restoration) based on weekly contractor reports and invoice processing by the City's Department of Public Works;

(iv) the total amount of monies approved for payment by the City for program-management and administrative work relating to the City's excavation and service line replacement work (FAST Start Program), based on invoice processing by the City's Department of Public Works and/or the City's Finance Department; and

(v) (1) the date and recipient address of any letter sent pursuant to Paragraph 14 below; and (2) the date and time of any in person outreach conducted during the reporting period by the City pursuant to Paragraph 15 of the Settlement Agreement and Paragraphs 14-15 below, including the result of the outreach attempt.

For all of the items above (items (i) through (v)), the information reported on the 28th day of the month shall be current through at least the 7th day of the same month. The City shall include, in any contracts concerning the FAST Start Program awarded after this Stipulation is executed, provisions reasonably calculated to ensure that contractors timely submit invoices to the City, such that the information the City submits under this Paragraph on the 28th day of each month reflects all work performed during the preceding month. The sum of (iii) and (iv) shall represent the total costs approved for payment by the City for the FAST Start Program as of the 7th day of the month in which the Report is submitted. For those months in which a quarterly status report is required under Paragraph 117 of the Settlement Agreement (February, May, August, November), the City may submit the information required under this Paragraph contemporaneously with the quarterly status report, and need not submit duplicate data to the extent the same data has been submitted under Paragraph 117 of the Settlement Agreement for the same period.

7. **Submission of bid documents and invoice information.** No later than the 28th day of the month after the first month in which the City begins excavations and service line replacements for Phase VI (e.g., if excavations and replacements begin in April, then on May 28),

the City shall submit to all parties copies of the requests for proposal, bid documents, bid awards, and contracts for all contractors for excavations, service line replacements, and site restoration in 2019, including the unit pricing information associated with each bid. The City shall also provide to all parties all invoices received for excavation, service line replacement, and site restoration work for Phase VI as of the 21st day of the month in which the submission under this Paragraph is required.

8. **Submission of contractor schedules.** The City shall provide Plaintiffs with (i) copies of all construction schedules submitted by its excavation and/or service line replacement contractors to the City or the program manager for the FAST Start Program; and (ii) any other information and/or updates submitted or sent to the City by its program manager or contractors concerning the planned locations or schedules for excavations and service line replacements for the FAST Start Program. The parties recognize that information submitted under this Paragraph may be subject to change after its submittal; the City will nonetheless undertake best efforts to ensure that the information it provides under this Paragraph is up to date. The obligations of this Paragraph shall take effect beginning on the first Wednesday of the month in which excavations and service line replacements begin in 2019. The City shall submit the information described in this Paragraph on the first and third Wednesdays of each month thereafter, with each submittal including all information the City and/or program manager has received as of two days prior to the submittal date.

9. **Submission of Model Update List.** Within two weeks after Plaintiffs receive a monthly status report indicating the City has conducted 2,000 excavations in 2019, Plaintiffs will work with Drs. Schwartz and Abernethy to update the results of the predictive model. Based on these updated results, Plaintiffs shall provide the City and State with a list of up to 200 addresses

(the “Model Update List”) that shall be added to the 2019 Excavation List based on the likelihood of having a lead or galvanized steel service line.

10. **Conference regarding remaining available Settlement Agreement funding and expected costs for 2019.** The parties shall meet and confer to discuss (a) whether the available Settlement Agreement funding is likely to be sufficient to cover the costs of completing excavations and service line replacements (if appropriate) at all addresses on the 2019 Excavation List, Model Update List, and Additional Addresses (including program-management costs); and (b) if the available Settlement Agreement funding is likely to be insufficient to complete the work described in (a) above, whether additional funds are available to complete that work. As soon as the City or State becomes aware that there remains less than \$15 million in available funding under the Settlement Agreement, based on the total amount the City has (i) approved in invoices under contracts awarded for the FAST Start Program and (ii) expensed to the City’s FORCE Account for reimbursement from the State, the respective party will notify the other parties in writing. The conference described in this Paragraph shall take place as soon as possible after the execution of this Stipulation and no later than two weeks after any party notifies the other parties in writing that, based on their estimates, there remains less than \$15 million in available funding under the Settlement Agreement (as described in the previous sentence).

11. No later than one week before the conference described in Paragraph 10 above, the City shall provide to all other parties the following unit pricing information: (i) price per service line replacement; (ii) price per exploratory excavation (if multiple methods of exploratory excavations are used, the unit price for each excavation method); (iii) price per sewer lateral inspection; (iv) price for road restoration (100 square feet); (v) price for curb restoration (10 linear feet); (vi) price per sidewalk restoration (50 square feet); (vii) and price for greenbelt restoration

(40 square feet). The City shall calculate the unit pricing based on a method agreed to by all parties. No later than one week before the conference described in Paragraph 10 above, the City shall also provide to all other parties an updated version of its Full Inventory Cost Projection for the FAST Start Program.¹ No later than one week before the conference described in Paragraph 10, the State shall provide the parties with its projection of how much Settlement Agreement funding remains, based on the work the City has completed to date, and its projection of how much funding the City will need to complete the work (including excavations, service line replacements, restoration, and (if applicable) program management) required under this Stipulation.

12. Prioritization of addresses for excavation after completion of 2019 Excavation List and Model Update List. The City shall conduct excavations and service line replacements until the Settlement Agreement funds (as described in Paragraphs 22 and 27 of the Settlement Agreement), and any additional funds obtained as a result of the conference described in Paragraph 10 above, are exhausted. Within two weeks of the City's submission of the monthly status report showing that the City has completed more than 2,000 excavations in 2019, the parties shall meet and confer concerning how the City will prioritize excavations at remaining unexcavated replacement eligible homes after the City completes excavations and service line replacements (if appropriate) for all addresses on the 2019 Excavation List and the Model Update List. The parties shall undertake all reasonable efforts to reach an agreement as to a method for such prioritization within 4 weeks of the initial conference. The City shall prioritize excavations for these remaining homes based on a method agreed upon by all parties. During the four-week meet-and-confer period, if the City has already completed excavations and service line replacements (if appropriate)

¹ The City previously provided to the parties a version of the Full Inventory Cost Projection on February 4, 2019.

at all addresses on the 2019 Excavation List and the Model Update List, the City may continue to use available funds under the Settlement Agreement, and any additional funds obtained as a result of the conference described in Paragraph 10 above, to excavate and replace (if appropriate) service lines at eligible homes. During this period the City shall, based on all information available to it, continue to prioritize addresses for excavation and service line replacement (if appropriate) that have the highest likelihood of having a lead or galvanized steel service line. If insufficient funds remain to conduct excavations and service line replacements at such additional homes, the parties will confer to discuss whether additional funds are available to complete the excavations at the remaining replacement eligible homes in Flint.

13. **Submission of information to facilitate creation of 2019 Excavation List.** By February 12, 2019, the City shall submit to Plaintiffs and the State the following information in a single list to facilitate the preparation of the 2019 Excavation List. The single list shall include:

A. All excavated addresses. All addresses, including parcel ID numbers, at which the City has conducted excavations since 2016 and either (i) identified copper service lines, (ii) completed a service line replacement, or (iii) identified a lead and/or galvanized steel service line but not yet replaced that service line. For each of these addresses, the list shall include the service line material discovered at each address and the date of each excavation and service line replacement (if applicable); and

B. All replacement eligible addresses not yet excavated. All addresses, including parcel ID numbers, of remaining replacement eligible households, as defined in Paragraph 11 of the Settlement Agreement, in the City that have not been excavated. To generate the portion of the list required under Paragraph 13.B, the City will begin with the list of all active water accounts as of February 1, 2019, and will add to that list any address where an active water

account has been terminated or otherwise deactivated between March 28, 2017, and February 1, 2019. The City will then remove any address at which an excavation has been conducted since 2016, and any currently abandoned households, as defined in Paragraph 12 of the Settlement Agreement.

All occupied, residential households for which the City has not yet obtained permission to conduct a service line replacement will be included on this list. By no later than February 12, 2019, the City shall provide Plaintiffs with a list of all addresses where water accounts have been deactivated and/or terminated since March 28, 2017.

14. **Compliance with Paragraph 15 of Settlement Agreement.** The City shall complete its obligations under Paragraph 15 of the Settlement Agreement, as modified on July 19, 2018, and as further modified in this Paragraph and Paragraph 15 below. For any replacement eligible household at which the City has not obtained permission from the resident and/or property owner to conduct a service line replacement as of February 1, 2019, the City shall send the letters described in Paragraph 15.a.ii and 15.a.iii of the Settlement Agreement by February 28, 2019. The City shall provide Plaintiffs with a draft of the letter required by Paragraph 15.a.ii no later than February 12, 2019. Plaintiffs may propose edits to the draft letter until February 15, 2019. If the City objects to any of Plaintiffs' proposed edits, the parties shall meet and confer to achieve language in the letter that is acceptable to all parties. The letter shall include language stating that if the property owner or resident declines replacement within 30 days from the date of the letter or does not respond to it, he or she may still opt in to the FAST Start Program and grant the City permission to replace the portion of the service line lying beneath his or her property until at least 90 days after the City makes a first in-person attempt to request permission to replace the service line at the address, as described below.

15. The City shall conduct the in-person outreach attempts required by Paragraph 15 of the Settlement Agreement for all remaining replacement eligible households that do not respond to the letter described in Paragraph 14 above, regardless of whether the City previously conducted in-person outreach attempts for those households. By May 31, 2019, the City shall conduct at least one in-person outreach attempt as described in Paragraph 15.a.i and 15.b of the Settlement Agreement (as amended), for all households described in the preceding sentence. The City shall conduct a second in-person outreach attempt as described in Paragraph 15.a.i and 15.b of the Settlement Agreement (as amended) for all addresses for which the first attempt described in the preceding sentence is not successful. For all addresses requiring two in-person attempts, at least one attempt shall be made during the evening (after 5 p.m.) or on a weekend (Saturday or Sunday). If the City conducts an in-person outreach attempt for an address after it has sent the letter(s) required by Paragraph 15.a.ii and 15.a.iii of the Settlement Agreement, the resident or property owner at that address may opt-in to the FAST Start Program up until 90 days after the first in-person outreach attempt, or the date on which the City completes excavations and service line replacements for Phase VI, whichever is later.

16. By March 31, 2019, the City shall provide the State with documentation demonstrating that all Phase IV construction contracts have been officially closed and retainage released.

17. Within 30 days after execution by all parties of this Stipulation, the State will pay any costs submitted by the City for open-trench excavations conducted in 2018 and 2019 for which payment had been withheld, subject to the maximum average cost of \$5,000 per address (unless otherwise authorized by the Michigan Department of Environmental Quality) described in Paragraph 23 of the Settlement Agreement.

18. In 2019, the City will request, on a monthly basis, reimbursement from the State for all invoices received in the previous month (i.e., requests for reimbursement for invoices paid in April 2019 will be submitted to the State by the end of May 2019).

19. The City shall not submit the written statement described in Paragraph 45 of the Settlement Agreement until after it has completed excavations and service line replacements at all addresses on the 2019 Excavation List and the Model Update List.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Date: March 26, 2019

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on March 26, 2019.

s/Susan K. Pinkowski
SUSAN K. PINKOWSKI