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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.,	)	Case No. 2:18-cv-11025
Plaintiffs,	)	**Judge Esther Salas**
v.	)	**Magistrate Judge Cathy L. Waldor**
CITY OF NEWARK, RAS BARAKA, in his official capacity as Mayor of the City of Newark, NEWARK DEPARTMENT OF WATER AND SEWER UTILITIES, ANDREA HALL ADEBOWALE, in her 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,	)	Hearing Dates: October 26, 2018 October 29, 2018 **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE**
Defendants.	)	

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. This Court may order the relief Plaintiffs request to remedy harm caused by City Defendants' violations of the Safe Drinking Water Act 1

A. Absent an unambiguous statutory limitation, courts retain broad discretion to order relief to remedy violations 1

B. Congress has not constrained authority to order this relief.. 4

II. The State has not required compliance with the Act, nor does its Administrative Compliance Order bar relief 5

A. The State's tepid efforts to require compliance are inadequate 6

B. The ACO does not bar citizen enforcement, particularly because the relief supplements, and does not conflict with, the ACO 8

III. Plaintiffs have established the factors required for this Court to order preliminary relief.. 11

A. Newark residents are suffering irreparable harm 11

1. Blood lead data underrepresent cumulative exposure.. 11

2. There is a well-established causal link between elevated lead in drinking water and negative health effects 12

3. Blood lead levels in Newark are extremely high 13

B. Plaintiffs have established a likelihood of success on the merits 15

IV. Plaintiffs request appropriate and necessary relief 16

A. Newark has the information it needs to implement this relief 16

B. The proposed relief costs less than City Defendants claim, and is easily scalable 19

C. Ordering the proposed relief will not inappropriately expand the Court's responsibilities 20

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Baykeeper v. NL Indus., Inc.,
660 F.3d 686 (3d Cir. 2011) 10

Colo. River Water Conservation Dist. v. United States,
424 U.S. 800 (1976) 10

Concerned Pastors for Soc. Action v. Khouri,
844 F.3d 546 (6th Cir. 2016) 3

Envtl. Def. Ctr., Inc. v. EPA,
344 F.3d 832 (9th Cir. 2003) 17

FTC v. Lane Labs-USA, Inc.,
624 F.3d 575 (3d Cir. 2010) 20

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,
484 U.S. 49 (1987) 11

Henrietta D. v. Bloomberg,
331 F.3d 261 (2d Cir. 2003) 20

Interfaith Cmty. Org. v. Honeywell Int'l,
399 F.3d 248 (3d Cir. 2005) 10

Interfaith Cmty. Org. v. PPG Indus., Inc.,
702 F. Supp. 2d 295 (D.N.J. 2010) 8, 10

Mitchell v. Robert DeMario Jewelry, Inc.,
361 U.S. 288 (1960) 1, 2

NRDC v. Sw. Marine, Inc.,
236 F.3d 985 (9th Cir. 2000) 3

NRDC v. Texaco,
2 F.3d 493 (3d Cir.1993) 16

PennEnvironment v. PPG Indus., Inc.,
964 F. Supp. 2d 429 (W.D. Pa. 2013) 10

Porter v. Warner Holding Co.,
328 U.S. 395 (1946)... 2, 5

Pub. Int. Research Grp. of N.J., Inc. v. Rice,
774 F. Supp. 317 (D.N.J. 1991) 20

Reilly v. City of Harrisburg,
858 F.3d 173 (3d Cir. 2017) 1, 11, 15

ThermoLife Int'l LLC v. Connors,
Civ. No. 2:13-4399 (KM), 2014 WL 1050789
(D.N.J. Mar. 17, 2014)... 17

Trinity Industries, Inc. v. Chicago Bridge & Iron Co.,
735 F.3d 131 (3d Cir. 2013) 9

U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me., LLC,
339 F.3d 23 (1st Cir. 2003) 3, 9

United States v. City of New York,
198 F.3d 360 (2d Cir. 1999) 3

United States v. Lane Labs-USA,
427 F.3d 219 (3d Cir. 2005) 2

United States v. Oakland Cannabis Buyers' Cooperative,
532 U.S. 483 (2001)... 3

Winter v. NRDC,
555 U.S. 7 (2008) 11

Statutes

33 U.S.C. § 1365(a)(1) 11

42 U.S.C. § 300i 4

42 U.S.C. § 300i(a) 4

42 U.S.C. § 300j-8(a)(1) 4

42 U.S.C. § 300j-8(b)(1)(B) 8

42 U.S.C. § 6972(a)(1)(B) 4

42 U.S.C. § 6973 4

Regulations

34 C.F.R. § 99.31(9)(i) 18

34 C.F.R. § 99.31(10) 18

40 C.F.R. § 141.84 6

40 C.F.R. § 141.90(a)(1)(i) 18

45 C.F.R. § 164.512(b)(1)(i) 19

45 C.F.R. § 164.512(e)(1)(i) 19

56 Fed. Reg. 26460-01 (June 7, 1991) 5

56 Fed. Reg. 26,460 (June 7, 1991) 17

Legislative History

Pub. L. No. 93-523, 88 Stat. 1660 (1974) 5

Other Authorities

N.J.A.C. § 6A:32-7.3(a) 18

N.J.A.C. § 6A:32-7.5(e)(15) 18

N.J.A.C. § 6A:32-7.5(f) 18

N.J.A.C. § 8:44-2.11(c) 18

N.J.A.C. § 8:57-3.16(d) 18

N.J.A.C. § 8:51A-2.2(a)(1) 18

N.J.A.C. § 8:51-3.3(a)(2)-(3) 19

N.J.A.C. §§ 8:57-4.10 to -4.20 19

INTRODUCTION

City Defendants would deny this Court its full powers to protect the health of Newark residents injured by the City's illegal failures to keep lead out of Newark's drinking water. The Court has discretion to fill the gaps left by the State's inadequate enforcement efforts. Harmful lead exposures continue, and Plaintiffs ask the Court to require the City to mitigate the well-known dangers.[1]

ARGUMENT

I. This Court may order the relief Plaintiffs request to remedy harm caused by City Defendants' violations of the Safe Drinking Water Act

A. Absent an unambiguous statutory limitation, courts retain broad discretion to order relief to remedy violations

This Court has broad equitable authority to remedy harm caused by violations of the Safe Drinking Water Act (the Act) and Lead and Copper Rule (the Rule). *See Reilly v. City of Harrisburg*, 858 F.3d 173, 178-79 (3d Cir. 2017). Where, as here, statutory violations have caused injury, courts may wield "the historic power of equity to provide complete relief in light of the statutory

[1] Yesterday, Newark announced plans to provide water filters for homes with lead service lines. Plaintiffs immediately requested the program's details and supporting studies, so they could evaluate the City's proposal in this brief. City Defendants declined. Today, City and State Defendants filed supplemental statements, ECF Nos. 53, 54, regarding plans to provide filters to certain residents. Plaintiffs will respond to those filings once they have a chance to evaluate City and State Defendants' proposed plans.

purposes." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960). When public interest is at stake, such authority "assume[s] an even broader and more flexible character." *Id.* at 291.

City Defendants argue that this Court may not order an interim alternate water supply under the Act. But unless a statute explicitly prohibits specific relief, courts may grant any relief necessary to remedy the harm caused by a defendant's violations. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). This comprehensive equitable jurisdiction is not to be "denied or limited in the absence of a clear and valid legislative command," and must not be "yielded to light inferences, or doubtful construction." *Id.*

The Third Circuit has adopted this "expansive" view of a court's equitable powers. *United States v. Lane Labs-USA*, 427 F.3d 219, 223 (3d Cir. 2005). In *Lane Labs-USA*, the underlying statute granted the district court jurisdiction only "to restrain violations" of the act. *Id.* Following *Mitchell* and *Porter*, the court upheld an equitable remedy of restitution. *Id.* at 223-26. The court held 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. Here, Plaintiffs request relief aimed squarely at furthering the Act's health-protective purposes.

Consistent with these bedrock principles, the Sixth Circuit determined that door-to-door delivery of bottled water and installation of filters were "appropriate" remedies for the "specific systemic harms" resulting from many of the very same violations of the Act that are at issue here. *Concerned Pastors for Soc. Action v. Khouri*, 844 F.3d 546, 550 (6th Cir. 2016); *see also U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 31 (1st Cir. 2003) (holding Clean Water Act provision authorizing court to enforce an effluent standard or limitation does not limit court's power to impose additional remedies); *NRDC v. Sw. Marine, Inc.*, 236 F.3d 985, 999-1000 (9th Cir. 2000) (approving equitable remedy beyond Clean Water Act permit requirements).

United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001), and *United States v. City of New York*, 198 F.3d 360 (2d Cir. 1999), are not on point. Def. Br. 7. In *Oakland Cannabis*, the lower court attempted to include a medical necessity exception to an injunction banning the sale of marijuana, in direct conflict with Congress's determination that marijuana was never medically necessary. 532 U.S. at 498-99. In *City of New York*, the court concluded intervenors had no legally protectable interest in blocking enforcement of what the court found were requirements of the statute and rules issued under that law. 198 F.3d at 365-66. Here, the requested relief furthers the aims of the Act and is not proscribed. The Court has discretion to order it.

B. Congress has not constrained authority to order this relief

Congress has not imposed any limits on this Court's authority to order relief for violations of the Act. The Act's citizen suit provision is broad, allowing suit against "any person . . . who is alleged to be in violation of any requirement prescribed by or under this subchapter." 42 U.S.C. § 300j-8(a)(1). City Defendants' attempt to discern such limits through other provisions of the Act, or even other statutes, cannot undermine this Court's authority, consistent with the Supreme Court's teachings.

Congress's addition of "imminent and substantial endangerment" provisions to the Act and to the Resource Conservation and Recovery Act (RCRA) does not bear on this Court's remedial powers under the Act's citizen suit provision. Def. Br. 8-9. Those emergency provisions authorize the government (and, in the case of RCRA, also citizens) to act, even absent a violation of law. *See* 42 U.S.C. §§ 300i(a), 6972(a)(1)(B), 6973. They do not limit relief available under the citizen suit provision, but rather provide additional, complementary tools to address an emergency, like a "threatened or potential terrorist attack . . . or other intentional act," *id.* § 300i, without the need to first establish a statutory or regulatory violation.[2]

[2] City Defendants claim an NRDC report supports a limitation on the Court's discretion to order relief. Def. Br. 10. However, that report merely

Nor has EPA rejected the relief Plaintiffs seek. Def. Br. 10-11. In 1991, EPA did not require bottled water as systems came into compliance with the new Rule, given the 40,000 systems (serving 130 million people) that "may *initially* exceed the lead action level." 56 Fed. Reg. 26460-01 (June 7, 1991) (emphasis added). Now, more than 25 years later, EPA's initial reasoning no longer applies, as far fewer systems are out of compliance. Moreover, EPA never rejected providing bottled water to residents served by water systems committing ongoing violations of the Act's basic treatment standards, including Newark, which has some of the highest lead levels of any large city.

The relief Plaintiffs seek is not barred by a "clear and valid legislative command." *Porter*, 328 U.S. at 398. Rather, it serves the purpose of the Act—to "assure that the public is provided with safe drinking water." Pub. L. No. 93-523, 88 Stat. 1660, 1600 (1974). The Court may order it.

II. The State has not required compliance with the Act, nor does its Administrative Compliance Order bar relief

For years, the New Jersey Department of Environmental Protection (NJDEP) has been asleep at the wheel, allowing the City to operate without optimizing corrosion control treatment, without sampling sufficient Tier 1

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highlights that emergency powers are available to EPA "*even if no violation of the law is proven*." Imperiale Ex. 1 (emphasis added). By contrast, the citizen suit provision requires such a showing. The report provides no basis to assert that a court's discretion is curtailed in adjudicating a citizen suit.

sites, and without completing a materials evaluation, among other violations. Even today, as discussed in Section III, many of these violations are ongoing. The State's enforcement efforts are facially inadequate to address the harm caused by City Defendants' violations and do not bar relief.

A. The State's tepid efforts to require compliance are inadequate

NJDEP has long been complicit in the City's violations. The July 2018 Administrative Compliance Order (ACO) permits unlawful extensions to regulatory deadlines, allows for incomplete submission of mandatory documentation, excuses the City from paying for required infrastructure improvements, and sets a protracted schedule for the abatement of lead in the City's drinking water. Select examples of the deficiencies are discussed below.

First, the ACO does not require the City to commence replacement of lead service lines within the timeframe mandated by the Rule. ECF No. 15-6 ¶ 14-15, 34. Under the Rule, the City must replace seven percent of its approximately 23,000 lead service lines within one year of its first action level exceedance, 40 C.F.R. § 141.84, which occurred on June 30, 2017. However, the City does not claim to have broken ground on a single replacement. In fact, the City does not expect to award the contract for the replacement work until December 2018, Imperiale Ex. 2, and the first phase of the program will not be

completed until September 2019, at the earliest. Def. Br. 5; ECF No. 49-5 ¶ 8. The ACO does nothing to address this unlawful and substantial delay.[3]

The ACO also excuses the City from the Rule's requirement to account for lead materials within the system. In July 2017, the State issued a notice of non-compliance, which required the City to complete a lead service line inventory within 60 days. ECF No. 19-23, 62 ¶ 6. When the City did not do so, the State granted extensions. ECF No. 15-6 ¶ 15; Imperiale Ex. 17. More than a year has passed since the City's first action level exceedance—the Rule's deadline for completion of the required inventory—yet the inventory remains incomplete, missing critical designations for at least 5,100 homes. *Id.* ¶ 35. The ACO does not compel timely compliance. Instead, it merely notes the inventory "is expected to take several years" to complete. *Id.*

The ACO also acknowledges, but fails to address, the City's third-consecutive violation of the Rule's requirement to distribute public education materials. *See* Pl. Br. 19-21; ECF No. 15-6 at n.1. It does nothing to enforce the obligation to promptly notify residents in the future, beyond including regulatory language that the City has repeatedly flouted.

[3] City Defendants attempt to skirt their replacement obligation by asserting the City's lead service lines are privately owned. ECF No. 49-5 ¶ 3. They offer no legal authority to support this claim, relying on an unsupported statement by an employee. *Id.*

The State also asserts the City's efforts to sample Tier 1 sites are adequate. But, as discussed in section III.B., the City has failed to meet this requirement, without sufficient excuse. The State has not rectified this lapse.

Finally, the State suggests that flushing tap water will protect residents. Imperiale Ex. 4, Tr. 53:11-14. But a system cannot estimate necessary flushing time without studying unique system characteristics, which Newark has not done. Giammar Decl. ¶¶ 16-19. Moreover, flushing may be effective in reducing lead exposure only if accurate instructions are given by the system and followed by residents. *Id.* Neither the City nor the State deny that inconsistent flushing instructions have been provided to residents. Even where instructions are given and followed, flushing may not be fully protective in a system that has systemic lead problems, like Newark. *Id.*

B. The ACO does not bar citizen enforcement, particularly because the relief supplements, and does not conflict with, the ACO

A citizen suit under the Act may be precluded only when the state "has commenced and is diligently prosecuting a civil action in a court of the United States" for the same violation that citizens seek to prosecute. 42 U.S.C. § 300j-8(b)(1)(B); *see Interfaith Cmty. Org. v. PPG Indus., Inc.*, 702 F. Supp. 2d 295, 304-05 (D.N.J. 2010). It is undisputed that the State has not taken such an action here, so this citizen suit may proceed. In adjudicating it, the Court is free to order relief that goes beyond the State's regulatory efforts.

City Defendants rely heavily on *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131 (3d Cir. 2013). That case does *not* stand for the proposition that a court is constrained by whatever remedy an agency orders. Def. Br. 12-13. In *Trinity*, the Third Circuit held that the district court did not abuse its discretion in denying relief where an effective remedy was already in place, and the plaintiffs did not argue otherwise. *Id.* at 140. The district court found that an injunction would be "futile" because the existing order already required the cleanup of "all contamination" at the disputed site. *Id.* at 139. The *Trinity* court expressly recognized that injunctive relief may be appropriate where an agency's remediation scheme is "deficient or ineffective." *Id.* at 140. Here, the ACO is not sufficiently protecting Newark residents from the effects of the City's violations, so the Court may order additional relief, like provision of bottled water, that does not interfere with the tasks or deadlines specified in the ACO. *See Atl. Salmon*, 339 F.3d at 31 (holding that a court may order relief beyond that required by an agency if it does not reduce protections and is aimed at remedying past violations).

City Defendants' invocation of the primary jurisdiction doctrine is the same argument in a different guise. Def. Br. 22-24. Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817

(1976). "Abstention, therefore, is the exception rather than the rule." *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (citations omitted).

Primary jurisdiction doctrine has no application where, as here, Congress enacted a law authorizing federal courts to decide citizen suits. *See id.; PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 453 (W.D. Pa. 2013); *see also Interfaith Cmty. Org.*, 702 F. Supp. at 311 (holding primary jurisdiction inapplicable because, by narrowly defining conditions that circumscribe a citizen suit, Congress signaled the courts' duty to hear cases). There is no "substantial danger" of inconsistent rulings, Def. Br. 24, where the City's "concern appears to be based on the possibility of a more stringent remediation standard emanating from [the] Court" than from the ACO. *PennEnvironment*, 964 F. Supp. 2d at 453; *see also Interfaith Cmty. Org. v. Honeywell Int'l*, 399 F.3d 248, 267 (3d Cir. 2005).

City Defendants also misstate the Court's narrow holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52 (1987). In that case, the Court found that allowing private citizens to adjudicate "wholly past" violations would frustrate the purpose of the Clean Water Act's citizen suit provision, which is limited to defendants "alleged to be in violation" at the time of suit. *Gwaltney*, 484 U.S. at 52; 33 U.S.C. § 1365(a)(1). Here, Plaintiffs seek a remedy for City Defendants' ongoing violations of the Act.

III. Plaintiffs have established the factors required for this Court to order preliminary relief

Despite City Defendants' attempts to inflate Plaintiffs' burden to near certainty, Plaintiffs must show only "that irreparable injury is *likely* in the absence of an injunction" under a preponderance of evidence standard. *See Winter v. NRDC*, 555 U.S. 7, 22 (2008). And in the Third Circuit, Plaintiffs need only establish their chances of success are "significantly better than negligible." *Reilly*, 858 F.3d at 179. On each of these gateway factors, Plaintiffs have offered evidence that goes well beyond the required showing.

A. Newark residents are suffering irreparable harm

Ignoring the robust body of research that connects lead in drinking water to adverse health effects, City Defendants assert that Newark residents are not likely to suffer irreparable harm. They contend that harm can be shown only through blood lead levels, despite the well-known shortcomings of blood lead data. The fact is, many children in Newark do have high blood lead levels because of their drinking water and are suffering injury as a result.

1. Blood lead data underrepresent cumulative exposure

Plaintiffs have not relied exclusively on blood lead levels to establish harm because they underrepresent cumulative lead exposure. Hanna-Attisha Decl. ¶ 19-21, 23-25, 32; Griffiths Decl. ¶ 10-13. Lead that is consumed is initially stored in the blood. After that initial period, lead is distributed to and

stored in organs, teeth, and bones. Griffiths Decl. ¶ 10. If taken after 30 to 60 days, a blood lead level test will not show the lead that has already been sent to the body's organs and bones. Hanna-Attisha Decl. ¶ 25. For this reason, blood lead levels underestimate total exposure. Griffith's Decl. ¶ 12.

2. There is a well-established causal link between elevated lead in drinking water and negative health effects

This Court should look to Newark's drinking water lead levels—which not only far exceed all health-based standards for lead, but also exceed the federal action level—to establish that irreparable harm will continue to occur absent an injunction. The overwhelming weight of scientific evidence demonstrates that lead exposure through drinking water contributes to blood lead levels and that children and pregnant women are among those populations most vulnerable to harm. Griffiths Decl. ¶ 23. For example, researchers found that blood lead levels above 10 micrograms per deciliter (µg/dL) in young children increased by more than 400% after lead in Washington D.C.'s drinking water rose to more than 45 parts per billion (ppb) at the 90th percentile. *Id.* ¶ 21; Hanna-Attisha Decl. ¶ 14. Numerous studies conducted across the U.S., Canada, and Europe have come to similar conclusions. Hanna-Attisha Decl. ¶ 9-19, 29-33; Griffiths Decl. ¶ 15-31.

City Defendants dismiss this well-settled correlation by citing a single study, which not only understates the harm caused by elevated lead levels in

Flint's water but uses unsound scientific methodology. Hanna-Attisha Decl. ¶ 22. Despite its deficiencies, that study concludes that blood lead levels increased during Flint's lead crisis and decreased after measures were taken to address the crisis. *Id.* In reality, the incidence of elevated blood lead levels for children younger than five more than doubled from 2.4% to 4.9% after lead in Flint's tap water increased. *Id.*¶ 18.

3. Blood lead levels in Newark are extremely high

Even if Plaintiffs were required to prove harm solely based on blood lead levels, data show that many children in Newark suffer from high blood lead levels associated with long-term adverse health impacts. In 2016, nearly one-quarter of Newark children screened under six years tested with 3-4 μg/dL. Griffiths ¶ 14. According to the National Institutes of Health, blood lead concentrations in this range are strongly associated with intellectual deficits, diminished academic abilities, attention deficits, and problem behaviors. Hanna-Attisha Decl. ¶ 29. Evidence of neurodegenerative, cardiovascular, and renal effects at these levels are also well documented. Griffiths ¶ 15. And 5.3% of Newark children aged between 6 and 26 months had blood lead levels that were higher than 5 μg/dL. *Id.* ¶ 14. Children who have blood lead concentrations over 5 μg/dL experience, on average, a lead-associated IQ

deficit of 6.1 points. *Id.* ¶ 17. Every 5 μg/dL increase in maternal blood lead raises the risk of miscarriage or fetal deaths by 180%. Hanna-Attisha ¶ 30.

City Defendants minimize Newark children's blood lead levels by creating false geographical or historical comparisons,[4] but the numbers speak for themselves. Newark children have elevated blood lead levels at rates almost double the State overall. *Id.* The State identified approximately 4,800 New Jersey children with elevated blood lead levels (at or above 5 μg/dL) in 2016. *Id.* ¶ 14. About 13% of those children live in Newark, though the City comprises only 3.8% of the State's children in that age group. Griffiths ¶ 14.

City Defendants try to divert the Court's attention by arguing that lead exposure was higher in the past. This perverse argument does nothing to counter the well-established evidence that Newark drinking water lead levels are causing serious and irreversible harm to residents' health.

B. Plaintiffs have established a likelihood of success on the merits

City Defendants' violations regarding sampling, maintaining optimal corrosion control, and conducting public education are continuing.[5] ECF No.

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[4] City Defendants also minimize the problem by focusing on children testing above 10 μg/dL. The CDC recommends that public health actions be initiated if a child tests above 5 μg/dL. Imperiale Ex. 16.

[5] Plaintiffs disagree that their materials evaluation claim is time barred. Def. Br. 20-22. However, the Court need not resolve this issue now, given that Plaintiffs have not based their motion on that claim.

49-4 ¶ 10; ECF No. 15-6, at 1 n.1. Plaintiffs' chances of establishing violations are "significantly better than negligible." *Reilly*, 858 F.3d at 179.

The City has admitted that it did not sample 100 Tier 1 sites, *see* ECF No. 49-4 ¶ 10, but claims it is excused because it needed additional time to identify such sites. But Newark already had 131 Tier 1 sites in its sampling pool. Imperiale Ex. 5. Where sufficient Tier 1 sites are available throughout the system, the Rule is not flexible. Imperiale Ex. 6-7.[6] And Newark's excuse does not explain why the violation continued through the second half of 2017, Pl. Br. 17-19, and continues today, Panditharatne Decl. ¶¶ 2-6.

Newark has also failed both to implement *and* maintain optimal corrosion control treatment. Neither Newark nor NJDEP offer evidence to show Newark has ever implemented optimal corrosion control treatment. *See* Imperiale Ex. 4, at Tr. 34:1-23, 57:2-10.[7] Nor do they allege that corrosion control treatment is currently optimized. A water system with lead levels as

[6] Any reluctance among residents to participate in the City's sampling program would not confer permission to abandon the Rule's requirements. Many large cities offer financial incentives to encourage participation by residents at high priority sites, including water bill credits of $50 in Philadelphia, $100 in New York, and $100 in Cleveland. Imperiale Exs. 8-10.

[7] The City's failure to implement optimal corrosion control treatment is continuing and is not time-barred. A plaintiff can prove continuing violations by showing a "likelihood of recurring violations of the same parameter," or by showing "the same inadequately corrected source of trouble will cause recurring violations." *NRDC v. Texaco*, 2 F.3d 493, 499 (3d Cir.1993).

high as Newark's is not maintaining optimal corrosion control. ECF No. 19-9, ¶¶ 30, 32. NJDEP agreed, first in its July 2017 notice of non-compliance, ECF No. 19-23 at 62 ¶ 5, and again in its January 2018 notice of non-compliance. *Id.* at 72 ¶ 4. The City's currently reported lead levels are 42.9 ppb at the 90th percentile, more than 1.5 times the levels NJDEP relied on to conclude Newark does not have optimal corrosion control treatment. Imperiale Ex. 11.

Finally, City Defendants do not rebut Plaintiffs' claim that they have failed to provide the required public education materials to every service account holder within sixty days of the close of the monitoring period. In fact, City Defendants admit to violating these public education requirements after Newark's second consecutive action level exceedance. ECF No. 15-6, at 1 n.1.

IV. Plaintiffs request appropriate and necessary relief

A. Newark has the information it needs to implement this relief

Plaintiffs' propose narrowly tailored relief[8] to protect the Newark residents most at risk: those in households with children aged six or under,

[8] The First Amendment does not bar Plaintiffs' request that the Court enjoin Newark from assuring residents that the water is safe to drink. *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 849 (9th Cir. 2003) (requiring municipal sewer authority to publish information about the impact of discharges did not violate First Amendment); *ThermoLife Int'l LLC v. Connors*, Civ. No. 2:13-4399 (KM), 2014 WL 1050789, at *8 (D.N.J. Mar. 17, 2014) (enjoining defendant from "[m]aking any false statement on the internet" on a specified subject).

pregnant women, a recent test showing at least 10 ppb of lead in household tap water,[9] a lead service line, or lead plumbing. ECF No. 41 ¶ 1.

City Defendants have access to the information necessary to identify nearly all of these households.[10] A lack of perfect information should not defeat relief, for the Court can target the vast majority of those facing grave injury. The City has already located buildings with lead service lines, lines of unknown material, or lead plumbing. *See* ECF No. 49-5 ¶ 8, Exs. A-B. City Defendants also record the location of each sampling site, 40 C.F.R. § 141.90(a)(1)(i), allowing them to identify any household with a tap water lead concentration of at least 10 ppb.

The City can use preexisting databases to identify households with young children, a strategy frequently used by municipalities in public-health work. Ghani Decl. ¶¶ 10-13. The Newark Board of Education maintains a list

[9] This level derives from the World Health Organization's (WHO) provisional guideline value of 10 ppb. Imperiale Ex. 11. Even WHO recognizes 10 ppb may not be protective of health. *Id.* Nonetheless, Plaintiffs suggest this level, rather than the EPA goal of 0 ppb, *see* 56 Fed. Reg. 26,460, 26,467 (June 7, 1991), or the American Academy of Pediatrics' goal of 1 ppb, *see* Landrigan Decl. Ex. E, ECF No. 19-16, to tailor the relief. Providing relief to these households would not "interfere" with the State's enforcement activities, Def. Br. 27; it is intended to remedy the City's violations of the Act until those violations are finally corrected.

[10] Some covered households, particularly households with pregnant women but no young children, of which there are about 2,300, Shefftz Decl. ¶ 8, may need to identify themselves to the City.

of enrolled students—who may be as young as three because of Newark's free pre-kindergarten program, *see* Imperiale Ex. 12—including their ages and addresses. *See* N.J.A.C. § 6A:32-7.3(a). This information may be used for purposes of the proposed relief because it would be in service of public health and effectuating a court order. *See id.* § 6A:32-7.5(e)(15), (f); *see also* 34 C.F.R. § 99.31(9)(i), (10).

The City may also identify households with young children using state health records. The New Jersey Department of Health maintains a record of the age and address of any child who received a lead screening or vaccination. *See* N.J.A.C. § 8:44-2.11(c) (lead screening); *id.* § 8:57-3.16(d) (vaccinations). Such records include information on almost every child in New Jersey, since children must be screened for lead at ages one and two, N.J.A.C. § 8:51A-2.2(a)(1), and receive a wide variety of vaccinations before enrolling in school or childcare, *see generally id.* §§ 8:57-4.10 to -4.20.[11] As with school records, these data may be used for protection of public health or in response to a court order. *Id.* § 8:51-3.3(a)(2)-(3); 45 C.F.R. § 164.512(b)(1)(i), (e)(1)(i).

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[11] New Jersey has lead-screening reports on 93% of children by the time they turn six, DTaP vaccination reports for at least 87% of children by the time they turn three, and hepatitis B vaccination reports for 66.7% of children within a few days of birth. *See* Imperiale Ex. 13 at 10; Ex. 14-15.

B. The proposed relief costs less than City Defendants claim and is easily scalable

City Defendants claim it would cost $82 million a year to provide bottled water to every resident. Def. Br. 26. As discussed above, the City has workable strategies to target the most vulnerable households, greatly reducing those costs. Moreover, households will have the option of using a water filter instead of bottled water. ECF No. 41 ¶ 3.

The Court has feasible and economical options for responding to residents' health needs. Even the most ambitious remedial program would cost $50 million less than City Defendants' inflated estimate. Shefftz Decl. ¶ 13. But the Court has choices for reducing costs further. For example, if the amount of water provided to each household were reduced from four to three cases per person per week, relief would cost about $25 million. *Id.* ¶ 16. If the population covered were limited to households with pregnant women or children age six or under, relief would cost about $9 million. *Id.* ¶ 15. This change would protect the most vulnerable Newark residents, but would leave unprotected many families with high lead concentrations. If the Court ordered the provision of only filters (including proper installation and maintenance), not bottled water, to the homes Plaintiffs have identified, relief would cost about $5.3 million. *Id.* ¶ 17. Even this modest step could provide effective protection for many vulnerable residents.

C. Ordering the proposed relief will not inappropriately expand the Court's responsibilities

Finally, the proposed relief will not involve the Court in minor "customer-service complaints" or require an unlimited judicial takeover of the water utility. Def. Br. 27-28. If City Defendants "take[] all reasonable steps to comply with" this Court's order and "violate[] the order in a manner that is merely 'technical' or inadvertent,'" they may not be held in contempt. *FTC v. Lane Labs-USA, Inc.*, 624 F.3d 575, 591 (3d Cir. 2010). Indeed, district courts routinely grant injunctive relief requiring specific administrative actions. *See, e.g.*, *Pub. Int. Research Grp. of N.J., Inc. v. Rice*, 774 F. Supp. 317, 330-31 (D.N.J. 1991) (ordering specific steps to comply with existing permit); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 283 (2d Cir. 2003) (upholding injunction requiring city to ensure access to public benefits by people with HIV/AIDS).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue a preliminary injunction and order City Defendants to implement relief necessary to abate ongoing harm to the City's most vulnerable populations.

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Respectfully submitted,

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