IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONCERNED PASTORS FOR SOCIAL ACTION, et al.,

Plaintiffs,

v.

NICK A. KHOURI, et al.,

Defendants.
_____/

Case No. 16-10277

Hon. David M. Lawson

Mag. J. Stephanie Dawkins Davis

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants do not dispute that there is a public health crisis in Flint because of lead contamination in the City's drinking water. Nor, in their response to Plaintiffs' motion, do they dispute that Flint's water system is violating the Safe Drinking Water Act. Defendants' remaining arguments contesting Plaintiffs' likelihood of success on the merits were largely rejected by the Court in its order denying Defendants' motions to dismiss.

The Court is left to decide whether current response efforts ensure Flint residents have access to safe drinking water now, while their tap water is unsafe. Plaintiffs have shown that barriers to water access remain significant and systemic, particularly for residents who cannot travel to water-distribution sites. Defendants have not refuted this competent evidence of irreparable harm. In fact, their assertions about water access are undermined by the deposition testimony of their own witnesses, who could not answer the most basic questions about the water and filter delivery services they claim serve all Flint residents who need them.

Plaintiffs' requested relief—a door-to-door bottled-water delivery service or a filter installation, monitoring, and maintenance plan for all Flint residents—provides a reasonable remedy to address gaps in water access. The relief also serves the public interest because it places the burden of water provision on those responsible for the problem: the owners and operators of Flint's water system.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their claims

A. Defendants continue to violate the Safe Drinking Water Act

Defendants do not contest Plaintiffs' claims that Flint's water system (Water System) continues to violate the Safe Drinking Water Act's corrosion control treatment and tap water monitoring requirements. Pls.' Br. 12-21, ECF No. 27. Defendants thus have waived opposition on the issue with respect to this motion. *See Thorn v. Medtronic Sofamor Danek, USA, Inc.*, 81 F. Supp. 3d 619, 631 (W.D. Mich. 2015).[1] But even absent waiver, the City's Water Utilities Supervisor admitted at her deposition that the System is violating the Act's requirements for corrosion control, McDay Dep. 81; *see* 40 C.F.R. § 141.82(g), and monitoring, McDay Dep. 71-72, 135-36, 144-45; *see* 40 C.F.R. § 141.86(a)(3), (a)(8), (d).

B. State Defendants are operators of the Water System

State Defendants' claims that they exercise "mere budgetary oversight" over the Water System, *see* State Defs.' Br. 21, 24-27, 29, are belied by the evidence. Plaintiffs have shown that State Defendants control the System. *See* Pls.' Br. at 23-25. State Defendants routinely take an active role in managing the System's operations, including by assessing whether plant operators are qualified, evaluating

[1] The arguments Defendants repeat from their motions to dismiss, *see* City Defs.' Br. 9 & n.36, ECF No. 42; *compare* State Defs.' Br. 11-13, 16-19, ECF No. 40, *with* State Defs.' Mot. to Dismiss 7-14, 17-23, ECF No. 23, fail for the reasons the Court identified when it denied the motions. Op. & Order 7-23, ECF No. 62.

the System's water-source options, and gathering information about chemicals and equipment needed for water treatment. *See* Pls.' Br. 23-25; PA 546-48, 669-70, 675, 678-80, 682, 684-85. For years, Treasury officials have participated in near-weekly meetings with City officials during which they discussed various aspects of the System, including water-quality sampling, PA 690, 693, 699; issuance of boil-water notices, *id.* at 702-03; environmental compliance, *id.* at 707, 710; and the water plant's preparation for the switch of water sources, *id.* at 714. Moreover, the System cannot proceed with current plans to purchase treatment chemicals or implement a "Project Plan for water system improvements" absent approval by the Receivership Transition Advisory Board. *Id.* at 827-28; *see also id.* at 838-39, 841.

State Defendants do not acknowledge this evidence of their "active[] participat[ion] in and exert[ion] [of] control over" the Water System's operations. *United States v. Bestfoods*, 524 U.S. 51, 72 (1998). Instead, they attempt to obfuscate their role by listing, without citation to evidence, actions they claim *not* to take—in some instances, despite evidence to the contrary. *Compare* State Defs.' Br. 22, *with* Pls.' Br. 23. For example, while State Defendants assert that the Board does not "set qualifications of water department staff," State Defs.' Br. 22, a Defendant Board Member at a recent meeting stated that the Board will have "input with regards to what the qualifications should be" and approve "the necessary qualifications" for the Director of the Department of Public Works. PA

718-21; *see id.* at 821, 834-35. State Defendants' affirmative acts of control go far beyond "mere budgetary oversight" and show that Plaintiffs are likely to succeed on their claim that State Defendants are operators of the Water System.[2]

Moreover, financial control is indicative of operator liability under the *Bestfoods* standard, Pls.' Br. 23-24 (citing cases); Op. & Order 24-25, because financial and operational control are often indistinguishable. *See* PA 723-26. State Defendants' decisions for the Water System, whether based on cost comparisons or water-quality assessments, *see* State Defs.' Br. 25-26, are "specifically related to" the distribution of—and profoundly affect the System's ability to provide—safe water to Flint residents. *Bestfoods*, 524 U.S. at 66.

II. Flint residents are suffering irreparable harm

Plaintiffs have shown that Flint residents are irreparably harmed by the difficulties they face in obtaining bottled water and working filters while their tap water is unsafe. Pls.' Br. 25-34; *infra* 5-10. Defendants have not refuted Plaintiffs' showing.

A. Defendants' water-distribution efforts do not provide all Flint residents with adequate access to safe drinking water

Flint residents are still struggling to access safe drinking water. *See* Burns Decl. ¶¶ 8, 11-17; Childress Decl. ¶¶ 6-13; Gains Decl. ¶¶ 6, 12-18; PA 732. Some

[2] In this Circuit, affirmative acts need not rise to the level of day-to-day, hands-on control. *See United States v. Twp. of Brighton*, 153 F.3d 307, 314-16 & n.11 (6th Cir. 1998); *id.* at 325-27 (Moore, J., concurring).

residents cannot reliably find transportation to water-distribution sites, *e.g.*, Childress Decl. ¶¶ 6-10; have trouble getting enough water from those sites to meet their needs, *e.g.*, Burns Decl. ¶ 16; or have requested delivery services, but to no avail, *e.g.*, Childress Decl. ¶¶ 11-12. These residents' efforts to obtain safe drinking water—though characterized by Defendants as "anecdote," *see* City Defs.' Br. 6—are competent evidence of irreparable harm.[3] *See Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 657 (6th Cir. 1996). Organizers and volunteers in Flint confirm that these residents' experiences are not unique, but instead reflect systemic barriers to safe drinking water access despite existing relief efforts. *See* Brady-Enerson Decl. ¶¶ 10, 24; Ishmel Decl. ¶¶ 5-8; Reyes Decl. ¶¶ 10, 14, 16; PA 738.[4]

Defendants' claims to the contrary, *e.g.*, State Defs.' Br. 15-16, rely on ambiguous statistics and unsupported assertions. Visits to Flint homes by response teams up to six months ago, *see* Kelenske Aff. ¶¶ 19-29, ECF No. 40-2, are not probative of those homes' access to safe water today. *See* Brady-Enerson Decl. ¶¶ 14-18; PA 746. When State Defendants say that a home was "visited" and "confirmed to have" a filter, *see* Kelenske Aff. ¶¶ 31-32, it only means that a filter

[3] *See also* Collins Decl. ¶ 11; Fordham Decl. ¶¶ 7, 9, 12, 16; Hasan Decl. ¶¶ 23, 29-30; Mays Decl. ¶¶ 10, 20, 63; McClanahan Decl. ¶¶ 5, 11-12; Newsom Decl. ¶¶ 5-6, 9-11, 16, 25; Rasool Decl. ¶¶ 9-14, 24, 28, 34, 36-37; Williams Decl. ¶¶ 8-11; Pls.' Br. 34-35.

[4] *See also* Duell Decl. ¶¶ 14-15, 17, 26; Harris Decl. ¶ 19; Lancaster Decl. ¶¶ 6-7; Overton Decl. ¶¶ 6-8; Roper Decl. ¶¶ 10-14.

was dropped off at that home. *See* Kelenske Dep. 61-62, 70. State Defendants have no information on whether the filter was installed properly, has been maintained adequately, or is in use today. *Id*. at 114-15.

This disconnect is significant because, even assuming that filters can render Flint's tap water safe to drink, they can do so only when "properly installed and used." PA 749; *see also id.* at 616-18, 625; Kelenske Dep. 114.[5] Volunteer social workers report that between 50% and 70% of homes they visit "have filters that are not working." PA 730. Filter instructions vary by model and can be difficult to comprehend, *see id.* at 752-54, 759, particularly for a community where 35% of adults are illiterate, *id.* at 761, 763. And, even after installation, residents often do not know whether their filter is working properly. Brady-Enerson Decl. ¶ 17; Gains Decl. ¶ 22; PA 730-31, 768; Pls.' Br. 30.[6] Defendants have not refuted this evidence. Indeed, Captain Kelenske testified that the State does not know what percentage of residents are using properly installed and maintained filters. Kelenske Dep. 114-15. Absent evidence that filters are installed and maintained properly, filter distribution is not adequate to ensure access to safe water for all

[5] In late June, EPA announced that filtered water was safe for all Flint residents to drink. PA 775. The Genesee County Medical Society, however, continues to urge pregnant women and children to drink only bottled water. *See id.* at 749, 778; *see also* Pls.' Br. 30-31.

[6] *See also* Collins Decl. ¶ 15; Duell Decl. ¶ 29; Fordham Decl. ¶ 10; Lancaster Decl. ¶ 10; Newsom Decl. ¶ 22; Mays Decl. ¶¶ 11, 55; Williams Decl. ¶ 13.

Flint residents. Brady-Enerson Decl. ¶ 18; *see* 40 C.F.R. § 142.62(h)(1), (6).[7]

The water-distribution sites touted by Defendants are also inadequate. Nearly 20% of Flint households lack access to a vehicle. PA 577. And significant swaths of the City are more than a quarter-mile from a state-run or private water-distribution site. Lee Decl. ¶ 11 & Ex. 3.[8] As a result, residents who lack access to a vehicle "effectively lack access to the . . . resources available at distribution centers," because for them walking or traveling by public transportation to the centers is inconvenient, time-consuming, and physically demanding due to the weight of the bottled water. Brady-Enerson Decl. ¶ 22; *see also* Childress Decl. ¶¶ 6-10; Ishmel Decl. ¶ 7; Gains Decl. ¶¶ 17-18.[9]

The water-delivery programs relied on by Defendants, *see* Branch Decl. ¶ 4, ECF No. 42-2; Kelenske Aff. ¶¶ 38-42, are also deficient because they do not serve

[7] Lack of trust in filters—and, relatedly, the government—is also a significant barrier to filter use in Flint. *See* PA 729-30, 768, 781; Burns Decl. ¶ 18; Childress Decl. ¶ 15; Gains Decl. ¶ 23; *cf.* Reyes Decl. ¶ 25. In a recent survey, nearly 70% of Flint residents reported they do not "trust government assurances that filtered tap water is safe to drink"; only 11% trusted those assurances. PA 787. Defendants acknowledge that this "trust issue" limits the efficacy of filter distribution. Kelenske Dep. 24-25, 27-29.

[8] Water-distribution sites' limited hours also pose a barrier to access. *See* Brady-Enerson Decl. ¶ 25. State-run water-distribution sites are open only in the afternoon and not open at all on Sundays. PA 791. Early morning, late evening, and Sunday hours are limited for both state-run and private distribution sites. Lee Decl. ¶¶ 12-13 & Exs. 4, 6.

[9] *See also* Hasan Decl. ¶ 30; Lancaster Decl. ¶¶ 6-7; McLanahan Decl. ¶ 11; Newsom Decl. ¶ 6; Overton Decl. ¶ 7; Roper Decl. ¶ 10; Williams Decl. ¶¶ 8, 11.

all Flint residents who need assistance. Organizers in Flint regularly encounter residents who are homebound but do not receive any water-delivery services. Brady-Enerson Decl. ¶ 23. Indeed, Defendants' witnesses do not know how many Flint residents need bottled-water delivery. Branch Dep. 16-17, 38; Kelenske Dep. 81-83, 128. Nor could they answer the most basic questions about the water-delivery programs described in their declarations, including how many homes the programs serve, who is eligible for deliveries, or how often the programs deliver. Branch Dep. 38-39, 46-47; Kelenske Dep. 120-22, 133-34, 153-54.

That residents who call United Way's 211 helpline potentially could be added to a "homebound" list, *see* Kelenske Aff. ¶¶ 38, 41, will not close the gaps in water access. The 211 helpline is not reliable or effectively advertised as a means of requesting water delivery and, even if it were, many Flint residents reasonably have stopped calling because of 211's history of providing incorrect information and offering no option for water delivery. *See* Pls.' Br. 28-29; PA 584, 741, 743; Childress Decl. ¶¶ 11-12; Lancaster Suppl. Decl. ¶ 6.[10]

[10] The lack of current and clear information from the government is a problem for many Flint residents. *See* PA 744. While the City mailed an English-language-only notice about flushing pipes to every household in April, *see* ECF No. 42-13, Plaintiffs are unaware of any similar mailed notices describing water-delivery resources, including the 211 helpline. Defendants do not even advertise delivery services on the front pages of their water-crisis websites. *See* PA 794, 798. Residents often must rely on word of mouth or volunteer canvassers to learn where and how they can get bottled water. Burns Decl. ¶ 10; Gains Decl. ¶¶ 14-15; *see also* PA 746.

B. Volunteer water-relief efforts are unsustainable and cannot fill existing gaps in government services

Defendants' reliance on third-party, volunteer water-distribution efforts, *see, e.g.*, City Defs.' Br. 3, 14-15, overstates the effectiveness of those efforts and ignores the government's responsibility to end the crisis. To be sure, third-party relief efforts are invaluable to countless Flint residents. Those who coordinate these efforts, however, are the first to admit that they lack the funds and personnel necessary to completely fill the gaps in government-provided services. *See* Brady-Enerson Decl. ¶ 26; Ishmel Decl. ¶¶ 16-17; Reyes Decl. ¶¶ 17-18.[11] Third-party efforts are also facing capacity reductions, as the numbers of volunteers and donations decline while the crisis persists. *See* Brady-Enerson Decl. ¶¶ 27-28; Ishmel Decl. ¶ 21; Lancaster Suppl. Decl. ¶ 4; Reyes Decl. ¶¶ 19-20; PA 801. In fact, the volunteer delivery service cited by City Defendants, *see* City Defs.' Br. 3, has shut down due to a lack of resources. Ishmel Decl. ¶ 21.

Even if volunteer response efforts were able to fill completely the gaps in government-provided services, Defendants should be the ones to ensure that all Flint residents have access to safe drinking water. It is Defendants' violations of the law that caused Flint's tap water to be unsafe. Many volunteers do not want to be in the water-distribution business. *See* Ishmel Decl. ¶ 23; Roper Decl. ¶¶ 20-21. They do so, at the expense of other priorities, because they feel compelled to help

[11] *See also* Duell Decl. ¶¶ 34, 36; Harris Decl. ¶¶ 19, 22; Roper Decl. ¶ 22.

their neighbors who are struggling to obtain safe drinking water. *See* Duell Decl. ¶ 32; Ishmel Decl. ¶¶ 22-23; Harris Decl. ¶¶ 21-22; Roper Decl. ¶¶ 21-22. It would be inequitable to deny injunctive relief on the grounds that private groups are, out of necessity, stepping up to furnish relief that should be provided by the parties responsible for the harm.[12]

III. Plaintiffs' requested relief is in the public interest

Defendants do not dispute that adequate access to safe drinking water serves the public interest. *See* Pls.' Br. 36. Nor do they assert that Flint's tap water will soon be safe and render alternative water resources unnecessary. *See id*. at 25.[13]

Plaintiffs' requested relief is a reasonable way to ensure all Flint residents have reliable access to alternative sources of drinking water until their tap water is safe. This is precisely what EPA requires water systems to do when they seek exemptions from the Lead and Copper Rule: implement either robust door-to-door bottled-water delivery or a filter installation, monitoring, and maintenance program

[12] *Lyda v. City of Detroit*, No. 13-53846, 2014 WL 6474081 (Bankr. E.D. Mich. Nov. 19, 2014) (PA 850), did not conclude that the availability of "alternative sources" of drinking water was fatal to a request for preliminary injunctive relief. To the contrary, the *Lyda* court held that despite "alternative sources" of drinking water and a "patchwork combination of charity and public funds" dedicated to helping residents pay their water bills, plaintiffs would suffer irreparable harm if the defendant terminated its water service. *Id.* at *11-12. The court denied relief primarily because plaintiffs' "likelihood of ultimate success [wa]s so remote." *Id.* at *13. That is not the case here.

[13] Indeed, recent testing indicates that Flint's tap water may not be safe to drink for a year or more. PA 817-18; *see also* Giammar Decl. ¶¶ 38-41; Giammar Suppl. Decl. ¶¶ 5-7, 10-12, 14.

for *all* customers. *See* 40 C.F.R. § 142.62(f)-(h).

Plaintiffs do not contend that the requested relief will be without expense. Nonetheless, Defendants have not shown that providing the relief would cause them substantial harm. Flint's Deputy Finance Director could not say that a program serving up to 5000 homes was beyond Flint's financial means. Steele Dep. 78-79. Likewise, State Defendants' assertion that they lack "access to, or control over" the money necessary to fund relief, *see* State Defs.' Br. 12, is irrelevant and contradicted by the testimony of Captain Kelenske. Injunctive relief against State Defendants can be funded from "the state treasury," *see Nelson v. Miller*, 170 F.3d 641, 646 (6th Cir. 1999), and Captain Kelenske confirmed the State would "find a way" to support any response efforts deemed necessary, Kelenske Dep. 158; *see also id.* at 101, 161.

Moreover, contrary to City Defendants' contentions, *see* City Defs.' Br. 20-23, Plaintiffs' requested relief would not disrupt Defendants' efforts to come into compliance with the Safe Drinking Water Act.[14] At her deposition, Flint's Water Utilities Supervisor admitted that a bottled-water delivery program would only

[14] The City's response plan is not subject to deference. *See* City Defs.' Br. 20. Courts defer to reasoned actions of regulators, not decisions of regulated parties. *See Trinity Am. Corp. v. EPA*, 150 F.3d 389, 395 (4th Cir. 1998) (deferring to EPA when regulated party challenged an emergency order). In any event, there is nothing to which the Court could defer here, as the EPA Order does not address the provision of safe alternative water resources while Flint's tap water remains unsafe. *See* PA 274-92; Op. & Order 16.

impair the Water System's operations to the extent Utilities Department employees were required to make the deliveries. *Compare* McDay Dep. 51, *and id.* at 47-50, *with* McDay Decl. ¶ 13.[15] But Plaintiffs' requested relief would not require that. *See* McDay Dep. 50. This is not a case, as City Defendants suggest, where the requested relief is adverse to the public's interest "in having remedial action go forward as quickly as possible." *Miron v. Menominee Cty.*, 795 F. Supp. 840, 847 (W.D. Mich. 1992); *see* City Defs.' Br. 20-21.[16] Rather, Plaintiffs' requested relief would complement the Water System's remediation efforts—aimed at providing safe water in the future—by assuring Flint residents access to safe water now.

IV. The Court has authority to order the relief requested

A. The Court can provide relief that extends beyond named plaintiffs

Contrary to State Defendants' suggestion, *see* State Defs.' Br. 14-15, access to safe drinking water should not depend upon participation in this, or any, lawsuit. The Safe Drinking Water Act, like other federal environmental statutes, allows citizens to act as "private attorneys general" to "seek relief not on their own behalf

[15] The Declarations of JoLisa McDay, PA 884-86, and Dawn Steele, *id.* at 888-90, replace the Declarations of Michael Glasgow, ECF No. 42-14, and Jody Lunquist, ECF No. 42-16, respectively. Chaudhary Suppl. Decl. ¶ 42; PA 879-80.

[16] The other cases City Defendants cite, *see* City Defs.' Br. 20-23, are similarly inapt. In *United States v. Price*, the district court denied injunctive relief that could have delayed cleanup efforts when the plaintiff could begin cleanup right away and recoup its costs later. 688 F.2d 204, 214 (3d Cir. 1982). *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, is inapposite because Plaintiffs here have identified additional response efforts Defendants should undertake. *See* No. CV 08-3985 PA (Ex), 2010 WL 5464296, at *13 (C.D. Cal. Dec. 29, 2010) (PA 876).

but on behalf of society as a whole." *See Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004) (discussing citizen suits under the Clean Air Act); 42 U.S.C. § 300j-8. Indeed, the "very nature" of the interests Plaintiffs "seek to vindicate requires that the decree run to the benefit not only of the named plaintiffs but also for all persons similarly situated." *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974); *see also Caspar v. Snyder*, 77 F. Supp. 3d 616, 642-43 (E.D. Mich. 2015); *Feld v. Berger*, 424 F. Supp. 1356, 1363 (S.D.N.Y. 1976).[17]

B. Plaintiffs' request for relief is not moot

The planned bottled-water delivery program City Defendants cite, *see* City Defs.' Br. 2-3, 9-10, does not moot Plaintiffs' motion. City Defendants have "no role" in implementing the program and offer no evidence of its efficacy. Branch Dep. 24-25. In fact, the Mayor's Chief of Staff testified that he does not know the program's goal, whether deliveries have started, how many residents the program will serve, or how often it will serve them. *Id.* at 33, 37-39. City Defendants' mere reference to a planned delivery program outside of their control does not satisfy their "heavy burden" to show mootness. *See Friends of the Earth, Inc. v. Laidlaw*

[17] Further, the relief Plaintiffs seek would address continuing irreparable harm caused by Defendants' ongoing Safe Drinking Water Act violations. *See* Pls.' Br. 37-40. Contrary to State Defendants' argument, State Defs.' Br. 11, such prospective relief is not barred by the Eleventh Amendment. *See* Op. & Order 21-22; *cf. Price*, 688 F.2d at 212 ("A preliminary injunction designed to prevent an irreparable injury is conceptually distinct from a claim for damages.").

Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

C. The Court has discretion to tailor Plaintiffs' requested relief

The Court's broad power to enter equitable relief includes the discretion to tailor that relief. *Cf. Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 599 (6th Cir. 2012). Although Plaintiffs believe the relief described in their opening brief is most appropriate, *see* Pls.' Br. 38-39, to the extent the Court considers narrower relief, Plaintiffs request that Defendants perform a Court-approved, comprehensive, door-to-door audit of all Flint households. This audit would identify households that for any reason—e.g., disability, lack of access to transportation, conflicting work schedules—lack reliable access to safe drinking water through distribution sites. For the households identified, Defendants would then provide door-to-door water deliveries as described in Plaintiffs' opening brief. *See* Pls.' Br. 38-39; PA 652-55.

CONCLUSION

Plaintiffs request for preliminary injunctive relief should be granted.

Dated: July 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed Plaintiffs' Reply Brief in Support of Motion for Preliminary Injunction with the Clerk of the Court using the ECF system.

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