Dr. Karen W. Weaver
Mayor

CITY OF FLINT, MICHIGAN
Department of Law

Angela Wheeler
Chief Legal Officer

November 5, 2018

Richard Kuhl
State of Michigan, Department of Attorney General
Environment, Natural Resources, and Agriculture Division
PO Box 30755
Lansing, MI 48909

RE: Notice of State of Michigan's Violation of the Settlement Agreement in *Concerned Pastors et al v. Khouri et al*, Case No. 16-cv-10277

Dear Richard,

Pursuant to Paragraph 128 of the Settlement Agreement in *Concerned Pastors et al v. Khouri et al*, 16-10277, Dkt 147-1, the City of Flint formally notifies all parties to that Agreement of a dispute regarding "the meaning of, compliance with, and/or implementation" of that Settlement Agreement. Based on your November 1, 2018 letter, the City understands that the State intends to violate the terms of the Settlement Agreement by denying reimbursement for service line replacement (SLR) activities without just cause, due to the excavation method approved by the City. As set forth herein, the Settlement Agreement explicitly provides that the City, and not the State, may select the excavation method for identification of service line composition. In addition, the newly revised LCR does not mandate any particular method for such excavations.

Mayor Weaver refuses to sacrifice the health and safety of the City's residents to reduce the State's obligation to reimburse the City for the cost of identifying and replacing all lead and galvanized steel service lines in the City. Nothing in the Settlement Agreement allows the State to impose these additional conditions on SLR reimbursements, or to deny the City's reimbursement requests simply because the City refuses to compromise on protecting the public health. Furthermore, the City objects to any attempt by the State to address its financial concerns at the expense of the health and safety of the City's residents. The City thus requests that a meet and confer be scheduled to discuss these issues.

1) The City, and not the State, is authorized to approve excavation methods

The City's goal, as the Settlement Agreement states, is to "replac[e] all lead and galvanized steel water service lines in the City of Flint with copper water service lines . . ."[1] Based on your November 1, 2018 letter, the City has grave concerns regarding the State's commitment to this goal. The City's efforts to replace all lead and galvanized steel service lines in the City of Flint depends on the State's fulfilment of its obligation to reimburse the City for the costs incurred. The City views your November 1 letter as an

[1] Settlement Agreement, *Concerned Pastors et al v. Khouri et al*, 16-cv-10277, Dkt 147-1, at 3.

attempt to impose additional conditions on those reimbursements, exceeding those set forth in the Settlement Agreement, and to once again impose state policies that place the State's financial concerns above the health and safety of the City's residents.

Paragraph 2(l) the Settlement Agreement defines "excavations" to mean "digging a hole or channel through a method approved by the City at the location of a curb stop and box and exposing several inches of the service line in each direction, for the purpose of identifying the material of a buried service line."[2] That paragraph explicitly refers to "a method approved by the City." Furthermore, that paragraph also states that the purpose of excavations are to identify "the material of a buried service line." The City thus construes paragraph 2(l) as recognizing that the City has the discretion to select a method of excavation that will best accomplish the goal of identifying the material of buried service lines.

This year, the City has identified seven addresses at which the service line either was, or would have been, incorrectly identified as copper due to "splicing," or the partial replacement of a service line by a homeowner. The City thus determined that hydrovac excavation, which exposes only one to two feet of a service line on the resident's side of the curb box, was an insufficiently reliable method of identifying homes with spliced service lines, because such splices can occur outside of that one to two foot range. The City thus determined that it was necessary to utilize traditional open-cut excavations in order to ensure that it was correctly identifying the material of buried service lines.

Furthermore, under the Settlement Agreement, the State of Michigan is obligated "to pay on behalf of or to reimburse the City for costs" incurred in conducting SLRs.[3] These SLR costs specifically include "excavations related to identification of service line material."[4] The Settlement Agreement requires that the "the average cost of the service line replacements" not exceed $5,000, but does not otherwise limit the cost of excavations.[5]

Under the plain language of the Settlement Agreement, the State's obligation to reimburse the City's excavations costs is contingent only on the average per-address cost for SLR activities. So long as the average per-address cost of those activities is at or below $5,000, the State is obligated to reimburse the City for its costs. The State admits that it cannot show that the City exceeded this $5,000 per address limit, and the State's expressed intention to deny reimbursement, based on the cost of an open-cut excavation, thus constitutes a violation of the Settlement Agreement.

As a result, the State's is violating, or has expressed an intention to violate, the Settlement Agreement by: (a) superseding the City's determination of what excavation method will best identify buried service lines composition, (b) imposing additional reimbursement conditions not previously agreed to, and (c) prioritizing financial concerns over the health and safety of the City's residents.

2) The appropriate prioritization of SLR in 2019 has not yet been determined

The City also objects to the factual inaccuracies in your November 1, 2018 letter, regarding the selection of areas for SLR in 2018. Specifically, you alleged that, "in 2018 . . . the City made a policy decision to stop prioritizing excavations at homes where lead or galvanized steel service lines were expected to be

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[2] *Id.* at ¶2(l).
[3] *Id.* at ¶23.
[4] *Id.*
[5] *Id.* at ¶23(b).

found." This allegation is incorrect and contrary to numerous statements made by the City over the past year, in both informal and formal communications.

The City has consistently stated that in 2018, the FAST Start program selected areas, based on the best information available to our project management consultants, with the intention of maximizing the chance of hitting lead or galvanized steel service lines. Specifically, our personnel made these determinations based on a combination of historical service line composition information, the age of the nearby City water infrastructure, preliminary information provided by outside researchers such as Drs. Schwartz and Abernathy, and other information. As information became available in 2018, once that data was integrated into the FAST Start program's dataset, it was considered, along with the other available data, by the City's program management consultants.

However, the City recognizes that it now has more information available than it did at the beginning of 2018, and believes that it would be appropriate to refine its planning for Phase VI of the FAST Start program, scheduled to occur in 2019, to focus on the areas where lead and galvanized steel service lines remain. While the City intends to complete the excavation and replacement of the approximately 11,000 service lines remaining in 2019, the ordering of the areas in which the City will conduct SLRs has yet to be determined. The City does not expect to determine the order of 2019's SLR activity until January or February of 2019, at the earliest.

3) Reimbursement Request Issues

The City was also astonished to read of the State's concerns regarding reimbursement requests by the City. City personnel and our project management consultants have been in regular communication with State personnel to address those issues as they may arise. To the best of our knowledge, none of these State's communications indicated any systemic deficiencies in the City's reporting or reimbursement requests. However, the complete lack of specificity in your letter regarding the alleged deficiencies prevents the City from intelligently responding.

In addition, while the State raised this issue this past summer, the City is also surprised that the State has not communicated any detailed concerns regarding any systemic issues in reimbursement requests, to the City's finance or legal personnel, since September 5, 2018. Our CFO is in regular communication with state personnel regarding these and related issues. The City's legal staff has also been consistently available for consultation regarding the implementation of the Settlement Agreement. The State's failure to notify the City of any ongoing concerns is particularly troubling given the City's reliance on State funding to complete the replacement of lead and galvanized steel service lines in the City.

Furthermore, the City also notes that it currently has three reimbursement requests pending with the State: one of which was submitted on September 25, 2018, and two of which were submitted on October 23, 2018. Prior to your November 1, 2018 letter, the City believed that the State was processing these requests in good faith. However, given the unreasonable demands made in your letter, the City reluctantly concludes that the State has already decided to deny those requests. This denial is patently unreasonable and in violation of Paragraph 23 of the Settlement Agreement, which provides no grounds on which the State may deny a reimbursement request that does not exceed the $5,000/address average. The September 25, 2018 request is also overdue, pursuant to Paragraph 23(a) of the Settlement Agreement, which requires that reimbursement be made within 30 days.

The State's violation, and its expressed intention to continue violating the Settlement Agreement, appears to be nothing less than an attempt to hold the funding needed to complete the City's SLR efforts hostage. Once again, the State is putting its own financial concerns above the health and safety of the City's residents. The City expects that the State will fulfil its obligations under the Settlement Agreement by reimbursing the City as promised. The residents of Flint deserve nothing less.

The City thus formally asks that these outstanding reimbursement requests, and the State's attempt to impose additional conditions on its obligation to reimburse the City, be subject to a forthcoming meet and confer under Paragraph 128 of the Settlement Agreement.

William Kim, Assistant City Attorney
City of Flint, Department of Law