STATE OF MICHIGAN
COURT OF CLAIMS

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, as County Agent for the County of Oakland, GREAT LAKES WATER AUTHORITY, CITY OF DETROIT, by and through its Water and Sewerage Department, and CITY OF LIVONIA,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

No. 2018-000259-MZ

HON. CHRISTOPHER M. MURRAY

/

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PLAINTIFF CITY OF LIVONIA'S MOTION FOR RECONSIDERATION OF THE COURT'S DECISION ON DEFENDANT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) AND PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(I)

NOW COMES Plaintiff City of Livonia ("Livonia"), by and through its attorneys, Paul A. Bernier, City Attorney, and Michael E. Fisher, Chief Assistant City Attorney, and in support of its Motion for Reconsideration of the Court's Decision on Defendant's Motion for Summary Disposition Under MCR 2.116(C)(8) and Plaintiffs' Motion for Summary Disposition under MCR 2.116(I), pursuant to MCR 2.119(F), states as follows:

1. Plaintiffs filed this action of December 11, 2018 seeking a declaratory judgment that the revised lead and copper rules enacted by Michigan's Department of Environmental Quality ("MDEQ") on June 14, 2018 (the "Rules") were invalid on a variety of legal grounds.

2. One such ground is that the Rules, particularly Rule 325.10604f(6)(e)[1], violates the Revenue Bond Act, MCL 141.101, *et seq*, especially MCL 141.129, by requiring water supplies to treat the cost of replacing private lead water service lines as an expense of the system which must *ergo* be paid out of general customer water rates, per MCL 141.121(1). Complaint paras 129-130.

3. Defendant filed its Motion for Summary Disposition under MCR 2.116(C)(8) against Plaintiffs ("Defendant's Motion") on February 1, 2019.

4. Defendant's Motion argued in part that the rate rules do not actually set or prescribe water rates. Defendant MDEQ's February 1, 2019 Brief in Support of its Motion for Summary Disposition under MCR 2.116(C)(8) ("Defendant's Brief") at 43.

5. Defendant's Brief further argued that MDEQ is free to impose higher costs on water supplies pursuant to the Safe Drinking Water Act, MCL 325.1001, *et seq* (the "SDWA"), without being deemed to have set rates in so doing. Defendant's Brief at 43-44.

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[1] To the same effect is Rule 325.10604f(5)(c). Together, Rules 325.10604f(5)(c) and (6)(e) are hereafter referred to as the "rate rules".

6. Finally, Defendant's Brief concluded that the Legislature intended to repeal by implication MCL 141.129 unless that section is read as Defendant reads it. Defendant's Brief at 44-45.

7. Defendant did not deny that MCL 141.121(1) requires that expenses of the water system be covered by rates, and that the rate rules, by requiring that the private lead line replacement costs be treated as expenses of the system, thereby compel the inclusion of those costs in the rate base. Indeed, Defendant observed that the costs "must ultimately be recovered . . . via rates." Defendant's Brief at 39.

8. Defendant failed to explain the meaning of "supervision" – separate and apart from "regulation" – of rates in MCL 141.129.

9. In their response to Defendant's Motion, Plaintiffs pointed out the policy conflict between MCL 141.129 and the rate rules: Solicitude for bond buyers and holders was the Legislature's motive in adopting MCL 141.129, whereas the rate rules subject bondholders to unacceptable risk, such as *Bolt* liability. Plaintiffs' February 15, 2019 Response in Opposition to Defendant MDEQ's February 1, 2019 Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) ("Plaintiffs' Response") at 32, 35-36.

10. Plaintiffs also pointed out that Defendant's proposed repeal by implication is to be avoided at almost all costs. Plaintiffs' Response at 32, citing *AK Steel Holding Corp v Dept of Treasury*, 314 Mich App 453, 471; 887 NW2d 209 (2016).

11. Plaintiffs proposed a construction which would harmonize the SDWA and the Revenue Bond Act, i.e., that the Court honor the SDWA's silence regarding ratesetting, and leave that subject to the Revenue Bond Act. Plaintiffs' Response at 32-33.

12. Plaintiffs concluded by requesting that summary judgment be granted to Plaintiffs as to Count V of Plaintiffs' Complaint, Plaintiffs' Response at 36, per MCR 2.116(I)(2).

13. In its Reply Brief, Defendant repeated its claim to be able to impose limitless costs on Plaintiffs and argued, in effect, that MDEQ does this all the time. Defendant MDEQ's Reply Brief in Support of its February 1, 2019 Motion for Summary Disposition under MCR 2.116(C)(8) at 12.

14. The Court graciously allowed the parties to have oral argument on this case on July 23, 2019.

15. On that occasion, MDEQ argued that MCL 141.129 really means that MDEQ is prohibited from behaving as the Michigan Public Service Commission behaves in its supervision of ratesetting by regulated utilities.

16. On July 26, 2019, the Court issued its Order Granting Defendant Michigan Department of Environmental Quality's February 1, 2019 Motion for Summary Disposition pursuant to MCR 2.116(C)(8), as well as its Opinion Regarding Defendant's February 1, 2019 Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) (the "Opinion").

17. Although parts of the Opinion may be susceptible to more than one interpretation,[2] the Opinion evidences two palpable errors where the rate rules are concerned: the notions that a) "nothing in the rules *require* Plaintiffs to charge back customers for the improvements;" and b) MDEQ "has simply imposed . . . new costs on the water supply." Opinion at 16-17 (emphasis original).

18. Because MCL 141.121(1) requires that rates cover all expenses of the system, and the rate rules require that private service line replacement be treated as an expense of the system,

[2] If what is meant by "the rules only require that the replacement costs be *initially* borne by the supply"(Opinion at 16, emphasis added) is that the homeowner could be required to reimburse the system sometime later on, this would alleviate some concerns about the rate rules. However, this seems an unlikely interpretation of the Opinion because it appears to conflict with the rate rules.

the rate rules *do* require Plaintiffs to charge back customers for the improvements, and Defendant has not argued to the contrary.

19. Likewise, the statement that MDEQ "has simply imposed . . . new costs on the water supply" is palpable error. In addition to imposing new costs, MDEQ has, by its adoption of the rate rules, specifically *withdrawn a revenue source* from Plaintiffs.

20. The foregoing palpable errors misled this Court, and a different disposition of the Motion – at least where validity of the rate rules is concerned – must result from correction of these errors.

21. As further explained in Plaintiff City of Livonia's Brief in Support of Motion for Reconsideration attached hereto, Plaintiff City of Livonia should be granted summary disposition on Count V of the Complaint, where the rate rules are concerned, together with such other relief as justice may require.

WHEREFORE, Plaintiff City of Livonia respectfully request that this Honorable Court reconsider the decision embodied in the Order, and instead grant Plaintiff City of Livonia's request for summary disposition as to Count V of the Complaint regarding the rate rules.

Respectfully submitted,

Attorneys for Plaintiffs

By:_____

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Dated: August 8, 2019

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PLAINTIFF CITY OF LIVONIA'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

As the Court is no doubt aware, MCR 2.119(F)(2) provides that no response to this Motion may be filed, and no oral argument held, unless the Court otherwise directs.

The Standard for Deciding Motions Under MCR 2.119(F)

Generally speaking, MCR 2.119(F)(3) disfavors motions which rehash old arguments, preferring arguments which demonstrate "palpable" errors by which the Court has been misled. Accordingly, this Motion addresses two such errors. But MCR 2.119(F)(3) is careful to preserve the Court's discretion in responding to motions for reconsideration because the point of such motions is to facilitate self-correction of errors before they do any real harm.

> MCR 2.119(F)(3) "allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties."

Bakian v Nat'l City Bank (*In re Estate of Moukalled*), 269 Mich App 708, 714; 714 NW2d 400 (2006), quoting *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000).

> This rehearing procedure allows a court to correct mistakes which would otherwise be subject to correction on appeal, though at much greater expense to the parties.

People v Turner, 181 Mich App 680, 683; 449 NW2d 680 (1989).

> [I]t would be a strange result to perpetuate an error on the grounds that it was not "palpable" or more generally upon a reluctance to reconsider issues (especially when the same error, if not harmless, would presumably be subject to correction on appeal, but at much greater expense).

Brown v Northville Regional Psychiatric Hospital, 153 Mich App 300, 309; 395 NW2d 18 (1986). (Citation omitted.)

Rules R325.10604f(5)(c) and 6(a) Violate MCL 141.129

The upshot of Rules R325.10604f (5)(c) and 6(e) (hereafter, the "rate rules") is that

[t]he cost of the replacement lines must ultimately be recovered . . . via rates.

Defendant's Brief in Support of its Motion for Summary Disposition Under MCR 2.116(C)(8)

("Defendant's Brief", emphasis added) at 39.[1]

But per MCL 141.129, Defendant (also called "MDEQ" herein) has no authority over - and indeed is statutorily prohibited from – regulating or supervising what Plaintiffs must or must not do with its rates. Specifically, MCL 141.129 says the

> [r]ates . . . shall not be subject to supervision or regulation by any state bureau, board commission, or other like instrumentality or agency thereof.

Since MDEQ is prohibited from regulating or supervising the setting of rates, the rate rules cannot stand.

MDEQ attempts to get around this seemingly obvious proposition by arguing that it is not prescribing or limiting rates. Defendant's Brief at 43. This argument might well be taken if the prohibition in MCL 141.29 extended only to *regulation* of rates, e.g., prescribing or capping rates. But the prohibition extends to state *supervision* of rates as well. And the old adage of statutory interpretation holds that

> "Statutes should be so construed, if possible, as to give full effect to every part and render no portion nugatory, every clause and word being presumed to have some force and meaning." *Attorney General, ex rel. Zacharias v Board of Education of City of Detroit* (syllabus), 154 Mich 584.
>
> See also, *Rohde v Wayne Circuit Judge*, 168 Mich 683; *Bloomshield v City of Bay City*, 192 Mich 488.

Chamski v Wayne County Board of Auditors, 288 Mich 238, 258 (1939). Giving effect to *both* the statutory bar on state supervision *and* the ban on state regulation yields a different construction: a

[1] Defendant does not appear to argue, as the Court does (Opinion at 16), that the rate rules do not require Plaintiffs to recover these costs via rates. Among other things, if it were not for the rate rules, Plaintiffs could recover these costs by charging the entire replacement cost to the affected property owners, as is done, e.g. for initial service connections.

general independence of local water ratesetting from state agency interference.[2]

MDEQ also argues that it is free to impose higher costs on Plaintiffs. Defendant's Brief at 44. (See also Opinion at 16-17.) While Plaintiffs are understandably wary of MDEQ's asserted right to unilaterally impose limitless costs on Plaintiffs, the infliction of costs is not MDEQ's most flagrant violation of MCL 141.129 in this case. That honor belongs to the rate rules. MDEQ is doing much more than prescribing expensive improvements in this case. Here MDEQ is taking the unprecedented step of *forbidding* Plaintiffs from recovering costs from the affected property owners, decreeing instead that the costs "must ultimately be recovered . . . via rates". Defendant's Brief at 39. In other words, this is not merely an unfunded mandate; it is a *de*funded mandate.

Ironically, during oral argument MDEQ argued that MCL 141.129 really means that MDEQ is not allowed to behave as the Michigan Public Service Commission ("MPSC") does in the context of electric utilities. But MPSC, "in exercise of its supervisory powers" over electric rates, *Attorney General v MPSC*, 412 Mich 385, 413; 316 NW2d 187 (1982), determines what items to include in and exclude from the utility rate base[3] - an action almost identical to the rate base determination made by MDEQ's rate rules in this case.

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[2] See, e.g., *City of Quincy v Mass Water Resources Authority*, 421 Mass 463, 465; 658 NE2d 145 (1995) (Exhibit A hereto, emphasis added):

> The authority's ratesetting powers are exercised *independently* by its board of directors and are *not subject to supervision or regulation* by any other agency of the Commonwealth.

[3] Justice Williams, writing in dissent, described a hypothetical exercise of this power:

> [The] MPSC would be confronted with an impossible dilemma. One the one hand, if it included all or the major portion of the cost in the rate base, the rate base would be so swollen as to make rates prohibitively expensive and an unwarranted economic burden on the ratepayer. On the other hand, if such costs were not included in the rate base, the financial well-being of the utility might be disastrously affected[.]

AG v MPSC at 432. Though the significance of rate base inclusion in the instant case varies somewhat from that in *AG v MPSC, supra*, the supervisory element of the action is, if anything, more evident in the case at bar.

The Safe Drinking Water Act Does Not Repeal By Implication MCL 141.129[4]

Finally, MDEQ also argues that the Safe Drinking Water Act, MCL 325.1001, *et seq* ("SDWA") repeals MCL 141.129 by implication. But there is no conflict between the SDWA and the Revenue Bond Act. The conflict in this case is between MDEQ's *rate rules* and the Revenue Bond Act. MDEQ has yet to cite a case where a statutory provision has been repealed by implication through the adoption of an administrative rule. Indeed, one would expect the statute to take precedence in such cases.[5]

This conclusion is buttressed by the fact that the subject of ratesetting and collection are central to the Revenue Bond Act, whereas the SDWA is totally silent on these topics. Large bondholders can, among other things

> compel . . . the fixing of sufficient rates, the collection of revenues, the proper segregation of revenues, and the proper application of the revenues.

MCL 141.109. And if there is a default in bond payments, the Revenue Bond Act provides for receivership to direct the fixing and charging of rates and the collection of revenues sufficient to pay off bonds, other obligations, and the expenses of the system. MCL 141.110. These protections are in place – as are the additional safeguards in MCL 141.121(1) and 141.129 – to protect the financial system on which all water supplies depend. Nothing in the SDWA purports to knock

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[4] The Court did not argue to the contrary in its Opinion, and has therefore not erred in this regard. Plaintiffs seek only to place on the record some defects in MDEQ's argument.

[5] We hold that the statute . . . takes precedence over the administrative rules.

Livingston County Board of Social Services v DSS, 208 Mich App 402, 404; 529 NW2d 308 (1995).

down or undermine the Revenue Bond Act or the financial market it helped foster.[6]

MCL 141.129 *Is* The Legislative Fix For Most Problems Identified In This Case

MDEQ, on the other hand, does not appear to care about bondholders at all. Via the rate rules, MDEQ blithely placed a major potential revenue source off limits to bondholders. Not content with that, it put those bondholders at risk of *Bolt* liability.

The danger in *Bolt* cases is that a community's user fees, including water fees, may be found to be a tax in violation of Const 1963 art 9, §31, as in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998). *Bolt* involved a stormwater fee, rather than water rates, but the rate rules arguably put Plaintiffs' water rates in a similar position to Lansing's ill-fated stormwater fee. The rate rules require that

> the charge applies to all property owners, rather than only to those who actually benefit.

Bolt, supra, at 165. The *Bolt* majority pointed out that the fee "lack[ed] a significant element of regulation," *Bolt, supra*, at 166, and added – as an argument that the fee was a tax –

> Improved water quality . . . benefit[s] everyone in the City, not only property owners.

Bolt, supra, at 166. *Bolt* liability can come unpredictably, as in *County of Jackson v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013), where the City hired a consultant in order to avoid *Bolt* liability, but got tagged anyhow. *Jackson, supra*, at 95. The *Jackson* Court observed that "There is no bright-line test", at 99, quoting *Bolt, supra*, at 159, before going on to order the

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[6] Contrast this with *Telford v State*, unpublished per curiam opinion of the Court of Appeals, issued February 26, 2019 (Docket No. 340929) (Exhibit B hereto), where the Court of Appeals found that the amended MCL 600.6419(1)(a) repealed by implication MCL 600.308a(1), regarding jurisdiction over Headlee Claims, on the strength of the phrase

> notwithstanding another law that confers jurisdiction of the case in the circuit court.

MCL 600.6419(1)(a); *Telford, supra*, at 2, 5. Such narrow targeting of one statute by another – a prerequisite for repeal by implication – is not found in the SDWA.

City to "cease collecting the charge and . . . reimburse . . . plaintiffs for any charges paid to date". *Jackson, supra*, at 112.[7]

Needless to say, *Bolt* is not a popular decision in municipal circles. It compels local water supplies to walk a tightrope, while carrying the bondholders on their shoulders. In adopting the rate rules, MDEQ has seen fit to give the rope a shake.

With reference to *Bolt* and the various other constitutional and statutory problems created or exacerbated by the rate rules, there was some suggestion that a legislative fix might be on the way. But with respect, the Legislature already provided the fix when it adopted MCL 141.129. Adherence to that section would prevent or negate all the constitutional issues raised in the Complaint. But a legislative fix – or 1,000 legislative fixes, for that matter – avails nothing unless applied by the courts. MCL 141.129 must be applied to prevent the dangers posed by the rate rules.

Section 34 of Article VII of Michigan's 1963 Constitution provides that

> The provisions of this constitution and law concerning counties [and] . . . cities . . . shall be liberally construed in their favor.

Construing the Constitution, the SDWA, and the Revenue Bond Act in favor of the County and the cities in this case requires deletion of the rate rules.

Good riddance.

CONCLUSION

Plaintiff City of Livonia recognizes the courage required for the Court to self-correct errors in a case like this. But there is - without a doubt – palpable error behind the Opinion. The rate rules' mandate to charge the customer base for the cost of lead service line replacement is not

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[7] For other odd permutations wrought by *Bolt*, see Laitner, *Law firm gets rich off sewer lawsuits against cities and townships*, Detroit Free Press (October 8, 2018) found at https://www.freep.com/story/news/local/michigan/oakland/2018/10/08/lawsuits-sewer-storm-water-bills-michigan-detroit/1418087002/, Exhibit C attached.

optional. And in adopting the rate rules, MDEQ did not confine itself to imposing costs on Plaintiffs. MDEQ made choices for Plaintiffs, including the choice of what costs will be paid by water rates.

In the interest of law and justice, the rate rules must go. Accordingly, Plaintiff City of Livonia requests that this Honorable Court kindly issue a declaratory judgment that the rate rules are invalid.

Respectfully submitted,

By: Michael E. Fisher

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Dated: August 8, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2019, I served a copy of the above document in this matter on all attorneys of record at their addresses below via email per this Court's Order July 29, 2019:

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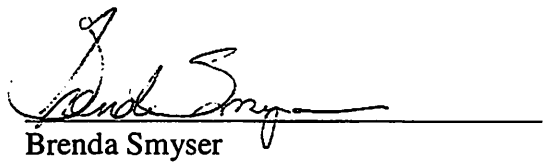

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12. Plaintiffs concluded by requesting that summary judgment be granted to Plaintiffs as to Count V of Plaintiffs' Complaint, Plaintiffs' Response at 36, per MCR 2.116(I)(2).

13. In its Reply Brief, Defendant repeated its claim to be able to impose limitless costs on Plaintiffs and argued, in effect, that MDEQ does this all the time. Defendant MDEQ's Reply Brief in Support of its February 1, 2019 Motion for Summary Disposition under MCR 2.116(C)(8) at 12.

14. The Court graciously allowed the parties to have oral argument on this case on July 23, 2019.

15. On that occasion, MDEQ argued that MCL 141.129 really means that MDEQ is prohibited from behaving as the Michigan Public Service Commission behaves in its supervision of ratesetting by regulated utilities.

16. On July 26, 2019, the Court issued its Order Granting Defendant Michigan Department of Environmental Quality's February 1, 2019 Motion for Summary Disposition pursuant to MCR 2.116(C)(8), as well as its Opinion Regarding Defendant's February 1, 2019 Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) (the "Opinion").

17. Although parts of the Opinion may be susceptible to more than one interpretation,[2] the Opinion evidences two palpable errors where the rate rules are concerned: the notions that a) "nothing in the rules *require* Plaintiffs to charge back customers for the improvements;" and b) MDEQ "has simply imposed . . . new costs on the water supply." Opinion at 16-17 (emphasis original).

18. Because MCL 141.121(1) requires that rates cover all expenses of the system, and the rate rules require that private service line replacement be treated as an expense of the system,

[2] If what is meant by "the rules only require that the replacement costs be *initially* borne by the supply"(Opinion at 16, emphasis added) is that the homeowner could be required to reimburse the system sometime later on, this would alleviate some concerns about the rate rules. However, this seems an unlikely interpretation of the Opinion because it appears to conflict with the rate rules.

the rate rules *do* require Plaintiffs to charge back customers for the improvements, and Defendant has not argued to the contrary.

19. Likewise, the statement that MDEQ "has simply imposed . . . new costs on the water supply" is palpable error. In addition to imposing new costs, MDEQ has, by its adoption of the rate rules, specifically *withdrawn a revenue source* from Plaintiffs.

20. The foregoing palpable errors misled this Court, and a different disposition of the Motion – at least where validity of the rate rules is concerned – must result from correction of these errors.

21. As further explained in Plaintiff City of Livonia's Brief in Support of Motion for Reconsideration attached hereto, Plaintiff City of Livonia should be granted summary disposition on Count V of the Complaint, where the rate rules are concerned, together with such other relief as justice may require.

WHEREFORE, Plaintiff City of Livonia respectfully request that this Honorable Court reconsider the decision embodied in the Order, and instead grant Plaintiff City of Livonia's request for summary disposition as to Count V of the Complaint regarding the rate rules.

Respectfully submitted,

Attorneys for Plaintiffs

By:_____

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Dated: August 8, 2019

Exhibit A

City of Quincy v Massachusetts Water Resources Auth.

City of Quincy v. Massachusetts Water Resources Auth.

Supreme Judicial Court of Massachusetts

October 3, 1995, Argued ; December 8, 1995, Decided

SJC-06863

Reporter
421 Mass. 463 *; 658 N.E.2d 145 **; 1995 Mass. LEXIS 460 ***

CITY OF QUINCY & another [1] vs. MASSACHUSETTS WATER RESOURCES AUTHORITY.

Prior History: [***1] Suffolk. Civil action commenced in the Superior Court Department on July 13, 1993. The case was heard by Gordon L. Doerfer, J., on motions for partial summary judgment. The Supreme Judicial court on its own initiative transferred the case from the Appeals Court.

Core Terms

charges, methodology, sewer, rate setting, communities, costs, summary judgment, local body, regulation, assessments, enabling legislation, infiltration, services, inflow, sewer system, provisions, metropolitan, sewerage, water delivery, population-equivalent, conservation, apportioned, plaintiffs', wastewater, factors, metered, notice

Case Summary

Procedural Posture
Plaintiff city and intervenor water and sewer commission challenged an order from the Superior Court Department (Massachusetts) that granted defendant water utility's motion for summary judgment and dismissed an action seeking a declaration that the water utility's annual sewer assessments were in violation of the water utility's enabling legislation, Mass. Gen. Laws ch. 372, § 10(a) (1984).

Overview
The city filed an action for a declaration that the water utility's annual sewer assessments violated the water utility's enabling legislation. The commission intervened. The superior court entered summary judgment for the water utility, and a judgment was entered dismissing the complaints of the city and the commission. On appeal, the court vacated the dismissal and held that the water utility's annual sewer assessments were calculated in a manner consistent with its statutory authority. The water utility was given broad discretion in the establishment and adjustment of its rates. Because the water utility was required to recoup most of its operating costs from charges to its member communities, any reduction in its charges to one community inevitably would increase charges to another. It was reasonable and proper for the water utility to defer altering its rate setting methodology until it could implement a more equitable method that utilized data closely approximating actual system usage. The water utility's use of the population and population-equivalent methodology pending the shift to a system based on metered sewerage flow was in compliance with its legislative mandate.

Outcome
The court vacated the dismissal of the action against the water utility and remanded the action for entry of a judgment declaring that the water utility's method of setting rates and assessing charges was in conformity with its enabling legislation.

LexisNexis® Headnotes

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN1[] Mass. Gen. Laws ch. 372, § 10(a) (1984) authorizes a utility company to "establish and adjust" charges for sewerage services provided by the utility company, sufficient to meet all of the costs the utility company incurs for debt service, current operations and

[1] Boston Water and Sewer Commission (commission) was permitted to intervene as a plaintiff in the case. See Mass. R. Civ. P. 24, 365 Mass. 769 (1974).

capital improvement projects. Although a utility company possesses broad rate setting power, the legislature has directed that its charges be structured to advance or promote, certain policies, including water conservation and environmental protection.

Governments > Local Governments > Duties & Powers

Energy & Utilities Law > Utility Companies > Rates > General Overview

Governments > Public Improvements > Sanitation & Water

HN2[] **Duties & Powers**

Mass. Gen. Laws ch. 372, § 10(a) (1984) directs that the charges levied by a utility company shall give account to (i) actual costs to the utility company of providing services, (ii) reasonable provisions in the nature of incentives and disincentives to promote conservation of resources and protection of the environment and to induce the protection, maintenance and improvement of the sewer and waterworks systems and of sewer and water systems of local bodies, (iii) reasonable provisions reflecting the contribution made by local bodies through expenditures including, but not limited to, leak detection, system rehabilitation and other water management programs, sewerage inflow/infiltration reduction projects, separation of combined sewers and other projects which improve the overall efficiency of the utility company's and local bodies' service delivery, (iv) reasonable provisions to reflect respective local bodies' disproportionate historic investment in the sewer and waterworks systems and in the former metropolitan district commission sewer system and metropolitan district commission water system used in the services delivered by the utility company, (v) reasonable interest charges and penalties for delinquency in payment.

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN3[] Under Mass. Gen. Laws ch. 372, § 10(a), a utility company's charges are established and reviewable in accordance with the notice and hearing procedures established by Mass. Gen. Laws ch. 30A (1994). A utility company's rate setting methodology should be reviewed as a regulation.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN4[] **Formal Rulemaking**

Regulations properly adopted by an administrative agency stand on the same footing as statutes and all rational presumptions are to be made in favor of their validity. Such regulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate. The principle of deference is not one of abdication, and a regulation that is irreconcilable with an agency's enabling legislation cannot stand.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Separation of Powers > Legislative Controls > General Overview

HN5[] **Formal Rulemaking**

A regulation adopted by an agency must be in conformity with the agency's governing legislation.

Governments > Legislation > Interpretation

HN6[] **Interpretation**

The word "shall" is ordinarily interpreted as having a mandatory or imperative obligation.

Civil Procedure > ... > Justiciability > Mootness > Genera

I Overview

HN7[] When there is no liability, the question of remedies becomes moot.

Headnotes/Summary

Headnotes

Massachusetts Water Resources Authority. Sewer. Municipal Corporations, Sewers. *Administrative Law,* Regulations, Rate setting. *Statute,* Construction. *Practice, Civil,* Summary judgment. *Moot Question.*

Counsel: Peter L. Koff for city of Quincy.

Laura Steinberg (Lisa F. Sherman with him) for Boston Water and Sewer Commission.

E. Michael Sloman (Richard Goldstein with him) for the defendant.

Judges: Present: Liacos, C.J., Abrams, Lynch, & Greaney, JJ.

Opinion by: GREANEY

Opinion

[*464] **[**146]** GREANEY, J. The defendant, Massachusetts Water Resources Authority (authority), is responsible for providing sewage collection services to communities in the metropolitan Boston area, including the cities of Quincy and Boston. [2] **[***3]** The city of Quincy commenced this action in the Superior Court seeking a declaration pursuant to G. L. c. 231A (1994 ed.), that the authority's annual sewer assessments for fiscal years 1985 through 1994, which **[***2]** were calculated based on the so-called population and population-equivalent methodology, were in violation of various provisions of St. 1984, c. 372, the authority's enabling legislation. The Boston Water and Sewer Commission intervened. The plaintiffs each moved for partial summary judgment limited to the issue of the authority's compliance with its enabling legislation. See Mass. R. Civ. P. 56 (a), (d), 365 Mass. 824 (1974). [3] A judge in the Superior Court ordered full summary judgment for the authority, see Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974), and a judgment entered dismissing the plaintiffs' complaints. The plaintiffs appealed, and we transferred the case to this court on our own motion. We agree with the judge's conclusion that the authority's annual sewer assessments were calculated in a manner consistent with its statutory authority, **[*465]** and, accordingly, that the case was an appropriate one for full summary judgment. We vacate the judgment of dismissal and direct the entry of a judgment which declares the rights of the parties.

The undisputed factual background of the case may be summarized as follows. The authority was created in 1984, and, effective July 1, 1985, succeeded the Metropolitan District Commission as the State agency responsible for the operation, regulation, financing, and improvement of the systems of water delivery and sewage collection, treatment and disposal for a number of communities in the metropolitan Boston area. The authority's sewerage services to the member **[***4]** communities, or "local bodies," are wholesale services, meaning that the authority collects, treats, and disposes of the wastewater from local sewers operated by the member communities.

HN1[] Section 10 (a) of St. 1984, c. 372, authorizes the authority to "establish and adjust" charges for sewerage services provided by the authority, sufficient to meet all of the costs the authority incurs for debt service, current operations and capital improvement projects. [4] The authority's rate setting powers are exercised independently by its board of directors and are not subject to supervision or regulation by any other agency of the Commonwealth. See St. 1984, c. 372, §

[2] The authority's enabling legislation refers to the municipalities and other political subdivisions of the Commonwealth which use the authority's sewerage and water delivery services as "local bodies." See St. 1984, c. 372, § 2 (h). Quincy and the commission are "local bodies" for purposes of the legislation.

[3] The complaint filed by the commission also alleges that the authority's assessments for water distribution have not complied with its enabling legislation. So far as the summary judgment record indicates, the authority's assessments for water delivery have been based on the metered volume of water supplied to a member community. The commission's motion for partial summary judgment makes no reference to the authority's water delivery charges, nor is that issue addressed in its brief to this court. We assume, as the judge appears to have done, that the commission has abandoned its challenge to the authority's water delivery charges.

[4] The authority receives some revenue from investment income, reserve funds, and State and Federal grants, but most of its revenue is derived from charges to the local bodies it serves.

10 (a), second par. Although the authority possesses broad rate setting power, the Legislature has directed that its charges be structured to advance or promote, certain policies, including water conservation and environmental protection. HN2[] Section 10 (a) of St. 1984, c. 372, directs that the charges levied by the authority,

> **[**147]** "shall give account to (i) actual costs to the Authority of providing services, (ii) reasonable provisions in the nature of incentives and disincentives to promote conservation of resources and protection **[***5]** of the environment **[*466]** and to induce the protection, maintenance and improvement of the sewer and waterworks systems and of sewer and water systems of local bodies, (iii) reasonable provisions reflecting the contribution made by local bodies through expenditures including, but not limited to, leak detection, system rehabilitation and other water management programs, sewerage inflow/infiltration reduction projects, separation of combined sewers and other projects which improve the overall efficiency of the Authority's and local bodies' service delivery, (iv) reasonable provisions to reflect respective local bodies' disproportionate historic investment in the sewer and waterworks systems and in the former metropolitan district commission sewer system and metropolitan district commission water system used in the services delivered by the Authority, (v) reasonable interest charges and penalties for delinquency in payment."

[*6]** Since its establishment, the authority has apportioned charges for sewerage services according to a methodology, originally adopted by the Metropolitan District Commission, known as the population and population-equivalent methodology. Under this methodology, the projected costs of operating the sewerage system are divided into two components, capital costs (consisting of debt service and long-term capital expenditures for upgrading facilities), and operation and maintenance costs. The operation and maintenance costs are apportioned among the user communities based on the "contributing population" of each community, meaning the number of persons who are connected to the local sewer system. The capital costs are apportioned based on each user community's census population, on the theory that the entire community benefits from improvements to the authority's system. Nonresidential users, such as industrial, commercial and institutional users, are factored in as "population equivalents" in their respective communities, based on the volume, capacity, and suspended solids of their wastewater streams.

[*467] The plaintiffs have invested substantial resources in improving their local sewer systems, **[***7]** including expenditures to reduce inflow and infiltration. [5] **[***8]** As the judge noted, it is conceded that the population and population-equivalent methodology employed by the authority during fiscal years 1985 through 1994 [6] to apportion charges did not "identify actual flows generated by each local body or provide incentives for local bodies to reduce their wastewater flows or to promote conservation. . . . The methodology did not give account to local bodies' differing rates of infiltration and inflow. . . . The [authority) also admitted that it never determined whether the plaintiffs' historic investments in their sewer systems were disproportionate to the investments of other local bodies."

1. HN3[] Under § 10 (a), the authority's charges are established and reviewable in accordance with the notice and hearing procedures established by G. L. c. 30A (1994 ed.). On the basis of this provision in § 10 (a), the judge and the parties concluded (correctly, in our view) that the authority's rate setting methodology should be reviewed as a regulation. See *Steinbergh v. Rent Control Bd. of [**148] Cambridge, 410 Mass. 160, [***9] 162, 571 N.E.2d 15 (1991)* (agencies' charges or assessments of general application may be reviewed as regulations under G. L. **[*468]** c. 30A). HN4[] "Regulations properly adopted by an

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[5] "Inflow" is extraneous water, including rainwater, that enters a sewer system from a public source, such as a manhole cover, or a private source, such as a roof drain or a sump pump. "Infiltration" is groundwater that leaks into a sewer system through defective pipes, pipe joints, and sewer connections. According to the authority, inflow and infiltration account for close to one-half of the wastewater stream which reaches the authority's waste treatment facilities.

[6] In 1993, the Legislature instructed the Advisory Board (board) of the authority to consider alternate methods of assessing sewer service charges. See St. 1993, c. 110, § 283. In June, 1994, a committee established by the board selected an alternative sewer rate methodology, which allocates operation and maintenance costs based on metered flow and apportions the authority's capital costs based, with respect to each local body, in part on metered flow, in part on contributing population, and in part on census population. The Legislature has instructed the authority to implement the new sewer charge assessment methodology for fiscal year 1986. See St. 1994, c. 60 § 220A.

administrative agency stand on the same footing as statutes and all rational presumptions are to be made in favor of their validity. Greenleaf Fin. Co. v. Small Loans Regulatory Bd., 377 Mass. 282, 293, 385 N.E.2d 1364 (1979). . . . Such regulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate, Massachusetts Nurses Ass'n v. Board of Registration in Nursing, 18 Mass. App. Ct. 380, 389 n. 19, 465 N.E.2d 1238 (1984)). . . ." Berrios v. Department of Pub. Welfare, 411 Mass. 587, 595-596, 583 N.E.2d 856 (1992). Nonetheless, the principle of deference is not one of abdication, and a regulation that is irreconcilable with an agency's enabling legislation cannot stand. See *Nuclear Metals, Inc.* v. *Low-Level Radioactive Waste Management Bd.*, *ante* 196, 211 (1995). [7]

[*10]** The plaintiffs contend that the authority's use of the population and population-equivalent methodology, which admittedly does not adjust assessments based on all of the factors listed in § 10 (a), is irreconcilable with the language of that section, which, by its use of the term "shall," is made mandatory rather than discretionary. In addition to § 10 (a), the plaintiffs rely on several other provisions of the enabling legislation to bolster their contention that the Legislature intended the authority to move immediately to a rate setting methodology which adjusts assessments to local communities based on the factors listed in § 10 (a). [8]

[*11]** **[*469]** HN6[↑]

The word "shall," of course, "is ordinarily interpreted as having a mandatory or imperative obligation." Hashimi v. Kalil, 388 Mass. 607, 609, 446 N.E.2d 1387 (1983). Here, however, the use of "shall" in § 10 (a), is tempered by the succeeding words, "give account to," rather than words such as "include" or "incorporate," which are unmistakable words of command. See Associated Indus. of Mass. v. Secretary of the Commonwealth, 413 Mass. 1, 7, 595 N.E.2d 282 (1992). Viewed in the context of the legislation as a whole, and § 10 in particular, which grants to the authority broad discretion in the establishment and adjustment of its rates, we think the term "shall give account to" requires the authority to consider, but not necessarily to include, the statutory factors in its assessment methodology. The language of § 8 (m), which requires that the charges of the authority "shall also reasonably provide" for abatement of inflow and infiltration, as well as leak detection and repair, similarly reflect a grant of discretion to the authority with respect to the means selected for achieving these ends.

The undisputed material in the record establishes that the authority **[***12]** has given adequate and careful consideration to inclusion of the § 10 (a) factors in its rate setting methodology. The report prepared in compliance with § 8 (e) evaluated alternative rate setting methodologies that might more closely **[**149]** approximate a community's actual use of the authority's sewer and wastewater treatment facilities. Like the population and population equivalent methodology, the proposed alternatives also would have failed to reflect and to distribute appropriately costs associated with unnecessary infiltration and inflow. The authority made the reasonable decision to **[*470]** defer any significant alteration in its method of setting rates until, with the installation of meters, it could shift to a rate setting methodology based on a relatively close approximation of a community's actual use of the system and, therefore, capable of offering appropriate incentives for local improvements in efficiency.

The authority's use of the population and population-

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[7] We have addressed the plaintiffs' arguments under the line of cases which holds that HN5[↑] a regulation adopted by an agency must be in conformity with the agency's governing legislation. See, e.g., *Nuclear Metals, Inc.* v. *Low-Level Radioactive Waste Management Bd.*, *ante* 196, 211 (1995), and cases cited. Thus, we need not consider the precise meaning of the word "illegal" as it is used in Borden, Inc. v. Commissioner of Pub. Health, 388 Mass. 707, 721-723, 448 N.E.2d 367, cert. denied sub nom. ***Formaldehyde Inst., Inc. v. Frechette, 464 U.S. 936, 78 L. Ed. 2d 312, 104 S. Ct. 345 (1983)***, a point in dispute between the parties.

[8] In addition to § 10 (a), the plaintiffs point to the following provisions of St. 1984, c. 372, § 8, as supporting their position.

Section 8 (m) provides, in pertinent part:

> "The procedures, regulations, charges and licensing, permitting and other programs of the Authority shall also reasonably provide for abatement, reduction and prevention of infiltration and inflow . . . . The procedures, regulations, charges, licensing, permitting and other programs of the Authority shall also reasonably provide for leak detection and repair, for programs for water conservation. . . ."

Section 8 (e) directs the authority to "promote water conservation and environmental quality through its schedule of charges," and directs it to prepare a "comprehensive study of environmental, social and economic impacts of its charges to serve as a basis for the implementation of charges fully consistent with the objectives of [the enabling legislation]."

equivalent methodology pending the shift to a system based on metered sewerage flow therefore was in compliance with its legislative mandate. See *Greenleaf Fin. Co. v. Small Loans Regulatory Bd., supra.* Because the authority **[***13]** is required to recoup most of its operating costs from charges to its member communities, any reduction in its charges to one community inevitably will result in an increase in charges to another. It was the authority's position, not contested on this record, that a temporary, interim alteration of the rate setting method would have unfairly burdened some communities. It was reasonable (and proper) for the authority to defer altering its rate setting methodology until it could implement a more equitable method which utilized data closely approximating actual system usage. [9]

2. The plaintiffs also contend that the judge abused his discretion by granting summary judgment in full to the authority on the plaintiffs' motions for partial **[***14]** summary judgment. The plaintiffs do not dispute that judgment could enter for the defendant on the issues raised in the plaintiffs' motions. See *Mass. R. Civ. P. 56 (c)* ("Summary judgment, when appropriate, may be rendered against the moving party"). They claim, however, that when their motions addressed only issues of liability, the judge could not enter full summary judgment, encompassing questions related to remedy, without providing them notice and an opportunity to be heard. In support of their position, they rely on *Gamache v. Mayor of N. Adams, 17 Mass. App. Ct. 291, 295, 458 N.E.2d 334 (1983)*, in which the **[*471]** Appeals Court stated that a judge has "the power, sua sponte, to enter full summary judgment [on a motion for partial summary judgment], provided the parties had sufficient notice of his intention to do so, opportunity to submit affidavits, and a right to be heard on the matter." Here, the plaintiffs contend, they were denied notice and the right to be heard before full judgment entered on their claims.

The judge resolved the question of liability in the authority's favor, and we have affirmed that decision. *HN7*[↑] When there is no liability, the question of remedies **[***15]** obviously becomes moot. In these circumstances, notice and the opportunity to submit affidavits would not avail the plaintiffs. In addition, the judge properly could conclude that judgment should enter with regard to any claims of future liability, because the evidence was uncontroverted that the authority is in the process of adopting a new rate setting method dictated by legislation which is very specific on this point. See St. 1994, c. 60, § 220A. Cf. *Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 419, 589 N.E.2d 1224 (1992)* (claim may become moot because of material changes in statute on which claim is based). It was appropriate to enter judgment on all claims in the complaint.

3. The judgment is vacated. A judgment is to enter declaring that the authority's method of setting rates and assessing charges between fiscal years 1985 and 1994, was in conformity with St. 1984, c. 372.

So ordered.

End of Document

[9] In view of our conclusion that the authority's rate setting methodology was in compliance with its enabling legislation, we need not consider whether, as Quincy contends, the judge erred by placing a burden on the plaintiffs to articulate an alternate rate setting methodology.

Exhibit B

Telford v State

Telford v. State

Court of Appeals of Michigan

February 26, 2019, Decided

No. 340929

Reporter
2019 Mich. App. LEXIS 345 *; 2019 WL 942935

JOHN TELFORD, HELEN MOORE, ALIYA MOORE, YOLANDA PEOPLES, BOBBI DICKERSON, DENISE TANKS, JUVETTE HAWKINS-WILLIAMS, ELENA HERRADA, WANDA REDMOND, IDA SHORT, and TWANNA SIMPSON, Plaintiffs-Appellees, v STATE OF MICHIGAN, GOVERNOR, STATE TREASURER, DEPARTMENT OF TREASURY, and DEPARTMENT OF TECHNOLOGY, MANAGEMENT, AND BUDGET, Defendants-Appellants.

Prior History: **[*1]** Court of Claims. LC No. 17-000239-MM.

Core Terms

circuit court, jury trial

Case Summary

Overview
HOLDINGS: [1]-In a case in which plaintiffs alleged defendants had engaged in a longstanding practice of mandating certain educational services without providing funding for those services, in violation of the Headlee Amendment, the appellate court concluded the court of claims properly relied on case law binding upon it; [2]-Nevertheless, the court of claims incorrectly determined that it lacked subject matter jurisdiction over plaintiffs' Headlee Amendment claims on that basis; [3]-The Headlee Amendment precluded the argument that plaintiffs were entitled to a jury trial because its initial grant of jurisdiction was only to the appellate court; [4]-The appellate court was fundamentally not a trial court, and it was fundamentally ill-equipped to handle trials of any kind, let alone jury trials; a fact that would have been obvious when the Headlee Amendment was adopted.

Outcome
Reversed and remanded.

LexisNexis® Headnotes

Governments > Courts > Judicial Precedent

HN1[] **Judicial Precedent**

The rule of stare decisis, under which published opinions of the Michigan Court of Appeals have precedential effect, *MCR 7.215(C)(2)*, may be inapplicable when the Michigan Legislature significantly alters any underlying statutory law.

Governments > Legislation > Interpretation

HN2[] **Interpretation**

All other things being equal, a more specific statutory provision controls over a more general statutory provision; however, again all other things being equal, a more recent statutory provision controls over an older statutory provision.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Interpretation

HN3[] **Expiration, Repeal & Suspension**

Repeals by implication have long been disfavored and will only be found if no other intention by the legislature is possible.

Governments > Legislation > Interpretation

HN4[] Interpretation

The fundamental goal of statutory interpretation is to discover and implement the intent of the legislature, and to that end, the rules of construction are merely helpful guides.

Governments > Legislation > Interpretation

HN5[] Interpretation

Legislative analyses are of minor value, but the Michigan Supreme Court has recognized that they may nevertheless be helpful in resolving a close question regarding an ambiguous statute.

Governments > Courts > Judicial Precedent

HN6[] Judicial Precedent

Where the pertinent rule of law has been overturned by the legislature, the court is bound to follow the new rule.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN7[] Trial by Jury in Civil Actions

No right to a jury trial for Headlee Amendment claims is specified in any statute or provision of the Michigan Constitution. A right to a jury trial may be found for claims similar in character to claims for which a right to a jury trial existed prior to the adoption of the Michigan Constitution.

Judges: Before: CAMERON, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

Opinion by: RONAYNE KRAUSE

Opinion

RONAYNE KRAUSE, J.

Plaintiffs are a variety of taxpayers, residents, and parents of children in the City of Detroit, who generally contend that defendants have engaged in a longstanding practice of mandating certain educational services without providing funding for those services, in violation of the Headlee Amendment, Const 1963, Art 9, §§ 25-34. The dispute in this appeal concerns the division of jurisdiction between the Court of Claims and the Circuit Courts; specifically, which court has subject-matter jurisdiction over Headlee Amendment claims. The Court of Claims concluded that it lacked subject-matter jurisdiction, and it ordered the matter transferred to the Wayne Circuit Court. Although the Court of Claims properly relied on case law binding upon it, we reverse and remand.

This Court has previously and unambiguously held that the Court of Claims lacks subject matter jurisdiction over Headlee Amendment claims. City of Riverview v State of Michigan, 292 Mich App 516; 808 NW2d 532 (2011). *Riverview* relied on MCL 600.308a(1), which provided, and continues to provide, that a Headlee Amendment action "may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action." **[*2]** After *Riverview* was decided, the Legislature amended the Court of Claims Act, pursuant to 2013 PA 164. In relevant part, 2013 PA 164 amended MCL 600.6419(1)(a), which previously provided:

> The [Court of Claims] has power and jurisdiction:
>
> (a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.

MCL 600.6419(1)(a) currently provides:

> Except as otherwise provided in this section, the [Court of Claims] has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

There is no serious dispute that **HN1[]** the rule of stare decisis, under which published opinions of this Court have precedential effect, MCR 7.215(C)(2), may be inapplicable when the Legislature significantly alters any underlying statutory law. See People v Feezel, 486

Mich 184, 212-213; 783 NW2d 67 (2010); Lamp v Reynolds, 249 Mich App 591, 604; 645 NW2d 311 (2002).

This Court has previously held that the amended MCL 600.6419(1)(a) prevails over **[*3]** MCL 600.4401(1). O'Connell v Director of Elections, 316 Mich App 91, 108; 891 NW2d 240 (2016). This does not entirely resolve the issue before us. MCL 600.4401(1) addresses where mandamus actions may be filed, which is not a matter addressed by Michigan's Constitution. See Const 1963, Art 11, § 5. In contrast, MCL 600.308a(1) expanded on jurisdiction expressly conferred by our Constitution. See Const 1963, Art 9, § 32. Furthermore, this Court in *Riverview* held that despite the "broad statutory grant of jurisdiction to the Court of Claims" found in the then-existing version of MCL 600.6419(1)(a), MCL 600.308a(1) controlled because the latter statute was more specific and operated as an exclusion of jurisdiction to other tribunals. Riverview, 292 Mich App at 520, 524-525. In short, there are enough differences between MCL 600.308a(1) and MCL 600.4401(1) that we decline to extend the holding in O'Connell by rote.

Nevertheless, we find an ambiguity in the pertinent statutes because MCL 600.308a(1) and MCL 600.6419(1)(a) irreconcilably conflict. People v Hall, 499 Mich 446, 454; 884 NW2d 561 (2016). We additionally note that there is also an irreconcilable conflict between two rules of statutory construction. ***HN2***[↑] All other things being equal, a more specific statutory provision controls over a more general statutory provision; however, again all other things being equal, a more recent statutory provision controls over an older statutory provision. See Huron Twp v City Disposal Sys, Inc, 448 Mich 362, 366; 531 NW2d 153 (1995); Malcolm v City of East Detroit, 437 Mich 132, 139; 468 NW2d 479 (1991). It appears to us that MCL 600.308a(1) is more specific, whereas MCL 600.6419(1)(a) is more recent. Finally, ***HN3***[↑] repeals by **[*4]** implication have long been disfavored and will only be found if no other intention by the Legislature is possible. Int'l Business Machines Corp v Dep't of Treasury, 496 Mich 642, 651; 852 NW2d 865 (2014). However, ***HN4***[↑] the fundamental goal of statutory interpretation is to discover and implement the intent of the Legislature, and to that end, the "rules of construction" are merely helpful guides. Browder v Int'l Fidelity Ins Co, 413 Mich 603, 611; 321 NW2d 668 (1982).

Therefore, we ultimately arrive at the same conclusion as the Court did in O'Connell. We are persuaded that the Legislature intended to repeal MCL 600.308a(1) by implication when it enacted 2013 PA 164, even though MCL 600.308a(1) is clearly more specific, and nowhere in 2013 PA 164 is the Headlee Amendment mentioned. ***HN5***[↑] Legislative analyses are of minor value, but our Supreme Court has recognized that they may nevertheless be helpful in resolving a close question regarding an ambiguous statute. In re Certified Question from the US Court of Appeals for the Sixth Circuit, 468 Mich. 109, 115 n 5; 659 N.W.2d 597 (2003). We have reviewed the legislative analyses of 2013 PA 164, and we also find no mention of the Headlee Amendment. However, the legislative analyses *do* show a clear intention to extensively rewrite the Court of Claims's jurisdiction in the process of removing it from the Ingham County Circuit Court. In other words, there is a strong inference that expanding the scope of the Court of Claims's jurisdiction was intentional and knowing. The phrase "notwithstanding **[*5]** another law that confers jurisdiction . . . " only occurs once, and, significantly, is new language. At the same time, the Legislature added two provisions making express exceptions to the new grant of jurisdiction. See MCL 600.6419(5) and (6).

We conclude that, notwithstanding the specificity of MCL 600.308a(1), our reluctance to find a repeal by implication, and the lack of any mention of the Headlee Amendment in 2013 PA 164 or its legislative analyses, the Legislature did intend to repeal MCL 600.308a(1). ***HN6***[↑] The pertinent rule of law in Riverview has therefore been overturned by the Legislature, and we are bound to follow the new rule. See US v Lee, 106 U.S. (16 Otto) 196, 220; 1 S Ct 240; 27 L Ed 171 (1882) (we "are creatures of the law and are bound to obey it"); Gleason v Kincaid, 323 Mich App 308, 317; 917 NW2d 685 (2018) ("[c]ourts are bound to follow statutes and must apply them as written"). The Court of Claims properly found itself bound by *Riverview*, but it nevertheless incorrectly determined that it lacked subject matter jurisdiction over plaintiffs' Headlee Amendment claims on that basis.

Finally, plaintiffs argue that the Court of Claims lacks subject matter jurisdiction because they are entitled to a trial by a jury. We disagree. ***HN7***[↑] No right to a jury trial for Headlee Amendment claims is specified in any statute or provision of the Michigan Constitution. See Madugula v Taub, 496 Mich 685, 696; 853 NW2d 75 (2014). A right to a jury trial may be found for claims "similar **[*6]** in character to" claims for which a right to a jury trial existed prior to the adoption of the Michigan Constitution. Id. at 704-705 (citation omitted). Nevertheless, we conclude that the Headlee Amendment itself precludes plaintiffs' argument

because its initial grant of jurisdiction was only to this Court. *Const 1963, art 9, § 32*. *Riverview* held that the Legislature was not precluded from treating the constitutional grant of jurisdiction as nonexclusive, which remains a rule of law established by a published opinion of this Court that we are bound to follow. *MCR 7.215(J)(1)*. However, this Court is fundamentally not a trial court, and it is fundamentally ill-equipped to handle trials of any kind, let alone jury trials; a fact that would have been obvious when the *Headlee Amendment* was adopted. The grant of jurisdiction to this Court shows that no right to a jury trial was anticipated.

Reversed and remanded. We do not retain jurisdiction. We direct that the parties shall bear their own costs on appeal. *MCR 7.219(A)*.

/s/ Amy Ronayne Krause

/s/ Thomas C. Cameron

/s/ Jane M. Beckering

End of Document

Exhibit C

Bolt, see Laitner, Law firm gets rich off sewer lawsuits against cities and townships, Detroit Free Press (October 8, 2018)

Law firm gets rich off sewer lawsuits against cities and townships

Bill Laitner, Detroit Free Press Published 6:00 a.m. ET Oct. 8, 2018 | **Updated 10:00 a.m. ET Oct. 8, 2018**

(Photo: Bill Laitner, Detroit Free Press)

A single law firm based in Royal Oak has won tens of millions of dollars in lawsuits against a growing list of metro Detroit communities — including Detroit, Royal Oak, Ferndale, Birmingham, and the townships of Bloomfield, Waterford and Brighton.

More cases are pending against St. Clair Shores, Taylor, and most recently Harper Woods. The firm did lose a notable case against Westland and appealed another loss to Dearborn.

Mostly, though, these savvy lawyers win. Their claim? From town to township, usually the same. Namely, that some communities improperly charged residents for storm water. That's the rainfall that spills off roofs, runs off lawns and pours down driveways into storm sewers, before it flows off to treatment plants.

Even without any lawsuits, it's a flow whose cost of treatment is shared by most every user of water. Yet, when the attorneys of Kickham Hanley win, there's a different torrent. It's cash, flowing from city and township coffers into the firm's law offices on Woodward Avenue.

Last year, when the lawyers settled with Birmingham, the judgment was for $2.85 million to cover years of storm-water billings, spread over the city's thousands of homes and businesses. Many homes and businesses received modest refunds, averaging $230 apiece. But a judge said the firm's attorneys "were hereby awarded" a total of $999,974 — roughly one nice lunch shy of a million bucks.

Also last year, a judgment in Ferndale came to $4.25 million; one in Royal Oak, $2 million; and in Waterford, $1.4 million. This year, one in Brighton Township was $1.5 million; and in Detroit, a whopping $27.5 million. On Sept. 17, Bloomfield Township was ordered to pay $3.7 million. St. Clair Shores has been sued. Harper Woods lost its case and can expect an adverse multimillion-dollar judgment at any time. More than a dozen communities have been targets.

The upshot? Most communities are forced to pay up, with the law firm typically taking about 33 percent.

Jim Nash, Oakland County Water Resources Commissioner is photographed at the George W. Kuhn Retention Treatment Basin in Madison Heights, Wednesday, August 20, 2017. The $140 million facility holds and partially treats stormwater-sewage water mix and prevents it from backing up into people's basements. *(Photo: Kathleen Galligan, Detroit Free Press)*

Kickham Hanley has won so much money, from so many communities, that two bills are pending in Lansing that aim to stop the firm's judgment-winning juggernaut. The firm's lawsuits "are siphoning funds earmarked for badly needed infrastructure repair and maintenance" of local sewer systems, said Oakland County Water Resources Commissioner Jim Nash.

Yet, the law firm has done nothing devious or improper, according to court rulings. Instead, it merely pointed out, with the concurrence of judges, that many communities have violated Michigan's Headlee Amendment. The local governments imposed storm-water charges that were more like a tax than a fee — a violation of the late Richard Headlee's famous limit on taxation, as enshrined in the Michigan Constitution. Now, for better or worse, each community that has lost in court must revise how it bills customers.

Typically, after the law firm takes its share of a settlement, the rest gets divvied up to a given community's water and sewer customers. But homeowners don't much of a payoff, said Waterford Township Supervisor Gary Wall.

Last year in Waterford, "I think the average person got, like, $22 back for a four-year period -- about $5.50 a year," Wall said.

"When you think about it, that money has to come from the same people getting the refunds. Really, it ends up the residents just paying themselves, besides of course paying the lawyers," he said.

And one more person.

Paying the puppet

"The puppet usually gets $10,000," Wall said, referring derisively to what state law calls "the Plaintiff certified as Class Representative." That's usually one person who happens to own property in the community, and who lets the lawyers slap his or her name on top of the lawsuits, functioning on paper as the chief complainer about storm-water rates. The "puppet" stands in for all of the "class," which in these lawsuits generally means everybody else in the community who pays storm water charges.

Once a community settles and cuts a hefty check to Kickham Hanley, it's still not over, said Birmingham City Manager Joe Valentine. Each community must invest considerably more to devise an all-new way of charging for storm water, Valentine said.

"The billing methodologies in all these towns were put in place decades ago. The way we'd been doing it was in a lot of cities. We would charge a portion of your water usage to apply as your storm water charge," he said.

Now, based on Kickham Hanley's victories, that old billing method doesn't pass muster with the Headlee Amendment, especially not when the lawyers add arguments from some key Headlee-spawned legal cases, including one that strikes mild terror into many a Michigan mayor, called Bolt versus Lansing.

Who hasn't heard of taxation without representation? That's what these storm water charges constitute, the lawyers argue. And judge after judge agrees, said Greg Hanley, a principal with the law firm.

"We're having a pretty good run of success — I'm fully aware that we're not popular with a lot of people," he said.

Many of their critics don't understand the reasons for high-dollar legal awards, which compensate lawyers for the high risks of taking on such cases, he said. Lawyers routinely are granted fees of 33 to 40 percent of a settlement if they've handled the case for free. The storm-water lawsuits are in the category called class actions, in which lawyers accept the risk of earning literally nothing if they lose, even after expending years of effort and sometimes steep costs for research.

"It's been a unique practice that results from people coming to us and complaining about their utility bills. I don't know of any other law firm doing this" in Michigan, Hanley said.

Hidden taxes

The common thread in most of the cases is the argument that some communities used their water and sewer rates to pay for public expenses that should be covered by taxes.

A key but subtle example? In Royal Oak and several other cities of Oakland County, the lawyers showed that the long-term bond payments for a giant, 2.2-mile underground sewer called the George Kuhn Retention Treatment Facility had been buried — so to speak — in the cities' water and sewer charges.

READ MORE:

Detroit water chief: Owners of green lots shouldn't pay hefty drainage fee (https://www.freep.com/story/news/local/michigan/detroit/2017/08/13/detroit-wgreen-lots-drainage-fee/558156001/)

Counties spar over Lake St. Clair water woes (https://www.freep.com/story/news/2017/10/04/lake-st-clair-water-quality-macomb-oakland/603311001/)

As Hanley put it, when it comes to big infrastructure costs, "Our contention is, it's inappropriate to charge that in your water and sewer rates. Headlee says, either pay for it out of current funds or go to the people and make your case" for higher taxes; "tell them, 'We need a new fire station' or whatever.

"And Bolt (versus Lansing) says, if this project benefits the public as a whole, not the individual utility rate payers, then it can't come out of the utility rates."

As for basing storm-water charges on how much water a customer uses, "What if you and I are neighbors and you live alone but I have four daughters, which I do," Hanley said.

"My house is using a lot more water, but our lawn and our driveway and roof are not necessarily contributing any more storm water to the system," he said. Instead, the storm-water volume depends on how much of a given property doesn't absorb rainfall, what's called the "impervious surface area."

Thus, owners of a tiny house and huge lawn shouldn't pay as much for storm water as folks with the opposite — a large house and tiny yard. The idea is to tailor the fee to exactly how much storm water each property sloshes into the street's sewer grates.

As costly as these lawsuits have been to community coffers, in virtually every case the local government was able to pay off the settlement from its general fund -- no borrowing necessary, Hanley said.

And Kickham Hanley's legal victories have been the catalyst for getting communities to shift their billing practices. In the firm's case against Detroit, it was businesses — not residents — who sued to stop tens of millions of dollars in unfair "drainage charges," according to legal documents. The lawsuit not only won, it drew praise from the court that the law firm had exposed unfair billing practices and "provided a substantial benefit to society," according to the Final Judgement and Order issued in February by Wayne County Circuit Judge John A. Murphy.

Still, it's an expensive way to right a wrong, said John LaMacchia of the Michigan Municipal League, a major association of city and village officials. Some of the cases amount to costly nit-picking, said LaMacchia, the group's assistant director of state and federal affairs.

Fire hydrant hassle

One nit picker was the recent judgment against Bloomfield Township, LaMacchia said. It requires the township from now on to "explicitly document payment of the cost of water that passes through fire hoses," and to show that its cost is covered by the township's general fund, not by residents' water and sewer charges, according to a judge's order.

Not so nit picky, however, was the rest of the judge's order — requiring Bloomfield Township to pay a $3.7-million settlement, of which the law firm can be expected to receive about one-third, after about two-thirds is distributed to the community's water and sewer customers.

Such lawsuits "are taking advantage of a loophole" that a new state law would close if Lansing's lawmakers support it this fall, after more than a year of dickering, LaMacchia said. Unfortunately, too many lawmakers have blocked passage because they think the proposed law "would give communities more taxing power — that's not true," he said.

Instead, the state House and Senate proposals would create a model that any community could copy for revising its storm water and other utility charges, making them lawsuit-proof, said state Sen. Marty Knollenberg, R-Troy.

Knollenberg, who sponsored the Senate version, Senate Bill 756, said the new law "would create one statewide standard for everyone to follow."

The sponsor on the House side, state Rep. Mike McCready, R-Birmingham, said his version is House Bill 4100. McCready, the former mayor of Bloomfield Hills, sounded less than generous — but certainly amusing — in how he described the situation, making a pun of the law firm's name:

"I say kick 'em, hand 'em and steal have been at this for far too long."

Contact Bill Laitner: blaitner@freepress.com

Read or Share this story: https://www.freep.com/story/news/local/michigan/oakland/2018/10/08/lawsuits-sewer-storm-water-bills-michigan-detroit/1418087002/

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
LANSING

GRETCHEN WHITMER
GOVERNOR

LIESL EICHLER CLARK
DIRECTOR

January 16, 2020

CERTIFIED MAIL

Mr. Blaine Wing, City Manager
City of Rochester
400 Sixth Street
Rochester, Michigan 48307

Dear Mr. Wing:

SUBJECT: Administrative Consent Order (ACO); City of Rochester; WSSN: 05720

Enclosed please find a fully executed ACO between the City of Rochester (City) and the Department of Environment, Great Lakes, and Energy (EGLE), Drinking Water and Environmental Health Division, regarding the City's water supply. The ACO results from changes to the administrative rules promulgated under the Safe Drinking Water Act, 1976 PA 399, as amended (Act 399). The effective date of the ACO is January 16, 2020.

If you have any questions regarding the ACO, please contact me at 517-242-8328; NelsonM2@Michigan.gov; or EGLE, P.O. Box 30817, Lansing Michigan 48909-8311.

Sincerely,

Maureen Nelson, Enforcement Specialist
Drinking Water and Environmental Health
Division

Enclosures
cc: Mr. Cory Bendick, City of Rochester (via email)
Mr. Jeffrey Kragt, Law Offices of Jeffrey S. Kragt, PLLC (via email)
Mr. Brian Thurston, EGLE (via email)
Ms. Kristina Donaldson, EGLE (via email)
Ms. Tiffany Yusko-Kotimko, EGLE (via email)

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY
DRINKING WATER AND ENVIRONMENTAL HEALTH DIVISION

ADMINISTRATIVE CONSENT ORDER

In the matter of: DWEHD Order No. ACO-399-01-2020

SECTION I

WATERWORKS SYSTEM OWNER/OPERATOR

NAME City of Rochester		OWNER☒	OPERATOR☒
ADDRESS 400 Sixth Street			
CITY Rochester	STATE Michigan	ZIP CODE 48307	
CONTACT NAME/TITLE Blaine Wing, City Manager	PHONE # 248-651-5165		

WATERWORKS SYSTEM NAME AND LOCATION

WATERWORKS SYSTEM NAME City of Rochester, Department of Public Works		WATER SUPPLY SERIAL NUMBER 05720
ADDRESS 1141 North Wilcox		
CITY Rochester	STATE Michigan	CITY Rochester
COUNTY Oakland		
CONTACT NAME Cory Bendick, Water Working Foreman	PHONE # 248-651-5165	

1.1 This agreement between the Department of Environment, Great Lakes, and Energy (EGLE), Drinking Water and Environmental Health Division (DWEHD) and the City of Rochester (Owner/Operator), owner/operator of the above-referenced community water supply, results from changes to the administrative rules promulgated under the Safe Drinking Water Act, 1976 PA 399, as amended (Act 399), specifically R 325.10604f, the Lead and Copper Rule (LCR). This agreement addresses the Drinking Water Revolving Fund (DWRF) water system project in place prior to June 14, 2018, the effective date of the revised LCR, resulting in the partial replacement of lead service lines. The specific work plan is Project Number 7426-01, Watermain Rehabilitation and Replacement (Project 7426-01). This agreement is only applicable to the aforementioned work and not to work plans contracted after June 14, 2018.

1.2 EGLE and the Owner/Operator agree to resolve impediments to compliance with the revised LCR through entry of this Consent Order. This Consent Order, in its entirety, shall consist of Section I, the attached Sections II, III, and IV, and any other referenced attachments, exhibits, or appendices. This Consent Order shall be considered null and void if it does not include, at a minimum, Sections I, II, III, and IV. The Owner/Operator further agrees that this Consent Order shall become effective on the date it is signed by the DWEHD Director, designee of EGLE Director.

SECTION II - COMPLIANCE SCHEDULE

IT IS THEREFORE AGREED AND ORDERED THAT the Owner/Operator shall take the following actions to achieve compliance with the revised LCR of Act 399 and the administrative rules promulgated thereunder.

2.1 Make a good faith effort to replace the entire lead service line and document the reason(s) for each individual partial lead service line replacement.

2.2 Where partial replacement of lead service lines occurs, do the following:

a. Not later than 45 days prior to commencement of Project Number 7426-01, the City shall notify customers of the project including projected project timeframe. The Owner/Operator shall provide NSF International (NSF)/American National Standards Institute (ANSI) Standard 53 certified lead reducing filters and a minimum six (6) month supply of NSF/ANSI Standard 53 certified lead reducing filter replacement cartridges to each facility that will receive a partial lead or galvanized service line replacement. In addition, the City must provide educational and outreach material including, but not limited to, the distribution of educational material to customers on measures that can be taken to reduce lead exposure from drinking water, such as appropriate flushing practices, cleaning aerators, replacing old fixtures, and the use of filters.

b. Follow the American Water Works Association (AWWA) Standard C810-17, *Replacement and Flushing of Lead Service Lines.*

c. Record locations where partial service line replacements have occurred, ensure they remain on the system's inventory for replacement and are scheduled for replacement in accordance with the system's replacement program.

2.3 Provide a report to EGLE within 90 days of project completion, summarizing the partial lead service line replacements completed during the project. The report shall include the reason(s) why entire service line replacement(s) were not feasible and documenting that the remaining portion of the service line has been included in a schedule for replacement per the City's asset management plan. Lead, and galvanized service lines that were previously connected to lead, shall be replaced in accordance with that schedule.

Sections III and IV of this Consent Order shall not be altered in any way, including adding or eliminating any language, striking terms or parts of terms, retyping in whole or in part, or using a different format. Any changes to this document without written approval from EGLE renders the Consent Order null and void.

SECTION III - STIPULATIONS

The Owner/Operator and EGLE stipulate as follows:

3.1 EGLE is authorized to enter this Consent Order requiring the Owner/Operator to comply with state law under Section 15 of Act 399.

3.2 The Owner/Operator consents to the issuance and entry of this Consent Order and stipulates that the entry of this Consent Order constitutes a final order of EGLE and is enforceable as such under the appropriate provisions of state law identified in this Consent Order. The Owner/Operator agrees not to contest the issuance of this Consent

Order and that the resolution of this matter by the entry of this Consent Order is appropriate and acceptable under the current LCR.

3.3 The Owner/Operator and EGLE agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by the Owner/Operator that the law has been violated.

3.4 The Signatory to this Consent Order on behalf of the Owner/Operator agrees and attests that he/she is fully authorized to ensure that the Owner/Operator will comply with all requirements under this Consent Order.

3.5 The Owner/Operator shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section II of this Consent Order.

SECTION IV - GENERAL PROVISIONS

The Owner/Operator and EGLE further stipulate as follows:

4.1 With respect to any violations not specifically addressed and resolved by this Consent Order, EGLE reserves the right to pursue any other remedies to which it is entitled for any failure on the part of the Owner/Operator to comply with the requirements of Act 399 and the administrative rules promulgated thereunder.

4.2 The Owner/Operator and EGLE consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to the provisions of Act 399.

4.3 This Consent Order in no way affects the Owner/Operator's responsibility to comply with any other applicable local, state, or federal laws or regulations.

4.4 EGLE reserves its right to pursue appropriate action, including injunctive relief to enforce the provisions of this Consent Order, and applicable statutory fines for any violation of this Consent Order.

4.5 In the event the Owner/Operator sells or transfers the waterworks system, he/she shall advise any purchaser or transferee of the existence of this Consent Order in connection with such sale or transfer. Within 30 calendar days, the Owner/Operator shall also notify the DWEHD District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Consent Order has been given to the purchaser and/or transferee. The purchaser and/or transferee of this Consent Order must agree, in writing, to assume all of the obligations of this Consent Order. A copy of that agreement shall be submitted to the DWEHD District Supervisor within 30 days of assuming the obligations of this Consent Order.

4.6 The provisions of this Consent Order shall apply to and be binding upon the parties to this action and their successors and assigns.

4.7 This Consent Order constitutes a civil settlement and satisfaction as to the resolution of the issues specifically addressed herein. This Consent Order does not resolve any other issues not specifically addressed herein.

4.8 The Owner/Operator shall verbally report any violation(s) of the terms and conditions of this Consent Order to the DWEHD District Supervisor at 586-753-3759 by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with submittal of a written report within five (5) business days following detection of such violation(s). The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violation(s). The Owner/Operator shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

4.9 No change or modification to this Consent Order shall be valid unless approved in writing from EGLE.

Retention of Records

4.10 Upon request by an authorized representative of EGLE, the Owner/Operator shall make available to EGLE all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to applicable laws or rules. All such documents shall be retained by the Owner/Operator for at least a period of three (3) years from the date of generation of the record unless a longer period of record retention is required by the applicable law or its rules.

Right of Entry

4.11 The Owner/Operator shall allow any authorized representative or contractor of EGLE, upon presentation of proper credentials, to enter upon the premises of the work area at all reasonable times for the purpose of monitoring compliance with the provisions of this Consent Order. This paragraph in no way limits the authority of EGLE to conduct tests and inspections pursuant to Act 399 and the administrative rules promulgated thereunder or any other applicable statutory provision.

Termination

4.12 This Consent Order shall remain in full force and effect until terminated by a written Termination Notice (TN) issued by EGLE. The termination of this Consent Order may be initiated by either the City of Rochester or EGLE. Prior to issuance of a written TN, the City of Rochester shall submit a request consisting of a written certification that the City of Rochester has fully complied with the requirements of this Consent Order. EGLE may request additional relevant information. EGLE shall not unreasonably withhold issuance of a TN.

Signatories

DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

Eric J. Oswald, Director
Drinking Water and Environmental Health Division

15-Jan-2020
Date

I, the undersigned CERTIFY that I am fully authorized by the party identified above to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it. I further attest that all information provided herein is accurate and true.

CITY OF ROCHESTER

Blaine Wing, City Manager

1-7-2020
Date

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

GRETCHEN WHITMER
GOVERNOR

LIESL EICHLER CLARK
DIRECTOR

April 12, 2019

CERTIFIED MAIL

The Honorable Kathleen L. Newsham
Mayor of Bay City
301 Washington Avenue
Bay City, Michigan 48708

Dear Mayor Newsham:

SUBJECT: Administrative Consent Order (ACO); City of Bay City; WSSN: 00470

Enclosed please find a fully executed ACO between the City of Bay City and the Department of Environmental Quality (DEQ), Drinking Water and Municipal Assistance Division, regarding the water supply at the City of Bay City. The compliance schedule in this ACO is meant to bring the water supply into compliance with the Michigan Safe Drinking Water Act, 1976 PA 399, as amended. The effective date of the ACO is April 8, 2019.

If you have any questions regarding the ACO, please contact me at 616-490-9590; lachancea1@michigan.gov; or DEQ P.O. Box 30817, Lansing Michigan 48909-8311.

Sincerely,

Amy Lachance
Assistant Division Director
Drinking Water and Municipal Assistance Division

Enclosure
cc: Mr. Robert Dion, City of Bay City
Mr. Brian Thurston, DEQ
Ms. Kris Philip, DEQ
Mr. Joseph Reinke, DEQ
Mr. David Willard, DEQ

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
DRINKING WATER AND MUNICIPAL ASSISTANCE DIVISION

ADMINISTRATIVE CONSENT ORDER

In the matter of: DWMAD Order No. ACO-399-08 -2019

SECTION I

WATERWORKS SYSTEM OWNER/OPERATOR

NAME		OWNER ☒	OPERATOR ☐
City of Bay City			
ADDRESS			
301 Washington Avenue			
CITY	STATE	ZIP CODE	
Bay City	Michigan	48708	
CONTACT NAME/TITLE	PHONE #		
Mr. Robert Dion, Public Works Director	989-894-8317		

WATERWORKS SYSTEM NAME AND LOCATION

WATERWORKS SYSTEM NAME		WATER SUPPLY SERIAL NUMBER
City of Bay City		00470
ADDRESS		
301 Washington Avenue		
CITY	STATE	ZIP CODE
Bay City	Michigan	48708
COUNTY		
Bay		
CONTACT NAME	PHONE #	
Mr. Marty Jurish	989-894-8320	

1.1 This agreement between the Department of Environmental Quality (DEQ), Drinking Water and Municipal Assistance Division (DWMAD) and the City of Bay City (Owner/Operator), owner/operator of the above-referenced community water supply, results from changes to the administrative rules promulgated under the Safe Drinking Water Act, 1976 PA 399, as amended (Act 399), specifically R 325.10604f, the Lead Copper Rule (LCR). The DEQ acknowledges that early implementation of LCR revisions may cause undue hardship on the Owner/Operator due to contracts entered prior to implementation of the revised LCR.

1.2 The DEQ and the Owner/Operator agree to resolve impediments to compliance with the revised LCR through entry of this Administrative Consent Order (Consent Order). This Consent Order, in its entirety, shall consist of Section I, the attached Sections II, III, and IV, and any other referenced attachments, exhibits, or appendices. This Consent Order shall be considered null and void if it does not include, at a minimum, Sections I, II, III, and IV. The Owner/Operator further agrees that this Consent Order shall become effective on the date it is signed by the DWMAD Director, designee of the DEQ Director.

Signatories

DEPARTMENT OF ENVIRONMENTAL QUALITY

Eric Oswald, Director
Drinking Water and Municipal Assistance Division

8-April-19
Date

I undersigned CERTIFY that I am fully authorized by the party identified above to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it. I further attest that all information provided herein is accurate and true.

CITY OF BAY CITY

~~Robert Dion, Public Works Director~~
Kathleen L. Newsham, Mayor

3-26-19
Date

SECTION II - COMPLIANCE SCHEDULE

IT IS THEREFORE AGREED AND ORDERED THAT the Owner/Operator shall take the following actions to achieve compliance with the revised LCR of Act 399 and the administrative rules promulgated thereunder.

2.1 Make every effort to replace entire lead service line where feasible to do so.

2.2 Where partial replacement of lead service lines occurs, do both of the following:

a. Follow the emergency repair provisions of R 325.10604f(6)(e)(i) through R 325.10604f(6)(e)(v).

b. Follow the guidance in American Water Works Association (AWWA) Standard C810-17, *Replacement and Flushing of Lead Service Lines*.

2.3 Include a schedule for replacement of the remaining portion of the lead service line in an asset management plan no later than June 30, 2019. Lead service lines shall be replaced in accordance with that schedule or an alternate schedule approved by the DEQ.

2.4 Ensure all future projects include the requirement for full lead service line replacement.

2.5 The allowance for partial lead service line replacement in this section shall expire on December 31, 2019, regardless of any amendment, extension, or change to any contract entered prior to the implementation of the revised LCR.

Sections III and IV of this Consent Order shall not be altered in any way, including adding or eliminating any language, striking terms or parts of terms, retyping in whole or in part, or using a different format. Any changes to this document without written approval from the DEQ renders the Consent Order null and void.

SECTION III - STIPULATIONS

The Owner/Operator and the DEQ stipulate as follows:

3.1 The DEQ is authorized to enter this Consent Order requiring the Owner/Operator to comply with state law under Section 15 of Act 399.

3.2 The Owner/Operator consents to the issuance and entry of this Consent Order and stipulates that the entry of this Consent Order constitutes a final order of the DEQ and is enforceable as such under the appropriate provisions of state law identified in this Consent Order. The Owner/Operator agrees not to contest the issuance of this Consent Order and that the resolution of this matter by the entry of this Consent Order is appropriate and acceptable.

3.3 The Owner/Operator and the DEQ agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by the Owner/Operator that the law has been violated.

3.4 The Signatory to this Consent Order on behalf of the Owner/Operator agrees and attests that he/she is fully authorized to ensure that the Owner/Operator will comply with all requirements under this Consent Order.

3.5 The Owner/Operator shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section II of this Consent Order.

SECTION IV - GENERAL PROVISIONS

The Owner/Operator and the DEQ further stipulate as follows:

4.1 With respect to any violations not specifically addressed and resolved by this Consent Order, the DEQ reserves the right to pursue any other remedies to which it is entitled for any failure on the part of the Owner/Operator to comply with the requirements of Act 399 and the administrative rules promulgated thereunder.

4.2 The DEQ and the Owner/Operator consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to the provisions of Act 399.

4.3 This Consent Order in no way affects the Owner/Operator's responsibility to comply with any other applicable local, state, or federal laws or regulations.

4.4 The DEQ reserves its right to pursue appropriate action, including injunctive relief to enforce the provisions of this Consent Order, and applicable statutory fines for any violation of this Consent Order.

4.5 In the event the Owner/Operator sells or transfers the waterworks system, he/she shall advise any purchaser or transferee of the existence of this Consent Order in connection with such sale or transfer. Within 30 calendar days, the Owner/Operator shall also notify the DWMAD District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Consent Order has been given to the purchaser and/or transferee. The purchaser and/or transferee of this Consent Order must agree, in writing, to assume all of the obligations of this Consent Order. A copy of that agreement shall be submitted to the DWMAD District Supervisor within 30 days of assuming the obligations of this Consent Order.

4.6 The provisions of this Consent Order shall apply to and be binding upon the parties to this action and their successors and assigns.

4.7 This Consent Order constitutes a civil settlement and satisfaction as to the resolution of the issues specifically addressed herein; however, it does not resolve any criminal action that may result from these same issues.

4.8 No change or modification to this Consent Order shall be valid unless approved in writing by the DEQ.

Reporting

4.9 The Owner/Operator shall verbally report any violation(s) of the terms and conditions of this Consent Order to the DWMAD District Supervisor at 586-753-3759 by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with submittal of a written report within five business days following detection of such violation(s) to the DEQ Saginaw Bay District office at 401 Ketchum Street, Suite B, Bay City, Michigan 48708. The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violation(s). The Owner/Operator shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

Retention of Records

4.10 Upon request by an authorized representative of the DEQ, the Owner/Operator shall make available to the DEQ all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to applicable laws or rules. All such documents shall be retained by the Owner/Operator for at least a period of three years from the date of generation of the record unless a longer period of record retention is required by the applicable law or its rules.

Right of Entry

4.11 The Owner/Operator shall allow any authorized representative or contractor of the DEQ, upon presentation of proper credentials, to enter upon the premises of the work area at all reasonable times for the purpose of monitoring compliance with the provisions of this Consent Order. This paragraph in no way limits the authority of the DEQ to conduct tests and inspections pursuant to Act 399 and the administrative rules promulgated thereunder or any other applicable statutory provision.

Termination

4.12 This Consent Order shall remain in full force and effect until terminated by a written Termination Notice (TN) issued by the DEQ. Prior to issuance of a written TN, the Owner/Operator shall submit a request consisting of a written certification that the Owner/Operator has fully complied with the requirements of this Consent Order. The DEQ shall not unreasonably withhold issuance of a TN.

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
LANSING

GRETCHEN WHITMER
GOVERNOR

LIESL EICHLER CLARK
DIRECTOR

June 28, 2019

CERTIFIED MAIL

Mr. M. Yunus Patel, City Engineer
2951 Greenfield Road
Dearborn, Michigan 48120

Dear Mr. Patel:

SUBJECT: Administrative Consent Order (ACO); City of Dearborn (City)

Enclosed please find a fully executed ACO between the City, and the Department of Environment, Great Lakes, and Energy (EGLE), Drinking Water and Environmental Health Division, regarding the City's water supply. The ACO results from changes to the administrative rules promulgated under the Safe Drinking Water Act, 1976 PA 399, as amended (Act 399). The effective date of the ACO is June 26, 2019.

If you have any questions regarding the ACO, please contact me at 517-242-8328; nelsonm2@michigan.gov; or EGLE, P.O. Box 30817, Lansing Michigan 48909-8311.

Sincerely,

Maureen Nelson, Enforcement Specialist
Drinking Water and Environmental Health
Division

Attachment
cc: Ms. Amy Lachance, EGLE
Mr. Brian Thurston, EGLE
Ms. Kristina Donaldson, EGLE
Ms. Tiffany Yusko-Kotimko, EGLE

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY
DRINKING WATER AND ENVIRONMENTAL HEALTH DIVISION

ADMINISTRATIVE CONSENT ORDER

In the matter of: DWEHD Order No. ACO-399- 11 -2019

SECTION I

WATERWORKS SYSTEM OWNER/OPERATOR

NAME City of Dearborn		OWNER☒	OPERATOR☒
ADDRESS 2951 Greenfield Rd			
CITY Dearborn	STATE Michigan	ZIP CODE 48120	
CONTACT NAME/TITLE John B. O'Reilly Jr / Mayor	PHONE # 313-943-2300		

WATERWORKS SYSTEM NAME AND LOCATION

WATERWORKS SYSTEM NAME City of Dearborn		WATER SUPPLY SERIAL NUMBER	
ADDRESS 2951 Greenfield Rd			
CITY Dearborn	STATE Michigan	ZIP CODE 48120	
COUNTY Wayne County			
CONTACT NAME M. Yunus Patel	PHONE # 313-943-3058		

1.1 This agreement between the Department of Environment, Great Lakes, and Energy (EGLE), Drinking Water and Environmental Health Division (DWEHD) and the City of Dearborn (Owner/Operator), owner/operator of the above-referenced community water supply, results from changes to the administrative rules promulgated under the Safe Drinking Water Act, 1976 PA 399, as amended (Act 399), specifically R 325.10604f, the Lead Copper Rule (LCR). EGLE acknowledges that early implementation of LCR revisions may cause undue hardship on the Owner/Operator due to the coordination of contract to implement the revised LCR, customers refusing private property access to replace their service line, unexpected service line materials discovered during construction of watermain replacement project, customers refusal to grant access to basement for material inspection during project design, and other unforeseen circumstances.

1.2 EGLE and the Owner/Operator agree to resolve impediments to compliance with the revised LCR through entry of this Consent Order. This Consent Order, in its entirety, shall consist of Section I, the attached Sections II, III, and IV, Exhibit A, and any other referenced attachments, exhibits, or appendices. This Consent Order shall be considered null and void if it does not include, at a minimum, Sections I, II, III, and IV. The Owner/Operator further agrees that this Consent Order shall become effective on the date it is signed by the DWEHD Director, designee of EGLE Director.

SECTION II - COMPLIANCE SCHEDULE

IT IS THEREFORE AGREED AND ORDERED THAT the Owner/Operator shall take the following actions to achieve compliance with the revised LCR of Act 399 and the administrative rules promulgated thereunder.

2.1 Make a good faith effort to replace the entire lead service line.

2.2 Where partial replacement of lead service lines occurs, do the following:

a. Follow the emergency repair provisions of R 325.10604f(6)(e)(i) through R 325.10604f(6)(e)(v).

b. Follow the guidance in American Water Works Association (AWWA) Standard C810-17, *Replacement and Flushing of Lead Service Lines*.

c. Record locations where partial service line replacements have occurred, ensure they remain on the system's inventory as lead service lines and are scheduled for replacement in accordance with the systems lead service line replacement program.

2.3 Provide an annual report to EGLE by March 31st of each year summarizing the partial lead service line replacements completed during the previous year. The report shall include the reason why entire service line replacement was not feasible and documenting that the remaining portion of the lead service line has been included in a schedule for replacement in an asset management plan. Lead service lines shall be replaced in accordance with that schedule or an alternate schedule approved by EGLE.

Sections III and IV of this Consent Order shall not be altered in any way, including adding or eliminating any language, striking terms or parts of terms, retyping in whole or in part, or using a different format. Any changes to this document without written approval from EGLE renders the Consent Order null and void.

SECTION III - STIPULATIONS

The Owner/Operator and EGLE stipulate as follows:

3.1 EGLE is authorized to enter this Consent Order requiring the Owner/Operator to comply with state law under Section 15 of Act 399.

3.2 The Owner/Operator consents to the issuance and entry of this Consent Order and stipulates that the entry of this Consent Order constitutes a final order of EGLE and is enforceable as such under the appropriate provisions of state law identified in this Consent Order. The Owner/Operator agrees not to contest the issuance of this Consent Order and that the resolution of this matter by the entry of this Consent Order is appropriate and acceptable under the current LCR.

3.3 The Owner/Operator and EGLE agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by the Owner/Operator that the law has been violated.

3.4 The Signatory to this Consent Order on behalf of the Owner/Operator agrees and attests that he/she is fully authorized to ensure that the Owner/Operator will comply with all requirements under this Consent Order.

3.5 The Owner/Operator shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section II of this Consent Order.

SECTION IV - GENERAL PROVISIONS

The Owner/Operator and EGLE further stipulate as follows:

4.1 With respect to any violations not specifically addressed and resolved by this Consent Order, EGLE reserves the right to pursue any other remedies to which it is entitled for any failure on the part of the Owner/Operator to comply with the requirements of Act 399 and the administrative rules promulgated thereunder.

4.2 EGLE and the Owner/Operator consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to the provisions of Act 399.

4.3 This Consent Order in no way affects the Owner/Operator's responsibility to comply with any other applicable local, state, or federal laws or regulations.

4.4 EGLE reserves its right to pursue appropriate action, including injunctive relief to enforce the provisions of this Consent Order, and applicable statutory fines for any violation of this Consent Order.

4.5 In the event the Owner/Operator sells or transfers the waterworks system, he/she shall advise any purchaser or transferee of the existence of this Consent Order in connection with such sale or transfer. Within 30 calendar days, the Owner/Operator shall also notify the DWEHD District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Consent Order has been given to the purchaser and/or transferee. The purchaser and/or transferee of this Consent Order must agree, in writing, to assume all of the obligations of this Consent Order. A copy of that agreement shall be submitted to the DWEHD District Supervisor within 30 days of assuming the obligations of this Consent Order.

4.6 The provisions of this Consent Order shall apply to and be binding upon the parties to this action and their successors and assigns.

4.7 This Consent Order constitutes a civil settlement and satisfaction as to the resolution of the issues specifically addressed herein. This Consent Order does not resolve any other issues not specifically addressed herein.

4.8 The Owner/Operator shall verbally report any violation(s) of the terms and conditions of this Consent Order to the DWEHD District Supervisor at **586-753-3759** by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with submittal of a written report within five business days following detection of such violation(s). The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violation(s). The Owner/Operator shall report any anticipated violation(s)

of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

4.9 No change or modification to this Consent Order shall be valid unless approved in writing from EGLE.

Retention of Records

4.10 Upon request by an authorized representative of EGLE, the Owner/Operator shall make available to EGLE all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to applicable laws or rules. All such documents shall be retained by the Owner/Operator for at least a period of three years from the date of generation of the record unless a longer period of record retention is required by the applicable law or its rules.

Right of Entry

4.11 The Owner/Operator shall allow any authorized representative or contractor of EGLE, upon presentation of proper credentials, to enter upon the premises of the work area at all reasonable times for the purpose of monitoring compliance with the provisions of this Consent Order. This paragraph in no way limits the authority of EGLE to conduct tests and inspections pursuant to Act 399 and the administrative rules promulgated thereunder or any other applicable statutory provision.

Termination

4.12 This Consent Order shall remain in full force and effect until terminated by the mutual agreement of both Parties. Such termination shall be effective only if memorialized in a writing signed by individuals with the authority to bind each party.

Ensuring Equality of Contract Terms

4.13 If EGLE enters into any Consent Order, agreements to settle litigation, contracts, or any amendments thereto addressing Partial Lead Service Line Replacements with an Owner/Operator other than the City of Dearborn and the material terms of such other Consent Order, settlement agreement, or contract are more favorable to the Owner/Operator than the material terms of this Consent Order, the City of Dearborn may elect to adopt all of such other material terms and EGLE will agree to the same.

Signatories

DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

Eric Oswald, Director
Drinking Water and Environmental Health Division

26-Jun-19
Date

I undersigned CERTIFY that I am fully authorized by the party identified above to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it. I further attest that all information provided herein is accurate and true.

City of Dearborn
As authorized by CR 6-251-19

John B O'Reilly Jr, Mayor

6-24-2019
Date

APPROVED:
DATE: June 24, 2019
CORPORATION COUNSEL

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY
DRINKING WATER AND ENVIRONMENTAL HEALTH DIVISION

ADMINISTRATIVE CONSENT ORDER

In the matter of: City of Milan DWEHD Order No. ACO-399-13-2019

SECTION I

WATERWORKS SYSTEM OWNER

NAME		OWNER☒	OPERATOR
City of Milan			
ADDRESS			
147 Wabash Street			
CITY	STATE	ZIP CODE	
Milan	Michigan	48160	
CONTACT NAME/TITLE	PHONE #		
Jade Smith, City Administrator	(734) 439-1501		

WATERWORKS SYSTEM NAME AND LOCATION

WATERWORKS SYSTEM NAME		WATER SUPPLY SERIAL NUMBER
City of Milan Drinking Water		04380
ADDRESS		
100 Neckel Ct.		
CITY	STATE	ZIP CODE
Milan	Michigan	48160
COUNTY		
Monroe		
CONTACT NAME	PHONE #	
Matt Holtz	(734) 819-0467	

1.1 This agreement between the Department of Environment, Great Lakes, and Energy (EGLE), Drinking Water and Environmental Health Division (DWEHD) and the City of Milan, Counties of Washtenaw and Monroe (Owner), owner of the above-referenced community water supply, results from changes to the administrative rules promulgated under the Safe Drinking Water Act, 1976 PA 399, as amended (Act 399), specifically R 325.10604f, the Lead Copper Rule (LCR). EGLE acknowledges that early implementation of LCR revisions may cause undue hardship on the Owner due to the coordination of contracts to implement the revised LCR, customers refusing private property access to replace their service lines, unexpected service line materials discovered during construction of watermain replacement projects, customers refusal to grant access to basements for material inspection during project design, and other unforeseen circumstances.

1.2 EGLE acknowledges that the LCR revisions have been legally challenged on statutory and constitutional grounds in the case of *Oakland County Water Resources Commissioner, et al v Michigan Department of Environmental Quality,* Michigan Court of Claims, File No. 2018-000259-MZ and that litigation is ongoing.

1.3 EGLE and the Owner agree to resolve impediments to compliance with the revised LCR through entry of this Consent Order. This Consent Order, in its entirety, shall consist of Section I, the attached Sections II, III, and IV, Exhibit A, and any other referenced attachments, exhibits, or appendices. This Consent Order shall be considered null and void if it does not include, at a minimum, Sections I, II, III, and IV. The Owner further

agrees that this Consent Order shall become effective on the date it is signed by the DWEHD Director, designee of EGLE Director.

SECTION II - COMPLIANCE SCHEDULE

IT IS THEREFORE AGREED AND ORDERED THAT the Owner shall take the following actions to achieve compliance with the revised LCR of Act 399 and the administrative rules promulgated thereunder.

2.1 Make a good faith effort to replace the entire lead service line.

2.2 Where partial replacement of lead service lines occurs, do all of the following:

a. Follow the emergency repair provisions of R 325.10604f(6)(e)(i) through R 325.10604f(6)(e)(v).

b. Follow the guidance in American Water Works Association (AWWA) Standard C810-17, *Replacement and Flushing of Lead Service Lines.*

c. Record locations where partial service line replacements have occurred, ensure they remain on the system's inventory as lead service lines and are scheduled for replacement in accordance with the systems lead service line replacement program.

2.3 Provide an annual report to EGLE by March 31st of each year summarizing the partial lead service line replacements completed during the previous year. The report shall include the reason why entire service line replacement was not feasible and documenting that the remaining portion of the lead service line has been included in a schedule for replacement in an asset management plan. Lead service lines shall be replaced in accordance with that schedule or an alternate schedule approved by EGLE.

2.4 If, after a final order for which all appeals have been exhausted, a court determines that the LCR, or any requirement of the LCR, is invalid or unenforceable for any reason, then Owner shall have the right request modification of or unilaterally to terminate the Consent Order. Similarly, if EGLE revises the LCR, or any requirement of the LCR, in a manner contrary to any requirement of this Consent Order, then the Owner shall have the right to request modification of or to terminate the Consent Order.

Sections III and IV of this Consent Order shall not be altered in any way, including adding or eliminating any language, striking terms or parts of terms, retyping in whole or in part, or using a different format. Any changes to this document without written approval from EGLE renders the Consent Order null and void.

SECTION III - STIPULATIONS

The Owner and EGLE stipulate as follows:

3.1 EGLE is authorized to enter this Consent Order requiring the Owner to comply with state law under Section 15 of Act 399.

3.2 The Owner consents to the issuance and entry of this Consent Order and stipulates that the entry of this Consent Order constitutes a final order of EGLE and is enforceable as such under the appropriate provisions of state law identified in this Consent Order. The Owner agrees not to contest the issuance of this Consent Order and that the resolution of this matter by the entry of this Consent Order is appropriate and acceptable under the current LCR.

3.3 The Owner and EGLE agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by the Owner that the law has been violated.

3.4 The Signatory to this Consent Order on behalf of the Owner agrees and attests that he/she is fully authorized to ensure that the Owner will comply with all requirements under this Consent Order.

3.5 The Owner shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section II of this Consent Order.

SECTION IV - GENERAL PROVISIONS

The Owner and EGLE further stipulate as follows:

4.1 With respect to any violations not specifically addressed and resolved by this Consent Order, EGLE reserves the right to pursue any other remedies to which it is entitled for any failure on the part of the Owner to comply with the requirements of Act 399 and the administrative rules promulgated thereunder.

4.2 EGLE and the Owner consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to the provisions of Act 399.

4.3 This Consent Order in no way affects the Owner's responsibility to comply with any other applicable local, state, or federal laws or regulations.

4.4 EGLE reserves its right to pursue appropriate action, including injunctive relief to enforce the provisions of this Consent Order, and applicable statutory fines for any violation of this Consent Order.

4.5 In the event the Owner sells or transfers the waterworks system, he/she shall advise any purchaser or transferee of the existence of this Consent Order in connection with such sale or transfer. Within 30 calendar days, the Owner shall also notify the DWEHD District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Consent Order has been given to the purchaser and/or transferee. The purchaser and/or transferee of this Consent Order must agree, in writing, to assume all of the obligations of this Consent Order. A copy of that agreement shall be submitted to the DWEHD District Supervisor within 30 days of assuming the obligations of this Consent Order.

4.6 The provisions of this Consent Order shall apply to and be binding upon the parties to this action and their successors and assigns.

4.7 This Consent Order constitutes a civil settlement and satisfaction as to the resolution of the issues specifically addressed herein. This Consent Order does not resolve any other issues not specifically addressed herein.

4.8 The Owner shall verbally report any violation(s) of the terms and conditions of this Consent Order to the DWEHD District Supervisor at 517-581-2769 by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with submittal of a written report within five business days following detection of such violation(s). The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violation(s). The Owner shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

4.9 No change or modification to this Consent Order shall be valid unless approved in writing from EGLE.

Retention of Records

4.10 Upon request by an authorized representative of EGLE, the Owner shall make available to EGLE all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to applicable laws or rules. All such documents shall be retained by the Owner for at least a period of three years from the date of generation of the record unless a longer period of record retention is required by the applicable law or its rules.

Right of Entry

4.11 The Owner shall allow any authorized representative or contractor of EGLE, upon presentation of proper credentials, to enter upon the premises of the work area at all reasonable times for the purpose of monitoring compliance with the provisions of this Consent Order. This paragraph in no way limits the authority of EGLE to conduct tests and inspections pursuant to Act 399 and the administrative rules promulgated thereunder or any other applicable statutory provision.

Termination

4.12 Except as provided in paragraph 2.4, this Consent Order shall remain in full force and effect until terminated by the mutual agreement of both Parties. Such termination shall be effective only if memorialized in a writing signed by individuals with the authority to bind each party. EGLE shall use its best efforts to take action within 30 days of receiving a request to terminate from the City of Milan, and such approval shall not be unreasonably withheld.

Ensuring Equality of Contract Terms

4.13 If EGLE enters into any Consent Order, agreements to settle litigation, contracts, or any amendments thereto addressing Partial Lead Service Line Replacements with an Owner other than the City of Milan and the material terms of such other Consent Order, settlement agreement, or contract are more favorable to the Owner than the material terms of this Consent Order, the City of Milan may elect to adopt all of such other material terms and EGLE will agree to the same.

Signatories

DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY

Eric Oswald, Director
Drinking Water and Environmental Health Division

25-July-19
Date

I undersigned CERTIFY that I am fully authorized by the party identified above to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it. I further attest that all information provided herein is accurate and true.

City of Milan

Dominic N. Hamden, Mayor

7-22-19
Date

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
LANSING

LIESL EICHLER CLARK
DIRECTOR

July 26, 2019

CERTIFIED MAIL

Steven D. Mann, Attorney and Counselor at Law
Miller, Canfield, Paddock and Stone, PLC
150 West Jefferson, Suite 2500
Detroit, Michigan 48226

Dear Mr. Mann:

SUBJECT: Administrative Consent Order (ACO); City of Milan (City)

Enclosed please find a fully executed original ACO between the City, and the Department of Environment, Great Lakes, and Energy (EGLE), Drinking Water and Environmental Health Division, regarding the City's water supply. The ACO results from changes to the administrative rules promulgated under the Safe Drinking Water Act, 1976 PA 399, as amended (Act 399). The effective date of the ACO is July 25, 2019.

If you have any questions regarding the ACO, please contact me at 517-242-8328; nelsonm2@michigan.gov; or EGLE, P.O. Box 30817, Lansing Michigan 48909-8311.

Sincerely,

Maureen Nelson, Enforcement Specialist
Drinking Water and Environmental Health
Division

Attachments
cc: Ms. Amy Lachance, EGLE
Mr. Brian Thurston, EGLE
Mr. Patrick Brennan, EGLE
Mr. Sean Brown, EGLE

From:	Lachance, Amy (EGLE)
To:	Nelson, Maureen (EGLE)
Subject:	FW: Oakland County Water Resources Commissioner, et al. v Michigan Department of Environmental Quality
Date:	Thursday, August 8, 2019 2:27:16 PM
Attachments:	Facebook_561b4dd8-3ab4-4b3f-b5c7-9a2ab0fea5b2.png Twitter_9169bdd3-701f-4e51-83c2-446163224372.png 29 - Plaintiff City of Livonia"s Motion for Reconsideration.pdf

FYI

From: Larsen, Zachary (AG) <LarsenZ@michigan.gov>
Sent: Thursday, August 8, 2019 2:15 PM
To: Keatley, Aaron (EGLE) <KeatleyA@michigan.gov>; Oswald, Eric (EGLE) <OswaldE1@michigan.gov>; Lachance, Amy (EGLE) <LACHANCEA1@michigan.gov>; Philip, Kris (EGLE) <PHILIPK@michigan.gov>; Krisztian, George (EGLE) <krisztiang@michigan.gov>
Cc: Manning, Peter (AG) <ManningP@michigan.gov>
Subject: FW: Oakland County Water Resources Commissioner, et al. v Michigan Department of Environmental Quality

The City of Livonia filed a motion for reconsideration in the *Oakland County Water Resources Commissioner* case today, separate from the other Plaintiffs.

The gist of the City's argument is that they believe the Court erred on the Revenue Bond Act issue because the Court held that "nothing in the rules *require* plaintiffs to charge back its customers for the improvements" when the Revenue Bond Act (MCL 141.121(1)) does require those expenses to be included in the rates. But the Court *also* rejected the Plaintiffs' claim on the broader ground that it would "lead the conclusion that any regulation which leads to increased costs . . . runs afoul of MCL 141.129." So, even if the Court was mistaken on the first issue, it does not matter because the Court rejected their argument for other reasons as well.

It is not clear yet whether the City's filing of this motion—without DWSD, GLWA, and Oakland County—indicates a rift or difference in approach by the Plaintiffs in responding to the Court's ruling or instead a strategy of having each Plaintiff address discrete issues on reconsideration. Plaintiffs have until next Friday, August 16, to file their motions for reconsideration, so time will tell.

We do not have a right to respond to this or any other motion for reconsideration. Only if the Court requests it will a response be required.

Sincerely,

Zach Larsen
Assistant Attorney General
Michigan Department of Attorney General
Environment, Natural Resources, & Agriculture Division
6th Flr, G. Mennen Williams Bldg.

525 W. Ottawa St.
Lansing, MI 48909
(517) 335-7664

From: Smyser, Brenda <BSmyser@ci.livonia.mi.us>
Sent: Thursday, August 08, 2019 1:35 PM
To: Larsen, Zachary (AG) <LarsenZ@michigan.gov>
Cc: Fisher, Mike <MFisher@ci.livonia.mi.us>
Subject: Oakland County Water Resources Commissioner, et al. v Michigan Department of Environmental Quality

Good afternoon,

Please see attached Plaintiff City of Livonia's Motion for Reconsideration which I am emailing to you at the request of Chief Assistant City Attorney Michael Fisher.

Thank you,

Brenda Smyser
Program Supervisor
City of Livonia | Law Department
(734) 466-2521
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STATE OF MICHIGAN
COURT OF CLAIMS

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, as County Agent for the County of Oakland, GREAT LAKES WATER AUTHORITY, CITY OF DETROIT, by and through its Water and Sewerage Department, and CITY OF LIVONIA,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

No. 2018-000259-MZ

HON. CHRISTOPHER M. MURRAY

/

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PLAINTIFF CITY OF LIVONIA'S MOTION FOR RECONSIDERATION OF THE COURT'S DECISION ON DEFENDANT'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8) AND PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(I)

NOW COMES Plaintiff City of Livonia ("Livonia"), by and through its attorneys, Paul A. Bernier, City Attorney, and Michael E. Fisher, Chief Assistant City Attorney, and in support of its Motion for Reconsideration of the Court's Decision on Defendant's Motion for Summary Disposition Under MCR 2.116(C)(8) and Plaintiffs' Motion for Summary Disposition under MCR 2.116(I), pursuant to MCR 2.119(F), states as follows:

1. Plaintiffs filed this action of December 11, 2018 seeking a declaratory judgment that the revised lead and copper rules enacted by Michigan's Department of Environmental Quality ("MDEQ") on June 14, 2018 (the "Rules") were invalid on a variety of legal grounds.

2. One such ground is that the Rules, particularly Rule 325.10604f(6)(e)[1], violates the Revenue Bond Act, MCL 141.101, *et seq*, especially MCL 141.129, by requiring water supplies to treat the cost of replacing private lead water service lines as an expense of the system which must *ergo* be paid out of general customer water rates, per MCL 141.121(1). Complaint paras 129-130.

3. Defendant filed its Motion for Summary Disposition under MCR 2.116(C)(8) against Plaintiffs ("Defendant's Motion") on February 1, 2019.

4. Defendant's Motion argued in part that the rate rules do not actually set or prescribe water rates. Defendant MDEQ's February 1, 2019 Brief in Support of its Motion for Summary Disposition under MCR 2.116(C)(8) ("Defendant's Brief") at 43.

5. Defendant's Brief further argued that MDEQ is free to impose higher costs on water supplies pursuant to the Safe Drinking Water Act, MCL 325.1001, *et seq* (the "SDWA"), without being deemed to have set rates in so doing. Defendant's Brief at 43-44.

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[1] To the same effect is Rule 325.10604f(5)(c). Together, Rules 325.10604f(5)(c) and (6)(e) are hereafter referred to as the "rate rules".

6. Finally, Defendant's Brief concluded that the Legislature intended to repeal by implication MCL 141.129 unless that section is read as Defendant reads it. Defendant's Brief at 44-45.

7. Defendant did not deny that MCL 141.121(1) requires that expenses of the water system be covered by rates, and that the rate rules, by requiring that the private lead line replacement costs be treated as expenses of the system, thereby compel the inclusion of those costs in the rate base. Indeed, Defendant observed that the costs "must ultimately be recovered . . . via rates." Defendant's Brief at 39.

8. Defendant failed to explain the meaning of "supervision" – separate and apart from "regulation" – of rates in MCL 141.129.

9. In their response to Defendant's Motion, Plaintiffs pointed out the policy conflict between MCL 141.129 and the rate rules: Solicitude for bond buyers and holders was the Legislature's motive in adopting MCL 141.129, whereas the rate rules subject bondholders to unacceptable risk, such as *Bolt* liability. Plaintiffs' February 15, 2019 Response in Opposition to Defendant MDEQ's February 1, 2019 Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) ("Plaintiffs' Response") at 32, 35-36.

10. Plaintiffs also pointed out that Defendant's proposed repeal by implication is to be avoided at almost all costs. Plaintiffs' Response at 32, citing *AK Steel Holding Corp v Dept of Treasury*, 314 Mich App 453, 471; 887 NW2d 209 (2016).

11. Plaintiffs proposed a construction which would harmonize the SDWA and the Revenue Bond Act, i.e., that the Court honor the SDWA's silence regarding ratesetting, and leave that subject to the Revenue Bond Act. Plaintiffs' Response at 32-33.

12. Plaintiffs concluded by requesting that summary judgment be granted to Plaintiffs as to Count V of Plaintiffs' Complaint, Plaintiffs' Response at 36, per MCR 2.116(I)(2).

13. In its Reply Brief, Defendant repeated its claim to be able to impose limitless costs on Plaintiffs and argued, in effect, that MDEQ does this all the time. Defendant MDEQ's Reply Brief in Support of its February 1, 2019 Motion for Summary Disposition under MCR 2.116(C)(8) at 12.

14. The Court graciously allowed the parties to have oral argument on this case on July 23, 2019.

15. On that occasion, MDEQ argued that MCL 141.129 really means that MDEQ is prohibited from behaving as the Michigan Public Service Commission behaves in its supervision of ratesetting by regulated utilities.

16. On July 26, 2019, the Court issued its Order Granting Defendant Michigan Department of Environmental Quality's February 1, 2019 Motion for Summary Disposition pursuant to MCR 2.116(C)(8), as well as its Opinion Regarding Defendant's February 1, 2019 Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) (the "Opinion").

17. Although parts of the Opinion may be susceptible to more than one interpretation,[2] the Opinion evidences two palpable errors where the rate rules are concerned: the notions that a) "nothing in the rules *require* Plaintiffs to charge back customers for the improvements;" and b) MDEQ "has simply imposed . . . new costs on the water supply." Opinion at 16-17 (emphasis original).

18. Because MCL 141.121(1) requires that rates cover all expenses of the system, and the rate rules require that private service line replacement be treated as an expense of the system,

[2] If what is meant by "the rules only require that the replacement costs be *initially* borne by the supply"(Opinion at 16, emphasis added) is that the homeowner could be required to reimburse the system sometime later on, this would alleviate some concerns about the rate rules. However, this seems an unlikely interpretation of the Opinion because it appears to conflict with the rate rules.

the rate rules *do* require Plaintiffs to charge back customers for the improvements, and Defendant has not argued to the contrary.

19. Likewise, the statement that MDEQ "has simply imposed . . . new costs on the water supply" is palpable error. In addition to imposing new costs, MDEQ has, by its adoption of the rate rules, specifically *withdrawn a revenue source* from Plaintiffs.

20. The foregoing palpable errors misled this Court, and a different disposition of the Motion – at least where validity of the rate rules is concerned – must result from correction of these errors.

21. As further explained in Plaintiff City of Livonia's Brief in Support of Motion for Reconsideration attached hereto, Plaintiff City of Livonia should be granted summary disposition on Count V of the Complaint, where the rate rules are concerned, together with such other relief as justice may require.

WHEREFORE, Plaintiff City of Livonia respectfully request that this Honorable Court reconsider the decision embodied in the Order, and instead grant Plaintiff City of Livonia's request for summary disposition as to Count V of the Complaint regarding the rate rules.

Respectfully submitted,

Attorneys for Plaintiffs

By:_____

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Dated: August 8, 2019

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PLAINTIFF CITY OF LIVONIA'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

As the Court is no doubt aware, MCR 2.119(F)(2) provides that no response to this Motion may be filed, and no oral argument held, unless the Court otherwise directs.

The Standard for Deciding Motions Under MCR 2.119(F)

Generally speaking, MCR 2.119(F)(3) disfavors motions which rehash old arguments, preferring arguments which demonstrate "palpable" errors by which the Court has been misled. Accordingly, this Motion addresses two such errors. But MCR 2.119(F)(3) is careful to preserve the Court's discretion in responding to motions for reconsideration because the point of such motions is to facilitate self-correction of errors before they do any real harm.

> MCR 2.119(F)(3) "allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties."

Bakian v Nat'l City Bank (*In re Estate of Moukalled*), 269 Mich App 708, 714; 714 NW2d 400 (2006), quoting *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000).

> This rehearing procedure allows a court to correct mistakes which would otherwise be subject to correction on appeal, though at much greater expense to the parties.

People v Turner, 181 Mich App 680, 683; 449 NW2d 680 (1989).

> [I]t would be a strange result to perpetuate an error on the grounds that it was not "palpable" or more generally upon a reluctance to reconsider issues (especially when the same error, if not harmless, would presumably be subject to correction on appeal, but at much greater expense).

Brown v Northville Regional Psychiatric Hospital, 153 Mich App 300, 309; 395 NW2d 18 (1986). (Citation omitted.)

Rules R325.10604f(5)(c) and 6(a) Violate MCL 141.129

The upshot of Rules R325.10604f (5)(c) and 6(e) (hereafter, the "rate rules") is that

[t]he cost of the replacement lines must ultimately be recovered . . . via rates.

Defendant's Brief in Support of its Motion for Summary Disposition Under MCR 2.116(C)(8)

("Defendant's Brief", emphasis added) at 39.[1]

But per MCL 141.129, Defendant (also called "MDEQ" herein) has no authority over - and indeed is statutorily prohibited from – regulating or supervising what Plaintiffs must or must not do with its rates. Specifically, MCL 141.129 says the

> [r]ates . . . shall not be subject to supervision or regulation by any state bureau, board commission, or other like instrumentality or agency thereof.

Since MDEQ is prohibited from regulating or supervising the setting of rates, the rate rules cannot stand.

MDEQ attempts to get around this seemingly obvious proposition by arguing that it is not prescribing or limiting rates. Defendant's Brief at 43. This argument might well be taken if the prohibition in MCL 141.29 extended only to *regulation* of rates, e.g., prescribing or capping rates. But the prohibition extends to state *supervision* of rates as well. And the old adage of statutory interpretation holds that

> "Statutes should be so construed, if possible, as to give full effect to every part and render no portion nugatory, every clause and word being presumed to have some force and meaning." *Attorney General, ex rel. Zacharias v Board of Education of City of Detroit* (syllabus), 154 Mich 584.
>
> See also, *Rohde v Wayne Circuit Judge*, 168 Mich 683; *Bloomshield v City of Bay City*, 192 Mich 488.

Chamski v Wayne County Board of Auditors, 288 Mich 238, 258 (1939). Giving effect to *both* the statutory bar on state supervision *and* the ban on state regulation yields a different construction: a

[1] Defendant does not appear to argue, as the Court does (Opinion at 16), that the rate rules do not require Plaintiffs to recover these costs via rates. Among other things, if it were not for the rate rules, Plaintiffs could recover these costs by charging the entire replacement cost to the affected property owners, as is done, e.g. for initial service connections.

general independence of local water ratesetting from state agency interference.[2]

MDEQ also argues that it is free to impose higher costs on Plaintiffs. Defendant's Brief at 44. (See also Opinion at 16-17.) While Plaintiffs are understandably wary of MDEQ's asserted right to unilaterally impose limitless costs on Plaintiffs, the infliction of costs is not MDEQ's most flagrant violation of MCL 141.129 in this case. That honor belongs to the rate rules. MDEQ is doing much more than prescribing expensive improvements in this case. Here MDEQ is taking the unprecedented step of *forbidding* Plaintiffs from recovering costs from the affected property owners, decreeing instead that the costs "must ultimately be recovered . . . via rates". Defendant's Brief at 39. In other words, this is not merely an unfunded mandate; it is a *de*funded mandate.

Ironically, during oral argument MDEQ argued that MCL 141.129 really means that MDEQ is not allowed to behave as the Michigan Public Service Commission ("MPSC") does in the context of electric utilities. But MPSC, "in exercise of its supervisory powers" over electric rates, *Attorney General v MPSC*, 412 Mich 385, 413; 316 NW2d 187 (1982), determines what items to include in and exclude from the utility rate base[3] - an action almost identical to the rate base determination made by MDEQ's rate rules in this case.

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[2] See, e.g., *City of Quincy v Mass Water Resources Authority*, 421 Mass 463, 465; 658 NE2d 145 (1995) (Exhibit A hereto, emphasis added):

> The authority's ratesetting powers are exercised *independently* by its board of directors and are *not subject to supervision or regulation* by any other agency of the Commonwealth.

[3] Justice Williams, writing in dissent, described a hypothetical exercise of this power:

> [The] MPSC would be confronted with an impossible dilemma. One the one hand, if it included all or the major portion of the cost in the rate base, the rate base would be so swollen as to make rates prohibitively expensive and an unwarranted economic burden on the ratepayer. On the other hand, if such costs were not included in the rate base, the financial well-being of the utility might be disastrously affected[.]

AG v MPSC at 432. Though the significance of rate base inclusion in the instant case varies somewhat from that in *AG v MPSC, supra*, the supervisory element of the action is, if anything, more evident in the case at bar.

The Safe Drinking Water Act Does Not Repeal By Implication MCL 141.129[4]

Finally, MDEQ also argues that the Safe Drinking Water Act, MCL 325.1001, *et seq* ("SDWA") repeals MCL 141.129 by implication. But there is no conflict between the SDWA and the Revenue Bond Act. The conflict in this case is between MDEQ's *rate rules* and the Revenue Bond Act. MDEQ has yet to cite a case where a statutory provision has been repealed by implication through the adoption of an administrative rule. Indeed, one would expect the statute to take precedence in such cases.[5]

This conclusion is buttressed by the fact that the subject of ratesetting and collection are central to the Revenue Bond Act, whereas the SDWA is totally silent on these topics. Large bondholders can, among other things

> compel . . . the fixing of sufficient rates, the collection of revenues, the proper segregation of revenues, and the proper application of the revenues.

MCL 141.109. And if there is a default in bond payments, the Revenue Bond Act provides for receivership to direct the fixing and charging of rates and the collection of revenues sufficient to pay off bonds, other obligations, and the expenses of the system. MCL 141.110. These protections are in place – as are the additional safeguards in MCL 141.121(1) and 141.129 – to protect the financial system on which all water supplies depend. Nothing in the SDWA purports to knock

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[4] The Court did not argue to the contrary in its Opinion, and has therefore not erred in this regard. Plaintiffs seek only to place on the record some defects in MDEQ's argument.

[5] We hold that the statute . . . takes precedence over the administrative rules.

Livingston County Board of Social Services v DSS, 208 Mich App 402, 404; 529 NW2d 308 (1995).

down or undermine the Revenue Bond Act or the financial market it helped foster.[6]

MCL 141.129 *Is* The Legislative Fix For Most Problems Identified In This Case

MDEQ, on the other hand, does not appear to care about bondholders at all. Via the rate rules, MDEQ blithely placed a major potential revenue source off limits to bondholders. Not content with that, it put those bondholders at risk of *Bolt* liability.

The danger in *Bolt* cases is that a community's user fees, including water fees, may be found to be a tax in violation of Const 1963 art 9, §31, as in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998). *Bolt* involved a stormwater fee, rather than water rates, but the rate rules arguably put Plaintiffs' water rates in a similar position to Lansing's ill-fated stormwater fee. The rate rules require that

> the charge applies to all property owners, rather than only to those who actually benefit.

Bolt, supra, at 165. The *Bolt* majority pointed out that the fee "lack[ed] a significant element of regulation," *Bolt, supra*, at 166, and added – as an argument that the fee was a tax –

> Improved water quality . . . benefit[s] everyone in the City, not only property owners.

Bolt, supra, at 166. *Bolt* liability can come unpredictably, as in *County of Jackson v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013), where the City hired a consultant in order to avoid *Bolt* liability, but got tagged anyhow. *Jackson, supra*, at 95. The *Jackson* Court observed that "There is no bright-line test", at 99, quoting *Bolt, supra*, at 159, before going on to order the

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[6] Contrast this with *Telford v State*, unpublished per curiam opinion of the Court of Appeals, issued February 26, 2019 (Docket No. 340929) (Exhibit B hereto), where the Court of Appeals found that the amended MCL 600.6419(1)(a) repealed by implication MCL 600.308a(1), regarding jurisdiction over Headlee Claims, on the strength of the phrase

> notwithstanding another law that confers jurisdiction of the case in the circuit court.

MCL 600.6419(1)(a); *Telford, supra*, at 2, 5. Such narrow targeting of one statute by another – a prerequisite for repeal by implication – is not found in the SDWA.

City to "cease collecting the charge and . . . reimburse . . . plaintiffs for any charges paid to date". *Jackson, supra*, at 112.[7]

Needless to say, *Bolt* is not a popular decision in municipal circles. It compels local water supplies to walk a tightrope, while carrying the bondholders on their shoulders. In adopting the rate rules, MDEQ has seen fit to give the rope a shake.

With reference to *Bolt* and the various other constitutional and statutory problems created or exacerbated by the rate rules, there was some suggestion that a legislative fix might be on the way. But with respect, the Legislature already provided the fix when it adopted MCL 141.129. Adherence to that section would prevent or negate all the constitutional issues raised in the Complaint. But a legislative fix – or 1,000 legislative fixes, for that matter – avails nothing unless applied by the courts. MCL 141.129 must be applied to prevent the dangers posed by the rate rules.

Section 34 of Article VII of Michigan's 1963 Constitution provides that

> The provisions of this constitution and law concerning counties [and] . . . cities . . . shall be liberally construed in their favor.

Construing the Constitution, the SDWA, and the Revenue Bond Act in favor of the County and the cities in this case requires deletion of the rate rules.

Good riddance.

CONCLUSION

Plaintiff City of Livonia recognizes the courage required for the Court to self-correct errors in a case like this. But there is - without a doubt – palpable error behind the Opinion. The rate rules' mandate to charge the customer base for the cost of lead service line replacement is not

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[7] For other odd permutations wrought by *Bolt*, see Laitner, *Law firm gets rich off sewer lawsuits against cities and townships*, Detroit Free Press (October 8, 2018) found at https://www.freep.com/story/news/local/michigan/oakland/2018/10/08/lawsuits-sewer-storm-water-bills-michigan-detroit/1418087002/, Exhibit C attached.

optional. And in adopting the rate rules, MDEQ did not confine itself to imposing costs on Plaintiffs. MDEQ made choices for Plaintiffs, including the choice of what costs will be paid by water rates.

In the interest of law and justice, the rate rules must go. Accordingly, Plaintiff City of Livonia requests that this Honorable Court kindly issue a declaratory judgment that the rate rules are invalid.

Respectfully submitted,

By: Michael E. Fisher

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Dated: August 8, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2019, I served a copy of the above document in this matter on all attorneys of record at their addresses below via email per this Court's Order July 29, 2019:

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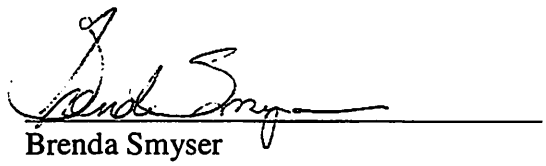

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11. Plaintiffs proposed a construction which would harmonize the SDWA and the Revenue Bond Act, i.e., that the Court honor the SDWA's silence regarding ratesetting, and leave that subject to the Revenue Bond Act. Plaintiffs' Response at 32-33.

12. Plaintiffs concluded by requesting that summary judgment be granted to Plaintiffs as to Count V of Plaintiffs' Complaint, Plaintiffs' Response at 36, per MCR 2.116(I)(2).

13. In its Reply Brief, Defendant repeated its claim to be able to impose limitless costs on Plaintiffs and argued, in effect, that MDEQ does this all the time. Defendant MDEQ's Reply Brief in Support of its February 1, 2019 Motion for Summary Disposition under MCR 2.116(C)(8) at 12.

14. The Court graciously allowed the parties to have oral argument on this case on July 23, 2019.

15. On that occasion, MDEQ argued that MCL 141.129 really means that MDEQ is prohibited from behaving as the Michigan Public Service Commission behaves in its supervision of ratesetting by regulated utilities.

16. On July 26, 2019, the Court issued its Order Granting Defendant Michigan Department of Environmental Quality's February 1, 2019 Motion for Summary Disposition pursuant to MCR 2.116(C)(8), as well as its Opinion Regarding Defendant's February 1, 2019 Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) (the "Opinion").

17. Although parts of the Opinion may be susceptible to more than one interpretation,[2] the Opinion evidences two palpable errors where the rate rules are concerned: the notions that a) "nothing in the rules *require* Plaintiffs to charge back customers for the improvements;" and b) MDEQ "has simply imposed . . . new costs on the water supply." Opinion at 16-17 (emphasis original).

18. Because MCL 141.121(1) requires that rates cover all expenses of the system, and the rate rules require that private service line replacement be treated as an expense of the system,

[2] If what is meant by "the rules only require that the replacement costs be *initially* borne by the supply"(Opinion at 16, emphasis added) is that the homeowner could be required to reimburse the system sometime later on, this would alleviate some concerns about the rate rules. However, this seems an unlikely interpretation of the Opinion because it appears to conflict with the rate rules.

the rate rules *do* require Plaintiffs to charge back customers for the improvements, and Defendant has not argued to the contrary.

19. Likewise, the statement that MDEQ "has simply imposed . . . new costs on the water supply" is palpable error. In addition to imposing new costs, MDEQ has, by its adoption of the rate rules, specifically *withdrawn a revenue source* from Plaintiffs.

20. The foregoing palpable errors misled this Court, and a different disposition of the Motion – at least where validity of the rate rules is concerned – must result from correction of these errors.

21. As further explained in Plaintiff City of Livonia's Brief in Support of Motion for Reconsideration attached hereto, Plaintiff City of Livonia should be granted summary disposition on Count V of the Complaint, where the rate rules are concerned, together with such other relief as justice may require.

WHEREFORE, Plaintiff City of Livonia respectfully request that this Honorable Court reconsider the decision embodied in the Order, and instead grant Plaintiff City of Livonia's request for summary disposition as to Count V of the Complaint regarding the rate rules.

Respectfully submitted,

Attorneys for Plaintiffs

By:_____

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Dated: August 8, 2019

Exhibit A

City of Quincy v Massachusetts Water Resources Auth.

City of Quincy v. Massachusetts Water Resources Auth.

Supreme Judicial Court of Massachusetts

October 3, 1995, Argued ; December 8, 1995, Decided

SJC-06863

Reporter
421 Mass. 463 *; 658 N.E.2d 145 **; 1995 Mass. LEXIS 460 ***

CITY OF QUINCY & another [1] vs. MASSACHUSETTS WATER RESOURCES AUTHORITY.

Prior History: [***1] Suffolk. Civil action commenced in the Superior Court Department on July 13, 1993. The case was heard by Gordon L. Doerfer, J., on motions for partial summary judgment. The Supreme Judicial court on its own initiative transferred the case from the Appeals Court.

Core Terms

charges, methodology, sewer, rate setting, communities, costs, summary judgment, local body, regulation, assessments, enabling legislation, infiltration, services, inflow, sewer system, provisions, metropolitan, sewerage, water delivery, population-equivalent, conservation, apportioned, plaintiffs', wastewater, factors, metered, notice

Case Summary

Procedural Posture
Plaintiff city and intervenor water and sewer commission challenged an order from the Superior Court Department (Massachusetts) that granted defendant water utility's motion for summary judgment and dismissed an action seeking a declaration that the water utility's annual sewer assessments were in violation of the water utility's enabling legislation, Mass. Gen. Laws ch. 372, § 10(a) (1984).

Overview
The city filed an action for a declaration that the water utility's annual sewer assessments violated the water utility's enabling legislation. The commission intervened. The superior court entered summary judgment for the water utility, and a judgment was entered dismissing the complaints of the city and the commission. On appeal, the court vacated the dismissal and held that the water utility's annual sewer assessments were calculated in a manner consistent with its statutory authority. The water utility was given broad discretion in the establishment and adjustment of its rates. Because the water utility was required to recoup most of its operating costs from charges to its member communities, any reduction in its charges to one community inevitably would increase charges to another. It was reasonable and proper for the water utility to defer altering its rate setting methodology until it could implement a more equitable method that utilized data closely approximating actual system usage. The water utility's use of the population and population-equivalent methodology pending the shift to a system based on metered sewerage flow was in compliance with its legislative mandate.

Outcome
The court vacated the dismissal of the action against the water utility and remanded the action for entry of a judgment declaring that the water utility's method of setting rates and assessing charges was in conformity with its enabling legislation.

LexisNexis® Headnotes

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN1[] Mass. Gen. Laws ch. 372, § 10(a) (1984) authorizes a utility company to "establish and adjust" charges for sewerage services provided by the utility company, sufficient to meet all of the costs the utility company incurs for debt service, current operations and

[1] Boston Water and Sewer Commission (commission) was permitted to intervene as a plaintiff in the case. See Mass. R. Civ. P. 24, 365 Mass. 769 (1974).

capital improvement projects. Although a utility company possesses broad rate setting power, the legislature has directed that its charges be structured to advance or promote, certain policies, including water conservation and environmental protection.

Governments > Local Governments > Duties & Powers

Energy & Utilities Law > Utility Companies > Rates > General Overview

Governments > Public Improvements > Sanitation & Water

HN2[] **Duties & Powers**

Mass. Gen. Laws ch. 372, § 10(a) (1984) directs that the charges levied by a utility company shall give account to (i) actual costs to the utility company of providing services, (ii) reasonable provisions in the nature of incentives and disincentives to promote conservation of resources and protection of the environment and to induce the protection, maintenance and improvement of the sewer and waterworks systems and of sewer and water systems of local bodies, (iii) reasonable provisions reflecting the contribution made by local bodies through expenditures including, but not limited to, leak detection, system rehabilitation and other water management programs, sewerage inflow/infiltration reduction projects, separation of combined sewers and other projects which improve the overall efficiency of the utility company's and local bodies' service delivery, (iv) reasonable provisions to reflect respective local bodies' disproportionate historic investment in the sewer and waterworks systems and in the former metropolitan district commission sewer system and metropolitan district commission water system used in the services delivered by the utility company, (v) reasonable interest charges and penalties for delinquency in payment.

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

HN3[] Under Mass. Gen. Laws ch. 372, § 10(a), a utility company's charges are established and reviewable in accordance with the notice and hearing procedures established by Mass. Gen. Laws ch. 30A (1994). A utility company's rate setting methodology should be reviewed as a regulation.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN4[] **Formal Rulemaking**

Regulations properly adopted by an administrative agency stand on the same footing as statutes and all rational presumptions are to be made in favor of their validity. Such regulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate. The principle of deference is not one of abdication, and a regulation that is irreconcilable with an agency's enabling legislation cannot stand.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Administrative Law > Separation of Powers > Legislative Controls > General Overview

HN5[] **Formal Rulemaking**

A regulation adopted by an agency must be in conformity with the agency's governing legislation.

Governments > Legislation > Interpretation

HN6[] **Interpretation**

The word "shall" is ordinarily interpreted as having a mandatory or imperative obligation.

Civil Procedure > ... > Justiciability > Mootness > Genera

I Overview

HN7[] When there is no liability, the question of remedies becomes moot.

Headnotes/Summary

Headnotes

Massachusetts Water Resources Authority. Sewer. Municipal Corporations, Sewers. *Administrative Law,* Regulations, Rate setting. *Statute,* Construction. *Practice, Civil,* Summary judgment. *Moot Question.*

Counsel: Peter L. Koff for city of Quincy.

Laura Steinberg (Lisa F. Sherman with him) for Boston Water and Sewer Commission.

E. Michael Sloman (Richard Goldstein with him) for the defendant.

Judges: Present: Liacos, C.J., Abrams, Lynch, & Greaney, JJ.

Opinion by: GREANEY

Opinion

[*464] **[**146]** GREANEY, J. The defendant, Massachusetts Water Resources Authority (authority), is responsible for providing sewage collection services to communities in the metropolitan Boston area, including the cities of Quincy and Boston. [2] **[***3]** The city of Quincy commenced this action in the Superior Court seeking a declaration pursuant to G. L. c. 231A (1994 ed.), that the authority's annual sewer assessments for fiscal years 1985 through 1994, which **[***2]** were calculated based on the so-called population and population-equivalent methodology, were in violation of various provisions of St. 1984, c. 372, the authority's enabling legislation. The Boston Water and Sewer Commission intervened. The plaintiffs each moved for partial summary judgment limited to the issue of the authority's compliance with its enabling legislation. See Mass. R. Civ. P. 56 (a), (d), 365 Mass. 824 (1974). [3] A judge in the Superior Court ordered full summary judgment for the authority, see Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974), and a judgment entered dismissing the plaintiffs' complaints. The plaintiffs appealed, and we transferred the case to this court on our own motion. We agree with the judge's conclusion that the authority's annual sewer assessments were calculated in a manner consistent with its statutory authority, **[*465]** and, accordingly, that the case was an appropriate one for full summary judgment. We vacate the judgment of dismissal and direct the entry of a judgment which declares the rights of the parties.

The undisputed factual background of the case may be summarized as follows. The authority was created in 1984, and, effective July 1, 1985, succeeded the Metropolitan District Commission as the State agency responsible for the operation, regulation, financing, and improvement of the systems of water delivery and sewage collection, treatment and disposal for a number of communities in the metropolitan Boston area. The authority's sewerage services to the member **[***4]** communities, or "local bodies," are wholesale services, meaning that the authority collects, treats, and disposes of the wastewater from local sewers operated by the member communities.

HN1[] Section 10 (a) of St. 1984, c. 372, authorizes the authority to "establish and adjust" charges for sewerage services provided by the authority, sufficient to meet all of the costs the authority incurs for debt service, current operations and capital improvement projects. [4] The authority's rate setting powers are exercised independently by its board of directors and are not subject to supervision or regulation by any other agency of the Commonwealth. See St. 1984, c. 372, §

[2] The authority's enabling legislation refers to the municipalities and other political subdivisions of the Commonwealth which use the authority's sewerage and water delivery services as "local bodies." See St. 1984, c. 372, § 2 (h). Quincy and the commission are "local bodies" for purposes of the legislation.

[3] The complaint filed by the commission also alleges that the authority's assessments for water distribution have not complied with its enabling legislation. So far as the summary judgment record indicates, the authority's assessments for water delivery have been based on the metered volume of water supplied to a member community. The commission's motion for partial summary judgment makes no reference to the authority's water delivery charges, nor is that issue addressed in its brief to this court. We assume, as the judge appears to have done, that the commission has abandoned its challenge to the authority's water delivery charges.

[4] The authority receives some revenue from investment income, reserve funds, and State and Federal grants, but most of its revenue is derived from charges to the local bodies it serves.

10 (a), second par. Although the authority possesses broad rate setting power, the Legislature has directed that its charges be structured to advance or promote, certain policies, including water conservation and environmental protection. HN2[] Section 10 (a) of St. 1984, c. 372, directs that the charges levied by the authority,

> **[**147]** "shall give account to (i) actual costs to the Authority of providing services, (ii) reasonable provisions in the nature of incentives and disincentives to promote conservation of resources and protection **[***5]** of the environment **[*466]** and to induce the protection, maintenance and improvement of the sewer and waterworks systems and of sewer and water systems of local bodies, (iii) reasonable provisions reflecting the contribution made by local bodies through expenditures including, but not limited to, leak detection, system rehabilitation and other water management programs, sewerage inflow/infiltration reduction projects, separation of combined sewers and other projects which improve the overall efficiency of the Authority's and local bodies' service delivery, (iv) reasonable provisions to reflect respective local bodies' disproportionate historic investment in the sewer and waterworks systems and in the former metropolitan district commission sewer system and metropolitan district commission water system used in the services delivered by the Authority, (v) reasonable interest charges and penalties for delinquency in payment."

[*6]** Since its establishment, the authority has apportioned charges for sewerage services according to a methodology, originally adopted by the Metropolitan District Commission, known as the population and population-equivalent methodology. Under this methodology, the projected costs of operating the sewerage system are divided into two components, capital costs (consisting of debt service and long-term capital expenditures for upgrading facilities), and operation and maintenance costs. The operation and maintenance costs are apportioned among the user communities based on the "contributing population" of each community, meaning the number of persons who are connected to the local sewer system. The capital costs are apportioned based on each user community's census population, on the theory that the entire community benefits from improvements to the authority's system. Nonresidential users, such as industrial, commercial and institutional users, are factored in as "population equivalents" in their respective communities, based on the volume, capacity, and suspended solids of their wastewater streams.

[*467] The plaintiffs have invested substantial resources in improving their local sewer systems, **[***7]** including expenditures to reduce inflow and infiltration. [5] **[***8]** As the judge noted, it is conceded that the population and population-equivalent methodology employed by the authority during fiscal years 1985 through 1994 [6] to apportion charges did not "identify actual flows generated by each local body or provide incentives for local bodies to reduce their wastewater flows or to promote conservation. . . . The methodology did not give account to local bodies' differing rates of infiltration and inflow. . . . The [authority) also admitted that it never determined whether the plaintiffs' historic investments in their sewer systems were disproportionate to the investments of other local bodies."

1. HN3[] Under § 10 (a), the authority's charges are established and reviewable in accordance with the notice and hearing procedures established by G. L. c. 30A (1994 ed.). On the basis of this provision in § 10 (a), the judge and the parties concluded (correctly, in our view) that the authority's rate setting methodology should be reviewed as a regulation. See *Steinbergh v. Rent Control Bd. of [**148] Cambridge, 410 Mass. 160, [***9] 162, 571 N.E.2d 15 (1991)* (agencies' charges or assessments of general application may be reviewed as regulations under G. L. **[*468]** c. 30A). HN4[] "Regulations properly adopted by an

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[5] "Inflow" is extraneous water, including rainwater, that enters a sewer system from a public source, such as a manhole cover, or a private source, such as a roof drain or a sump pump. "Infiltration" is groundwater that leaks into a sewer system through defective pipes, pipe joints, and sewer connections. According to the authority, inflow and infiltration account for close to one-half of the wastewater stream which reaches the authority's waste treatment facilities.

[6] In 1993, the Legislature instructed the Advisory Board (board) of the authority to consider alternate methods of assessing sewer service charges. See St. 1993, c. 110, § 283. In June, 1994, a committee established by the board selected an alternative sewer rate methodology, which allocates operation and maintenance costs based on metered flow and apportions the authority's capital costs based, with respect to each local body, in part on metered flow, in part on contributing population, and in part on census population. The Legislature has instructed the authority to implement the new sewer charge assessment methodology for fiscal year 1986. See St. 1994, c. 60 § 220A.

administrative agency stand on the same footing as statutes and all rational presumptions are to be made in favor of their validity. Greenleaf Fin. Co. v. Small Loans Regulatory Bd., 377 Mass. 282, 293, 385 N.E.2d 1364 (1979). . . . Such regulations are not to be declared void unless their provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate, Massachusetts Nurses Ass'n v. Board of Registration in Nursing, 18 Mass. App. Ct. 380, 389 n. 19, 465 N.E.2d 1238 (1984)). . . ." Berrios v. Department of Pub. Welfare, 411 Mass. 587, 595-596, 583 N.E.2d 856 (1992). Nonetheless, the principle of deference is not one of abdication, and a regulation that is irreconcilable with an agency's enabling legislation cannot stand. See *Nuclear Metals, Inc.* v. *Low-Level Radioactive Waste Management Bd.*, *ante* 196, 211 (1995). [7]

[*10]** The plaintiffs contend that the authority's use of the population and population-equivalent methodology, which admittedly does not adjust assessments based on all of the factors listed in § 10 (a), is irreconcilable with the language of that section, which, by its use of the term "shall," is made mandatory rather than discretionary. In addition to § 10 (a), the plaintiffs rely on several other provisions of the enabling legislation to bolster their contention that the Legislature intended the authority to move immediately to a rate setting methodology which adjusts assessments to local communities based on the factors listed in § 10 (a). [8]

[*11]** **[*469]** HN6[↑]

The word "shall," of course, "is ordinarily interpreted as having a mandatory or imperative obligation." Hashimi v. Kalil, 388 Mass. 607, 609, 446 N.E.2d 1387 (1983). Here, however, the use of "shall" in § 10 (a), is tempered by the succeeding words, "give account to," rather than words such as "include" or "incorporate," which are unmistakable words of command. See Associated Indus. of Mass. v. Secretary of the Commonwealth, 413 Mass. 1, 7, 595 N.E.2d 282 (1992). Viewed in the context of the legislation as a whole, and § 10 in particular, which grants to the authority broad discretion in the establishment and adjustment of its rates, we think the term "shall give account to" requires the authority to consider, but not necessarily to include, the statutory factors in its assessment methodology. The language of § 8 (m), which requires that the charges of the authority "shall also reasonably provide" for abatement of inflow and infiltration, as well as leak detection and repair, similarly reflect a grant of discretion to the authority with respect to the means selected for achieving these ends.

The undisputed material in the record establishes that the authority **[***12]** has given adequate and careful consideration to inclusion of the § 10 (a) factors in its rate setting methodology. The report prepared in compliance with § 8 (e) evaluated alternative rate setting methodologies that might more closely **[**149]** approximate a community's actual use of the authority's sewer and wastewater treatment facilities. Like the population and population equivalent methodology, the proposed alternatives also would have failed to reflect and to distribute appropriately costs associated with unnecessary infiltration and inflow. The authority made the reasonable decision to **[*470]** defer any significant alteration in its method of setting rates until, with the installation of meters, it could shift to a rate setting methodology based on a relatively close approximation of a community's actual use of the system and, therefore, capable of offering appropriate incentives for local improvements in efficiency.

The authority's use of the population and population-

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[7] We have addressed the plaintiffs' arguments under the line of cases which holds that HN5[↑] a regulation adopted by an agency must be in conformity with the agency's governing legislation. See, e.g., *Nuclear Metals, Inc.* v. *Low-Level Radioactive Waste Management Bd.*, *ante* 196, 211 (1995), and cases cited. Thus, we need not consider the precise meaning of the word "illegal" as it is used in Borden, Inc. v. Commissioner of Pub. Health, 388 Mass. 707, 721-723, 448 N.E.2d 367, cert. denied sub nom. ***Formaldehyde Inst., Inc. v. Frechette, 464 U.S. 936, 78 L. Ed. 2d 312, 104 S. Ct. 345 (1983)***, a point in dispute between the parties.

[8] In addition to § 10 (a), the plaintiffs point to the following provisions of St. 1984, c. 372, § 8, as supporting their position.

Section 8 (m) provides, in pertinent part:

> "The procedures, regulations, charges and licensing, permitting and other programs of the Authority shall also reasonably provide for abatement, reduction and prevention of infiltration and inflow . . . . The procedures, regulations, charges, licensing, permitting and other programs of the Authority shall also reasonably provide for leak detection and repair, for programs for water conservation. . . ."

Section 8 (e) directs the authority to "promote water conservation and environmental quality through its schedule of charges," and directs it to prepare a "comprehensive study of environmental, social and economic impacts of its charges to serve as a basis for the implementation of charges fully consistent with the objectives of [the enabling legislation]."

equivalent methodology pending the shift to a system based on metered sewerage flow therefore was in compliance with its legislative mandate. See *Greenleaf Fin. Co. v. Small Loans Regulatory Bd., supra.* Because the authority **[***13]** is required to recoup most of its operating costs from charges to its member communities, any reduction in its charges to one community inevitably will result in an increase in charges to another. It was the authority's position, not contested on this record, that a temporary, interim alteration of the rate setting method would have unfairly burdened some communities. It was reasonable (and proper) for the authority to defer altering its rate setting methodology until it could implement a more equitable method which utilized data closely approximating actual system usage. [9]

2. The plaintiffs also contend that the judge abused his discretion by granting summary judgment in full to the authority on the plaintiffs' motions for partial **[***14]** summary judgment. The plaintiffs do not dispute that judgment could enter for the defendant on the issues raised in the plaintiffs' motions. See *Mass. R. Civ. P. 56 (c)* ("Summary judgment, when appropriate, may be rendered against the moving party"). They claim, however, that when their motions addressed only issues of liability, the judge could not enter full summary judgment, encompassing questions related to remedy, without providing them notice and an opportunity to be heard. In support of their position, they rely on *Gamache v. Mayor of N. Adams, 17 Mass. App. Ct. 291, 295, 458 N.E.2d 334 (1983)*, in which the **[*471]** Appeals Court stated that a judge has "the power, sua sponte, to enter full summary judgment [on a motion for partial summary judgment], provided the parties had sufficient notice of his intention to do so, opportunity to submit affidavits, and a right to be heard on the matter." Here, the plaintiffs contend, they were denied notice and the right to be heard before full judgment entered on their claims.

The judge resolved the question of liability in the authority's favor, and we have affirmed that decision. *HN7*[↑] When there is no liability, the question of remedies **[***15]** obviously becomes moot. In these circumstances, notice and the opportunity to submit affidavits would not avail the plaintiffs. In addition, the judge properly could conclude that judgment should enter with regard to any claims of future liability, because the evidence was uncontroverted that the authority is in the process of adopting a new rate setting method dictated by legislation which is very specific on this point. See St. 1994, c. 60, § 220A. Cf. *Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 419, 589 N.E.2d 1224 (1992)* (claim may become moot because of material changes in statute on which claim is based). It was appropriate to enter judgment on all claims in the complaint.

3. The judgment is vacated. A judgment is to enter declaring that the authority's method of setting rates and assessing charges between fiscal years 1985 and 1994, was in conformity with St. 1984, c. 372.

So ordered.

End of Document

[9] In view of our conclusion that the authority's rate setting methodology was in compliance with its enabling legislation, we need not consider whether, as Quincy contends, the judge erred by placing a burden on the plaintiffs to articulate an alternate rate setting methodology.

Exhibit B

Telford v State

Telford v. State

Court of Appeals of Michigan

February 26, 2019, Decided

No. 340929

Reporter
2019 Mich. App. LEXIS 345 *; 2019 WL 942935

JOHN TELFORD, HELEN MOORE, ALIYA MOORE, YOLANDA PEOPLES, BOBBI DICKERSON, DENISE TANKS, JUVETTE HAWKINS-WILLIAMS, ELENA HERRADA, WANDA REDMOND, IDA SHORT, and TWANNA SIMPSON, Plaintiffs-Appellees, v STATE OF MICHIGAN, GOVERNOR, STATE TREASURER, DEPARTMENT OF TREASURY, and DEPARTMENT OF TECHNOLOGY, MANAGEMENT, AND BUDGET, Defendants-Appellants.

Prior History: **[*1]** Court of Claims. LC No. 17-000239-MM.

Core Terms

circuit court, jury trial

Case Summary

Overview
HOLDINGS: [1]-In a case in which plaintiffs alleged defendants had engaged in a longstanding practice of mandating certain educational services without providing funding for those services, in violation of the Headlee Amendment, the appellate court concluded the court of claims properly relied on case law binding upon it; [2]-Nevertheless, the court of claims incorrectly determined that it lacked subject matter jurisdiction over plaintiffs' Headlee Amendment claims on that basis; [3]-The Headlee Amendment precluded the argument that plaintiffs were entitled to a jury trial because its initial grant of jurisdiction was only to the appellate court; [4]-The appellate court was fundamentally not a trial court, and it was fundamentally ill-equipped to handle trials of any kind, let alone jury trials; a fact that would have been obvious when the Headlee Amendment was adopted.

Outcome
Reversed and remanded.

LexisNexis® Headnotes

Governments > Courts > Judicial Precedent

HN1[] **Judicial Precedent**

The rule of stare decisis, under which published opinions of the Michigan Court of Appeals have precedential effect, *MCR 7.215(C)(2)*, may be inapplicable when the Michigan Legislature significantly alters any underlying statutory law.

Governments > Legislation > Interpretation

HN2[] **Interpretation**

All other things being equal, a more specific statutory provision controls over a more general statutory provision; however, again all other things being equal, a more recent statutory provision controls over an older statutory provision.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Interpretation

HN3[] **Expiration, Repeal & Suspension**

Repeals by implication have long been disfavored and will only be found if no other intention by the legislature is possible.

Governments > Legislation > Interpretation

HN4[] Interpretation

The fundamental goal of statutory interpretation is to discover and implement the intent of the legislature, and to that end, the rules of construction are merely helpful guides.

Governments > Legislation > Interpretation

HN5[] Interpretation

Legislative analyses are of minor value, but the Michigan Supreme Court has recognized that they may nevertheless be helpful in resolving a close question regarding an ambiguous statute.

Governments > Courts > Judicial Precedent

HN6[] Judicial Precedent

Where the pertinent rule of law has been overturned by the legislature, the court is bound to follow the new rule.

Constitutional Law > Bill of Rights > Fundamental Rights > Trial by Jury in Civil Actions

HN7[] Trial by Jury in Civil Actions

No right to a jury trial for Headlee Amendment claims is specified in any statute or provision of the Michigan Constitution. A right to a jury trial may be found for claims similar in character to claims for which a right to a jury trial existed prior to the adoption of the Michigan Constitution.

Judges: Before: CAMERON, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

Opinion by: RONAYNE KRAUSE

Opinion

RONAYNE KRAUSE, J.

Plaintiffs are a variety of taxpayers, residents, and parents of children in the City of Detroit, who generally contend that defendants have engaged in a longstanding practice of mandating certain educational services without providing funding for those services, in violation of the Headlee Amendment, Const 1963, Art 9, §§ 25-34. The dispute in this appeal concerns the division of jurisdiction between the Court of Claims and the Circuit Courts; specifically, which court has subject-matter jurisdiction over Headlee Amendment claims. The Court of Claims concluded that it lacked subject-matter jurisdiction, and it ordered the matter transferred to the Wayne Circuit Court. Although the Court of Claims properly relied on case law binding upon it, we reverse and remand.

This Court has previously and unambiguously held that the Court of Claims lacks subject matter jurisdiction over Headlee Amendment claims. City of Riverview v State of Michigan, 292 Mich App 516; 808 NW2d 532 (2011). *Riverview* relied on MCL 600.308a(1), which provided, and continues to provide, that a Headlee Amendment action "may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action." **[*2]** After *Riverview* was decided, the Legislature amended the Court of Claims Act, pursuant to 2013 PA 164. In relevant part, 2013 PA 164 amended MCL 600.6419(1)(a), which previously provided:

> The [Court of Claims] has power and jurisdiction:
>
> (a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.

MCL 600.6419(1)(a) currently provides:

> Except as otherwise provided in this section, the [Court of Claims] has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

There is no serious dispute that **HN1[]** the rule of stare decisis, under which published opinions of this Court have precedential effect, MCR 7.215(C)(2), may be inapplicable when the Legislature significantly alters any underlying statutory law. See People v Feezel, 486

Mich 184, 212-213; 783 NW2d 67 (2010); Lamp v Reynolds, 249 Mich App 591, 604; 645 NW2d 311 (2002).

This Court has previously held that the amended MCL 600.6419(1)(a) prevails over **[*3]** MCL 600.4401(1). O'Connell v Director of Elections, 316 Mich App 91, 108; 891 NW2d 240 (2016). This does not entirely resolve the issue before us. MCL 600.4401(1) addresses where mandamus actions may be filed, which is not a matter addressed by Michigan's Constitution. See Const 1963, Art 11, § 5. In contrast, MCL 600.308a(1) expanded on jurisdiction expressly conferred by our Constitution. See Const 1963, Art 9, § 32. Furthermore, this Court in *Riverview* held that despite the "broad statutory grant of jurisdiction to the Court of Claims" found in the then-existing version of MCL 600.6419(1)(a), MCL 600.308a(1) controlled because the latter statute was more specific and operated as an exclusion of jurisdiction to other tribunals. Riverview, 292 Mich App at 520, 524-525. In short, there are enough differences between MCL 600.308a(1) and MCL 600.4401(1) that we decline to extend the holding in O'Connell by rote.

Nevertheless, we find an ambiguity in the pertinent statutes because MCL 600.308a(1) and MCL 600.6419(1)(a) irreconcilably conflict. People v Hall, 499 Mich 446, 454; 884 NW2d 561 (2016). We additionally note that there is also an irreconcilable conflict between two rules of statutory construction. ***HN2***[↑] All other things being equal, a more specific statutory provision controls over a more general statutory provision; however, again all other things being equal, a more recent statutory provision controls over an older statutory provision. See Huron Twp v City Disposal Sys, Inc, 448 Mich 362, 366; 531 NW2d 153 (1995); Malcolm v City of East Detroit, 437 Mich 132, 139; 468 NW2d 479 (1991). It appears to us that MCL 600.308a(1) is more specific, whereas MCL 600.6419(1)(a) is more recent. Finally, ***HN3***[↑] repeals by **[*4]** implication have long been disfavored and will only be found if no other intention by the Legislature is possible. Int'l Business Machines Corp v Dep't of Treasury, 496 Mich 642, 651; 852 NW2d 865 (2014). However, ***HN4***[↑] the fundamental goal of statutory interpretation is to discover and implement the intent of the Legislature, and to that end, the "rules of construction" are merely helpful guides. Browder v Int'l Fidelity Ins Co, 413 Mich 603, 611; 321 NW2d 668 (1982).

Therefore, we ultimately arrive at the same conclusion as the Court did in O'Connell. We are persuaded that the Legislature intended to repeal MCL 600.308a(1) by implication when it enacted 2013 PA 164, even though MCL 600.308a(1) is clearly more specific, and nowhere in 2013 PA 164 is the Headlee Amendment mentioned. ***HN5***[↑] Legislative analyses are of minor value, but our Supreme Court has recognized that they may nevertheless be helpful in resolving a close question regarding an ambiguous statute. In re Certified Question from the US Court of Appeals for the Sixth Circuit, 468 Mich. 109, 115 n 5; 659 N.W.2d 597 (2003). We have reviewed the legislative analyses of 2013 PA 164, and we also find no mention of the Headlee Amendment. However, the legislative analyses *do* show a clear intention to extensively rewrite the Court of Claims's jurisdiction in the process of removing it from the Ingham County Circuit Court. In other words, there is a strong inference that expanding the scope of the Court of Claims's jurisdiction was intentional and knowing. The phrase "notwithstanding **[*5]** another law that confers jurisdiction . . . " only occurs once, and, significantly, is new language. At the same time, the Legislature added two provisions making express exceptions to the new grant of jurisdiction. See MCL 600.6419(5) and (6).

We conclude that, notwithstanding the specificity of MCL 600.308a(1), our reluctance to find a repeal by implication, and the lack of any mention of the Headlee Amendment in 2013 PA 164 or its legislative analyses, the Legislature did intend to repeal MCL 600.308a(1). ***HN6***[↑] The pertinent rule of law in Riverview has therefore been overturned by the Legislature, and we are bound to follow the new rule. See US v Lee, 106 U.S. (16 Otto) 196, 220; 1 S Ct 240; 27 L Ed 171 (1882) (we "are creatures of the law and are bound to obey it"); Gleason v Kincaid, 323 Mich App 308, 317; 917 NW2d 685 (2018) ("[c]ourts are bound to follow statutes and must apply them as written"). The Court of Claims properly found itself bound by *Riverview*, but it nevertheless incorrectly determined that it lacked subject matter jurisdiction over plaintiffs' Headlee Amendment claims on that basis.

Finally, plaintiffs argue that the Court of Claims lacks subject matter jurisdiction because they are entitled to a trial by a jury. We disagree. ***HN7***[↑] No right to a jury trial for Headlee Amendment claims is specified in any statute or provision of the Michigan Constitution. See Madugula v Taub, 496 Mich 685, 696; 853 NW2d 75 (2014). A right to a jury trial may be found for claims "similar **[*6]** in character to" claims for which a right to a jury trial existed prior to the adoption of the Michigan Constitution. Id. at 704-705 (citation omitted). Nevertheless, we conclude that the Headlee Amendment itself precludes plaintiffs' argument

because its initial grant of jurisdiction was only to this Court. *Const 1963, art 9, § 32*. *Riverview* held that the Legislature was not precluded from treating the constitutional grant of jurisdiction as nonexclusive, which remains a rule of law established by a published opinion of this Court that we are bound to follow. *MCR 7.215(J)(1)*. However, this Court is fundamentally not a trial court, and it is fundamentally ill-equipped to handle trials of any kind, let alone jury trials; a fact that would have been obvious when the *Headlee Amendment* was adopted. The grant of jurisdiction to this Court shows that no right to a jury trial was anticipated.

Reversed and remanded. We do not retain jurisdiction. We direct that the parties shall bear their own costs on appeal. *MCR 7.219(A)*.

/s/ Amy Ronayne Krause

/s/ Thomas C. Cameron

/s/ Jane M. Beckering

End of Document

Exhibit C

Bolt, see Laitner, Law firm gets rich off sewer lawsuits against cities and townships, Detroit Free Press (October 8, 2018)

Law firm gets rich off sewer lawsuits against cities and townships

Bill Laitner, Detroit Free Press Published 6:00 a.m. ET Oct. 8, 2018 | **Updated 10:00 a.m. ET Oct. 8, 2018**

(Photo: Bill Laitner, Detroit Free Press)

A single law firm based in Royal Oak has won tens of millions of dollars in lawsuits against a growing list of metro Detroit communities — including Detroit, Royal Oak, Ferndale, Birmingham, and the townships of Bloomfield, Waterford and Brighton.

More cases are pending against St. Clair Shores, Taylor, and most recently Harper Woods. The firm did lose a notable case against Westland and appealed another loss to Dearborn.

Mostly, though, these savvy lawyers win. Their claim? From town to township, usually the same. Namely, that some communities improperly charged residents for storm water. That's the rainfall that spills off roofs, runs off lawns and pours down driveways into storm sewers, before it flows off to treatment plants.

Even without any lawsuits, it's a flow whose cost of treatment is shared by most every user of water. Yet, when the attorneys of Kickham Hanley win, there's a different torrent. It's cash, flowing from city and township coffers into the firm's law offices on Woodward Avenue.

Last year, when the lawyers settled with Birmingham, the judgment was for $2.85 million to cover years of storm-water billings, spread over the city's thousands of homes and businesses. Many homes and businesses received modest refunds, averaging $230 apiece. But a judge said the firm's attorneys "were hereby awarded" a total of $999,974 — roughly one nice lunch shy of a million bucks.

Also last year, a judgment in Ferndale came to $4.25 million; one in Royal Oak, $2 million; and in Waterford, $1.4 million. This year, one in Brighton Township was $1.5 million; and in Detroit, a whopping $27.5 million. On Sept. 17, Bloomfield Township was ordered to pay $3.7 million. St. Clair Shores has been sued. Harper Woods lost its case and can expect an adverse multimillion-dollar judgment at any time. More than a dozen communities have been targets.

The upshot? Most communities are forced to pay up, with the law firm typically taking about 33 percent.

Jim Nash, Oakland County Water Resources Commissioner is photographed at the George W. Kuhn Retention Treatment Basin in Madison Heights, Wednesday, August 20, 2017. The $140 million facility holds and partially treats stormwater-sewage water mix and prevents it from backing up into people's basements. *(Photo: Kathleen Galligan, Detroit Free Press)*

Kickham Hanley has won so much money, from so many communities, that two bills are pending in Lansing that aim to stop the firm's judgment-winning juggernaut. The firm's lawsuits "are siphoning funds earmarked for badly needed infrastructure repair and maintenance" of local sewer systems, said Oakland County Water Resources Commissioner Jim Nash.

Yet, the law firm has done nothing devious or improper, according to court rulings. Instead, it merely pointed out, with the concurrence of judges, that many communities have violated Michigan's Headlee Amendment. The local governments imposed storm-water charges that were more like a tax than a fee — a violation of the late Richard Headlee's famous limit on taxation, as enshrined in the Michigan Constitution. Now, for better or worse, each community that has lost in court must revise how it bills customers.

Typically, after the law firm takes its share of a settlement, the rest gets divvied up to a given community's water and sewer customers. But homeowners don't much of a payoff, said Waterford Township Supervisor Gary Wall.

Last year in Waterford, "I think the average person got, like, $22 back for a four-year period -- about $5.50 a year," Wall said.

"When you think about it, that money has to come from the same people getting the refunds. Really, it ends up the residents just paying themselves, besides of course paying the lawyers," he said.

And one more person.

Paying the puppet

"The puppet usually gets $10,000," Wall said, referring derisively to what state law calls "the Plaintiff certified as Class Representative." That's usually one person who happens to own property in the community, and who lets the lawyers slap his or her name on top of the lawsuits, functioning on paper as the chief complainer about storm-water rates. The "puppet" stands in for all of the "class," which in these lawsuits generally means everybody else in the community who pays storm water charges.

Once a community settles and cuts a hefty check to Kickham Hanley, it's still not over, said Birmingham City Manager Joe Valentine. Each community must invest considerably more to devise an all-new way of charging for storm water, Valentine said.

"The billing methodologies in all these towns were put in place decades ago. The way we'd been doing it was in a lot of cities. We would charge a portion of your water usage to apply as your storm water charge," he said.

Now, based on Kickham Hanley's victories, that old billing method doesn't pass muster with the Headlee Amendment, especially not when the lawyers add arguments from some key Headlee-spawned legal cases, including one that strikes mild terror into many a Michigan mayor, called Bolt versus Lansing.

Who hasn't heard of taxation without representation? That's what these storm water charges constitute, the lawyers argue. And judge after judge agrees, said Greg Hanley, a principal with the law firm.

"We're having a pretty good run of success — I'm fully aware that we're not popular with a lot of people," he said.

Many of their critics don't understand the reasons for high-dollar legal awards, which compensate lawyers for the high risks of taking on such cases, he said. Lawyers routinely are granted fees of 33 to 40 percent of a settlement if they've handled the case for free. The storm-water lawsuits are in the category called class actions, in which lawyers accept the risk of earning literally nothing if they lose, even after expending years of effort and sometimes steep costs for research.

"It's been a unique practice that results from people coming to us and complaining about their utility bills. I don't know of any other law firm doing this" in Michigan, Hanley said.

Hidden taxes

The common thread in most of the cases is the argument that some communities used their water and sewer rates to pay for public expenses that should be covered by taxes.

A key but subtle example? In Royal Oak and several other cities of Oakland County, the lawyers showed that the long-term bond payments for a giant, 2.2-mile underground sewer called the George Kuhn Retention Treatment Facility had been buried — so to speak — in the cities' water and sewer charges.

READ MORE:

Detroit water chief: Owners of green lots shouldn't pay hefty drainage fee (https://www.freep.com/story/news/local/michigan/detroit/2017/08/13/detroit-wgreen-lots-drainage-fee/558156001/)

Counties spar over Lake St. Clair water woes (https://www.freep.com/story/news/2017/10/04/lake-st-clair-water-quality-macomb-oakland/603311001/)

As Hanley put it, when it comes to big infrastructure costs, "Our contention is, it's inappropriate to charge that in your water and sewer rates. Headlee says, either pay for it out of current funds or go to the people and make your case" for higher taxes; "tell them, 'We need a new fire station' or whatever.

"And Bolt (versus Lansing) says, if this project benefits the public as a whole, not the individual utility rate payers, then it can't come out of the utility rates."

As for basing storm-water charges on how much water a customer uses, "What if you and I are neighbors and you live alone but I have four daughters, which I do," Hanley said.

"My house is using a lot more water, but our lawn and our driveway and roof are not necessarily contributing any more storm water to the system," he said. Instead, the storm-water volume depends on how much of a given property doesn't absorb rainfall, what's called the "impervious surface area."

Thus, owners of a tiny house and huge lawn shouldn't pay as much for storm water as folks with the opposite — a large house and tiny yard. The idea is to tailor the fee to exactly how much storm water each property sloshes into the street's sewer grates.

As costly as these lawsuits have been to community coffers, in virtually every case the local government was able to pay off the settlement from its general fund -- no borrowing necessary, Hanley said.

And Kickham Hanley's legal victories have been the catalyst for getting communities to shift their billing practices. In the firm's case against Detroit, it was businesses — not residents — who sued to stop tens of millions of dollars in unfair "drainage charges," according to legal documents. The lawsuit not only won, it drew praise from the court that the law firm had exposed unfair billing practices and "provided a substantial benefit to society," according to the Final Judgement and Order issued in February by Wayne County Circuit Judge John A. Murphy.

Still, it's an expensive way to right a wrong, said John LaMacchia of the Michigan Municipal League, a major association of city and village officials. Some of the cases amount to costly nit-picking, said LaMacchia, the group's assistant director of state and federal affairs.

Fire hydrant hassle

One nit picker was the recent judgment against Bloomfield Township, LaMacchia said. It requires the township from now on to "explicitly document payment of the cost of water that passes through fire hoses," and to show that its cost is covered by the township's general fund, not by residents' water and sewer charges, according to a judge's order.

Not so nit picky, however, was the rest of the judge's order — requiring Bloomfield Township to pay a $3.7-million settlement, of which the law firm can be expected to receive about one-third, after about two-thirds is distributed to the community's water and sewer customers.

Such lawsuits "are taking advantage of a loophole" that a new state law would close if Lansing's lawmakers support it this fall, after more than a year of dickering, LaMacchia said. Unfortunately, too many lawmakers have blocked passage because they think the proposed law "would give communities more taxing power — that's not true," he said.

Instead, the state House and Senate proposals would create a model that any community could copy for revising its storm water and other utility charges, making them lawsuit-proof, said state Sen. Marty Knollenberg, R-Troy.

Knollenberg, who sponsored the Senate version, Senate Bill 756, said the new law "would create one statewide standard for everyone to follow."

The sponsor on the House side, state Rep. Mike McCready, R-Birmingham, said his version is House Bill 4100. McCready, the former mayor of Bloomfield Hills, sounded less than generous — but certainly amusing — in how he described the situation, making a pun of the law firm's name:

"I say kick 'em, hand 'em and steal have been at this for far too long."

Contact Bill Laitner: blaitner@freepress.com

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STATE OF MICHIGAN

COURT OF CLAIMS

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, GREAT LAKES WATER AUTHORITY, CITY OF DETROIT and CITY OF LIVONIA,

Plaintiffs,

v

Case No. 18-000259-MZ

Hon. Christopher M. Murray

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.
_____/

ORDER GRANTING DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S FEBRUARY 1, 2019 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8).

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan.

The Court, having reviewed defendant's February 1, 2019 motion for summary disposition, and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED that defendant's February 1, 2019 motion for summary disposition is GRANTED, and Counts I-V of plaintiffs' complaint are DISMISSED with prejudice.

IT IS SO ORDERED.

This is a not a final order that closes this case.

Date: July 26, 2019

Christopher M. Murray
Judge, Court of Claims

STATE OF MICHIGAN

COURT OF CLAIMS

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, GREAT LAKES WATER AUTHORITY, CITY OF DETROIT, and CITY OF LIVONIA,

Plaintiffs,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.
_____/

OPINION REGARDING DEFENDANT'S FEBRUARY 1, 2019 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8).

Case No. 18-000259-MZ

Hon. Christopher M. Murray

Pending before the Court is defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). For the reasons that follow, the motion will be GRANTED.

I. BACKGROUND

Pursuant to the Michigan Safe Drinking Water Act (MSDWA), defendant Michigan Department of Environmental Quality (MDEQ)[1] has the authority to promulgate and enforce rules to carry out the act, "pursuant to the administrative procedures act of 1969, 1969 PA 306[.]" MCL 325.1005(1). The case at bar involves MDEQ's promulgation of revised lead and copper rules, pursuant to MDEQ's authority to promulgate rules pertaining to "State drinking

[1] Effective April 22, 2019, the Department of Environmental Quality was renamed the "Department of Environment, Great Lakes, and Energy." Executive Order No. 2019-06. This opinion will refer to the Department as "MDEQ" because the Department was so designated at all times pertinent to this case.

water standards and associated monitoring requirements[.]" MCL 325.1005(1)(b). These State drinking water standards are intended to work in tandem with pertinent federal law, set forth at 42 USC 300f *et seq.* Federal law sets "national primary drinking water regulations," and the states are permitted to adopt their own standards that are "no less stringent" than the national standards. 42 USC 300g-2(a)(1). Federal law sets forth a "maximum contaminant level" for drinking water regulations and, in certain instances, such as situations pertaining to lead levels in water, the federal standards set forth a "treatment technique in lieu of establishing a maximum contaminant level[.]" 42 USC 300g-1; 40 CFR 141.80. The current federal lead action level is triggered "if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period . . . is greater than .015 ml/L" (also referred to as 15 parts per billion). 40 CFR 141.80(c)(1).

Pursuant to its rule-making authority, MDEQ submitted a Request for Rulemaking to the Office of Regulatory Reform in March 2017.[2] The request noted that the proposed rules were prompted by "immense public pressure to update the rules to protect public health" in the wake of what occurred with the Flint water system. Between July 2017 and November 2017, MDEQ held five "stakeholder" meetings with entities—including plaintiffs—that would be affected by the proposed rule changes. After receiving comments and suggestions, MDEQ produced a 13-page Regulatory Impact Statement and Cost-Benefit Analysis (RIS). The RIS proposed making

[2] Many of the documents outlining the rule-making process have been attached to the parties' briefing. These documents were not attached to plaintiffs' complaint, however. Because the Court considers these documents and because the parties' briefing repeatedly cites the same, the Court will consider them and will evaluate defendant's motion pursuant to MCR 2.116(C)(10), as well as pursuant to (C)(8), where appropriate and noted.

Michigan's lead and copper rule more stringent than the current federal standard, including a lowering of the lead action level, and the removal of lead service lines.

The rulemaking process continued in February and March 2018 with notices and a public hearing. In response to comments received at the March 1, 2018 public hearing, MDEQ made additional changes to the rules and submitted them, along with public comments, to the Joint Committee on Administrative Rules (JCAR). Based on requests for changes made by JCAR, MDEQ re-submitted the rules to JCAR prior to their formal adoption. MDEQ filed the rules with the Office of the Great Seal in June 2018, and the rules took immediate effect.

The rules promulgated during this process are what plaintiffs' complaint describes as some of the "toughest" lead rules in the nation and are set forth, in pertinent part, in Mich Admin Code, R 325.10604f(6), 325.10401a, 325.11604(c), and 325.10410(7). Plaintiffs' complaint notes that Rule 325.10604f(6) requires a water supply to replace every lead service line in a water system, including any portion of a service line that is privately owned,[3] at the supply's expense. The rules require a materials inventory at certain intervals to assess the type of piping at issue. The rules also require that service lines "shall be replaced at a rate averaging 5% per year, not to exceed 20 years total for replacement of all service lines under this subrule, unless an alternate schedule in an asset management plan is approved by" MDEQ. Mich Admin Code, R

[3] According to the pleadings and documents attached to plaintiffs' complaint as Exhibit B, some of the piping sought to be replaced belongs to private property owners (customers of the water system). A diagram purports to show a typical water distribution system, which includes water mains that disburse water into areas served by the water system. Water enters individual properties through service lines; these service lines are sometimes owned in part by the water system and in part by the property owner. In a scenario of split ownership, the water system owns the service line up to a point known as a "curb stop," and the remainder of the service line is owned by the property owner.

325.10604f(6)(b). See also Rule 325.11604(c). And if a water supply "controls the entire service line, the supply shall replace the entire service line at the water supply's expense." Rule 325.10604f(6)(c).

In addition to imposing these service-line replacement parameters, Table 1 of Rule 325.10401a lowers the federal lead action level from 15 parts per billion (ppb) to 12 ppb as of January 1, 2025. As noted above, the action level refers to the level of a contaminant—in this case, lead—that must be found in a water supply in order to trigger the implementation of remedial requirements and public notification.

In December 2018, plaintiffs filed a complaint alleging, among other matters, that the new rules fail to take into consideration a number of public health issues and that they impose high and allegedly unnecessary costs on a water supply. The complaint cites what plaintiffs have identified as several "key deficiencies," including that the rules: (1) mandate service line replacement without a meaningful study of affordability and funding; (2) fail to consider the legal implications of providing free services—replacement of service lines—to private property owners; (3) require a materials inventory before replacing service lines, meaning that a water supply will need to excavate and access service lines on at least two occasions, which will lead to increased costs; and (4) lower the lead action level without reasoned explanation or justification.

The complaint alleges five counts against MDEQ and seeks a declaratory judgment that the rules are, for one or multiple reasons, invalid. In Count I plaintiffs allege that MDEQ violated the APA in its promulgation of the rules, while in Count II plaintiffs allege that the rules are substantively invalid because they: (1) are arbitrary and capricious; and (2) are beyond the scope of the MSDWA. In Count III, plaintiff Wayne County Water Resources Commissioner

alleges that the rules violate Const 1963, art 9, § 18 by extending the credit of a local government. Along a somewhat similar vein, Count IV—brought by plaintiff City of Livonia and plaintiff City of Detroit—alleges that the replacement of private service lines violates Const 1963, art 7, § 26 by giving away a public service for free. Finally, Count V contains an allegation that, by requiring water supplies to pay for service line replacement on private property, MDEQ has required water supplies to provide a free service in violation of the Revenue Bond Act, MCL 141.101 *et seq.* In addition, plaintiffs contend that the rules violate the Revenue Bond Act by regulating the rates charged to plaintiffs' customers.

II. ANALYSIS

The validity of the rules are now before the Court on summary disposition.[4] "To be enforceable, administrative rules must be constitutionally valid, procedurally valid, and substantively valid." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 129; 807 NW2d 866 (2011). Plaintiffs raise challenges to all three components of enforceability, i.e., procedural invalidity, substantive invalidity, and constitutional invalidity. As it concerns their constitutional challenges, the Court must remain mindful that administrative rules, like legislative enactments, are presumed to be constitutional. *Id.* at 129 n 8.

[4] MDEQ moved pursuant to MCR 2.116(C)(8), which tests the validity of the allegations in the complaint, and nothing more. However, as mentioned in footnote 2, the complaint had numerous documents attached to it, including the RIS and certain emails from MDEQ employees, and *both* parties attached numerous documents to their briefs. Thus, the motion will be treated as brought pursuant to MCR 2.116(C)(10), see *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008), because the Court considered the RIS, the MDEQ emails and several other noted documents in deciding this motion. Additionally, both parties addressed documents during oral argument, and the Court noted it may treat the motion as one also brought under (C)(10).

A. WHETHER THE RULES ARE PROCEDURALLY INVALID

Turning first to plaintiffs' allegations of procedural invalidity, caselaw has held that "[a]n agency's failure to follow the process outlined in the APA" with respect to rule promulgation "renders a rule invalid." *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015). See also *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239; 501 NW2d 88 (1993). Here, plaintiffs allege procedural deficiencies with respect to the Regulatory Impact Statement or RIS mandated by MCL 24.245(3), as well as with respect to MDEQ's engagement of the public during the promulgation process.

Turning first to the RIS, plaintiffs' complaint and briefing articulate a number of ways in which the RIS is allegedly inadequate. For example, they contend that the RIS is inadequate because it fails to provide an "estimate of the actual statewide compliance costs of the proposed rule on individuals" as is required by MCL 24.245(3)(*l*).[5] However, the RIS contains several pages pertaining to cost estimates and includes, as plaintiffs' briefing even admits, a cost estimate of the actual statewide costs of compliance. Contrary to plaintiffs' suggestions, the plain language of MCL 24.245(3)(*l*) does not demand an exacting factual justification for the estimate provided, and a court's review of a challenge to the facts underlying the implementation of a rule is not as broad as plaintiffs have asserted. See *Mich Ass'n of Home Builders v Dir of Dep't of Labor & Econ Growth*, 481 Mich 496, 500-501; 750 NW2d 593 (2008). And there is a reasoned justification for the number contained in the RIS—MDEQ looked to actual costs

[5] The APA was amended, effective January 1, 2019, by 2018 PA 602. The amendments did not effectuate any substantive changes pertinent to the challenges plaintiffs raise; however, the amendments re-numbered some of the subrules at issue. This opinion will address plaintiffs challenge while citing the current subrules to which the challenges pertain.

experienced by the Lansing Board of Water and Light when replacing all of the lead service lines it services, and then extrapolated those numbers to what MDEQ determined were the statewide needs. This is not by any means an arbitrary number, and the emails submitted by plaintiffs regarding the pre-administrative process number of $2.5 billion do not change that conclusion. The simple fact is the RIS contained the estimated actual cost of the requirements, explained why the cost was justified,[6] and any and all stakeholders or interested parties were given the opportunity to address those numbers. While plaintiffs object to the sufficiency of the estimate, the estimate is plainly included within the RIS, and the Court declines to conclude that the rules were procedurally invalid as a result.

Plaintiffs' arguments regarding the RIS lacking a justification as to why the proposed rules were necessary in proportion to the burden placed on individuals, see MCL 24.245(3)(m), as well as an estimate regarding the benefits of the rule, see MCL 24.245(3)(x), suffer from a similar flaw. That is, while plaintiffs fault the RIS for failing to address these matters, pages 5 and 11 of the RIS address these very subjects. Thus, each aspect of the RIS challenged by plaintiffs appears within the RIS. While plaintiffs disagree with many of the conclusions asserted by MDEQ in the RIS, plaintiffs have not identified any instances where MDEQ shirked its responsibility to divulge information or where MDEQ otherwise failed to follow appropriate procedures.

[6] Contrary to plaintiffs' argument, the MDEQ repeatedly acknowledges in the RIS the significant financial and logistics burden placed on water systems by these rules. But each time the MDEQ states that those burdens are outweighed by the state interest in safe drinking water.

At oral argument (but not in their response brief) plaintiffs stressed that *Michigan Charitable Gaming* controls on their APA argument, as that Court stated that there is no "temporal limit" on the ability to change a rule submitted to JCAR, "so long as those changes are consistent with impact statements that have already been submitted . . . ." *Michigan Charitable Gaming*, 310 Mich App at 602. That decision, however, does not support plaintiffs' argument. For one, the RIS addresses the final cost estimate of $499 million. Additionally, the Legislature amended the APA after *Michigan Charitable Gaming* to allow modifications to proposed rules without necessarily needing to alter an RIS. MCL 24.245c(4).

Finally, plaintiffs' criticism that the RIS does not contain an analysis of any conflicting laws is misplaced. Nothing within MCL 24.245(3)(a)-(dd) requires a discussion of conflicting state laws or constitutional provisions; instead, MCL 24.245(3)(a) requires an analysis of "parallel federal rules set by" certain federal or state agencies or associations, while MCL 24.245(3)(d) requires (if requested) information about other similar states. The legal arguments put forth by plaintiffs regarding purported conflicts with state statutes or constitutional provisions that are not parallel to what these rules address are simply not statutorily required to be addressed in the RIS.

Instead, the arguments raised by plaintiffs sound more in the nature of matters that could have—and in fact appear to have been—addressed during the public comment period. With respect to the public comment afforded by MDEQ during the promulgation process, plaintiffs' own briefing admits that MDEQ provided public comment and that plaintiffs "submitted a

detailed critique of the cost estimate" during the period for public comment.[7] Plaintiffs have not alleged that MDEQ dispensed with the requisite public comment; instead, they contend there was no meaningful public comment because their suggestions and protestations were ignored. Again, plaintiffs' assertions sound in the nature of disagreements with the decision reached by MDEQ, not that MDEQ failed to follow the requisite procedures. For that reason, they have failed to state a claim or establish a genuine issue of material fact that the rules are procedurally invalid.

B. WHETHER THE RULES ARE SUBSTANTIVELY INVALID

Plaintiffs next allege in Count II that the rules are substantively invalid. "To determine the substantive validity of an administrative rule, Michigan courts employ a three-part test: (1) whether the rule is within the subject matter of the enabling statute, (2) whether it complies with the legislative intent underlying the enabling statute, and (3) whether it is arbitrary or capricious." *Mich Farm Bureau*, 292 Mich App at 129. In determining whether a rule is within the subject-matter of a statute, courts adopt a broad view of the statute at issue. See *Dykstra v Dir, Dep't of Natural Resources*, 198 Mich App 482, 486; 499 NW2d 367 (1993) (discussing, in general terms, what the act at issue concerned). When undertaking this analysis, the Court must give "respectful consideration" to MDEQ's construction of a statute, the MSDWA, with which it has been charged with administering. *Mich Farm Bureau*, 292 Mich App at 129 (citation and quotation marks omitted). "Administrative rules are valid so long as they are not unreasonable; and, if doubt exists as to their invalidity, they must be upheld." *Id.* (citation and quotation marks omitted).

[7] Not only did the MDEQ hold required public hearings on the proposed rules, but before the official APA process took place MDEQ held "stakeholder" meetings in which plaintiffs participated.

Turning to the question of whether the rules are within the subject matter of the enabling statute, the MSDWA[8] authorizes MDEQ to promulgate rules necessary to carry out the objectives of the act. The pertinent question is whether the subject matter of the rules "is encompassed by, or falls within, any of" MDEQ's statutory duties under the MSDWA. See *Mich Farm Bureau*, 292 Mich App at 134. Furthermore, "[i]t is well established that an agency may exercise some discretion concerning the rules that it promulgates, as long as the ultimate rules are consistent with the legislative scheme." *Id.* at 135.

Here, the primary allegations are that MDEQ exceeded its authority under the MSDWA by promulgating rules that mandate the replacement of public and private service lines. However, the MSDWA applies to a "waterworks system" which includes "a system of pipes and structures through which water *is obtained and distributed*, including but not limited to . . . *pipelines and appurtenances* . . . actually used or intended for use for the purpose of furnishing water for drinking or household purposes." MCL 325.1002(x) (emphasis added). There are no statutory prohibitions restricting MDEQ from reaching mixed public and private service lines, eliminating any merit to plaintiffs' contention that there was no statutory authority for the rules to reach private service lines that may exist in some municipalities after the "curb stop." Indeed, the ability to regulate the waterworks system of a public water supply is expressly within the realm of authority granted to MDEQ so long as the system does not consist *solely* of customer site piping. See MCL 325.1003 (giving MDEQ authority over a "public water suppl[y]"); MCL 325.1002(p) defining a "public water supply" as a waterworks system that does not consist

[8] Plaintiffs are within the MSDWA's definition of "supplier of water" set forth in MCL 325.1002(t).

"*solely of customer site piping*"). In other words, so long as the system is not entirely privately owned, it is plainly within the ambit of MDEQ's regulatory authority. As a result, the challenged rules are not substantively invalid, as they are not outside the realm of MDEQ's statutory authority. See *Mich Farm Bureau*, 292 Mich App at 134-135.

Nor are the rules arbitrary or capricious. Caselaw has explained that the arbitrary and capricious analysis "equates with rational-basis analysis. If a rule is rationally related to the purpose of the statute, it is neither arbitrary nor capricious." *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 650 n 8; 873 NW2d 842 (2015) (citation and quotation marks omitted). "Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, and capricious means apt to change suddenly, freakish or whimsical." *Mich Farm Bureau*, 292 Mich App at 141 (citation and quotation marks omitted). "In general, an agency's rules will be found to be arbitrary only if the agency had no reasonable ground for the exercise of judgment." *Id.* at 141-142. And in undertaking this review, the Court must uphold the rule if "it is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Johnson*, 310 Mich App at 651 (citation and quotation marks omitted).

In light of these controlling standards, plaintiffs have failed to show that the rules were arrived at "without consideration" or reference to principles, or that they are otherwise "apt to change suddenly, freakish, or whimsical." See *id.* For instance, MDEQ's decision to prioritize the replacement of lead service lines over what plaintiffs describe as other health concerns or infrastructure issues does not demonstrate that the rules were arbitrary and capricious. A rule is not arbitrary and capricious simply "because it does not address every conceivable issue[.]" *Dykstra*, 198 Mich App at 493. Neither does MDEQ's decision to set a lead-action level lower

than the current federal standards make the rules arbitrary and capricious. See *Mich Farm Bureau*, 292 Mich App at 143. Furthermore, plaintiffs' contentions about the cost of replacing service lines and of performing the requisite materials inventory do not render the rules arbitrary and capricious. As articulated in *Mich Farm Bureau* "a rule is not arbitrary or capricious merely because it displeases the regulated parties. Nor is a rule arbitrary or capricious merely because it causes some inconvenience or imposes new or additional requirements." *Id.* at 145 (citations omitted). In short, plaintiffs have not presented a convincing argument as to why the rules were not rationally related to the MSDWA's purpose, articulated in MCL 325.1001a, of "assur[ing] the long-term health of [the State's] public water supplies and other vital natural resources." As a result, the rules are not invalid in their substance. See *Johnson*, 310 Mich App at 650 n 8.

Plaintiffs' remaining contentions as to why the rules are arbitrary and capricious involve allegations that the rules fail to take into account constitutional and statutory conflicts. Because plaintiffs have also raised these same issues as separate, substantive claims, the Court will address them below. And for the reasons set forth below, the conflicts identified by plaintiffs do not exist. As a result, the rules are not arbitrary and capricious for failing to take into account these non-conflicting authorities.

C. CONSTITUTIONAL CLAIMS

Plaintiffs' constitutional claims take aim at Rule 325.10604f, particularly subsection (6)(e), which states that a water supply "shall replace the entire lead service line," and shall do so "at the supply's expense," even if the supply does not own the entire line, i.e., does not own the portion of the line that goes from the curb stop to the customer's home or place of business. Plaintiffs argue that Rule 325.10604f(6)(e)'s requirement that the water supply pay for the entire cost of replacement, even if the pipe to be replaced is privately owned, violates this state's

Constitution. Plaintiffs point to Const 1963 art 9, § 18, which provides that "The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution." "The purpose of this provision is to make certain that the State, which itself cannot borrow, except as authorized, does not accumulate unauthorized debts by indorsing or guaranteeing the obligations of others." *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 119; 422 NW2d 186 (1988). Caselaw interpreting this provision has held that art 9, § 18 prohibits the State[9] from giving away something of value without consideration. *Alan v Wayne Co*, 388 Mich 210, 325; 200 NW2d 628 (1972).

However, the prohibition against the lending of credit in art 9, § 18 is subject to an exception when such lending is "authorized in this constitution." And pertinent to municipalities, Const 1963, art 7, § 26 creates an exception to the prohibition against the lending of credit where the lending is "provided by law, for any public purpose." See also *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 119 ("In order to conform to the requirements of the art 7, § 26 exception, the loan of a municipality's credit must be both: (1) authorized by law, and (2) for a public purpose.").

The first inquiry is whether there is a lending of credit, because if there is not, "then there is no need to consider art 7, § 26." *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 119-120. The Court concludes that there is no lending of credit and

[9]Although art 9, § 18 refers to the "credit of the *state*," caselaw has held that the prohibition on the lending of credit "applies to local governments as political subdivisions and instrumentalities of the state." *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 119.

that the municipalities have not been forced to give something away without consideration. As an initial matter, Rule 325.10604f(6)(e) permits a building owner to opt-out, so to speak, by refusing the replacement. If a homeowner exercises this option, "the supply shall not replace any portion of the service line, unless in conjunction with emergency repair." Moreover, even if a building owner consents to the replacement of the service lines, nothing prevents the water supply—as it freely acknowledges—from spreading out replacement costs and imposing the costs system-wide, on all users of the water supply.[10] In this scenario, the service lines are not given away for free. In addition, the replacement of lead service lines benefits the affected area and municipality by eliminating potential sources of lead contamination, system-wide. Thus, the municipality receives a benefit in return, and has not given something of value away in return for nothing in violation of the constitutional prohibition. See *Alan*, 388 Mich at 326-327 (explaining that courts will generally not inquire into whether a municipality "made a good bargain or a bad one" and will generally defer to the municipality's conclusion that value was received); *Ziegler v Witherspoon*, 331 Mich 337, 357; 49 NW2d 318 (1951) (concluding, under a substantively identical predecessor to art 9, § 18, that the receipt of a general benefit in exchange for a public expenditure did not amount to a lending of credit). Cf. *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 127 (concluding that a municipality "giving away something of value in the hope that general economic growth will result within the district" was not a "value for value" exchange as contemplated by *Alan*, 388 Mich at 326-327).

[10] It must also be noted—as the parties have freely admitted—that, in some or many circumstances, the water supply owns the entire service line leading up to a home or building. In these instances, there is no replacement of a private line; the water supply only replaces its *own* service lines. Plaintiffs, despite seeking to invalidate the rule in its entirety, have not articulated a separate constitutional challenge in this scenario.

Furthermore, even if there were a lending of credit, the Court would conclude that the exception articulated in art 7, § 26 would apply. MDEQ is authorized by law to promulgate rules, which have the force and effect of law. See *Bloomfield Twp v Kane*, 302 Mich App 170, 177; 839 NW2d 505 (2013). The rule at issue authorizes the expenditure in this case, and does so, according to the rules, for the purported purpose of removing lead service lines and promoting the public health. This fits within the exception articulated in art 7, § 26. See *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 119. Indeed, projects designed to promote the public health are generally considered to be projects which promote a public purpose, and the Court "decline[s] to second-guess the wisdom" of this public purpose determination. *Id.* at 129, 131.

D. REVENUE BOND ACT

Plaintiffs' final challenge to the rules invokes two sections of the Revenue Bond Act, MCL 141.101 *et seq.* First, plaintiffs note that public improvements, such as water supply systems, see MCL 141.103(b), are prohibited from giving away free services, see *NL Ventures VI Farmington, LLC v Livonia*, 314 Mich App 222, 232; 886 NW2d 772 (2015). In this regard, MCL 141.118(1) provides that, with the exception of hospitals and health care facilities, "free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality." Plaintiffs have summarily asserted that the replacement of the lines[11] is the provision of a "service," but they have not meaningfully analyzed the same. Furthermore, and significantly, plaintiffs' own allegations note that they

[11] Again, this argument only pertains to the service lines that are partially owned, after the curb stop, by homeowners and/or building owners.

intend to recover the costs of service-line replacement by imposing the costs on all water customers. When the costs of the replacement service lines are charged to customers, nothing is given away for free, thereby defeating plaintiffs' claim under MCL 141.118(1).

Second, plaintiffs' argument under MCL 141.129 fares no better. That section of the Revenue Bond Act provides that "*Rates charged for the services furnished by any public improvement* purchased, acquired, constructed, improved, enlarged, extended and/or repaired under the provisions of this act *shall not be subject to supervision or regulation by any state bureau, board, commission or other like instrumentality or agency thereof.*" MCL 141.129 (emphasis added). Plaintiffs contend that MDEQ has supervised or regulated rates by forcing them to spread out the costs of service-line replacements among all customers. Again, the Court disagrees, as nothing in the rules *require* plaintiffs to charge back its customers for the improvements; rather, the rules only require that the replacement costs be initially borne by the supply and not charged to the homeowner. Secondly, plaintiffs' view takes too broad of an approach to the term "rates" and conflates what is essentially a cost imposed via regulation with the rate charged by a water supply. Adopting plaintiffs' view could lead to the conclusion that any regulation which leads to increased costs on the part of water supplies runs afoul of MCL 141.129. For instance, any MDEQ regulations regarding testing requirements or contaminant action levels that lead to an increase in a water supply's costs could, under plaintiffs view, amount to supervision or regulation of the supply's rates. For that matter, statutes setting minimum-wage requirements or other employment standards inevitably affect the water supply's costs and could, under plaintiffs' view, amount to supervision or regulation of the supply's rates. The Court declines to adopt this view. Rather, the service-line replacements mandated by MDEQ have, at most, an indirect effect on the rates charged by plaintiffs. MDEQ has not

supervised or regulated the rates charged to customers; it has simply imposed, via regulations, new costs on the water supply. It is left to plaintiffs' authority and discretion, see MCL 141.121, to determine how to set rates in response to rising costs. That plaintiffs intend to exercise that discretion by recovering service-line replacement costs from their customers does not mean that MDEQ has supervised or regulated the rates plaintiffs charge for services.

III. CONCLUSION

For the foregoing reasons, and pursuant to MCR 2.116(C)(8) and (C)(10), the Court will enter an order contemporaneously with this opinion GRANTING defendant's motion for summary disposition.

Date: July 26, 2019

Christopher M. Murray
Chief Judge, Court of Claims