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Department of Environmental Protection

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SUPERIOR COURT OF NEW JERSEY  
MERCER COUNTY  
CHANCERY DIVISION  
DOCKET NO.

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|---|---|----------------------------|
| STATE OF NEW JERSEY, DEPARTMENT<br>OF ENVIRONMENTAL PROTECTION, | : | <b><u>Civil Action</u></b> |
|   | : |                            |
| Plaintiff,  | : |                            |
|   | : |                            |
| v.  | : | <b>VERIFIED COMPLAINT</b>  |
|   | : |                            |
| CITY OF TRENTON, and TRENTON<br>WATER WORKS,                    | : |                            |
|   | : |                            |
| Defendants.   | : |                            |

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PRELIMINARY STATEMENT

1. This is a civil action brought by the State of New Jersey, Department of Environmental Protection ("Department"), seeking a preliminary injunction to compel Defendants the City of Trenton and the Trenton Water Works ("TWW") to replace numerous lead service lines providing drinking water to the customers they service. The Complaint also requests an order requiring Defendants

to make needed improvements to their water system to protect the finished water reservoir from contamination prior to delivery, and to complete certain requirements related to system integrity, maintenance, and resiliency.

2. The replacement of lead service lines in particular is critical to ensuring the public has safe, clean drinking water, and to comply with the Safe Drinking Water Act ("SDWA"), N.J.S.A. 58:12A-1 to -39, and the Lead and Copper Rule ("LCR"), N.J.A.C. 7:10.<sup>1</sup> Exposure to lead in drinking water may cause health problems ranging from stomach distress to brain damage. Children are particularly vulnerable when exposed to lead.

3. The Department has tried diligently and repeatedly to convince Defendants to comply with their obligations to protect consumers from lead exposure and to make other required improvements within the drinking water system. Further, the Trenton City Council recently failed to approve critical and necessary funding for many of the improvements the law demands. The Department now seeks a preliminary injunction requiring Defendants to address lead service line replacement to protect consumers, and an order to remedy their failure to protect the health and safety of their customers.

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<sup>1</sup> The Department has incorporated the federal Safe Drinking Water Act's Lead & Copper Rule regulations at 40 C.F.R. §141.80 to 91 by reference in their entirety.

4. Specifically, this action seeks preliminary injunctive relief pursuant to R. 4:52-1, and the enforcement of two Administrative Consent Orders ("ACOs") entered into by Defendants, pursuant to R. 4:67-6. The ACOs authorize the Department to institute a civil action for appropriate relief in Superior Court in a summary manner pursuant to R. 4:67-6 and N.J.S.A. 58:11-71(a), 58:1A-16(c), and 58:12A-10(c). The Department further seeks all appropriate relief under the Water Supply and Wastewater Operators' Licensing Act ("Operators Act"), N.J.S.A. 58:11-64 to 73, the Water Supply Management Act ("WSMA"), N.J.S.A. 58:1A-1 to 26, the SDWA, and their respective regulations.

5. Defendants are subject to state and federal drinking water requirements as incorporated into the SDWA and its corresponding regulations, including the LCR. See N.J.S.A. 12A-1 to -39; N.J.A.C. 7:10-5.1 to 5.9.

6. After numerous findings of noncompliance by the Department, Defendants entered into the two ACOs to address three main compliance obligations under the SDWA: (a) replacing a total of 21% of its lead service lines; (b) remedying the threat of contamination of the open finished water reservoir; and (c) ensuring adequate staffing within the water system.

7. The July 26, 2018 ACO ("Lead & Copper ACO" or "L&C ACO"), required Defendants to replace 21% of the system's lead service

lines, including 7% by December 31, 2019, and a total of 14% of lead service lines by July 31, 2020.

8. The February 5, 2018 ACO ("Operations ACO"), required Defendants to cover their reservoir of "finished" water (potable drinking water) by July 31, 2023, extended from March 2013, to comply with their obligations under Federal law.

9. The Operations ACO also addressed other system-related issues, including various system resiliency projects and critical staffing deficiencies identified within the water system.

10. Despite efforts by the Department to assist Defendants with compliance, Defendants have consistently failed to complete key milestones, including, in particular, the repeated failure to replace a sufficient number of lead service lines.

11. Further, since at least September 2017, Defendants have been aware that their operations lacked trained professional staff in a number of key positions, including the lack of qualified licensed personnel in critical positions in operations management and the filtration plant. Only in the last several months have Defendants taken steps to address these issues.

12. Defendants have also proposed to construct a series of above-ground storage tanks as an alternative to installation of a reservoir cover, but have not obtained either formal DEP approval or adequate funding because of the Trenton City Council's failure to approve critical and necessary funding.

13. To obtain the necessary funding to fully address its lead service line and reservoir project obligations, TWW proposed comprehensive ordinances to the Trenton City Council to revise water rates for its customers and allow the City to bond for the \$108 million needed to fund capital improvements, including lead service line replacement and the reservoir project.

14. The ordinances expressly stated that they were intended to provide a means for the City to achieve compliance with its ACO obligations.

15. On April 2, 2020, the Trenton City Council approved a portion of the comprehensive ordinance, adopting a rate increase and approving \$7 million in funding for lead service line replacement. On May 7, 2020, the Trenton City Council approved an additional \$25 million for lead service line replacements.

16. Despite written support from the Department as well as from surrounding towns, also on May 7, 2020, the Council rejected the remaining request for more than \$83 million in bonds, which included \$50 million for the protection of the finished water in the system, and was also necessary to ensure other maintenance and operations obligations are satisfied.

17. As a result of the City Council's failure to approve the \$83 million funding ordinance, Defendants are without sufficient funding to fully meet their SDWA obligations.

## PARTIES

18. The Department is an administrative agency in the Executive Branch of the State government and maintains its principal offices at 401 East State Street, Trenton, New Jersey.

19. The City of Trenton is organized pursuant to the Optional Municipal Charter Law, N.J. S.A. 40:69A-1 to -17, under a mayor and seven-member city council. Trenton is the capital city of New Jersey and the county seat of Mercer County. Trenton's principal offices are at 319 East State Street, Trenton, New Jersey.

20. TWW is a self-financing department of the City of Trenton, operating under the Department of Water and Sewer. Its principal offices are at 333 Cortland Street, Trenton, New Jersey.

## FACTUAL ALLEGATIONS

21. Defendant City of Trenton owns and operates the TWW.

22. Defendants' water system provides water to more than 200,000 people in Trenton as well as portions of four surrounding towns - Ewing, Hamilton, Hopewell, and Lawrence. Certification of Jessica Sponaugle ("Sponaugle Cert."), ¶ 5.

23. The Delaware River is Defendants' only source of drinking water. The filtration plant at Route 29 and Calhoun St. was constructed in the 1950s and is currently Defendants' only treatment facility. Id. ¶ 6.

24. Defendants also maintain a finished-water reservoir of approximately 7 acres containing approximately 78 million gallons

of useable treated water. The reservoir stores treated water processed by TWW, and provides reserve and emergency supplies to Trenton and neighboring towns when necessary. Ibid.

25. The average water demand for the system is approximately 29.5 million gallons per day ("mgd"). Id. ¶ 7.

SDWA, LCR, and L&C ACO Non-Compliance

26. Lead occurs in drinking water primarily as a result of corrosion of plumbing materials in water distribution systems. See 56 Fed. Reg. 26,463. Exposure to lead in drinking water may cause health problems ranging from stomach distress to brain damage. Ibid. There is no safe level for lead in drinking water. See <https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water> (last visited June 11, 2020). Children are particularly vulnerable to lead contamination. Id. The LCR requires large water systems to implement corrosion control techniques to minimize the potential for lead to enter drinking water. See 40 C.F.R. §141.80(b)(incorporated by reference by N.J.A.C. 7:10-5.1 to 5.2(a)(9)).

27. To maintain the integrity of their system operations and to provide the public with safe drinking water, Defendants are subject to state and federal drinking water requirements, including the SDWA's LCR. See N.J.S.A. 58:12A-1 to -39; see also N.J.A.C. 7:10-5.1. The LCR requires monitoring of lead and copper

levels in drinking water, and it also requires a water system to take certain additional actions whenever more than 10% of samples taken during a monitoring period show lead concentrations above a certain concentration. These include replacement of lead service lines. See 40 C.F.R. §141.84.

28. Under the LCR, a water system experiences "Action Level Exceedances" ("ALE") when more than 10% of tap-water samples taken during a monitoring period show lead concentrations above 0.015 mg/l (15 parts per billion, or "ppb"). 40 C.F.R. §141.80(c)(1).

29. After a water system records an ALE, the SDWA requires that system to implement several corrective action measures. Among the required corrective actions, a water system with corrosion control treatment must inventory the lead service lines that it owns and replace at least 7% of system-owned lead service lines over a one-year period, and offer to replace the customer-owned portion, starting the first day following the monitoring period in which the ALE occurred. See 40 C.F.R. § 141.84(b)(1).

30. Defendants had three lead ALE for the monitoring periods of January 1 to June 30, 2017; January 1 to June 30, 2018; and July 1 to December 31, 2018. Sponaugle Cert. ¶ 12, Exhibit C.

31. The first ALE required Defendants to replace 7% of the approved lead service line inventory by June 30, 2018. 40 C.F.R. § 141.84(b)(1). Defendants did not meet this deadline. Sponaugle Cert., Exhibit E.

32. The second ALE required Defendants to complete a total replacement of 14% of the approved lead service line inventory by June 30, 2019 (i.e., an additional 7%). See 40 C.F.R. § 141.84(b)(1).

33. Because of Defendants' failure to meet the regulatory deadline after the first ALE in 2017, Defendants and the Department entered into the L&C ACO on July 26, 2018. Id., Exhibit E.

34. The L&C ACO required Defendants to inventory the total number of lead service lines in the system. Ibid. Defendants' July 2019 inventory identified 36,700 total lead service lines. Sponaugle Cert., ¶¶ 16.

35. The L&C ACO extended the deadline for Defendants to replace the initial 7% of lead service lines to December 31, 2019. Id., Exhibit E. This is more than 2,500 lead service lines. Defendants did not meet this ACO deadline. Id., ¶ 17.

36. Instead, to date, Defendants have replaced only 828 lead service lines since entry into the L&C ACO. Id., ¶ 18. Thus, Defendants have still only replaced less than 2.2% of lead service lines according to Defendants' own inventory.

37. The L&C ACO also requires Defendants to replace a total of 14% of lead service lines by July 31, 2020, Ibid., Exhibit E. This is more than 5,000 lead service lines.

38. Based upon the pace of lead service line replacement, absent a court order, there is no way that Defendants will meet the L&C ACO 14% replacement deadline of July 31, 2020.

39. In the L&C ACO, Defendants also agreed to achieve 21% replacement as a result of the ALE for the July 1 to December 31, 2018 monitoring period at a later date to be determined by the parties. Id., ¶ 21. Based on Defendants' failures to complete their lead service line replacement obligations to date, it is not possible to determine when they will meet this obligation.

#### Operations ACO Issues

40. The Operations ACO addressed numerous non-lead service line system issues under the SDWA, including various resiliency projects needed to address system integrity and performance, adequate staffing levels for essential positions, and a schedule to cover the finished water reservoir in compliance with the requirements of 40 C.F.R. §141.714. Id., Exhibit A.

41. Under the Operations ACO, TWW is required to cover the reservoir in compliance with 40 C.F.R. § 141.714 by January 2023. This is 10 years past the original deadline to cover the reservoir. See, Exhibit A. A cover is designed to protect the water from contamination after it has been finished (i.e., has been made potable) and before it has been delivered.

42. In 2010, the Department and the New Jersey Environmental Infrastructure Trust provided almost \$13.5 million in loan funding

for the reservoir cover project. Certification of Paul Hauch, ¶ 6.

43. On June 29, 2019, TWW submitted an interconnection capacity analysis that expressed a preference to now construct a series of above-ground storage tanks instead of completing the reservoir cover project agreed to in the Operations ACO. Sponaugle Cert., ¶ 28, Exhibit K. On April 12, 2020, the Department requested more information from TWW, the response to which is currently under Department review. Id., Exhibits L, M.

44. In addition to the reservoir project, Defendants have also failed to complete a required valve exercising, evaluation and replacement project for valves 8" or greater by September 30, 2019, as required by the Operations ACO. Id. ¶ 30.

45. The Operations ACO also focused on significant staffing shortfalls at TWW and required TWW to maintain full and adequate staffing levels, which is necessary to ensure the public health and safety. TWW's staffing deficiencies were outlined in a 2017 Technical, Managerial and Financial Capacity ("TMF") analysis Trenton commissioned from an independent consultant as directed by DEP pursuant to the Standards for Technical, Managerial and Financial Capacity of Public Community Water Systems, N.J.A.C. 7:10-13.3 - 13.4, because of historic problems with system management and staffing. Id., Exhibit B. The TMF noted that TWW "faces challenges relating to its extensive vacancy rate of

positions, many of which are at critical managerial levels. Due to the low staffing levels, succession planning does not appear to be an obvious focus. There is also a concern that operating with a skeleton staff for an extended period of time may compromise the utility's ability to continue to produce drinking water in a safe and reliable manner." Ibid., p. 3.

46. The TMF was issued in September 2017, and TWW agreed to maintain full and adequate staffing in the 2018 Operations ACO. However, despite numerous discussions with DEP about correcting the known staffing deficiencies, it was only recently that Defendants began to address these critical staffing and management issues in a more fulsome manner. Sponaugle Cert., ¶ 33.

47. The historic lack of critical staffing and TWW's challenges in recruiting and retaining experienced water system operators led TWW to secure the necessary support of experienced personnel through third-party contracts. On multiple occasions, the Trenton City Council opposed their use but without provision of a feasible alternative, meaning that TWW would have been unable to sufficiently operate the water system, placing the public health and safety of TWW's subscribers at risk.

COUNT ONE

REQUIRING DEFENDANTS TO MEET THE OBLIGATION OF REPLACING  
21% OF LEAD SERVICE LINES, INCLUDING PRELIMINARY RELIEF.

48. The Department incorporates paragraphs 1-47 of the Complaint as if fully set forth herein.

49. By entering into the L&C ACO, Defendants agreed to comply with all required deadlines contained therein.

50. Defendants also agreed that the requirements of the L&C ACO would be fully enforceable as a final agency order in the Superior Court of New Jersey, and Defendants agreed not to contest the ACO's requirements in any action brought to enforce its terms.

51. In accordance with the SDWA and LCR, and as specified in the L&C ACO, Defendants were required to replace 7% of lead service lines no later than December 31, 2019.

52. Defendants did not meet this deadline.

53. To date, Defendants have replaced only 828 lead service lines, approximately 2.2% of lead service lines.

54. Defendants' inability to replace the required number of lead service lines has the potential to increase the risk of lead exposure in drinking water, with the attendant consequences for public health, especially for children.

55. Pursuant to ¶ 60 of the L&C ACO, the Department is authorized to proceed by summary action to seek compliance with the ACO as a final agency order of the Department.

56. Absent a preliminary injunction compelling Defendants to meet an expedited lead service line replacement deadline, Defendants will continue to remain in significant noncompliance with the SDWA, LCR and the L&C ACO.

57. N.J.S.A. 58:12A-10(c) authorizes the Department to seek a temporary or permanent injunction for violations of the NJSDWA, including any order of the Department.

WHEREFORE, Plaintiff, Department of Environmental Protection, demands entry of an order against Defendants:

a) Finding Defendants in violation of the SDWA, the L&C ACO, the LCR, 40 C.F.R. § 141.80 - 91, as incorporated in the SDWA regulations, N.J.A.C. 7:10-5.1 - 5.2(a)(9);

b) Ordering preliminary injunctive relief requiring Defendants to replace 7% of lead service lines by no later than by December 31, 2020;

c) Ordering Defendants to replace 14% of lead service lines by no later than March 31, 2021, and 21% of lead service lines by no later than June 30, 2021;

d) Assessing civil penalties as authorized by N.J.S.A. 58:12A-16(e) for each day of violation; and

e) Granting such other relief as the court deems just and proper.

COUNT TWO

REQUIRING DEFENDANTS TO SUBMIT A FORMAL PROPOSAL FOR CONSTRUCTION OF STORAGE TANKS REQUIRING COMPLETION BY THE OPERATIONS ACO DEADLINE OF JULY 31, 2023.

58. The Department incorporates paragraphs 1-57 of the Complaint as if fully set forth herein.

59. In the Operations ACO, Defendants agreed to install a protective cover over Defendants' uncovered finished water reservoir, as required by 40 C.F.R. § 141.714.

60. On November 27, 2019, TWW notified the Department of its intention to construct a series of above-ground storage tanks in lieu of the reservoir cover.

61. Although a tank project could also fulfill Defendants obligations under 40 C.F.R. §141.714, Defendants have to date not submitted a comprehensive, approvable plan for the tank project, including how Defendants intend to fund the project. Further, despite Department support, the Trenton City Council rejected a portion of a bond ordinance earmarking \$50 million for the proposed reservoir replacement project.

62. Nearly two-and-a-half years after entry of the Operations ACO, Defendants are no closer to satisfying their obligation under the ACO and federal law to secure and protect the finished water from contamination, and court intervention is necessary.

63. Defendants' abandonment of the reservoir cover project without express Department authorization violates the requirements of the Operations ACO.

64. The Operations ACO authorizes the Department to enforce its terms through summary action pursuant to R. 4:67.

WHEREFORE, Plaintiff, Department of Environmental Protection, demands entry of an order against Defendants:

a) Requiring them to submit to the Department within 45 days a comprehensive tank proposal, including funding sources for land acquisition, tank construction, system resiliency related to tank construction, and a schedule for reservoir protection and decommissioning, including interim deadlines to ensure completion of the project by the ACO deadline of July 31, 2023; and

b) Granting such other relief as the court deems just and proper.

COUNT THREE

ENFORCING DELINQUENT WATER SYSTEM MAINTENANCE,  
RESILIENCY AND STAFFING REQUIREMENTS OF THE OPERATIONS  
ACO.

65. The Plaintiff incorporates paragraphs 1-64 of the complaint as if fully set forth herein;

66. The Operations ACO included numerous requirements for Defendants to complete related to system integrity, maintenance, resiliency and staffing;

67. Included among those are requirements that Defendants complete a valve exercising, evaluation, and replacement project for valves 8" or greater by September 30, 2019.

68. Defendants also agreed in the ACO to maintain full and adequate staffing levels for operation of the water system.

69. Defendants have failed to complete the valve exercising project requirement of the Operations ACO.

70. Defendants also have a history of failing to maintain adequate managerial and technical capacity related to staffing of the water system, as outlined in the TMF report.

71. The Operations ACO authorizes the Department to enforce its terms through summary action pursuant to R. 4:67.

WHEREFORE, Plaintiff, Department of Environmental Protection, demands entry of an order against Defendants:

a) Requiring Defendants to complete the valve exercising, evaluation and replacement project for valves 8" or greater within 180 days.

b) Ordering Defendants to submit to the Department for its approval an updated TMF evidencing its commitment to, among other regulatory TMF requirements, maintain full and adequate staffing as agreed to in the Operations ACO and as authorized by N.J.A.C. 7:10-13.3 and -13.4, within 45 days.

c) Assessing civil penalties pursuant to N.J.S.A. 58:12A-10(e) for Defendants' failure to complete the above requirements;

d) Granting such other relief that the court deems just and proper.

Respectfully Submitted,

GURBIR S. GREWAL  
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Robert J. Kinney  
Robert J. Kinney  
Deputy Attorney General

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, the Court is advised that Robert J. Kinney, Deputy Attorney General, is hereby designated as trial counsel for plaintiff in this action.

**CERTIFICATION REGARDING OTHER PROCEEDINGS AND PARTIES**

Undersigned counsel hereby certifies, in accordance with R. 4:5-1(b)(2), that the matters in controversy in this action are not the subject of any other pending or contemplated action in any court or arbitration proceeding known to plaintiff at this time, nor is any non-party known to plaintiff at this time who should be joined in this action pursuant to R. 4:28, or who is subject to joinder pursuant to R. 4:29-1. If, however, any such non-party later becomes known to plaintiff, an amended certification shall be filed and served on all other parties and with this Court in accordance with R. 4:5-1(b)(2).

*/s/ Robert J. Kinney*

Robert J. Kinney  
Deputy Attorney General

DATED: June 15, 2020

**CERTIFICATION OF COMPLIANCE WITH RULE 1:38-7(C)**

Undersigned counsel further certifies that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with R. 1.38-7(b).

DATED: \_\_\_\_\_

\_\_\_\_\_  
Robert J. Kinney  
Deputy Attorney General

**VERIFICATION**

Jessica Sponaugle, by way of certification, states that:

1. I have read the Verified Complaint.
2. I certify that the factual allegations in paragraphs 22 - 25, 33 -37, 39 - 41 and 43- 46 are true and correct.
3. I am aware that if the foregoing statements made by me are willfully false, I may be subject to punishment.

By: /s/ Jessica Sponaugle  
Jessica Sponaugle

**VERIFICATION**

Paul Hauch, by way of certification, states that:

1. I have read the Verified Complaint.
2. I certify that the factual allegations in paragraph 42 is true and correct.
3. I am aware that if the foregoing statements made by me are willfully false, I may be subject to punishment.

By: /s/ Paul Hauch  
Paul Hauch