

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

---

Melissa Mays, *et al.*,

Plaintiffs,

v.

City of Flint, a municipal corporation, *et al.*,

Defendants.

Case No:

Genesee County Circuit  
Court Case No.  
16-106112-CZ

CLASS ACTION

---

**JOINT NOTICE OF REMOVAL TO FEDERAL COURT AND  
CONSENT TO REMOVAL**

Defendants Patrick Cook (“Cook”), Liane Shekter-Smith (“Shekter-Smith”), Stephen Busch (“Busch”), and Bradley Wurfel (“Wurfel”) (collectively, the “Removing Defendants”), by and through their respective counsel, hereby remove this action from the Genesee County Circuit Court to the United States District Court for the Eastern District of Michigan pursuant to 28 U.S.C. §§ 1441, 1442 and 1446. In support of this Notice of Removal, the Removing Defendants state as follows:

**BACKGROUND**

1. On January 19, 2016, Plaintiffs filed this action against the Removing Defendants, among others, in the Genesee County Circuit Court. A copy of the Complaint is attached as **Exhibit A**.

2. These same Plaintiffs had previously filed a Class Action Complaint in the United States District Court for the Eastern District of Michigan. That federal Class Action Complaint is based on the same events as this action, names many of the same Defendants sued in this action, and is currently pending before this Court. A copy of the federal Class Action Complaint is attached as **Exhibit B**.

3. Defendants Cook, Shekter-Smith, Busch, and Wurfel are present or former employees of the Michigan Department of Environmental Quality (“MDEQ”), and are being sued for alleged actions and omissions that occurred during the course and scope of their employment. Defendant Cook was a Water Treatment Specialist assigned to the MDEQ’s Lansing Community Drinking Water Unit. Defendant Shekter-Smith was Chief of MDEQ’s Office of Drinking Water and Municipal Assistance. Defendant Busch was the MDEQ’s Office of Drinking Water and Municipal Assistance Lansing District Supervisor. And, Defendant Wurfel was the MDEQ’s Director of Communications.

4. Plaintiffs filed a First Amended Complaint on February 16, 2016, a copy of which is attached as **Exhibit C**.

5. Defendant Cook acknowledged service of the First Amended Complaint by appearance on April 5, 2016.<sup>1</sup> **Exhibit D**. Defendants Shekter-Smith,

---

<sup>1</sup> While the Court docket suggests that Defendant Cook was served via certified mail on February 29, 2016, Defendant Cook did not receive service on this date,

Busch by way of appearance, and Wurfel similarly acknowledged service on April 18, 2016, April 8, 2016, and March 28, 2016, respectively. **Exhibit E**, **Exhibit F**, and **Exhibit G**. This joint notice of removal is filed within thirty (30) days of service upon these Removing Defendants, and is timely under 28 U.S.C. § 1446(b).

6. Only Counts I and II of the Amended Complaint apply to the Removing Defendants. Count I alleges that the Removing Defendants (along with other individual Defendants that consent to this removal), during the course and scope of their employment with the MDEQ, were purportedly grossly negligent in their alleged decision-making and their oversight of the City of Flint's monitoring, testing, and treatment of Flint's drinking water under the federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300f *et seq.*, and the United States Environmental Protection Agency's ("EPA's") Lead and Copper Rule ("LCR"), 40 C.F.R. Part 141 Subpart I. **Exhibit C**, ¶¶ 182-192.

7. Count II alleges "Intentional Misconduct Fraud and Assault and Battery and Intentional Infliction of Emotional Distress" against the Removing Defendants (and other individual Defendants consenting to this removal). Plaintiffs assert that Removing Defendants, during the course and scope of their employment with the MDEQ, committed tortious acts related to their alleged decision-making, public notifications, and oversight of monitoring, testing, and

---

and did not accept service in this lawsuit except through the Acknowledgement of Service filed on April 5, 2016.

treatment of Flint's drinking water pursuant to the SDWA and LCR. **Exhibit C**, ¶¶ 193-201.

8. Plaintiffs have demanded a jury in this class action lawsuit.

9. As more fully described below, Plaintiffs' claims are removable to this Court under the federal officer removal statute (28 U.S.C. § 1442), and alternatively under the substantial federal question doctrine (28 U.S.C. § 1441).

10. In accordance with 28 U.S.C. § 1446(d), a notice of filing this Joint Notice of Removal and Consent to Removal and a copy of this Notice of Removal are being filed with the Genesee County Circuit Court. A copy of both notices will be served upon Plaintiffs.

11. Copies of all process, pleadings, and orders received by Removing Defendants are attached. **Exhibit H**.

12. By removing this action, Defendants do not waive any defenses, objections, or motions available under state or federal law.

**REMOVAL UNDER 28 U.S.C. § 1442**

13. The federal officer removal statute permits a defendant to remove a state-court action brought against "any [federal] agency or any [federal] officer (or any person acting under that officer) . . . for or relating to any act under color of such office . . . ." 28 U.S.C. § 1442.

14. "The federal officer removal statute is not 'narrow' or 'limited.' At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969).

15. A defendant who is not a federal officer or federal agency must satisfy three elements to remove under the federal officer statute: (1) the defendant is a person acting under a federal officer or agency; (2) the defendant performed the actions for which the defendant is being sued under the direction of a federal officer or agency; and (3) the defendant has raised a colorable federal defense. *See, e.g., Bennett v. MIS Corp.*, 607 F.3d 1076, 1085 (6th Cir. 2010) (citation omitted); *Mesa v. California*, 489 U.S. 121, 138-39 (1989).

16. In this case, the Removing Defendants satisfy all three elements of the federal officer removal statute.

**I. The Removing Defendants are Persons Acting Under Federal Officers and Agencies.**

17. The Removing Defendants are "persons," 1 U.S.C. § 1, whose authority to regulate Michigan's public drinking water systems is derived from the SDWA, LCR, and other EPA regulations, and whose actual regulation of Michigan's public drinking water systems occurs under the EPA's direction, control, and close supervision.

**II. The Removing Defendants' Actions For Which They Are Being Sued Were Performed Under the Direction of a Federal Officer or Agency.**

18. The SDWA directs the EPA to promulgate national primary drinking water standards and to regulate public water systems. *See* 42 U.S.C. § 300f *et seq.*

19. Specifically, with respect to the regulation of lead and copper, the EPA, in 1991, promulgated national primary drinking water regulations (“NPDWRs”) for controlling lead and copper in public drinking water. 56 Fed. Reg. 26460 (June 7, 1991). These regulations are known as the “Lead and Copper Rule” or “LCR” and are found at 40 C.F.R. §§ 141.80, *et seq.* The EPA has since amended the LCR several times, most notably in 2000 and 2007. *See, e.g.*, 65 Fed. Reg. 1950 (Jan. 12, 2000); 72 Fed. Reg. 57782 (Oct. 10, 2007).

20. The EPA’s LCR applies to public water systems such as the City of Flint. *See* 40 C.F.R. § 141.80(a). Generally speaking, it requires those water systems to monitor the levels of lead and copper at consumers’ taps and, under a number of different circumstances, requires those systems to employ various treatment techniques such as corrosion control treatment, source water treatment, lead service line replacement, and public education. 40 C.F.R. §§ 141.80(b) – (h).<sup>2</sup>

---

<sup>2</sup> Numerous scholars and practitioners have characterized the LCR as complex and recognized that many of its provisions are confusing and ambiguous. Most recently, the EPA and its Office of General Counsel determined, after several months of review, that “there are differing possible interpretations of the LCR with

21. The SDWA authorizes the EPA to delegate primary enforcement responsibility for public drinking water systems to states where the EPA determines, *inter alia*, that the state: (1) has adopted drinking water regulations that are no less stringent than the national primary drinking water regulations promulgated by the EPA; (2) has adopted and is implementing adequate procedures for the enforcement of such State regulations, including conducting such monitoring and making such inspection as required by the EPA; and (3) will keep such records and make such reports with respect to its activities as required by the EPA. *See* 42 U.S.C. § 300g-2; *see also* 40 C.F.R. §§ 142.10, 142.11.<sup>3</sup>

22. The SDWA, however, reserves tremendous oversight authority to the EPA, including mandatory EPA intervention in the form of notifications, advice, technical assistance, and, failing timely and sufficient state action, enforceable orders and inspections to bring water systems into compliance with federal standards. *See* 42 U.S.C. § 300g-3; *see also* 40 C.F.R. §§ 141.82(i), 141.83(b)(7), 142.19, 142.30, and 142.34.

23. By way of example, each state with primary enforcement responsibility is required to submit to EPA detailed quarterly and annual reports

---

respect to how the rule's optimal corrosion control treatment procedures" applied to Flint's water system. **Exhibit I.**

<sup>3</sup> EPA first granted the Michigan Department of Public Health primary enforcement responsibility over the regulation of Michigan's public drinking water systems in 1977. 42 Fed. Reg. 44835 (Sept. 7, 1977).

regarding the regulation of public drinking water systems including detailed information regarding each system's compliance with the treatment techniques for lead and copper. *See* 40 C.F.R. §§ 142.15, 142.19. All of these reports are publicly available and the EPA is required to, at least annually, review each state's submittals for compliance with EPA requirements. 40 C.F.R. §§ 142.17(a)(1).

24. If the EPA determines that a state no longer meets its requirements, the EPA is required to initiate proceedings to withdraw primacy approval. *See* 40 C.F.R. §§ 142.17(a)(2). If the EPA believes a state has abused its discretion in making corrosion control or source water treatment determinations in a substantial number of cases, or in cases affecting a substantial population, *the EPA may issue an order establishing federal treatment requirements for a public water system.* *See* 40 C.F.R. § 142.19(a) (emphasis added).

25. By way of further example whenever a state revises its approved primacy program in response to new or revised federal regulations, including those regulations which relate to lead and copper, the state must submit a request to the Administrator for approval of the program revision. *See* 40 C.F.R. §§ 142.12(a)(1), 142.16(d). And, before approving the revisions, the EPA must publish notice and provide an opportunity for a public hearing. *See* 40 C.F.R. §§ 142.13.

26. By way of even further example, whenever the EPA finds that a public water system is not in compliance with any primary drinking water



regulation, the EPA “shall provide advice and technical assistance to such State and public water system as may be appropriate to bring the system into compliance by the earliest feasible time.” 40 C.F.R. §§ 142.30.

27. Recognizing the complexity and ambiguity of the LCR, the EPA’s commentary to its 2007 amendments to the LCR states that the EPA will provide guidance to help systems identify source water changes that could impact optimal corrosion control. 72 Fed. Reg. 57782, 57789 (Oct. 10, 2007). The EPA has responded to this mandate by issuing at least eleven major guidance documents, directing all aspects of a state’s implementation of the LCR:

- Lead and Copper Rule Guidance Manual: Volume I: Monitoring (Sept. 1991);
- Lead and Copper Rule Guidance Manual: Volume II: Corrosion Control Treatment (EPA 811-B-92-002) (Sept. 1992);
- Guidance Manual for Selecting Lead and Copper Control Strategies (Jan. 1997);
- How to Determine Compliance with Optimal Water Quality Parameters as Revised by the Lead and Copper Minor Revisions (EPA 815-R-99-019) (Feb. 2001);
- Lead and Copper Monitoring and Reporting Guidance for Public Water Systems, EPA-816-R-02-009 (Feb. 2002);
- Lead in Drinking Water Regulation: Public Education Guidance for Community Water Systems, EPA 816-R-02-010 (June 2002);
- Revised Guidance Manual for Selecting Lead and Copper Control Strategies (March 2003);
- Lead and Copper Rule: 2007 Short-Term Regulatory Revisions and Clarifications; State Implementation Guidance, EPA 816-R-08-009 (June 2008);

- Implementing the Lead Public Education Provision of the Lead and Copper Rule: A Guide for Community Water Systems (June 2008);
- Lead and Copper Rule: Monitoring and Reporting Guidance for Public Water Systems, EPA 816-R-10-004 (March 2010); and
- Optimal Corrosion Control Treatment Evaluation Technical Recommendations for Primacy Agencies and Public Water Systems (March 2016).

28. Furthermore, EPA's direction and control over the MDEQ's implementation of the SDWA and LCR is most clearly demonstrated by the EPA's January 21, 2016 emergency order, whereby the EPA began monitoring and testing the Flint water system and ordered the MDEQ to take specific actions related to Flint. **Exhibit J.**

29. The Removing Defendants are being sued for allegedly failing to adhere to federal law, due to their alleged lack of compliance with the SDWA and LCR's detailed monitoring, testing, sampling, and notification requirements in overseeing the Flint water system, as administered by Removing Defendants under the EPA's direction and control.

30. In *Clio Convalescent Center v. Mich. Dept. of Consumer and Industry Services*, 66 F. Supp. 2d 875, (E.D. Mich. 1999), this Court held that a Michigan agency was entitled to federal officer removal under 28 U.S.C. § 1442, finding that since the state agency was sued for "implementing federal regulations pursuant to

its obligation under statutes, regulations, and/or contract, [the agency] was acting as [the federal agency's] agent.” *Id.* at 877.

31. Similar to the state agency in *Clio*, the Removing Defendants are entitled to federal officer removal because the MDEQ functions as an agent of the EPA to implement the SDWA and LCR. The MDEQ has entered into an agreement with the EPA to assure compliance with the SDWA and LCR, has the authority to investigate whether federal law has been violated by a public water system, and is obligated to forward monitoring results, consumer confidence reports, and SDWA and LCR violations to the EPA. *Id.* at 876; *see also City of St. Louis v. Velsicol Chemical Corp.*, 708 F. Supp. 2d 632, 661-662 (E.D. Mich. 2010) (holding that federal officer removal was proper where defendant acted under EPA direction and control and assisted the EPA in performing tasks the EPA would otherwise be obligated to perform).

32. The Removing Defendants are, therefore, properly characterized as the EPA's agents, acting under the EPA's direction and control to assist with implementing and enforcing the federal SDWA and LCR. Furthermore, the Removing Defendants' alleged actions and inactions in this case were not only taken pursuant to EPA's LCR, guidance documents, training manuals, quarterly and annual reviews, but they were also guided by repeated written and verbal

dialogue with a number of EPA officers who advised and oversaw the Removing Defendants' state-based regulation of the Flint water system.

**III. Removing Defendants Have Raised a Colorable Federal Defense.**

33. The Removing Defendants have colorable federal defenses including: preemption of Plaintiffs' claims by the SDWA (*Mattoon v. Pittsfield*, 980 F.2d 1 (1st Cir. 1992)); absolute immunity (*Butz v. Economou*, 438 U.S. 478 (1978)); and qualified immunity (*Phillips v. Roane County*, 534 F.3d 531, 538 (6th Cir. 2008) (holding that government officials sued in their individual capacity can be shielded from liability by qualified immunity)).

34. Venue may be proper in this district under 28 U.S.C. § 1442(a), because the Genesee County Circuit Court is located in the Eastern District of Michigan, Southern Division.

35. For all these reasons, removal is proper under 28 U.S.C. § 1442.

**REMOVAL UNDER 28 U.S.C. § 1441**

36. A federal court must generally determine if a claim arises under federal law based on the well-pleaded complaint, but substantial federal question jurisdiction is an exception to the well-pleaded complaint rule. *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 560 (6th Cir. 2007). The substantial federal question doctrine provides that "a state law cause of action may actually arise under federal law, even though Congress has not created a private right of action, if

the vindication of the right under state law depends on the validity, construction, or effect of federal law.” *Id.* at 565 (internal citations omitted).

37. Under the substantial federal question doctrine, federal jurisdiction exists when a “state-law claim necessarily raises a federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing a congressionally approved balance of federal and state judicial responsibilities.” *Grable v. Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308, 314 (2005).

38. At the heart of Plaintiffs’ Complaint are allegations that the drinking water provided to Flint residents was not safe and did not meet federal water quality standards, specifically standards related to lead. These and other Defendants were allegedly grossly negligent; committed fraud, assault, and battery; and inflicted emotional distress by failing to require, ensure, implement, and advise the public regarding compliance with federal water quality standards and corrosion control requirements.

39. The SDWA governs drinking water quality and provides detailed regulations related to water quality standards, monitoring, and testing requirements. The LCR specifically regulates lead in drinking water and provides detailed standards, monitoring, and testing protocols related to lead in drinking water. For additional information on the SDWA and LCR, see above ¶¶ 18-28.

40. Plaintiffs' Complaint both specifically<sup>4</sup> and implicitly<sup>5</sup> alleges that these Removing Defendants (along with other individual Defendants consenting to this removal) had duties to Plaintiffs based on the federal SDWA and LCR standards, regulations, monitoring, and testing requirements that were purportedly not followed and give rise to Plaintiffs' various causes of action.

41. Plaintiffs' claims are inextricably intertwined with the construction, interpretation, and effect of the SDWA and the LCR. If these and other Defendants establish that these federal laws and regulations were not violated, Plaintiffs' claims against these Removing Defendants are defeated.

42. Plaintiffs' gross negligence claims depend on a question of federal law, primarily whether these Removing Defendants complied with the SDWA and LCR during their oversight of the Flint water system. There are no alternative theories supporting gross negligence that do not implicate the SDWA and/or LCR, as the Removing Defendants are being sued for carrying out the EPA's duty, as delegated to Removing Defendants, to ensure that public water systems such as Flint comply with the SDWA and LCR.

43. This is not a garden variety state law tort action that merely references a federal law or statute. This litigation stems from a unique situation involving individual governmental defendants implementing federal lead regulations, and

---

<sup>4</sup> Exhibit C, ¶¶ 74, 82, 84, 86, 95, 96, 99, 134, 160, 166, and 188.

<sup>5</sup> Exhibit C, ¶¶ 1, 2, 8, 52, 77, 80, 81, 83, 85, 93, 94, 98, 123, 124, 125, 128, 130, 132, 135, 142, 143, 154, 184, and 187.

removal of this action will not open the door to removal of a vast number of purely state law claims.

44. Whether these and other Defendants violated the SDWA and LCR is disputed. The EPA has admitted that the LCR is ambiguous and subject to different possible interpretations and constructions when applied to this particular situation. As recently as November 3, 2015, the Director of EPA's Office of Drinking Water wrote a memo to the EPA's Regional Water Division Directors stating: "After reviewing the rule with our Office of General Counsel, it appears that there are differing possible interpretations of the LCR with respect to how the rule's optimal corrosion control treatment procedures apply to this situation, which may have led to some uncertainty with respect to the Flint water system." **Exhibit I.**

45. There is a substantial need for uniform interpretation of the SDWA and LCR as it applies to Flint, and the other 155,000 public water systems subject to the SDWA and LCR, that provide water to almost all Americans across the United States.

46. As the Court pointed out in *Harding-Wright v. D.C. Water and Sewer Auth.*, 350 F. Supp. 2d 102, 107 (D.D.C. 2005), "federal jurisdiction over a state law claim is appropriate when necessary to protect against inconsistent interpretation of a federal statutory regime." There is a substantial federal interest in resolving the disputed interpretations and effect of the SDWA and LCR to

ensure accurate, consistent application of the federal statutes and regulations across the nation and across the various lawsuits relating to Flint's drinking water.

47. This Court's exercise of jurisdiction over this case will not disturb a congressionally approved balance of federal and state judicial responsibilities. Congress has placed the regulation of drinking water within the federal realm through promulgation of the SDWA, and via the EPA's federal oversight, direction, and authority over the SDWA regulatory scheme.

48. To the extent some of Plaintiffs' claims do not involve a substantial federal question, this Court has supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367(a).

49. Venue may be proper in this district under 28 U.S.C. § 1441, because the Genesee County Circuit Court is located in the Eastern District of Michigan, Southern Division.

WHEREFORE, Defendants Patrick Cook, Liane Shekter-Smith, Stephen Busch, and Bradley Wurfel, respectfully request that this action proceed in this Court as an action properly removed.



Respectfully submitted,

Foster, Swift, Collins & Smith, P.C.  
Attorneys for Defendant Patrick Cook

Fraser, Trebilcock, Davis & Dunlap  
Attorneys for Defendant Liane  
Shekter Smith

By: /s/ Charles E. Barbieri  
Charles E. Barbieri (P31793)  
Bruce A. Vande Vusse (P28547)  
Ray H. Littleton II (P69733)  
Allison M. Collins (P78849)  
313 S. Washington Square  
Lansing, MI 48933  
(517) 371-8100  
[cbarbieri@fosterswift.com](mailto:cbarbieri@fosterswift.com)

By: /s/ Thaddeus E. Morgan (w/permission)  
Thaddeus E. Morgan (P47394)  
124 West Allegan Street, St 1000  
Lansing, MI 48933  
(517) 482-5800  
[tmorgan@fraserlawfirm.com](mailto:tmorgan@fraserlawfirm.com)

Clark Hill PLC  
Attorneys for Bradley Wurfel

Kotz Sangster Wysocki, P.C.  
Attorneys for Stephen Busch

By: /s/ Michael Pattwell (w/permission)  
Jay M. Berger (P57663)  
Michael J. Pattwell (P72419)  
212 E. Grand River Ave.  
Lansing, Michigan 48906  
(517) 318-3043  
[jberger@clarkhill.com](mailto:jberger@clarkhill.com)  
[mpattwell@clarkhill.com](mailto:mpattwell@clarkhill.com)

By: /s/ Phillip Grashoff (w/permission)  
Phillip A. Grashoff, Jr. (P14279)  
36700 Woodward Ave., Suite 202  
Bloomfield Hills, MI 48304  
(248) 646-1050  
[pgrashoff@kotzsangster.com](mailto:pgrashoff@kotzsangster.com)

Dated: April 27, 2016

**ALL INDIVIDUAL MDEQ DEFENDANTS CONSENT TO AND JOIN IN  
THIS JOINT NOTICE OF REMOVAL**

All individual MDEQ consent to and join in this Joint Notice of Removal. It is understood, based on previous conversations, that Flint Defendants will separately consent. Therefore, removal under 28 U.S.C. § 1441 is permitted pursuant to 28 U.S.C. § 1446(b)(2)(b), because all Defendants implicated in Counts I and II that have been served in this lawsuit consent and join in Defendants' Joint Notice of Removal, as indicated by their signatures below.

WHEREFORE, the below designated Defendants respectfully request that this Court exercise jurisdiction over this action and grant such other relief as this Court deems proper.

Respectfully Submitted,

Foster, Swift, Collins & Smith, P.C.  
Attorneys for Michael Prysby and  
Adam Rosenthal

Dated: April 27, 2016

By: /s/ Charles E. Barbieri  
Charles E. Barbieri (P31793)  
Bruce A. Vande Vusse (P28547)  
Ray H. Littleton II (P69733)  
Allison M. Collins (P78849)  
313 S. Washington Square  
Lansing, MI 48933  
(517) 371-8100  
cbarbieri@fosterswift.com

**CERTIFICATE OF SERVICE**

I hereby certify that on April 27, 2016, I directed Wendy Paul to electronically file the foregoing with the Clerk of the Court using the ECF system. A copy of the foregoing will be served upon all parties of record by regular mail.

Dated: April 27, 2016

s/ Charles E. Barbieri  
Charles E. Barbieri (P31793)  
Foster, Swift, Collins & Smith, P.C.  
313 S. Washington Square  
Lansing, MI 48933-2193  
(517) 371-8155  
[cbarbieri@fosterswift.com](mailto:cbarbieri@fosterswift.com)