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STATE OF MICHIGAN

IN THE 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.

Honorable Christopher M. Murray

Case 2018-000259-MZ

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PROPOSED BRIEF OF AMICI CURIAE ENVIRONMENTAL GROUPS IN OPPOSITION TO PLAINTIFFS' 05/28/2019 MOTION FOR LEAVE TO AMEND COMPLAINT

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SUMMARY OF ARGUMENT

Plaintiffs' motion for leave to amend their complaint should be denied as futile. Plaintiffs propose to add allegations to Count 1, which alleges violations of the Administrative Procedures Act ("APA"); and to add a Count 6 alleging a violation of the Headlee Amendment. But neither of those proposed amendments would cure the fundamental defect in Plaintiffs' complaint: failure to state a claim on which relief can be granted. The Court therefore should deny Plaintiffs' motion to amend; grant the motion for summary disposition filed by Defendant Michigan Department of Environmental Quality ("MDEQ"); and dismiss this lawsuit, for reasons explained herein and in Environmental Groups' amicus brief filed in support of MDEQ's motion for summary disposition.

First, Plaintiffs' proposed amendments to Count 1 do not support a claim for relief under the APA. Plaintiffs newly allege that the Lead and Copper Rule ("LCR") is "procedurally invalid" because MDEQ premised its Regulatory Impact Statement ("RIS") on the version of the LCR that the agency proposed rather than the version adopted. But, as MDEQ explains (Opp. at 12–14), the APA directed MDEQ to base its RIS on the proposed rule. Whether MDEQ had to prepare another RIS before finalizing the LCR is a decision vested in a different agency, the Office of Regulatory Reform. Plaintiffs have not sued that agency or challenged the substance of its decision. Therefore, even with the proffered amendment, Count 1 fails to state a claim on which relief can be granted.

Second, Plaintiffs' proposed Count 6 fails as a matter of law because, as MDEQ explains (Opp. at 3–12), the Headlee Amendment prohibits only state laws that mandate new or additional expenditures by local governments *qua* local governments without accompanying funding. While some local governments have "voluntarily assumed" the role of water supplier, *Livingston Cty. v. Dep't of Mgmt. & Budget*, 430 Mich. 635, 645 (1988), many others have not, and most of the water supplies to which the LCR applies are not run by local governments. Plaintiffs may be correct that

practical considerations have prompted some individual local governments to become suppliers of water. But that is beside the point. Because state law does not "mandate[ ] in the first instance," *id.* at 643, that local governments supply water, Plaintiffs cannot state an unfunded-mandate claim.

ARGUMENT

"Leave to amend [a complaint] may be denied if the amendment would be futile," *Detroit Int'l Bridge Co. v. Commodities Export Co.*, 279 Mich. App. 662, 666 (2008), *i.e.*, if the amended complaint "is legally insufficient on its face," *Ben P. Fyke & Sons, Inc. v. Gunter Co.*, 390 Mich. 649, 660 (1973). MDEQ and Environmental Groups have previously explained why the original complaint was legally insufficient on its face. *See Formall, Inc. v. Cmty. Nat'l Bank*, 166 Mich. App. 772, 777 (1988) (observing that a motion for summary disposition under MCL 2.116(C)(8) "tests the legal sufficiency of the claim as determined from the pleadings alone"). The proposed amended complaint fares no better, so this Court should deny Plaintiffs' motion for leave as futile.

I. MDEQ followed the express and unambiguous terms of the APA when it prepared a single RIS based on the original proposed Lead and Copper Rule.

Count 1 of the complaint alleges only procedural violations of the APA. *See* Pls.' Proposed First Amended Compl. ("FAC") ¶¶ 70–110; Pls.' Proposed Reply to Mot. at 1. But a court cannot invalidate a rule on procedural grounds unless the agency failed to follow a procedure expressly "set forth" in the APA. *Clonara, Inc. v. State Bd. of Educ.*, 442 Mich. 230, 239 (1993). *Cf. Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (observing that the federal Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, "establishes the maximum procedural requirements which [the legislature] was willing to have the courts impose upon agencies in conducting rulemaking procedures" (citation omitted)). A careful reading of the APA reveals that Count 1, as amended, fails to state a claim on its face because it does not identify any statutory procedure that MDEQ

failed to follow. To the contrary, the APA explicitly relieved an administrative agency in MDEQ's position of any duty to prepare the second RIS that Plaintiffs now allege was required.

As relevant here, the APA required MDEQ to prepare an RIS analyzing regulatory impacts of its "proposed rule." MCL 24.245(3). Plaintiffs do not dispute that MDEQ did so here. Next, the APA directed MDEQ to submit the RIS to the Office of Regulatory Reform, MCL 24.245(2), "an independent and autonomous … agency" that the APA charges with "review[ing] proposed rules" and "coordinat[ing] processing of rules by agencies," MCL 24.234.[1] Plaintiffs do not dispute that MDEQ did so here. The Office of Regulatory Reform then sent the RIS and proposed rule to the Joint Committee on Administrative Rules ("JCAR"), *see* MCL 24.245(2), which is made up "of 5 members of the senate and 5 members of the house of representatives," MCL 24.235(1). After JCAR "[p]ropose[d] that the rule be changed," MCL 24.245a(1)(b); *see* State's Mot. for Summ. Disposition, Ex. L, MDEQ exercised its option under the APA to "withdraw the rule to change" it, MCL 24.245a(10)(a); *see also* MCL 24.245c(2). Plaintiffs do not challenge that withdrawal.

Plaintiffs do not dispute that, after making changes to the proposed LCR, MDEQ shared those changes with the Office of Regulatory Reform, as required by the APA. MCL 24.245c(2).

[1] The Office of Regulatory Reform was originally established by executive order, and the legislature has since codified its role and added the regulatory-review function at issue in the APA. *See* MCL 24.234. The Office remains a "type 1 agency," MCL 24.234(1), that the Governor may reorganize, rename, and administratively house within any executive-branch agency. *See generally* D. LeDuc, Michigan Administrative Law § 4:40 (2019 ed.). While the LCR was under review, the relevant statutory functions of the Office of Regulatory Reform were performed by the Office of Regulatory Reinvention, which was housed within the Department of Licensing and Regulatory Affairs. *See* E.O. 2011-5, §§ 1–2 (Feb. 23, 2011). More recently, Governor Whitmer abolished the Office of Regulatory Reinvention and transferred all its functions (including the regulatory-review function that the APA assigns to the Office of Regulatory Reform) to the newly established Office of Administrative Hearings and Rules, which also is housed within the Department of Licensing and Regulatory Affairs. E.O. 2019-2, § 3 (Feb. 4, 2019). Because the question here is whether the APA was violated, and that statute refers only to the Office of Regulatory Reform, Environmental Groups use the term "Office of Regulatory Reform" to refer to whichever administrative body the governor had designated to perform the statutory functions of that office at the relevant time.

Nor do Plaintiffs dispute that the Office of Regulatory Reform (not MDEQ) discharged its duty under the APA to "review the rule as changed and determine whether the regulatory impact or the impact on small businesses of the rule as changed would be more burdensome than the regulatory impact or the impact on small businesses of the rule as originally proposed." MCL 24.245c(3).

The APA states, in no uncertain terms, that "[i]f the office's determination … is that the regulatory impact and the impact on small businesses of the rule as changed would not be more burdensome, the agency *is not required* to prepare a new [RIS]," MCL 24.245c(4) (emphasis added), before resubmitting the proposed rule, as changed, to JCAR. Plaintiffs do not dispute that the Office of Regulatory Reform made such a determination in this case. When MDEQ resubmitted the proposed rule to JCAR, that committee did not propose any further changes, and MDEQ then adopted that version of the LCR consistent with express APA procedures. *See* MCL 24.246.

Plaintiffs' motion for leave to amend clarifies that the object of their concern is MDEQ's failure to prepare a second RIS. *See* Mot. at 3 (complaining "that MDEQ based its published RIS on a prior version of the [LCR]," rather than "the Rule[ ] as enacted"); FAC ¶ 78 (asserting "the need for another RIS" to reflect changes made to the proposed rule). But the agency followed the letter of the APA by relying on the determination of the Office of Regulatory Reform, and Plaintiffs have not challenged the substance of that office's determination.[2] Plaintiffs instead have attacked *MDEQ* for complying with that determination and following procedures that the APA prescribes

[2] No precedent addresses whether the Office of Regulatory Reform is an "agency" suable under the APA, MCL 24.203(2), but the better view is that Plaintiffs could have named the office as a defendant in this case. The office's power to "determine whether the [impacts] … of [a] rule as changed would be more burdensome than the [impacts] … of the rule as originally proposed," MCL 24.245c(3), is "created by … statute," MCL 24.203(2), and lies "[i]n addition to any other powers and duties" that the governor vests in the Office of Regulatory Reform. The office itself is not "the governor," nor is it "an agency in the legislative or judicial branch." MCL 24.203(2). Yet Plaintiffs have not listed the office as an "agency of the state involved in connection with [a] claim" pleaded in their original or proposed amended complaint. MCL 600.6431(2).

for deciding when to prepare a new RIS. As a matter of law, the APA did not require MDEQ to prepare a new RIS in this instance. Plaintiffs' proffered amendment to Count 1 is therefore futile.

For completeness, it is worth noting that Count 2 of the complaint, which Plaintiffs have not sought leave to amend, summarily asserts that the LCR is "substantively invalid because" it was "enacted by MDEQ without any explanation in its [RIS] of the technical and legal foundation behind the [final rule]." FAC ¶ 127. The complaint does not specify which "technical and legal foundation[s]" were supposedly left unexplained, *ibid.*, but, to the extent Plaintiffs now purport to be referencing changes made to the proposed rule after completion of the RIS, Count 2 likewise fails. Notably, Plaintiffs lack standing to sue MDEQ (the only named defendant) to challenge the substance of a determination made by the Office of Regulatory Reform. *See supra*, note 3.

II. The Lead and Copper Rule does not impose an unfunded mandate because state law does not require local governments to supply water.

Article IX, Section 29 of the Michigan Constitution is one of the "Headlee Amendments" ratified in 1978. The second sentence of that Section is known "as the 'prohibition on unfunded mandates.'" *Adair v. State*, 486 Mich. 468, 478 (2010). That sentence reads:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

Mich. Const., art. IX, § 29. A plaintiff invoking this sentence bears the burden to establish that a state law *requires* local governments to engage in a new activity or service or increase the level of their activity or service beyond that mandated by existing law. *Adair*, 486 Mich. at 480. The term "state requirement" excludes state laws that grant local governments the option not to perform an activity or service, *see* MCL 21.234(5)(i), however unpalatable that option may prove in practice.

Plaintiffs' Count 6 does not carry its burden to allege an unfunded-mandate violation, for the simple reason that no state law requires local governments to own, operate, or fund the "public

water supplies" to which the LCR applies. Mich. Code Admin. R. ("Rule") 325.10604f(1)(a). The "public" in "public water supply" does not refer to a water supply's owner or operator; any "person" may fill that role. MCL 325.1002(t) (defining "supplier of water"). The LCR covers "community supplies" (*i.e.*, year-round supplies) and "nontransient noncommunity supplies" (*i.e.*, partial-year supplies). Rule 325.10604f(1)(a); *see also* MCL 325.1002(c), (*l*). Local governments are among the "persons" eligible to own or operate those water supplies, *see* MCL 325.1002(m), but several local governments do not supply water, and a minority of the supplies subject to the LCR are run by local governments, FAC, Exh. C, at 9. *See also* MCL 21.234(5)(g) (explaining that the Headlee Amendment does not bar a "requirement of state law which applies to a larger class of persons or corporations and does not apply principally or exclusively to a local unit or units of government").

Plaintiffs allege that the Home Rule Cities Act of 1909, when read in conjunction with the Michigan Safe Drinking Water Act, "for all practical purposes" requires some home-rule cities to own, operate, or fund public water supplies. FAC ¶¶ 158, 161. That claim fails as a matter of law, for several reasons. The sole provision of the Home Rule Cities Act that Plaintiffs invoke is merely a general directive to provide in city charters for "[t]he public peace and health and for the safety of persons and property." MCL 117.3(j). That provision does not require that home-rule cities run public water supplies. *Cf. City of Ann Arbor v. State*, 132 Mich. App. 132, 136 (1984) (declining to construe MCL 117.3(j) to require home-rule cities to provide fire protection). Even if the statute could be interpreted to mandate water service, it gives cities the choice to "expend funds *or* enter into contracts" with outside parties. MCL 117.3(j) (emphasis added). A state statute that explicitly affords local governments the option *not* to expend funds cannot be the linchpin of a claim under the Headlee Amendment that state law requires local governments to expend funds.

Nor can Plaintiffs premise such a claim on "practical" considerations that have prompted particular home-rule cities to become water suppliers. The unfunded-mandate prohibition applies only to "services and activities that state law mandates [of local governments] *in the first instance*." *Livingston Cty.*, 430 Mich. at 643 (emphasis added). *Accord Kramer v. City of Dearborn Heights*, 197 Mich. App. 723, 726 (1992) (holding that local governments are not required to dispose of sewage); *Saginaw Firefighters Ass'n, Local 422, Int'l Ass'n of Firefighters, AFL-CIO v. City of Saginaw*, 137 Mich. App. 625, 630 (1984) (same for fire protection). It cannot be gainsaid that some local governments are best suited to supply water to their residents, or that the "continued operation" of those public water supplies will "be beneficial," *Livingston Cty.*, 430 Mich. at 652, so long as they comply with the LCR and all other federal and state laws designed to ensure safe drinking water. But even if Plaintiffs could demonstrate that it is "*functionally* … mandatory" for particular local governments to become water suppliers based on individual circumstances, FAC ¶ 23 (emphasis added), Count 6 still would fail under well-established law. *See* MCL 21.234(5)(i).

Finally, it is worth underscoring that the *other* Headlee Amendment claims that Plaintiffs conjure in their complaint and papers—theoretical claims against water suppliers for hypothetical rate increases allegedly caused by the LCR, *see* FAC ¶¶ 52–58, 105, 129–139—are not before the Court and cannot support vacatur of the rule either. Even assuming such claims could be and had been brought against Plaintiffs, this Court could not hear them. *See Council of Orgs. & Others for Educ. About Parochiaid v. State*, 321 Mich. App. 456, 465 (2017) ("[T]he Court of Claims lack[s] subject-matter jurisdiction over claims against nonstate actors."). This Court does have jurisdiction over Plaintiffs' unfunded-mandate claim, but, as just explained, that claim fails as a matter of law.

CONCLUSION

Plaintiffs' motion for leave to amend their complaint should be denied.

Respectfully submitted,

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