

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

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TAMARA NAPPIER, *et al.*,

Case No:

Plaintiffs,

Court of Claims Case No. 16-000071-MM

v.

CLASS ACTION

RICHARD SNYDER, *et al.*,

Defendants.

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

Defendant Stephen Busch (“Removing Defendant”) hereby removes this action from the Michigan Court of Claims to the United States District Court for the Western District of Michigan pursuant to 28 U.S.C. §§ 1441, 1442 and 1446. In support of this Notice of Removal, the Removing Defendant states as follows:

**BACKGROUND**

1. On March 23, 2016, Plaintiffs filed this class action against the Removing Defendant, and Patrick Cook (“Cook”), Michael Prysby (“Prysby”), Liane Shekter Smith (“Shekter Smith”), Bradley Wurfel (“Wurfel”) and Daniel Wyant (“Wyant”) (collectively “MDEQ Employee Defendants”), among others, in the Michigan Court of Claims. Plaintiffs have sued the Removing Defendant and MDEQ Employee Defendants in both their official and individual capacities. A copy of the Summons to Stephen Busch is attached as **Exhibit A** and Complaint is attached as **Exhibit B**.

2. Removing Defendant is a current employee of MDEQ on an unpaid leave of absence. The MDEQ Employee Defendants are also current or former employees of the

Michigan Department of Environmental Quality (“MDEQ”). All 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 Prysby was the District 11 Engineer for the MDEQ’s Office of Drinking Water and Municipal Assistance (“ODWMA”). Removing Defendant was the MDEQ’s ODWMA Lansing District Supervisor. Defendant Shekter-Smith was Chief of MDEQ’s ODWMA. Defendant Wurfel was the MDEQ’s Director of Communications, and Defendant Wyant was the MDEQ Director.

3. Removing Defendant accepted Service of Process on April 29, 2016, **Exhibit C**. This Notice of Removal is filed within thirty (30) days of service upon the Removing Defendant. Due to the running of the thirty (30) day period during the course of the Memorial Day holiday, this Notice of Removal is timely under 28 U.S.C. § 1446(b).

4. Only Count I of the Complaint applies to the Removing Defendant and the MDEQ Employee Defendants. Count I alleges that the Removing Defendant and the MDEQ Employee Defendants, during the course and scope of their employment with the MDEQ, were purportedly negligent and/or grossly negligent in their alleged decision-making and 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 B**, ¶¶ 75-77.

5. Plaintiffs have not demanded a jury in this class action.

6. As more fully described below, Plaintiffs’ claims are removable to this Court by Removing Defendant (joined in and consented to by the former or current MDEQ employee

Defendants) under the federal officer removal statute (28 U.S.C. § 1442), and alternatively under the substantial federal question doctrine (28 U.S.C. § 1441).

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

8. Copies of all process, pleadings, and orders received by Removing Defendant other than the Complaint are attached, **Exhibit D**. The Complaint is attached as **Exhibit B**.

9. By removing this action, Removing Defendant and the joining MDEQ Employee Defendants do not waive any defenses, objections, or motions available under state or federal law.

#### **REMOVAL UNDER 28 U.S.C. § 1442**

10. 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.

11. “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).

12. 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).

13. In this case, the Removing Defendant satisfies all three elements of the federal officer removal statute.

**I. The Removing Defendant is a Person Acting Under Federal Officers and Agencies.**

14. The Removing Defendant is a “person,” 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 occurred under the EPA’s direction, control, and close supervision.

15. As more thoroughly explained in Section II below, EPA has delegated authority to MDEQ’s ODWQMA to act on its behalf and regulate public drinking water systems in the State of Michigan. Removing Defendant’s alleged actions occurred while fulfilling these duties. Removing Defendant was standing in the shoes of EPA and taking actions which EPA would otherwise have been required to take, and his alleged actions were taken pursuant to EPA’s oversight and guidance.

**II. The Removing Defendant’s Actions For Which He Is Being Sued Were Performed Under the Direction of a Federal Officer or Agency.**

16. 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.*

17. 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).

18. 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>1</sup>

19. 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>2</sup>

20. 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.

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<sup>1</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 respect to how the rule's optimal corrosion control treatment procedures [applied] which may have led to some uncertainty with respect to the Flint water system.” **Exhibit E**.

<sup>2</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).

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

22. 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).

23. 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.

24. 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.

25. 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).

26. EPA's direction and control over the MDEQ's implementation of the SDWA and LCR is further 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 F.**

27. The Removing Defendant and the MDEQ Employee 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 the Removing Defendant and the MDEQ Employee Defendants under the EPA's direction and control.

28. The court in *Clio Convalescent Center v. Mich. Dept. of Consumer and Industry Services*, 66 F. Supp. 2d 875, (E.D. Mich. 1999) (O'Meara, J.), held that a Michigan agency was entitled to federal officer removal under 28 U.S.C. § 1442, where the state agency was sued for "implementing federal regulations pursuant to its obligation under statutes, regulations, and/or contract, [and] was acting as [the federal agency's] agent." *Id.* at 877.

29. Similar to the state agency in *Clio*, the Removing Defendant is 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 and been delegated authority by 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).

30. The Removing Defendant is, therefore, properly characterized as the EPA's agent, acting under the EPA's direction and control to assist with implementing and enforcing the federal SDWA and LCR. Furthermore, the Removing Defendant's 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 and interaction with a number of EPA officers who advised and oversaw the MDEQ's regulation of the City of Flint water system.

### III. Removing Defendant Has Raised a Colorable Federal Defense.

31. The Removing Defendant has colorable federal defenses including: preemption of Plaintiffs' claims by the SDWA (*Matoon v. Pittsfield*, 980 F.2d 1 (1st Cir. 1992)); 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); derivative discretionary function immunity (*Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 648-49 (6<sup>th</sup> Cir. 2015); and a demonstration that he satisfied his delegated obligations to enforce the federal SDWA (*Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11<sup>th</sup> Cir. 1996) ("The scope of our inquiry here is only whether Smith has advanced a colorable federal defense (including an assertion that he complied with all his federal law obligations), not whether his defense will be successful.") (citing *Mesa v. California*, 489 U.S. 121, 133 (1989)).

32. Venue is proper in this district under 28 U.S.C. § 1442(a), because this case is pending in the Michigan Court of Claims District 3 (Grand Rapids), which is located in the Western District of Michigan, Southern Division.

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

### **REMOVAL UNDER 28 U.S.C. § 1441**

34. 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).

35. 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).

36. 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 or negligent by failing to require, ensure, implement, and advise the public regarding compliance with federal water quality standards and corrosion control requirements.

37. 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 ¶¶ 17-25.

38. Plaintiffs’ Complaint both specifically<sup>3</sup> and implicitly<sup>4</sup> alleges that these Defendants 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.

39. Plaintiffs’ claims are inextricably intertwined with the construction, interpretation, and effect of the SDWA and the LCR. If the Removing Defendant and former or current MDEQ

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<sup>3</sup> **Exhibit B** ¶¶ 12, 21, 22, 39, 40, 55, 69, 70.

<sup>4</sup> **Exhibit B**, ¶¶ 1, 11, 13, 15, 16, 18, 27, 36, 37, 38, 41, 42, 44, 45, 46, 47, 50, 54, 56, 58, 59, 61, 68, 73, 75, 81.

Employee Defendants establish that these federal laws and regulations were not violated, Plaintiffs' claim against these Defendants are defeated.

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

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

42. Whether these 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 E.**

43. 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.

44. 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.

45. 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.

46. 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).

47. Venue is proper in this district under 28 U.S.C. § 1441, because this case is pending in the Michigan Court of Claims District 3 (Grand Rapids) which is located in the Western District of Michigan, Southern Division.

48. A copy of the Notice of Filing of the Notice of Removal is attached hereto as **Exhibit G**.

WHEREFORE, Removing Defendant, Stephen Busch, respectfully requests that this action proceed in this Court as an action properly removed.

Respectfully submitted,

KOTZ SANGSTER WYSOCKI, P.C.  
Attorneys for Stephen Busch

By: /s/ Philip A. Grashoff, Jr.  
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Dated: May 31, 2016

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

Consent to this Notice of Removal by all previously served Defendants is not procedurally required. Removal pursuant to 28 U.S.C. § 1442 does not require consent from all other properly joined and served defendants. Additionally, since this Notice of Removal is not based *solely* on 28 U.S.C. § 1441, consent of all other properly joined and served defendants is not required. While consent is not required to meet the procedural requirements for removal, Removing Defendant has sought the consent of all other joined and served MDEQ employee Defendants. The following Defendants have consented and join in the Removal: Daniel Wyant, Liane Shekter Smith, Patrick Cook, Michael Prysby, and Bradley Wurfel.

Therefore, removal under 28 U.S.C. § 1441 is permitted pursuant to 28 U.S.C. § 1446(b)(2)(b), because all MDEQ Employee Defendants implicated in Count I that have been served in this lawsuit consent and join in Removing Defendant's 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,

By: /s/ Philip A. Grashoff Jr. P14279  
Attorney for Defendant Stephen Busch

By: /s/ Michael J. Pattwell P72419 (w/permission)  
Attorney for Defendants Daniel Wyant and Bradley Wurfel

By: /s/ Thaddeus E. Morgan P47394 (w/permission)  
Fraser Trebilcock Davis & Dunlap PC  
Attorney for Defendant Liane Shekter Smith

By: /s/ Charles E. Barbieri P31793 (w/permission)  
Foster Swift Collins & Smith, P.C.  
Attorney for Defendants Patrick Cook and Michael Prysby

Dated: May 31, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on May 31, 2016, I electronically filed 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: May 31, 2016

s/ Philip A. Grashoff, Jr.

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