SURVEY OF MICHIGAN ENVIRONMENTAL CASES FOR THE PERIOD MAY 31, 2018 THROUGH JUNE 1, 2019

NATHAN D. DUPES†

I. INTRODUCTION 573
II. BACKGROUND ON THE FLINT WATER CRISIS.................................. 574
A. Boler v. Governor 576
B. Guertin v. State of Michigan 579
1. Flint Defendants 582
2. MDEQ Defendants.. 583
3. Michigan Department of Health and Human Services (MDHHS) Defendants 584
C. Burgess v. United States 588
III. NON-FLINT WATER CRISIS CASES 591
A. South Dearborn Environment Improvement Ass'n, Inc. v. Dep't of Environmental Quality 591
B. National Wildlife Federation v. Secretary of the Dep't of Transportation 592

I. INTRODUCTION

Not surprisingly, the reported Michigan environmental law cases for the survey period primarily relate to the so-called Flint Water Crisis. The opinions were issued from three different courts and dealt with numerous legal issues, including subject-matter jurisdiction, governmental immunity, and substantive due process rights.

The United States District Court for the Eastern District of Michigan issued opinions in two separate Flint Water Crisis actions. One of the actions, before the Honorable Judith E. Levy, is a consolidated class action brought by Flint residents and businesses against the State of Michigan, the City of Flint, related governmental officials, and private firms that provided technical consulting to the governmental entities.[1] The other action, before the Honorable Linda V. Parker, involves claims

† Member, Bodman PLC. Bachelor of Arts, 2007, with Highest Distinction, University of Michigan; Juris Doctor, 2011, magna cum laude, Wayne State University Law School. The author thanks his colleague, Erica Shell of Bodman PLC, for her review and feedback concerning a draft of this Article.

1. *In re* Flint Water Cases, 384 F. Supp. 3d 802 (E.D. Mich. 2019).

by Flint residents against the United States for the Environmental Protection Agency's (EPA) role in the Flint Water Crisis.[2]

The U.S. Court of Appeals for the Sixth Circuit issued an opinion in connection with yet a third Flint Water Crisis action pending in the Eastern District of Michigan.[3] In *Guertin v. State of Michigan*, Flint residents asserted civil rights claims against various governmental and non-governmental defendants.[4]

Finally, the Michigan Court of Appeals issued an opinion in another Flint Water Crisis action involving claims by Flint residents against governmental and non-governmental defendants.[5] This article will cover these cases in detail.

There were two additional notable environmental decisions published during the Survey period that do not relate to the Flint Water Crisis. Although there is not space to cover them in detail, they will be briefly summarized at the end of the Article.

II. BACKGROUND ON THE FLINT WATER CRISIS

The Flint Water Crisis has been one of the dominant environmental issues in the State of Michigan in recent history, if not the single most dominant issue. The Crisis has attracted national and international attention, was an issue in the 2016 United States presidential campaign,[6] and—not surprisingly—has spawned a myriad of criminal and civil litigation. An in-depth treatment of the facts and history of the Flint Water Crisis is beyond the scope of this Article but what follows is a brief overview.

For years, the City of Flint, Michigan obtained drinking water for its residents through the Detroit Water and Sewerage Department (DWSD), which drew its water from Lake Huron.[7] In the 1990s, Flint began to explore more economical alternatives for its water supply and eventually identified the possibility of joining a new water authority.[8] An interim source was necessary, however, given that the new water authority would

2. Burgess v. U.S., 375 F. Supp. 3d 796 (E.D. Mich. 2019).

3. Guertin v. State of Michigan, 912 F.3d 907 (6th Cir. 2019).

4. *Id.* at 915.

5. Boler v. Governor, 324 Mich. App. 614, 923 N.W.2d 287 (2018).

6. *See, e.g.*, Paul Waldman, *Time to Press the Presidential Candidates on Flint's Water Crisis*, WASH. POST (Jan. 21, 2016, 12:46 PM), https://www.washingtonpost.com/blogs/plum-line/wp/2016/01/21/time-to-press-the-presidential-candidates-on-flints-water-crisis/ [http://web.archive.org/web/20200404135550/https://www.washingtonpost.com/blogs/plum-line/wp/2016/01/21/time-to-press-the-presidential-candidates-on-flints-water-crisis/].

7. *In re* Flint Water Cases, 384 F. Supp. 3d 802, 825–26 (E.D. Mich. 2019).

8. *Id.*

not be operational for several years because, among other things, a new pipeline needed to be constructed to draw water from Lake Huron.[9]

In 2011, Flint commissioned a study to determine the viability of using the Flint River as a source of drinking water.[10] The study concluded that using water from the Flint River would require much more treatment than water sourced from Lake Huron, including the use of corrosion control chemicals.[11] The study also concluded that more than $69 million in capital improvements would be needed to upgrade the City's mothballed water treatment facility in order to properly treat water from the Flint River.[12]

At the same time that officials were assessing Flint's drinking water source, Flint's economic woes had become so dire that Governor Rick Snyder declared a financial emergency in Flint, and in August 2012, he appointed an Emergency Manager for the City under Michigan Public Act 436 of 2012.[13]

In 2013, Governor Snyder authorized Flint's Emergency Manager to enter into a contract with the new water authority beginning in mid-2016.[14] In June 2013, representatives from Flint, an engineering firm the City retained, the Genesee County Drain Commissioner's Office, and the Michigan Department of Environmental Quality (MDEQ)[15] met to discuss the transition to the Flint River as an interim source; the participants determined that the Flint River was a viable option provided that upgrades were made to Flint's idled water treatment system.[16]

On April 25, 2014, Flint's water treatment system began providing residents with water from the Flint River, without first adding chemicals to neutralize the water's known corrosivity.[17] As the Sixth Circuit explained regarding the transition:

> The harmful effects were as swift as they were severe. Within days, residents complained of foul smelling and tasting water. Within weeks, some residents' hair began to fall out and their skin developed rashes. And within a year, there were positive

---

9. *Id*. at 826–27.
10. *Id*. at 826.
11. *Id*.
12. *Id*.
13. *Id.* at 826; MICH. COMP. LAWS § 141.1549 (2013).
14. *Flint Water Cases*, 384 F. Supp. 3d at 827.
15. MDEQ recently changed its name to the Department of Environment, Great Lakes, and Energy. This Article will refer to the agency as MDEQ, which was the agency's name at the time the relevant events occurred.
16. *Id.* at 828.
17. Guertin v. State of Michigan, 912 F.3d 907, 914 (6th Cir. 2019).

> tests for E. coli, a spike in deaths from Legionnaires' disease, and reports of dangerously high blood-lead levels in Flint children. All of this resulted because the river water was 19 times more corrosive than the water pumped from Lake Huron by the DWSD, and because, without corrosion-control treatment, lead leached out the lead-based service lines at alarming rates and found its way to the homes of Flint's residents. The crisis was predictable, and preventable.[18]

The plaintiffs in the cases covered in this Article generally allege that numerous local, state, and federal officials and private consultants directed or recommended the switch to the Flint River despite the known risks, falsely assured the public that the water was safe to drink, and failed to take steps to mitigate the harmful effects of switching to the Flint River.[19]

A. Boler v. Governor

Similar to the other Flint Water Crisis cases discussed below, *Boler* involves claims by Flint residents and a Flint-based business against the City of Flint, City officials, the City's former emergency managers, the Governor, the State of Michigan, and the MDEQ and some of its employees.[20] Plaintiffs "allege that defendants conspired to keep from plaintiffs the seriousness of the pollution and contamination and that defendants allowed delivery of the water supply to continue, which put plaintiffs' health at risk and caused them damages."[21]

Boler considered, sua sponte, certain defendants' appeal of the Court of Claims's dismissal of plaintiffs' claims against them for lack of subject-matter jurisdiction.[22] The Court of Claims's decision was based on a prior opinion and order from the same court, holding that the City of Flint was not an "arm of the state," and "claims against the [C]ity and its employees were within the []jurisdiction of the circuit court[s]."[23]

By statute, the Court of Claims has exclusive jurisdiction over claims "against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court."[24]

---

18. *Id*. (citing Mason v. Lockwood, Andrews & Newmans, P.C., 842 F.3d 383, 387 (6th Cir. 2016)).
19. *See generally infra*.
20. Boler v. Governor, 324 Mich. App. 614, 617, 923 N.W.2d 287, 289 (2018).
21. *Id*. at 618, 923 N.W.2d at 289.
22. *Id*. at 617, 923 N.W.2d at 289.
23. *Id*. at 618–19, 923 N.W.2d at 290.
24. MICH. COMP. LAWS § 600.6419(1)(a) (2013).

The statute includes within the definition of "the state or any of its departments or officers," an "arm, or agency of the state."[25] On appeal, the City and its employees (referred to hereafter as "defendants") argued that the City was an "arm of the state" because (1) it operated "public waterworks in the name of public health," and (2) the State of Michigan exercised emergency management of the City during the relevant time period under the authority of MCL section 141.1549.[26]

With respect to the first issue, the *Boler* court described how Michigan law recognizes that a municipality can act in distinct roles: as an arm of the state when its actions affect the general public, and as an independent municipality when its actions are proprietary in nature and affect only its residents.[27]

The *Boler* court then surveyed the cases in the area of utilities and services and noted the fact that Michigan has increased the authority of municipalities over the years, particularly with the enactment of the Home Rule City Act and the adoption of the State's 1963 Constitution.[28] The court concluded:

> What is gleaned from these cases is that if a municipality is supplying a utility—or specifically waterworks—to its citizens and the citizens are paying for the waterworks, the municipality is operating the waterworks as a business, and it is doing so as a businessman or corporation, not as a concern of the state government or as the arm of the state. It is, after all, serving only a limited number of people within its boundaries, not the state as a whole. If, on the other hand, the municipality is supplying water for the purpose of protecting its citizens from fire or natural disaster or anything else that has the potential to have statewide impact, and it is not profiting from the provision of that water, it could be deemed to be serving a government function and serving the public in general. Then the municipality could be deemed to be acting as an arm of the state in maintaining and operating waterworks.[29]

---

25. MICH. COMP. LAWS § 600.6419(7) (2013).

26. *Boler*, 324 Mich. App. at 619, 923 N.W.2d at 290; MICH. COMP. LAWS § 141.1549 (2013).

27. *Boler*, 324 Mich. App. at 621, 923 N.W.2d at 291 (citing Tzatzken v. Detroit, 226 Mich. 603, 604, 198 N.W. 214, 214 (1924)).

28. *Id.* at 623–26, 923 N.W.2d at 292–93 (citing Associated Builders and Contractors v. City of Lansing, 499 Mich. 177, 186, 880 N.W.2d 743, 756 (Mich. 2016)).

29. *Id*. at 625–26, 923 N.W.2d at 293.

In light of that conclusion, the *Boler* court held that the City of Flint was not acting as an arm of the state when providing drinking water to its citizens.[30]

The court then moved to consider whether the City was transformed into an arm of the state by virtue of the State's emergency management.[31] The court described the relevant structure of Michigan's emergency management law—the governor has the authority to determine that a municipality is in a state of financial emergency and appoint an emergency manager.[32] Once appointed, the emergency manager takes over the municipality's executive authority.[33] The State compensates and employs the emergency manager.[34]

Next, the court considered the meaning of "arm of the state." After concluding that the phrase was not defined in the statute or in caselaw, the court consulted Black's Law Dictionary, which defined the phrase as "[a]n entity created by a state and operating as an alter ego or instrumentality of the state, such as a state university or a state department of transportation."[35] Black's Law Dictionary defined "instrumentality" as "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body."[36]

Based on these definitions, the *Boler* court held that the City of Flint remained an independent municipality despite the State's emergency management: "No function or purpose of the state was accomplished by the emergency manager's oversight of the city. The City was instead always operating as a means through which its own functions were accomplished."[37] The court concluded by observing that, if it were to hold otherwise, there would be serious, negative ramifications for the limited liability scheme established by the Governmental Tort Liability Act (GTLA).[38] Accordingly, the *Boler* court affirmed the dismissal of plaintiffs' claims because the Court of Claims did not have exclusive jurisdiction over the defendants.[39]

---

30. *Id*. at 626, 923 N.W.2d at 293–94.
31. *Id.*, 923 N.W.2d at 294.
32. *Id*. at 627, 923 N.W.2d at 294 (citing MICH. COMP. LAWS § 141.1546(1)(b), § 141.1549(1) (2013)).
33. *Id*. at 627–28, 923 N.W.2d at 294–95 (citing MICH. COMP. LAWS § 141.1549(2) (2013) and § 141.1549(3)(e)–(f) (2013)).
34. *Id*. at 628, 923 N.W.2d at 295 (citing Mays v. Governor, 323 Mich. App. 1, 54, 916 N.W.2d 227, 258–59 (2018)).
35. *Id*. at 629, 923 N.W.2d at 295 (quoting BLACK'S LAW DICTIONARY (10th ed. 2014)).
36. *Id*.
37. *Id*. at 630, 923 N.W.2d at 296.
38. *Id.*; *see also* MICH. COMP. LAWS § 691.1401 *et seq.* (2012).
39. *Boler*, 324 Mich. App. at 630, 923 N.W.2d at 296.

Defendants subsequently filed an application for leave to appeal to the Michigan Supreme Court.[40] Although the application was denied on March 29, 2019, Justice Zahra wrote a concurring opinion to address concerns raised by amici curiae, the Great Lakes Water Authority, DWSD, and the Oakland County Water Resources Commissioner.[41] Amici, who all provided drinking water to certain segments of Michigan's population, worried that *Boler*'s discussion of the distinction between governmental and proprietary functions in the provision of water could adversely affect their ability to claim governmental immunity under the GTLA.[42] Justice Zahra clarified that because *Boler* "does not address whether operating a water supply and distribution system is a governmental or proprietary function for purposes of the GTLA," there was no reason for the Supreme Court "to vacate any portion of [*Boler*] suggesting otherwise."[43]

Interestingly, although at least one Michigan Supreme Court justice believed that *Boler*'s holding has no direct bearing on governmental immunity under Michigan's GTLA, as discussed below, the Sixth Circuit in *Guertin* expressly relied on *Boler* in concluding that Flint was not entitled to qualified governmental immunity for purposes of the *Guertin* plaintiffs' federal civil rights claims.[44]

B. Guertin v. State of Michigan

The plaintiffs in *Guertin* were three Flint residents, claiming personal injuries from using the Flint River water.[45] *Guertin* arrived at the Sixth Circuit after the district court granted in part and denied in part the defendants' motion to dismiss.[46] On appeal, the remaining defendants argued qualified immunity and Eleventh Amendment immunity barred plaintiffs' civil rights claim under 42 U.S.C. § 1983.[47] The nature of plaintiffs' civil rights claim was that defendants violated their right to bodily integrity, guaranteed by the Fourteenth Amendment to the United States Constitution.[48]

The court first described what a plaintiff must show to avoid the defense of qualified immunity: "(1) that the official violated a statutory

40. *See* Boler v. Governor, 503 Mich. 997, 924 N.W.2d 250 (2019).
41. *Id.* (Zahra, J., concurring).
42. *Id.*
43. *Id.*, 924 N.W.2d at 251–52.
44. Guertin v. State, 912 F.3d 907, 928–40 (6th Cir. 2019).
45. *Id.* at 915.
46. *Id*.
47. *Id*. at 915–17.
48. *Id*. at 915.

or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct."[49] The court further cited United States Supreme Court precedent holding that the Due Process Clause in the Fourteenth Amendment protects, among other things, the right to bodily integrity and the right to be free from arbitrary and capricious government conduct that "shocks the conscience and violates the decencies of civilized conduct."[50]

Although the court in *Guertin* conceded that bodily integrity cases typically involve "government-imposed punishment or physical restraint," it stated that the cases are not limited to those fact patterns.[51] Instead, the jurisprudence on bodily integrity involves "balancing an individual's common law right to informed consent with tenable state interests, regardless of the manner in which the government intrudes upon an individual's body."[52] The *Guertin* court employed relevant examples, such as a state government's administration of medication to an inmate without consent and without a hearing[53] and governmental officials subjecting cancer patients to massive doses of radiation therapy without disclosing the associated risks.[54]

The court further observed:

> The numerous cases involving government experiments on unknowing and unwilling patients provides a strong analogy to the Flint Water Crisis. Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value—often under false pretenses and with deceptive practices hiding the nature of the interference—is a classic example of invading the core of the bodily integrity protection.[55]

Next, the court distinguished *Coshow v. City of Escondido*, one of the main cases relied on by the defendants and the dissent, which involved a municipality adding fluoride to the public water supply.[56] The court found the case inapposite because the city in *Coshow* publicized its

49. *Id.* at 917 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011)).
50. *Id.* at 918 (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998)).
51. *Id*. at 919 (citing Kallstrom v. City of Columbus, 136 F.3d 1055, 1062 (6th Cir. 1998)).
52. *Id*. (citing Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 269–70 (1990)).
53. Washington v. Harper, 494 U.S. 210, 213–17 (1990).
54. *Guertin*, 912 F.3d at 921 (citing *In re* Cincinnati Radiation Litig., 874 F. Supp. 796, 802–04 (S.D. Ohio 1995)).
55. *Id.* at 920–21.
56. *Id.* at 922 (citing Coshow v. City of Escondido, 34 Cal. Rptr. 3d. 19, 30 (Cal. Ct. App. 2005)).

action, and fluoride has widely recognized therapeutic value in preventing tooth decay.[57] In contrast, the lead in Flint's water had no health benefit, nor were Flint residents provided adequate notice concerning the contaminated water.[58] The *Guertin* court concluded that the district court was correct in holding that "a government actor violates the right to bodily integrity by knowingly and intentionally introducing life-threatening substances into individuals without their consent, especially when such substances have zero therapeutic benefit."[59]

Having found a deprivation of a constitutionally protected liberty interest, the *Guertin* court then proceeded to consider the second element: whether the defendants' conduct in depriving this constitutionally protected liberty interest was deliberately indifferent and shocked the conscience.[60] The outer goal posts of governmental conduct are mere negligence on the one end—which is categorically below the threshold—and intent to injure without a justification on the other—which very likely supports a substantive due process claim.[61] The instant case, the *Guertin* court observed, fell somewhere in the middle—closer to "recklessness or gross negligence."[62]

To determine whether the alleged conduct rose to the level of deliberate indifference, the *Guertin* court stated that:

> [W]e must find not only that the governmental actor chose to act (or failed to act) despite a subjective awareness of substantial risk of serious injury, but we also must make some assessment that he did not act in furtherance of a countervailing governmental purpose that justified taking that risk.[63]

The factors the Sixth Circuit regularly considers for that analysis are: (1) the amount of time the governmental actor had to deliberate; (2) the relationship between the actor and the plaintiff; and (3) the governmental purpose motivating the actor's conduct.[64]

The court in *Guertin* then considered those factors in the general sense before applying them to the individual defendants. The court found that the first factor generally weighed in plaintiffs' favor because the

---

57. *Id.*
58. *Id*.
59. *Id*. at 921.
60. *Id*. at 922 (collecting cases).
61. *Id*. at 923 (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)).
62. *Id*.
63. *Id*. at 924 (quoting Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ., 542 F.3d 529, 541 (6th Cir. 2008)).
64. *Id*.

harm suffered was a predictable and "known risk that cannot be excused on the basis of split-second decision making"; rather the decisions that culminated in the Flint Water Crisis were made over a period of years[65]

Likewise, the second factor favored plaintiffs because the relationship between the governmental actors and the plaintiffs was involuntary—Flint was required to provide drinking water to its residents, and the residents were required to accept it (unless they received approval for a spring or well).[66] In addition, by concealing the risks of the contaminated water and assuring the residents of the water's safety, the defendants transformed the residents' voluntary consumption of water into involuntary self-poisoning.[67] On the third factor, the court held that the temporary switch to river water was motivated by a desire to cut costs, which is a legitimate government interest; but, "jealously guarding the public's purse cannot, under any circumstances, justify the yearlong contamination of an entire community."[68]

Because plaintiffs did not allege that any defendants intended to harm Flint's residents, the court proceeded to determine whether each defendant met the deliberate indifference standard.[69]

1. Flint Defendants

As to the Flint Defendants, the court found that "[t]hese individuals were among the chief architects of Flint's decision to switch water sources and then use a plant they knew was not ready to safely process the water, especially in light of the Flint River's known environmental issues and the problems associated with lead exposure."[70] The court further found that they repeatedly misled the public by telling residents that the water was safe to drink.[71] The court found former Emergency Manager Gerald Ambrose's decision to twice turn down the opportunity to reconnect to DWSD water "especially egregious."[72] As to the defendants' argument that they reasonably relied on the expertise and professional judgment of the MDEQ and technical consultants (a point also made by the dissent, discussed below), the court found that those

---

65. *Id*. at 925.
66. *Id*.
67. *Id*. at 925–26.
68. *Id*. at 926.
69. *Id.*
70. *Id*. at 926–27.
71. *Id*. at 927.
72. *Id*.

were facts to be explored in discovery and did not justify dismissing plaintiffs' claims at such an early stage in the proceedings.[73]

2. MDEQ Defendants

With the exception of one MDEQ official (Director Daniel Wyant), the *Guertin* court reached a similar conclusion with respect to these defendants as it did for the Flint defendants:

> These MDEQ defendants played a pivotal role in authorizing Flint to use its ill-prepared water treatment plant to distribute drinking water from a river they knew was rife with public-health-compromising complications. Furthermore, when faced with the consequences of their actions, they falsely assured the public that the water was safe and attempted to refute assertions to the contrary.[74]

The court then described some of the most significant examples of the objectionable conduct.[75]

Thereafter, the court rejected the defendants' claim that they honestly misinterpreted and misapplied the EPA's Lead and Copper Rule (40 C.F.R. section 141.80 *et seq*.).[76] The rule requires a system like Flint's to optimize corrosion control treatment before distributing water to the public, yet MDEQ argued that it misinterpreted the rule as allowing for post-distribution sampling to determine if corrosion control is needed.[77] The *Guertin* majority noted that it was improper to conclude, as the dissent did, that the defendants did no more than misinterpret the rule, given plaintiffs' allegations that the EPA informed defendants that their interpretation was wrong, yet they ignored the agency's advice.[78]

As to the remaining MDEQ defendant, Director Wyant, the court held that the district court erred in refusing to grant his motion to dismiss.[79] At most, plaintiffs alleged that Wyant was aware of some of the issues arising from the switch to the Flint River and admitted, after the City reconnected to DWSD, that MDEQ's handling of the situation

73. *Id*.
74. *Id*.
75. *Id*. at 927–28.
76. *Id*. at 928–29.
77. *Id*.
78. *Id*. at 929.
79. *Id.*

was a "colossal failure."[80] The court concluded that this was insufficient to establish deliberate indifference.[81]

3. Michigan Department of Health and Human Services (MDHHS) Defendants

Plaintiffs asserted claims against two MDHHS executives and two lower-level MDHHS employees.[82] As to the executives, the *Guertin* court concluded that plaintiffs had at most alleged that they were unjustifiably skeptical of a study finding high blood-lead levels in Flint children and wanted to marshal data to disprove the study.[83] Because "[t]his falls well-short of conscience-shocking conduct," the court held that the district court erred by not dismissing the claims against the executives.[84] As to the lower-level employees, plaintiffs had generally alleged that they knew that the elevated lead levels in the drinking water could have been attributed to corrosion in the pipes but tried to attribute the issue to regular fluctuations in water quality.[85] The court held that this was insufficient—the employees' inaction did not cause any Flint resident to consume contaminated water.[86]

Having found that, as to at least some of the defendants, plaintiffs had properly met the first requirement needed to avoid the defense of qualified immunity—alleging the deprivation of their right to bodily integrity caused by deliberate indifference—the court proceeded to address the second element.[87]

The second element asks whether the constitutional right was clearly established at the time of the conduct at issue, such that "officials had 'fair warning' that their conduct was unconstitutional."[88] This requires plaintiffs to identify a case with a similar, though not identical, fact pattern to those in the complaint.[89]

The *Guertin* majority grappled with the issue that there was no case with facts comparable to the Flint Water Crisis.[90] But it ultimately concluded that this was not fatal to plaintiffs' claims because the conduct

---

80. *Id*.
81. *Id.*
82. *Id.* at 929, 931.
83. *Id.* at 930.
84. *Id.* at 930–31.
85. *Id*.
86. *Id*. at 930.
87. *Id.* at 932.
88. *Id*. (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).
89. *Id*. (citing White v. Pauly, 137 S. Ct. 548, 552 (2017); Burgess v. Fischer, 735 F.3d 462, 474 (6th Cir. 2013)).
90. *Id.* at 933.

alleged was so heinous that "[a]ny reasonable official should have known" that it was "conscious-shocking" and would lead to liability under the Substantive Due Process Clause.[91]

The court then identified the line of cases it described previously in the opinion, dealing with governmental administration of medical treatment to nonconsenting individuals, as sufficient notice to the defendants.[92] The court emphasized that the Flint Water Crisis was even more egregious than those cases because the governmental officials caused residents to unwittingly drink water contaminated with a toxin with no known health benefit and then falsely told them that the water was safe to drink.[93] The *Guertin* court, therefore, concluded that plaintiffs had properly pleaded claims against all remaining defendants other than Director Wyant and the MDHHS defendants.[94]

The court then addressed the second major issue—whether Flint was entitled to sovereign immunity under the Eleventh Amendment to the U.S. Constitution.[95] "The bar of the Eleventh Amendment to suit in federal court extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations."[96] To counter this general rule, Flint made the same argument that it made in *Boler*—the State's emergency management of the City transformed it into an arm of the state for purposes of sovereign immunity.[97]

The court stated that the Sixth Circuit considers four factors to determine whether an entity is an arm of the state:

> (1) [T]he State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the

---

91. *Id*.
92. *Id*. at 934.
93. *Id*.
94. *Id.* at 935.
95. *Id*. at 935–36.
96. *Id*. at 936 (quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)).
97. *Id.* at 938; *see also* Boler v. Governor, 324 Mich. App. 614, 619, 923 N.W.2d 287, 290 (2018).

entity's functions fall within the traditional purview of state or local government.[98]

The first factor, which the court described as the most important, weighed against Flint because the relevant Michigan statute provides that claims against cities are paid by the local tax rolls.[99] The applicable provisions of the emergency management statute are in accord with that general rule; they provide that any claims arising out of acts by the emergency manager are to be paid out of the funds of the municipality and that the emergency manager's actions do not create State liability.[100] Because the State has no potential liability for claims against Flint, the court held that this creates a "strong presumption" against Eleventh Amendment immunity.[101]

As to the second factor—state control over the municipality—the *Guertin* court began by observing that cities have broad powers under Michigan law.[102] As to Flint's argument that it acted as an "arm of the state" when supplying drinking water to its residents, the court followed *Boler* and held that "Flint's provision of water services clearly falls within its 'proprietor' function and does not transform the city into an arm of the state."[103] The court also followed *Boler* by concluding that the State's emergency management of Flint did not make the City an "arm of the state."[104] The court found *Boler*'s analysis persuasive and in accordance with another Sixth Circuit case, which found the emergency management statute "does not remove local elected officials; it simply vests the powers of the local government in an emergency manager."[105]

As to the third factor—state appointment of executives—the court found that it favored Flint because the State appointed Flint's emergency managers.[106]

The *Guertin* court found that the fourth factor weighed heavily against Flint because the City's functions, of course, fall within the traditional purview of local government.[107] The fact that MDEQ

98. *Guertin*, 912 F.3d at 937 (quoting Ernst v. Rising, 427 F.3d 351, 359 (6th Cir. 2005)).

99. MICH. COMP. LAWS § 600.6093(1) (2013).

100. MICH. COMP. LAWS § 141.1560(5), § 141.1572 (2013).

101. *Guertin*, 912 F.3d at 938 (quoting Kreipke v. Wayne State Univ., 807 F.3d 768, 777 (6th Cir. 2015)).

102. *Id*.

103. *Id*.

104. *Id*. at 939–40.

105. *Id*. at 940 (quoting Phillips v. Snyder, 836 F.3d 707, 715 (6th Cir. 2016)).

106. *Id*. at 940–41.

107. *Id*. at 941.

exercised oversight authority over Flint's provision of drinking water was not determinative in the court's opinion because MDEQ did not own or control Flint's water delivery system.[108]

In summary, *Guertin* affirmed the district court's conclusion that Flint was not entitled to Eleventh Amendment immunity and affirmed in part and reversed in part the district court's conclusion that the individual defendants were entitled to qualified immunity.[109]

Judge McKeague filed an opinion concurring in the majority's conclusion with respect to Eleventh Amendment immunity but dissenting from the ruling on qualified immunity; the fundamental distinction between Judge McKeague's opinion and the majority opinion lies in their interpretations of the complaint's factual allegations:

> The majority tells a story of intentional poisoning based on a grossly exaggerated version of plaintiffs' allegations. The complaint tells an entirely different story. It is a story of discrete and discretionary decisions made by a variety of policy and regulatory officials who were acting on the best information available to them at the time. In retrospect, that information turned out to be grievously wrong.[110]

In Judge McKeague's opinion, plaintiffs failed on both elements of the substantive due process analysis. First, he did not view the alleged conduct as conscience-shocking.[111] Second, he concluded that, even if the conduct met the standard, the governmental officials were not on notice that their conduct was constitutionally impermissible because "the Due Process Clause has never before been recognized as protecting against government conduct that in some way results in others being exposed to contaminated water."[112]

The *Guertin* opinion is far from the end of the matter. Defendants filed a petition for rehearing en banc, which was denied on May 16, 2019.[113] Two judges wrote separate concurring opinions stating that discovery should be allowed to proceed, but lamented the fact that the majority and dissenting opinions seemed to have reached the ultimate issues in the case without first allowing discovery to unfold.[114] Judge

---

108. *Id*.
109. *Id.*
110. *Id*. at 941 (McKeague, J., concurring in part and dissenting in part).
111. *Id*. at 942.
112. *Id*.
113. Guertin v. Michigan, 924 F.3d 309, 310 (6th Cir. 2019).
114. *Id*. at 310 (Gibbons, J., concurring); *id.* (Sutton, J., concurring).

Kethledge dissented from the denial of rehearing en banc, concluding that "the majority's decision on the issue of qualified immunity is barely colorable."[115]

Not surprisingly, defendants filed a petition for writ of certiorari,[116] which the U.S. Supreme Court denied on January 21, 2020.[117]

C. Burgess v. United States

The final Flint Water Crisis case this Article will cover is a federal district court's ruling on motions to dismiss filed by the federal government. *Burgess* involves consolidated cases brought by numerous Flint residents against the federal government due to the EPA's alleged role in the Flint Water Crisis.[118] Plaintiffs asserted claims under the Federal Tort Claims Act (FTCA).[119] The crux of plaintiffs' claims was the allegation that EPA "officials and employees negligently responded to the water crisis, including by failing to utilize the agency's enforcement authority under the Safe Drinking Water Act ('SDWA') to intervene, investigate, obtain compliance, and warn Flint residents of the health risks posed by the water."[120] The United States filed motions to dismiss for lack of subject-matter jurisdiction.[121]

Although the United States is typically immune from suit, the FTCA generally waives sovereign immunity provided that a private person under similar circumstances would be liable under state law for the alleged conduct.[122] But even if this hurdle is cleared, the FTCA contains exceptions, including the discretionary function exception.[123] Under that exception, the FTCA does not waive immunity for acts that are discretionary, meaning that they "involve an element of judgment or choice."[124] For the discretionary function exception to apply, a court must first determine whether the conduct involves an element of judgment and, if so, whether it is a judgment based on considerations of public policy.[125]

---

115. *Id*. at 315 (Kethledge, J., dissenting).
116. *See* Petition for Writ of Certiorari, City of Flint v. Guertin, 140 S. Ct. 933 (2020) (No. 19-205), 2019 WL 3890475.
117. City of Flint v. Guertin, 140 S. Ct. 933 (2020) (mem.).
118. Burgess v. U.S., 375 F. Supp. 3d 796, 800 (E.D. Mich. 2019).
119. *Id.* at 800–01; 28 U.S.C. § 2671 *et seq.*
120. *Burgess*, 375 F. Supp. 3d at 801.
121. *Id.*
122. *Id*. at 809 (citing 28 U.S.C. § 2674 (1988)).
123. *Id*.
124. *Id*. (quoting U.S. v. Gaubert, 499 U.S. 315, 322 (1991)).
125. *Id*. at 810 (citing Berkovitz v. U.S., 486 U.S. 531, 536–37 (1988)).

Turning to the allegations at issue, the *Burgess* court began by observing that, even if the EPA found that Flint's water system did not comply with the SDWA, the statutory sections on which plaintiffs relied gave the EPA broad discretion in deciding what, if any, action to take to address the noncompliance.[126] For example, Section 1414 of the SDWA provides that the EPA has discretion to decide what "advice and technical assistance . . . may be appropriate to bring the system into compliance" and what "the earliest feasible time" is to reach compliance.[127] Additionally, Section 1431 of the SWDA gives the EPA discretion to assess "what State and local authorities have done, whether those actions will protect public health, and whether those actions are sufficient."[128]

As to plaintiffs' allegation that the EPA failed to warn the public of the inadequacy of Flint's water system, the *Burgess* court found that "neither Section 1414 nor Section 1431 set forth a mandatory obligation for the EPA to issue warnings."[129]

The court then turned to the second element of the exception—whether the EPA's discretionary actions were of the type that the "exception was designed to shield."[130] Although the actions of regulatory agencies are entitled to the presumption that they are based on policy considerations,[131] plaintiffs relied on several cases to rebut that presumption.[132] For example, in *Myers v. United States*, the court determined that a mining safety inspector was not authorized to make safety compliance determinations based on policy considerations under the relevant statutory and regulatory scheme.[133] Courts in other cases reached similar conclusions.[134]

The court in *Burgess* found those cases analogous to the EPA's obligations under the SDWA.[135] The court observed that "Congress expressly directed the EPA to intervene under specified conditions. . . . The assessment of whether those conditions have been satisfied are informed by objective scientific standards, scientific knowledge, and the

126. *Id*. at 813.
127. 42 U.S.C. § 300g-3(a)(1)(A) (2018).
128. *Burgess*, 375 F. Supp. 3d at 813.
129. *Id*. at 813–14.
130. *Id*. at 814.
131. *See* U.S. v. Gaubert, 499 U.S. 315, 324 (1991).
132. *Burgess*, 375 F. Supp. 3d at 814–15.
133. Myers v. U.S., 17 F.3d 890, 898 (6th Cir. 1994).
134. *See, e.g.*, Whisnant v. U.S., 400 F.3d 1177, 1183–84 (9th Cir. 2005) ("Cleaning up [toxic] mold involves professional and scientific judgment, not decisions of social, economic, or political policy.").
135. *Burgess*, 375 F. Supp. 3d at 815.

professional judgment of experts in the field."[136] The court further found it significant that "[t]he EPA was well aware that the Flint River was highly corrosive and posed a significant danger of lead leaching out of the City's lead-based service lines at alarming rates into residents' homes," and "the EPA knew that MDEQ and Flint officials were not warning Flint's residents that they were being supplied with lead-laced water."[137]

The *Burgess* court concluded that the egregious nature of the conduct at issue presented "an instance where decisions by government actors, even if discretionary, 'may pass a threshold of objective unreasonableness such that no reasonable observer would see them as susceptible to policy analysis.'"[138] For further support, the court relied on the Sixth Circuit's *Guertin* decision.[139] In sum, the *Burgess* court held that the discretionary function exception did not apply to plaintiffs' claims that the EPA failed to act timely in response to the crisis.[140]

The court similarly held that the exception did not apply to plaintiffs' claim that the EPA acted negligently when responding to citizens' complaints.[141] It cited several cases standing for the proposition that the discretionary function exception does not apply where an agency chooses to act because, once it does, it must "do so without negligence."[142]

The court then considered the government's alternative argument that the misrepresentation exception applied to plaintiffs' claim that the EPA acted negligently.[143] The court rejected that argument because the exception is limited to misrepresentations of a "financial or commercial character," which the alleged EPA actions were not.[144]

The *Burgess* court proceeded to determine whether plaintiffs could state a claim under Michigan law—a necessary element for the FTCA waiver to apply.[145] Plaintiffs relied on the Good Samaritan doctrine that the Michigan Supreme Court adopted.[146] That doctrine provides:

---

136. *Id*.
137. *Id*. at 815–16.
138. *Id*. at 816 (quoting Hajdusek v. U.S., 895 F.3d 146, 152 (1st Cir. 2018)).
139. *Id*.; *see supra* Part II.B.
140. *Burgess*, 375 F. Supp. 3d at 816.
141. *Id*. at 817.
142. *Id*. at 816–17 (citing Wysinger v. U.S., 784 F.2d 1252, 1253 (5th Cir. 1986)).
143. *Id*. (citing 28 U.S.C. § 2680(h) (2006)).
144. *Id*. at 817.
145. *Id*.
146. *Id*. (citing Fultz v. Union-Commerce Assoc., 470 Mich. 460, 464, 683 N.W.2d 587, 590 (2004)).

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.[147]

The court found that the EPA undertook to provide services to plaintiffs by engaging in oversight of Flint's water system and responding to citizen complaints.[148] The court also found that plaintiffs had established subpart (c) of the doctrine by alleging detrimental reliance on the EPA's oversight and assurances that the water was safe to drink, and that state and local officials were adequately addressing residents' safety concerns.[149]

The *Burgess* court concluded that plaintiffs' claims came within FTCA's waiver of governmental immunity, and therefore denied the federal government's motions to dismiss.[150] The government subsequently petitioned the court to certify its decision for interlocutory appeal under 28 U.S.C. § 1292(b).[151] On September 27, 2019, the court denied the petition, concluding that its prior decision was too fact-intensive for interlocutory review and that interlocutory review would not expedite resolution of the case.[152]

III. NON-FLINT WATER CRISIS CASES

A. South Dearborn Environment Improvement Ass'n, Inc. v. Dep't of Environmental Quality

The Michigan Supreme Court issued a decision involving an environmental advocacy group's challenge to a state air permit-to-install

---

147. *Id*. at 818 (quoting RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965)).
148. *Id*.
149. *Id*.
150. *Id*. at 819.
151. Burgess v. U.S., Nos. 17-11218, 18-10243, 2019 WL 4734686, at *1 (E.D. Mich. Sept. 27, 2019).
152. *Id.* at *1–2.

issued to an existing steel mill.[153] At issue was whether plaintiff timely filed a petition for judicial review of the permit.[154] In a 4-3 decision, the Court held that the petition was timely because plaintiff had 90 days after the final permit action to file its petition, and plaintiff's petition was filed within that time period.[155]

The Court based its decision on the following sentence from Part 55 of Michigan's Natural Resources and Environmental Protection Act: "A petition for judicial review is the exclusive means of obtaining judicial review of a permit and shall be filed within 90 days after the final permit action."[156] The Court further based its decision on a sentence in MCL section 324.5505(8), which provides that "[a]ppeals of permit actions for existing sources are subject to section 5506(14)."[157]

The dissent disagreed and concluded that because the statute does not provide for judicial review of permits to install for existing sources of air emissions and because the Administrative Procedures Act does not apply, then one must look to the appellate court rules, which would fix the deadline for appeal at 21 days after the final permit action.[158]

B. National Wildlife Federation v. Secretary of the Dep't of Transportation

The Eastern District of Michigan issued a decision concerning the federal government's approval of response plans for the well-known Line 5 section of Enbridge's oil pipeline.[159] Line 5 is a section of the pipeline that runs through the Straits of Mackinac, the area where Lakes Michigan and Huron meet.[160] Due to concerns voiced over Line 5's condition and the fact that an oil spill in the Straits of Mackinac could be catastrophic, Line 5 has attracted significant attention in the press.[161]

---

153. South Dearborn Envtl. Improvement Ass'n. v. Dep't of Envtl. Quality, 502 Mich. 349, 355–57, 917 N.W.2d 603, 605–06 (2018).

154. *Id.* at 355, 917 N.W.2d at 605.

155. *Id.* at 374, 917 N.W.2d at 615–16.

156. *Id.* at 366–74, 917 N.W.2d at 611–16 (quoting MICH. COMP. LAWS § 324.5506(14) (2013)).

157. *Id.* at 362–74, 917 N.W.2d at 609–16 (quoting MICH. COMP. LAWS § 324.5505(8) (2013)).

158. *Id*. at 388–89, 917 N.W.2d at 623.

159. NWF v. Sec'y of the Dep't of Transp., 374 F. Supp. 3d 634 (E.D. Mich. 2019).

160. *Id.* at 642.

161. *See, e.g.*, Chad Livengood, *Nessel Sues to Shut Down Enbridge's Line 5 Oil Pipeline*, CRAIN'S DET. BUS. (June 27, 2019, 11:15 AM), https://www.crainsdetroit.com/environment/nessel-sues-shut-down-enbridges-line-5-oil-pipeline

The National Wildlife Federation (NWF) filed an action arguing that the federal government's approvals of the response plans for Line 5 were arbitrary and capricious because (1) they did not comply with the Clean Water Act's requirements, and (2) the government failed to explain the basis for its decision.[162] The NWF also argued that the approvals were invalid because the government did not follow the requirements of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).[163] Specifically, the NWF argued that the government did not prepare an environmental impact statement or consult with the appropriate agencies to ensure that endangered species would not be adversely impacted.[164] The NWF filed a motion for summary judgment on those grounds.[165]

With respect to the first issue, the court held that there was an ambiguity in the Clean Water Act over whether an oil pipeline should be considered a single "onshore" facility, as defendants argued, or numerous "onshore" and "offshore" facilities, as the NWF argued.[166] The court concluded that the statute was ambiguous on this point and, applying *Chevron* deference,[167] concluded that the government's interpretation was reasonable and denied the NWF's motion as to that issue.[168]

With respect to the second issue, the court agreed with the NWF and concluded that, as to each of the government's decisions approving the response plans, the government failed to adequately explain the basis for its decisions.[169] The court remanded the decisions to the government to provide a fuller explanation.[170]

With respect to the third issue, the court again sided with the NWF.[171] The court ruled that the government has obligations under NEPA and the ESA "because its review of response plans includes an exercise of environmental judgment for which the environmental

---

[http://web.archive.org/web/20200302020545/https://www.crainsdetroit.com/environment/nessel-sues-shut-down-enbridges-line-5-oil-pipeline].

162. *NWF*, 374 F. Supp. 3d at 645.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 641.
167. *See* Chevron USA, Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837 (1984).
168. *NWF*, 374 F. Supp. 3d at 646–47.
169. *Id.* at 655.
170. *Id.*
171. *See id.*

information imparted by way of those statutory processes could well be useful."[172]

On June 4, 2019, the Government appealed the district court's ruling to the U.S. Court of Appeals for the Sixth Circuit.[173] On January 13th, 2020, the Sixth Circuit set oral argument for March 19th, 2020.[174] However, oral argument was cancelled on March 16th, 2020, amid the COVID-19 outbreak.[175]

---

172. *Id*.

173. NWF v. Sec'y Dep't Transp. (19-1609), COURT LISTENER (June 5, 2019), https://www.courtlistener.com/docket/10735/national-wildlife-federation-v-secretary-dept-transportation/ [http://web.archive.org/web/20200305172330/https://www.courtlistener.com/docket/10735/national-wildlife-federation-v-secretary-dept-transportation/].

174. *Id.*

175. *Id.*