

November 12, 2019

Governor Gretchen Whitmer
P.O. Box 30013
Lansing, MI 48909

Re: Detroit Water Shutoffs

Dear Governor Whitmer:

On July 23, 2019, the organizations and individuals listed below submitted a request to the Michigan Department of Health and Human Services (MDHHS) for a declaratory ruling that the termination of water service to thousands of Detroit residents poses an imminent danger requiring immediate action to end the shutoffs.



State Headquarters
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6800
aclumich.org

West Michigan
Regional Office
1514 Wealthy Street SE
Suite 242
Grand Rapids, MI 49506
(616) 301-0930

Legislative Office
115 West Allegan
Lansing, MI 48933
(517) 372-8503

On September 23, 2019, Robert Gordon, Director of MDHHS, denied the request on grounds that MDHHS has “not identified data that suggest a causal association between water shutoffs and water-borne disease.” Left unaddressed was our warning that there are other grave health consequences caused by shutoffs that are unrelated to water-borne disease. These include such practical problems as: infant malnutrition resulting from the inability to make baby formula; the inability of diabetics to prepare meals essential to health maintenance; chronic urinary tract infections; upper respiratory tract infections, etc.

Most troubling however is a procedural irregularity. The Director’s letter states: “We have worked with the Detroit Health Department and have also evaluated state data. We have not identified data that suggest a causal association between water shutoffs and water-borne disease.” The nature and substance of any communications between MDHHS and the Detroit Health Department as well as referenced data have not been disclosed to us. In keeping with the spirit if not requirement that we receive some measure of due process, this information should have been provided to us, as well as the opportunity to challenge, supplement or comment.

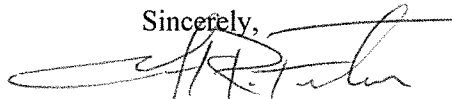
Our procedural grievance could be addressed by you by having the Director rescind his ruling on our petition and extend to us the opportunity to test any information provided by the Detroit Health Department and others. The Director could also address the practical health consequences we have identified. Although we are interested in receiving all information the Director considered, we also believe he has already betrayed his sentiments and analysis as well as the likelihood they will be unchanged by any additional arguments we might offer. For that reason, our approach to you is essentially an appeal of the Director’s decision.

Enclosed you will find a copy of our original petition that we ask that you review. In addition, we have enclosed a memorandum that outlines legal authority for our request that you issue an executive order that, among other things, directs restoration of water service for those in poverty who have lost it as well as a moratorium on future shutoffs. This is a reasonable and necessary remedy. Mayor Lori Lightfoot has directed that there be no further water shutoffs in Chicago. (See enclosed news article.) Detroit needs a moratorium as well.

Mass water shutoffs in Detroit have created a silent crisis that has already claimed the health and lives of far too many innocent people over the course of nearly two decades. Whatever political, economic or social factors that have to date prevented a remedy must be cast aside in the interest of preserving lives and communities. We urge in the strongest terms that you consider our appeal seriously and that you meet with us to discuss any concerns or reservations you might have about the remedies we propose.

Thank you very much for considering these matters. We look forward to hearing from you.

Sincerely,



Mark P. Fancher, Esq.
Staff Attorney
ACLU of Michigan Racial Justice Project

Bonsitu Kitaba-Gaviglio, Esq.
Deputy Legal Director
ACLU of Michigan

Alice Jennings, Esq.
Edwards & Jennings

John Philo, Esq.
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Sugar Law Center for Economic & Social Justice

Desiree Ferguson, Esq.
Legal Director
Detroit Justice Center

Jerome D. Goldberg, Esq.
Attorney for Moratorium Now

Anthony Adams, Esq.
Marine-Adams Law, P.C.

Erin Mette, Esq.
Equal Justice Works Fellow
Great Lakes Environmental Law Center

Cc: Ninah Sasy, Clean Water Public Advocate

MDHHS Declaratory Ruling Form

Michigan Department of Health & Human Services Request for Declaratory Ruling	
Applicants' full name: <ul style="list-style-type: none"> American Civil Liberties Union of Michigan Edwards & Jennings, P.C. Maurice & Jane Sugar Law Center for Economic and Social Justice Detroit Justice Center Moratorium Now Marine-Adams Law, P.C. Great Lakes Environmental Law Center 	Applicant's degree or title (if applicable):
Applicant's mailing address: Correspondence to all Applicants will be received by: ACLU of Michigan Attn: Mark P. Fancher 2966 Woodward Ave. Detroit, MI 48201	Professional/occupational license no. (if applicable):
Daytime telephone no.: Mark P. Fancher (313) 578-6822	Name and address of legal counsel (if applicable): Mark P. Fancher, Esq. (ACLU of Michigan) Bonsitu Kitaba-Gaviglio, Esq. (ACLU of Michigan) Alice Jennings, Esq. (Edwards & Jennings) John Philo, Esq. (Sugar Law Center) Desiree Ferguson, Esq. (Detroit Justice Center) Jerome Goldberg, Esq. (Moratorium Now) Anthony Adams, Esq. (Marine-Adams Law, P.C.) Erin Mette, Esq. (Great Lakes Environmental Law Center)
<p>Statement of facts: (Please provide a complete, accurate and concise statement of the facts or situation upon which the request is based. The statement shall include all facts known to you which are or may be relevant to a determination of the applicability of statute, rule, final order or decision.)</p> <p>See the Attachment for the Statement of Facts.</p>	

Laws/Rules/Orders: (Please provide references to all statutes, rules, final decisions or orders which are to be considered.)

MCL 333.2251; MCL 333.2253

Issues: (Please provide a concise statement of the issues presented)

Health experts have concluded that mass water shutoffs in Detroit directly cause the spread of water-borne illness. Thus, the relevant questions are:

- Whether mass water shutoffs are an “imminent danger” as defined in MCL 333.2251 requiring the health director take “immediate action” to suspend the shutoffs.
- Whether the spread of water-borne illness constitutes an “epidemic” as defined by MCL 333.2253 that requires the health director to suspend water shutoffs in order to “insure continuation of essential public health services” as defined by statute.

Analysis and Conclusions: (Please provide an analysis, legal brief or memorandum of the issues presented, including reference to any legal authority relied upon, and the applicant’s conclusions.)

See the Attachment for the Analysis and Conclusions.

Certification: I hereby certify the existence of the actual state of facts set forth and the submission of all relevant facts known to me:

Date: July 23, 2019

Signature: /s/ Mark P. Fancher

Attachment to
REQUEST FOR MDHHS DECLARATORY RULING

Submitted by:

- American Civil Liberties Union of Michigan
- Edwards & Jennings, P.C.
- Maurice & Jane Sugar Law Center for Economic and Social Justice
- Detroit Justice Center
- Moratorium Now
- Marine-Adams Law, P.C.
- Great Lakes Environmental Law Center

Pursuant to MCL 24.263 and Administrative Rule 325.1211, Applicants request a Declaratory Ruling from the Michigan Department of Health and Human Services (MDHHS) because ongoing water shutoffs in Detroit are causing widespread health problems and there is a high likelihood that shutoffs will lead to outbreaks of disease. This circumstance constitutes an “imminent danger” as defined by the Public Health Code. Applicants seek voluntary restraint or injunctive relief to stop the termination of water services to thousands of Detroit households pursuant to Michigan’s Public Health Code sections 333.2251 and 333.2253. Applicants respectfully request an accelerated ruling from MDHHS on this request.

A. Statement of Facts

1. The Detroit Water and Sewerage Department (DWSD), the municipal utility responsible for the delivery of water services to residents and businesses in Detroit, regularly engages in water shutoffs as a response to customers’ purported payment delinquency. The number of affected households has frequently numbered in the thousands. For instance, in 2014, 33,000 households had their water shutoff; in 2015, 23,000 residents were disconnected; in 2016, 27,552 residents were disconnected; in 2017, 17,665 residents were disconnected; and for 2018, as of August of that year, 11,422 residents were shut off from clean running water at their

homes.¹ The United Nations General Assembly formally recognized “the importance of equitable access to safe and clean drinking water as an integral component of the realization of all human rights.”²

2. Researchers and other public health experts are particularly concerned about the threat of large outbreaks of communicable diseases that can result from mass water shutoffs. While the occurrence of epidemics after mass water shutoffs is often sporadic and unpredictable, several other dangers to public health occur predictably and routinely whenever a water authority engages in mass water shutoffs to the scale seen in Detroit. This petition places special emphasis on such health hazards because too often the threat and significance of such health conditions are disregarded.

3. Providers of support services for low income residents of the Brightmoor neighborhood in northwest Detroit report that widespread water shutoffs in the area have triggered a variety of serious health problems.

4. One of the health problems observed in Brightmoor (that occurs in other communities as well), is low infant weight. When family households lose water service, mothers are unable to consistently prepare infant formula and feed their babies. As a direct result, infants do not receive adequate nourishment and the lack of nourishment is reflected in the babies’ physical condition.

5. Some persons who have lost water service experience elevated blood pressure brought on by the stress of not having water.

¹ Joel Kurth, “In Detroit, surviving without running water has become a way of life” (October 24, 2018), *Bridge Magazine*, <<https://www.bridgemi.com/detroit-journalism-cooperative/detroit-surviving-without-running-water-has-become-way-life>>.

² United Nations Resolution 64/292 (accessed October 26, 2018), <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/292>.

6. Service providers report that in some Brightmoor homes without clean running water, residents experience illnesses resulting from the consumption of rain water accumulated in barrels.

7. Persons with diabetes living without clean running water have been reported to suffer complications because they cannot prepare meals without clean water.

8. Brightmoor residents living without clean running water cope with a variety of other illnesses that include, among others: chronic urinary tract infections among women and children; upper respiratory illnesses; and chronic and infected eczema and other skin disorders.

9. While some might discount the seriousness of the health conditions described above, what makes the reported illness stand out is that they are all preventable. But because of the lack of access to clean running water, these illnesses occur needlessly and affect thousands of water customers with terminated service. Additionally, other observable consequences of water shutoffs can affect households that have not been shutoff. Because mass water shutoffs dramatically decrease the number of consumers using the water distribution system, shutoffs directly contribute to conditions that contaminate the water supply itself and create breeding grounds for communicable disease. This is because far fewer consumers are regularly flushing the distribution pipes and there are areas of the city where the water stagnates.

10. Researchers who study the effects of water interruptions on the water distribution system explain:

Increasingly, concern has been raised on contamination occurring within the distribution system. This can occur through cross-connections, contaminated storage facilities, backflow and during low and negative pressure incidents. There are many causes of pressure transients, such as turning on and off a pump, opening and closing valves, power failures, flushing of the network, fire fighting and **anything that causes a sudden change in demand**. Mains breaks, maintenance work and repair can cause loss of water pressure lasting for hours. Studies performed in the United States have shown that low-pressure incidents in otherwise

satisfactory water distribution pipes can cause aspiration of microorganisms from the surrounding soil. (Emphasis added.)³

11. There is also a measured correlation between poverty and lack of water. In Detroit, 35.7 percent of the population lives below the federal poverty line, meaning that among major U.S. cities, Detroit has one of the highest rates of poverty.⁴ Although the U.S. Environmental Protection Agency recommends that water services should cost no more than 4.5 percent of household income, Detroit residents often pay as much as 20 percent of their household income on water.⁵ Consequently, many Detroit residents are unable to afford clean running water.

12. In 2014, DWSD initiated a campaign to terminate the water services of city residents with bills delinquent by more than 60 days or with arrearages of over \$150.⁶ It is estimated that as of October 2018, DWSD had disconnected more than 112,000 homes as part of this ongoing program of mass water shutoffs.⁷

13. These mass water shutoffs have not gone unnoticed. Rapporteurs from the United Nations condemned the DWSD policy and issued a statement that the Detroit water shutoffs are “contrary to human rights.”⁸

³ *Breaks and Maintenance Work in the Water Distribution Systems and Gastrointestinal Illness: A Cohort Study*, by: Karin Nygard, et al., *International Journal of Epidemiology*, 36:873-880 (Feb. 7, 2007).

⁴ Frank Witsil, “Metro Detroit’s poverty gets worse despite city’s comeback” (April 26, 2018), *Detroit Free Press*, <<https://www.freep.com/story/news/local/michigan/detroit/2018/04/26/detroit-poverty-getting-worse/553439002/>>.

⁵ Cria Kay, et al, “Water Insecurity in Southesat Michigan: The Impacts of Unaffordability and Shutoffs on Resident Wellbeing” (April 2018), University of Michigan School for Environment and Sustainability, <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/143169/Roadmap%20to%20Water%20Security_320%20%281%29.pdf?sequence=1&isAllowed=y>.

⁶ Mary M. Chapman, “Hundreds in Detroit Protest Over Move to Shut Off Water” (July 18, 2014), *New York Times*, <<https://www.nytimes.com/2014/07/19/us/protesters-picket-detroit-over-move-to-shut-off-water.html>>.

⁷ *Id.* at fn 1.

⁸ UN News, “In Detroit, city-backed water shut-offs ‘contrary to human rights,’ say UN experts,” (October 20, 2014), <<https://news.un.org/en/story/2014/10/481542-detroit-city-backed-water-shut-offs-contrary-human-rights-say-un-experts>>.

14. In April 2017, the Henry Ford Global Health Initiative and Division of Infectious Disease released the results of a study which found a significant association between water shutoffs and the spread of water-borne illnesses, even when controlling for socioeconomic status.⁹ Authors of the study included Alexander Plum, MPH and Dr. Marcus Zervos, MD. Their study -- "The Impact of Geographical Water Shutoffs on the Diagnosis of Potentially Water-associated Illness, with the Role of Social Vulnerability Examined" -- examined "the relationship between city-imposed water shutoffs and health outcomes among patients at its hospital in Detroit."

15. The study utilized block level data where the city-imposed water shutoffs occurred along with information about Henry Ford patient admissions and the diagnosis of certain gastrointestinal (GI) and soft tissue diseases. The research shows that "patients who are the most likely to be impacted by water-associated illness resulting from the shutoffs are also the most socially vulnerable. . . . [T]he effect of living on a block that has been affected by shutoffs results in increased likelihood that patients will be diagnosed with water-associated illness."

16. In July 2017, co-author Dr. Zervos publicly qualified the study's findings as "preliminary," and he cautioned against the politicization of the research. Specifically, he noted that available data identified only residential blocks where shutoffs occurred, and specific houses that lost water services could not be pinpointed. Consequently, researchers were unable to make specific findings regarding illnesses of specific individuals and the specific causes.¹⁰

⁹ Alexander Plum, MPH, CHES, Kyle Moxley, ABD, Marcus Zervos, MD, "The Impact of Geographical Water Shutoffs on the Diagnosis of Potentially Water-associated Illness, with the Role of Social Vulnerability Examined" (April 8, 2017), < <http://wethepeopleofdetroit.com/wp-content/uploads/2017/07/Water-ShutoffsIllnesses-Report.pdf>>.

¹⁰ Jennifer Chambers, "Experts: Water shutoffs causing public health emergency" (July 26, 2017), *The Detroit News*, < <https://www.detroitnews.com/story/news/local/detroit-city/2017/07/26/detroit-water-shutoffs-health-study/104016812/>>.

17. However, Dr. Zervos' co-author, Dr. Alexander Plum, wrote: "because bacteria can begin to grow when water shutoffs occur, neighbors of impacted shutoff residences can also become sick. For that reason, and while still imperfect, our level of analysis in the current research (i.e. the block level) is still an appropriate associative level for analysis."¹¹

18. Other health experts have concluded that the water shutoffs have caused a "public health crisis." These include Dr. Wendy Johnson, clinical assistant professor at the University of Washington;¹² Dr. Abdul El-Sayed, former health director of the City of Detroit;¹³ and George Gaines, MSW, MPH, who in a 2018 analysis found that the shutoffs caused "epidemic levels" of water-borne illness.¹⁴ In a document titled "Memorandum of Waterborne and Food borne Disease in Detroit 2015- 2017," Gaines, a former Deputy Director of the Detroit Health Department identified four diseases which are directly related to the absence of water in a community. They are: gastroenteritis, campylobacter, shigellosis, and giardiasis. Gaines compared annual data for the period 2012 through 2015 with data from 2016 and 2017 when as many as 80,000 shut offs occurred.

19. Additional research is in progress, and it is expected to add to the already disturbing evidence that mass water shutoffs trigger public health emergencies. These projects are being conducted by We the People of Detroit and the Community Research Collective in cooperation with other researchers. The projects include:

¹¹ Alexander Plum to Dr. Marcus Zervos and Dr. Joneigh S. Khaldun, "Re: Thanks & 2 next steps" (April 18, 2017). Email.

¹² *Supra.* fn 10.

¹³ Jonathan Oosting, "Gov hopeful pledges moratorium on shutoffs" (November 2, 2017), *The Detroit News*, <<https://www.detroitnews.com/story/news/politics/2017/11/02/el-sayed-water-shutoff-moratorium/107247470/>>.

¹⁴ George Gaines, MSW, MPH, "Three Waterborne Outbreaks in Detroit" (June 2018), <<https://www.peopleswaterboard.org/wp-content/uploads/2018/07/DetInfDisease.pdf>>.

- A collaborative effort with Michigan State University that focuses on water quality within the water distribution system of DWSD. The project seeks an answer to the question of how water shut offs impact the quality of water.
<https://engagedscholar.msu.edu/magazine/volume11/quality-water.aspx>
- A Youth-led project conducted in partnership with Freshwater Futures and the University of Michigan that involves, among other things, water sampling and testing for high lead and copper levels in Detroit water.
<https://vimeo.com/320809586>
- A project led by Prof. Nadia Gaber to examine the psychosocial impact of water shut-offs – specifically the mental and physical health impact of water insecurity. The results of this study will soon be released by the New England Journal of Medicine. The research includes surveys that examine the health impact of water insecurity on prenatal care, medical necessity and other health vulnerabilities.¹⁵

ANALYSIS AND CONCLUSION

Scientific studies and the actual circumstances of persons without water services as set forth in detail above provide the basis for a declaratory ruling from MDHHS for a moratorium on water shutoffs in Detroit. MCL 333.2251 provides in relevant part:

Upon a determination that an imminent danger to the health or lives of individuals exists in this state, the director immediately shall inform the individuals affected by the imminent danger and issue an order that shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. The order shall incorporate the director's findings and require

¹⁵ <http://www.urbanwaterslearningnetwork.org/water-as-a-human-right-public-health-research-and-advocacy-in-detroit/>
<http://www.urbanwaterslearningnetwork.org/author/kaitlin-popielarz>
(Pages 7 - 9/ highlight the WPD: CRC work on the psychosocial impacts of water insecurity)
<https://haasinstitute.berkeley.edu/detroitwaterequity>
<http://inthesetimes.com/article/21412/detroit-water-shutoffs-child-services-debt>
<https://www.npr.org/2019/02/08/691409795/a-water-crisis-is-growing-in-a-place-you-d-least-expect-it>

immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger.

The statute further provides:

If the director determines that conditions anywhere in this state constitute a menace to the public health, the director may take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances in addressing that menace.

Given the facts and circumstances set forth above, this law minimally requires MDHHS to consider the facts and studies presented in this petition, and to make a determination of whether the conditions described pose an imminent danger to the people of Detroit.

The statute defines “imminent danger” as “...a condition or practice [that] exists that could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided.”

The existing and potential health crises demand an immediate official response. As provided by the statute, the Applicants request that MDHHS order correction of the imminent danger, specifically by the cessation of residential water shutoffs. If there is non-compliance or non-cooperation by the City of Detroit, and it is determined that conditions resulting from the water shutoffs are a menace to the public health, then Applicants urge “the director...[to]... take full charge of the administration of applicable state and local health laws, rules, regulations, and ordinances in addressing that menace.”

Finally, Applicants are concerned about actual or potential epidemics. MCL 333.2253 provides in relevant part:

If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people

for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

Applicants conclude that water constitutes an “essential public health service” necessary to prevent the spread of water-borne illness, and therefore finds this statute applicable to the mass water shutoffs. Applicants further highlight the fact that the Director’s emergency procedure options “shall not be limited to” the statute, and the Director is authorized pursuant to MCL 333.2253 to suspend water shutoffs. We urge the Director to do so now.

Respectfully Submitted:

/s/ Mark P. Fancher

Mark P. Fancher, Esq. (ACLU of Michigan)

Bonsitu Kitaba-Gaviglio (ACLU of Michigan)

Alice Jennings, Esq. (Edwards & Jennings)

John Philo, Esq. (Sugar Law Center)

Desiree Ferguson, Esq. (Detroit Justice Center)

Jerome Goldberg, Esq. (Moratorium Now)

Anthony Adams, Esq. (Marine-Adams Law, P.C.)

Erin Mette, Esq. (Great Lakes Environmental Law Center)

Dated: July 23, 2019



STATE OF MICHIGAN

GRETCHEN WHITMER
GOVERNOR

DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

ROBERT GORDON
DIRECTOR

September 23, 2019

Mark P. Fancher, Esq.
2966 Woodward Avenue
Detroit, MI 48201

Re: Request for Declaratory Ruling

Dear Mr. Fancher:

On July 29, 2019, the Michigan Department of Health and Human Services received your request for a declaratory ruling under the Michigan Administrative Procedures Act, MCL 24.263. Specifically, you have requested a declaratory ruling in response to the following questions as posed in your request:

- Whether mass water shutoffs are an "imminent danger" as defined in MCL 333.2251 requiring the health director take "immediate action" to suspend the shutoffs.
- Whether the spread of water-borne illness constitutes an "epidemic" as defined by MCL 333.2253 that requires the health director to suspend water shutoffs in order to "[i]nsure continuation of essential public health services" as defined by statute.

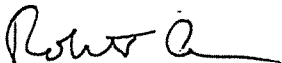
Michigan Administrative Code Rule 325.1211 governs requests for declaratory rulings. It gives the Agency full discretion to determine whether it will issue a declaratory ruling within 60 days of the receipt of a request. Specifically, Rule 325.1211(8) provides:

(8) The agency may deny a request for declaratory ruling if the applicant fails to follow the procedure for submission in this rule, if the statement of facts is incomplete or inaccurate, if the facts or circumstances relate to a changing situation, if the ruling would not be in the public interest or in furtherance of statutory objectives, or for any other stated reason. The agency shall set forth the reason or reasons for denial of the request in its written notification to the applicant.

The Department denies your Request for Declaratory Ruling for the following reasons:

1. "Imminent danger" as defined by MCL 333.2251(5)(b) means "a condition or practice exists that could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided." While the department believes that access to clean water is a priority for everyone in Michigan, and there are significant challenges faced by residents whose water has been shut off, these challenges do not rise to the level of an imminent danger under the Public Health Code. We have worked with the Detroit Health Department and have also evaluated state data. We have not identified data that suggest a causal association between water shutoffs and water-borne disease. We suggest that municipalities work diligently to prevent any water shutoffs from occurring, and that every effort be made by local authorities to make resources available to residents in the event they are at risk of having an interruption in water services due to inability to pay.
2. The applicants may seek, via counsel, legal remedies other than requesting a declaratory ruling from the Department of Health and Human Services.
3. MCL 333.2253 provides that "if the director of the department determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws." As noted above, there is insufficient data to show that water-borne diseases are specifically caused by water shutoffs, how the purported water-borne diseases caused by water shutoffs are an epidemic, or how a declaratory or emergency ruling by the department would control illness.

Sincerely,



Robert Gordon
Director

RG:llr

MEMORANDUM

November 12, 2019

To: Governor Gretchen Whitmer

From: Mark P. Fancher, Esq.
Staff Attorney
ACLU of Michigan Racial Justice Project

Bonsitu Kitaba-Gaviglio, Esq.
Deputy Legal Director
ACLU of Michigan

Alice Jennings, Esq.
Edwards & Jennings

John Philo, Esq.
Executive and Legal Director
Sugar Law Center for Economic & Social Justice

Desiree Ferguson, Esq.
Legal Director
Detroit Justice Center

Jerome D. Goldberg, Esq.
Attorney for Moratorium Now

Anthony Adams, Esq.
Marine-Adams Law, P.C.

Erin Mette, Esq.
Equal Justice Works Fellow
Great Lakes Environmental Law Center

Re: Legal Authority for Executive Order on Detroit Water Shutoffs

Background

On July 23, 2019 a coalition of organizations and individuals submitted a request to the Michigan Department of Health and Human Services (MDHHS) for a declaratory ruling that the termination of water service to thousands of Detroit residents posed an imminent danger requiring immediate action to end the shutoffs. The petition also included a request for acknowledgment of the existence of an epidemic of water-borne illnesses. On September 23, 2019, the director of MDHHS denied the request, stating in part: “We have worked with the Detroit Health Department and have also evaluated state data. We have not identified data that suggest a causal association between water shutoffs and water-borne disease.”

The petitioners object to this ruling, and we believe the Governor should be particularly troubled by it because it completely disregards her first executive directive (Executive Directive 2019-01). It states in relevant part:

Action to mitigate preventable threats to public health, safety, and welfare always should take precedence over any ill-advised attempt to protect the reputation of a department or agency, manipulate public perception, avoid political backlash, or engage in defensiveness, self-justification, or insular conduct.

The Directive further states:

When information relating to a threat to public health, safety, or welfare contradicts an official position or prior action, I expect state departments and agencies to be receptive and open-minded toward that information. Informed opinions based on science and evidence—even when critical of state government—must be viewed as an opportunity for reassessment rather than as a threat.

The petitioners otherwise take exception to the MDHHS ruling for several additional reasons that include, but are not limited to the following:

1. The ruling was issued with no consideration for due process opportunities for the petitioners. Apparently, there was extensive engagement with Detroit officials, but there was no opportunity for the petitioners to review any data that was submitted or to challenge any assertions or representations made by city officials.
2. The ruling addressed only one set of circumstances that was the subject of the petition, namely water-borne illnesses. The petition also complained of more practical, more easily observed consequences of not having water. The petition stated in relevant part:

“Providers of support services for low income residents of the Brightmoor neighborhood in northwest Detroit report that widespread water shutoffs in the area have triggered a variety of serious health problems. One of the health problems observed in Brightmoor (that occurs in other communities as well), is low infant weight. When family households lose water service, mothers are unable to consistently prepare infant formula and feed their babies. As a direct result, infants do not receive adequate nourishment and the lack of nourishment is reflected in the babies’ physical condition. Some persons who have lost water service experience elevated blood pressure brought on by the stress of not having water. Service providers report that in some Brightmoor homes without clean running water, residents experience illnesses resulting from the consumption of rain water accumulated in barrels. Persons with diabetes living without clean running water have been reported to suffer complications because they cannot prepare meals without clean water. Brightmoor residents living without clean running water cope with a variety of other illnesses that include, among others: chronic urinary tract infections among women and children; upper respiratory illnesses; and chronic and infected eczema and other skin disorders. While some might discount the seriousness of the

health conditions described above, what makes the reported illness stand out is that they are all preventable”

These conditions were presented in support of the petitioners’ conclusion that the absence of water causes an “imminent danger” that demands the declaration of a public health emergency. However, the ruling ignored these conditions altogether notwithstanding the substantial threat to public health that they pose.

The struggle to end mass water shutoffs is not of recent origin. Mass water shutoffs and resistance to them have occurred for more than 15 years. In addition to numerous campaigns, petitions and other forms of advocacy by numerous individuals and organizations, the issue was the subject of a litigation challenge in *Lyda, et al v. Detroit Water and Sewerage Department*. [*In re City of Detroit*, 841 F.3d 684 (6th Cir. 2016)]. That case found its way to the Sixth Circuit Court of Appeals, and the courts turned the aggrieved water customers away at each level of the proceedings. The hope that MDHHS might grant some measure of relief was frustrated by the MDHHS director’s recent ruling. Concerned organizations and individuals now turn to the Governor for relief.

Proposed Remedy

We propose an executive order that addresses the many crises caused by the termination of water service to thousands of residential customers in Detroit. The order would declare that mass water shutoffs have created a public health emergency in Detroit, and it would direct the director of the Michigan Department of Health and Human Services (MDHHS) to reconsider his factual and legal conclusions about our petition for declaration of a public health emergency. It would further direct restoration of water service for residential water customers whose service was terminated and order a moratorium on water service termination until affected residential customers are able to participate in a water affordability plan. Finally, it would require transparency by water providers regarding their termination of water service to their customers.

Legal Authority

Each element of the proposed executive order is grounded in legal authority as demonstrated below:

1. May a governor declare a public health emergency?

A governor has authority to declare an emergency pursuant to the Emergency Management Act (MCL 30.402). That statute defines an emergency as: “...any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state.” This definition is quite broad, and we believe it embraces the many dire consequences that befall the thousands of people in Detroit who lack water. Even in the absence of water-borne disease, members of communities who lack

water must cope with dehydration, inability to prepare infant formula, inability to prepare meals essential for diabetics, etc.

2. May a governor call upon an agency head to reconsider a decision?

Article 5, Section 10 of the Michigan Constitution provides in relevant part: “The governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive.” In addition, Article 5, Section 8 provides: “Each principal department shall be under the supervision of the governor unless otherwise provided by this constitution. The governor shall take care that the laws be faithfully executed. He shall transact all necessary business with the officers of government and may require information in writing from all executive and administrative state officers, elective and appointive, upon any subject relating to the duties of their respective offices.” Therefore, in a good faith effort to ensure faithful execution of the laws, it is entirely permissible for a governor to request the head of an agency to revisit what the governor may regard as an ill-considered decision.

3. May a governor order the reconnection of water service for residential customers?

The Emergency Management Act authorizes a governor to take direct action to ameliorate emergency conditions. MCL 30.405(1) provides in relevant part: “In addition to the general authority granted to the governor by this act, the governor may, upon the declaration of a state of disaster or a state of emergency do 1 or more of the following: “(b) [The governor may] **[u]tilize the available resources of the state and its political subdivisions, and those of the federal government made available to the state, as are reasonably necessary to cope with the disaster or emergency.**” (emphasis added) Also, “... (j) Direct all other actions which are necessary and appropriate under the circumstances.” Presumably, these provisions and others provide statutory authority for the governor to address the crises resulting from the lack of water by directing the reconnection of water, or even taking direct control of the machinery of water providers.

4. May a governor declare a moratorium on termination of water services?

MCL 30.405(1)(a), (b) and (j) allow the governor to declare a moratorium on shutoffs. Pursuant to MCL 30.405(1)(a), a governor may: “Suspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency.” A policy of terminating water service as a means of collection certainly contributes to the community crisis, and a governor is permitted to suspend any such order by a water provider. The courts have also affirmed this authority. In *Home Building & Loan Association v Blaisdell*, 290 US 398 (1934), the Supreme Court upheld a moratorium on foreclosures during a period of emergency, essentially holding that the people's right to survive superseded the contract clause of the constitution. And in *Russell v Battle Creek Lumber Co.*, 265 Mich 649 (1934), a similar moratorium on foreclosures in Michigan was upheld by the Michigan Supreme court citing *Blaisdell*.

5. May a governor demand transparency by an agency of government?

As noted above Article 5, Section 10 of the Michigan Constitution provides in relevant part: “The governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive.” The clear implication of this language is that a request can be made for an agency head to produce information about agency operations to a governor, and that in her discretion the governor may share such information with the public. There is continuing uncertainty about the number of water shutoffs that occur in Michigan. Consequently, effective planning and policy development are likely inhibited or limited.

Conclusion

Water shutoffs have plagued Detroit’s poor for far too long. The Governor has the right and responsibility to address this problem directly. It is respectfully requested that by way of executive order, or otherwise, that the Governor direct the reconnection of water service for customers whose service was terminated as well as declare a moratorium on present shutoffs and grant all other appropriate and necessary forms of relief.

Chicago Will Stop Shutting Off Water Service Due To Unpaid Bills: 'Water Is A Basic Human Right'

The utility bill reform is Mayor Lori Lightfoot's latest step in her push to overhaul the city's fines and fees system.

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By: Pascal Sabino

NORTH LAWNDALE — The city will no longer shut off a resident's water supply because of unpaid utility bills, Mayor Lori Lightfoot announced Friday.

At the announcement at Saint Agatha's Church in North Lawndale, Lightfoot said access to water is a basic human right that too many Chicagoans have had to go without because they have had to choose between paying the utility bills and paying for other needs. The city's new Utility Billing Relief and Debt Forgiveness program aims to alleviate the burden of overdue water bills on residents.

The new policy will also provide pathways for residents to settle their utility debts by paying a discounted rate of 50 percent for water service, sewer and water-sewer tax bills. After one year of meeting the discounted payments, the city would forgive previously incurred debt.

An estimated 20,000 people will be affected by the relief program, the mayor said, and the changes would lower the average homeowner's metered bill from \$53 to \$33 a month.

Lightfoot said this program is a continuation of her larger fines and fees overhaul to stop penalizing people because they can't afford to keep up with their city bills. The city's historically regressive fines and fees system "entrap[s] our residents, our neighbors in generational poverty," Lightfoot said.

"Our families deserve to live their lives without the constant financial stress imposed by city government. They need a pathway to compliance to be able to pay their bills," the mayor said.

In July, Lightfoot said similar reforms would be made to the city's parking ticket program when she announced the city would stop suspending driver's

licenses for unpaid tickets and make it easier for drivers to access payment plans to settle ticket debt.

An ordinance to authorize the new program will be introduced to City Council next month. The program will be implemented in partnership with the Community and Economic Development Association of Cook County, which will work with partner groups across the city to conduct enroll homeowners in the new program beginning in March 2020.

Homeowners whose households fall below 150 percent of the federal poverty level qualify for the program. That amounts to an annual income of \$18,735 for a single person household, \$25,365 for a two-person household, \$31,995 for a three-person household and \$38,625 for a family of four.

Ald. Michael Scott Jr. (24th) said the new utility billing program will go help level the playing field for families overburdened by utility bills.

“Water is a basic human right... This allows folks who do not have the wherewithal or the means or who have tried and bills have just kind of stacked up... to not have to worry about that choice,” Scott said.

North Lawndale Employment Network CEO Brenda Palms Barber said the new program will have a tremendous impact on North Lawndale and on families across the city that are similarly impacted by unemployment, mass incarceration and disinvestment.

“We continue to be a community that has four times the unemployment rate of other neighborhoods,” Barber said. “It’s expensive to be poor. And when you can’t pay a phone bill or can’t pay a utility bill or, or a water bill, it doesn’t make you ready to work. It doesn’t allow you to support yourself or your family.”

Lawndale resident Sadie Joseph, who has been helped by existing utility assistance programs after she was incarcerated, said the new program will be a critical pathway for people to get the assistance they need.

“The struggle is real, and everybody can’t afford it right after being incarcerated,” Joseph said. “Or just can’t afford it and [are] too ashamed to come forward.”