



Congress of the United States
House of Representatives

October 25, 2016

The Honorable Loretta Lynch
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Lynch:

We are concerned that the State of Michigan's application of its Emergency Manager Law (EML)¹ to block the City of Flint from suing the State in connection with the Flint water crisis is not only unlawful under state law, but raises serious constitutional due process, equal protection, and associated environmental justice issues. We are writing to ask that you review these constitutional issues.

By way of background, the EML permits the State to usurp the powers of local elected municipal officials by replacing them with an unaccountable emergency financial manager (EFM) appointed by the governor. It was the EFM appointed for the City of Flint who made the decision to switch the municipal water supply to the Flint River as a cost saving measure. The untreated river water corroded pipes during delivery, exposing thousands of Flint residents to toxic levels of lead and other contaminants. In fact, the Flint Water Advisory Task Force, appointed by Governor Rick Snyder to determine the causes of the water contamination, found:

The Flint water crisis occurred when state-appointed emergency managers replaced local representative decision-making in Flint, removing the checks and balances and public accountability that come with public decision-making. Emergency managers made key decisions that contributed to the crisis, from the use of the Flint River to delays in reconnecting to [the Detroit Water and Sewer Department] once water quality problems were encountered.²

Unfortunately, it now appears that the State is attempting to further abuse its authority under the EML by preventing the City of Flint from pursuing legal claims should the State fail to make the City and its residents whole.

¹ The Local Financial Stability and Choice Act, Michigan Public Act 436 of 2012.

² Flint Water Advisory Task Force, Final Report at 1 (Mar. 21, 2016), *available at* http://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf

On March 31, 2016, Flint’s Receivership Transition Advisory Board (RTAB) – a body controlled by the State for the purpose of transitioning the City back to local elected governance – recommended that an order issued by the Flint EFM be revised to require the City to seek the Board’s approval prior to the initiation of any litigation by the City.³ This restriction was imposed only days after the City filed a routine notice of intent to file suit against the State, which is necessary under Michigan law in order for a city to preserve its right to seek a legal remedy.⁴

Before removing a local government from receivership, MCL section 141.1563(1) authorizes the governor to appoint a RTAB “to monitor the affairs of the local government until the receivership is terminated.”⁵ The statute, in turn authorizes the RTAB to carry out various, specifically enumerated duties pertaining to the monitoring of a city’s financial affairs.⁶ MCL section 141.1563(5)(h) also authorizes the governor to assign to a RTAB “any other duties...at the time the receivership transition advisory board is appointed.”⁷

On April 29, 2015, Governor Snyder appointed a RTAB for Flint and authorized it to perform various “other duties” including the following:

Recommend amendments, modifications, repeal, or termination of Emergency Manager Order No. 20, or any other Flint Emergency Manager orders, to the State Treasurer. Recommended amendments, modifications, repeal, or termination of Emergency Manager Orders must be approved by the State Treasurer before any such modification becomes effective.⁸

On March 24, 2016, the City of Flint filed a notice of intent to sue the State for “grossly negligent oversight.”⁹ In apparent retaliation, the RTAB just a week later issued a recommendation requiring that it first approve the initiation of any litigation by Flint, including any action by the City against the State.¹⁰ On April 5, 2016, this recommendation was approved by the state treasurer.¹¹

As a matter of state law, prior constraint on Flint’s ability to seek judicial redress appears to exceed the governor’s authority under MCL section 141.1563 in several respects. First,

³ Paul Egan, *After Court Threat, State of Michigan Removed Flint's Power To Sue*, DETROIT FREE PRESS, Sept. 19, 2016, available at <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/09/18/after-court-threat-state-removed-flints-power-sue/90467828/>.

⁴ *Id.*; Paul Egan & Matthew Dolan, *State to Flint: Withdraw Lawsuit Threat*, DETROIT FREE PRESS, Apr. 1, 2016, available at <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/01/flint-sue-state-over-water/82514758/>.

⁵ MCL § 141.1563.

⁶ *Id.*

⁷ *Id.*

⁸ Letter to Ruth Johnson, Michigan Secretary of State, from Rick Snyder, Governor of Michigan (Apr. 29, 2015).

⁹ Paul Egan & Matthew Dolan, *State to Flint: Withdraw Lawsuit Threat*, DETROIT FREE PRESS, Apr. 1, 2016, available at <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/01/flint-sue-state-over-water/82514758/>.

¹⁰ Receivership Transition Advisory Board for the City of Flint Resolution 2016-3 available at http://www.michigan.gov/documents/treasury/Resolution_2016-3_520735_7.pdf.

¹¹ *Id.*

section 141.1563(1) specifically limits the purpose of appointing a RTAB “to monitor the affairs of the local government.”¹² Second, section 141.1563(5) very clearly enumerates the RTAB’s specific duties, virtually all of which relate to the review of the City’s revenue and financial policies.¹³ And, nowhere in the enumerated powers is the State granted the power to disapprove lawsuits filed by the City. Third, it would seem counterintuitive if the EML statute was construed to permit the RTAB – a mere transitory body meant to pave the way for local governance after an EFM – to deny the City of Flint the authority to seek appropriate legal redress when the law does not grant the EM itself such explicit authority. Fourth, it would also seem to be a juxtaposition of public policy for the EML to allow the governor to violate the public trust by appointing officials who engaged in misconduct on behalf of the State and then allow the same governor to appoint individuals to the RTAB endowed with the power to insulate the State and governor from legal responsibility for such misconduct.

Lastly, although section 141.1563(5)(h) authorizes the governor to assign the RTAB “any other duties . . . at the time the [Board] is appointed,” Flint’s RTAB was not given the additional responsibility of pre-approving any litigation by City at the time of the Board’s appointment.¹⁴ Instead, the Board was not given this power until nearly one year later under the RTAB’s responsibility to “[r]ecommend amendments, modifications, repeal, or termination of Emergency Manager Order No. 20, or any other Flint Emergency Manager orders, to the State

¹² MCL § 141.1563.

¹³ (5) A receivership transition advisory board may do all of the following:

(a) Require the local government to annually convene a consensus revenue estimating conference for the purpose of arriving at a consensus estimate of revenues to be available for the ensuing fiscal year of the local government.

(b) Require the local government to provide monthly cash flow projections and a comparison of budgeted revenues and expenditures to actual revenues and expenditures.

(c) Review proposed and amended budgets of the local government. A proposed budget or budget amendment shall not take effect unless approved by the receivership transition advisory board.

(d) Review requests by the local government to issue debt under the revised municipal finance act, 2001 PA 34, MCL 141.2101 to 141.2821, or any other law governing the issuance of bonds or notes.

(e) Review proposed collective bargaining agreements negotiated under section 15(1) of 1947 PA 336, MCL 423.215. A proposed collective bargaining agreement shall not take effect unless approved by the receivership transition advisory board.

(f) Review compliance by the local government with a deficit elimination plan submitted under section 21 of the Glenn Steil state revenue sharing act of 1971, 1971 PA 140, MCL 141.921.

(g) Review proposed judgment levies before submission to a court under section 6093 or 6094 of the revised judicature act of 1961, 1961 PA 236, MCL 600.6093 and 600.6094.

(h) Perform any other duties assigned by the governor at the time the receivership transition advisory board is appointed.

Id.

¹⁴ *Id.* (emphasis added); *Supra* n. 8.

Treasurer.”¹⁵ This appears to be an invalid exercise of the Governor’s appointment power under section 141.1563(5)(h). And, it appears designed to circumvent the time restrictions on the Governor’s power to assign other unenumerated duties to a RTAB. It does so by permitting the RTAB to “recommend” new duties for itself at any time and without limitation, so long as it has the approval of the state treasurer. Empowering the RTAB with such boundless unfettered authority appears to contradict limitations placed on the governor’s appointment power under section 141.1563(5)(h), which specifically limits the RTAB’s powers to those mandated “*at the time* the [Board] is appointed.” As such, the RTAB’s actions denying the City of Flint the power to initiate litigation without its approval may be unauthorized by the statute.

In terms of federal constitutional concerns, we would in particular ask that you review whether the State’s attempt to foreclose Flint’s legal authority to sue the State for the harms inflicted on the City’s residents implicates the Due Process Clause,¹⁶ Equal Protection Clause,¹⁷ and associated environmental justice concerns.

First, we are concerned that the state-appointed RTAB’s potentially unauthorized action to restrain Flint’s authority to initiate litigation and its apparent failure to adequately notify the City of the import of its actions may have deprived the City of Flint and its residents of constitutionally protected due process. It is a fundamental precept of due process that state officials are required to follow fair procedures before taking away life, liberty, or property—in this case, the right to seek legal redress from the State — and that government, regardless of the procedure afforded, may not exercise power arbitrarily or oppressively.¹⁸

The RTAB, according to news reports, failed to fully explain to Flint City Council members and others in attendance during the Board’s March 31 meeting that the Board’s recommendation would further limit the powers of city officials to sue, rather than restore greater autonomy to the City.¹⁹ The minutes of the RTAB’s March 31 meeting indicate that RTAB Chairman Frederick Headen told City Council members and others “that the ‘purpose of the proposed RTAB resolution ... is to restore, basically, the role the City Council would otherwise have had, meaning that such litigation could not be settled without first being approved by the

¹⁵ *Supra* n. 8.

¹⁶ U.S. Const., art. XIV, § 1.

¹⁷ *Id.*

¹⁸ *See* *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (“We have emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government,’ whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective”) (citations omitted); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case”); *See also* *Gomillion v. Lightfoot*, 364 U.S. 339, 344–45 (1960) (“[T]he Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution”).

¹⁹ Ron Fonger, *Council members didn't know state board's move limited Flint's ability to sue*, Mlive.com (Sept. 20, 2016) available at http://www.mlive.com/news/index.ssf/2016/09/flint_council_didnt_know_state.html.

City Council.’”²⁰ Furthermore, the meeting minutes show that Chairman Headen “[made] no mention of the RTAB’s new authority to approve all lawsuit filings and settlements.”²¹

Second, we are unaware of any other instance where Michigan has prohibited a municipality from seeking judicial redress without obtaining prior approval from the State.²² As you know, Equal Protection—which fully applies to the states—is the constitutional guarantee that no person or class of persons shall be denied the same protection of the laws that is enjoyed by others in the same circumstances.²³ Given the fact that Flint is a majority African American municipality, the denial of the City’s right to obtain judicial redress may therefore implicate the Equal Protection Clause.²⁴ The State’s own Flint Water Advisory Task Force acknowledged that the lack of public accountability for public decision-making by an EFM was especially harmful to low-income communities of color. The Task Force found that “Flint residents, who are majority Black or African American and among the most impoverished of any metropolitan area in the United States, did not enjoy the same degree of protection from environmental and health hazards as that provided to other communities.”²⁵ Voting-rights expert Jocelyn Benson, the former dean of Wayne State Law School, previously observed “there is significant evidence [that the] amended Emergency Financial Manager law [itself] has disproportionate impact on the state’s Black and Latino population.”²⁶

Third, we are concerned that the actions of the State may have violated principles of environmental justice, which are premised on notions of Equal Protection. Indeed, the State’s own Water Advisory Task Force recognized that the City’s water crisis is an “environmental injustice” and cited three structural failings: (1) the EFMs ignored the necessary checks and balances inherent in a functioning democracy;²⁷ (2) the EFMs created a decision-making framework biased in favor of fiscal austerity, while ignoring public health and safety needs. This triggers financial decisions that can threaten public safety and social needs;²⁸ (3) the EFMs failed to build in necessary non-financial sources of expertise needed to govern a city across its full range of human and social concerns.²⁹

At its core, this predominately African American and high-poverty community has been deprived of all ability to influence the most basic decisions affecting its health and safety at enormous human and economic cost. The EFMs completely disregarded the opinions of Flint’s residents in a legal environment in which EFMs had sole authority.

²⁰ *Id.*

²¹ *Id.*

²² See, e.g., Editorial, *State’s Cowardly Act: Changing the Rules for Flint*, DETROIT FREE PRESS, Sept. 19, 2016, available at <http://www.freep.com/story/opinion/editorials/2016/09/19/flint-water-crisis-lawsuit/90688258/>

²³ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race”).

²⁴ *Id.*

²⁵ Flint Water Advisory Task Force, Final Report at 54 (Mar. 21, 2016).

²⁶ Rep. John Conyers, Jr., *The Long, Dangerous History of Emergency Management*, THE NATION 22, at 23, Mar. 7, 2016.

²⁷ Flint Water Advisory Task Force, Final Report at 1 (Mar. 21, 2016).

²⁸ *Id.* at 40-2.

²⁹ *Id.* at 12.

In this regard, it is important to note that Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, requires a federal agency to “make environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”³⁰ On February 11, 2014, President Obama issued a Presidential Proclamation commemorating the 20th Anniversary of Executive Order 12898 and firmly re-committed the Administration’s dedication to making sure that we “live up to the promise that here in America, no matter who you are or where you come from, you can pursue your dreams in a safe and just environment.”³¹ Further, the Environmental Protection Agency has defined environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”³² It goes without saying that such treatment has not been provided in the present instance.

Finally, in light of the fact that the Michigan State Attorney General may be called upon to defend the State against any such lawsuit by the City, it would appear that he has a potential conflict of interest and thus may be unable or unwilling to address the concerns that we are bringing to your attention.

For the reasons outlined above, we respectfully ask the Justice Department to investigate these concerns and report back your conclusions.

³⁰ Exec. Order No. 12,898, 3 C.F.R. 859 (1995).

³¹ Proclamation No. 9082, 3 C.F.R. 9082 (2015).

³² U.S. Environmental Protection Agency, *Environmental Justice*, at <https://www.epa.gov/environmentaljustice> (last modified Sept. 14, 2016).

Sincerely,

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