

Judge rules former Michigan Governor Snyder, EPA can be sued by Flint residents

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23 April 2019

Thousands of Flint, Michigan residents have been party to several civil suits over the contamination and lead-poisoning of their water system for almost five years. Until recently, former Governor Rick Snyder, who presided over the switch in the city's water supply from the Detroit system to the heavily polluted Flint River, was protected from liability under the "sovereign immunity" doctrine. The same was true for the federal government, including the US Environmental Protection Agency (EPA).

However, recent federal court rulings have opened both Snyder and the EPA to civil liability charges.

Legal actions were initiated by residents and businesses charging Flint city officials, the state of Michigan and two private consulting firms with 14 claims of harm, ranging from violation of bodily integrity to gross negligence. Another action by approximately 3,000 city residents is underway in federal court targeting the EPA for its negligence.

As US District Judge Judith E. Levy makes clear in her 128-page opinion filed earlier this month in regard to what are collectively referred to as the "Flint Water Cases," the "procedural history" of the legal action is "complicated." Motions were filed by more than 150 lawyers and several leaves were granted by the court for plaintiffs to amend the complaints originally submitted.

Last August, Levy separated Snyder and five other state employees, including former Michigan Department of Environmental Quality (MDEQ) Director Dan Wyant, Flint Emergency Manager Ed Kurtz, Flint Mayor Dayne Walling and former Michigan Department of Health and Human Services official Nancy Peeler, from the case. The judge justified her decision on the grounds that the plaintiffs had not provided specific evidence that could, under the Federal Tort Claims Act (FTCA), justify a limited waiver of sovereign immunity.

This month, the judge partially reversed her ruling from last August regarding the liability of the former governor, based on the newly amended complaints. Judge Levy ruled on April 1 that Snyder can be sued by Flint residents for violating the "right to bodily integrity."

At the same time, Levy dismissed claims against Snyder and others for violation of the US Constitution's guarantee of equal protection as set forth in the Fourteenth Amendment, save for the specific issue of violations of bodily integrity.

She also dismissed conspiracy charges, charges of violations of Michigan's ELCRA (civil rights) protections, and allegations of a state-created danger. Charges against the private water consulting and engineering firms Veolia and LAN for fraud, negligent infliction of emotional distress, negligence and gross negligence were also dismissed.

Of the 14 counts alleged, claims continue for only (1) allegations of

violation of bodily integrity by city and state officials and (2) allegations of professional negligence by Veolia and LAN.

In rejecting the request of plaintiffs' attorneys to modify their earlier filings with respect to claims of violations of equal protection, Levy ruled against the argument that Flint residents had suffered illegal discrimination based on race or poverty in the water crisis.

With respect to allegations of racial discrimination, Levy ruled that even if all the allegations against the defendants were proven true, they would not meet the requirements to prove racial discrimination (particularly those concerning discriminatory intent or purpose). Among other points, the judge noted that the city is 40 percent white.

Moreover, while not contesting the history of racial discrimination in the Flint area, Levy argued that the suit did not connect this history to the actions and intentions of the government officials being sued. In summarizing her dismissal of the claim of equal protection on grounds of racial discrimination, Levy wrote, "Neither the specific sequence of events nor any departure from standard procedures suggests a race-based motive."

With respect to allegations of discrimination against the poor, a very different legal yardstick applies. Here, Levy plainly stated, "A class of less wealthy persons is not a protected class for the purposes of equal protection."

This is certainly the case, as denial of basic services is a part of daily life for the working class!

The judge did accept the plaintiffs' argument that the charges in relation to the violation of bodily integrity, a right courts have accepted as a part of the 14th Amendment's guarantee of equal protection, could proceed.

It is noteworthy that the order did not claim that this violation was about the failure to provide clean water per se. "This is not a case about the right to a contaminant-free environment or clean water," wrote Levy. The judge made clear that she was not carving out a right of the public to this vital necessity.

Other courts have made this more explicit. Stephen Rhodes, the judge who presided over the Detroit bankruptcy case, ruled in 2014 against a proposed six-month moratorium on water shutoffs by the city's Water and Sewage Department, writing that "there is no such right or law" that mandates the provision of clean and safe water.

In the Flint water civil cases, the claim of violation of bodily integrity turns on allegations that officials committed harm by misleading the public, attempting to persuade it to continue to drink, bathe, and otherwise use water that they knew, very soon after the April 25, 2014 switch to the Flint River, to be unfit for consumption and unsafe. "[O]fficials can violate an individual's bodily integrity by introducing life-threatening substances into that person's body

without their consent.” So wrote Levy in her order.

The protracted period during which government officials knew about the danger, advocated continued use of the toxic water and declared it to be safe, hid evidence to the contrary, blackguarded those who came forward with evidence of the danger, rejected arguments to return to the former water source, and belittled the complaints of residents “shocks the conscience,” the judge wrote. This is the legal threshold needed to pursue a case against executive officials for violation of bodily integrity, a bar that is set intentionally high so as to limit such claims.

Having had ample warning about the water, reasoned Levy, the Snyder administration could have alerted residents or simply confirmed the validity of residents’ complaints. “Instead, the governor misled them into assuming that nothing was wrong” Judge Levy wrote. “Governor Snyder’s administration even encouraged them to continue to drink and bathe in the water.”

In particular, the judge noted the decision to delay for months the declaration of a state of emergency.

Five years have passed since the beginning of the crisis. The lawsuit before Levy is, the judge writes, “still in its early phases.” Assuming that some sort of financial damages are awarded to some portion of Flint residents, it will be many years before the money is paid.

In a similar ruling filed last Thursday, US District Judge Linda V. Parker allowed a lawsuit to go forward against the EPA. The decision concluded that “Plaintiffs plead facts sufficient to hold the Government liable under the FTCA for its response to the Flint Water Crisis.”

The EPA’s defense, which was rejected with this ruling, was that its role as an oversight body made the Flint water disaster solely the liability of the state of Michigan.

Meanwhile, the criminal prosecutions announced with much fanfare by then-Michigan Attorney General Bill Schuette in 2016, charging 15 individuals with a series of misdemeanors and crimes related to their roles in the man-made disaster, have stalled. Seven of these cases have resulted in defendants, generally lower-level officials, pleading guilty to lesser charges in exchange for offers to cooperate with state prosecutors, while eight cases are yet to be decided.

Stephen Busch, the former Lansing district coordinator for the MDEQ’s Office of Drinking Water and Municipal Assistance, pled to a misdemeanor charge of creating a disturbance at a public meeting. His initial charges included involuntary manslaughter.

The turnover of control of the state executive to the Democratic Party has brought the proceedings to a virtual end. In January, the Republican administration of Rick Snyder was succeeded by that of Democrat Gretchen Whitmer. Candidate Whitmer had pledged to “fight to clean up Michigan’s drinking water” and accused Schuette of using the legal proceedings to promote his failed run for the governor’s office.

On February 7 of this year, the special assistant attorney general for the Flint Water Crisis, Noah Hall, was dismissed, just one month after he had given a radio interview in which he spoke about the financing of the Karegnondi Water Authority (KWA) pipeline as being “riddled with fraud.”

The KWA was the entity created to provide water to Flint and surrounding areas instead of the Detroit system, on which Flint had relied for decades. There was no real need for the new KWA pipeline, as the Detroit water system had been operating a similar one, just miles away, for decades.

In a radio interview just a week after the swearing-in of the New

Democratic governor, Hall stated that most surprising and troubling to him was the discovery that what happened during the previous administration was not a mistake, but a “systematic disregard” for human life. Hall added that he expected Whitmer would both allow civil cases against former state officials to proceed unimpeded and provide a “complete accounting” of how the water crisis began in the first place.

In 2016, Hall, a professor of law at Wayne State University specializing in environmental matters, was brought in by the then-attorney general, Bill Schuette, to provide himself with a veneer of independence from the Snyder administration. (Schuette would go on to unsuccessfully challenge Whitmer for the governor’s seat in the November 2018 election).

As the WWS reported in 2016, the participation of Flint in the KWA was dependent upon fraud. Roughly one-third of the \$285 million dollar cost to set up the KWA infrastructure was to be borne by the city. The problem with the plans of the KWA organizers, and their backers in the Flint government, was that the city was under borrowing restrictions as part of its emergency financial management status.

To circumvent the city’s debt limits, the MDEQ, at the request of public officials, created a phony “Administrative Consent Order” (ACO) requiring the city to make fixes to lagoons at its wastewater treatment plants. The ACO was then cited to justify taking on debt otherwise not allowed. Cleaning up the lagoons would use only a small fraction of the funds obtained, leaving the rest for the KWA project.

This was the fraud to which Hall referred in his January 7 interview, one month before being fired by the office of Dana Nessel, the new Democratic state attorney general.

At nearly the same time, the news service Mlive reported that the new administration’s solicitor general, Fadwa Hammoud, had paused prosecution of former officials in order to “evaluate and re-evaluate the evidence in this case and the charges on all defendants.”

Meanwhile, repairs to the water infrastructure in Flint continue at a glacial pace. The release of \$77 million in federal funds announced earlier this month does not fundamentally alter the situation. The money, in fact, consists of loans that will have to be repaid, and this will undoubtedly fall most heavily on the working class of Flint.



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