**STATE OF MICHIGAN**

**COURT OF CLAIMS**

OAKLAND COUNTY WATER RESOURCES COMMISSIONER, GREAT LAKES WATER AUTHORITY, CITY OF DETROIT and CITY OF LIVONIA,

Plaintiffs,

v

Case No. 18-000259-MZ

Hon. Christopher M. Murray

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.
_____/

**ORDER GRANTING DEFENDANT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY'S FEBRUARY 1, 2019 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8).**

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan.

The Court, having reviewed defendant's February 1, 2019 motion for summary disposition, and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED that defendant's February 1, 2019 motion for summary disposition is GRANTED, and Counts I-V of plaintiffs' complaint are DISMISSED with prejudice.

IT IS SO ORDERED.

This is a not a final order that closes this case.

Date: July 26, 2019

Christopher M. Murray
Judge, Court of Claims

# STATE OF MICHIGAN

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DEPARTMENT OF ENVIRONMENTAL QUALITY,

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**OPINION REGARDING DEFENDANT'S FEBRUARY 1, 2019 MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8).**

Case No. 18-000259-MZ

Hon. Christopher M. Murray

Pending before the Court is defendant's motion for summary disposition pursuant to MCR 2.116(C)(8). For the reasons that follow, the motion will be GRANTED.

## I. BACKGROUND

Pursuant to the Michigan Safe Drinking Water Act (MSDWA), defendant Michigan Department of Environmental Quality (MDEQ)[1] has the authority to promulgate and enforce rules to carry out the act, "pursuant to the administrative procedures act of 1969, 1969 PA 306[.]" MCL 325.1005(1). The case at bar involves MDEQ's promulgation of revised lead and copper rules, pursuant to MDEQ's authority to promulgate rules pertaining to "State drinking

[1] Effective April 22, 2019, the Department of Environmental Quality was renamed the "Department of Environment, Great Lakes, and Energy." Executive Order No. 2019-06. This opinion will refer to the Department as "MDEQ" because the Department was so designated at all times pertinent to this case.

water standards and associated monitoring requirements[.]" MCL 325.1005(1)(b). These State drinking water standards are intended to work in tandem with pertinent federal law, set forth at 42 USC 300f *et seq.* Federal law sets "national primary drinking water regulations," and the states are permitted to adopt their own standards that are "no less stringent" than the national standards. 42 USC 300g-2(a)(1). Federal law sets forth a "maximum contaminant level" for drinking water regulations and, in certain instances, such as situations pertaining to lead levels in water, the federal standards set forth a "treatment technique in lieu of establishing a maximum contaminant level[.]" 42 USC 300g-1; 40 CFR 141.80. The current federal lead action level is triggered "if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period . . . is greater than .015 ml/L" (also referred to as 15 parts per billion). 40 CFR 141.80(c)(1).

Pursuant to its rule-making authority, MDEQ submitted a Request for Rulemaking to the Office of Regulatory Reform in March 2017.[2] The request noted that the proposed rules were prompted by "immense public pressure to update the rules to protect public health" in the wake of what occurred with the Flint water system. Between July 2017 and November 2017, MDEQ held five "stakeholder" meetings with entities—including plaintiffs—that would be affected by the proposed rule changes. After receiving comments and suggestions, MDEQ produced a 13-page Regulatory Impact Statement and Cost-Benefit Analysis (RIS). The RIS proposed making

[2] Many of the documents outlining the rule-making process have been attached to the parties' briefing. These documents were not attached to plaintiffs' complaint, however. Because the Court considers these documents and because the parties' briefing repeatedly cites the same, the Court will consider them and will evaluate defendant's motion pursuant to MCR 2.116(C)(10), as well as pursuant to (C)(8), where appropriate and noted.

Michigan's lead and copper rule more stringent than the current federal standard, including a lowering of the lead action level, and the removal of lead service lines.

The rulemaking process continued in February and March 2018 with notices and a public hearing. In response to comments received at the March 1, 2018 public hearing, MDEQ made additional changes to the rules and submitted them, along with public comments, to the Joint Committee on Administrative Rules (JCAR). Based on requests for changes made by JCAR, MDEQ re-submitted the rules to JCAR prior to their formal adoption. MDEQ filed the rules with the Office of the Great Seal in June 2018, and the rules took immediate effect.

The rules promulgated during this process are what plaintiffs' complaint describes as some of the "toughest" lead rules in the nation and are set forth, in pertinent part, in Mich Admin Code, R 325.10604f(6), 325.10401a, 325.11604(c), and 325.10410(7). Plaintiffs' complaint notes that Rule 325.10604f(6) requires a water supply to replace every lead service line in a water system, including any portion of a service line that is privately owned,[3] at the supply's expense. The rules require a materials inventory at certain intervals to assess the type of piping at issue. The rules also require that service lines "shall be replaced at a rate averaging 5% per year, not to exceed 20 years total for replacement of all service lines under this subrule, unless an alternate schedule in an asset management plan is approved by" MDEQ. Mich Admin Code, R

[3] According to the pleadings and documents attached to plaintiffs' complaint as Exhibit B, some of the piping sought to be replaced belongs to private property owners (customers of the water system). A diagram purports to show a typical water distribution system, which includes water mains that disburse water into areas served by the water system. Water enters individual properties through service lines; these service lines are sometimes owned in part by the water system and in part by the property owner. In a scenario of split ownership, the water system owns the service line up to a point known as a "curb stop," and the remainder of the service line is owned by the property owner.

325.10604f(6)(b). See also Rule 325.11604(c). And if a water supply "controls the entire service line, the supply shall replace the entire service line at the water supply's expense." Rule 325.10604f(6)(c).

In addition to imposing these service-line replacement parameters, Table 1 of Rule 325.10401a lowers the federal lead action level from 15 parts per billion (ppb) to 12 ppb as of January 1, 2025. As noted above, the action level refers to the level of a contaminant—in this case, lead—that must be found in a water supply in order to trigger the implementation of remedial requirements and public notification.

In December 2018, plaintiffs filed a complaint alleging, among other matters, that the new rules fail to take into consideration a number of public health issues and that they impose high and allegedly unnecessary costs on a water supply. The complaint cites what plaintiffs have identified as several "key deficiencies," including that the rules: (1) mandate service line replacement without a meaningful study of affordability and funding; (2) fail to consider the legal implications of providing free services—replacement of service lines—to private property owners; (3) require a materials inventory before replacing service lines, meaning that a water supply will need to excavate and access service lines on at least two occasions, which will lead to increased costs; and (4) lower the lead action level without reasoned explanation or justification.

The complaint alleges five counts against MDEQ and seeks a declaratory judgment that the rules are, for one or multiple reasons, invalid. In Count I plaintiffs allege that MDEQ violated the APA in its promulgation of the rules, while in Count II plaintiffs allege that the rules are substantively invalid because they: (1) are arbitrary and capricious; and (2) are beyond the scope of the MSDWA. In Count III, plaintiff Wayne County Water Resources Commissioner

alleges that the rules violate Const 1963, art 9, § 18 by extending the credit of a local government. Along a somewhat similar vein, Count IV—brought by plaintiff City of Livonia and plaintiff City of Detroit—alleges that the replacement of private service lines violates Const 1963, art 7, § 26 by giving away a public service for free. Finally, Count V contains an allegation that, by requiring water supplies to pay for service line replacement on private property, MDEQ has required water supplies to provide a free service in violation of the Revenue Bond Act, MCL 141.101 *et seq.* In addition, plaintiffs contend that the rules violate the Revenue Bond Act by regulating the rates charged to plaintiffs' customers.

## II. ANALYSIS

The validity of the rules are now before the Court on summary disposition.[4] "To be enforceable, administrative rules must be constitutionally valid, procedurally valid, and substantively valid." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 129; 807 NW2d 866 (2011). Plaintiffs raise challenges to all three components of enforceability, i.e., procedural invalidity, substantive invalidity, and constitutional invalidity. As it concerns their constitutional challenges, the Court must remain mindful that administrative rules, like legislative enactments, are presumed to be constitutional. *Id.* at 129 n 8.

[4] MDEQ moved pursuant to MCR 2.116(C)(8), which tests the validity of the allegations in the complaint, and nothing more. However, as mentioned in footnote 2, the complaint had numerous documents attached to it, including the RIS and certain emails from MDEQ employees, and *both* parties attached numerous documents to their briefs. Thus, the motion will be treated as brought pursuant to MCR 2.116(C)(10), see *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008), because the Court considered the RIS, the MDEQ emails and several other noted documents in deciding this motion. Additionally, both parties addressed documents during oral argument, and the Court noted it may treat the motion as one also brought under (C)(10).

## A. WHETHER THE RULES ARE PROCEDURALLY INVALID

Turning first to plaintiffs' allegations of procedural invalidity, caselaw has held that "[a]n agency's failure to follow the process outlined in the APA" with respect to rule promulgation "renders a rule invalid." *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 594; 873 NW2d 827 (2015). See also *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 239; 501 NW2d 88 (1993). Here, plaintiffs allege procedural deficiencies with respect to the Regulatory Impact Statement or RIS mandated by MCL 24.245(3), as well as with respect to MDEQ's engagement of the public during the promulgation process.

Turning first to the RIS, plaintiffs' complaint and briefing articulate a number of ways in which the RIS is allegedly inadequate. For example, they contend that the RIS is inadequate because it fails to provide an "estimate of the actual statewide compliance costs of the proposed rule on individuals" as is required by MCL 24.245(3)(*l*).[5] However, the RIS contains several pages pertaining to cost estimates and includes, as plaintiffs' briefing even admits, a cost estimate of the actual statewide costs of compliance. Contrary to plaintiffs' suggestions, the plain language of MCL 24.245(3)(*l*) does not demand an exacting factual justification for the estimate provided, and a court's review of a challenge to the facts underlying the implementation of a rule is not as broad as plaintiffs have asserted. See *Mich Ass'n of Home Builders v Dir of Dep't of Labor & Econ Growth*, 481 Mich 496, 500-501; 750 NW2d 593 (2008). And there is a reasoned justification for the number contained in the RIS—MDEQ looked to actual costs

[5] The APA was amended, effective January 1, 2019, by 2018 PA 602. The amendments did not effectuate any substantive changes pertinent to the challenges plaintiffs raise; however, the amendments re-numbered some of the subrules at issue. This opinion will address plaintiffs challenge while citing the current subrules to which the challenges pertain.

experienced by the Lansing Board of Water and Light when replacing all of the lead service lines it services, and then extrapolated those numbers to what MDEQ determined were the statewide needs. This is not by any means an arbitrary number, and the emails submitted by plaintiffs regarding the pre-administrative process number of $2.5 billion do not change that conclusion. The simple fact is the RIS contained the estimated actual cost of the requirements, explained why the cost was justified,[6] and any and all stakeholders or interested parties were given the opportunity to address those numbers. While plaintiffs object to the sufficiency of the estimate, the estimate is plainly included within the RIS, and the Court declines to conclude that the rules were procedurally invalid as a result.

Plaintiffs' arguments regarding the RIS lacking a justification as to why the proposed rules were necessary in proportion to the burden placed on individuals, see MCL 24.245(3)(m), as well as an estimate regarding the benefits of the rule, see MCL 24.245(3)(x), suffer from a similar flaw. That is, while plaintiffs fault the RIS for failing to address these matters, pages 5 and 11 of the RIS address these very subjects. Thus, each aspect of the RIS challenged by plaintiffs appears within the RIS. While plaintiffs disagree with many of the conclusions asserted by MDEQ in the RIS, plaintiffs have not identified any instances where MDEQ shirked its responsibility to divulge information or where MDEQ otherwise failed to follow appropriate procedures.

[6] Contrary to plaintiffs' argument, the MDEQ repeatedly acknowledges in the RIS the significant financial and logistics burden placed on water systems by these rules. But each time the MDEQ states that those burdens are outweighed by the state interest in safe drinking water.

At oral argument (but not in their response brief) plaintiffs stressed that *Michigan Charitable Gaming* controls on their APA argument, as that Court stated that there is no "temporal limit" on the ability to change a rule submitted to JCAR, "so long as those changes are consistent with impact statements that have already been submitted . . . ." *Michigan Charitable Gaming*, 310 Mich App at 602. That decision, however, does not support plaintiffs' argument. For one, the RIS addresses the final cost estimate of $499 million. Additionally, the Legislature amended the APA after *Michigan Charitable Gaming* to allow modifications to proposed rules without necessarily needing to alter an RIS. MCL 24.245c(4).

Finally, plaintiffs' criticism that the RIS does not contain an analysis of any conflicting laws is misplaced. Nothing within MCL 24.245(3)(a)-(dd) requires a discussion of conflicting state laws or constitutional provisions; instead, MCL 24.245(3)(a) requires an analysis of "parallel federal rules set by" certain federal or state agencies or associations, while MCL 24.245(3)(d) requires (if requested) information about other similar states. The legal arguments put forth by plaintiffs regarding purported conflicts with state statutes or constitutional provisions that are not parallel to what these rules address are simply not statutorily required to be addressed in the RIS.

Instead, the arguments raised by plaintiffs sound more in the nature of matters that could have—and in fact appear to have been—addressed during the public comment period. With respect to the public comment afforded by MDEQ during the promulgation process, plaintiffs' own briefing admits that MDEQ provided public comment and that plaintiffs "submitted a

detailed critique of the cost estimate" during the period for public comment.[7] Plaintiffs have not alleged that MDEQ dispensed with the requisite public comment; instead, they contend there was no meaningful public comment because their suggestions and protestations were ignored. Again, plaintiffs' assertions sound in the nature of disagreements with the decision reached by MDEQ, not that MDEQ failed to follow the requisite procedures. For that reason, they have failed to state a claim or establish a genuine issue of material fact that the rules are procedurally invalid.

## B. WHETHER THE RULES ARE SUBSTANTIVELY INVALID

Plaintiffs next allege in Count II that the rules are substantively invalid. "To determine the substantive validity of an administrative rule, Michigan courts employ a three-part test: (1) whether the rule is within the subject matter of the enabling statute, (2) whether it complies with the legislative intent underlying the enabling statute, and (3) whether it is arbitrary or capricious." *Mich Farm Bureau*, 292 Mich App at 129. In determining whether a rule is within the subject-matter of a statute, courts adopt a broad view of the statute at issue. See *Dykstra v Dir, Dep't of Natural Resources*, 198 Mich App 482, 486; 499 NW2d 367 (1993) (discussing, in general terms, what the act at issue concerned). When undertaking this analysis, the Court must give "respectful consideration" to MDEQ's construction of a statute, the MSDWA, with which it has been charged with administering. *Mich Farm Bureau*, 292 Mich App at 129 (citation and quotation marks omitted). "Administrative rules are valid so long as they are not unreasonable; and, if doubt exists as to their invalidity, they must be upheld." *Id.* (citation and quotation marks omitted).

[7] Not only did the MDEQ hold required public hearings on the proposed rules, but before the official APA process took place MDEQ held "stakeholder" meetings in which plaintiffs participated.

Turning to the question of whether the rules are within the subject matter of the enabling statute, the MSDWA[8] authorizes MDEQ to promulgate rules necessary to carry out the objectives of the act. The pertinent question is whether the subject matter of the rules "is encompassed by, or falls within, any of" MDEQ's statutory duties under the MSDWA. See *Mich Farm Bureau*, 292 Mich App at 134. Furthermore, "[i]t is well established that an agency may exercise some discretion concerning the rules that it promulgates, as long as the ultimate rules are consistent with the legislative scheme." *Id.* at 135.

Here, the primary allegations are that MDEQ exceeded its authority under the MSDWA by promulgating rules that mandate the replacement of public and private service lines. However, the MSDWA applies to a "waterworks system" which includes "a system of pipes and structures through which water *is obtained and distributed*, including but not limited to . . . *pipelines and appurtenances* . . . actually used or intended for use for the purpose of furnishing water for drinking or household purposes." MCL 325.1002(x) (emphasis added). There are no statutory prohibitions restricting MDEQ from reaching mixed public and private service lines, eliminating any merit to plaintiffs' contention that there was no statutory authority for the rules to reach private service lines that may exist in some municipalities after the "curb stop." Indeed, the ability to regulate the waterworks system of a public water supply is expressly within the realm of authority granted to MDEQ so long as the system does not consist *solely* of customer site piping. See MCL 325.1003 (giving MDEQ authority over a "public water suppl[y]"); MCL 325.1002(p) defining a "public water supply" as a waterworks system that does not consist

[8] Plaintiffs are within the MSDWA's definition of "supplier of water" set forth in MCL 325.1002(t).

"*solely of customer site piping*"). In other words, so long as the system is not entirely privately owned, it is plainly within the ambit of MDEQ's regulatory authority. As a result, the challenged rules are not substantively invalid, as they are not outside the realm of MDEQ's statutory authority. See *Mich Farm Bureau*, 292 Mich App at 134-135.

Nor are the rules arbitrary or capricious. Caselaw has explained that the arbitrary and capricious analysis "equates with rational-basis analysis. If a rule is rationally related to the purpose of the statute, it is neither arbitrary nor capricious." *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 650 n 8; 873 NW2d 842 (2015) (citation and quotation marks omitted). "Arbitrary means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, and capricious means apt to change suddenly, freakish or whimsical." *Mich Farm Bureau*, 292 Mich App at 141 (citation and quotation marks omitted). "In general, an agency's rules will be found to be arbitrary only if the agency had no reasonable ground for the exercise of judgment." *Id.* at 141-142. And in undertaking this review, the Court must uphold the rule if "it is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Johnson*, 310 Mich App at 651 (citation and quotation marks omitted).

In light of these controlling standards, plaintiffs have failed to show that the rules were arrived at "without consideration" or reference to principles, or that they are otherwise "apt to change suddenly, freakish, or whimsical." See *id.* For instance, MDEQ's decision to prioritize the replacement of lead service lines over what plaintiffs describe as other health concerns or infrastructure issues does not demonstrate that the rules were arbitrary and capricious. A rule is not arbitrary and capricious simply "because it does not address every conceivable issue[.]" *Dykstra*, 198 Mich App at 493. Neither does MDEQ's decision to set a lead-action level lower

than the current federal standards make the rules arbitrary and capricious. See *Mich Farm Bureau*, 292 Mich App at 143. Furthermore, plaintiffs' contentions about the cost of replacing service lines and of performing the requisite materials inventory do not render the rules arbitrary and capricious. As articulated in *Mich Farm Bureau* "a rule is not arbitrary or capricious merely because it displeases the regulated parties. Nor is a rule arbitrary or capricious merely because it causes some inconvenience or imposes new or additional requirements." *Id.* at 145 (citations omitted). In short, plaintiffs have not presented a convincing argument as to why the rules were not rationally related to the MSDWA's purpose, articulated in MCL 325.1001a, of "assur[ing] the long-term health of [the State's] public water supplies and other vital natural resources." As a result, the rules are not invalid in their substance. See *Johnson*, 310 Mich App at 650 n 8.

Plaintiffs' remaining contentions as to why the rules are arbitrary and capricious involve allegations that the rules fail to take into account constitutional and statutory conflicts. Because plaintiffs have also raised these same issues as separate, substantive claims, the Court will address them below. And for the reasons set forth below, the conflicts identified by plaintiffs do not exist. As a result, the rules are not arbitrary and capricious for failing to take into account these non-conflicting authorities.

## C. CONSTITUTIONAL CLAIMS

Plaintiffs' constitutional claims take aim at Rule 325.10604f, particularly subsection (6)(e), which states that a water supply "shall replace the entire lead service line," and shall do so "at the supply's expense," even if the supply does not own the entire line, i.e., does not own the portion of the line that goes from the curb stop to the customer's home or place of business. Plaintiffs argue that Rule 325.10604f(6)(e)'s requirement that the water supply pay for the entire cost of replacement, even if the pipe to be replaced is privately owned, violates this state's

Constitution. Plaintiffs point to Const 1963 art 9, § 18, which provides that "The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution." "The purpose of this provision is to make certain that the State, which itself cannot borrow, except as authorized, does not accumulate unauthorized debts by indorsing or guaranteeing the obligations of others." *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich 93, 119; 422 NW2d 186 (1988). Caselaw interpreting this provision has held that art 9, § 18 prohibits the State[9] from giving away something of value without consideration. *Alan v Wayne Co*, 388 Mich 210, 325; 200 NW2d 628 (1972).

However, the prohibition against the lending of credit in art 9, § 18 is subject to an exception when such lending is "authorized in this constitution." And pertinent to municipalities, Const 1963, art 7, § 26 creates an exception to the prohibition against the lending of credit where the lending is "provided by law, for any public purpose." See also *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 119 ("In order to conform to the requirements of the art 7, § 26 exception, the loan of a municipality's credit must be both: (1) authorized by law, and (2) for a public purpose.").

The first inquiry is whether there is a lending of credit, because if there is not, "then there is no need to consider art 7, § 26." *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 119-120. The Court concludes that there is no lending of credit and

[9]Although art 9, § 18 refers to the "credit of the *state*," caselaw has held that the prohibition on the lending of credit "applies to local governments as political subdivisions and instrumentalities of the state." *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 119.

that the municipalities have not been forced to give something away without consideration. As an initial matter, Rule 325.10604f(6)(e) permits a building owner to opt-out, so to speak, by refusing the replacement. If a homeowner exercises this option, "the supply shall not replace any portion of the service line, unless in conjunction with emergency repair." Moreover, even if a building owner consents to the replacement of the service lines, nothing prevents the water supply—as it freely acknowledges—from spreading out replacement costs and imposing the costs system-wide, on all users of the water supply.[10] In this scenario, the service lines are not given away for free. In addition, the replacement of lead service lines benefits the affected area and municipality by eliminating potential sources of lead contamination, system-wide. Thus, the municipality receives a benefit in return, and has not given something of value away in return for nothing in violation of the constitutional prohibition. See *Alan*, 388 Mich at 326-327 (explaining that courts will generally not inquire into whether a municipality "made a good bargain or a bad one" and will generally defer to the municipality's conclusion that value was received); *Ziegler v Witherspoon*, 331 Mich 337, 357; 49 NW2d 318 (1951) (concluding, under a substantively identical predecessor to art 9, § 18, that the receipt of a general benefit in exchange for a public expenditure did not amount to a lending of credit). Cf. *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 127 (concluding that a municipality "giving away something of value in the hope that general economic growth will result within the district" was not a "value for value" exchange as contemplated by *Alan*, 388 Mich at 326-327).

[10] It must also be noted—as the parties have freely admitted—that, in some or many circumstances, the water supply owns the entire service line leading up to a home or building. In these instances, there is no replacement of a private line; the water supply only replaces its *own* service lines. Plaintiffs, despite seeking to invalidate the rule in its entirety, have not articulated a separate constitutional challenge in this scenario.

Furthermore, even if there were a lending of credit, the Court would conclude that the exception articulated in art 7, § 26 would apply. MDEQ is authorized by law to promulgate rules, which have the force and effect of law. See *Bloomfield Twp v Kane*, 302 Mich App 170, 177; 839 NW2d 505 (2013). The rule at issue authorizes the expenditure in this case, and does so, according to the rules, for the purported purpose of removing lead service lines and promoting the public health. This fits within the exception articulated in art 7, § 26. See *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281*, 430 Mich at 119. Indeed, projects designed to promote the public health are generally considered to be projects which promote a public purpose, and the Court "decline[s] to second-guess the wisdom" of this public purpose determination. *Id.* at 129, 131.

D. REVENUE BOND ACT

Plaintiffs' final challenge to the rules invokes two sections of the Revenue Bond Act, MCL 141.101 *et seq.* First, plaintiffs note that public improvements, such as water supply systems, see MCL 141.103(b), are prohibited from giving away free services, see *NL Ventures VI Farmington, LLC v Livonia*, 314 Mich App 222, 232; 886 NW2d 772 (2015). In this regard, MCL 141.118(1) provides that, with the exception of hospitals and health care facilities, "free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality." Plaintiffs have summarily asserted that the replacement of the lines[11] is the provision of a "service," but they have not meaningfully analyzed the same. Furthermore, and significantly, plaintiffs' own allegations note that they

[11] Again, this argument only pertains to the service lines that are partially owned, after the curb stop, by homeowners and/or building owners.

intend to recover the costs of service-line replacement by imposing the costs on all water customers. When the costs of the replacement service lines are charged to customers, nothing is given away for free, thereby defeating plaintiffs' claim under MCL 141.118(1).

Second, plaintiffs' argument under MCL 141.129 fares no better. That section of the Revenue Bond Act provides that "*Rates charged for the services furnished by any public improvement* purchased, acquired, constructed, improved, enlarged, extended and/or repaired under the provisions of this act *shall not be subject to supervision or regulation by any state bureau, board, commission or other like instrumentality or agency thereof.*" MCL 141.129 (emphasis added). Plaintiffs contend that MDEQ has supervised or regulated rates by forcing them to spread out the costs of service-line replacements among all customers. Again, the Court disagrees, as nothing in the rules *require* plaintiffs to charge back its customers for the improvements; rather, the rules only require that the replacement costs be initially borne by the supply and not charged to the homeowner. Secondly, plaintiffs' view takes too broad of an approach to the term "rates" and conflates what is essentially a cost imposed via regulation with the rate charged by a water supply. Adopting plaintiffs' view could lead to the conclusion that any regulation which leads to increased costs on the part of water supplies runs afoul of MCL 141.129. For instance, any MDEQ regulations regarding testing requirements or contaminant action levels that lead to an increase in a water supply's costs could, under plaintiffs view, amount to supervision or regulation of the supply's rates. For that matter, statutes setting minimum-wage requirements or other employment standards inevitably affect the water supply's costs and could, under plaintiffs' view, amount to supervision or regulation of the supply's rates. The Court declines to adopt this view. Rather, the service-line replacements mandated by MDEQ have, at most, an indirect effect on the rates charged by plaintiffs. MDEQ has not

supervised or regulated the rates charged to customers; it has simply imposed, via regulations, new costs on the water supply. It is left to plaintiffs' authority and discretion, see MCL 141.121, to determine how to set rates in response to rising costs. That plaintiffs intend to exercise that discretion by recovering service-line replacement costs from their customers does not mean that MDEQ has supervised or regulated the rates plaintiffs charge for services.

## III. CONCLUSION

For the foregoing reasons, and pursuant to MCR 2.116(C)(8) and (C)(10), the Court will enter an order contemporaneously with this opinion GRANTING defendant's motion for summary disposition.

Date: July 26, 2019

Christopher M. Murray
Chief Judge, Court of Claims