

# Legally ( Relevant



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## Flint Water Crisis: How Could This Happen?

**T**he biggest story in the public water supply industry in many years concerns recent events in Flint, Michigan. The story has received much media attention, shaking the belief of Americans that their public water supply is safe. A detailed report prepared by the task force appointed by Michigan Governor Snyder was released on March 23, 2016. But the story was far from over, with criminal charges filed against two Michigan state employees and the water treatment plant supervisor on April 20, 2016, charging the three with violating Michigan's drinking water law, official misconduct and evidence tampering. With the story still very much in the news, the time is right to consider two questions for Kansas

water systems and their customers: Given the extent of the regulation over public drinking water supplies, how could this happen to the residents of Flint? Bringing that question home, could it happen here?

### Flint, Michigan

A once thriving city, Flint is an example of what happens when a city is abandoned by American industry. Home to Chevy and Buick, General Motors once had 80,000 well-paid employees in Flint. By 2010 that number had been reduced to 8,000. Its population declined from 200,000 in 1960 to less than 100,000 by 2014. It is one of the most dangerous cities in America, with a crime rate seven times the national average.

This decline resulted in a declaration of financial emergency for Flint by Michigan Governor Snyder in November 2012. Under Michigan law, an emergency manager (EM) has broad general management authority over the city.

Flint is located seventy miles north of Detroit. Since 1967, Flint had purchased its drinking water from Detroit. In April 2013, as a cost cutting measure, the EM opted to join a new regional water cooperative to replace purchases of water from Detroit. On receiving this notice from Flint, Detroit gave a one year notice of termination of its water supply contract with Flint. One year later, having reached no new agreement with Detroit, and with

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the new regional supply not yet online, Flint’s water treatment plant was put into production supplying all of Flint’s water supply, treating water from the Flint River.

**What Went Wrong?**

The following is a brief summary of the findings by the Flint Water Advisory Task Force, a group of five persons appointed by the Governor to investigate the factors that led to Flint’s water issues and possible solutions. The Task Force included a water consultant, two pediatricians, a CPA, and members of both political parties. The full report is 116 pages.

Following the switch to the Flint Water Treatment Plant/Flint River water supply, problems began to occur almost immediately. Under the Federal Safe Drinking Water Act (“SDWA”), responsibility for compliance with water quality requirements rests with the public water system. The most critical failure of the City in the operation of its plant concerned failure to comply with the Lead and Copper Rule (“LCR”). Regulations require that every public water supply system use Optimized Corrosion Control Treatment (“OCCT”) in order to limit levels of lead in water. Flint failed to implement OCCT, and as a result, the water it produced and delivered to its customers was excessively corrosive, capable of dissolving metals, particularly lead, found in lead pipes in portions of the City’s distribution system, but particularly lead pipes and lead solder found in many Flint residences. To make matters worse, Flint Water Department staff used improper testing methods to determine the level of lead for

purposes of the LCR. Federal regulations require “monitoring at consumer taps to identify levels of lead in drinking water that may result from corrosion of lead-bearing components in a public’s water distribution system or in household plumbing”. (“40 C.F.R. §§ 141.80-141.91). Samples are to be taken at locations known to have lead fixtures. Lines to be tested should not be pre-flushed, but should have had water in lines for at least six hours since the last use. Flint violated virtually all of these required procedures, taking most samples away from neighborhoods having lead fixtures and most importantly – pre-flushing lines before samples were taken. The result was to grossly distort actual lead levels in water as measured according to the rule.

Lead is a harmful substance when ingested in humans. High levels of lead can produce death in children, and at lower levels may cause various types of neural dysfunction. Children below the age of three are particularly vulnerable. Action levels for lead are fifteen parts per billion. Water tested in one home in February 2015, revealed lead of one hundred and four parts per billion.

By the fall of 2014, concerns were already being raised about the quality and safety of water being delivered from the Flint Water Treatment Plant. Over



## Conceal Carry by Public Employees

In the final days of the 2016 session, the Legislature enacted a new “Gun Bill” that impacts cities and rural water districts. Among the many provisions contained in the bill, there are provisions that generally prevent cities, rural water districts and other units of local government from prohibiting employees to carry concealed guns while working. The new law applies to all “public employers”, defined to include the state, all cities and other units of local government including rural water districts. Note that school districts are excluded from the definition of public employer. The result of this portion of the bill is to grant public employees the right to carry handguns both on and off the employers’ premises, and specifically include the right to carry in the employers’ vehicles.

Previously, both public and private employers could prohibit their employees from the concealed carry of handguns while at work. While this bill changes those rules for public employers, private employers retain their right to prohibit their employees from concealed carry while at work.

the next several months, levels of lead in the blood streams of Flint children were found to be higher than normal, and state agencies, EPA and Virginia Tech scientists were evaluating these blood tests and the potential link to Flint water.

While primary responsibility for SDWA compliance lies with the public water system, Michigan’s Department of Environmental Quality (“MDEQ”) had responsibility to ensure compliance with the SDWA through its regulatory oversight. The Advisory Task Force Report, although critical of parties at all levels, saved its harshest criticism for MDEQ. MDEQ (the counterpart to Kansas Department of Health and Environment) failed to understand elemental requirements of the SDWA, including the commonly understood requirements for how lead and copper rule testing was to be accomplished. MDEQ misapplied the rule requiring OCCT to prevent lead contamination, and failed to follow through with investigation of complaints about the quality of water being produced by Flint, even in the face of overwhelming scientific evidence of failure. As stated by the Task Force:

“MDEQ caused this crisis to happen. Moreover, when confronted with evidence of its failures, MDEQ responded publically through formal communications with a degree of intransigence and belligerence that has no place in government. These failures are not diminished, nor should focus on them be deflected, by the fact that other parties contributed to the disastrous decisions or the prolonging of their consequences.”

## Could This Happen in Kansas?

KDHE staff understand quite well what is required in the way of optimized treatment to prevent corrosive water from dissolving lead in pipes and fixtures. KDHE and KRWA staff regularly train water system operators in proper LCR testing techniques. Since news of the Flint water crisis spread, there have been two incidences of a spike in some lead test samples and officials at both the local and state level have acted promptly to notify the



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public, retest, and determine if measures need to be taken. The executive summary to the Flint Task Force Report begins by saying that: “[t]he Flint water crisis is a story of governmental failure, intransigence, unpreparedness, delay, inaction, and environmental injustice.” That statement does not characterize the way that Kansas water system operators, local governing bodies, state or federal agencies deal with water quality problems in Kansas.

### Conclusion

There are some vital lessons to be learned from Flint. The first is that the object of every public water supply system and every one of their employees is to first and foremost comply with the law and applicable regulations. Failure to do so can result in prosecution of those persons responsible, just as is occurring in Michigan. Moreover, the goal is not to try to get something past KDHE, or to otherwise do the minimal amount necessary to technically comply, but to provide the best, safest drinking water possible.

Second, quality does matter. Cost of service is important, but the story of Flint begins with an

attempt to save money when ill-prepared to provide a quality product. In the end, there can be no question but that this tradeoff was a poor one.

Third, governing bodies and managers need to be responsive to the concerns and needs of the public. The EM in Flint was not responsive to citizens’ concerns, and his short-sighted efforts to save money cost many times more in the long run than any short term savings he achieved.

Fourth, state and federal agencies should not be overbearing in their zeal to enforce regulations. But, a high price is being paid by both MDEQ and EPA for their slow, overly bureaucratic response to what became a fast moving emergency in Flint.

Finally, the public’s awareness of the health and safety of their drinking water supplies is as high as it has been in memory. The public has no means to do the sophisticated tests necessary to check to see if the water being delivered to them is healthy. Customers trust their public water supplies to do this, and those public water supplies need to work to earn and maintain that trust every day.

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