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The Flint, Michigan Water Crisis: A Case Study of the United States' Broken Water Regulation Laws

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I. Introduction

On April 25, 2014, the City of Flint, Michigan, switched its water supply source from Lake Huron to the Flint River.¹ Less than a month later, Flint citizens noticed a difference in the odor, taste and color of their water, and that summer, began to congregate outside City Hall, wielding clear, plastic gallon jugs filled with brown, murky water, in order to protest the safety of the water from the Flint water system.² It was obvious, just from the sickening, brownish tinge of the water sloshing around in the jugs, that there was a big problem with the water in Flint, and that something had to be done immediately. Nothing, however, was done immediately. The local, state, and federal governments did nothing in response to the Flint citizens' pleas for help until almost two years later, and only after the issue had been investigated by private citizens and governmental failings had been largely exposed. In fact, the circumstances surrounding the Flint, Michigan Water Crisis suggest that government officials on every level concealed evidence of dangerous levels of lead in Flint water, and actively mislead the very people they were entrusted to protect.

The water in Flint remains unsafe still. Flint's infrastructure has been irreparably damaged by the corrosive water from the Flint River, which has leached lead and other contaminants out from

¹ Jennifer Dixon, *How Flint's Water Crisis Unfolded*, Detroit Free Press, <http://www.freep.com/pages/interactives/flint-water-crisis-timeline/> (last visited Dec. 13, 2016).

² Erik Kirkland, *How the Flint Water Crisis Emerged*, MLive, https://www.mlive.com/news/flint/index.ssf/2015/10/how_the_flint_water_crisis_eme.html#7 (last visited Dec. 13, 2016); Arthur Delaney, *Justice Department Opens Investigation into Toxic Tap Water in Flint*, The Post News Group (Jan. 8, 2016, 11:45 p.m.), <http://postnewsgroup.com/blog/2016/01/08/justice-department-opens-investigation-toxic-tap-water-flint/>.

the city's pipes and caused faucet water in homes, businesses, and even hospitals to run an alarming shade of brown. Lead levels in drinking water in Flint homes has tested as high as thirteen thousand, two hundred parts per billion, over eight hundred and eighty times the national limit of what is considered safe, and over two times the level of lead in water that is considered hazardous waste.³ Flint citizens are advised to drink, cook, and take sponge baths using bottled water.⁴ They are told to use sink filters and at-home lead testing kits, which are donated by private citizens and organizations.⁵ When they absolutely have to take a shower, they are to use cold water only, and leave the shower door open, so as not create and ingest the toxic steam.⁶

It shocks the conscience to consider that in 2016, United States citizens can be denied clean drinking water, the most basic of all human rights. Even more shocking is to think that the government, either through its incompetence or indifference, has somehow designed to conceal the fact of contaminated drinking water from the very people it is entrusted to protect. It is almost inconceivable to think that local, state and federal government actors in Flint, Michigan, and the United States could have ignored the pleas of angry citizens for almost two years, and acted only when their jobs were on the line. More shocking still is that various government officials have evaded culpability and are free to act so egregiously again.

Indeed, it has become apparent that Flint is not the only city in the United States that has dangerous drinking water, and that the government's inaction, ineptitude and indifference in

³ Siddhartha Roy, *Hazardous Waste-Levels of Lead Found in a Flint Household's Water*, Flint Water Study (Aug. 24, 2015), <http://flintwaterstudy.org/2015/08/hazardous-waste-levels-of-lead-found-in-a-flint-households-water/>.

⁴ *Flint is STILL a Crisis*, TYT Politics (Sept. 6, 2016), <https://www.youtube.com/watch?v=ZVKsPIInU44&t=193s>.

⁵ *Id.*

⁶ *Id.*

Flint is not a one-off mistake. Public health catastrophes similar to that in Flint have occurred in the past, and water poisoned by lead continues to be an issue in the United States today. Not even a decade ago, in Washington, D.C., evidence of excessively high levels of lead in the water supply was exposed by private citizens, and concealed by the government for three years.⁷ More recently, in Newark, New Jersey, it was discovered students in thirty of public schools are being poisoned by drinking water that is thirty-five times the federal action level of fifteen parts per billion.⁸ It has been suggested, even, that the crisis in Flint is only the “tip of the iceberg” of water contamination issues in the United States, and that over five thousand water systems across the United States are in violation of federal law.⁹

All levels of government, federal, state and local, are to blame for what happened in Flint. All parties involved are guilty of miscommunication, inaction, indifference, self-interest, and even fraud. It is clear, then, that a proper fix for the Flint, Michigan water crisis will take much more than the replacement of infrastructure. In order to achieve a lasting change in Flint and to correct and prevent instances of toxic water elsewhere in the United States, the structure of water regulation laws in the United States must be fundamentally changed at their core.

II. The Flint, Michigan Water Crisis

⁷ Arthur Delaney & Philip Lewis, *How the Federal Government Botched Flint’s Water Crisis*, The Huffington Post, (Jan 12, 2016, 3:20 p.m.), http://www.huffingtonpost.com/entry/flint-lead-water-epa_us_569522a8e4b086bc1cd5373c.

⁸ Jessica Mazzola, *Lead in Newark Schools’ Water Dates Back to at Least 2012*, NJ.com, (Mar. 16, 2016, 7:37 p.m.), http://www.nj.com/essex/index.ssf/2016/03/lead_in_newark_schools_water_dates_back_to_at_leas.html.

⁹ Erik Olson & Kristi Pullen Fedinick, *Report: What’s in Your Water? Flint and Beyond: Analysis of EPA Data Reveals Widespread Lead Crisis Potentially Affecting Millions of Americans*, NRDC, (Jun. 2016), <https://www.nrdc.org/sites/default/files/whats-in-your-water-flint-beyond-report.pdf>.

Flint, Michigan, located seventy miles north of Detroit, was once a bustling city.¹⁰ Home to the largest General Motors plant, its residents had jobs, incomes, and, most importantly, access to clean water.¹¹ For forty-seven years, the city of Flint purchased its supply of water from the Detroit Water and Sewerage Department (“DWSD”), which draws pre-treated water from the Lake Huron.¹² By the late 1980s, however, a financial depression hit Flint, and by 2011, Flint had reached a \$25.7 million deficit, with approximately 40% of its population living beneath the poverty line.¹³ As such, in November 2012, the City of Flint came under State management, pursuant to Michigan’s Emergency Manager Law, which allows for the appointment of an “Emergency Manager” to unilaterally make decisions during a state of financial emergency.¹⁴ Flint’s first Emergency Manager, Darnell Earley, decided to switch the water systems for Flint from the DWSD to the Karegondi Water Authority (“KWA”), which also draws from Lake Huron.¹⁵ The switch would save the city millions, but would take time, as the KWA lines would not be completed until 2016.¹⁶ In the two years before the switch would be complete, the City of Flint, the Genesee County Drain Commission and the Michigan Department of Environmental Quality (“MDEQ”) agreed to use a water system drawing from the Flint River.¹⁷

¹⁰ *QuickFacts: Flint City, Michigan*, United States Census Bureau, <http://www.census.gov/quickfacts/table/PST045215/2629000> (last visited Dec. 13, 2016).

¹¹ *Flint, Michigan*, Wikipedia, https://en.wikipedia.org/wiki/Flint,_Michigan (last modified Dec. 13, 2016, 10:36 p.m.).

¹² *Id.*

¹³ Roger Fraser, Laura Argyle, Gene Dennis, Darnell Earley, Robert L. Emerson, Frederick Headen, Doug Ringler & Brom Stibitz, *Report of the Flint Financial Review Team*, State of Michigan Department of Treasury, (Nov, 7, 2011), https://www.michigan.gov/documents/treasury/Flint-ReviewTeamReport-11-7-11_417437_7.pdf.

¹⁴ Dixon, *supra* note 1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

The water from the Flint River was, as it was later discovered, extremely corrosive.¹⁸ Although the EPA's Lead and Copper Rule requires that corrosion control treatment, the addition of phosphates to the water system, be applied to water systems serving over 100,000 users, as was the case in Flint, the City of Flint never administered the quality control measure, and the MDEQ never required the city to do so.¹⁹ Instead, the MDEQ ordered the city to begin two, six-month long rounds of testing of the water in order to determine whether the corrosion control was necessary, a quality control measure that is only appropriate for water systems serving fewer than 50,000 people.²⁰ As a result, the corrosive Flint water leached the lead and other contaminants from the aging service lines delivering water from the river and into businesses and homes, causing the water in faucets and showers to run a disturbing shade of brown.²¹ Flint residents noticed the change in the water within weeks and immediately voiced their concerns.²²

Responses to citizens' complaints were minor and ineffective. In August and September of 2014, the City issued boil-water advisories because of e-coli bacteria in the water, and treated the water by administering a chlorine disinfectant.²³ On January 2, 2015, the city issued a warning that total trihalomethanes (TTHMS), byproducts of water-disinfectant chemicals, exceeded federal limits, but assured that the water was still safe to consume for those who were not sick or elderly.²⁴ By that time, General Motors had already announced that it planned to discontinue the use of Flint River water in its engine plant because new parts had begun to corrode.²⁵ Likewise,

¹⁸ *Id.*

¹⁹ Noah Hall, *The Flint Drinking Water Crisis – First Thoughts and a Legal Overview*, Great Lakes Law, (Jan. 24, 2016), <http://www.greatlakeslaw.org/blog/flint-water-crisis/>.

²⁰ *Id.*

²¹ Kirkland, *supra* note 2.

²² *Id.*

²³ Dixon, *supra* note 1.

²⁴ *Id.*

²⁵ *Id.*

the State Department of Technology, Management had begun to provide water coolers on each floor of its offices so that state workers would not have to drink from water fountains. Still, the city maintained that the water was safe to drink.²⁶ On January 6, Flint Mayor Dayne Walling held a news conference and assured that the water was safe to drink, and that despite the boil advisories, he and his family used it every day.²⁷ In response to mounting concerns, an officer from the DWSD wrote to the Emergency Manager, Darnell Earley, on January 12, 2015, and offered to reconnect the city of Flint to its water system at no extra cost to Flint, if the city would only make a long-term agreement to use water supplied by the company.²⁸ Earley refused.²⁹

Exposure and Government Concealment

In the face of government inaction, it fell upon private citizens and private organizations to expose and attempt to combat the lead contamination in the water in Flint. Flint residents complained about their water with a renewed vigor, staging protests and turning up to town hall meetings to complain of their lead-poisoning-related symptoms.³⁰ The University of Michigan-Flint started testing the water fountains in its buildings for lead, and on January 9, 2015, and found elevated levels of lead in drinking fountains in two of its buildings. After her four-year-old son developed a rash covering his entire body, Flint resident LeeAnne Walters appeared before the Flint City Council on February 4, 2015, and demanded that the City of Flint test her home for

²⁶ Kim Bellware, *State Gave its Workers in Flint Clean Water as it Assured Residents Taps Were Safe*, The Huffington Post (Jan 28, 2016, 9:19 p.m.), http://www.huffingtonpost.com/entry/flint-government-water-coolers_us_56aaa4a5e4b077d4fe8d8135.

²⁷ Ron Fonger, *Flint Officials Say City on Track to Address Disinfection Byproduct in Drinking Water*, MLive, (Jan. 6, 2015, 5:43 p.m.), http://www.mlive.com/news/flint/index.ssf/2015/01/flint_officials_say_city_on_ri.html.

²⁸ Dixon, *supra* note 1.

²⁹ *Id.*

³⁰ *Id.*

lead.³¹ The test revealed that her tap water contained lead levels of one hundred and four parts per billion, six times the fifteen parts per billion safety threshold of the EPA.³² A follow-up test done by a city official one week later came back with a lead level of a staggering three hundred and ninety seven parts per billion, over twenty-six times the federal limit.³³

Alarmed by the levels of lead in the water in her home, Walters contacted the Environmental Protection Agency (“EPA”) on February 25, 2015.³⁴ Miguel Del Toral, Regulations Manager for Region Five of the EPA, acknowledged the alarming amount of lead found in the Flint water, and reached out to the MDEQ on March 9, 2015 to express his concern.³⁵ After initially claiming that Flint had an “optimized” corrosion control program, MDEQ agent Stephen Busch finally admitted to the EPA on April 24, 2015, that there was no corrosion control in Flint, but that the MDEQ was monitoring the lead levels in the water, and that the results indicated that no additional corrosion control was needed.³⁶ Del Toral drafted an internal memo to the EPA which detailed the hazardous level of lead in Walter’s home, and questioned the lack of corrosion control in Flint. In the memo, he explained,

A major concern from a public health standpoint is the absence of corrosion control treatment in the City of Flint for mitigating lead and copper levels in the drinking water. [...] Recent drinking water sample results indicate the presence of high lead results in the drinking water, which is to be expected in a public water system that is not providing corrosion control treatment. [...] The lack of any mitigating treatment for lead is of serious concern for residents

³¹ *Id.*

³² Lindsey Smith, *This Mom Helped Uncover What Was Really Going on with Flint’s Water*, Michigan Radio, (Dec. 14, 2015), <http://michiganradio.org/post/mom-helped-uncover-what-was-really-going-flint-s-water>.

³³ *Id.*

³⁴ Dixon, *supra* note 1.

³⁵ *Id.*

³⁶ *Id.*

that live in homes with lead service lines or partial lead service lines, which are common throughout the City of Flint.³⁷

Del Toral went on to explain how the levels of lead which had been reported to citizens were likely also inaccurate, because the City of Flint had been engaging in the practice of “pre-flushing” the pipes before testing them for lead, which significantly lowered the lead levels that showed up in the samples collected.³⁸ The memo claimed that this issue of inaccurate reporting was raised with the MDEQ, however, the MDEQ “has indicated that this practice is not prohibited by the LCR and continues to retain the ‘pre-flushing’ recommendation in their lead compliance sampling guidance to public water systems in Michigan.”³⁹ Del Toral’s supervisors declined to publish his report, calling it “premature”.⁴⁰ Despite this, the report eventually was made public after Del Toral gave a copy to LeeAnne Walters, who forwarded it in July of 2015 to the American Civil Liberties Union (“ACLU”).⁴¹ In response to new public concerns, MDEQ spokesperson Brad Wurfel assured that “anyone who is concerned about lead in the drinking water in Flint can relax.”⁴²

LeeAnne Walters also reached out to Dr. Marc Edwards, professor of environmental engineering at Virginia Tech, who had, a decade prior, helped to expose a toxic level of lead in drinking water in Washington, D.C.⁴³ Dr. Edwards and his team initiated an independent study into the lead levels in homes in Flint. He tested the home of LeeAnne Walters without first

³⁷ Miguel Del Toral, *High Lead Levels in Flint, Michigan – Interim Report*, United States Environmental Protection Agency, Region 5, (Jun. 24, 2015), <https://www.aclumich.org/sites/default/files/Original%20EPA%20memo.%20062514.pdf>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Dixon, *supra* note 1.

⁴¹ Delaney, *supra* note 7.

⁴² *Id.*

⁴³ *Id.*

flushing out the pipes, and found an astounding lead level of thirteen thousand, two hundred parts per billion, almost three times the 5,000 part per billion lead level at which water is considered to be hazardous waste.⁴⁴ Over the course of several months, Edwards tested over three hundred more homes in Flint and continued to find staggering levels of lead.⁴⁵ He, like Del Toral, confirmed that the EPA regularly “cheats the system” in order to avoid detecting impermissibly high levels of lead in communities’ drinking water by “selectively testing homes that are unlikely to have high levels of lead, by asking residents to ‘pre-flush’ their taps, and taking water samples ‘slowly’, which reduces lead levels.”⁴⁶

Dr. Mona Hanna-Attisha also played a crucial role in exposing the severity of the problems being caused by the water contaminated by lead. After hearing about complaints by parents that their children were suffering from symptoms potentially related to their drinking water, Dr. Hanna-Attisha, director of the Pediatric Residency Program at Hurley Medical Center, a public hospital in Flint, began independently testing children in Flint for lead poisoning.⁴⁷ Dr. Hanna-Attisha, as doctor and a hospital administrator, was in a unique position to access and interpret the records of lead levels in the blood of Flint children, and went public with her results in September of 2015.⁴⁸ Her tests revealed that lead levels in the blood of Flint children under the

⁴⁴ Roy, *supra* note 3.

⁴⁵ *Id.*

⁴⁶ Sara Ganim, *5,300 U.S. Water Systems are in Violation of Lead Rules*, CNN (Jun. 29, 2016, 6:50 a.m.), <http://www.cnn.com/2016/06/28/us/epa-lead-in-u-s-water-systems/>.

⁴⁷ Dr. Sanjay Gupta, Ben Tinker & Tim Hume, ‘*Our Mouths Were Ajar*’: Doctor’s Fight to Expose Flint’s Water Crisis, CNN (Jan. 22, 2016, 8:25 a.m.), <http://www.cnn.com/2016/01/21/health/flint-water-mona-hanna-attish/>.

⁴⁸ Mona Hanna-Attisha, MD, Jenny LaChance, MS, Richard Casey Sadler, PhD, & Allison Champney Schnepf, MD, *Elevated Blood Lead Levels in Children Associated With the Flint Drinking Water Crisis: A Spatial Analysis of Risk and Public Health Response*, AJPB Research, <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2015.303003> (accepted Nov. 21, 2015).

age of five had doubled and in some cases tripled after the water had been switched.⁴⁹ In response to her research, Spokesperson for the MDEQ, Brad Wurfel, labeled Hanna-Attisha an “unfortunate researcher” in an attempt to discredit her findings.⁵⁰ Much later, when the CDC finally confirmed her findings, Dr. Hanna-Attisha lamented the whole experience, saying that it “shattered” her trust in the government.⁵¹ “It’s not that I was naive to start with,” she reflected, “but you’d expect that utilities, states, federal agencies would take their jobs seriously and try to protect people rather than deliberately mislead, lie and make up excuses not to protect public health.”⁵²

III. Health Effects of Lead Poisoning

The CDC confirmed the findings of Dr. Hanna-Attisha that approximately eight thousand Flint children under the age of six had suffered from elevated lead levels in their blood as a result of drinking Flint water.⁵³ As Documentary Filmmaker and Flint native Michael Moore pointed out in an interview with MSNBC, eight thousand is the entire population of children under the age of six in Flint.⁵⁴ Every Flint child under six has been poisoned by lead.⁵⁵ While the CDC test revealed that the risk level of having dangerously elevated blood lead levels in children who ingested Flint water has increased by fifty percent, the effects of the lead exposure on these eight

⁴⁹ Gupta, *supra* note 47.

⁵⁰ Delaney, *supra* note 7.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Maggie Fox, *CDC Confirms Lead Levels Shot Up in Flint Kids After Water Switch*, NBC News (Jun. 24, 2016, 1:34 p.m.), <http://www.nbcnews.com/storyline/flint-water-crisis/cdc-confirms-lead-levels-shot-flint-kids-after-water-switch-n598496>.

⁵⁴ *Michael Moore on the Flint Water Crisis*, MRNBC (Jan. 20, 2016), https://www.youtube.com/watch?v=1hSLL_IRNE8 [hereinafter *Moore*].

⁵⁵ *Id.*

thousand children and on all the citizens of Flint have not yet been fully tested, and are, to a large degree, still unknown.⁵⁶

Pediatricians agree that lead poisoning has especially devastating effects on young children.⁵⁷ Exposure to lead of young children can lead to rashes, irritability, loss of appetite, weight loss, vomiting, abdominal pain, constipation, hearing loss and seizures, amongst other side effects.⁵⁸ It can also lead to long-term health issues such as stunted growth, learning disabilities, behavioral and emotional problems, Attention Deficit Hyperactive Disorder (“ADHD”) and a lowered IQ.⁵⁹ These consequences are permanent to developing brains. The World Health Organization (WHO) has noted that “because the human brain has little capacity for repair, these effects are untreatable and irreversible. They cause diminution in brain function and reduction in achievement that last throughout life.”⁶⁰ Indeed, research has shown that “children with serious lead-related brain impacts are less likely to graduate from high school and more prone to delinquency, teen pregnancy, violent crime and incarceration.”⁶¹

Lead poisoning also poses a significant risk for adults, older children, pregnant woman and unborn babies. Adults who suffer from lead exposure may experience cardiovascular and kidney disease, cognitive dysfunction, and elevated blood pressure.⁶² “High levels of lead can also affect a mature brain and, in very high doses, can kill.”⁶³ Even in older children, lead exposure has

⁵⁶ Fox, *supra* note 16.

⁵⁷ *Id.*

⁵⁸ *Lead Poisoning: Symptoms and Causes*, Mayo Clinic (Dec. 6, 2016), <http://www.mayoclinic.org/diseases-conditions/lead-poisoning/symptoms-causes/dxc-20275054>.

⁵⁹ *Lead Levels Linked to Lower IQ in Children*, ABC News (June 2, 2016), <http://abcnews.go.com/GMA/AmericanFamily/story?id=125121&page=1>.

⁶⁰ Olson, *supra* note 9, at 3.

⁶¹ *Id.*

⁶² Olson, *supra* note 9, at 3.

⁶³ Fox, *supra* note 16.

been linked to delinquency, criminal behaviors, and conduct disorders.⁶⁴ One Flint mother attested to a change in behavior in her seven-year-old son and sixteen-year-old daughter, which she believes was a result of their ingesting the toxic Flint water.⁶⁵ After both of her children tested positive for elevated blood lead levels, Nakiya Wakes was dismayed to find that her daughter had become “more aggressive”, and that her son, who had been previously been suspended from school one time in one year, jumped to having being suspended fifty-six times the next year from the same school.⁶⁶ Wakes also suffered a miscarriage of twins, which she suspects is connected to the lead exposure.⁶⁷ “As the Centers for Disease Control and Prevention (CDC) notes, ‘Even low-level lead exposures in developing babies have been found to affect behavior and intelligence. Lead exposure can cause miscarriage, stillbirths, and infertility (in both men and women).’”⁶⁸

Lead poisoning has also been linked to a possible outbreak of Legionnaires’ Disease, a potentially fatal respiratory disease caused by the Legionella bacteria.⁶⁹ While the link between the Flint water and Legionnaires’ Disease has not been confirmed, it has been suggested that the corrosive Flint water created a condition which stimulated the growth of the Legionella bacteria.⁷⁰ This theory would seem to be confirmed by the sharp rise of cases in Legionnaires’ Disease in Flint. In Genesee County, consisting of Flint and its neighboring towns, only six to

⁶⁴ *Id.*

⁶⁵ Mallory Simon & Sara Sidner, *Flint Water Crisis: Families from ‘Manmade Disaster’*, CNN Health (Mar. 5, 2016, 8:33 a.m.), <http://www.cnn.com/2016/03/03/health/water-crisis-flint-michigan/>

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Olson, *supra* note 9, at 9.

⁶⁹ Janet Pelley, *Legionnaires’ Outbreaks in Flint Linked to Corrosive Tap Water*, C&EN (Jul. 25, 2016), <http://cen.acs.org/articles/94/web/2016/07/Legionnairesoutbreaks-Flint-linked-corrosive-tap.html>.

⁷⁰ *Id.*

thirteen cases of Legionnaires' disease had been reported in the several years preceding the water source switch.⁷¹ In 2014, however, this number rose to ninety-one cases of Legionnaires' Disease in Genesee County. Out of these ninety-one cases, there have been twelve fatalities.⁷²

IV. The Parties Responsible

“The Flint water crisis is a story of government failure, intransigence, unpreparedness, delay, inaction, and environmental injustice.”⁷³ The crisis in Flint could have been wholly avoided had the proper corrosion-control treatment been administered to the Flint River. Certainly, it could have been better corrected or at least dealt with had the appropriate authorities accepted responsibility and acted proactively to protect the citizens of Flint. In 2016, Michigan Governor Rick Snyder commissioned a group of individuals to assemble into the Flint Water Advisory Task Force and assess the situation in Flint.⁷⁴ The task force analyzed the parties at fault and the causes for the government's failure, and recommended ways to prevent future failures and ways to address the community's immediate concerns.⁷⁵ The task force ascribed blame to all levels of government involved, including the Federal Government through its Environmental Protection Agency, the State of Michigan's Department of Environmental Quality and Governor's Office, and the City of Flint.⁷⁶

a. Federal Government

⁷¹ Elisha Anderson, *Legionnaires'-Associated Deaths Grow to 12 in Flint Area*, Detroit Free Press (Apr. 11, 2016, 6:59 p.m.), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/11/legionnaires-deaths-flint-water/82897722/>.

⁷² *Id.*

⁷³ Matthew M. Davis, MD, MAPP, Chris Kolb, Lawrence Reynolds, MD, Eric Rothstein, CPA, Ken Sikkema, *Flint Water Advisory Task Force Report* (Mar. 21, 2016), https://docs.google.com/viewerng/viewer?url=http://flintwaterstudy.org/wp-content/uploads/2016/03/Flint-task-force-report_2438442_ver1.0.pdf&hl=en_US

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

“Though MDEQ was delegated primacy (authority to enforce federal law), the United States Environmental Protection Agency (EPA) delayed enforcement of the Safe Drinking Water Act (SDWA) and the Lead and Copper Rule (LCR), thereby prolonging the calamity.”⁷⁷ The EPA was certainly and undeniably put on notice as to the crisis in Flint in February, 2015 through LeeAnne Walter’s communications with Miguel Del Toral.⁷⁸ Del Toral reached out to the MDEQ that same month, and the MDEQ finally admitted to not using any corrosion control.⁷⁹ He notified the EPA of the issue, but was silenced by his superiors, who actively concealed his damning report until it was leaked to the public.⁸⁰ Even still, the EPA denied culpability, claiming that it was given inaccurate information from state and city officials, and so it failed to take action until January of 2016, only after President Obama declared Flint to be in a state of emergency.⁸¹

The EPA failed in its responsibility to enforce the Safe Drinking Water Act (“SWDA”) and the Lead and Copper Rule (“LCR”).⁸² The SWDA was enacted by Congress as a way to establish a national public health standard for water supply systems and to allow the federal government to regulate contaminants in public drinking water.⁸³ Under the SWDA, the EPA is required to set the national limit for dangerous contaminants.⁸⁴ For lead, the national limit of what is considered ‘safe’ is fifteen parts per billion. Under the authority of the SWDA, the EPA enacted the Lead and Copper Rule (LCR), which requires that operators of municipal water systems regularly monitor, treat, and report lead and copper levels in water to ensure that they are below the nation

⁷⁷ *Id.*

⁷⁸ Dixon, *supra* note 1.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Davis, *supra* note 73.

⁸³ Safe Drinking Water Act (SWDA), <https://www.epa.gov/sdwa>, (last updated Sept. 27, 2016).

⁸⁴ *Id.*

level of what is considered safe.⁸⁵ To this day, the EPA has failed to cite Flint as having violated the LCR.⁸⁶

b. State Government

“The Michigan Department of Environmental Quality (MDEQ) failed in its fundamental responsibility to effectively enforce drinking water regulations.”⁸⁷ The MDEQ is responsible for the initial enforcement of the Safe Drinking Water Act. States are required under the Act to have water regulations that are at least as stringent of those of the EPA, and must agree to provide safe drinking water to citizens in emergencies.⁸⁸ The MDEQ directly violated the SDWA by failing to require the City of Flint to apply corrosion control agents to the Flint River, thereby directly causing the crisis in Flint.⁸⁹ “The Michigan Department of Health and Human Services (MDHHS) failed to adequately and promptly act to protect public health.”⁹⁰ Along with the MDEQ, the MDHHS attempted to silence the complaints of Flint Citizens and “worked to discredit” the attempts of others, including Dr. Mona Hanna-Attish, to attempt to bring the issue of unsafe water into the public eye.⁹¹ Finally, “neither the Governor nor the Governor’s office took steps to reverse poor decisions by MDEQ and state-appointed emergency managers until October 2015, in spite of mounting problems and suggestions to do so by senior staff members in the Governor’s office.”⁹²

c. Local Government

⁸⁵ *Id.*

⁸⁶ Davis, *supra* note 73.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

“With the city of Flint under emergency management, the Flint Water Department rushed unprepared into full-time operation of the Flint Water Treatment Plant, drawing water from a highly corrosive source without the use of corrosion control.”⁹³ Although acting on the orders of the MDEQ, the City of Flint still had an obligation, as the governmental representatives closest in line to the people of Flint, to attempt to apply corrosion control in compliance with federal law and to attempt to address the health concerns brought by their neighbors and friends in Flint.⁹⁴ Regardless of whether City officials were acting on the orders of the MDEQ, the way they tested for water, by obtaining samples from low-risk homes and pre-flushing pipes, was manifestly unethical. Someone, somewhere along the line, should have stepped up and reported this.

d. Michigan’s Emergency Manager Law

In addition to the numerous failures by federal, state and local authorities, critics have largely agreed that the Flint water crisis was started, at its most fundamental point, by Michigan’s Emergency Manager Law. The controversial law was originally passed in 1988, and was amended in 2012. The law allows, when a city is declared to be in a state of financial crisis, for an Emergency manager to come in and unilaterally make decisions that would benefit the city’s financial situation. The controversial law has been criticized as unconstitutional, effectively allowing one person to replace a representative government.⁹⁵ The law has been widely criticized for displacing democratic government and imposing an unconstitutional, unilateral system of governance.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Can Emergency Managers be Held Accountable for Their Bad Decisions?*, Michigan Radio (Oct. 26, 2015), <http://michiganradio.org/post/can-emergency-managers-be-held-accountable-their-bad-decisions> [Robert A. Sedler, professor at Wayne State University Law School says Michigan’s Emergency Manager Law has clear constitutionality because local governments are given power by the state, and “that what can be given can also be taken away.”]

V. Short-Term Solutions for Flint

Many short-term solutions have been proposed to remedy the crisis in Flint. Governor Snyder, through his task force, has made a series of recommendations to ensure the safety of the Flint community.⁹⁶ It is without question that the safety of the people in Flint should be most immediate and important concern. Since the crisis has received national attention, various private organizations and citizens have made donations of bottled water, at-home lead testing kits, and other commodities. A fund has been set up by Dr. Mona Hanna-Attisha to provide for the children of Flint who have already faced irreparable damage from the exposure to lead. Millions of dollars have been allocated by the state and federal government to help the situation in Flint, which has been declared by president Obama to be in a federal state of emergency. Various engineering innovations have been proposed in order to create a more sturdy, viable infrastructure to replace the ageing pipes that have been corroded by the Flint River.

While it is axiomatic that the infrastructure in Flint must immediately be replaced, Dr. Marc Edwards has estimated that replacing the city-owned pipes in Flint would cost around 1.5 billion dollars, and the process would take approximately thirty years to complete.⁹⁷ While the problem in Flint can only be immediately fixed by spending money and time toward updates to infrastructure, the crisis of water contamination in the United States cannot be addressed in full unless it is addressed at its root. The disaster in Flint is the result of a failure on all levels of government to properly regulate the city's water and then to properly respond to the disaster once it had been revealed. It is the result of a lack of communication and cooperation between levels of government due to a lack of clear, distinguished federal laws.

⁹⁶ Davis, *supra* note 73.

⁹⁷ How do You Fix the Water Problems in Flint? WBUR (Jan. 22, 2016) <http://www.wbur.org/hereandnow/2016/01/22/how-to-fix-flint-water>.

VI. Poorly Defined Roles and Lack of Accountability

The United States' laws governing water regulation are ambiguous, poorly defined, and, as shown by the governmental responses to accusations of wrongdoing, open to interpretation. Each governmental agency accused of causing or exacerbating the contaminated water crisis in Flint has taken advantage of the lack of clearly defined roles in water regulation laws and attempted to shift blame from itself and onto another. In his January 19, 2015 State of the State address, Michigan Governor Rick Snyder promised that all involved in the Flint water crisis would be held accountable.⁹⁸ Ironically, Snyder himself was implicated by his own task force for contributing to the disaster, and many Flint citizens have called for Snyder's resignation and incarceration.⁹⁹ MDEQ director Dan Wyat's a long-overdue admission of guilt on October 19, 2016 was quickly followed by a finger pointed at the EPA. He declared, "It recently has become clear that our drinking water program staff made a mistake while working with the city of Flint [...] Simply stated, staff employed a federal protocol they believed was appropriate, and it was not."¹⁰⁰

The EPA has similarly attempted to relieve itself of the responsibility in Flint and place the blame on the State government. In response to the public outrage against the EPA for its delay in responding to the Flint crisis after it was revealed by Del Toral's leaked memo, Susan Hedman, director of Region Five, explained that information about the crisis was not released sooner because Del Toral's report was simply "premature."¹⁰¹ The EPA, she explained, had

⁹⁸ Governor Rick Snyder, *2015 State of the State Address*, (Jan. 20, 2015, 7:00 p.m.), http://www.michigan.gov/snyder/0,4668,7-277-74857_63747---,00.html.

⁹⁹ Davis, *supra* note 73.

¹⁰⁰ Julia Lurie, *A Toxic Timeline of Flint's Water Fiasco*, *Mother Jones* (Jan. 26, 2016), <http://www.motherjones.com/environment/2016/01/flint-lead-water-crisis-timeline>.

¹⁰¹ Fox, *supra* note 16.

elected to wait for a legal opinion before taking action in Flint.¹⁰² This legal opinion, which would not have been ready until November of 2015, would have contained information as to whether the EPA had the legal authority to force the State of Michigan and the MDEQ to act in response to the water crisis.¹⁰³ Susan Hedman has since resigned from the EPA.¹⁰⁴

In January of 2016, The EPA released a statement blaming its failure to act on the local government in Flint and the Michigan State Government and its agencies, who it accused of failing to be forthright and transparent with its reports to the EPA.¹⁰⁵ Likewise, after the EPA was exposed in June, 2016 for failing to respond to several cases of lead contamination across the United States, an EPA spokesperson responded with a statement that it is the states “who are responsible for and do take the majority of the drinking water enforcement actions and are the first line of oversight of drinking water systems.”¹⁰⁶ Senator and then-presidential candidate Marco Rubio was asked in early 2016 by a MSNBC reporter for his stance on the situation in Flint.¹⁰⁷ Rubio responded that although he was not fully briefed on the situation, it was his understanding that the federal government had no significant regulatory role to play in the water crisis in Flint.¹⁰⁸

The poorly-defined water regulation laws and the resulting blame-game played by all of those involved in the Flint water contamination crisis all but guarantees that total accountability will not be achieved and that such a disaster could easily happen again. Indeed, environmental activist Erin Brockovich has suggested that the crisis in Flint is just “the tip of the iceberg” for

¹⁰² Fox, *supra* note 16.

¹⁰³ Fox, *supra* note 16.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Moore, *supra* note 17.

¹⁰⁸ *Id.*

water contamination issues in the United States. On June 28, 2016, The Natural Resources and Defense Counsel (“NRDC”) released a report stating that 5,363 water systems in the United States violate the EPA’s Lead and Copper Rule, and that an estimated 18 million people in the United States live in communities that are served by water that falls short of federal safety regulations.¹⁰⁹ Violations of the Lead and Copper Rule included “failures to properly test the water for lead or contaminants that could result in lead contamination, failures to report contamination to state officials or to the public, and failures to treat the water appropriately to reduce corrosion.” 1,110 out of these systems provided water that exceeded lead levels of 15 parts per billion to over 3.9 million people.

Moreover, the NRDC reported that the EPA knows about these instances of dangerous lead levels in water, but in many cases has done nothing to rectify the issues. Looking at the EPA’s own data, it found that formal enforcement action was taken against a mere 11.2 percent of the 8,000 violations that occurred in 2015. Penalties were even more sparse, and were sought in only 3 percent of the 8,000 violations in 2016. Even worse, the EPA has admitted that its analyses and assessments of drinking water are “substantially incomplete.” The NRDC report contends that the EPA “failed to act, downplayed the problem, and emboldened the actions of some water systems of primacy agencies”, and posits that “as long as we have this culture of hiding violations and attacking staff members who do their jobs, more Flints can be expected.”

VII. Disturbing Pattern of Government Inaction

The government’s poor response to lead contamination has displayed itself in many other instances. The NRDC report references an incident of lead contamination that was discovered in Washington, D.C. in 2001, largely by the same Dr. Marc Edwards who was involved in exposing

¹⁰⁹ Olson, *supra* note 9, at 7.

the lead contamination in Flint. In 2001, Edwards conducted a study that found that lead levels were over eighty-three times higher than the EPA's limit. While it was alleged that the EPA and the D.C. Water and Sewer Authority knew of these high lead levels since 2002, this was never acknowledged to the public until 2004, when the contamination was exposed by an investigation by the Washington Post.¹¹⁰ In a series of publications, the newspaper accused the EPA of misrepresenting lead levels, as well as being slow to force states to collect and report required data on lead levels in drinking water. In response, the Center for Disease Control and Prevention ("CDC") published a report which claimed that the blood lead levels of the 201 residents whose homes tested high for lead were all below the level at which the government would be concerned.¹¹¹ In a similar effort to cover up any wrongdoing, the EPA removed from its website warnings that lead levels above 40 parts per billion were a serious concern to pregnant women and children.¹¹² Dr. Edwards was able to debunk the claims of the CDC and the EPA by obtaining data on blood lead levels from a local hospital, after his request for information under the Freedom of Information Act was denied. Edwards said of the experience, "In D.C., I learned that you can't trust your kids with a government agency."¹¹³

On March 9, 2016, thirty schools in Newark, New Jersey, were found to have been supplying their students with water that was thirty-five times the federal action level of fifteen parts per billion.¹¹⁴ Tests done by the State Department of Environmental Protection of three hundred school buildings in Newark revealed that fifty-nine of them were using water contaminated by lead. Although further studies are required to assess the situation, it has been

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Delaney, *supra* note 7.

¹¹³ *Id.*

¹¹⁴ Mazzola, *supra* note 8.

alleged by the Newark School Board that that district has known about elevated lead levels in students' drinking water since 2004. The water fountains in the affected schools have since been turned off and children are provided bottled water to drink at school. Despite this, over three thousand children have tested positive for lead poisoning in New Jersey last year, and results have shown that children in eleven New Jersey towns, including Newark, "have a higher proportion of dangerous lead levels than Flint."¹¹⁵

VIII. Viable Long-Term Solutions

It is indisputable that local, state and federal governments in the United States have repeatedly and systematically failed in their responses to toxic lead levels in the drinking water of United States citizens. The fact that every level of government, every agency that could be held responsible, has attempted and, in many cases, has managed to shift blame off themselves and onto one another, all but ensures this dangerous pattern is likely continuing to this day and will continue in the future. For this reason, it is imperative that structural changes be made to water regulation laws in the United States.

The National Resources Defense Council ("NRDC"), a non-profit environmental advocacy group, has suggested that in order for a crisis like Flint to be prevented in the future, both the Lead and Copper Rule of the EPA and the Safe Drinking Water Act must each be completely reworked.¹¹⁶ In a June, 2016 report, the NRDC pointed out that the Lead and Copper Rule of contains "weak language, implementation, and enforcement."¹¹⁷ Importantly, the Rule includes no specific provision making it mandatory for the EPA to alert the citizens of lead in

¹¹⁵ *Id.*

¹¹⁶ Olson, *supra* note 9, at 7.

¹¹⁷ *Id.* at 7.

their drinking water.¹¹⁸ Under the current law, the EPA has technically committed no legal wrongdoing by keeping the information about the lead contamination in Flint private, as the responsibility for notification under the current structure of the law lies at the state and local level.¹¹⁹ As such, the NRDC has suggested amending the federal rules to “(1) require the full replacement of all lead service lines; (2) more fully and fairly monitor lead levels, and prohibit water systems from using testing strategies that circumvent the detection or reporting of lead contamination; and (3) require clear, ongoing, timely, and culturally appropriate public education and notification of lead problems.”¹²⁰

Furthermore, the NRDC has proposed that changes be made to the Safe Drinking Water Act as well. The SDWA is largely unenforceable, due to its “poor funding, lack of management support, and bureaucratic indifference or fear of recrimination by the EPA.”¹²¹ Bi-partisan influences have created a substantial barrier blocking reforms of federal water regulation laws.¹²² The EPA is consistently attacked by the Republican Congress, which views water regulation as a traditionally state-led issue and dislikes when federal agencies overstep their bounds.¹²³ For real change to be made, it is necessary for Congress to curb its criticism of the EPA and to acknowledge that it is within the EPA’s jurisdiction to enforce the Safe Drinking Water Act.¹²⁴

Finally, the NRDC suggests that a “cultural change” must be integrated into the EPA and in other regulatory agencies who tried to conceal the crisis.¹²⁵ When Del Toral exposed the crisis, he was labeled a “whistleblower” and a “rogue employee” by the EPA, after the agency failed in

¹¹⁸ Davis, *supra* note 9.

¹¹⁹ *Id.*

¹²⁰ Olson, *supra* note 9, at 7.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

its attempts to suppress his report.¹²⁶ Similarly, Brad Wurfel, the spokesperson for the MDEQ attempted to downplay the crisis and discredit the findings of Dr. Hanna-Attisha.¹²⁷ While a change in the way the agencies operate is a noble goal, this remedy is perhaps a bit less practical than the others suggested by the NDRC. Instituting a “culture change” in a federal agency is a nebulous concept. In this context, would seem to be a virtual impossibility, given the egregiousness of the behavior of all the parties involved. Attempting to “change” the way that federal, state and even local officials operate would probably be as difficult as trying to change the instinctual human tendency to protect oneself over the needs of others. The goal should instead be to allow for the criminal enforcement of wrongdoers. While the NDRC posits that criminal enforcement will not be sufficient to bring about needed change to the agencies responsible for the crisis in Flint, perhaps it is the essential first step toward a so-called “culture change.”¹²⁸

IX. Conclusion

The Crisis in Flint, Michigan, is one of the most horrendous examples of the United States government failing its people. There is no easy solution to the problem in Flint, because the problem in Flint goes beyond a simple mistake of failing to add phosphates to a water system and then a subsequent series of mistakes in failing to correct the original mistake. What happened in Flint was caused by an abuse of power by those in power in all levels of government, and a callous disregard by those powerful people for the people they are supposed to protect. The actions of those responsible for the crisis were motivated by greed and self-preservation; by the desire to escape blame overcoming the desire to help those in need by taking

¹²⁶ *Id.*

¹²⁷ Delaney, *supra* note 7.

¹²⁸ Olson, *supra* note 9, at 7.

responsibility and correcting the problem. There is no guarantee that restructuring United States' water regulation laws will prevent something like Flint from ever happening again. There is no guarantee that entrusting more power to the EPA, the same agency which flagrantly flouted its power in Flint, will ensure that all people in the United States will have safe water to drink. Hopefully, at the very least, clarifying the United States water regulation laws will ensure accountability, and prevent government officials from "getting away" with the crime of poisoning its people. Certainly, the bravery and tenacity of the of citizens of Flint and all others who exposed the disaster suggests that, should another Flint happen in the future, it will not be tolerated and accountability will be held.