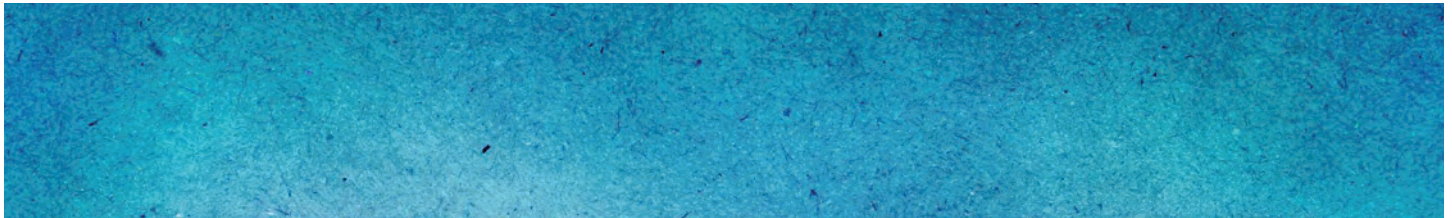




Take the Lead on Lead in Drinking Water

by Michael D. Klein, Esq.



Many years ago, when I was beginning my career as an attorney in the public water supply sector, I attended a water conference at which James McGirr Kelly gave a presentation. Mr. Kelly, now deceased, was a former utility regulator, water utility executive, and federal judge. His presentation focused on two points. The first point was that the price of water provided by public water suppliers to customers was a bargain. The second point was that public water suppliers had earned the well-deserved trust and confidence of the public. On the latter point, he gave as an example the many Americans who wake up at night and drink tap water, often without turning on any lights to see whether the water is crystal clear.

That was then, today is different. Water provided by public water suppliers is still a bargain, but public confidence in drinking water safety has taken some hard knocks recently.

On March 5, 2016, an Associated Press-GfK poll reported that only about half of Americans are extremely or very confident in the safety of their own tap water. That may be due largely to a series of recent water crises, the most publicized being the lead-in-drinking water crisis in Flint, Michigan. On the heels of Flint, during February of this year Mississippi officials issued an alert that pregnant women and young children in that state's capital, Jackson, should not drink unfiltered tap water because of high lead levels. ¹

Today, some are more inclined to turn on the lights, or do more, before drinking water from the tap. That is the unfortunate consequence of a few isolated but well publicized, occurrences of

tainted drinking water and should not be an indictment of the entire public water supply sector. But this cannot be ignored. The public water supply sector, and its regulators must work together to build public confidence.

I am not going to rehash everything that went wrong in Flint. The media continues to spotlight coverage of this international embarrassment. We are in a presidential election year and several candidates have made this an issue in their campaigns. One candidate has called it one of the worst health crises in the modern history of this country.²

Suffice it to say that the lead-in-drinking water problem got so bad in Flint that the President declared a federal emergency and the Governor declared a state of emergency. The National Guard was deployed, and several government officials from federal, state and local agencies resigned due to their roles in the Flint crisis.

The flash point of the public outcry and concern about Flint has been reports that regulators and public officials knew or should have known about the water quality problem long before it was made known to the public and action was taken.

Reports are that as public officials were telling Flint residents their water was safe to drink, they were arranging for coolers of purified water in Flint's state office building so employees would not have to drink from the tap.³

Michigan's Governor is now saying that he is kicking himself every day and wishes that he had asked more questions.⁴

Whenever there is a well-publicized crisis, investigations and litigation are sure to follow, and they have in Flint. In Flint, civil and criminal investigations are ongoing. Several civil class actions have already been filed seeking relief, including monetary damages, relief from water bills and shut-offs, and removal of lead pipes. There is also the possibility that criminal charges may be brought against certain individuals involved in the events in Flint.

The loss of public confidence in the safety of drinking water from the tap is not limited to Flint. The entire water supply industry is suffering guilt by association. That means that all public water supply systems and their regulators are being viewed by the public as being suspect.

Since Flint, other locales have been criticized for having high lead levels in their drinking water, and elevated blood lead levels in their children.

The latest city, after Flint, to be hit with a class-action lawsuit is Chicago. On February 18, a class-action was filed against Chicago alleging that unsafe lead levels in that city's water supply have contaminated the drinking water. Among the remedies requested is a court order that would require the city to remove the thousands of lead pipes in its water system. Fox News has reported that almost 80 percent of that city receives drinking water through lead pipes.⁵

Pennsylvania has not escaped scrutiny. It has been identified as being among the states with the highest number of children with elevated blood lead levels.⁶

A recent article on Vox.com reported that the rates of lead exposure in Pennsylvania are “incredibly alarming”. It reports that 10 percent of the more than 140,000 kids tested had levels of 5 or more micrograms per deciliter of lead in their blood, the threshold used by government to identify children with dangerously elevated blood levels. Vox.com reports further that 18 cities in Pennsylvania have higher reported levels of lead exposure in blood lead levels than Flint.⁷

Who is to blame for high lead exposure in Pennsylvania’s cities? The answer, according to the Pennsylvania Department of Environmental Protection (DEP) is not Pennsylvania’s public water systems. DEP issued a press release, dated February 8, 2016, titled “Pennsylvania Water Systems Not Cause of Lead Exposure”. In that press release it was stated that “An analysis of public water systems in Pennsylvania cities with high lead exposure rates shows that drinking water is not the source of lead. Out of the more than 150 public water systems reviewed by DEP none had exceeded EPA standards for lead in drinking water”.

DEP Secretary John Quigley is quoted in that press release as stating that “This eliminates one of the possible sources for the exposure”.

If public water systems are not the cause of the high blood lead levels, what is? According to the press release, DEP cites a 2014 Pennsylvania Department of Health (DOH) report as concluding “. . .the primary source of childhood lead poisoning in Pennsylvania continues to be exposure to aging, deteriorating lead-based paint (chips and dust) and not drinking water”.

The statements from DEP and DOH should be reassuring to Pennsylvanians who get their drinking water from public water systems.



However, Pennsylvania’s public water systems must not rest on their laurels regarding lead. They must continue to be ever vigilant in keeping lead levels in their water below the federal and state action levels. On DEP’s website there is an article titled “Lead in Drinking Water”.⁸ In that article it is repeated that lead-based paint is the cause of most lead exposure in Pennsylvania.

The article proceeds to state that EPA “. . . estimates that 10 to 20 percent of human exposure to lead may come from drinking water”. Those percentages of exposure are not specific to Pennsylvania, but emphasize the importance of maintaining low lead levels in Pennsylvania’s drinking water.

As discussed above, Flint is under a siege of investigations, lawsuits, and possible criminal indictments. The lead scare has spread to Chicago, resulting in lawsuits. Jackson, Mississippi is also in the spotlight for high lead levels in its drinking water. Pennsylvania has received critical press on the subject and, while its water systems are compliant with federal and state drinking water standards regarding lead, some are close to exceeding the action level standard.

I am asked frequently by public water systems what they should do as a result of Flint. My answer is that “doing

nothing” is not recommended. Stated otherwise, public water systems must do something as a result of Flint. Flint has put all public water suppliers on an elevated notice that if a public water system is not properly regulated and operated regarding lead that many people can be harmed, placing those responsible in a lot of trouble.

Along with the elevated notice comes an elevated standard of care. That elevated standard of care requires public water systems to be proactive on the issue of lead. If a public water system has a lead problem after Flint “nothing” is not the preferred answer, if their employees-in-responsible-charge are asked to testify about what actions they took regarding lead after Flint.

The following are some actions public water systems may want to consider:

- Do not place yourself in the position of the Governor of Michigan who is now kicking himself every day and wishing that he had asked more questions, and accepted less answers. When a problem initially manifests itself, that is the time to resolve it. A stitch in time does save nine.
- An example of what one public water system in Pennsylvania has done to address a lead issue is provided

by the Pittsburgh Water and Sewer Authority (PWSA). The PWSA has recently taken added measures to reduce the levels of lead in its water.

While in compliance with federal and state lead standards, PWSA was close to the lead action level. According to a report in the Pittsburgh Post-Gazette on January 22, 2016, the PWSA has begun “. . . using a new chemical that within months should make water less corrosive and form a film on pipes to prevent lead from seeping into a family’s potable water”.⁹ The new chemical is a switch from caustic soda to soda ash.



- In addition to reevaluating chemical treatment for lead, public water systems may also want to consider being more strategic when replacing lead pipes by prioritizing schools, day cares, health care facilities and other susceptible properties.

- Public water systems may also want to consider stepping-up customer outreach and information on the lead issue. DEP’s website has an informative article on lead in drinking water (discussed above) containing a detailed answer to the question “What can I do to reduce my exposure to lead in drinking water?”

Public water systems should consider providing similar information to customers via billing inserts and/or on websites, or other means of communication.

- An example of such customer outreach is provided by the District of Columbia Water and Sewer Authority (“DC Water”). DC Water announced on its website that it had a study performed on homes with lead service lines and galvanized pipes, focusing on the relationship between lead and iron released from galvanized plumbing.

The study concluded “. . .that in-home plumbing, specifically galvanized pipes,

may contribute to lead to residential drinking water and should be considered as potentially important a lead source as service lines themselves”. The report recommended that to fully ensure that lead is not released from galvanized plumbing, full home replacement of that plumbing is the most desirable option. It was also recommended that an NSF certified filter that removes lead at the tap, or a pitcher filter as acceptable alternatives. DC Water has made the report available to the public on its website.¹⁰ This is the type of approach and information to consider for websites and other forms of customer communications.

- Public water systems should not blindly assume that statutory liability caps and insurance will provide full protection on the lead issue. Discuss liability caps with your legal counsel. Certain forms of legal actions do not fall under liability caps. As for insurance, discuss with your agent/broker whether your water system’s insurance policy contains a “lead exclusion”. Lead exclusions are common in water system insurance policies. If there is a lead exclusion discuss with the agent/broker what it would take to have that exclusion removed for the policy.

- If not already in their rules, regulations and tariffs, public water systems

should consider adopting requirements to:

- prohibit the use of galvanized or lead customer service lines, and

- require the replacement of lead and galvanized customer service lines with pipe approved by the public water system. It is preferable to state the specifications of approved pipe in the rules, regulations and tariffs.

I hope that you have found this article to be helpful. Should you have any questions, do not hesitate to contact me.

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This article is intended to be a discussion of legal issues in the water industry. It is not intended to be legal advice, or to establish any attorney-client relationships.

Before making any legal decisions regarding anything discussed in this article you should always consult with an attorney.



References

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