

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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December 16, 2016

The Honorable Harold Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Over the last year, the Committee has investigated the Flint water crisis. This inquiry included a series of hearings, witness interviews in Michigan and Washington, D.C., meetings with affected residents and stakeholders, and the review of tens of thousands of pages of documents from relevant federal, state, and local government officials. The documents and testimony show a series of failures at all levels of government caused, and then exacerbated, the water crisis. The Committee found significant problems at Michigan's Department of Environmental Quality (MDEQ), and unacceptable delays in the Environmental Protection Agency's response to the crisis. The Committee also found that the federal regulatory framework is so outdated that it sets up states to fail.

This was not the first time this Committee investigated serious lead issues in a city's drinking water. The Flint crisis revived the alarming issue of high lead levels in thousands of drinking water systems throughout America—an issue explored in other recent congressional hearings¹ and through various studies on lead in drinking water systems. An Associated Press analysis of EPA's own data on lead-contaminated drinking water revealed that roughly 1,400 water systems serving 3.6 million Americans exceeded the federal lead standard in the last three years.²

Below is a brief review of the Committee's findings with respect to the failures in Flint, and recommendations to ensure that protecting our nation's drinking water remains a top federal priority.

Failures by the State of Michigan

Due to Flint's dire economic condition and years of administrative mismanagement, the State of Michigan was forced to intervene in the city's affairs in an effort to save it. In November 2011, Governor Rick Snyder appointed an emergency manager to oversee Flint after a

¹ Flint Water Crisis: Impacts and Lessons Learned: Hearing before H. Energy and Commerce Comm., 114th Cong. (available at <https://energycommerce.house.gov/hearings-and-votes/hearings/flint-water-crisis-impacts-and-lessons-learned>).

² Ryan J. Foley & Meghan Hoyer, *US water systems repeatedly exceed federal standard for lead*, ASSOC. PRESS, Apr. 9, 2016.

panel determined the city was in a financial crisis.³ At the time, the city of roughly 100,000 people faced a \$19.1 million General Fund deficit, an \$8.8 million Water Fund deficit, cash flow covering less than one month's expenses, and liabilities related to unfunded postemployment benefits that exceeded \$850 million.⁴ Moreover, Flint's city council was in a state of dysfunction. A former councilman who resigned in December 2015 after serving more than a decade on the council stated: "Very few [people] want to be associated with the side show that is the Flint City Council. Chaos is not an effective governing style, and Flint is a shining example of that."⁵

In addition to the emergency manager program, the State also oversaw the quality of Flint's drinking water. Under the Safe Drinking Water Act (SDWA), the State of Michigan has "primacy" for overseeing and implementing drinking water standards in the State.⁶ Throughout 2015, however, MDEQ repeatedly failed to meet these important responsibilities. In February 2015, MDEQ erroneously reported that Flint's lead water pipes contained corrosion control to prevent the leaching of lead into the city's drinking water.⁷ This claim was soon disproven by EPA water expert Miguel Del Toral.⁸ In an EPA memorandum released in June 2015, Del Toral confirmed that Flint's water pipes lacked corrosion control and verified "the presence of high lead results in the drinking water."⁹

The documents and testimony show MDEQ was aware of Del Toral's findings, but remained indifferent about the lead danger, and the safety of Flint's residents. Emails show MDEQ officials dismissed Del Toral as a "rogue employee" whose findings warranted no attention or credibility.¹⁰ In mid-July 2015, an MDEQ spokesman publicly promised that "anyone who is concerned about lead in the drinking water in Flint can relax."¹¹ In a July email to the governor's office, an MDEQ official stated that "the bottom line is that residents of Flint do not need to worry about lead in their water supply."¹² MDEQ's persistent refusal to acknowledge and respond to the emerging lead crisis throughout 2015 made the situation worse.

Moreover, rather than immediately launch into action, MDEQ struggled for several months to interpret the law on corrosion control before admitting it failed to properly follow the relevant guidelines. On October 19, MDEQ Director Dan Wyant issued a statement admitting

³ Letter from Gerald Ambrose, Emergency Manager, to Rick Snyder, Governor of Michigan (Apr. 28, 2015) *available at* <https://www.cityofflint.com/wp-content/uploads/Emergency-Manager-Exit-Letter.pdf>.

⁴ *Id.*

⁵ Tim Galbraith, *Interview w/ former Flint councilman Josh Freeman*, HASHTAG FLINT, Jan. 8, 2016, *available at* <http://www.hashtagflint.com/#!Interview-w-former-Flint-councilman-Josh-Freeman/cjds/568c13dc0cf23ef0cf5e552c>.

⁶ 42 U.S.C. §300g-2.

⁷ Email from Stephen Busch, MDEQ District Supervisor, to Jennifer Crooks, EPA Region 5, Feb. 27, 2015 (available at flintwaterstudy.org).

⁸ Memorandum from Miguel A. Del Toral, Regulations Manager, Ground Water and Drinking Water Branch, Region 5, U.S. EPA to Thomas Poy, Chief, Ground Water and Drinking Water Branch, Region 5, U.S. EPA (June 24, 2015) (*available at* <http://flintwaterstudy.org/wp-content/uploads/2015/11/Miguels-Memo.pdf>).

⁹ Memorandum from Miguel A. Del Toral, Regulations Manager, Ground Water and Drinking Water Branch, Region 5, U.S. EPA to Thomas Poy, Chief, Ground Water and Drinking Water Branch, Region 5, U.S. EPA (June 24, 2015) (*available at* <http://flintwaterstudy.org/wp-content/uploads/2015/11/Miguels-Memo.pdf>).

¹⁰ Nancy Kaffer, *MDEQ e-mails show stunning indifference to Flint peril*, DETROIT FREE PRESS, Oct. 22, 2015.

¹¹ Lindsey Smith, *Leaked internal memo shows federal regulator's concern about lead in Flint's water*, MICHIGAN RADIO, July 13, 2015, *available at* <http://michiganradio.org/post/leaked-internal-memo-shows-federal-regulator-s-concerns-about-lead-flint-s-water#stream/0>.

¹² Email from Brad Wurfel, MDEQ Spokesperson, to Dennis Muchmore, Chief of Staff, Governor of Michigan, July 24, 2015 (on file with the Committee).

MDEQ staff in Flint “employed a federal protocol they believed was appropriate, and it was not.”¹³ By December 2015, numerous MDEQ officials were forced to resign and Flint declared a state of emergency due to the lead crisis.¹⁴ By early 2016, another top MDEQ official was fired.¹⁵ Since then, Michigan prosecutors have filed criminal charges against nine government workers¹⁶ and a civil suit against two companies arising from the lead crisis.¹⁷ Two state officials have already entered into plea agreements with state prosecutors.¹⁸

Environmental Protection Agency Failures

While Michigan had primacy over drinking water issues, the SDWA vested the Environmental Protection Agency (EPA) with oversight responsibilities, and the authority to intervene when a “substantial endangerment to the health of persons” arises.¹⁹ Congress put EPA in this role as a backstop in the event that a state or territory failed to provide safe drinking water.²⁰ In this case, however, even the federal safeguard failed Flint’s residents.

When Del Toral’s June 2015 memo was released, EPA Region 5 Administrator Susan Hedman immediately downplayed its findings to Flint’s leaders, and counseled that immediate action was unnecessary.²¹ In mid-July 2015, EPA dismissed Del Toral’s memo as a “limited drinking water sampling for lead in Flint in response to a citizen complaint.”²²

As the crisis escalated and it became clear that MDEQ’s response was inadequate, EPA ignored multiple demands for federal intervention. For instance, emails from spring 2015 show Del Toral implored EPA officials to immediately act in Flint,²³ and referenced EPA’s power to intervene under the SDWA.²⁴ EPA also ignored desperate pleas from concerned community groups²⁵ and Rep. Dan Kildee²⁶ to actively get involved per the SDWA.

¹³ Statement of DEQ Director Dan Wyant, Oct. 19, 2015, available at <https://www.michigan.gov/deq/0,4561,7-135--367529--00.html>.

¹⁴ Paul Egan, *Snyder apologizes, Wyant resigns in Flint water crisis*, DETROIT FREE PRESS, Dec. 29, 2015, available at <http://www.freep.com/story/news/local/michigan/2015/12/29/deq-director-wyant-resigns-over-flint-water-crisis/78027052/>.

¹⁵ Ron Fonger, *DEQ memo names Michigan drinking water officials suspended over Flint water*, MLIVE, Jan. 26, 2016, available at http://www.mlive.com/news/flint/index.ssf/2016/01/flint_fallout_deq_memo_names_m.html.

¹⁶ Amy Haimerl and Abby Goodnough, *6 More State Workers Charged in Flint Water Crisis*, N.Y. TIMES, Jul. 29, 2016, available at <http://www.nytimes.com/2016/07/30/us/flint-michigan-water-crisis.html>.

¹⁷ Mitch Smith and Julie Bosman, *Michigan Attorney General Sues 2 Companies Over Flint Water Crisis*, N.Y. TIMES, June 22, 2016, available at <http://www.nytimes.com/2016/06/23/us/flint-water-crisis-michigan.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.

¹⁸ Jim Lynch, *Plea reached for ex-state worker in Flint water crisis*, THE DETROIT NEWS, Sept. 14, 2016, available at <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/09/14/plea-flint-water/90351652/>.

¹⁹ 42 U.S.C. §§300i.

²⁰ *Id.*

²¹ Email from Susan Hedman, EPA Region 5 Administrator, to Dayne Walling, Mayor of Flint, July, 2, 2015, available at <http://flintwaterstudy.org/wp-content/uploads/2015/10/Virginia-Tech-FOIA-EPA.pdf>.

²² FlintWaterStudy.Org, *Highlights of Marc Edwards FOIA: City of FLINT Emails to/from/cc/blind cc EPA and MDEQ*, available at <http://flintwaterstudy.org/wp-content/uploads/2015/10/Virginia-Tech-FOIA-EPA.pdf>.

²³ E-mail from Miguel Del Toral, Regulations Manager, to Thomas Poy, Region 5 Branch Chief, *et al.* (Apr. 22, 2015 7:45 EST) (on file with the Committee).

²⁴ 42 U.S.C. §§300i.

²⁵ NRDC, “Petition for Emergency Action Under the Safe Drinking Water Act 42 U.S.C. § 300i, to Abate the Imminent and Substantial Endangerment to Flint, MI Residents from Lead Contamination,” available at http://docs.nrdc.org/water/files/wat_15100101a.pdf.

²⁶ Letter from Susan Hedman, EPA Region 5 Administrator, to Rep. Dan Kildee (D-MI) (Sept. 15, 2015), available at <http://flintwaterstudy.org/wp-content/uploads/2015/09/Hon.-Daniel-Kildee-09-15-15.pdf>.

On September 20, 2015, water expert Dr. Marc Edwards wrote a lengthy email to EPA officials summarizing the data that showed overwhelming evidence of unsafe levels of lead in Flint's drinking water.²⁷ Dr. Edwards warned the EPA that MDEQ was still claiming Flint's water was safe to drink, and demanded that EPA "should immediately take decisive action on this issue to protect the public."²⁸ Meanwhile, EPA Administrator Gina McCarthy praised the EPA's response and called relief efforts "very encouraging" and "great progress."²⁹

It was not until January 21, 2016 (nine months after Del Toral requested EPA intervene under the SDWA, seven months after Del Toral's memorandum was released, and at least four months after Administrator McCarthy became involved) that EPA finally issued an Emergency Administrative Order under the SDWA.³⁰ The Order recognized EPA's "authority to order actions when an imminent and substantial endangerment exists," and finally acknowledged "The City of Flint's and the State of Michigan's response to the drinking water crisis in Flint have been inadequate to protect public health and that these failures continue."³¹ The EPA's Office of Inspector General later determined that the agency improperly delayed intervening in the Flint crisis.³² Specifically, the Inspector General found that "given what we know about the consequences of the Flint drinking water contamination, it is clear that EPA intervention was delayed. These situations should generate a greater sense of urgency. The EPA must be better prepared to timely intercede in public health emergencies like that which occurred in Flint."³³

Federal Regulatory Failures

EPA's failure to update the Lead and Copper Rule (LCR) made matters worse. The LCR governs corrosion control in drinking water systems serving over 50,000 persons, like Flint. Ambiguities in the LCR caused EPA and MDEQ to waste several months debating how the LCR applied to Flint, instead of taking immediate action to address the problem.

The SDWA requires the EPA to "review and revise" the LCR every six years to ensure the rule effectively protects America's drinking water.³⁴ Since the LCR was introduced in 1991, however, EPA has only released one set of short-term revisions (in 2007) and never conducted a full review, as required by law.³⁵ The agency admitted that the LCR is outdated and subject to

²⁷ E-mail from Dr. Marc Edwards, Va. Tech., to Miguel Del Toral, Regulations Manager, *et al.* (Sept. 20, 2015 9:30PM EST) (on file with the Committee).

²⁸ *Id.*

²⁹ Email from Hon. Gina McCarthy, Administrator, EPA, to Thomas Burke, Deputy Assistant Administrator, EPA, (Sept. 28, 2015) (on file with the Committee).

³⁰ EPA website, "Flint Drinking Water Response, EPA Safe Drinking Water Act Emergency Order for Flint, Michigan," available at http://www.epa.gov/sites/production/files/2016-01/documents/1_21_sdwa_1431_emergency_admin_order_012116.pdf.

³¹ *Id.*

³² U.S. Env'tl. Protection Agency Off. of Inspector Gen., *Management Alert: Drinking Water Contamination in Flint, Michigan, Demonstrates a Need to Clarify EPA Authority to Issue Emergency Orders to Protect the Public*, Proj. No. 17-P-0004, Oct. 20, 2016, available at https://www.epa.gov/sites/production/files/2016-10/documents/_epaig_20161020-17-p-0004.pdf.

³³ *Id.*

³⁴ 42 U.S.C. §§300f.

³⁵ EPA website, "Fact Sheet: Revisions to the Regulations Controlling Lead in Drinking Water," available at <http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=6000010Q.txt>.

“differing possible interpretations” that created the harmful confusion in Flint.³⁶ Since 2010, however, EPA has pushed the release of the final updated LCR back, by five years.³⁷ As of now, EPA does not plan to update the rule until late 2018 at the earliest.³⁸ Moreover, roughly one month after EPA Administrator Gina McCarthy provided written testimony to the Committee pledging that EPA was “actively working on revisions to the Lead and Copper Rule,”³⁹ EPA postponed the release of the final LCR by another six months.⁴⁰ Furthermore, in its Drinking Water Action Plan, released in November 2016, EPA indicated that it will continue to use “the existing LCR for at least the next five years.”⁴¹ Meanwhile, Governor Snyder introduced a new lead and copper rule for Michigan described as “the world’s toughest” LCR.⁴² Unlike Michigan, the EPA and the federal government have taken no actions against the people responsible for the crisis.

Appropriations Considerations

While the EPA has failed to update the LCR, it has aggressively pushed to finalize, and fund, controversial work to address climate change. For Fiscal Year 2017, the White House requested over \$279.8 million to “Address Climate Change.”⁴³ The President specifically requested \$50 million for activities associated with implementing the Clean Power Plan.⁴⁴ Moreover, earlier this year the administration made a \$500 million initial payment to the Green Climate Fund as part of a pledge to fight climate change abroad.⁴⁵

We recommend that the Committee on Appropriations review those requests to determine if they are consistent with the country’s most urgent needs. The findings from the Committee’s investigation of the Flint water crisis suggest this money could be better spent on upgrading America’s drinking and wastewater systems to protect the millions of citizens who may be exposed to unsafe levels of lead.

EPA estimates that roughly \$384 billion is needed by 2030 to replace and secure America’s drinking water infrastructure.⁴⁶ Cities like Lansing, Michigan,⁴⁷ and Boston,

³⁶ Memorandum from Peter C. Grevatt, Director, Office of Ground Water and Drinking Water, U.S. Environmental Protection Agency, to EPA Regional Water Division Directors, Region I-X, U.S. Environmental Protection Agency (Nov. 3, 2015), available at https://www.epa.gov/sites/production/files/2015-11/documents/occt_req_memo_signed_pg_2015-11-03-155158_508.pdf.

³⁷ Regulations.gov., <https://resources.regulations.gov/public/custom/jsp/navigation/main.jsp>.

³⁸ *Id.*

³⁹ *Examining Federal Administration of the Safe Drinking Water Act in Flint, Michigan, Part 3 Before the House Comm. on Oversight and Gov’t Reform*, 114th Cong. 2 (2016) (statement of Gina McCarthy, Administrator, U.S. EPA).

⁴⁰ *Supra* note 37.

⁴¹ U.S. EPA, Office of Water, *Drinking Water Action Plan*, Nov. 2016, available at <https://www.epa.gov/ground-water-and-drinking-water/drinking-water-action-plan>.

⁴² Paul Egan, *Snyder marks one-year anniversary of his acknowledgment of Flint crisis*, PACKERS NEWS, Sept. 28, 2016, available at <http://www.packersnews.com/story/news/local/michigan/flint-water-crisis/2016/09/28/snyder-flint-much-accomplished-year-more-do/91214242/>.

⁴³ EPA website, “FY 2017 EPA Budget in Brief,” available at <https://www.epa.gov/sites/production/files/2016-02/documents/fy17-budget-in-brief.pdf>.

⁴⁴ Amanda Reilly, *GOP lawmakers tell McCarthy to ‘refocus’ and ‘do your job’*, E&E NEWS, Mar. 23, 2016, available at <http://www.eenews.net/stories/1060034481>.

⁴⁵ Suzanne Goldenberg, *Obama administration pays out \$500m to climate change project*, THE GUARDIAN, Mar. 7, 2016.

⁴⁶ Michael Wines & John Schwartz, *Unsafe Lead Levels in Tap Water Not Limited to Flint*, N.Y. TIMES, Feb. 8, 2016.

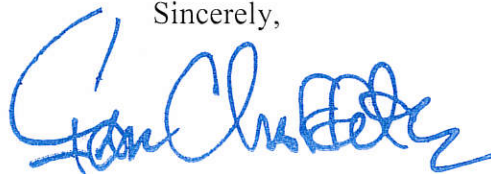
⁴⁷ John Wisely & Todd Spangler, *Where Are the Lead Pipes? In Many Cities, We Just Don’t Know*, DETROIT FREE PRESS, Feb. 28, 2016.

Massachusetts⁴⁸ have already implemented plans to replace lead pipes. While most of this work must be funded by state and local governments, federal programs can help. For example, EPA's Drinking Water State Revolving Fund (SRF) issues money to states to finance the improvement of local water systems. Similarly, the Department of Agriculture's Water and Waste Disposal Loan and Grant Program provides money for rural communities with fewer than 10,000 residents to update their drinking water facilities. The SRF loans could be utilized more efficiently by removing language from the FY2012 appropriations act that applied the Davis-Bacon prevailing wage requirement to the program.⁴⁹ Expanding Davis-Bacon to cover the SRF increased the cost of infrastructure projects, wasted taxpayer money, and limited the amount of qualified contractors able to perform upgrades. As the Government Accountability Office found, the Davis-Bacon Act requires "periodic wage verification and proof of purchase documentation, which increases both communities' paperwork burdens and costs of borrowing SRF funds."⁵⁰

Furthermore, since the SRF money goes toward contracts between non-federal entities, Davis-Bacon should not be applicable. As the Senate Committee on Environment and Public Works noted: "As enacted, Davis Bacon applies only to those contracts to which the Administrator or Federal Government is a contractee. In the case of the SRF, the contracts are between the State and the municipality and therefore, Davis-Bacon does not apply to the SRF."⁵¹

We hope you will consider these findings and recommendations. Thank you for your attention to this important matter. Please contact me with any questions. Please contact Drew Feeley of the Committee staff at (202) 225-5074 if you require additional information.

Sincerely,



Jason Chaffetz
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

⁴⁸ Stephanie Akin, *House Panel Urges EPA to Expedite New Lead Rules*, ROLL CALL, Apr. 13, 2016.

⁴⁹ See Consolidated Appropriations Act, 2012, P.L. 112-74, Dec. 23, 2011, available at <https://www.gpo.gov/fdsys/pkg/PLAW-112publ74/pdf/PLAW-112publ74.pdf>.

⁵⁰ Gov't Accountability Office, *State Revolving Funds, Improved Financial Indicators Could Strengthen EPA Oversight* (2015) (GAO-15-567).

⁵¹ Cong'l Research Serv., "Davis-Bacon Prevailing Wages and State Revolving Loan Programs Under the Clean Water Act and the Safe Drinking Water Act" (2013) (R41469).