CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
ADVANCING ETHICS, COOPERATION AND EDUCATION
2016 CLM Boston Conference
July 14-15, 2016 Boston, MA

Public Assets: Risks, Rewards and Reducing Environmental Liabilities

I. Recent Municipal/Governmental Contamination Sites & Issues

A. City of Flint: Lead Contamination and Legionnaires' Disease

1. Overview of the Issues

The Flint, Michigan water crisis has drawn national attention to the presence of lead and *Legionella* bacteria in municipal water supplies and distribution systems. In March 2016, the Flint Water Advisory Task Force issued its final report, detailing a variety of missteps by government officials which resulted in the exposure of City of Flint residents to contaminated drinking water. *See Flint Water Advisory Task Force-Final Report* (March 2016).

Lead has long been recognized as a neuro-toxicant with reports dating back to Dioscorides in 70 AD identifying the adverse cognitive effects of lead. Numerous sources of lead exist because lead is one of the most mined non-ferrous metals and exposures are typically found through environmental, occupational, or additional sources like traditional medicines and food. Lead has been used as sweeting agent in food, as medicine to control bleeding and diarrhea, as a paint and glaze material, as a pipe material, as a chemical additive in products such as gasoline, and as a waterproofing material.

The developing neurological systems of children are particularly vulnerable to lead intoxication and the some of the earliest intoxications in children were recognized in in children exposed to lead based paint in Australia in1897. Lead intoxication in children in the United States was first recognized in 1917 and continued to be an area of concern. Lead in paint and gasoline was reduced in mid- to late 1970's in the United States as a result of increased concern of childhood exposures and long term neurotoxicity in children. The United States Centers for Disease Control and Prevention has steadily decreased the level of concern for blood levels of lead in children from 60 micrograms per deciliter in the 1960's to a current "reference range" level of 5 micrograms per deciliter with the advent of more research on the toxicity of lead.

While household exposures from lead based paint are commonly recognized as the main source of exposure in children among the general public, lead in drinking water can be a significant source of childhood lead exposure. *See, e.g., "Lead in Drinking*

Water and Human Blood Lead Levels in the United States", United States Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, August 10, 2012, 61(04); 1-9. The United States Environmental Protection Agency estimates that drinking water can contribute over 20 percent or more of an individual's exposure to lead and infants who are fed formula may have 40 to 60 percent of their exposure to lead from decaying lead based water pipes. The United States Environmental Protection Agency has set the actionable level of lead in drinking at no more than 10 percent of a municipality's water supply locations having 15 parts per billion (ppb) of lead. In Flint, Michigan, the lead level has been estimated to be between 40 ppb and 100 ppb in some households based on federal and state sampling data.

Over the past several years, Legionnaires' disease outbreaks have made headlines across the country. In Flint, Michigan, an increase in the number of diagnosed cases of Legionnaires' disease was noted for the period of June 2014 to March 2015. Although state investigators were unable to definitively link the outbreak to the drinking water supply sourced from the Flint River, that water supply was identified as a possible cause. *See Flint Water Advisory Task Force-Final Report* at pp. 24-26 (March 2016).

Legionnaires' disease is a serious, potentially lethal, and increasingly common form of bacterial pneumonia that is caused by exposure to a ubiquitous waterborne bacterium of the genus Legionellae. Legionellae was first discovered in 1976, following an outbreak of pneumonia at the Bellevue Stratford Hotel in Philadelphia during an American Legion convention celebrating the United States' Bicentennial. This outbreak involved 221 cases of pneumonia and the death of 34 convention attendees, or "Legionnaires." A public health investigation resulted in identifying the causative pathogen, a new bacterium that was given the name "Legionella," in recognition of the convention attendees. *See* DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF THE INSPECTOR GENERAL, OFFICE OF HEALTHCARE INSPECTIONS, REPORT NO. 13-00994-180 (Apr. 23, 2013) (hereinafter "VA REPORT"). Legionellae are invisible, odorless, microscopic waterborne bacteria that occur naturally in many different water sources. There are more than 50 known species of Legionella. One strain, Legionella pneumophila serogroup 1, is most commonly associated with human disease. It has been estimated that more than 70 percent of all Legionella infections in humans have been caused by Legionella pneumophila serogroup 1. *See* VA REPORT at 2.

2. The Legal Framework for Municipal Water Suppliers

The Safe Drinking Water Act, 42 U.S.C. §300f et seq. (1974), is the foundation for many of these claims. The Safe Drinking Water Act empowers the United States Environmental Protection Agency to regulate the public drinking water supply. *Matoon v. Pittsfield,* 980 F.2d 1, 4 (1st Cit. 1992). Its purpose is "to assure that water supply systems serving the public meet minimum national standards for the protection of public health." *Id.* It applies "to each public water system in each State." *Id.* The Act empowers the administrator of the United States Environmental Protection Agency to "publish maximum contaminant level goals and promulgate national primary drinking water regulations." *Id*. The regulations address issues including maximum contaminant levels,

control of residual disinfectant levels, corrosion control, permissible water treatment techniques, and lead service line replacement requirements. *See generally* 40 C.F.R. Part 141. The Act authorizes agency enforcement actions as well as private citizen enforcement proceedings against violators. *See* 42 U.S.C. §§ 300g-3(b) and 300j-8.

The Safe Drinking Water Act has served as a basis for legal claims by residents against municipalities arising from contaminated drinking water. In *Matoon v. Pittsfield*, a group of residents of the City of Pittsfield, Massachusetts sued city officials for breach of warranty, public nuisance, violation of civil rights under 42 U.S.C § 1983, and violation of the Safe Drinking Water Act, alleging that they contracted giardiasis from drinking contaminated water. In *Matoon*, the First Circuit held that the Safe Drinking Water Act precluded certain the plaintiffs' federal nuisance and civil rights claims; however, the plaintiffs were permitted to pursue their claims under the Safe Drinking Water Act.

Although certain immunity-based defenses may be available, claims for fraud and gross negligence potentially void those defenses.

State and local governments are considering a variety of regulations to monitor and limit lead contamination in drinking water supplies. In March 2016, New Jersey lawmakers proposed a bill, A.B. 3595, to require regular lead testing of school drinking water. *See* "School Water Lead-Testing Bill Floated in NJ", Law 360, March 28, 2016.

3. The Potential Tort Liabilities

The water contamination crisis in Flint, Michigan has been in the headlines across the country since early 2014. As media attention escalated, so did the pressure on public health agencies and government officials to identify the source of contamination and mitigate exposures. When the municipal drinking water supply was identified as the source of exposure to lead and possibly also *Legionella* bacteria, lawsuits followed.

As of April 2016, there were eight lawsuits arising from the contamination of the Flint, Michigan water supply. These lawsuits illustrate the potential tort liabilities that may arise from a municipality's operation and management of the drinking water supply. By way of illustration, in *Lawrence Washington, Jr. et al. v. Governor Snyder, et al.*, United States District Court for the Eastern District of Michigan, Case No. 4:16-cv-11247, the defendants include officials of State of Michigan, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services. The core allegation is that government officials chose to draw water from the Flint River rather than paying for water from the City of Detroit. The plaintiffs have asserted claims including fraud, violation of the Racketeer Influenced and Corrupt Organizations Act, civil rights violations under 42 U.S.C. § 1983, breach of contract, breach of warranty, nuisance, trespass, negligence, gross negligence, and intentional infliction of emotional distress. In *Myia McMillian, et al. v. Governor Richard Dale Snyder, et al.*, Case No. 2:16-cv-10796 in the U.S. District Court for the Eastern District of Michigan, seven families claim that gross negligence of Governor Snyder and the City of Flint caused the

city's water to become contaminated with lead. The Complaint alleges that the governor and city leaders failed to provide safe drinking water to city residents and downplayed the seriousness of the contamination once it became known. The defendants include Governor Snyder and several current and former state and city officials. The plaintiffs allege property damage and bodily injury including weight loss, stunted growth, amnesia, headache, and other health symptoms. In yet another case, *Concerned Pastors for Social Action, et al. v. Nick A. Khouri, et al.,* Case No. 2:16-cv-10277 in the United States District Court for the District of Michigan, the Natural Resources Defense Council, American Civil Liberties Union, and others filed another suit against city and state officials, alleging Safe Drinking Water Act violations.

Similar litigation is pending in the District of Columbia. *Parkhurst v. D.C. Water and Sewer Authority,* Case No. 2013 CA 003814 in the Superior Court of the District of Columbia is a lawsuit filed on behalf of parents of children affected by lead in the drinking water during the period of 2001 to 2004. The lawsuit arose, in part, from information developed as a result of a study that found a correlation between blood lead levels in children who resided in certain neighborhoods with high levels of lead in drinking water. The core allegation is that the District of Columbia Water and Sewer Authority failed to notify failing to notify parents about the levels of lead in the drinking water supply, and the dangers of drinking the water. Class certification was denied in April 2013. The case proceeded as a consolidated tort action on behalf of multiple plaintiffs. In January 2016, partial summary judgment was granted in favor of the defendant, District of Columbia Water and Sewer, on the negligence and Consumer Protection Act claims. *Parkhurst et al. v. District of Columbia Water and Sewer Authority (WASA),* 2016 DC Super Lexis 1 (D.C. Super. Ct. January 13, 2016). The Superior Court ruled that the "public duty doctrine" barred the negligence claims because this long-recognized principle protects government entities from lawsuits related to services provided to the public at large, such as furnishing drinking water. The Consumer Protection Act claims were dismissed on the basis that the municipal water authority was not a "merchant" within the scope of the consumer protection statute. Although the municipal water authority collects fees from its customers, the court concluded that the fees were for services rendered in maintain the public infrastructure rather than for profit, so there is no "commercial" transaction and therefore no legal exposure under consumer protection laws. The *Parkhurst* court also addressed federal preemption under the Safe Drinking Water Act and discretionary function immunity arguments and declined to grant summary judgment on those issues.

Lawsuits seeking damages for contaminated drinking water supplies are on the horizon in other municipalities. In February 2016, a class action lawsuit was filed on behalf of Chicago residents claiming that the city knowingly started construction projects that increased the risk of high levels of lead in the tap water, and failed to warn residents of the risks and how to reduce the risks. The Complaint alleges that the aging lead water pipes are disturbed by various construction and repair projects which disrupts the polyphosphate coating that protects the lead service lines. Medical monitoring is sought. *See Tatjana Blotkevic, et al. v. City of Chicago,* No. 2016-CH-02292, Illinois Circuit

Court, Cook County, Chancery Division. Remedies sought include pipe replacement and medical monitoring.

Whether municipal entities will face legal exposure for Legionnaires' disease outbreaks remains to be seen. Legionella is not a regulated contaminant under the Safe Drinking Water Act. Potential legal exposure may arise from ownership or management of buildings identified as sources of Legionella infections. The standard of care applicable to building owners and operators to proactively undertake efforts to detect or control the growth of Legionella in building water systems, outside of the healthcare context, is the topic of some debate. *See Vellucci v. Allstate Ins. Co.*, 66 A. 3d 215 (N.J. 2013); and *Flaherty v. Legum & Norman Realty, Inc.*, No. 1:05-1492, 2007 WL 4694346 (E. D. Va. Jan. 4, 2007), *aff'd* 281 F. App'x 232 (4th Cir. 2008). In June 2015, the American Society of Heating, Refrigerating and Air-Conditioning Engineers ("ASHRAE") issued its guideline, *Legionellosis: Risk Management for Building Water Systems*, which is intended for use by the owners and managers of buildings that contain features associated with Legionella amplification. It establishes a risk management protocol and includes a mandate that building owners establish a "water management program" and designate a specific "program team" to oversee it. No court as yet has declared that any particular guideline is a definitive standard of care; however, the new ASHRAE standard is described as a consensus-based standard, enhancing the likelihood that it may be accepted as a standard of care.

4. The Potential Damages

Remedies sought include compensatory damages for bodily injury or property damage (including the cost to replace lead-containing water lines), and medical monitoring.

B. Gold King Mine

1. Overview of the Issues

In August 2015, The EPA's investigation of the Gold King Mine caused over 3 million gallons of wastewater contaminated with cadmium, lead and arsenic to be released into Cement Creek that flows into the Animas River and impacted Colorado, New Mexico and Utah. The release resulted when the EPA's contractor, Environmental Restoration LLC, was excavating above the old adit and pressurized water began leaking

2. The Legal Framework

The EPA acknowledged responsibility for the release and worked to remediate the spill, although the EPA delayed notifying the public of the release for more than 24 hours. And, the EPA's response has been criticized by the governors of Colorado, New Mexico, and Utah as well as the Navajo Nation President.

3. The Potential Tort Liabilities

In January 2016, New Mexico served a notice of intent to sue the EPA for the spill on the basis that the EPA has not held itself accountable for the spill as it holds private businesses for releases. However, the US Department of Interior investigation into the spill concluded that it was unintentional.

Thousands of local residents in Colorado, New Mexico, Utah and the Navajo Nation may pursue claims against the EPA for the spill. Potential private plaintiffs include ranchers, farmers, businesses that draw water from the river, and individuals with illnesses from water contamination.

4. The Potential Damages

The potential damages include loss of use of water from the river and potential health effects from exposure to contaminated water.

II. Regulatory Update & Impacts To Public Agencies

A. Definition of Waters of the United States

In June 2015, the EPA and Army Corps of Engineers amended the Clean Water Rule by amending the definition of "the waters of the United States," which defines the scope of the Clean Water Act. The jurisdiction of the Clean Water Act is important for construction because the application of the Act determines whether projects are required to comply with often onerous section 402 and section 404 programs. Approximately 13 states filed lawsuits to enjoin the EPA from enforcing this new rule. In October 2015, the Sixth Circuit issued a nationwide stay barring this new rule.

B. Regulatory Shifts On Vapor Intrusion Issues

Regulators have been actively updating the vapor intrusion screening levels and monitoring requirements for indoor air sampling. In fact, the EPA in June 2015 published a Technical Guide for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air. These new regulations have impacts to sites contaminated soil and shallow groundwater, particularly in residential and commercial areas.

C. Updates With Recent Maximum Contaminant Levels & The New Crystalline Silica Rule

Regulators have been actively implementing and investigating the maximum contaminant levels from several constituents of concern on the Contaminant Candidate List. In fact, California recently adopted the nation's first maximum contaminate level for hexavalent chromium.

In March 2016, the Occupational Safety and Health Administration published the final rule amending the 45 year old standards for occupational exposure to respirable crystalline silica. The final rule is a real challenge for industries, particularly construction and marine, to comply with the new standards. In fact, this new rule was challenged in court within two weeks of being published.

III. Interactive Discussion of Innovative Programs Designed To Shift These Environmental Liabilities Away From Public Agencies

Recent events surrounding impaired drinking water create a number of liabilities some of which create liability challenges, some of which are beyond the purview of insurance. Contaminated drinking water could result in 1) physical injury or harm to those who consume, 2) property damage and subsequent remediation expense to residential plumbing if exposed to perpetually high levels of lead contamination, 3) damage to the environment if contaminated water migrated beyond its intended receptors such as through cracked or leaking pipes.

Depending upon how complaints are drafted by plaintiffs' counsel a claim can be presented as a products liability claim or as a premises pollution claim. Products liability is apparent since water is sold to ratepayers and enters the stream of commerce as a product. There are two potential pitfalls with this argument: 1) assuming governmental entity has products liability coverage, it may not have products pollution coverage and 2) many utilities do not maintain products liability coverage. One significant advantage to filing a product's liability claim is coverage is occurrence based and "theoretically" continues in perpetuity. Coverage for products liability is afforded once the product leaves the originating facility.

Pollution liability is challenging since coverage is limited to 1) scheduled sites, 2) claims made coverage and 3) excludes products liability. This coverage could potentially fund the costs to repair or replace first party property damage coverage caused by impaired property but provides little third party liability coverage.

Lastly depending upon the particulars of the claim and corresponding levels of negligence, the persons in charge could be financially exposed to loss for fiscal irresponsibility. Many government employees are protected by governmental immunity but depending upon the egregiousness of the behavior, those making the decisions are exposed.

A. Cutting-Edge Insurance Programs

Options include customized insurance programs; self-insurance, captive or risk purchasing groups, or floating bonds to pay for expected losses.

B. Other Risk Transfer Mechanisms

Options include contractual risk transfer.