

CERCLA and Flint, Michigan

Despite the attention to the Safe Drinking Water Act and its relevance to the mass lead poisoning in Flint, Michigan, the crisis with the lead in the pipes of Flint is clearly covered under the Superfund law and actually requires a federal-level Superfund response.

Under CERCLA 103 (Superfund) [42 USC 9603] statutes regarding the release of toxic substances, emergency response, and notifications, if 10 pounds of lead (a CERCLA hazardous substance) or more is released into the environment within a 24 hour period from a “facility” that has no permit to release that lead, there must be a mandatory and immediate call by the facility owner/operator to the National Response Center reporting the lead release. This call is required each day there is another release of at least 10 pounds. Flint no doubt ever made the call to the National Response Center, but clearly, the amount of lead leaching and traveling through the pipes in Flint exceeds 10 pounds each and every day.

The water system in Flint clearly meets the definition of facility under CERCLA – [42 USC 9601 – Definitions (9)]” any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works).” It seems that this sort of scenario was deliberately written in to the statute when it was promulgated in 1980, anticipating that this could happen in a publicly owned treatment works.

The National Response Center (which doesn't actually respond itself), once notified, can activate the Regional Response Team, which is supposed to have a plan or the ability to move quickly to stop releases and mitigate the harm. Superfund Emergency Response funds would be immediately available. [42 USC 9604 (1)] “Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.”

Further, CERCLA created the ATSDR (Agency for Toxic Substances and Disease Registry), whose job it is to “respond” to a release of large enough amounts of a toxic chemical. The SARA Title III amendments, also known as EPCRA, broadened ATSDR's responsibilities in the areas of public health assessments, establishment and maintenance of toxicologic databases, information dissemination, and medical education.

The federal government and EPA now have the information that the required call should have provided, and need to step in now and take over the situation. The federal authority

and obligation is certainly there. So why hasn't this happened? Is it ignorance about these statutes and their applicability?