Expect Increased Environmental Regulatory Scrutiny in the Wake of the Flint Water Crisis

THE REGULATED COMMUNITY SHOULD PLAN FOR AN INCREASED LEVEL OF AGENCY OVERSIGHT, INSPECTION AND ENFORCEMENT AND INCREASED PUBLIC INVOLVEMENT.

Although there has been much finger pointing as to which party or parties may be responsible for the Flint, Michigan, drinking water issue, it is apparent that there were lapses at all levels of government. This article does not evaluate the breakdowns that occurred in Flint or assess responsibility. Rather, it focuses prospectively on how the Flint crisis may affect the regulated community, particularly the manufacturing industry. Much has been written about the potential increase in federal and state regulatory oversight of public water utilities and communities taking a closer look at their water systems in light of the crisis, but what should the manufacturing industry expect, and how might it best prepare?
What should the regulated community expect?

• **Increased governmental oversight through additional committees and commissions:** As breakdowns occur in the process, an immediate reaction often is to add additional governmental oversight. For example, several bills have been introduced in Michigan that would add additional layers of government review. Senate Bill 827 would create a Michigan Department of Environmental Quality (MDEQ) rules-review committee that would be appointed by the governor. This committee would review existing and proposed MDEQ rules. Senate Bill 829 would create a water resources commission that would have to approve all water-related permits (not just drinking water supply). Senate Bill 831 would create an air pollution control commission that would have to approve all air-related permits.

Although the prospect of any of these bills becoming law is unclear, the proposed laws are examples of the common initial reaction to address breakdowns in government by adding an additional level of control. One should expect that this may not only occur in Michigan, but in other states. Any such additional fragmentation of governmental control could have a significant impact on the implementation and enforcement of existing regulations. For example, the permitting process for industry would be less streamlined, increasing the time and costs required to obtain a permit. In addition, since positions on such committees and commissions likely would be appointed, the process would become more politicalized.

• **Increased public scrutiny of agency decisions:** As breakdowns occur, there typically is less trust in government decision-making and an increased public consciousness and scrutiny of environmental agency decisions. This will not be exclusive to decisions related to public drinking water supplies, and the trend will also impact decisions related to environmental permitting, remediation, site closure, brownfield development and facility siting and decommissioning. This additional scrutiny may arise through existing public review processes; expanded public review processes proposed in future regulations (*e.g.*, expanded commissions or committees, as noted above); increased review by citizen groups (some of which have increased fundraising efforts based on these issues); public outreach programs; or expanded freedom of information requests.
• **Agency reluctance to make decisions and increased state and federal site inspections:** With the much publicized lapses in government and more executive, legislative and public oversight and scrutiny of agency decisions, one can expect agency staff to be more reluctant to make decisions and to be more cautious and conservative in making them. An increase in site inspections by federal and state regulatory agencies also is likely as agencies are more cautious, trying to avoid similar breakdowns or missteps that could have environmental, health or safety consequences. These inspections will not be limited to drinking water supplies and can be expected to be multimedia in nature, being conducted by various divisions/departments of government.

• **Increased state and federal enforcement action:** With an increase in inspections, one might expect that there will be an increase in notices of violation and enforcement actions. We also may see a move or shift away from compliance assistance to more compliance enforcement as agencies will not want to miss something, be perceived as turning a blind eye to a problem, or be accused of not having properly enforced against the regulated entity.

**What should the regulated community do?**

Get your ducks in a row. The best advice for the regulated community is to be prepared and organized and to plan for an increased level of agency oversight, inspection and enforcement and increased public involvement. Industry should proactively evaluate current environmental management and compliance practices, programs and systems to identify potential problems early. Regulated parties may want to consider performing more regular environmental audits of their facilities to identify potential compliance issues, proactively take corrective action, and better plan where capital investment may be required. They also should consider with their counsel whether there is merit in utilizing the U.S. Environmental Protection Agency’s self-audit policy or state audit privilege, voluntary disclosure, or penalty immunity laws or policies. This may provide an opportunity to reduce environmental liability exposure (e.g., penalty immunity), while properly addressing compliance issues that were identified.

Also, since an increase in inspections is likely, regulated entities should develop a plan for how they will respond if an environmental regulatory agency knocks on the facility door to conduct an inspection. Employees should be prepared with personnel responsibilities clearly understood in advance of the inspection, and record-keeping should be organized and complete so no one is caught off guard. Work cooperatively with
the agency, while knowing your obligations and protecting your rights. Lastly, understand that there will be greater public review and scrutiny of certain projects. It generally will not be in a company’s best interest to ignore or fight these changes. Rather, a company may be better served to accept these and embrace them through appropriate public and community outreach.

Pepper’s environmental attorneys are well-versed in the challenges that increased agency and public scrutiny and oversight may pose for the regulated community, and we invite you to contact us with any questions.