

A Case Study in Public Engineering Liability: “Water You Doing?”

Presented by:

William Henn, J.D.

Attorney

Henn Lesperance PLC

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HENN LESPERANCE PLC
ATTORNEYS AT LAW

ENGINEERING LIABILITY: THE QUICK RUN DOWN

1. Professional negligence
 - ❖ Like lawyers, doctors, accountants
2. Governmental engineers have additional protection
 - ❖ Individual liability is very narrow
 - ❖ Employer liability is also very narrow
3. So, what's to worry about?



BACKGROUND

- ❖ 2012: Flint begins exploring ways to save money by switching from its current water provider, DWSD.
 - DWSD had increased the cost of water dramatically and consistently dating back to 2002.
 - Flint, Genesee County and GLCUA were paying 21% of the costs of DWSD, but using only 10% of the water.



AMERICA

Lead-Laced Water In Flint: A Step-By-Step Look At The Makings Of A Crisis

April 20, 2016 · 6:39 PM ET

MERRIT KENNEDY

n p r

BACKGROUND

- ❖ April 16, 2013: Flint announces intention to join the Karegnondi Water Authority (“KWA”), which had been pursuing plans since 2010 to build a pipeline from Lake Huron.
- ❖ April 17, 2013: DWSD announces that Flint will be terminated from its services in April 2014.



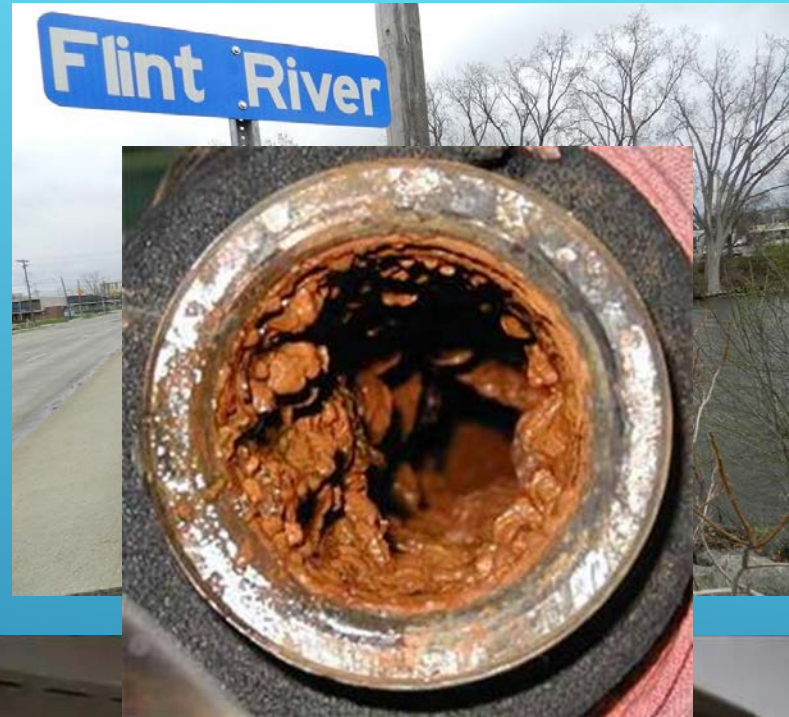
BACKGROUND

- ❖ June 28, 2013: Ground is broken on the KWA pipeline.
- ❖ Roughly 67 miles of pipe.
- ❖ \$292 million dollar cost.



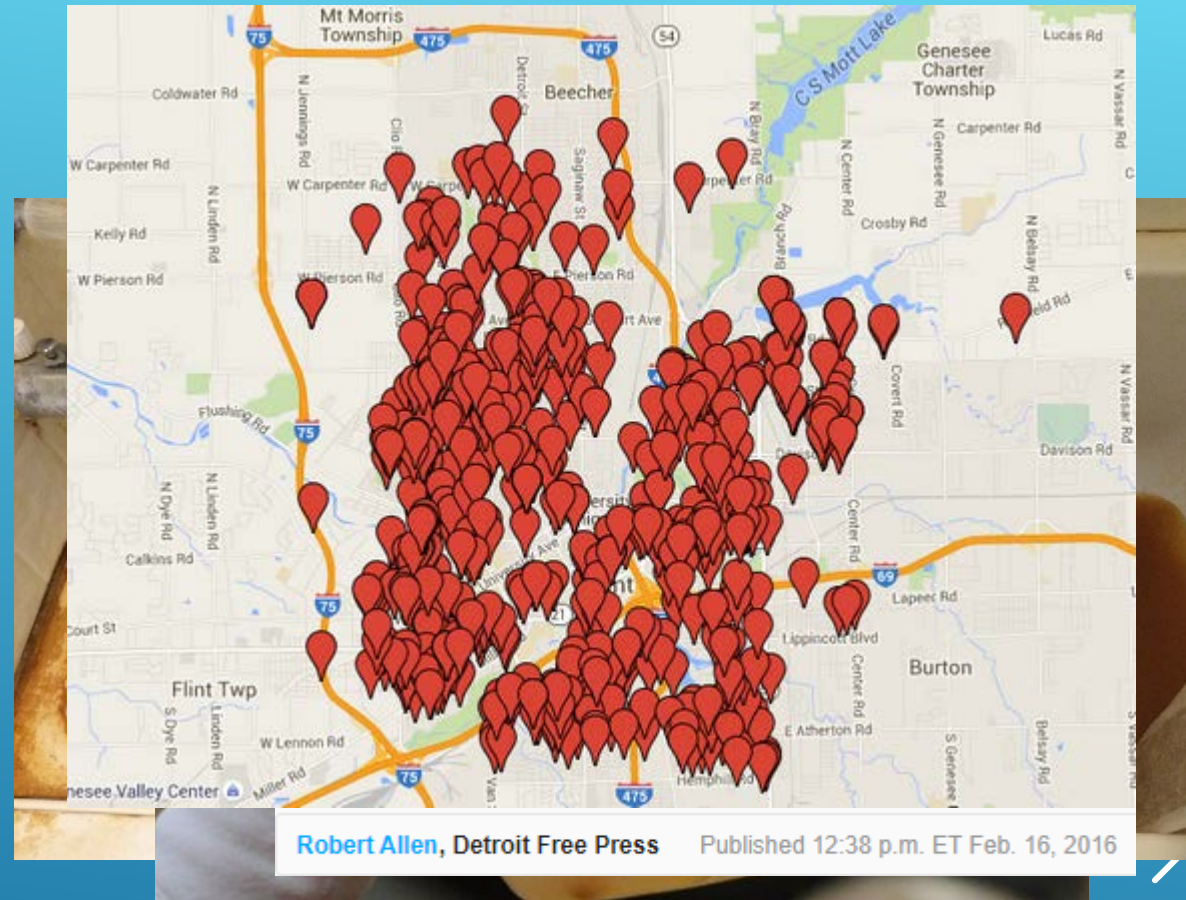
BACKGROUND

- ❖ April 25, 2014: Flint switches its water supply from DWSD to the Flint River, until the KWA pipeline is operational.
- ❖ Flint did not immediately apply corrosion prevention treatment to the Flint River water.



BACKGROUND

- ❖ February 25, 2015: Tests begin showing elevated lead levels in Flint water at some residences.
- ❖ September 2015: Independent academic researchers find “serious” levels of lead in Flint water.
- ❖ September 24, 2015: Medical study finds jump in elevated blood lead levels in children after switch to Flint River.



BACKGROUND

- ❖ October 16, 2015: Flint returns to DWSD (now GLWA).
- ❖ December 14, 2015: State of Emergency declared by Flint.
- ❖ January 2016: State of Michigan and Federal Government declare state of emergency in Flint.
- ❖ January 2016: Media maelstrom is in full effect.



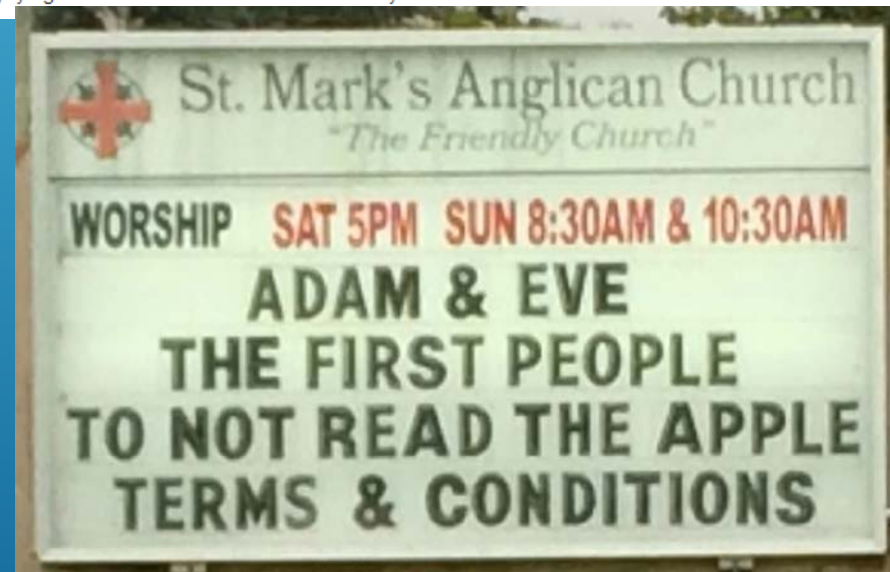
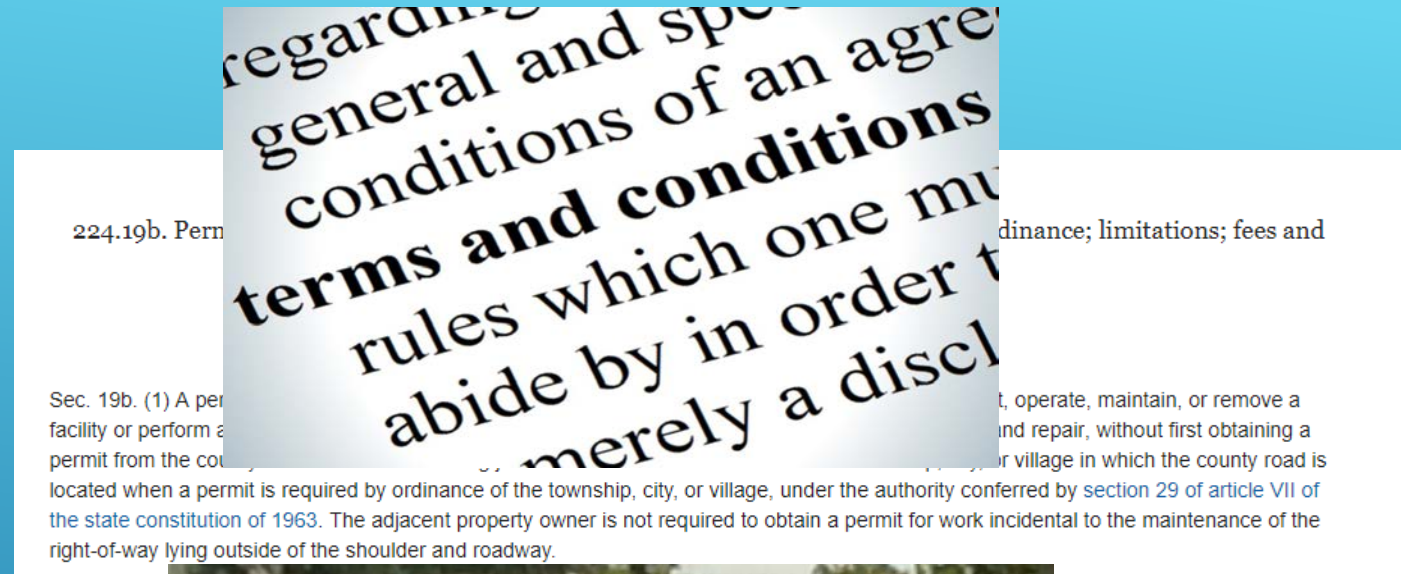
THE KWA PIPELINE

- ❖ Required multiple permits and intergovernmental agreements with affected County Road Commissions and other governmental entities.




THE KWA PIPELINE

- ❖ By statute, anyone performing work within a county highway right-of-way must obtain a permit from the County Road Commission.
- ❖ Those permits are subject to reasonable terms and conditions imposed by the County Road Commission.



THE KWA PIPELINE

- ❖ A County Road Commission may not refuse a permit for a governmental entity so long as security is given by the permittee or its contractor sufficient to insure restoration of the road and appurtenances to a condition reasonably equal to or better than existing before the installation.



Insurance
guarantee
principal
claims
up to

PRINCIPAL

the bond and agrees
to perform the work in a
manner (ultimately
responsible)

OBLIGEE

Requires that the principal
purchase a bond to attain a
license or perform a service
(usually a government agency)

THE KWA PIPELINE

- ❖ KWA advocated for a unique approach to the security requirement.
 - Intergovernmental Agreement
 - Separate Maintenance Agreement.
 - Pitched as a replenishing fund of \$100,000 to be used by the Road Commission when the contractor's work was unacceptable.

██████████ COUNTY ROAD COMMISSION
AND
KAREGNONDI WATER AUTHORITY
ROAD MAINTENANCE AGREEMENT
S-1005 S-1000 S-1007

INTERGOVERNMENTAL AGREEMENT IN LIEU OF
PERFORMANCE BOND
S-4005

ENTERED INTO PURSUANT TO ACT 7 OF THE MICHIGAN PUBLIC ACTS OF 1967 (EX SESS) BY AND BETWEEN THE BOARD OF COUNTY ROAD COMMISSIONERS OF THE COUNTY OF ██████████, A LOCAL ROAD AGENCY PURSUANT TO ACT 51 OF THE MICHIGAN PUBLIC ACTS OF 1951, AS AMENDED AND THE KAREGNONDI WATER AUTHORITY, A MUNICIPAL AUTHORITY AND PUBLIC BODY CORPORATE PURSUANT TO ACT 233 OF THE MICHIGAN PUBLIC ACTS OF 1955, AS AMENDED

THIS AGREEMENT made and entered into this _____ day of _____, 201__ (the Agreement Date), by and between THE BOARD OF COUNTY ROAD COMMISSIONERS OF THE COUNTY OF ██████████, MICHIGAN, a Michigan Municipal Corporation hereinafter called the "ROAD COMMISSION" whose address is 820 Davis Lake Road, Lapeer, Michigan 48446, and THE KAREGNONDI WATER AUTHORITY, a municipal authority created pursuant to Act 233 of the Michigan public Acts of 1955, as amended ("Act 233"), whose address is G-4610 Beecher Road, Flint, Michigan 48532 (hereinafter "KWA"). The ROAD COMMISSION and KWA are sometimes hereinafter referred to as the "Parties".

HOLDER may invoke an authorized representative to act on its behalf; and,

NOW, THEREFORE, in consideration and of the mutual covenants and promises herein contained, it is agreed by and between the parties hereto as follows:

The KWA shall provide a "maintenance deposit" of \$100,000. If a problem arises that creates any necessary road maintenance due to the project that is over and above normal road maintenance – the ROAD COMMISSION will notify the KWA of the problem verbally. This includes the construction zone, all haul routes used by the contractor(s), and detour routes. The KWA can opt to take care of the problem within 24 hours (or less if it is deemed an emergency) or to have the ROAD COMMISSION resolve the problem. The ROAD COMMISSION will follow up with written notification as well. Any performed work by the ROAD COMMISSION will be billed to this deposit. In such a case, the KWA will then replenish the deposit back to the full \$100,000 immediately.

THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

❖ In connection with the

permit application
submitted to the
Commission

- There is a concern
by the Commission
regarding the
engineering
plans submitted
for feasibility

SHEET INDEX

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OWNER INFORMATION
KAREGNONDI WATER AUTHORITY
9-4612 BEECHER ROAD
FLINT, MI 48532

ISSUED FOR CONSTRUCTION

KWA WATER SUPPLY SYSTEM
CONTRACT S-4005
60" TRANSMISSION MAIN
COVER SHEET

SHEET NUMBER
1.0
022016.01F

Pause (k)

THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

- ❖ Ultimately, the plans were accepted by the Road Commission and the permit was issued.
- ❖ As work on the pipeline progressed, pressure on the contractor to meet deadlines mounted, resulting in an ever increasing gap between the pipe installation and restoration of the right-of-way.



THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

- ❖ When this became unacceptable to the Road Commission, it sent a stop work notice to KWA and its contractor.
- ❖ That letter was promptly ignored.

Board of [REDACTED] County Road Commissioners
[REDACTED]

October 13, 2015

STOP WORK NOTICE

Per the 9/30/15 Revision to Permit #373-14, no water pipeline installation shall take place under said permit beyond station 315+00 of the S-4005 construction plans.

A new permit shall be applied for and approved prior to any water pipeline installation beyond the above location (on the S-4005 project).

Permits and further information regarding this notice can be obtained at the above address and phone number.

THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

- ❖ The Road Commission files suit in Circuit Court to enjoin the project pending the contractor's compliance with its restoration obligations.
- ❖ KWA opposes the injunction, arguing that there is no irreparable harm based on the Maintenance Agreement.



THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

- ❖ Court refuses to enter the injunction.
- ❖ Road Commission promptly does what KWA invited.
 - It uses the maintenance fund to replace a road.
 - Demands that KWA replenish the maintenance fund.



THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

- ❖ KWA refuses to replenish the maintenance fund.
- ❖ The Road Commission returns to Court, seeking an order requiring KWA to meet its contractual obligations.



THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

- ❖ KWA now claimed that the Road Commission could not simply use the maintenance fund at its discretion.
- ❖ In this way, KWA was positioning itself as the gatekeeper of any security fund beyond the initial \$100k.



THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

- ❖ Court went outside the box.
- ❖ Appointed Special Master
- ❖ Took the next \$100k in escrow
- ❖ Ordered the parties to work with the Special Master as issues arose, who would then issue a recommendation to the Court about the use of the security funds.



THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

- ❖ The problems begin to mount.
 - Edge/shoulder drop/foreslope
 - ARV and hydrant structures installed too high
 - Surface cracking
 - Vaults installed too high
 - Deviations from plans for drain crossings



THE KWA PIPELINE: TRENCH WARFARE OR THE VANISHING PERMIT

- ❖ Pipe becomes operational in November 2017.
- ❖ At that time, Road Commission had a deficiency punchlist containing nearly 260 items.
- ❖ Parties continued to work through Special Master.

Water will flow through KWA pipeline to Genesee County starting this weekend

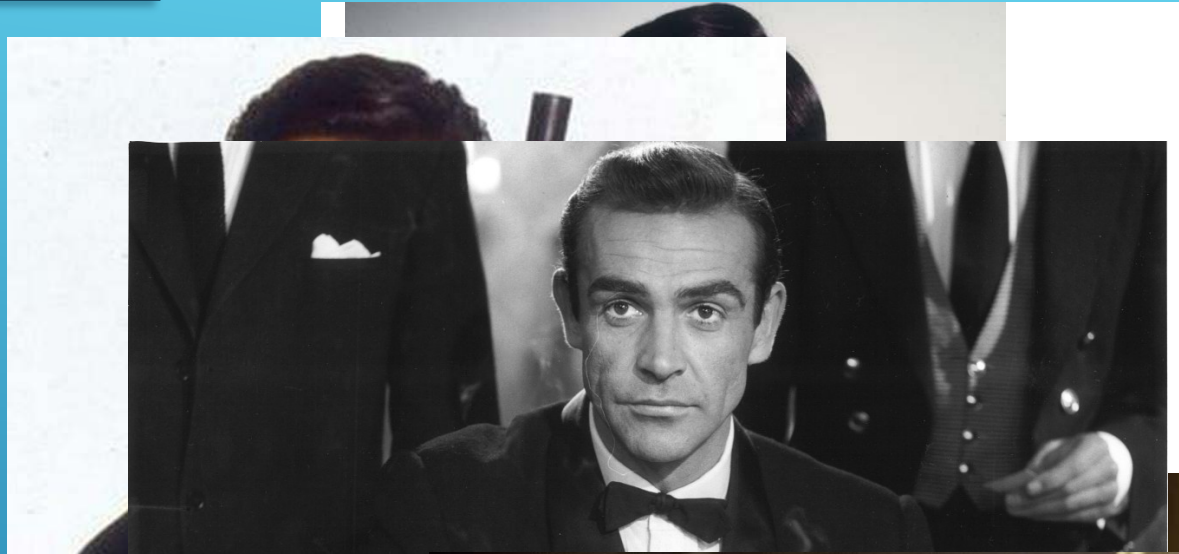
By STEVE CARMODY • NOV 21, 2017



**MICHIGAN
RADIO** npr
YOUR NPR NEWS STATION

TAKE AWAY POINTS

- ❖ Safeguard the bond obligation.
 - Don't assume that because it's a governmental agency everything will go smoothly.
- ❖ Not all bonds are created equal.



TAKE AWAY POINTS

❖ Building a solid bond

- Satisfaction with work is solely for the Road Commission to judge
- Default is solely for Road Commission to determine
- Performance bond continues until Road Commission releases the Surety
- At acceptance of work, warranty bond starts.

THE CONDITION OF THIS BOND is such that if the Principal, **to the satisfaction of the [Name of Road Commission]**, shall in all particulars promptly and faithfully perform all obligations of the Permit including restoration and repair of all affected rights-of-way, including the surface, subsurface, and all adjacent structures and appurtenances **no matter by whom owned**, then this obligation shall become void.

3. Its obligations assumed herein remain in full force and effect until notice of termination of such obligations is given to Surety by the **[Name of Road Commission]**. Otherwise, this obligation shall remain in full force and effect. Regardless of the number of years this bond shall continue in full force and effect, and of the number of premiums that shall be payable or paid, the Surety shall not be liable hereunder for a larger amount, in the aggregate, than the penal amount of this bond. The Surety may terminate its liability hereunder as to future acts of the Principal at any time by giving 60 days written notice of such termination to the Obligee.

Questions?

Thank you!

