

TO: AMWA Members and Subscribers
FROM: Diane VanDe Hei
DATE: October 20, 2009
SUBJECT: Status Update/Summary of Improvements on the “Drinking Water System Security Act”

With H.R. 3258, the “Drinking Water System Security Act,” moving rapidly through the House Energy and Commerce Committee, this memo is intended to provide AMWA members with an update on the Association’s efforts to improve the legislation.

Background and Political Landscape: Last week the Energy and Environment Subcommittee of the House Energy and Commerce Committee approved H.R. 3258, the “Drinking Water System Security Act.” The bill, which would continue the drinking water sector’s exemption from the Department of Homeland Security’s CFATS program while subjecting drinking water systems to updated facility security requirements issued by EPA, is expected to be considered by the full Energy and Commerce Committee tomorrow.

Throughout the year, AMWA has worked closely with Energy and Commerce Committee staff, AMWA’s Legislative and Security Committees as well as the Board of Directors to make the legislation as acceptable as possible for the nation’s drinking water systems. **Because of AMWA’s efforts, the bill does not include a nationwide “inherently safer technology” (IST) mandate that would broadly allow the federal government to dictate water disinfection methods to drinking water systems across the country.** Instead, certain water systems would be required to evaluate the use of IST and decide whether it is appropriate for the utility based on cost, feasibility, and other factors. However, only primacy state enforcement agencies – not EPA – would have the direct ability to review this evaluation. Then, a state could let the utility’s decision stand with no further action, or direct a water system to adopt an IST after the state considers specified feasibility and security criteria.

In July, AMWA’s Board of Directors voted to support this proposal but with some concerns that remained to be resolved. Since that time the Association has continued to work with committee staff to further improve the bill. Additionally, AMWA President Brian Ramaley testified on the bill at an Energy and Environment Subcommittee hearing held on October 1. EPA and DHS also testified voicing the Administration’s support for security legislation covering drinking water and wastewater systems. Bottom line: the Administration and Democratic majorities in Congress each support covering drinking water and wastewater utilities under new security legislation with IST provisions. **Given these circumstances AMWA**

recognized that to “just say no” was not a viable or winnable option for drinking water systems.

The Association of California Water Agencies (ACWA) has also endorsed H.R. 3258 with AMWA’s improvements, and the National Association of Clean Water Agencies (NACWA) is working with the House Transportation and Infrastructure Committee to develop similar legislation creating a similar EPA-based security program that would apply to wastewater facilities.

Nevertheless, AMWA understands that this legislation remains controversial, and some utilities have suggested that the water sector should simply oppose any bill that includes any utility consideration of IST or any level of government review of a utility decision. AMWA staff believes that this strategy would not be productive, and as an example points to the “Chemical Facility Anti-Terrorism Act” (H.R. 2868), which the Subcommittee also approved last week. This bill, which would allow the federal government to broadly dictate IST to chemical facilities, was strongly opposed by the chemical sector, but nevertheless won Subcommittee approval on a straight party-line vote. Similarly, a proposed amendment to the drinking water security bill that would have struck all remaining references to IST from the legislation also failed on a party line vote. **These votes were not close, and demonstrate the inadequacy of simply opposing the majority’s legislation without working with them to improve it.**

What follows is a summary of the major problems AMWA identified with early drafts of H.R. 3258, and on which the Association worked with majority staff to improve. While the resulting legislation is not perfect, AMWA believes it represents a significant improvement over much more stringent legislation the water sector would face had AMWA not worked with the Committee to make these improvements.

Problem: Broad Federal Authority to Mandate IST Conversion – As originally drafted by the Energy and Commerce Committee, drinking water systems across the country would be required to implement an IST if EPA determined that the technology was feasible at the water system.

Solution: AMWA strongly opposed this broad federal IST mandate, and as a result of the Association’s pledge to oppose the bill if it remained, the Committee removed it from the bill. In its place, state SDWA enforcement agencies will be tasked with reviewing IST decisions, but the bill includes no mandate that IST be implemented, even if both the utility and the state believe that it is feasible. Instead, states are given the ability to simply sign off on a utility’s IST decision without providing any explanation, but additional justification by the state is required if it wants a utility to change disinfection chemicals.

Problem: No Guaranteed Appeal of a State IST Implementation Order – Several AMWA members noted that, while they were more comfortable with the state, rather than EPA, reviewing disinfection decisions, the bill did not guarantee that

utilities would have an opportunity to appeal state IST implementation orders with which they disagreed.

Solution: AMWA and the committee staff worked together to add new language to the bill that requires states to provide utilities with an opportunity to appeal IST implementation decisions. This new section was added to H.R. 3258 during the October 14 subcommittee markup.

Problem: Failure of a Primacy State to Make an IST Determination – While AMWA’s committees and board expressed support for the bill’s overall IST framework, concerns were raised about a provision that would allow EPA to decide whether to require an individual utility to implement IST if a state fails to make a decision on IST implementation. Members noted that failure of a primacy state to fulfill its specified duties in this area should be met with a sanction – to discourage states from stepping away from a particular IST decision so as to allow EPA to make a choice instead.

Solution: In response to these concerns, the Energy and Commerce Committee added language to the bill that allows EPA to take into account the failure of a state to complete these duties when determining whether the state will retain SDWA primary enforcement responsibility.

Problem: Removal of Criminal Penalties for the Unlawful Disclosure of Protected Information – AMWA raised strong objections to early drafts of the bill that would have eliminated the existing criminal penalties that may be enforced against individuals who unlawfully release or distribute sensitive utility information such as vulnerability assessments. Instead, the drafts would have allowed EPA to establish the penalties through rulemaking, and subsequent drafts would have capped the penalties at a \$10,000 civil fine, and not required the firing of a federal official who unlawfully circulated protected utility information.

Solution: H.R. 3258 provides for – consistent with current law – a maximum criminal penalty of one year in jail and a fine consistent with federal class A misdemeanors (up to \$100,000) for individuals found to have unlawfully distributed protected utility information such as vulnerability assessments and site security plans. This provision covers all individuals with access to VAs and SSPs, but the current bill also reflects current law in requiring that federal employees found guilty of this offense be fired. These are the same penalties that are currently applicable under Section 1433 of SDWA against individuals found to have intentionally distributed security utility information in violation of the law. However, H.R. 3258 does replace the penalty’s current application to individuals who have “knowingly or recklessly” shared sensitive information in violation of the law to those who have done so “purposefully.” The Committee’s Democratic majority insisted on this change if criminal penalties were to appear in the bill, and AMWA does not believe that the altered standard will pose a problem in convicting individuals who have intentionally broken the law.

Problem: Required Sharing of Protected Information with Union

Representatives – Earlier drafts directed EPA to establish standards for the appropriate sharing of utility vulnerability assessments and site security plans with certain state and local authorities and first responders, utility employees with security responsibilities, and their union representatives. It also would have required EPA’s standards to provide unions with copies of the VAs and SSPs of any water utility that employed the union’s members. Representatives from each union representing any worker at a water system would also be able to participate in the formulation or updating of the utility’s vulnerability assessment and site security plan.

Solution: H.R. 3258 still directs EPA to establish information sharing standards, but specifies that unions must only be allowed to access portions of a utility’s vulnerability assessment or site security plan “relating to the roles and responsibilities” of union members at the facility. This suggests that the Committee does not intend for union representatives to be granted access to complete vulnerability assessments or site security plans, and does not give unions a right to possess a copy of a VA or an SSP. Furthermore, because VAs are unlikely to describe specific “roles and responsibilities” of workers, this language does not provide a union with the right to even see any portion of a VA. The bill allows union representatives to participate in the formulation of a utility’s vulnerability assessment and site security plan, but limits participation only to unions representing employees with security-related duties specified in the site security plan. The section does not require a utility’s VA or SSP to be approved by any union.

Problem: Inadequate Funding Authorization – Legislative and Security Committee members, and members of AMWA’s Board, believed that the federal funding authorization of \$160 million for the completion of VAs, SSPs, ERPs, security upgrades, and IST implementation costs at water systems, and an additional \$30 million for administrative costs at EPA, was inadequate.

Solution: H.R. 3258 now authorizes a total of \$315 million for costs associated with the legislation, with \$30 million reserved for administrative costs incurred by EPA and states, and \$125 million reserved for IST implementation costs at water systems, with priority for those funds given to systems in the highest-risk tiers. The remaining \$160 million authorization could be used to offset the completion of VAs, SSPs, ERPs, and security enhancements at water systems. Additionally, “such sums as may be necessary” are authorized for 2012 through 2015.

Problem: Drinking Water and Wastewater Utilities Covered Under Different Security Programs – Due to the jurisdictional makeup of the House of Representatives, only drinking water utilities would be subject to the EPA security program being created through the Energy and Commerce Committee’s legislation. Wastewater systems, as things currently stand, would be subject to DHS’ CFATS program, resulting in differing federal security standards applying to drinking water and wastewater facilities.

Solution: While the Energy and Commerce Committee is unable, due to jurisdictional constraints, to include wastewater systems in their legislation, AMWA is cooperating with the wastewater community to promote legislation from the Transportation and Infrastructure Committee that would exempt wastewater utilities from CFATS and subject them to new EPA-based security standards. Additionally, the Obama Administration has urged Congress to charge EPA with regulating the security of both drinking water and wastewater systems, so it is likely that this issue will ultimately be resolved favorably.

While the sum of these improvements led AMWA to endorse H.R. 3258 with some reservations, the inclusion of these modifications in the final bill was contingent upon AMWA delivering its support. Had the Association not endorsed the bill, these improvements would have been removed, and the water sector would likely be facing a bill similar to H.R. 2868 (the CFATS reauthorization bill) that would allow the federal government to broadly dictate chemical use at chemical facilities.

We will continue to work with the appropriate House and Senate committees to make additional improvements to the bill.

If you have any questions or would like additional clarification on this issue, please contact me or Dan Hartnett at 202-331-2820 or hartnett@amwa.net.