



ASSOCIATION OF
METROPOLITAN
WATER AGENCIES

July 27, 2010

The Honorable Barbara Boxer
Chairman
The Honorable James Inhofe
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

RE: Hearing on “Protecting America’s Water Treatment Facilities”

Dear Chairman Boxer and Ranking Member Inhofe,

As the Environment and Public Works Committee holds an important hearing on the security of the nation’s drinking water and wastewater facilities, the Association of Metropolitan Water Agencies (AMWA) believes it is important for the Committee to understand the factors that drinking water systems must consider when selecting chemicals to use during the water disinfection process. The Association would also like to offer some thoughts on S. 3598, the “Secure Water Facilities Act.”

As part of the drinking water treatment process, EPA regulations require water utilities to use chlorine (often in the form of liquefied gas or sodium hypochlorite) to kill harmful bacteria and viruses. When deciding which form of chlorine to use, individual utilities must consider not only how to best protect the communities they serve from manmade threats, but also climate, plant location, cost, ambient water quality, available technology, safety, and compliance with the Safe Drinking Water Act (SDWA). Because of these multiple factors, any suggestion that all drinking water utilities could properly disinfect their water supplies with a particular form of chlorine is simply false.

Nevertheless, many water systems currently use processes that may meet one’s definition of a so-called “inherently safer technology” (“IST”). According to an informal survey of large drinking water utilities conducted by AMWA in 2008, about sixty-five percent of survey respondents had considered adopting an alternate disinfectant to gaseous chlorine within the previous five years, and about forty-six percent actually began using an alternate at one or more water treatment facilities. This clearly shows that drinking water systems are willing to implement “ISTs” when they are able to do so without compromising public health or safety.

However, not all water systems can adopt “IST.” For example, in 2008 an official from a drinking water utility in California testified before the House Energy and Commerce Committee that, if his utility were to replace gaseous chlorine with sodium hypochlorite as its primary disinfectant, it would require seventy separate five-thousand gallon shipments of sodium hypochlorite each week. Similarly, the

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utility would have to hold the equivalent of 280 of these five-thousand gallon tanks on-site at the water treatment facility to maintain a 30-day backup supply necessary to continue water disinfection in the event of a supply chain disruption. The utility testified that the risks inherent with coordinating these shipments through local neighborhoods, protecting dozens of trucks against sabotage or attack, and ensuring that sodium hypochlorite supplies were used before their quality degraded outweighed the benefits of replacing gaseous chlorine. So while drinking water systems frequently consider “IST,” Congress should not believe it is a panacea that is feasible or advisable for every water system in every situation.

Water Security Legislative Background

As you know, following the 9/11 terrorist attacks Congress passed the Public Health Protection and Bioterrorism Preparedness and Response Act of 2002. This law added a new Section 1433 to SDWA, which required all drinking water utilities serving more than 3,300 people to prepare vulnerability assessments and emergency response plans to identify weaknesses in their security posture and prepare for security-related incidents. EPA officials have testified before Congress that all of the nation’s largest drinking water systems have successfully complied with this requirement.

In 2006, in light of these existing security requirements, subsequent unilateral measures taken by drinking water utilities (such as security enhancements, increased training, and chemical reduction and substitution when feasible), and the inherent differences between water systems and chemical facilities, Congress exempted the water sector from duplicative regulation through the DHS Chemical Facility Anti-Terrorism Standards (CFATS) program. Today, however, the Obama Administration believes that this exemption represents a regulatory “security gap” for the water sector, and has encouraged Congress to streamline a new EPA-based water and wastewater security program with the requirements of CFATS.

As the Senate made plans to proceed with water security legislation, AMWA was pleased to have the opportunity to work with Sen. Frank Lautenberg as he formulated S. 3598. As introduced, the bill is similar to Titles II and III of H.R. 2868, chemical and water facility security legislation that the House of Representatives approved last year. Importantly, S. 3598 includes no statutory requirement that a water utility implement an “IST” if any state or federal entity finds it to be feasible.

However, unlike the process of formulating H.R. 2868 in the House – where the Energy and Commerce Committee had an opportunity to reshape CFATS legislation first approved by the Homeland Security Committee to meet the needs of the water sector – S. 3598 was introduced before the Senate Homeland Security and Governmental Affairs Committee approved a bill to define the scope of new CFATS regulations. In fact, the Senate Homeland Security Committee is scheduled to meet to markup CFATS legislation on the same day as the Environment and Public Works Committee’s hearing on water security. Therefore, until there is an opportunity to carefully review any legislation approved by that panel it will remain unclear whether Sen. Lautenberg’s bill represents an accurate reflection of the new CFATS rules that the full Senate may consider, or a measure that would impose much more onerous security regulations on public water and wastewater systems than might be placed on private chemical manufacturers – thereby failing to achieve the Administration’s goal of reasonably streamlining the physical security requirements that apply to water, wastewater, and chemical facilities. Moreover, the fiscal year 2011 Homeland Security appropriations bill approved just two weeks ago by the Homeland Security Appropriations Subcommittee included a one-year extension of the current CFATS – further inviting confusion as to which security framework the water and wastewater security legislation should seek to replicate.

For this reason, AMWA believes that it is premature for the Environment and Public Works Committee to consider water and wastewater facility security legislation before it has had an opportunity to analyze any final CFATS reauthorization bill approved by the Senate Homeland Security Committee. Similarly, until we fully understand what CFATS legislation is approved by the Homeland Security Committee, AMWA will take no position on S. 3598.

Nevertheless, in addition to preserving the ability of local water system experts to choose the most appropriate water disinfection method, AMWA has several other suggestions that it hopes the Committee will consider in shaping water security legislation:

Sensitive Information Protection

The Committee must continue the protection of utility vulnerability assessments against public disclosure under the Freedom of Information Act or similar state or local laws. Currently, Section 1433 of SDWA bars this disclosure and allows judges to impose a criminal penalty of up to one year in prison and a fine of \$100,000 against individuals found to have unlawfully shared this sensitive information. These protections are critical because any information leak that puts a utility's security plans in the public domain would provide terrorists and criminals with a step-by-step guide of how to compromise a utility's security measures. Such an outcome could put millions of community residents at permanent risk, so it is crucial that Congress maintains these protections and penalties going forward.

Moreover, while S. 3598 would require EPA to conduct a rulemaking process to facilitate the sharing of some security information with outside groups such as first responders, the bill must not tie EPA's hands with preconditions that grant certain groups a statutory right to possess their own copies of sensitive utility security documents. Such entitlements would be inconsistent with our shared goal of ensuring the strongest protections for this sensitive information, and should be rejected by this Committee.

Avoiding Unreasonable Regulatory Burdens

Water security legislation must not require utilities to begin security planning from scratch when they already have robust security reviews and procedures in place. For example, any requirement that directs water systems to periodically update vulnerability assessments should make clear that utilities may follow recognized industry guidelines when completing this task. The water industry has developed widely used tools for the completion of VAs since enactment of the Bioterrorism Act in 2002, so new legislation should allow water systems to use these well-vetted processes when assessing their risks.

The new water legislation should also extend to water systems important legal protections that Congress may provide to chemical facilities as part of a new CFATS. For example, H.R. 2868 as passed by the House would prohibit individual citizens or organizations from suing chemical facilities for alleged non-compliance with requirements of the CFATS regulations. Instead, the bill included "citizen petition" provisions directing DHS to establish a process through which individuals can report alleged CFATS violations to the Department for investigation. Unfortunately, the House bill did not extend similar protections to water and wastewater facilities, resulting in an irrational situation where individuals may file lawsuits intended to influence chemical selection at public water systems, but not at private chemical facilities.

S. 3598 duplicates this mistake, which could be easily solved by specifying that existing citizen suit provisions in SDWA do not apply to a utility's choice of disinfectant chemicals. This would maintain the ability of

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individuals to file suit against water systems that are out of compliance with a drinking water contaminant standard, consistent with the original intent of SDWA, but would not allow virtually unlimited lawsuits against any water utility that does not choose to implement an "IST." AMWA would be happy to work with the Committee to develop language that meets these objectives.

Finally, as approved by the House H.R. 2868 would require EPA to place water systems in one of four risk-based tiers, with facilities in higher tiers required to meet more strict security standards. EPA would tier facilities based on the potential consequences of an attack on the water facility or contamination of the water supply. Under these criteria, water systems that serve large populations (and therefore may hold larger amounts of treatment chemicals) would likely be assigned to higher-risk tiers, because of the more significant potential consequences of an attack. But these same large systems could possibly be reassigned to lower-risk tiers if they begin to use less hazardous chemicals that would result in fewer off-site consequences in the event of an incident.

However, S. 3598 as introduced eliminates this incentive for large water systems to use less hazardous chemicals because it requires EPA to take into account both the size of the population served by the water system and the treatment facility's proximity to population centers when initially assigning systems to a tier. A likely result is that, at a minimum, more than 400 drinking water systems across the country classified by EPA as "very large" (each serving more than 100,000 people) will automatically be defined as high-risk, no matter which disinfectant chemicals they use or what other security measures they have put in place. Moreover, a significant portion of the nation's nearly 4,000 drinking water systems serving between 10,000 and 100,000 people could also be pulled into the high-risk tier. This would further reduce the incentive for many water systems to take steps to be assigned to a lower tier and increase the workload of EPA and primacy state agencies that must ensure compliance with elevated requirements of the highest tiers. Again, AMWA would be happy to work with the Committee to solve this problem at the appropriate time.

Working Together for Practical Water Facility Security

I want to reiterate that AMWA's willingness to cooperate with the Committee to close the so-called "security gap" that the Administration believes is present in the regulation of water and wastewater systems. But this gap can only be closed with the full knowledge of the updated CFATS legislation that the Senate may consider for private chemical facilities. When the contents of this bill are clear, I hope we can all agree on a path forward that allows local water system experts to make drinking water disinfection decisions on a localized, case-by-case basis to most effectively protect public health.

Sincerely,



Diane VanDe Hei
Executive Director

cc: Environment and Public Works Committee Members