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The Authoritative Resource on Safe Water SM

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House Committee Passes Chemical Security Act With Exemptions for Drinking Water Utilities

The House Homeland Security Committee on Friday passed its version of the Chemical Facility Anti-Terrorism Act (H.R. 5695) with crucial exemptions for drinking water utilities.

The bill as passed contained an important correction to the provision that allowed water utilities to be exempt from doing vulnerability assessments and facility security plans required by the bill. The bill as originally written exempted water utilities from this requirement if they had prepared a vulnerability assessment and “facility security plan” under the provisions of the Safe Drinking Water Act (SDWA), unless DHS determined, after reviewing the vulnerability assessment and facility security plan, that more stringent security measures were required. However, there is no requirement in the SDWA for a water utility to do a facility security plan. The SDWA requires utilities to do an emergency response plan (ERP), which is not exactly the same as a facility security plan. The findings of a vulnerability assessment are addressed not only in the ERP but other documents, such as capital improvement plans. Further, there is no requirement in the SDWA to submit the ERP to the federal government. The provision in H.R. 5695 was amended by adding “...other relevant documents voluntarily offered by the chemical facility.” This avoids adding a statutory requirement for utilities to submit ERPs to the federal government and preserves the status quo. However, a utility can voluntarily make the ERP available for review along with other documents that address the findings of a vulnerability assessment to make the case that the utility should remain exempt from doing an additional vulnerability assessment and facility security plan required in the bill.

The bill requires the Department of Homeland Security (DHS) to maintain a list of “significant” chemical facilities. Water utilities that submit Risk Management Plans (RMP) under Section 112(r) of the Clean Air Act most likely would be on this list. Water utilities on the list may be required to submit information to DHS concerning the quantities of substances of concern used or stored by the utility. They may also have to provide other information necessary to assist DHS in assigning the utility to the appropriate risk-based tier required by the bill.

The bill finally passed on a voice vote after committees members agreed to two key compromise amendments regarding the use of inherently safer technology and whether federal law would preempt state law on security at chemical plants.

Initially, an amendment had been offered that would have been more forceful in pushing chemical facilities to use “inherently safer technology.” The compromise the House committee adopted would affect only high-risk chemical facilities. Before imposing requirements for safer the technology on such facilities, DHS would have to determine that the use of safer technology would significantly reduce the

consequences of a terrorist attack, that such technology could be feasibly incorporated into the facility's operations, and that the new technology would not significantly impair the facility's ability to continue its business. The DHS decision to require a facility to use such technology could be appealed to a chemical security review board consisting of state and federal officials and chemical security experts. The "inherently safer technologies" provisions could jeopardize efforts to pass comprehensive chemical facility security legislation this year. However, the subcommittee chairman responsible for the bill says that he is "more optimistic" about passing a bill this year than in previous years because of the pending election and the upcoming fifth anniversary of the September 11 terrorist attack.

Whether or not federal chemical security law should preempt state laws was another contentious issue in H.R. 5695. Some members of Congress wanted states to be able to adopt stricter security standards, while others wanted a uniform system across the country. The compromise adopted would allow a state to enact stricter security standards for chemical facilities unless the state law "frustrates" the federal intent. The committee report on the bill is to further define "frustrate."

When H.R. 5695 was introduced, it was referred to both the Homeland Security Committee and the House Energy and Commerce Committee. The latter has yet to formally take up the bill. IST could face a tougher road in that committee, given the interests of key members on that panel.

Senate Bill Would Exempt Animal Wastes from Cleanup Law

A second bill has emerged in Congress that could take away one tool local communities have used to protect their source waters from animal wastes from large-scale agricultural operations. Sen. Pete Domenici, R-N.M., introduced on July 18 S.3681, also called the Agricultural Protection and Prosperity Act. Its purpose is "to amend the Comprehensive Environmental Response Compensation and Liability Act of 1980 to provide that manure shall not be considered to be a hazardous substance, pollutant, or contaminant."

The normal application of manure as fertilizer and releases under a federal permit (such as NPDES) are already exempt. That makes the bill unnecessary and unwise in our view.

Phosphorous, a major component of manure, is a hazardous substance under the law cited, also known as Superfund. The City of Waco, Texas, has documented that its ratepayers had to absorb \$3.5 million in rates to clean up phosphorous from upstream dairy operations.

The Senate bill has 24 cosponsors. Similar legislation was introduced in the House last fall and it has gathered 175 cosponsors. In June, AWWA sent a letter to members of Congress strongly urging them not to pass such legislation or incorporate it into other bills.

Comments on Proposed Revisions to Lead and Copper Rule Due Soon

Comments on the information collection portions of the U.S. Environmental Protection Agency's (EPA's) proposed revisions to the Lead and Copper Rule will be due to the agency August 17. Comments on the remainder of the rule will be due September 18.

The proposal affects monitoring, changes in water treatment, public notification, public education, and evaluation of lead service lines (see July 7 Washington Report). The proposal appeared in the July 18 *Federal Register* and can be read at <http://www.epa.gov/fedrgstr/EPA-WATER/2006/July/Day-18/w6250.pdf>

EPA Extends Deadline for Comments on Water Transfers

EPA has extended to August 7 the deadline for accepting comments on the proposed Water Transfer Rule, which would clarify that the Clean Water Act does not require National Pollutant Discharge Elimination System permits for the transfer of water from one body to another when there has been no intervening human use.

This issue has been raised in a number of court cases. AWWA plans to submit comments in support of the direction and intent of the rule. The proposal can be read at <http://www.epa.gov/fedrgstr/EPA-WATER/2006/June/Day-07/w8814.htm>

Environmental Lab Panel Recommends Accreditation Program

A committee chartered by the National Environmental Laboratory Accreditation Conference (NELAC) has issued a recommendation that all environmental compliance monitoring data be generated only by laboratories by NELAC.

The report noted that since the Office of Water at EPA already has authority under the Safe Drinking Water Act to certify labs, that the first step should be development of a cooperative accreditation program between the Office of Water and NELAC. Many utilities labs are opposed to this because it would impose significant costs and paperwork burdens. A copy of the report may be found at http://www.epa.gov/nelac/pdfs/NELAC_Special_Committee_Report.pdf

As always, please contact your AWWA Washington Office if you have questions or comments.