



- Board of Directors
Communications and Legislation Committee

10/11/2011 Board Meeting

8-4

Subject

Express opposition to H.R. 2890 (Clarke, D-MI) – Homeland Security and Public Water Systems

Description

H.R. 2890 (Clarke, D-MI) regarding Homeland Security and Public Water Systems would remove the current exemption water and wastewater agencies have from the U.S. Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) that govern certain chemical facilities around the nation. The legislation would also transfer the regulatory authority of CFATS for water and wastewater agencies to the U.S. Environmental Protection Agency.

Legislative and Regulatory Background

In 2006, Congress directed the DHS to secure certain chemical facilities against terrorist attacks. As a result, DHS promulgated the CFATS security regulations. This 2007 rule established risk-based performance standards for chemical facilities. The standards varied depending on the type and amount of chemicals stored or used on site. CFATS further required that high-risk facilities implement site security plans in order to minimize the economic damage and civilian casualties that could result from an attack.

Along with more than 300 other chemicals, chlorine gas was designated by the DHS as a chemical of interest because of its toxic properties and the potential for intentional release. DHS also classified more than 7,000 chemical facilities as high risk, including the primary chlorine supplier in Southern California. Thus, this company was required to submit a site security plan addressing 18 risk-based performance standards as a regulated entity under the CFATS program. These performance standards include elements such as restricting access, deterring attacks, reducing cyber-risks, and screening against insider sabotage.

Recognizing the crucial public health mission and existing regulatory requirements for water and wastewater treatment plants, Congress exempted these facilities from CFATS. Instead, water and wastewater agencies are regulated under the Safe Drinking Water Act and Clean Water Act, respectively, retaining the oversight of EPA.

When Congress authorized CFATS, it included a three-year "sunset" provision for the program whereby all regulatory authority would expire. After the first sunset in 2009, Congress passed two additional one-year extensions. This year, Congress must once again reauthorize CFATS to maintain the regulatory program.

Current Legislative Proposals

Four bills introduced in this 112th Congress reauthorize CFATS for the next three to seven years without substantive change. These bills include H.R. 901 (Lungren, R-CA), H.R. 908 (Murphy, R-PA), H.R. 916 (Dent, R-PA), and S. 473 (Collins, R-ME). Each of these bills maintains an exemption for water and wastewater treatment facilities. Because of Metropolitan's substantial security investments voluntarily undertaken following the Public Health Protection and Bioterrorism Preparedness and Response Act (Bioterrorism Act) of 2002, staff believes this exemption is appropriate to avoid duplicative and potentially contradictory federal regulation over drinking water facilities.

An additional bill, H.R. 2890 (**Attachment 1**), would reauthorize CFATS and eliminate the exemption for the water and wastewater sector; however, the bill would retain EPA oversight rather than require these treatment facilities to come under DHS regulation. While EPA oversight is preferred because the agency oversees other water and wastewater functions, there still remain specific provisions under CFATS that present significant concerns to public water and wastewater agencies entrusted with public health and safety. These issues are discussed further below.

Facility Shutdown Provisions. Water agencies widely oppose this onerous provision which was originally intended as the ultimate penalty for noncompliance by a chemical facility. When translated to the water industry, however, facility shutdown provisions would allow a vital water treatment plant to be closed for substantial noncompliance with security protocols mandated by CFATS. The essential public health and fire-fighting service provided by a water treatment plant should not be subject to shutdowns. Our society needs clean water, and access to this vital resource must not be jeopardized.

Regulation of Water Treatment Plants. H.R. 2890 presumes the current exemption for water and wastewater facilities from CFATS leaves the water sector without regulation and vulnerable to terrorist attacks. The legislation does not take into consideration the tremendous effort and expense that agencies such as Metropolitan have already undertaken to secure their operations. Metropolitan contends that no real security gap exists and that its own substantial security protocols for liquefied chlorine gas render unnecessary any additional regulation under CFATS. Rather, following Metropolitan's proactive approach, periodically updating vulnerability assessments and emergency response plans should suffice to guide water treatment plants in their security efforts.

Metropolitan's Chemical Security Strategy

Metropolitan's five water treatment plants rely on liquefied chlorine gas (in addition to ozone) to disinfect raw water and ensure a protective disinfectant residual in the distribution system. Approximately half of the liquefied chlorine gas supply is delivered directly to treatment plants by rail, and the remainder is transloaded from railcars to truck trailers for delivery.

Metropolitan's staff has been proactive and conscientious about security and the use of chemicals, such as chlorine. Following the terrorist attacks of 9/11, staff systematically increased security systems and procedures at the water treatment plants and chemical unloading facility where chlorine is stored. As required by the Bioterrorism Act, staff completed a vulnerability assessment identifying further areas for improvement. Staff members then developed an Emergency Response Plan and submitted the information to the U.S. Environmental Protection Agency (EPA). Guided in part by this assessment, Metropolitan upgraded its chemical safeguards in several ways, including:

- Developing security protocols for all chemical deliveries;
- Increasing the presence of on-site security guards;
- Investing approximately \$130 million to build chlorine containment buildings;
- Ensuring that its chlorine facilities operate within a multi-layered system of physical barriers with 24-hour guard patrols, camera observation, and electronic access controls; and
- Reducing the number of facilities that hold chlorine gas from 17 to 6.

Though water treatment plants which store liquefied chlorine gas remain exempt from CFATS, Metropolitan staff modified internal procedures and systems consistent with DHS's 18 risk-based security standards.

In 2006, Metropolitan completed its most recent study evaluating potential alternatives to the use of chlorine gas, such as on-site production of dilute hypochlorite (bleach) and the purchase of commercial sodium hypochlorite. Staff ultimately concluded that chlorine gas remains the most reliable and effective water treatment choice to ensure adequate disinfection of drinking water to 19 million consumers and to maintain sufficient chemical reserves following a major earthquake. These findings were presented to the Metropolitan Board in May 2009.

In addition to Metropolitan's voluntary security protocols, substantial bodies of regulation already govern the storage, handling and use of chlorine gas. For example, the EPA's Accidental Release Prevention/Risk Management Program and CalOSHA's Process Safety Management regulations exhaustively prescribe systems

and procedures to minimize accidental release and worker exposure to chlorine gas. By their very nature, these regulations also reduce the risk of intentional releases. Thus, Metropolitan has established a clear pattern of responsibility and concern for the prevention and containment of any potential hazards posed by the use of chlorine gas.

Staff Recommendations

Metropolitan remains committed to the highest standards of security for chlorine and other necessary water treatment chemicals. Given the onerous shutdown provisions in H.R. 2890 and the significant investment Metropolitan has made to secure on-site chemicals, improve security and protect both its workforce and the public, staff recommends the Board authorize the General Manager to express opposition to H.R. 2890 (Clarke, D-MI) Homeland Security and Public Water Systems to maintain the current exemption for water facilities from the Chemical Facility Anti-Terrorism Standards and protect Metropolitan's treatment options.

Policy

By Minute Item 48508, dated December 14, 2010, the Board adopted the Federal and State Legislative Strategy.

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination and authorize the General Manager to express opposition to H.R. 2890 (Clarke, D-MI) – Homeland Security and Public Water Systems to maintain the current exemption for water facilities from the Chemical Facility Anti-Terrorism Standards and protect Metropolitan's treatment options.

Fiscal Impact: None

Business Analysis: Legislation could require additional, unnecessary expenditures associated with securing facilities.

Option #2

Take no position at this time.

Fiscal Impact: None

Business Analysis: Potential costs associated with securing facilities or converting disinfection processes and potential lost sunk cost of \$130 million invested in chlorine containment facilities.

Staff Recommendation

Option #1



Linda Waade
Deputy General Manager, External Affairs

10/5/2011

Date



Jeffrey Kichtlinger
General Manager

10/5/2011

Date

Attachment 1 – H.R. 2890

Ref# ea12614874

112TH CONGRESS
1ST SESSION

H. R. 2890

To expand homeland security at public water systems and treatment works by allowing the Secretary of Homeland Security to include these facilities in the Chemical Facility Anti-Terrorism Standards program.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 12, 2011

Mr. CLARKE of Michigan introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on Transportation and Infrastructure, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To expand homeland security at public water systems and treatment works by allowing the Secretary of Homeland Security to include these facilities in the Chemical Facility Anti-Terrorism Standards program.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. DELEGATION OF AUTHORITY TO REGULATE**
2 **CERTAIN TREATMENT WORKS AND PUBLIC**
3 **WATER SYSTEMS TO THE ADMINISTRATOR OF**
4 **THE ENVIRONMENTAL PROTECTION AGENCY.**

5 Section 550 of the Department of Homeland Security
6 Appropriations Act, 2007 (Public Law 109–295; 6 U.S.C.
7 121 note) is amended—

8 (1) in subsection (a), by striking “Public Water
9 Systems, as defined by section 1401 of the Safe
10 Drinking Water Act, Public Law 93–523, as amend-
11 ed; Treatment Works as defined in section 212 of
12 the Federal Water Pollution Control Act, Public
13 Law 92–500, as amended;”; and

14 (2) by adding at the end the following new sub-
15 section:

16 “(i)(1) The President shall delegate to the Adminis-
17 trator of the Environmental Protection Agency the author-
18 ity otherwise provided to the Secretary under this section
19 with respect to—

20 “(A) a treatment works, as such term is defined
21 by section 212(2) of the Federal Water Pollution
22 Control Act (33 U.S.C. 1292(2)); and

23 “(B) a public water system, as such term is de-
24 fined by section 1401(4) of the Safe Drinking Water
25 Act (42 U.S.C. 300f(4)).

1 “(2) The Secretary shall provide technical assistance
2 regarding compliance with regulations under this section,
3 to any operator of a facility or treatment works referred
4 to in paragraph (1).”.

○