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Contacts

Washington Office

1900 K Street, NW
Washington, DC 20006-1109

[Evan D. Wolff](#)

(202) 955-1908
ewolff@hunton.com

[Brent A. Fewell](#)

(202) 955-1891
bfewell@hunton.com

[Joseph C. Stanko, Jr.](#)

(202) 955-1529
jstanko@hunton.com

[Steven P. Solow](#)

(202) 419-2065
ssolow@hunton.com

Richmond Office

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

[Brooks M. Smith](#)

(804) 787-8086
bsmith@hunton.com

McLean Office

1751 Pinnacle Drive
Suite 1700
McLean, VA 22102

[Stuart A. Raphael](#)

(703) 714-7463
sraphael@hunton.com

Water Treatment Facilities May Be Subjected to Chemical Security Regulations

Lawmakers consider proposals designed to close perceived security gap

Wastewater treatment and drinking water facilities may soon be subject to new chemical security regulations requiring them to complete and implement vulnerability assessments and security plans pursuant to the Chemical Facility Anti-Terrorism Standards (CFATS), subject to oversight by the Department of Homeland Security (DHS). Presently, water and wastewater facilities are exempt from CFATS. DHS and the Environmental Protection Agency (EPA), however, have requested that the House Energy and Commerce subcommittee remove the exemption for water facilities under interim chemical security regulations. During a June 12, 2008 hearing, EPA and DHS stated that they have been working closely together to eliminate a “gap in security” created by the drinking water and wastewater exemption.

Current Regulatory Framework

CFATS was enacted in June 2007, as part of federal appropriations legislation, and is DHS’s first sector security-specific regulation for critical infrastructure and key resources.

Under CFATS, regulated facilities are required to conduct comprehensive

security vulnerability assessments, leveraging extensive facility and corporate information. The follow-on site security plan requires companies to satisfy complex risk-based performance standards intended to address identified vulnerabilities and reduce a facility’s risk profile. Those plans currently require DHS approval through field inspections and document reviews. Failure to comply with the CFATS regulations could expose a water utility to civil penalties of up to \$25,000 per day, and closure of noncompliant facilities.

Proposal to ‘Close the Gap’

Currently, CFATS exempts public water systems that are regulated under the Safe Drinking Water Act (SDWA). Under SDWA, community waterworks serving populations of more than 3,300 must conduct vulnerability assessments and submit them to EPA. However, under SDWA, EPA has no authority to require implementation of these assessments. DHS and EPA believe this presents a significant gap in regulating the security of chemicals at drinking water facilities and protecting against potential terrorist threats. DHS and EPA are requesting that both drinking water and wastewater treatment facilities

that are determined to be high-risk, due to the presence of “chemicals of interest,” should be regulated for security in a manner that is consistent with the CFATS risk- and performance-based framework.

The CFATS regulations are set to sunset on September 30, 2009, and there are two pending House bills that would extend and modify the chemical facility security program. One proposed bill, HR 5577, covers drinking water treatment facilities regulated under SDWA, subjecting them to the vulnerability assessment requirements under CFATS. The other proposed bill, HR 5533, continues the SDWA exemption.

About Our Practice

The Hunton & Williams Emergency Planning and Homeland Security Practice attorneys have extensive homeland security and federal government regulatory experience. The firm has worked with chemical-sector clients on the enabling legislation and DHS’s CFATS regulatory requirements. We advise corporate clients on CFATS compliance and analysis of the legal issues and risk profiles arising from these new federal regulatory requirements.

Our environmental practice professionals have extensive experience providing guidance to clients, including municipal and industrial water/wastewater treatment facilities, regarding all aspects

of the federal Clean Water Act, Safe Drinking Water Act, and other statutes.

Our clients seek the most efficient way to implement and evaluate compliance with both water and chemical security regulations, including integration with existing compliance programs and effective internal audits. We review site security and vulnerability assessments to ensure completeness and to identify potential legal issues. We can also assist in the process of appealing DHS decisions within the agency.

If you have questions regarding compliance with these regulations, or the potential impact of the proposed legislation on your business, please contact us.

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