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S. 1961 and H.R. 4024: Legislative Responses to a Chemical Storage Facility Spill

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March 26, 2014

Congressional Research Service

7-5700

www.crs.gov

R43441

Summary

In January 2014, an estimated 10,000 gallons of the chemical 4-methylcyclohexanemethanol (MCHM), mixed with a small amount of glycol ethers, leaked from a 46,000-gallon aboveground storage tank at a chemical storage facility owned by Freedom Industries located 1.5 miles upstream from the intake pipes of a water treatment facility serving the area of Charleston, WV. A significant amount of the chemical entered the river and reached the public water system, prompting state and federal emergency declarations and causing the local water utility to issue a “do not use” order to more than 300,000 commercial and residential customers and others in nine counties of West Virginia.

The chemical storage tank at the center of the West Virginia incident appears to not have been subject to regulation under various federal or state laws aimed at protecting water resources from chemical releases. Oversight hearings by House and Senate committees began within a month to review the event, and to identify policy issues regarding the federal and state roles in regulating chemical facilities and whether legislation might be warranted. In further response to the spill, S. 1961, the Chemical Safety and Preparedness Act, was introduced on January 27, 2014, and H.R. 4024, the Ensuring Access to Clean Water Act of 2014, was introduced on February 10, 2014.

This report describes and analyzes these two bills. The bills have a number of core elements and provisions in common—both would direct states to establish a chemical storage facility leak prevention and response program for facilities located near drinking water sources—but they take different approaches to doing so: S. 1961 would make programmatic changes by amending the Safe Drinking Water Act (SDWA), while H.R. 4024 would amend the Clean Water Act (CWA).

The bills would require the Environmental Protection Agency or states with primary enforcement responsibility for public water systems (S. 1961) or primary authority to issue CWA discharge permits (H.R. 4024) to carry out a “chemical storage facility source water protection program” within one year of enactment. Both bills include identical minimum state program requirements: (1) an inventory of chemical facilities; (2) regular facility inspections; and (3) requirements for covered facilities (including construction standards, leak detection, emergency response and communication plans, employee training, and tank inspections, among other requirements). Both bills would authorize EPA or a state to issue corrective action orders to enforce the requirements of the legislation. Among other shared provisions, the bills would require pre-transfer inspections of facilities, and would require a state or EPA to provide public water systems with information about facility emergency response plans and chemicals stored at a facility. S. 1961 subjects administration and enforcement of the bill’s provisions to various existing SDWA authorities. Only H.R. 4024 defines the terms “chemical” and “aboveground storage tank”; however, both bills would give the states or EPA broad discretion in determining the scope of covered facilities.

Both bills contemplate creating state programs to provide for oversight and inspection of covered chemical storage facilities, and they do not explicitly direct the federal government to act in the event a state with primary water program enforcement authority does not establish a program. Nor do the bills provide financial resources to assist states. The pending legislation generally presents one approach among an array of possible approaches that have received some discussion. Some Members of Congress and other stakeholders have suggested that a federal legislative response to the West Virginia spill is premature, saying that they favor allowing states to take the lead in determining the need for and details of programs to address chemical storage facilities within their borders.

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Introduction

On January 9, 2014, officials in West Virginia discovered that an estimated 10,000 gallons of the chemical 4-methylcyclohexanemethanol (MCHM), mixed with a small amount of glycol ethers known as PPH, leaked from a 46,000-gallon aboveground storage tank at a chemical storage facility owned by Freedom Industries on a site northeast of Charleston, WV. A substantial amount of the chemical was released into the Elk River, a tributary to the Kanawha River. Moving downriver, an unknown amount of the chemical plume entered intake pipes of a water treatment facility located 1.5 miles from the chemical storage facility, causing the issuance of state and federal emergency declarations and prompting the local water utility to issue a “do not use” order that directed more than 300,000 commercial and residential customers in nine counties of West Virginia not to drink or use tap water for any purpose other than flushing toilets.¹

Multiple responses followed. Federal, state, and local emergency response, public health, and environmental officials assembled resources to sample and test for the chemical at the treatment plant and in the water distribution system. Officials sought to obtain and evaluate information about toxicity and potential hazards in order to understand the impact of the chemical contamination. Emergency officials delivered and made water supply available to affected citizens. Recommendations of the U.S. Centers for Disease Control and Prevention (CDC) were used to determine a “safe level” of the chemicals² and when the ban on the use of tap water could be lifted. It was fully and finally lifted on January 18, 2014. The U.S. Chemical Safety Board began an investigation of the incident to determine what happened and how to prevent a similar incident in the future.³

Public and congressional interest in the incident has been significant. Oversight hearings by House and Senate committees began within a month to review the event and to identify policy issues regarding the federal and state roles in regulating chemical facilities and whether legislative remedies may be warranted. Several concerns emerged from these discussions:

- Many have called for more robust inspections and controls at bulk chemical storage and manufacturing facilities and efforts to enhance inspection, spill containment, leak detection, and training requirements for personnel who manage activities at such facilities.
- Although underground storage tanks (USTs) are extensively regulated,⁴ relatively few federal regulations apply to aboveground storage tanks. For example, federal

¹ The January 14, 2014, announcement of the presidential emergency declaration for the spill is available at <http://www.fema.gov/news-release/2014/01/10/president-obama-signs-west-virginia-emergency-declaration>. For information on presidential declarations and federal disaster assistance, see CRS Report RL33053, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*, by Francis X. McCarthy. For a review of federal response authorities and procedures for chemical spills, see CRS Report R43251, *Oil and Chemical Spills: Federal Emergency Response Framework*, by David M. Bearden and Jonathan L. Ramseur.

² CDC determined that a maximum level of 1 part per million (ppm) of MCHM in drinking water would be protective of public health. The “do not use” ban remained in effect until MCHM levels were non-detectable (less than 0.01 ppm, or 10 parts per billion (ppb)) at all designated sampling locations throughout the distribution system. However, CDC also recommended extra precaution by pregnant women, even after the “do not use” ban was lifted.

³ Information on the Chemical Safety Board investigation of the Freedom Industries chemical release is available on the CSB website, <http://www.csb.gov/investigations/>.

⁴ However, federal UST requirements apply to tanks storing petroleum and “regulated substances” (i.e., substances defined as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), (continued...))

requirements for prevention and preparedness for releases from aboveground tanks apply to tanks containing oil, but do not apply to hazardous substances or tanks containing non-hazardous substances or chemicals such as those at the Freedom Industries facility.⁵ There is dispute over whether the tanks in question were subject to federal or state regulatory requirements that they be structurally sound and have adequate secondary containment, and whether existing requirements were effectively enforced.

- Little was known about the toxicity of the chemicals that leaked, which complicated efforts by the water utility, emergency responders, and other officials to assess risks to the affected public. Questions were raised about the adequacy of requirements for chemical testing of MCHM and PPH, as well as thousands of other chemicals used in commerce throughout the country.
- Facilities that store hazardous chemicals in excess of threshold quantities or experience a release in excess of established quantities are required by federal law to report and notify state and local emergency response personnel. However, there are no requirements that nearby or downstream water suppliers be notified. Rather, it is assumed that state and local emergency responders would notify affected entities and individuals.⁶
- Many have called for more effective accident prevention, encompassing siting and design of chemical storage tanks, as well as inspections to safeguard against structural failure. Similarly, some now recommend that federal environmental laws should give greater attention to protecting sources of water against pollution and contamination.

(...continued)

Section 101(14), excluding hazardous wastes (42 U.S.C. 9601(1)). Thus MCHM currently is not regulated under the UST program. Federal requirements for underground storage tanks comprise Subtitle I of the Solid Waste Disposal Act, also called the Resource Conservation and Recovery Act. 42 U.S.C. §§6991-6991m.

⁵ Clean Water Act, Section 311(j)(1) [33 U.S.C. 1321(j)(1)] directs the President to promulgate spill prevention, containment, and removal regulations for discharges of oil and hazardous substances to surface waters. An executive order delegated this authority to EPA, which issued oil Spill Prevention, Control, and Countermeasure (SPCC) regulations for non-transportation onshore and offshore facilities in 1973. EPA has not issued analogous regulations that apply to hazardous substances. In addition, Section 311(j)(5) directs the President to issue regulations requiring tank vessel and facility owners or operators to prepare and submit detailed response plans for responding to worst-case discharges of oil or a hazardous substance. Facilities subject to regulations include onshore facilities that, because of their location, could “cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.” EPA promulgated Facility Response Plan regulations for non-transportation onshore oil facilities in 1994. EPA has not issued similar regulations for facilities storing hazardous substances. Although both of these CWA sections direct the President to issue rules that address hazardous substances, if EPA had issued such regulations, they would apply only to materials defined as hazardous substances, which currently do not include MCHM. (However, for chemical spills, CERCLA authorizes the federal government to take actions to respond to a release of a hazardous substance, or a release of a pollutant or contaminant (such as MCHM), into the environment that may present an imminent and substantial danger to public health or welfare.)

For information on the SPCC regulations for oil, see CRS Report R43306, *Spill Prevention, Control, and Countermeasure (SPCC) Regulations: Background and Legislation in the 113th Congress*, by Jonathan L. Ramseur.

⁶ The Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 requires the owner or operator of a facility to notify state and local emergency response officials (and local fire departments) of certain hazardous chemicals present at the facility above specific quantities. EPCRA also requires notification of state and local emergency response officials in the event of a release of certain designated chemicals from the facility above specific quantities. See CRS Report RL32683, *The Emergency Planning and Community Right-to-Know Act (EPCRA): A Summary*, by David M. Bearden.

Some of these concerns are reflected in two bills that have been introduced in response to the chemical spill: S. 1961, the Chemical Safety and Preparedness Act, introduced by Senator Manchin on January 27, and H.R. 4024, the Ensuring Access to Clean Water Act of 2014, introduced by Representative Capito on February 10. This report describes and analyzes these two bills. The bills have a number of core elements and provisions in common—both would create a new chemical response program to address gaps highlighted by the West Virginia spill—but they take different approaches to doing so. S. 1961 would make programmatic changes by amending the Safe Drinking Water Act (SDWA), while H.R. 4024 would amend the Clean Water Act (CWA).

Table A-1 in the **Appendix** to this report provides a comparison of the two bills.

S. 1961

S. 1961 would add to the SDWA a new part G, requiring the Environmental Protection Agency (EPA) or states with primary enforcement authority for public water systems to carry out state programs to protect surface water from contamination by chemical storage facilities.⁷ Selected provisions are outlined below.

- Chemical storage facilities covered under S. 1961 would include any facility where a chemical is stored and that EPA or a state determines a release of the chemical would pose “a risk of harm to a public water system.”
- By one year after enactment, EPA, or a state with primary responsibility for public water systems,⁸ would be required to carry out (directly or through delegation) a chemical storage facility source water protection program (CSFSWP).
- S. 1961 would require a state program to provide for oversight and inspection of each covered facility to prevent the release of chemicals into the water supply in watersheds with public water systems that rely on surface water, including covered facilities located in source water areas identified in state source water assessments conducted under SDWA Section 1453.⁹
- State programs must contain the following minimum requirements:
 - *Covered facility requirements* including design, construction, and maintenance standards; leak detection; spill and overfill control; inventory

⁷ 42 U.S.C. §300f et seq. The SDWA comprises Title XIV of the Public Health Services Act. Thus the term “title” in S. 1961 refers to the SDWA as a whole.

⁸ All states except Wyoming have been delegated primary enforcement and oversight responsibility (i.e., primacy) for the public water system supervision (PWSS) program pursuant to SDWA §1413 (42 U.S.C. §300g-2). EPA would be required to implement a chemical facility program in Wyoming and also in most Indian lands and the District of Columbia (defined as a state in SDWA).

⁹ SDWA Section 1453 (42 U.S.C. §300j-13), added by the 1996 SDWA amendments (P.L. 104-182), required states to conduct an assessment of sources of drinking water for public water systems in the state to identify potential sources of contamination and to determine the susceptibility of water systems in the delineated area to these contaminants. Contaminants covered in the state source water assessment programs (SWAPs) include contaminants regulated, or for which monitoring is required, under the SDWA, as well as contaminants that the state determines present a threat to public health.

control; an emergency response and communication plan; a training and safety plan; facility integrity inspections; corrosion protection; notice to EPA, state agency, and relevant water systems of the potential toxicity of stored chemicals, and safeguards to detect or mitigate effects of a release; and financial responsibility requirements.¹⁰

- *Inspections* of facilities (at least once every three years for facilities identified in a source water assessment area, and every five years for other facilities).
- *Comprehensive inventory* of covered facilities in the state.
- Public water system owners or operators would be authorized to commence, or to petition EPA to commence, a civil action for equitable relief to address any activity or facility that may present an imminent and substantial endangerment to the health of persons supplied by the water system.

S. 1961 applies numerous SDWA provisions to the bill's requirements (new SDWA part G). For purposes of primary enforcement responsibility, the bill deems a state program and any requirements in the bill to be part of the national primary drinking water regulations under SDWA Section 1412. Further, S. 1961 (Section 1472(c)) would require the new provisions to be implemented and enforced in accordance with SDWA Section 1413 (state primary enforcement responsibility), Section 1414 (EPA enforcement and other requirements), and part E (including, for example, EPA regulatory authorities and citizen suit provisions).¹¹

The bill would require a state program created under proposed SDWA Section 1472 to be administered by states with primary enforcement responsibility (primacy) for public water system supervision (PWSS), and by EPA in non-primacy states.¹² All states but Wyoming have PWSS primacy; thus EPA would be required to implement a chemical facility program in Wyoming and in most Indian lands and the District of Columbia (defined as a state in SDWA).

S. 1961 does not authorize funding to support state administration of the CSFSWP program, and does not explicitly authorize EPA to administer a program in a primacy state, even if a program did not exist or failed to meet the bill's requirements.

Among other provisions, the Senate bill would authorize EPA or a state to issue corrective action orders (§1473) and make facility owners or operators liable for costs incurred by EPA or a state for response actions (§1474). The bill would prohibit the transfer of a facility unless an inspection is conducted and any necessary measures are taken to address the inspection results (§1475). A state or EPA would be required to provide to public water systems information on facility emergency response plans and chemical inventories for covered facilities within the same

¹⁰ These state program requirements largely parallel many of the requirements for underground storage tanks under Subtitle I of the Solid Waste Disposal Act, also called the Resource Conservation and Recovery Act. 42 U.S.C. §§6991-6991m. Subtitle I includes additional regulatory provisions, such as a prohibition on the delivery of product to ineligible tanks (e.g., tanks not in compliance with state or federal UST regulations). 42 U.S.C. §6991k.

¹¹ SDWA Part E includes, among other provisions, Section 1450(a) [42 U.S.C. §300j-9(a)] which authorizes the EPA Administrator "to prescribe such regulations as are necessary or appropriate to carry out his functions under this title." Section 1449, Citizen's Civil Action, also occurs in Part E.

¹² Proposed new SDWA Section 1472(d).

watershed as the water system, and primacy states would be required to submit emergency response plans to EPA and the Department of Homeland Security (§1476).

H.R. 4024: Similarities and Differences

The House measure, H.R. 4024, which would establish a new Title VII in the CWA, is similar to the Senate bill in many respects. For example:

- Like S. 1961, it requires EPA or states to carry out a chemical storage facility source water protection program. The purpose of the program in the House bill is to protect navigable waters that states have designated for use as domestic water sources.
- Minimum requirements for a state program are the same as those in S. 1961, except that the Senate bill would require inspection of covered facilities, while the House bill calls for inspection of aboveground storage tanks at covered facilities.
- EPA would be authorized to provide technical assistance to a state carrying out the program (but EPA is not authorized to provide guidance, as in S. 1961). Neither bill directs EPA to issue regulations¹³ or requires states to submit their programs to EPA for review and approval.
- Neither bill explicitly provides a formal sanction or consequence if a state fails to carry out a chemical storage facility source water protection program. Neither bill explicitly authorizes EPA to carry out such a program if a state with primary enforcement authority fails to do so.
- As with S. 1961, under H.R. 4024, EPA or a state would be authorized to issue a “corrective action order” to require the owner or operator of a covered chemical facility to carry out requirements of the title. Likewise, the owner or operator of a public water system may commence a civil action in court to address “any activity or facility” that may present an imminent and substantial endangerment to the health of persons supplied by the water system. Or the public water system may petition EPA or the state to commence a civil action or issue an order. Procedures for EPA to respond to such a petition are specified.
- As with S. 1961, under H.R. 4024 the owner or operator of a covered chemical storage facility shall be liable to EPA or a state for costs of a response action under Title VII. However, neither bill explicitly authorizes a response action relating to the release of a chemical; thus it is unclear to what the cost recovery provision refers.
- The bills include identical provisions regarding transfer of ownership of a covered chemical storage facility.

¹³ However, both the SDWA and CWA authorize EPA to prescribe regulations as are necessary to carry out functions under the act. 42 U.S.C. §300j-9(a)(1) (SDWA) and 33 U.S.C. §1361(a) (CWA). Neither bill precludes EPA from issuing rules to implement the legislation.

- The bills also include identical provisions requiring a covered chemical storage facility to prepare an emergency response plan and then to require EPA or a state to provide copies of the plan to neighboring water system operators, EPA (if the plan was submitted to a state), and the Secretary of Homeland Security. Provisions are included to protect sensitive or security-related information in the plan. While both bills provide that an inventory of each chemical held at a covered chemical storage facility be shared with public water systems, neither bill requires that the inventory be updated to reflect changes in the facility's operation, or types or amounts of chemicals stored there.
- Both bills allow a state to adopt or enforce standards regarding chemical storage facilities that are more stringent than minimum requirements in the legislation. H.R. 4024 explicitly allows a state to adopt or enforce standards regarding chemical storage facilities that are more stringent than minimum requirements in the legislation. This provision would conform the bill to CWA Section 510, which allows states to adopt or enforce water pollution abatement requirements more stringent than those specified in the CWA. S. 1961 has no similar provision, but specifies that the bill's requirements are to be implemented in accordance with SDWA Section 1414 (and certain other provisions). Section 1414(e) provides that nothing in the SDWA diminishes the authority of a state or political subdivision to adopt or enforce any law or regulation respecting drinking water regulations or public water systems.

Despite many similarities between the bills—there are more similarities than differences—H.R. 4024 does contain several differences from the Senate bill.

- First, as noted above, the purpose of the program in H.R. 4024 is to protect navigable waters that states have designated for use as domestic water sources. The use of the phrase “navigable waters” in the bill derives from the basic jurisdictional reach of the CWA, which is “navigable waters”—defined in the act to mean “the waters of the United States, including the territorial seas.”¹⁴ H.R. 4024 applies to a release from a chemical storage facility that poses a risk to “a navigable water that is designated for use as a domestic water supply.” Under the CWA, states adopt water quality standards, which include designated use or uses for water bodies in the states (such as public water supply, recreation, or industrial water supply) and criteria to support the designated uses by setting acceptable upper limits on pollutants in the waterbody. The bill is thus concerned with protecting waters designated by states for use as public water supply—typically the highest and most protective use that a state adopts—but not other waters that also could affect public health and welfare. For example, many state standards designate waters for fish consumption, or water contact recreation (swimming and fish), uses that can result in public exposure to and consumption of water that could be affected by a chemical facility release just as easily as a water designated for domestic water supply.

¹⁴ CWA Section 502(7); 33 U.S.C. §1362(7). The same definition of navigable waters applies to all of the programs and regulatory requirements of the CWA, meaning that it is central to determining the regulatory scope of the law. Two Supreme Court rulings have narrowed the law's geographic reach, creating considerable uncertainty about waters that are regulated or not. On March 25, 2014, EPA and the Army Corps of Engineers proposed a regulation in response. For background, see CRS Report RL33263, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond*, by Robert Meltz and Claudia Copeland.

- Second, while both bills call for the new program to be carried out by EPA or by a state that exercises primary enforcement responsibility for the underlying act, that means different things under the SDWA and CWA. As described above, S. 1961 would apply to states that have primary enforcement authority to implement the SDWA under that bill; EPA would be authorized to implement programs in Wyoming, the District of Columbia, and most Indian lands. H.R. 4024 would require that the new chemical storage facility program be carried out by states that have been delegated primary authority to issue CWA discharge permits. Forty-six states are authorized by EPA to implement CWA responsibilities that include adopting water quality standards, issuing discharge permits, conducting water quality monitoring, and enforcing the law. In the remaining states (Idaho, Massachusetts, New Hampshire, and New Mexico), plus the District of Columbia and most U.S. Territories, EPA retains core CWA responsibilities such as issuing permits, and it would be required to carry out the program detailed in H.R. 4024.
- Third, while the bills contain similar definitions of the terms “covered chemical storage facility” and “state program,” H.R. 4024 alone defines “aboveground storage tank” and “chemical.” The former term is defined to mean a container at a covered chemical storage facility located on or above ground with fluid capacity in excess of 1,100 gallons, or a tank that is greater than 500 gallons capacity and is located within 500 feet of a navigable water that is designated for domestic water supply. S. 1961 does not exclude any facilities based on storage capacity or distance from surface water; such determinations would be left to each state or EPA. (The Senate bill would exclude facilities subject to spill prevention, containment, and removal measures under CWA Section 311(j)(1), which would exclude facilities storing oil.)

The House bill defines “chemical” to mean “any substance or mixture of substances.” The proposed definition differs from and is broader than definitions in other laws,¹⁵ and interpreting it could raise questions such as whether it is intended to include a substance such as oil, which is subject to separate provisions in CWA Section 311.

- Fourth, H.R. 4024 directs EPA to survey and report on state programs and regulations developed to implement the requirements of the legislation.
- Fifth, the House bill provides for civil penalties, not to exceed \$15,000 per day, for violation by an owner or operator of a covered chemical storage facility of a requirement or an order issued by EPA or a state pursuant to the legislation. The stated penalty amount is less than the general civil penalty provision in Section 309(d) of the CWA, which specifies not to exceed \$25,000 per day for each violation of the act.¹⁶

¹⁵ For example, the Toxic Substances Control Act (TSCA) defines “chemical substance” as “any organic or inorganic substance of a particular molecular identity, including—(i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature and (ii) any element or uncombined radical.” The TSCA definition provides several exclusions, including any mixture and pesticides as defined in the Federal Insecticide, Fungicide, and Rodenticide Act. 15 U.S.C. §2602(2).

¹⁶ Pursuant to the Debt Collection Improvement Act of 1996, EPA periodically adjusts the maximum civil monetary penalties that can be imposed under the CWA and other statutes that it administers to account for inflation. Currently, the maximum inflation-adjusted civil penalty under CWA Section 309(d) is \$37,500 per day for each violation. 40 (continued...)

Conclusion

The spill from chemical storage tanks in West Virginia has generated considerable debate over the current state of regulation of such facilities, both at the federal and state level. As Congress considers possible legislation in response, multiple approaches may emerge. As noted above, the proposed facility requirements for state chemical facility programs broadly parallel federal requirements for underground storage tanks (USTs) in Subtitle I of the Solid Waste Disposal Act (SWDA).¹⁷ However, the framework in Subtitle I differs fundamentally from the proposed bills, in that the UST provisions in current law establish a federal regulatory program with authority for states to administer their own UST program in lieu of the federal program—with EPA approval and grant assistance; moreover, the UST requirements under Subtitle I apply only to petroleum and hazardous substances, and do not address tanks storing MCHM or other chemicals not classified as hazardous. States have had the predominant role in regulating aboveground storage tanks (ASTs) that contain chemicals, and various states have developed AST programs that include many comparable provisions to the UST regulatory programs.

Both of the bills discussed in this report contemplate creating state programs to provide for oversight and inspection of covered chemical storage facilities, and they do not explicitly give the federal government authority to carry out a program in the event a state does not establish a program (other than in states that do not have primary SDWA or CWA enforcement authority). Further, neither bill provides additional funds to states to support development or administration of the program called for in the legislation. Requirements, such as conducting periodic inspections of chemical storage facilities, are likely to be a challenge for resource-limited states without supplemental funding or shifting funds from other activities.

It is unclear how many facilities might be covered under either bill, as there is no existing inventory—a gap that both bills propose to close by requiring each state to develop its own inventory (a national inventory is not called for in either bill). Although the number of chemical storage facilities is expected to be large, the bills give states considerable flexibility to determine which of those might be “covered facilities” under a state program.

At congressional hearings and in other fora, some—including some state regulatory agencies—have expressed the view that federal legislative response to the Elk River chemical spill would be premature until more complete information about the incident is available and an assessment has been done of gaps in environmental laws and regulations and how best to address them—whether through amendment of laws and/or programs or enhancement of existing authorities.¹⁸ Further, some stakeholders prefer allowing states to take the lead in determining the need for and details of programs to address chemical storage facilities within their borders.¹⁹

(...continued)

C.F.R. part 19.

¹⁷ Underground Storage Tank provisions are located in Subtitle I of the Solid Waste Disposal Act, also known as the Resource Conservation and Recovery Act (42 U.S.C. §§6991-6991m).

¹⁸ Letter from Dick Pederson, President, Environmental Council of the States, Ryan Benefield, President, Association of State and Territorial Solid Waste Management Officials, and John Calkins, President, Association of Safe Drinking Water Administrators, et al. to Honorable Barbara Boxer, Honorable David Vitter, Honorable Joe Manchin, Honorable Jay Rockefeller, March 5, 2014.

¹⁹ For example, in response to the Elk River chemical spill, the West Virginia legislature approved a bill (S.B. 373) in March to establish new aboveground storage tank requirements, including regular inspections and stricter permitting, (continued...)

The Administration's views on the need for legislation to address spills from chemical storage facilities generally or on the specific bills discussed here are unknown for now.

(...continued)

and to improve coordination between state and local officials and water utilities. Fees on tank owners would fund inspections and a registry. Similarly, the Georgia legislature passed a bill (H.B. 549) in March to establish emergency response procedures in case of a hazardous chemical spill into a water supply.

Appendix. Comparison of S. 1961 and H.R. 4024

Table A-I. Comparison of S. 1961 and H.R. 4024

Provision	S. 1961	H.R. 4024
Title	Chemical Safety and Drinking Water Protection Act of 2014	Ensuring Access to Clean Water Act of 2014
Statute to be amended	Safe Drinking Water Act (SDWA) 42 U.S.C. §300f et. seq. Section 2 adds SDWA Part G (Sections 1471-1476)—Protection of Surface Water from Contamination by Chemical Storage Facilities	Federal Water Pollution Control Act (hereinafter referred to as the Clean Water Act (CWA)); 33 U.S.C. §1251 et. seq. Section 2 adds CWA Title VII—Protection of Navigable Water from Contamination by Chemical Storage Facilities
Definition: Aboveground storage tank	No similar provision.	New Section 701(1). Defines “aboveground storage tank” to mean any container or set of containers designed to contain fluids located at a covered chemical storage facility, constructed of materials including concrete, steel, plastic or fiberglass reinforced plastic and located on or above the ground surface. Excludes <ul style="list-style-type: none"> tanks of 1,100 gallons or less capacity except tanks greater than 500 gallons capacity within 500 feet of a navigable water designated for use as a domestic water supply tanks subject to oversight and inspection under a federal or state law or regulation determined by EPA or state to be at least as stringent as requirements in Section 702 (below)
Definition: Chemical	No similar provision.	Section 701(3). Defines “chemical” to mean any substance or mixture of substances.
Definition: Covered chemical storage facility	New Section 1471(1). A facility at which a chemical is stored and EPA or a state determines a release of the chemical would pose “a risk of harm to a public water system.” Excludes facilities subject to Spill Prevention, Control and Containment (SPCC) requirements to prevent and contain discharges of hazardous substances under CWA Section 311(j)(1)(C) [SPCC rules for hazardous substances have been issued for oil but not for hazardous substances ³] Consideration: in determining risk of harm, EPA or state may consider requirements of applicable federal or state laws and regulations.	Section 701(3). A facility at which a chemical is stored and EPA or state determines that a release poses a risk of harm to a navigable water designated for use as a domestic water supply under CWA Section 303. Same provision. Same provision.

Provision	S. 1961	H.R. 4024
Definition: State program	Section 1471(2). “State program” means a chemical storage facility source water protection (CSFSWP) program established under Section 1472.	Section 701(4). “State program” means a CSFSWP program established under Section 702.
Establishment of state programs	Section 1472(a). No later than 1 year after enactment, EPA, or each state exercising primary enforcement for public water systems, shall carry out, directly or through delegation, a CSFSWP program for protection of public water systems from a release of a chemical from a covered chemical storage facility.	Section 702(a). No later than 1 year after enactment, EPA, or each state exercising primary enforcement responsibility for issuing CWA discharge permits, shall carry out directly or through delegation, a CSFSWP program for the protection of navigable water designated for use as a domestic water source under CWA Section 303 from a release from a covered chemical storage facility.
Program requirements	Section 1472(b)(1). A state program must provide for oversight and inspection of each storage facility in accordance with specified requirements to prevent release of chemical into the water supply in watersheds with public water systems that rely on surface water, including a covered facility located in a source water areas identified under SDWA Section 1453.	Section 702(b)(1). A state program must provide for oversight and inspection of each covered storage facility in accordance with specified requirements to prevent the release of chemicals into a navigable water designated for use as a domestic water source under CWA Section 303.
Required program elements	Section 1472(b)(2). Minimum program requirements include (1) requirements for covered storage facilities including design, construction, and maintenance standards, leak detection, spill and overfill control, inventory control; emergency response and communication plan; training and safety plan; facility integrity inspections; corrosion protection; notice to EPA, state agency, and applicable public water systems of potential toxicity of stored chemicals, and safeguards to detect or mitigate effects of a release; and financial responsibility requirements; (2) requirements for inspections of covered facilities (at least every 3 years for facilities identified in SDWA source water assessment areas, and every 5 years for other facilities); and (3) a comprehensive inventory of covered facilities in the state.	Section 702(b)(2). Same provisions, except state programs must require inspections of aboveground storage tanks at covered facilities.
Administration	Section 1472(d). A state program shall be carried out by states that have primary enforcement responsibility for public water systems, or otherwise, by EPA.	Section 702(c). A state program shall be carried out by states that have primary enforcement responsibility for issuing CWA discharge permits, or otherwise, by EPA.
Right to adopt more stringent requirements	Existing authority in Section 1414(e) provides that nothing in this title (i.e., SDWA) shall diminish the authority of a state or political subdivision to adopt or enforce any law or regulation respecting drinking water regulations or public water systems.	Section 702(d). Nothing in this title shall preclude or deny the right of any state, political subdivision, or interstate agency to adopt or enforce standards for oversight and inspection of covered facilities that are more stringent than the minimum requirements in this section.

Provision	S. 1961	H.R. 4024
Technical assistance	<p>Section 1472(e). EPA is authorized to issue guidance or provide other technical assistance to state programs.</p> <p>[EPA has similar authority under SDWA part E, General Provisions, referenced in Section 1472(c).]</p>	Section 702(e). Upon the request of a state, EPA may provide technical assistance.
Best practices survey and report	No similar provision.	Section 702(f). EPA, within 18 months of enactment, shall prepare a report that surveys state oversight and inspection programs provided for herein and implementing regulations in each state. EPA must provide the report to committees of jurisdiction and states, and post the report on the EPA website.
Emergency powers: Corrective action orders	Section 1473. EPA or the primacy state, as applicable, shall issue an order to an owner or operator of a covered facility to carry out the requirements of this title.	Section 703(a) includes the same provision.
Emergency powers: Petitions	<p>Section 2(b) amends SDWA Section 1431, emergency powers.</p> <p>Owners or operators of public water systems are authorized to</p> <p>(1) commence a civil action for equitable relief, including restraining orders or permanent or temporary injunctions, to address any activities or facilities that may present an imminent and substantial endangerment to the health of persons served by the water system; or</p> <p>(2) petition EPA or the state to issue an order or commence a civil action.</p> <p>Within 30 days of receiving a petition, EPA must respond and initiate such action as the Administrator deems appropriate.</p> <p>If the petition is in response to an emergency, EPA must respond within 72 hours.</p>	Section 703(b) includes the same provisions.
State primacy; enforcement, penalties, and general authorities	<p>Section 1472(c). For purposes of primary enforcement responsibility, a state program and any requirements under this bill (new SDWA Part G) shall be</p> <p>(1) considered part of the national primary drinking water regulations established under SDWA Section 1412; and</p> <p>(2) implemented and enforced in accordance with Section 1413 (state enforcement), Section 1414 (EPA enforcement) and part E (general provisions, e.g., EPA rulemaking authority, technical assistance, and citizen suits provisions).</p>	Section 707. Any person owning or operating a covered facility who violates any applicable requirements or refuses to comply with an order issued by EPA or the state under this title may, in an action brought in the appropriate U.S. District Court, be subject to a civil penalty not to exceed \$15,000 for each day the violation occurs.

Provision	S. 1961	H.R. 4024
EPA enforcement: conforming amendments	<p>Section 2(c)(1) amends SDWA Section 1414, Enforcement of Drinking Water Regulations, to add after “public water system” and after “public water systems” each place they appear in specified subsections “or a covered chemical storage facility.”</p> <p>Section 2(c)(2) amends under Section 1414(i) to include part G in the definition of “applicable requirement” and to add the term “covered chemical storage facility.”</p>	No similar provision.
Cost recovery	Section 1474. An owner or operator of a covered chemical storage facility shall be liable for response costs if EPA or the primacy state incurs costs for undertaking a response action relating to the release of a chemical.	Section 704 includes the same provision.
Facility transfers	<p>Section 1475. Transfer of a covered facility is prohibited unless prior to closing or completing the transfer:</p> <p>(1) The transferor must submit to the transferee the results of pre-transfer inspection. The inspection must meet requirements set by EPA or a state with primary enforcement responsibility.</p> <p>(2) One of the parties must agree to take measures to address the results of the inspection within 30 days after the facility is closed or transferred.</p>	Section 705 includes the same provisions.
Information sharing	<p>Section 1476. EPA or the state, as applicable, must provide operators of water systems on navigable water designated for use as a domestic water source with information relating to (1) emergency response plans for covered facilities (required under Section 702(b)(2)(A)), and (2) an inventory of each chemical held at the facility.</p> <p>If the state exercises primary enforcement responsibility, the response plans must be provided to EPA and the Department of Homeland Security (DHS).</p> <p>EPA or the state, as applicable, may keep confidential information that EPA or the state deems to be sensitive or to present a security risk to a facility. However, confidentiality shall not apply to public health information or prevent information sharing with EPA, DHS, a public water system, or public agency involved in emergency response.</p>	Section 706 includes the same provisions.

Source: Prepared by the Congressional Research Service.

- a. Clean Water Act, Section 311(j)(1) [33 U.S.C. 1321(j)(1)] directs the President to promulgate spill prevention, containment, and removal regulations for discharges of oil and hazardous substances to surface waters. An executive order delegated this authority to EPA, which issued oil Spill Prevention, Control, and Countermeasure (SPCC) regulations in 1973. EPA has not issued analogous regulations that apply to hazardous substances. In addition, Section 311(j)(5) directs the President to issue regulations requiring tank

vessel and facility owners or operators to prepare and submit detailed response plans for responding to worst-case discharges of oil or a hazardous substance. Facilities subject to regulations include onshore facilities that, because of their location, could “cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.” Another executive order delegated this authority to EPA, which promulgated Facility Response Plan regulations for non-transportation onshore oil facilities in 1994. EPA has not issued similar regulations for facilities storing hazardous substances. Although both of these CWA sections direct the President to issue rules that address hazardous substances, if EPA had issued such regulations, they would apply only to materials defined as hazardous substances, which currently do not include MCHM.

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