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H.R. 2868, THE "CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2009"

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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H.R. 2868, THE "CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2009"

Tuesday, June 16, 2009

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOMELAND SECURITY,
Washington, DC.

The committee met, pursuant to call, at 10:05 a.m., in Room 311, Cannon House Office Building, Hon. Bennie G. Thompson [Chairman of the committee] presiding.

Present: Representatives Thompson, Norton, Jackson Lee, Cuellar, Carney, Clarke, Richardson, Pascrell, Cleaver, Green, Himes, Titus, King, Smith, Souder, Lungren, McCaul, Dent, Broun, Miller, Olson, Cao, and Austria.

Chairman THOMPSON [presiding]. The Committee on Homeland Security will come to order.

The committee is meeting today to receive testimony on H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009.

At the outset, let me indicate that we have been told that the air is out in all of Cannon. So I would assume that that means the testimony we receive today will not include hot air, but only the truth. We have been told that the maintenance personnel are working on it. So shedding coats and other things would absolutely be in order if the need arises.

Otherwise, good morning.

When I assumed the Chairmanship of this committee, I identified the needs to shield the Nation's critical infrastructure from foreign and domestic terrorism as one of the many key goals in charting the course toward freedom from fear.

To that end, reauthorization of the Department of Homeland Security's chemical security program, the Chemical Facilities Anti-Terrorism Standards program, before it expires on October 2009 is a major priority.

Yesterday, I was pleased to introduce H.R. 2868, which not only reauthorizes CFATS, but also enhances it in a number of critical ways. H.R. 2868, Chemical Facility Anti-Terrorism Act of 2009, is a product of over 6 months of stakeholder meetings and bipartisan discussions between the Committees on Homeland Security and Energy and Commerce. In the end, we have produced a bill that is both comprehensive and common-sense.

I have made no secret of my disappointment that past efforts to enhance chemical security legislation been bogged down between and because of jurisdictional conflicts.

This Congress, I have a partner that shares my commitment to enacting comprehensive chemical security legislation this year: Henry Waxman, the Chairman of Energy and Commerce Committee.

At our direction, over the past 6 months, committee staff worked in an open and bipartisan manner and sought input from a wide range of experts and stakeholders, including: The Department of Homeland Security; large and small chemical manufacturers; fertilizer manufacturers; petroleum and propane manufacturers and distributors; the explosive industry; key associations in the chemical sector; the State of New Jersey—I really wish Mr. Pascrell was here to hear that; representatives from labor unions that represent chemical facility workers; drinking water and wastewater organizations; academic and other experts.

Today's hearing will continue in that open and collaborative spirit. While at introduction the bill does not yet have a Republican cosponsor, I am hopeful that, in the end, it will garner bipartisan support just as similar committee-developed legislation has received.

After all, many of the key provisions that were accepted during the negotiations were offered by Republican staff. Today, in addition to discussing the new legislation, we will also be discussing how things are going with the implementation of CFATS.

As a close observer, I give credit to the Department for the good job it has done so far in promulgating and enforcing the CFATS regulations. There have been a few missteps, but the Department has adapted quickly and made adjustments as necessary.

The legislation we will discuss today represents a continuation of that effort. As the CFATS program has been implemented, it is evident that there are a number of areas that need to be addressed legislatively. These include: The current exemption on security regulations for drinking water, wastewater, and port facilities; the absence of strong whistleblower protection; restrictions of citizen suits; and absence of the requirement that facilities include methods to reduce consequences of terror attacks—a best practice in the chemical sector—in their vulnerability assessments.

The introduced version of H.R. 2868, together with forthcoming provisions that the Energy and Commerce Committee plans include, will take each of these issues on directly.

I look forward to hearing from our witnesses today as we move forward with reauthorizing and enhancing the CFATS program. Thank you.

[The statement of Chairman Thompson follows:]

PREPARED STATEMENT OF CHAIRMAN BENNIE G. THOMPSON

Good morning.

When I assumed the chairmanship of this committee, I identified the need to shield the Nation's critical infrastructure from foreign and domestic terrorism as one of my key goals in *Charting the Course Towards Freedom from Fear.*

To that end, reauthorization of the Department of Homeland Security's chemical security program—the "Chemical Facilities Anti-Terrorism Standards" program—before it expires in October 2009 is a major priority.

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- the Department of Homeland Security;
- large and small chemical manufacturers;
- fertilizer manufacturers;
- petroleum and propane manufacturers and distributors;
- the explosives industry;
- key associations in the chemical sector;
- the State of New Jersey;
- representatives from labor unions that represent chemical facility workers;
- drinking water and wastewater organizations, and
- academic and other experts.

Today's hearing will continue in that open, collaborative spirit.

While, at introduction, the bill does not yet have a Republican cosponsor, I am hopeful that, in the end, it will garner bipartisan support just as similar committee-developed legislation has received.

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As the CFATS program has been implemented, it is evident that there are a number of areas that need to be addressed legislatively.

These include: (1) The current exemption on security regulations for drinking water, wastewater, and port facilities; (2) the absence of strong whistleblower protections; (3) restrictions of citizen suits; and (4) the absence of a requirement that facilities include methods to reduce consequences of terrorist attacks—a "best practice" in the chemical sector—in their vulnerability assessments.

The introduced version of H.R. 2868—together with forthcoming provisions that the Energy and Commerce Committee plans include—will take each of these issues on—directly.

I look forward to hearing from our witnesses today, as we move forward with reauthorizing and enhancing the CFATS program.

Thank you.

Mr. KING. I now recognize the Ranking Member of the full committee, the gentleman from New York, Mr. King, for an opening statement.

Thank you very much, Mr. Chairman. Like you, I look forward to the testimony today.

I must say at the outset, though, that I do have very real concerns about going forward with this legislation. We adopted very comprehensive legislation back in 2006.

Mr. Lungren was in the forefront of the negotiations and discussions where we forged, I thought, very real and workable, amenable compromises. As the Chairman said in his opening statement, the Department has made real progress.

My understanding is that the President and the administration and the Department itself are asking that the legislation be extended for 1 year, that we do not rush to judgment, that we do not

rush to revise the bill or to change it, but give the Department 1 year to fully comply with and implement the legislation, which was passed in 2006.

Rand Beers, when testifying before the Senate as the President's nominee for under secretary, also requested that a 1-year extension be granted. My understanding is that the homeland security appropriations bill, which will be on the floor tomorrow or Friday, has included a 1-year extension.

So, we have the appropriations bill going forward with a 1-year extension, and yet we are attempting to revise the bill. That shows, I think, part of the weakness of not having an authorization bill, because we have the Appropriations Subcommittee on Homeland Security setting policy. We are coming in afterwards, setting different policy. That, I think, shows the inherent weakness in the multiplicity of jurisdictional committees in this issue of homeland security.

So, I have real concerns, and I see no purpose for rushing forward today against the wishes of the President, against the wishes of the Department, and against the wishes of the appropriations committee.

Now, I have real concerns about the issue of third-party suits. I would be interested in the testimony from the Department as to how they feel about having citizens bring lawsuits off of this legislation.

Again, the overall concern I have is that, in many ways, we are giving the environmental lobby too much of an in here. This is a homeland security issue; it is not environmental.

Obviously, there are environmental concerns, but the prime concern here should be homeland security, keeping Americans safe, and saving the lives of Americans. We get into the whole issue of inherently safer technology. I recall with some anguish listening to the debates between Mr. Lungren and Mr. Markey in 2006 over inherently safer technology.

I thought the compromise we worked out at that time made sense, because, without oversimplifying it, inherently safer technology is a concept. I just think it is dangerous for us to be jumping the gun, coming in a year before the Department wants to have all of its regulations and policies in place, and imposing a concept of security, rather than actual science and precise methodologies.

So, again, I look forward to the testimony. Mr. Chairman, I have to say, I have real concerns about the direction in which we are going. I am wondering, how much of this is almost wasted effort, in view of what the appropriations committee is going to be doing on the House floor this week and what I assume the Senate will be doing. We will be coming in too late with legislation, which serves no real purpose.

So with that, I still look forward to the hearing, and I thank the Chairman for his courtesy. I yield back the balance of my time.

Chairman THOMPSON. Thank you very much. I am happy to see my Ranking Member supports my President. I look forward to further——

Mr. KING. Somebody has to.

Chairman THOMPSON [continuing]. Opportunities to do that. Obviously, there are points of disagreement. That is why we are here.

Other Members of the committee are reminded that, under the committee rules, opening statements may be submitted for the record.

[The statement of Honorable Loretta Sanchez follows:]

PREPARED STATEMENT OF THE HONORABLE LORETTA SANCHEZ

I am pleased that today the full Committee on Homeland Security is holding this hearing on H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009.

Last Congress, a similar bill was presented in this committee and reported out.

However, I was disheartened when that legislation did not move through Congress.

To this end, I am thankful for the leadership that Chairman Thompson has shown in engaging Chairman Waxman of the Energy and Commerce Committee and working to find a compromise to move this bill forward.

I am also glad to see that an amendment I successfully proposed last Congress, requiring a minimum level of security training for all chemical facility employees, was included in the underlying legislation this Congress.

This provision, in Section 2103 will ensure that employees at chemical facilities will receive annual training that will improve the overall security of these facilities.

Oftentime, these employees are at the front lines and affected first by any crisis or accident at a facility.

This training is comprehensive and educates employees about the security procedures in their workplace.

Furthermore the training must:

- Provide an analysis of the potential hazards at the facility,
- Explain the specific prevention, preparedness, and response plan for the facility,
- Provide an opportunity to reduce the vulnerabilities of the facility, and
- Provide the opportunity to discuss and practice emergency response procedures.

These requirements will ensure that chemical facility workers have the tools to try to prevent an incident and, follow an effective response plan if a terrorist incident occurs.

We need to prepare these employees to effectively protect themselves, their coworkers, and the facility as a whole and I am pleased to see this provision included in H.R. 2868.

I hope today's hearing is productive and I look forward to this legislation moving swiftly through the committee process.

Chairman THOMPSON. I welcome our first panel of witnesses. Our first witness is Mr. Philip Reitinger. Mr. Reitinger is the deputy under secretary and currently acting under secretary for the National Protection and Programs Directorate at DHS. Prior to joining DHS, Mr. Reitinger served as the chief infrastructure strategist at Microsoft.

Our second witness is Ms. Sue Armstrong. Ms. Armstrong serves as the director of the Infrastructure Security Compliance Division within the Office of Infrastructure Protection at DHS. She is responsible for development and implementation of existing CFATS regulation.

Without objection, the witnesses' full statements will be inserted in the record.

Mr. Reitinger and Ms. Armstrong provided one joint testimony. I now recognize Mr. Reitinger to summarize their joint statement for 5 minutes.

STATEMENTS OF PHILIP R. REITINGER, DEPUTY UNDER SECRETARY, NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, DEPARTMENT OF HOMELAND SECURITY, AND SUE ARMSTRONG, DIRECTOR, INFRASTRUCTURE SECURITY COMPLIANCE DIVISION, OFFICE OF INFRASTRUCTURE PROTECTION, DEPARTMENT OF HOMELAND SECURITY

Mr. REITINGER. Thank you, Chairman Thompson, Ranking Member King, and distinguished Members of the committee. It is indeed an honor to appear before you today to address the Department's authority over high-risk chemical facilities through the Chemical Facilities Anti-Terrorism Standards, or CFATS, program and to discuss the Department's views on its reauthorization.

As the committee is aware, Section 550 of the fiscal year 2007 Department of Homeland Security Appropriations Act directed the Department to develop and implement a regulatory framework to address the high level of security risk posed by certain chemical facilities.

Consequently, the Department published the CFATS interim final rule on April 9, 2007. Specifically, Section 550(a) of the act authorized the Department to adopt rules requiring high-risk chemical facilities to complete security vulnerability assessments for SVAs, develop site security plan, or SSPs, and implement protective security measures necessary to meet risk-based performance standards established by the Department.

Section 550, however, expressly exempted from these rules certain facilities regulated under other Federal statutes. For example, Section 550 exempts facilities regulated by the United States Coast Guard pursuant to the Maritime Transportation Security Act; drinking water and wastewater treatment facilities regulated under Section 1401 of the Safe Drinking Water Act and Section 212 of the Federal Water Pollution Control Act, respectively, are similarly exempted, as are some other facilities.

Since publication of the interim final rule in April 2007, the Department has made significant progress in implementing the CFATS program. I would like to highlight some of this progress.

We have reviewed over 36,500 top-screen consequence assessment questionnaires. In June 2008, we notified 7,010 preliminarily tiered facilities of the Department's initial high-risk determination and of the facilities' requirement to submit security vulnerability assessments.

We received and are reviewing over 6,100 SVAs. We have recently began to notify facilities of their final high-ranking determination, tiering assignments, and requirements to complete and submit SSPs or alternative security programs.

Per Section 550, the CFATS program is scheduled to expire in October 2009. The President's fiscal year 2010 budget request would extend the authorization for a period of 1 year to October 2010 to allow time for Congress and the administration to develop an appropriate reauthorization bill.

To this end, we have enjoyed a constructive dialogue with Congress, particularly this committee, as it works on new authorizing legislation for CFATS. We urge that, in authorizing continued implementation of this important program, Congress provide ade-

quate time and resources to implement any new requirements under the legislation.

We are in the process of reviewing the most recent, current reauthorization bill. In general, we support some aspects of the bill, but do have concerns with other sections of the bill, particularly the provision relating to citizen suits.

We look forward to our continued collaboration with the committee to ensure that chemical sector security regulatory effort achieves success in reducing risk in the chemical sector and protects the public.

In addition to our Federal Government partners, success is dependent upon continued cooperation with industry and State and local government partners as we move towards a more secure future.

I am accompanied today by Sue Armstrong, who leads the CFATS program at DHS. Sue has been involved in this program since it was first established and can assist in answering the Members' questions regarding its implementation.

Thank you for the opportunity to appear today, and Sue and I are happy to answer any questions the committee may have.

[The joint statement of Mr. Reitinger and Ms. Armstrong follows:]

JOINT PREPARED STATEMENT OF PHILIP R. REITINGER AND SUE ARMSTRONG

JUNE 16, 2009

Thank you, Chairman Thompson, Ranking Member King, and distinguished Members of the committee. It is a pleasure to appear before you today to address the Department's authority over high-risk chemical facilities through the Chemical Facility Anti-Terrorism Standards (CFATS) program. We have made significant progress since CFATS' implementation. We have reviewed over 36,500 facilities' Top-Screen consequence assessment questionnaires. In June 2008, we notified 7,010 preliminarily tiered facilities of the Department's initial high-risk determination and of the facilities' requirement to submit Security Vulnerability Assessments (SVAs). We received and are reviewing over 6,100 SVAs; we have recently begun to notify facilities of their final high-risk determinations, tiering assignments, and the requirement to complete and submit Site Security Plans (SSPs) or Alternative Security Programs (ASPs). CFATS currently covers approximately 6,400 high-risk facilities Nation-wide, which reflects changes related to chemicals of interest that facilities have made since receiving preliminary tiering notifications in June 2008.

CHEMICAL SECURITY REGULATIONS

Section 550 of the fiscal year 2007 Department of Homeland Security Appropriations Act directed the Department to develop and implement a regulatory framework to address the high level of security risk posed by certain chemical facilities. Consequently, the Department published an Interim Final Rule, known as the Chemical Facility Anti-Terrorism Standards (CFATS), on April 9, 2007. Specifically, Section 550(a) of the Act authorized the Department to adopt rules requiring high-risk chemical facilities to complete SVAs, develop SSPs, and implement protective measures necessary to meet risk-based performance standards established by the Department. Section 550, however, expressly exempts from those rules certain facilities that are regulated under other Federal statutes. For example, Section 550 exempts facilities regulated by the United States Coast Guard pursuant to the Maritime Transportation Security Act (MTSA); drinking water and wastewater treatment facilities regulated under Section 1401 of the Safe Water Drinking Act and Section 212 of the Federal Water Pollution Control Act, respectively, are similarly exempted. In addition, Section 550 exempted facilities owned or operated by the Department of Defense and the Department of Energy, and certain facilities subject to regulation by the Nuclear Regulatory Commission.

The following core principles guided the development of the CFATS regulatory structure:

(1) Securing high-risk chemical facilities is an immense undertaking that involves a national effort, including all levels of Government and the private sector.—Integrated and effective participation by all stakeholders—Federal, State, local, and the private sector—is essential to securing our national critical infrastructures, including high-risk chemical facilities. Implementing this program means tackling a sophisticated and complex set of issues related to identifying and mitigating vulnerabilities and setting security goals. This requires a broad spectrum of input. By working closely with experts, members of industry, academics, and Federal Government partners, we leveraged vital knowledge and insight to develop the regulation.

(2) Risk-based tiering will ensure that resources are appropriately deployed.—Not all facilities present the same level of risk. The greatest level of scrutiny should be focused on those facilities that, if attacked, present the most risks and could endanger the greatest number of lives.

(3) Reasonable, clear, and equitable performance standards will lead to enhanced security.—The CFATS rule includes enforceable risk-based performance standards. High-risk facilities have the flexibility to select among appropriate site-specific security measures that will effectively address risk. The Department will analyze each tiered facility's SSP, to see if it meets CFATS performance standards; if necessary, DHS will work with the facility to revise and resubmit an acceptable plan.

(4) Recognition of the progress many companies have already made in improving facility security leverages those advancements.—Many responsible companies have made significant capital investments in security since 9/11. Building on that progress in implementing the CFATS program will raise the overall security baseline of high-risk chemical facilities.

Appendix A to CFATS lists 322 chemicals of interest, including common industrial chemicals such as chlorine, propane, and anhydrous ammonia, as well as specialty chemicals, such as arsine and phosphorus trichloride. The Department included chemicals based on the consequence associated with one or more of the following three security issues:

(1) Release—toxic, flammable, or explosive chemicals that have the potential to create significant adverse consequences for human life or health if intentionally released or detonated;

(2) Theft/Diversion—chemicals that have the potential, if stolen or diverted, to be used or converted into weapons that could cause significant adverse consequences for human life or health; and

(3) Sabotage/Contamination—chemicals that, if mixed with other readily available materials, have the potential to create significant adverse consequences for human life or health.

The Department established a Screening Threshold Quantity for each chemical based on its potential to create significant adverse consequences for human life or health in light of the security issues listed above.

IMPLEMENTATION STATUS

Implementation and execution of the CFATS regulation requires the Department to identify which facilities it considers high-risk. The Department developed the Chemical Security Assessment Tool (CSAT) to identify potentially high-risk facilities and to provide methodologies facilities can use to conduct SVAs and to develop SSPs. CSAT is a suite of on-line applications designed to facilitate compliance with the program; it includes user registration, the initial consequence-based screening tool (Top-Screen), an SVA tool, and an SSP template. Through the Top-Screen process, the Department can initially identify and sort facilities based on their associated risks.

If a facility is not designated as low-risk during the Top-Screen process, the Department assigns the facility to one of four preliminary risk-based tiers, with Tier 1 indicating the highest level of risk. Those facilities must then complete SVAs and submit them to the Department. Results from the SVA inform the Department's final determinations as to whether a facility is high-risk and, if it is high-risk, of the facility's final tier assignment. To date, the Department has received over 6,100 SVAs. Each one is carefully reviewed for its physical, cyber, and chemical security content.

Only facilities that receive a final high-risk determination letter under CFATS will be required to complete and submit an SSP or an Alternative Security Program. DHS's final determinations as to which facilities are high-risk are largely based on each facility's individual consequentiality and vulnerability as determined by the Top-Screen and SVA.

After approval of their SVAs, the final high-risk facilities are required to develop SSPs (or ASPs) that address their identified vulnerabilities and security issues. The higher the risk-based tier, the more robust the security measures and the more frequent and rigorous the inspections will be. The purpose of inspections is to validate the adequacy of a facility's SSP and to verify that measures identified in the SSP are being implemented.

In May, the Department issued about 140 final tiering determination letters to the highest risk (Tier 1) facilities, which confirm their high-risk status, and begin their time frame (120 days) for submitting an SSP. Following preliminary authorization of the SSPs, the Department expects to begin performing inspections in the first quarter of fiscal year 2010, starting with the designated Tier 1 facilities.

Along with issuing the initial set of final tiering determination notifications, the Department launched the SSP tool, which was developed by DHS with input from an industry working group. A critical element of the Department's efforts to identify and secure the Nation's high-risk chemical facilities, the SSP enables final high-risk facilities to document their individual security strategies for meeting the Risk-Based Performance Standards (RBPS) established under CFATS.

Each final high-risk facility's security strategy will be unique, depending on its risk level, security issues, characteristics, and other factors. Therefore, the SSP tool collects information and data on each of the 18 RBPS for each facility. The RBPS cover the fundamentals of security, such as restricting the area perimeter, securing site assets, screening and controlling access, cyber, training, and response. The SSP tool also recognizes that facilities typically administer most security measures on a facility-wide basis but that facilities also customize security for certain assets. That being the case, facilities can describe facility-wide and/or asset-specific security measures. Moreover, the Department understands that the private sector in general and, the CFATS-affected industries in particular are dynamic. The SSP tool allows facilities to involve its subject-matter experts from across the facility, company, and corporation, if appropriate, in completing the SSP and to submit a combination of existing and planned security measures to satisfy the RBPS. The Department expects that most approved SSPs will consist of a combination of existing and planned security measures. It will be through a review of the SSP, in conjunction with an on-site inspection, that DHS will determine whether a facility has met the requisite level of performance given its risk profile and thus whether its SSP should be approved.

With the launch of the SSP tool, DHS also issued the *Risk-Based Performance Standards Guidance* document. The Department developed this guidance to assist high-risk chemical facilities subject to CFATS in considering appropriate protective measures and practices to meet the RBPS. It seeks to help facilities comply with CFATS by describing in greater detail the 18 RBPS and by providing examples of various security measures and practices that could be considered by facilities to achieve the appropriate level of performance for the RBPS at each tier level. This guidance also reflects public and private sector dialogue on the RBPS and industrial security, including public comments on the draft guidance document. High-risk facilities are free to make use of whatever security programs or processes that they would like, provided that they achieve the requisite level of performance under the CFATS RBPS. The guidance will help high-risk facilities gain a sense of what types and combination of security measures may satisfy the RBPS.

To provide a concrete example: in the case of a Tier 1 facility with a release hazard security issue, the "restrict area perimeter" performance standard at the Tier 1 level may involve the facility establishing a clearly defined perimeter that cannot be breached by a wheeled vehicle. To meet the performance standard, the facility is able to consider a vast number of security measures. Among other options, a facility could, install cable anchored in concrete block along with movable bollards at all active gates, or it could "landscape" its perimeter with large boulders, steep berms, streams, or other obstacles that would thwart a wheeled vehicle. As long as the specific measures in the SSP are sufficient to address the performance standards, the Department would approve the plan.

OUTREACH EFFORTS AND PROGRAM IMPLEMENTATION

Since the release of CFATS in April 2007, the Department has taken significant steps to publicize the rule and make sure that our security partners are aware of CFATS and its requirements. As part of a dedicated outreach program, the Department has regularly updated the Sector Coordinating and Government Coordinating councils of sectors impacted by CFATS, including the Chemical, Oil and Natural Gas, and Food and Agriculture Sectors. We have also made it a point to solicit feedback from our public and private sector partners as we interact with them and,

where appropriate, to reflect that feedback in our implementing activities. We have presented at numerous security and chemical industry conferences, participated in a variety of other meetings of relevant security partners, established a Help Desk for CFATS questions, and developed and regularly updated a highly-regarded Chemical Security Web site. These efforts are having a positive impact: approximately 36,500 facilities have submitted Top-Screens to the Department via CSAT.

Additionally, the Department continues to focus efforts on fostering solid working relationships with State and local officials and first responders in jurisdictions with high-risk facilities. To meet the risk-based performance standards under CFATS, facilities likely will need to develop effective working relationships—including a clear understanding of roles and responsibilities—with local officials who would aid in delaying and responding to potential attacks. To facilitate these relationships, our inspectors have been actively working with facilities and officials in their assigned areas, and have participated in almost 100 Local Emergency Planning Committee meetings to give a better understanding of CFATS' requirements.

We are also pursuing efforts on several levels to identify facilities that may meet the threshold for potential CFATS compliance but have not yet registered with CSAT or filed a Top-Screen. We have recently completed pilot efforts at the State level with New York and New Jersey to identify such facilities in those jurisdictions; we will use those pilots to design an approach that all States can use to assist in this effort. Further, we are in the process of commencing targeted outreach efforts to certain segments of industry where we believe compliance may not be at the level it should be.

We continue to build the Infrastructure Security Compliance Division that is implementing CFATS. We have hired or are in the process of on-boarding over 125 people, and we will continue to hire throughout this fiscal year to meet our goals. Likewise, we continue our relationship with the Federal Protective Service to detail personnel with extensive physical security experience. The budget request for fiscal year 2010 contains an increase to support the hiring, training, equipping, and housing of additional inspectors to support the CFATS program as well as to continue to deploy and maintain compliance tools for covered facilities.

NEW LEGISLATION

We have enjoyed a constructive dialogue with Congress as it works on new draft authorizing legislation for CFATS. CFATS is enhancing security by helping to ensure high-risk chemical facilities throughout the country have security postures commensurate with their level of risk; thus, we support a permanent authorization of the program. Since the Department's authority under Section 550 is due to sunset on October 4, 2009, the administration's fiscal year 2010 budget includes a request for a 1-year extension of the statutory authority for CFATS. We look forward to working closely with Congress to extend the program permanently. We urge that, in authorizing continued implementation of this important program, Congress provide adequate time and resources to implement any new requirements under the legislation and ensure that new requirements would not require the Department to extensively revisit aspects of the program that are either currently in place or will be implemented in the near future. Throughout our discussions with Congressional committees, including the Committee on Homeland Security, the Department has communicated a series of issues for consideration to be discussed as part of any legislative proposal involving CFATS.

As DHS has stated before, we believe that there is an important gap in the framework for regulating the security of chemicals in the United States, namely drinking water and wastewater treatment facilities. We need to work with the Congress to close this gap in order to secure substances of concern at these facilities and protect the communities they serve. Drinking water and wastewater treatment facilities that would be considered high-risk due to the presence of substances of concern should be regulated; however, we do recognize the unique public health and environmental requirements and responsibilities of such facilities. For example, we understand that a cease operations order that might be appropriate for a chemical facility under CFATS could have significant public health and environmental consequences when applied to a water facility.

In addition, the Department's current authority under Section 550 does not extend to certain exempt facilities, including those regulated by the U.S. Coast Guard under MTSA and by the Nuclear Regulatory Commission. Because CFATS and MTSA both address chemical facility security, there certainly should be harmonization, where applicable, between these programs. We are working with the Coast Guard to review the processes and procedures of both programs in an on-going dia-

logue. We also support further clarification in the statute concerning the type of nuclear facilities exempt from CFATS.

CFATS currently provides facilities with flexibility to assess and determine what measures to include in their SSPs to meet the RBPS. This includes adoption of safer technologies, where appropriate. Under CFATS, facilities are also required to submit a revised Top-Screen when they make a material modification to their operations. Based on revised Top-Screens many facilities have already made voluntary changes to, among other things, their chemical holdings and distribution practices (for example, completely eliminating use of certain chemicals of interest). We support such voluntary measures when they reduce risk.

In the area of enforcement, we support eliminating the requirement that an Order Assessing Civil Penalty may only be issued following the issuance of an Administrative Order for compliance. This would greatly streamline the civil enforcement process, thereby enhancing the Department's ability to obtain compliance from facilities. We also support language that would authorize the Department to enforce compliance by initiating a civil penalty action in district court or commencing a civil action to obtain appropriate relief, including temporary or permanent injunction.

The Department has significant concerns with the citizen suit provision being contemplated under some legislative proposals.

The Department is concerned about the potential for disclosure of sensitive or classified information in such proceedings. Similarly, the Department urges that it retain discretion in determining the manner and extent to which information about the reasons for placing a facility in a given tier is divulged, as those reasons may involve classified information.

CONCLUSION

The Department is collaborating extensively with the public, including members of the chemical sector and other interested groups, to work toward achieving our collective goals under the CFATS regulatory framework. In many cases, industry has voluntarily done a tremendous amount to ensure the security and resiliency of its facilities and systems. As we implement the chemical facility security regulations, we will continue to work with industry, States, and localities to get the job done.

We must focus our efforts on implementing a risk- and performance-based approach to regulation and, in parallel fashion, continue to pursue the voluntary programs that have already experienced considerable success. We look forward to collaborating with the committee to ensure that the chemical security regulatory effort achieves success in reducing risk in the chemical sector. In addition to our Federal Government partners, success is dependent upon continued cooperation with our industry and State and local government partners as we move toward a more secure future.

Thank you for holding this important hearing. I would be happy to respond to any questions you may have.

Chairman THOMPSON. I thank you for your testimony. I remind each Member that he or she will have 5 minutes to question the panel.

I now recognize myself for the first question.

Getting right to it, in your statement, you noted that the Department's request for a 1-year extension of CFATS, you followed that by saying that you look forward to working with Congress to extend the program permanently. So it's fair to characterize a 1-year extension proposal as a backstop to ensure that CFATS isn't interrupted if Congress is unable to complete its work before October 2009, when the program is scheduled to sunset?

Mr. REITINGER. Thank you, sir. I would say that the proposal for a 1-year extension is so that we would have time to work on an appropriate reauthorization of the bill. Obviously, we believe this is a critical program that needs to continue, and we would like to work with the committee to have the most effective reauthorization possible.

A 1-year extension would give us the time to move forward and achieve the best possible authorization bill, and that was why it was requested in the President's budget. Thank you, sir.

Chairman THOMPSON. So where are you along the way if this bill that we are considering now becomes law?

Mr. REITINGER. If the question, sir, relates to, where are we on implementation of the CFATS regime?

Chairman THOMPSON. That is correct.

Mr. REITINGER. We are substantially into the implementation of the regime. As my testimony indicated, we have issued an interim final rule. The appropriate top screens have been submitted, and we are now in the process of identifying facilities on a rolling basis of where they are tiered with a recent notification to roughly 140 facilities that they are within the top tier or tier one.

As a result of that, they will be required to issue or to provide to DHS site security plans within 120 days. We will continue to do those notifications, review them, approve them, or engage in discussions with the regulated facilities, and move forward on implementation throughout all of the tiers and begin the inspections process, which would be the next step, during the next fiscal year.

Chairman THOMPSON. So if the bill passes before the sunset occurs, what interruption do you see occurring?

Mr. REITINGER. Sir, if the bill were passed before the reauthorization, I think there would be no interruption in the actual regime. However, we would like the opportunity to continue to work with the committee to make sure that the reauthorization is as effective as possible.

Chairman THOMPSON. The other issue speaks to this issue around civil suits. Now, am I to say to you that civil suits under this legislation is still subject to certain sensitive material and that, even if a lawsuit was brought, based on existing law, there are certain items that would not be available for public review in this civil suit?

Mr. REITINGER. Sir, I would need to spend, I think, more time to fully understand the nature of the language in H.R. 2868. I would say that, in general on civil suit provisions, I have a concern that civil litigation involving the CFATS regime would lead to a higher likelihood of disclosure of sensitive information covered under the existing CVI regime.

As the committee knows, that information is highly sensitive and would be of use to people who wanted to do harm to the Nation or the public. Therefore, I think it is important to give full consideration to all of the different factors that are involved.

Also, somewhat concerned with regard to civil suits that—I am sorry, sir.

Chairman THOMPSON. Well, without going through it, but are you aware that there are certain—and maybe you need to study it a little more—but there are some classifications in the bill that would prevent access to this information?

Mr. REITINGER. I understand that, sir, and we would be happy to work with the committee to make sure that those are as effective as possible. I am generally concerned, though, that civil litigation leads to, no matter what the protections are, a higher likelihood of disclosure of information.

So I would want to work effectively with the committee to make sure that those protections were optimal for ensuring sensitive information were not released.

Chairman THOMPSON. But you do—and I am not trying to debate it, but in America, that is one of the ways that our citizens have access to things they disagree with is the court of law. What we have tried to do is craft in this bill access, but also protect some of the secret or top-secret issues associated with it.

Mr. REITINGER. I understand, sir. Obviously, there is always a balance between availability to information possessed by Government, the First Amendment implications of that, and protection of sensitive information that could be used to harm the public.

I understand that. That is a difficult balance to draw, and we would be happy to work with the committee going forward.

I am not, however, in a position to take a formal position on the bill that the committee introduced yesterday at this point in time, and I apologize for that.

Chairman THOMPSON. Thank you.

I yield to the Ranking Member from New York.

Mr. KING. Thank you, Mr. Chairman.

Mr. Chairman, when I assumed my position as Ranking Member back in January, I did not think I would be sitting here as the defender of the Obama administration and their policies, but I do believe, in a bipartisan way, that when we believe the administration is right, we should stand with them. I believe they are right, in some respects.

As far as the 1-year extension, Mr. Reitinger, in your testimony, you said that you wanted to work with Congress to make the implementation of the regulations and legislation as effective as possible, and you believed it would take over the course of the next year to do that.

Now, the legislation has been introduced. I am not trying to play word games here, but you must not believe that this legislation is as effective as it could be and is not the most effective piece of legislation. We are talking about a very complex area. That is why I believe extending it out for a year makes a lot more sense, rather than rush to judgment.

What would you envision doing over the next year, assuming that the bill passes on the floor, the appropriations committee prevails, and there is a 1-year extension? What do you have in mind as far as what has to be done during the course of that year, as opposed to rushing it through within the next few weeks?

Mr. REITINGER. So, sir, once again, I am not in a position to take a DHS or administration position on the bill itself.

But, certainly, you know, within whatever time frame is allowed, we would intend to work effectively with the committee to make sure that we crystallize a position and provide the best advice possible we can to the committee so that the bill addresses the needs that are—that the committee is already discussing, and includes appropriate resolution of all of the issues that are included within the bill.

Mr. KING. On the issue of civil suits, have you considered how much time would go into responding to lawsuits, how much manpower and personnel would have to be expended to do this? My un-

derstanding is that right now senior officials in the Department have to testify before 108 committees and subcommittees of Congress, which is an extraordinary waste of time.

You add to that lawsuits being brought. As you said, there has to be a balance between security and what is open to the public. But have you looked into the amount of manpower that would be required and personnel hours required it were open to civilian lawsuits?

Mr. REITINGER. No, sir. I can't say that it is, I think, possible to determine that in advance.

My understanding is that there are some civil suit provisions that are rarely exercised and take little time and there are others that are rapidly or often exercised and take more time.

Certainly, reviewing such civil suit information and if testimony from the Department was required, it would take some time from the Department. We would want to work, if a civil suit provision were included, with the committee to make sure that there was as little risk of disclosure of information as possible and that the diversion from other substantive work that the Department is undertaking was as limited as possible.

Certainly, it is true that any civil suit provision at least raises the specter of some diversion of resources.

Mr. KING. Now, as I understand it, this will be the first time that the Department would be open to civil lawsuits. Is that true?

Mr. REITINGER. I do not know of any other provisions where the Department is open, but I can't say, sir, that I have talked with our office of general counsel and had them conduct an exhaustive survey yet.

Mr. KING. Could you expand at all upon your concern with the danger of vital information being disclosed as a result of these lawsuits, whether it is in discovery or in part of the proceeding?

Mr. REITINGER. Well, sir, I perhaps have some degree of innate caution about this. Having spent a large chunk of my career as a litigator, first on the civil side and then on the criminal side, and understanding what the scope of discovery and information disclosure is, I think that inevitably there is some risk of disclosure of information. This information is very sensitive and is, indeed, pursuant to the authorizing legislation, treated as classified for some particular purposes.

That said, as the Chairman indicated before, there are First Amendment concerns; the public needs access to information. Those need to be carefully balanced. I would want to have the Department continue to work effectively with the committee as it has been to make sure that balance is drawn in the appropriate place.

Mr. KING. If I could just make one more statement for the record as to why this should not be rushed and why we should wait out the year.

My understanding is that two of the senior positions at DHS, the assistant secretary for infrastructure protection and the under secretary for national protection and programs directorate, have not been filled and they have a vital role to play in implementation of the regulations and carrying forth of the legislation. Is that true?

Mr. REITINGER. Neither of those positions has been filled yet, sir.

Mr. KING. They would play a vital role in this legislation being implemented?

Mr. REITINGER. Yes, sir.

Mr. KING. I yield back.

Chairman THOMPSON. The Chair now recognizes other Members for questions they may wish to ask the witnesses.

In accordance with our committee rules, I will recognize Members who are present at the start of the hearing based on seniority on the committee, alternating between majority and minority. Those Members coming in later will be recognized in the order of their arrival.

The Chair now recognizes for 5 minutes the gentleman from Pennsylvania, Mr. Carney.

Mr. CARNEY. Thank you, Mr. Chairman.

I would like to thank you, Mr. Reitinger and Ms. Armstrong, for joining us today.

Ms. Armstrong, I actually have a question for you to start off. Now, as I understand it, present regulations and tiering structures, about 10 percent of underground natural gas reservoirs are subject to additional CFATS security requirements. Is that correct?

Ms. ARMSTRONG. There are underground natural gas storage facilities that are subject to CFATS, primarily based on the amount of methane stored there.

Mr. CARNEY. Okay. TSA and PHMSA also recommend and monitor security practices at these facilities, as well?

Ms. ARMSTRONG. If there is a pipeline nexus, yes.

Mr. CARNEY. Okay, just a pipeline nexus. Okay, all right.

Are there any conflicts between CFATS and TSA and PHMSA on how they monitor and regulate, if you are storing the gas, and—monitoring the system, is there——

Ms. ARMSTRONG. No, we actually have worked fairly closely with TSA, their rule—on their freight rail rule. We coordinate with them on a routine basis as we identify facilities that are subject to CFATS or are in some cases with other agencies exempt.

Mr. CARNEY. Okay. Now, when CFATS was first written, first developed, do you think it was intended to regulate, include underground natural gas storage?

Ms. ARMSTRONG. CFATS was designed to regulate the security of chemicals of interest, as published in our appendix A, which is 322 chemicals that—at or above screening threshold quantity, holding those chemicals triggers compliance with CFATS.

Mr. CARNEY. Does that include natural gas and if CFATS has a role to play in this?

Ms. ARMSTRONG. It includes fuel mixtures that have a chemical of interest in them, such as pentane, butane, or methane.

Mr. CARNEY. Understood. Cleared that up.

In your mind, are the regulations sufficient? Are they too much? Or are they—do they conflict with TSA or PHMSA?

Ms. ARMSTRONG. Sir, I don't see any conflicts with TSA and CFATS.

Mr. CARNEY. Okay. No further questions at this time.

Chairman THOMPSON. Thank you.

We now recognize the gentleman from California, Mr. Lungren, for 5 minutes.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

First, Ms. Armstrong, I want to thank you and the others in the Department who have worked hard to make CFATS work. We tried to get CFATS as freestanding legislation. We did not get that, but we did have it in appropriation language, which allowed us to go forward with H.R. 2868. I think the spirit of cooperation in the industry and the work done at DHS has been very helpful to the security of this country.

There is one fact I would like to establish. As I understand, our staff has broken down the various steps in the CFATS regulatory process. They have broken it down into eight steps.

According to their analysis, we are at about step five currently. In other words, we are in the middle of the process making sure it is a completed, matured process. Would that be correct, as far as you are concerned?

Ms. ARMSTRONG. On May 15, we took another step in the program to move from reviewing security vulnerability assessments submitted by CFATS facilities to completing review of the initial group of preliminary tier-one SVAs and issued approximately 140 facilities of final tiering notification, which included the deadline for their submission of their site security plan, which for that group is September 15.

Mr. LUNGREN. But for the completed CFATS regulatory process, the last step would be for DHS to conduct inspections, both targeted and random, to ensure the facility's compliance with its SVA. We are not there yet, correct?

Ms. ARMSTRONG. Correct. We have not done any inspections. Our inspectors have done a number over the past couple of months of compliance assistance visits to make sure we understand the content of a facility's security——

Mr. LUNGREN. More directly, my question is this: We have not completed the process of the entire regulated community at this point so that we would be at full maturity, correct?

Ms. ARMSTRONG. Correct. We have not verified content of site security plans.

Mr. LUNGREN. I have concerns about us passing legislation when we haven't even finished the process of CFATS, which you and the industry have been working on in order to evaluate how we are doing at that point in time.

Excuse me. Is it "Reitinger" or "Reitinger"? Or something else?

Mr. REITINGER. Sir, I will answer to just about anything.

Mr. LUNGREN. I know that. But I like to get it—I remember, "I before E except after C or pronounced as A as in neighbor and weigh." But that is only how you spell it. How do you pronounce it?

Mr. REITINGER. I think my name is roughly unpronounceable, but I generally say "Reitinger."

Mr. LUNGREN. Reitinger, okay. Mr. Reitinger, with respect to the issue of civil lawsuits, if I were to tell you there were potentially 304 million civil lawsuits, would that disturb you?

Mr. REITINGER. Yes, sir.

Mr. LUNGREN. Well, the language which Section 2116 has introduced says, "any person may commence a civil action on the person's own behalf against any person, including the United States

or other governmental instrumentality or agency who is alleged to be in violation of any standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this title."

Now, you are a former civil litigator. I am a former civil litigator. Normally, you have, not an expanded universe, but rather a contracted universe of potential litigants, however this language says any person. Don't you think that is a little bit of an overreach?

Mr. REITINGER. Sir, I regret, again, I am not in a position to take a position.

Mr. LUNGREN. Okay. Well, I will say that I think it is an overreach. Anybody involved in the civil litigation arena knows that if you have a potential universe of litigants who have no skin in the game, then there doesn't need to be any single allegation that they have suffered a loss as a result of this. There is no indication that they have been injured.

So what you would have, for the first time since the creation of DHS, is a requirement that the Department be liable to uninjured third parties in civil lawsuits. So I know you want to very careful about what you say.

You have said the administration has concerns about civil lawsuits. I would suggest it is more than just a concern with civil lawsuits. Rather, it is a concern with civil lawsuits that are open to anybody in the United States, yet it is not even limited to just the United States. I will limit my question to any person in the United States, but it doesn't even have to be that limited solely to millions of potential lawsuits.

One of my concerns is that we have had the industry work in collaboration with the Department with a certain level of trust. Would that trust in some ways be undermined by the possibility of lawsuits down the line, undetermined at this point in terms of its nature and its number?

Although you would say we will try to make sure we keep this information secure, do we recall not many years ago that we required, as a matter of law, all nuclear facilities to have their blueprint available to the public on the Internet? If that is not a problem in terms of terrorism, I think this would be.

So I thank you for your testimony.

Mr. REITINGER. Thank you, sir.

Chairman THOMPSON. Thank you.

Since the gentleman from California raised the lawsuit possibility, I want to read you what is in the act itself under hearing today. It says, "The bill requires a 60-day notice before a suit can commence. If the secretary takes action to fix a problem or require compliance in that time, the suit is terminated. In addition, the court is only allowed to issue orders directing specific action on the part of the agency or facility in civil fines that are returned to the Treasury. Thus, there is no incentive for frivolous lawsuits."

In other words, if you want to sue under this lawsuit, you have to notify the Government within 60 days, and then the Government has 60 days to fix the violation that you are alleging. If so, the suit goes away.

Mr. LUNGREN. Would the gentleman yield on that?

Chairman THOMPSON. I yield to the gentleman from California.

Mr. LUNGREN. By the terms of what the gentleman has just said, it requires action on behalf of the Department presumably to investigate the allegations contained in the lawsuit before they can make a judgment as to whether or not it is worthy of remedy and then they can remedy it.

I thank the Chairman.

Chairman THOMPSON. Well, thank you. Sixty days, we think, is good enough to see whether something is broken. Obviously, whatever needs fixing, we can fix by filing it with the court indicating so.

We will now recognize the gentleman from Kansas City, Mr. Cleaver, for 5 minutes.

Mr. CLEAVER. Thank you, Mr. Chairman.

Mr. Reitinger, in July, you notified 7,000 facilities of their initial high-risk assessment. Of the 7,000, 141 of them have been assigned tier-one status. My concern is that the time-line with regard to the rest of the tier assignment, as well as the requirements to complete and submit site security plans.

Mr. REITINGER. Yes, sir. So I will give a quick answer and then ask Ms. Armstrong to supplement where we are in the process, because she is—her level of detail knowledge far exceeds mine.

As you said, we have done the first notifications to some of the highest-risk facilities. We will be, over the next few months, notifying the remainder of those who have been tiered. They will all have 120 days after notification to submit site security plans.

Let me ask Ms. Armstrong if she can supplement that.

Ms. ARMSTRONG. Certainly. Sir, you are correct. Last year right about this time, on June 23, we notified 7,010 facilities of their preliminary tiering determination and their requirement to do an SVA, security vulnerability assessment. We have moved in the last couple of weeks, last month or so, into making final tiering notifications based on SVA review.

One thing to remember about the CFATS numbers is that they are constantly changing, because new facilities are filing a top screen and starting their clock, if you will, if they screen in.

Facilities are also resubmitting top screen, notifying the Department that they have made, for example, a material modification at the site and their COI holdings are now different, and they are putting us on notice of that, as required in the rule. So that is why you see some of the changes in the numbers.

The time frame we are on right now is to, by the end of this month, notify a group of tier-two facilities of their final tiering determination and site security plan requirement and then move into perhaps, as time goes on, monthly notifications of threes and fours as their SVAs are reviewed.

Mr. CLEAVER. Now, what is the on-going process? I mean, after you have—site security plan has been authorized, does DHS then require another assessment every year, every 6 months? I mean, what are we going to do in the on-going plan to make sure that we have, in fact, done the—made the proper step—taken the proper steps with regard to security?

Ms. ARMSTRONG. Well, the rule itself speaks to the time frame that facilities are on, but to—suffice it to say that, once we accept a site security plan, we will inspect the facility. We will be inspect-

ing tier-one facilities under the current construct every year and tier-two every 2 years.

Mr. CLEAVER. Okay.

Ms. ARMSTRONG. Then handle the threes and fours accordingly.

Mr. CLEAVER. Okay, yes, that was my concern, whether it was—whether we were going to do a one-time visit and that is it or rotating or reoccurring visits. You are saying——

Ms. ARMSTRONG. Correct. There will be——

Mr. CLEAVER [continuing]. Once a year?

Ms. ARMSTRONG [continuing]. Inspection cycle for each facility, depending on its tier.

Mr. CLEAVER. All right.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you.

We now recognize the gentleman from Texas, Mr. McCaul, for 5 minutes.

Mr. MCCAUL. Thank you, Mr. Chairman.

Let me thank the panel and thank you, Mr. Reitinger, for your service, not only in the Justice Department, where I worked, as well, but also on the CSI cybersecurity commission, making recommendations to the President regarding cybersecurity, many of which were adopted. It was great work, and I am glad to see you in the Department serving this country well.

I just have a couple of questions. I don't want to sound redundant, but I am curious. When did you get a copy of this draft legislation, Mr. Reitinger?

Mr. REITINGER. Sir, first, let me briefly thank you and thank you for your leadership of the CSIC commission. It was a pleasure to serve under your Chairmanship there.

Mr. MCCAUL. Thanks.

Mr. REITINGER. In terms of the legislation, I personally reviewed a draft copy last week. I believe the formal copy was just introduced yesterday, so I have begun to review that now, but have not completed it yet.

Mr. MCCAUL. Okay. In your testimony last week, you testified that the President and the Department requested a 1-year reauthorization or extension, as the Ranking Member has pointed out, to have more time to work effectively with the Congress for a permanent reauthorization. To me, that seems to make eminent sense. It seems like a reasonable request on the part of the administration.

Can you perhaps explain to this committee why it is important for the Department—and the President clearly also believes it is necessary—to have this 1-year extension?

Mr. REITINGER. Yes, sir. At least it seems to me, based on the questions around the table, that there is near consensus that the CFATS regime is—has been an essential step forward towards protecting chemical site security. Obviously, we did not want the regime to lapse while further discussions were taking place about a reauthorization of the program, and so the President requested a 1-year extension to give time for the discussions around what that authorization might look like.

Mr. MCCAUL. I would submit to the Chairman that it is certainly the position on our side, that a 1-year extension makes eminent sense to get the bill right. However, that is just our view.

The litigation issues concern me, as well. An uninjured plaintiff can bring a third-party lawsuit. This could include almost anybody, which could tie down the Department with extensive litigation. You and I, having worked in the Justice Department, know the burden of that type of litigation.

Is this the first time the Department will be open to these types of lawsuits?

Mr. REITINGER. Yes, sir. I cannot specifically say it would be the first time. I am not aware of other provisions like this. But I have not done either the exhaustive research myself, nor do I have access to the appropriate legal schools to do that anymore, nor have I asked our Office of General Counsel to engage in that inquiry yet, but——

Mr. MCCAUL. Based upon my experience, I can tell you, it will increase their workload and their burden. I think it will perhaps jeopardize some of the protected information, as the gentleman from California discussed.

We have critical infrastructures that want to work with the Government cooperatively. If this litigation risk calculation arises where this type of protected information could potentially be disclosed in a public lawsuit, I think, it will hurt our relationship with the private sector, in terms of our goals with security being the ultimate issue.

Finally, with respect to implementing inherently safer technologies, you stated in your testimony that the CFATS regulations did not prohibit companies from implementation today, is that correct?

Mr. REITINGER. Yes, sir.

Mr. MCCAUL. Okay. Now, this would actually mandate that implementation. Do you think the Department is in a position to be able to make those kinds of evaluations? Or is the private sector and the market a better place to make those decisions?

Mr. REITINGER. Sir, what I would say is, as you point out, the existing regime allows for regulated entities to use inherently safer technologies to tier down or perhaps tier out or as a part of their protected plans, but it is not mandatory.

Were we responsible for judging whether ISTs—whether they should be imposed and what those particular ISTs should look like, we would—although we are developing expertise in our chemical inspector corps, we would need to go farther and certainly bring in some additional experts to be able to effectively fulfill that mission.

Mr. MCCAUL. I see my time is expired. Thank you.

Chairman THOMPSON. Thank you very much.

Ms. Armstrong, for the record, since you have primary responsibility for CFATS and some other responsibilities directly related to where we are, are you familiar with this legislation? Have you been provided a draft routinely by committee staff?

Ms. ARMSTRONG. Yes, sir.

Chairman THOMPSON. Over what period of time?

Ms. ARMSTRONG. I believe we saw an April draft and an early June draft, in addition to the bill that was released last night.

Chairman THOMPSON. So basically you have had knowledge of everything going on so far?

Ms. ARMSTRONG. Yes, sir.

Chairman THOMPSON. Thank you.

The other point I want to make is that every other piece of legislation related to this—Clean Water Act, Safe Drinking Water Act, Toxic Substance Control Act, Water Pollution Control Act, Atomic Energy Act—all of them have references to civil suits. Clearly, because we are a Nation of laws, our citizens have to have an opportunity to have their day in court, whether they are right or wrong.

What we have done with this 60-day provision is to screen out what we think frivolous lawsuits would work an undue burden on the agency by saying the secretary can take that complaint within 60 days, file whatever response with the court, and go away. That is the intent of the legislation.

We now recognize Ms. Clarke, from New York, for 5 minutes.

Ms. CLARKE. Thank you, Mr. Chairman. I, too, find this whole topic of civil litigation somewhat intriguing and just wanted to get a sense from both of you—and good morning. It is good to see you again, Under Secretary Reitinger and Assistant Secretary Ms. Armstrong.

There has been discussion today about civil suits and how they will impact the functioning of the Department. Is DHS subject to suit under environmental statutes?

Mr. REITINGER. I am going to defer that question to Ms. Armstrong.

Ms. ARMSTRONG. Just for the record, I am the director of the Infrastructure Security Compliance Division, though thank you for the promotion.

Ms. CLARKE. Okay, we have to fix the materials here. Go on.

Ms. ARMSTRONG. In terms of subject to environmental litigation, I would say, at a very high level, the Department is subject to NEPA-type requirements when we impact the environment, but I don't know of any provisions that we are expressly subject to under how we implement CFATS at this point in time.

Ms. CLARKE. Okay. So, I mean, are we splitting hairs here? Or would you say that the Department is subject, particularly in the area of environment?

Mr. REITINGER. Let me see if I can supplement what I have said, Ms. Clarke. I worry about several things with civil suits that amount to concerns about a provision that would subject the Department to civil suits in these circumstances. One is disclosure of confidential information. Another is diversion of resources.

As I said before, while I—there are clear reasons why one might want to empower private citizens to bring these sorts of actions, and there are also concerns about public access to information, those have to be carefully balanced about with respect to both maintaining the confidentiality of highly sensitive information and enabling the Department to effectively implement the regime, you know, from the—you know, less importantly at the politically level, but much more importantly down through the subject matter experts.

So I would want to be very sure that any legislation drew the right balance to enable the strongest possible protections for chem-

ical facilities and, therefore, strongest possible protections for the public.

Ms. CLARKE. So are you saying that you are not in favor of citizens being able to bring suit if it is warranted? I mean, I understand your position with respect to privacy of the information that may be contained regarding chemical facilities, but your emphasis seems to be very heavily on that. You know, you say you are trying to strike a balance, but it just doesn't come across that way.

Mr. REITINGER. So I would say that, I am not in a position to take a formal position on the bill that was introduced yesterday. But I and the Department have significant concerns about civil suits in the context of CFATS.

Ms. CLARKE. Are you aware that the Nuclear Regulatory Commission is subject to citizen suits, as well, and, in any given year, it is sued 10 to 15 times within that year? This is—you know, in mind, is there any real reason to expect that there will be like a flurry of litigation with regard to citizen suits being included in this bill?

Mr. REITINGER. Ms. Armstrong may have additional information.

The one other thing I would point out, ma'am, is that there are obviously a very large number of high-risk chemical facilities around the country around——

Ms. CLARKE. Some very close to New York City.

Mr. REITINGER. Understood, ma'am. So I think that bears a potential risk for a high amount of litigation. But I am not in a position now to do a comparative analysis with the Nuclear Regulatory Commission provisions.

Ms. CLARKE. Well, we will just hope you will bear that in mind as you go through your review of the provision within this bill.

Having said that, Mr. Chairman, I yield back the balance of my time.

Chairman THOMPSON. Thank you very much.

The gentleman from Pennsylvania, Mr. Dent, is recognized for 5 minutes.

Mr. DENT. Thank you, Mr. Chairman.

I want to say first that I have letters here from over 40 organizations opposing H.R. 2868, the Chemical Facility Antiterrorism Act of 2009. These organizations include the Farm Bureau, Trucking Association, Chamber of Commerce, and many others. I would like to submit these for the record.

Chairman THOMPSON. Without objection.

[The information follows:]

LETTERS SUBMITTED FOR THE RECORD BY HONORABLE CHARLES W. DENT

JUNE 11, 2009.

DEAR MEMBER OF CONGRESS: We represent American businesses and local city services that provide millions of jobs and our national infrastructure. Protecting our communities and complying with Federal security standards is a top priority for us.

We ask that you cosponsor H.R. 2477, "The Chemical Facility Security Authorization Act", to reauthorize the DHS chemical facility security standards enacted by Congress in 2006. Extending the sunset date for the chemical security regulations would provide the certainty needed to both protect our citizens and enable our economic recovery.

However, we strongly urge you to oppose disrupting this security program by adding provisions that would mandate Government-favored substitutions, weaken protection of sensitive information, impose stifling penalties for administrative errors,

create conflicts with other security standards or move away from a performance (or risk-based) approach.

For example, last year's "Chemical Facility Anti-Terrorism Act" could have caused disruptions of new Federal security standards and reduced jobs in the short term, and in the long term weakened infrastructure protection and economic stability.

Our top concern is that legislation could go beyond security protections by creating a mandate to substitute products and processes with a Government-selected technology. Congressional testimony found that this could actually increase risk to the businesses that the bill intends to protect. Such a standard is not measurable and would likely lead to confusion, loss of viable products, prohibitive legal liability, and business failures.

We ask that you ensure that any security legislation avoid overlap and conflict with existing Federal security requirements, such as the U.S. Coast Guard's "Maritime Transportation Security Act." Any proposal must also protect from release any sensitive security information on site vulnerability.

Companies in thousands of communities are complying with the landmark new DHS chemical security standards while continuing to provide essential products and services for our daily lives. We believe that counter-productive adjustments to the current law would undermine security and endanger businesses in communities all around the country. Thank you for your consideration of our views.

Agricultural Retailers Association; American Exploration & Production Council; American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Trucking Association; Chemical Producers and Distributors Assn; Consumer Specialty Products Association; Croplife America; Edison Electric Institute; Environmental Technology Council; Institute of Makers of Explosives; International Assn of Drilling Contractors; International Assn of Refrigerated Warehouses; International Dairy Foods Association; International Liquid Terminals Association; International Warehouse Logistics Association; Midwest Food Processors Association; National Agricultural Aviation Association; National Association of Chemical Distributors; National Association of Manufacturers; National Mining Association; National Oilseed Processors Association; National Paint and Coatings Association; National Pest Management Association; National Petrochemical & Refiners Assn; National Propane Gas Association; North American Millers' Association; Petroleum Equipment Suppliers Association; Petroleum Marketers Association of America; Synthetic Organic Chemical Manufacturers Assn; The Fertilizer Institute; USA Rice Federation; U.S. Chamber of Commerce.

JUNE 12, 2009.

The Honorable Bennie Thompson,
Chairman, Committee on Homeland Security, 176 Ford House Office Building, Washington, DC 20515.

The Honorable Peter King,
Ranking Member, Committee an Homeland Security, 117 Ford House Office Building, Washington, DC 20515.

DEAR CHAIRMAN THOMPSON AND RANKING MEMBER KING: As the Committee on Homeland Security moves toward consideration of legislation to ensure the security of our Nation's chemical facilities, the undersigned agri-business community organizations would like to highlight several concerns that we believe must be addressed in any legislation ultimately approved by the committee. We look forward to working with you to provide solutions to our issues of concern as legislation moves through the legislative process.

We believe homeland security and the protection of America's food supply is a top priority. The Nation's agricultural industry continues to take pro-active steps to properly secure crops and livestock as well as critical crop input materials such as fertilizer and pesticides throughout the distribution chain. Our organizations and members are working closely with the Department of Homeland Security (DHS) to implement and ensure compliance with the Chemical Facility Anti-Terrorism Standards (CFATS) regulations. We encourage you to maintain the existing regulations and allow DHS to complete the first phase of their implementation.

We also want to raise with you our concerns with certain provisions in the "Chemical Facility Anti-Terrorism Security Act of 2009," which we believe would disrupt the current partnership that exists between DHS and the private sector and detrimentally impact American agriculture. Our key areas of concern include:

Inherently Safer Technology (IST).—While some may believe that IST is a valid goal at a manufacturing site for OSHA Process Safety Management (PSM) reasons, the requirement to assess the use of product substitution at all regulated chemical

facilities, including manufacturers, wholesale distributors and retailers, as proposed in draft legislation, could have a devastating impact on American agriculture. If an IST mandate is put in place for the Nation's agricultural industry, such a mandate could jeopardize the availability of lower-cost sources of plant nutrient products or certain agricultural pesticides used by farmers and ranchers, as well as products which are used for specific agronomic reasons.

It is disconcerting that this legislation actively discourages the use of products which are vital to American agriculture in all levels of the supply chain. In the report accompanying H.R. 5577, the "Chemical Facility Anti-Terrorism Act of 2007," the committee recognized the unique issues associated with IST and the agricultural sector. The committee explicitly stated in its report, "It is not the intention of the committee to promote or discourage the use of any particular chemical in agriculture though the provisions in this section." We therefore request that you alter the legislation to reflect the committee's intent with regards to the impact of IST on American agriculture and remove any language, for agricultural facilities, which implicitly or explicitly discourages the use of products.

Inclusion of MTSA Regulated Facilities.—The Maritime Transportation Security Act (MTSA) of 2002 is designed to protect our Nation's ports and chemical facilities located therein. MTSA facilities are required to conduct the same vulnerability assessments and develop security plans just as facilities regulated under CFATS. Due to the strong regulations currently in place, these facilities, which are regulated by the U.S. Coast Guard, were exempted by statute from the CFATS legislation. To continue to maintain this successful program and avoid duplicative regulation, it is necessary to maintain the MTSA exemption. We encourage you to alter the draft legislation to acknowledge and maintain the Coast Guard's important role and long-term commitment to the protection of chemical facilities currently located along our Nation's navigable waterways.

Third-Party Lawsuits.—The Ag Security Working Group is alarmed that the "Chemical Facility Anti-Terrorism Act of 2009" includes provisions allowing for private rights of action against regulated parties and against DHS to enforce compliance with applicable requirements. Such private rights of action provisions have fostered enormous amounts of litigation in other contexts and have no place in the legislation under consideration. First, we believe that these provisions increase the likelihood of disclosure to the public of sensitive security information. We also believe that these provisions provide a disincentive for chemical facility employees to take responsibility for implementing the legislation's provisions due to the personal liabilities associated with being named in a citizen's suit. In addition, we believe that citizen suits jeopardize cooperation between DHS and the regulated entity, specifically in an instance when cooperation is crucial for the protection of our Nation's critical infrastructure.

Information Protection.—A facility's information should be protected to the highest degree. Information should be treated as classified material in a court setting and should not be released to the general public. Section 2110 of the draft bill weakens certain information protection provisions and potentially exposes sensitive vulnerability information to the public domain. As the Federal Government has recently learned with the release of sensitive nuclear information, once information is released to the public, it can not be retrieved. Security vulnerability assessments and site security plans can provide those very terrorists that this legislation intends to protect us against with a roadmap to attack our Nation's critical infrastructure, an circumstance that this legislation seeks to mitigate. We believe it is necessary to treat this information as Critical-Terrorism Vulnerability Information (CVI) as currently defined by DHS.

Federal Preemption.—The agribusiness community is particularly concerned that Congress intends to encourage the creation of a patchwork of conflicting rules that stretch across Federal, State, and local lines. The DHS CFATS regulations should pre-empt inconsistent State and local chemical security laws and rules by pre-empting State or local requirements only if (1) there is an actual conflict between the two, or (2) the State or local program "frustrates the purpose" of the Federal program. Neither of these problems appears to be occurring with the way existing State programs are being implemented; thus, Congress should not need to act to "save" any current programs.

We support efforts in Congress to permanently authorize the existing DHS CFATS regulations. However, any legislation considered by the Committee on Homeland Security, or on the House floor, needs to take into account the regulatory and economic impact on American agriculture and the consumer for whom we provide essential food, fiber, and bioenergy.

We look forward to working with you both in a cooperative manner as the committee moves this measure forward. Thank you for your consideration of our concerns and unique perspectives shared in American agriculture.

Sincerely,

American Farm Bureau Federation; Agricultural Retailers Association; CropLife America; Chemical Producers and Distributors Association; National Agricultural Aviation Association; National Cattlemen's Beef Association; National Corn Growers Association; National Council of Farmer Cooperatives; The Fertilizer Institute.

JUNE 15, 2009.

The Honorable Bennie G. Thompson,
Chairman, Committee on Homeland Security, U.S. House of Representatives, Washington, DC 20515.

RE: Reauthorization of Chemical Facility Anti-Terrorism Standards (CFATS)

DEAR CHAIRMAN THOMPSON: On behalf of the member companies of the Chemical Industry Council of California (CICC)[1] and the California Manufacturers & Technology Association (CMTA),[2] we write to urge the Committee on Homeland Security to reauthorize the Department of Homeland Security (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) enacted by Congress in 2006. The security of our California chemical and chemical user facilities ranks among our highest priorities and as such we have proactively collaborated with the Governor's Emergency Management Agency (Cal/EMA), the State's Regional Terrorist Threat Assessment Centers (RTTAC's), the DHS Regional Offices, and the FBI InfraGard chapters throughout the State. Our organizations believe extending the chemical security regulations will provide the certainty needed to protect workers and the general public, critical infrastructure and jobs, and the environment from violent and reckless acts of terrorism.

However, we are compelled to express strong opposition to proposals which threaten to compromise the anti-terrorism security and law enforcement aspects of the program. Among these are new provisions which would add mandates for chemical substitutions, weaken protection of sensitive information, impose stifling penalties for administrative errors, create conflicts with other security standards or move away from a performance (or risk-based) approach.

California recently enacted comprehensive science-based "Green Chemistry" environmental legislation to identify and prioritize "chemicals of concern" and to enable a search for safer alternatives employing multi-media life cycle analysis to avoid the unintended negative consequences of improper substitutions. In contrast, we believe the concepts in the CFATS reauthorization proposal regarding Inherently Safer Technologies (IST) should more appropriately be debated in the context of environmental legislation rather than anti-terrorist legislation.

Further, California passed legislation in 2005 to protect sensitive critical infrastructure vulnerability assessments from disclosure under its Public Records Act. Weakening Federal protections for critical infrastructure information is moving in the wrong direction, and CICC and CMTA urge you to reject such provisions.

Chemical manufacturers, distributors, and downstream users of chemicals throughout California are complying with landmark CFATS legislation while continuing to provide essential products and services for daily life. CICC and CMTA strongly believe the aforementioned provisions (i.e., imposing IST, and softening security protections for critical infrastructure information, et al) if implemented will prove to be counter-productive; and will undermine security, endanger communities, and place critical infrastructure at greater risk—not only in California but all

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[1] The Chemical Industry Council of California (CICC) is a voluntary State-wide trade association comprised of large and small chemical manufacturers and distributors throughout California. CICC represents multiple facilities including: forty-three (43) manufacturing plants; five (5) research laboratories; and sixty-seven (67) sales, service, and distribution centers. Our California members account for annual sales in excess of $3,000,000,000 and directly employ more than 5,700 workers, with combined annual payroll in excess of $283,000,000. An additional 11,000 indirect jobs are created by CICC member companies with an additional combined annual payroll of some $360,000,000.

[2] The California Manufacturers & Technology Association (formerly the California Manufacturers Association) works to improve and enhance a strong business climate for California's 30,000 manufacturing, processing, and technology-based companies. Since 1918, CMTA has worked with State government to develop balanced laws, effective regulations, and sound public policies to stimulate economic growth and create new jobs while safeguarding the State's environmental resources. CMTA represents businesses from the tire manufacturing community—an economic sector that generates more than $250 billion every year and employs more than 1.5 million Californians.

around the country. We urge the committee to reject such measures. Thank you for your consideration.

Sincerely,

JOHN R. ULRICH,
Executive Director, CICC.
MIKE ROGGE,
Director, Environmental Policy, CMTA.

JUNE 4, 2009.

The Honorable Joe L. Barton,
2109 Rayburn HOB, Washington, DC 20515.

DEAR CONGRESSMAN BARTON: The Texas Chemical Council (TCC) urges you to support legislation to reauthorize the Department of Homeland Security (DHS) chemical facility security standards which were enacted by Congress in 2006.

TCC is a State-wide trade association representing 77 chemical manufacturers operating more than 200 manufacturing facilities in Texas. Our industry has invested more than $50 billion in physical assets in the State and pays over $1 billion annually in State and local taxes. TCC's members provide approximately 70,000 direct jobs and over 500,000 indirect jobs to Texans across the State.

TCC supports Congress enacting into statute the regulatory framework known as the "Chemical Facility Anti-Terrorism Standards" that the DHS carefully established and is now enforcing. Removing the sunset date and making the chemical security regulations permanent would provide the certainty needed to both protect our citizens and support our Nation's economic recovery.

TCC is strongly opposed to legislation that would disrupt this security program by adding provisions that would mandate Government-favored substitutions, weaken protection of sensitive information, impose onerous penalties for administrative errors, create conflicts with other security standards or move away from a risk-based approach. We ask that you oppose legislation that would go beyond security protections and create a mandate to substitute products and processes with a Government-selected technology. TCC also requests that you ensure that any security legislation avoid overlap and conflict with existing Federal security requirements, such as the U.S. Coast Guard's "Maritime Transportation Security Act."

Our members' highest priority is protecting their employees and the communities where they live and work. We feel this is being accomplished through compliance with the landmark new DHS chemical security standards. We ask that you oppose counter-productive changes to the current law that would undermine security and endanger businesses and communities. We appreciate your consideration of our concerns. If you have any questions or would like additional information, please do not hesitate to contact me.

Sincerely,

HECTOR L. RIVERO,
President and CEO.

JUNE 11, 2009.

The Honorable Nancy Pelosi,
Speaker of the House, House of Representatives, Washington, DC 20515.

DEAR SPEAKER PELOSI: The undersigned organizations representing wastewater and drinking water utilities throughout the Nation, write to express our concerns with jurisdictional conflicts arising over reauthorization of the Chemical Facilities Anti-Terrorism Act (CFAT) with respect to drinking water and wastewater utilities. If these conflicts are not resolved, we believe that security at drinking water and wastewater facilities will potentially be placed at greater risk.

Over the last several months, we have communicated with the House Homeland Security Committee, Energy and Commerce Committee, and Transportation and Infrastructure Committee setting forth our concerns over the prospect of multiple Federal agencies regulating chemical security at drinking water and wastewater treatment plants. We have urged the committees to draft legislation that places both drinking water and wastewater facilities under one security program at a single Federal agency. We believe this approach is the only way to ensure the highest level of security at these facilities while avoiding duplicative and overly burdensome regulatory regimes that will lead to increased costs to taxpayers with no appreciable public benefit.

However, we understand that the House Committee on Homeland Security intends to assert jurisdiction over chemical security at wastewater treatment utilities when it marks up a CFATS reauthorization bill on June 18 for the program administered by the Department of Homeland Security (DHS). On May 20, the House Committee on Energy and Commerce released draft legislation entitled the Drinking Water System Security Act which proposes a regulatory regime for security at drinking water facilities under the Environmental Protection Agency (EPA), per an agreement between HS Chairman Bennie Thompson and E&C Chairman Henry Waxman. To date, there has been no similar agreement between Chairman Thompson and T&I Chairman James Oberstar, though we understand that Mr. Oberstar intends to introduce separate wastewater security legislation as early as this week. We believe that wastewater treatment utilities should be placed under the jurisdictional authority of the EPA and its security program along with drinking water utilities,

If wastewater utilities are regulated under a CFATS program at DHS while drinking water utilities are regulated under a security program at EPA, separate security programs for water supply and wastewater treatment operators will be in place, thereby creating duplication of efforts, increased costs to ratepayers, and compliance mandates for two Federal programs without any discernable public benefit. The problematic nature of this approach is best crystallized by the example of water and wastewater utilities that are jointly owned and managed by a single entity. Under separate Federal agency authorities, these facilities would face the prospect of being regulated by two different Federal agencies for the same policy purpose. Indeed, we believe a splintered Federal regulatory oversight approach will result in greater security vulnerabilities at wastewater and drinking water systems vis-à-vis intentional acts of terrorism.

Therefore, we ask your assistance and support in our efforts to sort out these juridictional issues. Specifically, we ask your support that wastewater treatment utilities be granted an exemption from the CFATS program at DHS with the understanding that these utilities will be placed under the jurisdictional authority of the EPA and its security program, along with drinking water utilities. We also request that the Committee on Transportation and Infrastructure receive a jurisdictional referral on the CFATS reauthorization bill in order to appropriately incorporate wastewater utilities into the overall House legislative package on chemical security.

We appreciate your consideration and assistance with this matter. If you have any questions or wish to discuss this matter further, please contact Patricia Sinicropi, Legislative Director of the National Association of Clean Water Agencies.

Sincerely,

KEN KIRK,
Executive Director, National Association of Clean Water Agencies.
DIANE VANDE HEI,
Executive Director, Association of Metropolitan Water Agencies.
WADE MILLER,
Executive Director, WateReuse Association.
BILL BERTERA,
Executive Director, Water Environment Federation.
CATHERINE SMITH,
Executive Director, California Association of Sanitation Agencies.
TIM QUINN,
Executive Director, Association of California Water Agencies.

JUNE 15, 2009.

The Honorable James L. Oberstar,
Chairman, House T&I Committee, U.S. House of Representatives, Washington, DC, 20515.

The Honorable John L. Mica,
Ranking Member, House T&I Committee, U.S. House of Representatives, Washington, DC, 20515.

The Honorable Eddie Bernice Johnson,
Chairman, House T&I Subcommittee on Water Resources and Environment, U.S. House of Representatives, Washington, DC, 20515.

The Honorable John Boozman,
Ranking Member, House T&I Subcommittee on Water Resources and Environment, U.S. House of Representatives, Washington, DC, 20515.

DEAR CHAIRMAN OBERSTAR, RANKING MEMBER MICA, CHAIRWOMAN JOHNSON, AND RANKING MEMBER BOOZMAN: The National Association of Clean Water Agencies (NACWA), the leading advocacy organization representing the Nation's municipal wastewater treatment agencies supports the *Wastewater Treatment Works Security Act of 2009*. The bill, introduced by Rep. Eddie Bernice Johnson (D–Texas), Chair of the House Transportation and Infrastructure Subcommittee on Water Resources and Environment, would place wastewater facilities under the same security program as drinking water facilities at the U.S. Environmental Protection Agency (EPA). We believe this approach is the only way to ensure a consistent level of security at these facilities while avoiding duplicative and overly burdensome regulatory regimes that will lead to increased costs to taxpayers with no appreciable public benefit.

However, we understand that the House Committee on Homeland Security intends to assert jurisdiction over chemical security at wastewater treatment utilities when it marks-up a CFATS reauthorization bill on June 18 for the program administered by the Department of Homeland Security (DHS). If wastewater utilities are regulated under a CFATS program at DHS while drinking water utilities are regulated under a security program at EPA, separate security programs for water supply and wastewater treatment operators will be in place, thereby creating duplication of efforts, increased cost to ratepayers, and compliance mandates for two Federal programs without any discernible public benefit.

The problematic nature of this approach is best crystallized by the example of water and wastewater utilities that are jointly owned and managed by a single entity. Under separate Federal agency authorities, these facilities would face the prospect of being regulated by two different Federal agencies for the same policy purpose. Indeed, we believe a splintered Federal regulatory oversight approach will result in greater security vulnerabilities at wastewater and drinking water systems vis-à-vis intentional acts of terrorism.

NACWA recognizes Congress' interest in ensuring the best possible protections for the Nation's critical infrastructure but including publicly owned treatment works (POTWs), whose sole mission is the protection of public health and the environment, into regulations aimed at securing private chemical plants is not a sound approach. POTWs are already heavily regulated under the Clean Water Act (CWA), which is administered by EPA and overseen by the T&I committee.

NACWA has worked diligently with EPA's water security division on effective security protocols to protect their facilities.The Association developed a suite of vulnerability self-assessment tools (VSAT™) that was distributed broadly for use by wastewater and drinking water agencies and also worked to develop its chlorine gas decision tree to help utilities assess the feasibility of switching to alternative disinfection method. The CFATS bill has the potential to undermine both this work and EPA's ability to implement the CWA by giving overly broad discretion to DHS.

Clearly, any new legislation focusing on security at wastewater treatment facilities should fall under the oversight of the T&I committee. NACWA fully supports the committee in its efforts to assert jurisdiction over wastewater treatment sector security through the *Wastewater Treatment Works Security Act of 2009* and we look forward to working with you on these efforts going forward.

Sincerely,

KEN KIRK,
NACWA Executive Director.

Mr. DENT. Thank you.

Also, Mr. Reitinger, good to see you again.

Ms. Armstrong, good to be with you, too.

I want to say a few things first, Mr. Reitinger. How many IST specialists do you have on staff currently in DHS?

Mr. REITINGER. Sir, I think the answer is none, because we don't have any positions that are formally IST specialists, but I think we are in the process of hiring chemical inspectors who may have some—will have an increasing degree of knowledge generally around chemical facility security.

Mr. DENT. That is not particularly reassuring, but I understand. With the $19 million increase in the President's fiscal year 2010 budget request for the Office of Infrastructure Protection, how many IST specialists will you hire? Would you hire two or three people with some background?

Mr. REITINGER. Sir, again, I don't know that we have anyone that I would firmly say now is an IST specialist, because we are budgeting under the current regime.

Ms. Armstrong, can you supplement that answer?

Ms. ARMSTRONG. Certainly. I would agree that we don't have anybody that is by title an IST specialist on staff. We have hired chemists, chemical engineers, inspectors, and other program staff for the program. The budget increase is to allow us to continue to staff up to full complement and to continue to deploy and maintain compliance tools for industry.

Mr. DENT. Okay, so you have a limited staff. Following up on Mr. McCaul's question, I would like to ask a yes-or-no question. Do you believe that requiring IST implementation is necessary or simply preferable? I think we need it on the record.

Mr. REITINGER. Sir, I regret, giving you a yes-or-no answer would require me taking a specific position on the bill, and I am not ready to do that. What I can say is that the current regime allows for companies to use inherently safer technologies in either tiering out or in responding to—including within their site security plan, excuse me, tiering out or reducing their tier.

Therefore, we would be happy—and we would be happy to work with Congress to have the best possible provision going forward.

Mr. DENT. Understood. I have another issue. As you know, many industry- and company-specific studies show massive costs to substitute chemical products. This committee has discussed this issue numerous times over the years.

Has there been any DHS analysis of the cost required to mandate product substitution for chemical facilities? Has there been any analysis on potential job loss as a result of mandating such a substitution?

Mr. REITINGER. Let me defer that question to Ms. Armstrong.

Ms. ARMSTRONG. Thank you. I don't—we are not in ISCD at the point of such specific analysis. The Science and Technology Directorate of the Department is doing and should complete this summer a literature review related to the topic of IST to start building a base of information on that topic.

Mr. DENT. Do you agree that IST is essentially an engineering practice? Do you agree that IST really deals more with workplace safety issues, perhaps, than plant security issues?

Ms. ARMSTRONG. I think that there is enough debate in industry and academia, et cetera, that I can't take a position on that very topic.

Mr. DENT. However, somebody will have to implement this, and we have to understand what it is and what it is not. I have talked with a number of engineers who tell me that this is really a workplace safety issue. It is not a chemical plant security issue. Therefore, it should not be mandated into legislation.

If we are going to mandate such a practice, we ought to know what we are doing here. I would appreciate receiving some guidance from the Department.

I think you are right to ask for this 1-year extension on the CFATS regulations because of these types of questions for which you may be unable to provide an answer or you may not be permitted to do so. Therefore I would appreciate some clarification on that point.

Another question: Has there ever been any analysis or study completed that shows MTSA is not working or MTSA facilities are unsafe?

Ms. ARMSTRONG. I don't think that there has been any specific analysis at that question. I am sure that the Coast Guard has requirements to provide reports on progress in implementing MTSA.

Mr. DENT. Has DHS conducted a strict assessment of the current CFATS program? If so, has it been presented to the Congress?

Ms. ARMSTRONG. We don't have a requirement at this point in time to provide a sort of annual congressional report.

Mr. DENT. Okay, thank you.

Chairman THOMPSON. Thank you very much.

Ms. Armstrong, Mr. Dent talked about staffing. Am I to understand that some of the requirements for CFATS and others is ongoing and that you are, in fact, still hiring as we speak, whether this legislation passes or not?

Ms. ARMSTRONG. Yes, sir, we are continuing to hire. I have a selection certificate for three positions to bring security specialist expertise to the program on my desk. As of this date, we either have on-board or are in the process of on-boarding approximately 125 people.

Chairman THOMPSON. Thank you. With respect to the legislation, we are talking about an additional $100 million to provide the Department for both regulatory and staffing requirements to implement it. So we are indeed not adding burden to the agency without providing the resources to do the job.

I now recognize the gentleman from Texas for 5 minutes, Mr. Cuellar.

Mr. CUELLAR. Thank you, Mr. Chairman.

I guess what a lot of us are trying to do is find a balance between security and, of course, industries that we represent. As you know, in Texas, the chemical industry down there, we have over 77 chemical manufacturers operating more than 200 facilities, a lot of jobs are created, and I know there has been concern.

I appreciate you working with myself, but I think with Al Green on some language. I am in particular talking about Section 2111 and 2103, and I believe you also have shown a willingness to work with us on some report language. I certainly want to work with you

on that report language, but I do want to thank you for enhancing that language on that, whether it comes as a form of a manager's amendment or whatever—you are going to use.

So I know Al Green has shown some concern, so I want to thank you and look forward to working with you to further enhance the language to address some of the issues, Mr. Chairman.

Thank you.

Chairman THOMPSON. Thank you very much. The gentleman yields back?

Mr. CUELLAR. Yes, sir.

Chairman THOMPSON. I recognize Mr. Cao for 5 minutes.

Mr. CAO. Thank you, Mr. Chairman.

Mr. Secretary, my main concern in connection with this bill is the mandatory implementation of IST. Small businesses, which make up the bulk of my district's local economy, will pay tens of thousands of dollars to implement these measures. The impact of this bill on the agriculture industry will be enormous.

According to the Louisiana Department of Agriculture, more than 30,000 farms in our State will be affected at a cost of more than $120 million. To quote the State agriculture commissioner, "If we are not very careful with how we regulate the cost of implementation of this bill and jumps in fertilizer costs could cost food inflation upwards of 10 percent. At the rate we are going in this country, we will have regulated ourselves into a position in which we can't feed ourselves."

How is evaluating alternative processes that are necessary to produce synthetics, such as rubber, paint, and fertilizer, among others related to homeland security?

Mr. REITINGER. Sir, let me say that, first off, with regard to agricultural end users under the CFATS regime, my understanding is that, in December 2007, an extension was granted to submit top screen. So there are no current regulatory requirements under the CFATS regime with regard to them.

I could ask Ms. Armstrong to supplement that answer.

Ms. ARMSTRONG. That is correct. At the time of publication of Appendix A to CFATS, we noted that there was an unintended consequence of the rule in that, at current screening threshold quantities, we would screen in potentially individual homes, small businesses, and farms, which was not the intent of the CFATS program. It is to identify and protect high-risk chemical facilities.

So we did issue an indefinite extension for certain agricultural chemical end-users, and we are working right now to resolve that situation.

Mr. CAO. Besides the unintended consequences that you just outlined, what other unintended consequences do you know of that may result due to this bill?

Mr. REITINGER. If the question is the bill that was introduced yesterday, I regret I will need a little more time to look at the bill to formulate a position and work effectively with the committee. But you have my personal commitment to work effectively with the committee on the authorization language.

Mr. CAO. My second concern in connection with this bill is the inherent jurisdictional conflicts between DHS and EPA and be-

tween DHS and the U.S. Coast Guard. Do you have procedures in place that will resolve this conflict?

Mr. REITINGER. Let me talk about this—both of those things, and then perhaps Ms. Armstrong may want to supplement that.

With regard to the issue with MTSA, we are in on-going discussions with the Coast Guard to work towards harmonization of the CFATS and MTSA regimes so that we have a consistent level of protection across both MTSA and CFATS.

With regard to wastewater and water treatment facilities, drinking water facilities, we believe that there is a coverage, a security gap with regard to them that needs to be addressed.

Ms. ARMSTRONG. I would just add that we don't have a conflict with either EPA or the Coast Guard. To echo the point, currently, water and wastewater treatment facilities are exempt from CFATS, and we are working very closely with the Coast Guard within DHS to harmonize our approach to both MTSA and CFATS implementation.

Mr. CAO. Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman THOMPSON. Thank you.

For the record, again, Ms. Armstrong, you clarified the agricultural concern. Basically, this legislation adds no new burden on agriculture. CFATS is CFATS. It is already law.

So whatever concern that individuals would have, it wouldn't be with this bill. It would be with existing law from a CFATS standpoint.

Ms. ARMSTRONG. Yes.

Chairman THOMPSON. Am I correct?

Ms. ARMSTRONG. That is correct, sir, yes.

Chairman THOMPSON. Thank you.

The Chair now recognizes the gentlelady from Nevada for 5 minutes, Ms. Titus.

Ms. TITUS. Thank you, Mr. Chairman.

I would address this to both of you. On May 4, 1988, there was an explosion at the PEPCON facility. That was a rocket fuel manufacturer that had been built originally, you know, in kind of an isolated area of the desert. But by the time it exploded, it was surrounded by the suburbs of Henderson.

As a result of that explosion, two workers were killed, 372 people were injured, and $100 million in damage was done up to 10 miles away to buildings, homes, other facilities. Resulting from that, the Nevada legislature enacted a very tough storage disclosure, safety law to prevent that from happening again.

Now, we want to keep workers and residents safe and facilities secure, but we don't want to create a kind of bureaucratic nightmare where there are all these kind of conflict regulations and duplication of reports that have to be filed.

Would you address how you work with States and how this regulation or legislation might interact with what we have already got in place?

Mr. REITINGER. I will give a quick response and then ask Ms. Armstrong to supplement it.

The point I would make on pre-emption is that there is nothing in the current regime that prohibits States from implementing re-

gimes that are more protective, facilities or people in the States than the existing regime, at least insofar as those regimes do not expressly conflict with the purpose of CFATS.

In addition, I know that well prior to my arrival at the Department of Homeland Security, Sue and her team and other people across the Department were working very effectively with States and local governments to ensure we had the best regime possible.

With that, I will ask her to supplement.

Ms. ARMSTRONG. Thank you. One of the kind of tenants of CFATS is that we don't intend it to conflict with existing regulatory compliance that is out there, as we know there are many, many, many Federal and State programs. So we built the—in particular, the site security plan template for CFATS to allow reporting and articulating how a facility is in compliance with other regulations, if that facility is, indeed, covered by CFATS due to holdings of chemicals of interest.

I would echo that we have worked very closely with States. We recognize homeland security advisers as authorized CVI users and share information with them to help them better secure facilities that are in their jurisdiction.

If you look at the risk-based performance standards that underlie CFATS, there are a few that do speak to the working relationship between owners and operators and their first responders in State and local jurisdictions. We will be looking for multi-jurisdictional joint planning and exercising of those plans at high-risk chemical facilities.

Ms. TITUS. Thank you, Mr. Chairman. I yield back.

Chairman THOMPSON. Thank you.

The Chair now recognizes the gentleman from Michigan, is—oh, Olson, I am sorry, Olson from Texas.

Mr. OLSON. Thank you very much, Mr. Chairman.

I have a couple questions, again, getting back to CFATS. As my colleague from California mentioned, there is an eight-step process that the Department is going through. We are essentially at step five.

We have three steps remaining, with facilities completing their site security plans, followed by a DHS review—and either approving or rejecting their plans. Then, finally, DHS conducts inspections.

This has been a 3-year process to get to where we are on "step five." How much longer will it take to get through the next three steps, and get the CFATS program fully running?

Mr. REITINGER. I would start by saying, the CFATS program is up and running. We haven't completed all the steps yet. But as I think the time line shows, we have been working very avidly to do that and, I think, have made steady progress.

In terms of where we—the last step is essentially that inspections I think on the eight-step program you did. My understanding is that those inspections will start during the next fiscal year, but let me ask Sue to supplement that.

Ms. ARMSTRONG. That is correct. We anticipate doing the first inspections of tier-one facilities in the first quarter of fiscal year 2010.

Mr. OLSON. Okay, that makes sense. That is why the administration is asking for the 1-year extension. It will be fully up and running at the eighth step of the process by the end of the year.

One other question I would like to ask is about the Maritime Transportation Security Act. How many facilities that are affected by the MTSA from CFATS have claimed an exemption?

Ms. ARMSTRONG. In the initial submission of top screens and preliminary tiering, 365 facilities claimed full exemption under MTSA and 135 claimed partial extremism under—due to MTSA.

Mr. OLSON. Three hundred seventy-five whole and 135 partial?

Ms. ARMSTRONG. Partial.

Mr. OLSON. Is that correct? Okay. How many inspectors will you have at the end of 2010? We have talked about a lot of the manpower needs that will probably arise if we do have the inherently safer technology and the civil suits while leaving the Department exposed to them, so it certainly sounds like you will have to grow the Department. Are you going to have the manpower of inspectors at the end of 2010?

Mr. REITINGER. Yes, sir. For those of you who were at the committee hearing I testified at last week, you know that continuing to expand the personnel resources in the National Protection and Programs Directorate is my personal top priority. We have some great people, and we need to continue to get more of them.

The plan for fiscal year 2010 in terms of field inspectors is to have 135 CFATS inspectors and 20—throughout a term—20 FTE, 40 FTP—full-term positions—or, sorry, full-time positions—and who are cross-trained, ammonium nitrate CFATS inspectors during the fiscal year 2010.

Mr. OLSON. Okay. Thank you very much.

One final question. I have a little more time than I thought I would have, and the Texas Chemical Council has written to me, that they are concerned about some of the overlap in conflict that may exist with the Maritime Transportation Security Act, the MTSA, which we talked about earlier.

As you know, they have begun hiring. I believe they have hired over 200 maritime inspectors in the last year. These inspectors will oversee the MTSA facilities. How do you think they can inspect over 7,000 facilities with 200 inspectors? I mean, those numbers don't seem to match up. Do you have any comments?

Mr. REITINGER. I am not sure I understood the question, sir. The——

Mr. OLSON. Let me rephrase my question. Again, this is under the MTSA, but there are 7,000 facilities that are covered by the MTSA. Last year the Coast Guard began hiring their inspectors. They have about 200 currently. So we have 200 inspectors who are basically tasked with inspecting over 7,000 facilities. That is quite a big discrepancy in numbers.

I just wanted to get your thoughts on how they can make that work.

Mr. REITINGER. Sir, I would have to defer that question to the Coast Guard. I don't think it is appropriate for me to comment on their resourcing of their statutory missions. I am sorry.

Mr. OLSON. I appreciate the answer, and I appreciate your time. Thank you both very much.

I yield back my time, Mr. Chairman.

Chairman THOMPSON. Thank you.

The Chair now recognizes the gentlelady from California, Ms. Richardson, for 5 minutes.

Ms. RICHARDSON. Thank you, Mr. Chairman.

I would like to take this opportunity to get us back on track of the actual bill itself, which is the Chemical Facility Anti-Terrorism Act of 2009. It is my understanding the reason why we are considering this bill is for very serious reasons, and I think the public needs to get back on track of that discussion.

No. 1, we are talking about it because there is the potential release of toxic, flammable, and explosive chemicals that could have a potential to create adverse consequences for human life and health. So when we talk about a year, we are talking about ongoing possibilities that the American people are facing on a day-to-day basis.

The second concern is theft and diversion, chemicals that have the potential to be stolen or diverted and to be used and converted into weapons that could cause significant, adverse consequences for human life.

Then the third reason is the potential for sabotage and contamination.

Now, sir, in your own testimony, on page 6, you say, "As DHS has stated before, we believe that there is an important gap in the framework of regulating the security of chemicals in the United States, namely drinking water and wastewater treatment facilities. We need to work with Congress to close this gap in order to secure the substances of concerns at these facilities and protect the communities that they serve."

"Drinking water and wastewater treatment facilities that would be considered high-risk due to the presence of substance of concern should be regulated. However, we do recognize the unique public health and environmental requirements and responsibility of such facilities. For example, we understand that a cease-operations order that might be appropriate for a chemical facility under CFATS could have a significant public health and environmental consequence when applied to a water facility."

In my district, we have several chemical facilities. My whole comment is, it is my understanding, we have waited on legislation such as this for 3 years. My comment is, I am not willing to continue to put the residents that I am responsible to ensure that we have the adequate protections and preparation in place to wait another year.

In closing, I just wanted to reiterate, because I have heard several questions from my colleagues, and you didn't say this in the answer, and I think it is important to restate, and then I would ask your comment on.

According to the legislation that we have before us, it is intended to reduce the consequences of a terrorist attack. The bill authorizes the DHS secretary to require the implementation of inherently safer technologies, or IST, for tier one and tier two, which are the highest-risk tiers.

However—and this is, I think, the thing that needs to be repeated here today—however, before the secretary can require the

implementation of an IST bill, he or she—but in this case, he—must make the factual determination of that implementation. Within the secretary, the secretary has the purview to determine, is it technically feasible? Is it cost-effective? Will it lower the overall risk that is not—without disproportionately shifting the risks elsewhere in the supply chain and, No. 4, would not impair the ability of the facility to continue its operations in its current location?

So the legislation is quite clear and gives the secretary a tremendous amount of discretion and flexibility to adjust. Do you agree? Do you understand that? Have you read this?

Mr. REITINGER. I have read that provision, ma'am. I am not in a position to take a position on it yet, but I understand that the committee has made efforts to ensure that the secretary retains discretion in that space.

I would like to go to what you said before. Certainly, as your quoting of my testimony points out, we believe that there is a gap around wastewater treatment and drinking water facilities that ought to be addressed.

I would also say that we at the Department do not intend to sit on our hands, but intend to move forward and continue implementation of CFATS as we have been doing to do our absolute best under the existing regime or whatever regime may come to protect the public from the risk of the release of the various threats and vulnerabilities you pointed out.

Ms. RICHARDSON. We both have different jobs. Your job is to implement the legislation and then ensure that the laws are carried out. Our job is to create the legislation to make sure that that happens. I think there is a role for both of us.

So, again, I want to come back to my point of the secretary's flexibility, because there were questions here of my colleagues. The secretary does have the flexibility that, if it is not technically feasible, if it is not cost-effective, if it would lower the overall risks and disproportionately shift the risks elsewhere in the supply chain, and if it would impair the ability of the facility to operate, the secretary has the discretion to step forward, and that needs to be clearly said in testimony.

Mr. REITINGER. Thank you.

Ms. RICHARDSON. Do you agree?

Mr. REITINGER. My understanding is that is what the bill provides.

Ms. RICHARDSON. Okay.

Mr. REITINGER. We would be happy to continue to work with Congress——

Ms. RICHARDSON. I just wanted to make sure you acknowledged that. Thank you, sir.

Chairman THOMPSON. Thank you very much.

The Chair now recognizes the gentleman from Indiana for 5 minutes, Mr. Souder.

Mr. SOUDER. Thank you, Mr. Chairman. The more I hear, the more concerned I get.

To follow from Congresswoman Richardson, do you, Mr. Reitinger, agree that—since 9/11—the reason for the creation of the Department of Homeland Security was terrorism, and rather than

having kind of a mission creep it has been more like a potential mission leap. Do you view any of your responsibilities in dealing with the risk of these chemical facilities when there is a flood, a hurricane, or tornado? Or is your focus solely on terrorism?

Mr. REITINGER. Let me defer that question to Ms. Armstrong, who is much more deeply familiar with the statutory——

Ms. ARMSTRONG. Well, CFATS is in and of itself a security regulatory program with a definite anti-terrorism bent to it. As we heard, it is focused at looking at three main types of security issues: the potential for a toxic, flammable, or explosive release at a facility——

Mr. SOUDER. But caused by a terrorist or just——

Ms. ARMSTRONG. Caused by a——

Mr. SOUDER [continuing]. From an industrial accident, for example? Do you view yourself as trying to make things safer from an industrial accident or from terrorism?

Ms. ARMSTRONG. From an intentional act, yes, sir.

Mr. SOUDER. Okay. Looking at it as an intentional terrorist act, how do you move from, say, protecting a facility to micromanaging what a facility might make? In other words, do you view part of your mission as telling a facility that given some of the guidelines, if they don't shut down, in order, for example, to take a product that is more expensive and less effective, because you have concluded that it is safer from terrorists?

Ms. ARMSTRONG. Well, there is no requirement to do that at this point in time, but I would be not inclined to tell industry how to do its business and what a cost-effective process is for a particular facility. Our focus is on security.

But if I could go back to your original point, the ISCD is one division in the Office of Infrastructure Protection, and the larger mission of I.P. is to coordinate the national effort to protect all CI/KR across all 18 sectors. I.P. has a distinct role in incident management to support CI/KR owners and operators when there is an incident to help them with doing damage assessment, to help provide credentialing and access to damaged facilities for workers who need to get back to get a facility back up on-line, or to—and also to participate as the infrastructure liaison in a joint Federal office.

Mr. SOUDER. Are you thinking like in a traditional FEMA function?

Ms. ARMSTRONG. No, we are focused—FEMA is focused on human lives and disaster response. We are focused on helping owners and operators get back up and operating to provide key things like clean water, food, et cetera.

Mr. SOUDER. The challenge that I have, whether it be these random lawsuits which commonly occur—I remember where I—in an earlier life, when I worked for the senator from Indiana, that there was an aluminum facility where at least a few people who would certainly file a lawsuit, using whatever angle they could, were convinced that this aluminum company was replacing the cows at night because they were dying during the day due to pollutants and, therefore, they were doing this at night. They would have found any reason to try to harass this facility.

My congressional district is the No. 1 manufacturing district in the United States. Every single thing is a collection of chemicals.

Agriculture needs chemicals, and when two hydrogen facilities went down because of Katrina, even though steel production only requires a little bit of hydrogen, all the steel industry would have gone down. The auto industry would have gone down. The truck industry would have gone down.

Any time there are additional lawsuits, there is a cost. Any time there are regulations that may not be directly related to the issue at hand, there is an increase in cost.

Where the average unemployment rate is 15 percent in my eight counties, it puts the companies there at additional risk of being unable to produce. It puts them at additional cost to the consumers in a time when this Government is worried about deflation, not inflation. It puts additional cost on the consumers while they are making less.

There needs to be a definite, clearly stated terrorism risk, rather than just micromanaging potential things that might be preferable, which could blow up 10 people here or there. I am worried that we are drifting away from our original, targeted mission.

I yield back.

Chairman THOMPSON. Thank you.

The Chair would like, with unanimous consent, to enter into the record a statement for this hearing from U.S. PIRG, federation of State PIRGs, without objection.

[The information follows:]

PREPARED STATEMENT OF ELIZABETH HITCHCOCK, U.S. PUBLIC INTEREST RESEARCH GROUP

JUNE 16, 2009

Chairman Thompson, Representative King, Members of the committee: I am Elizabeth Hitchcock, public health advocate for the U.S. Public Interest Research Group. U.S. PIRG is the federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations with 1 million members across the country.

We are pleased to present our views at this hearing on the Chemical Facilities Anti-Terrorism Act of 2009. The State PIRGs have long been concerned with the important issues of toxic hazards in our communities, and the ability of the Federal Government to protect us from preventable hazards. We commend you for your efforts to improve security and safety at U.S. chemical facilities, including last year's passage of H.R. 5577 in this committee, and are happy to support the legislation before the committee today.

Attached to this testimony is a letter from the more than 50 labor, public health, first responder, environment and other public interest organizations with whom U.S. PIRG joins in advocating comprehensive action on chemical security this year.

SUMMARY

In August 2008, a huge explosion occurred at Bayer CropScience chemical plant in Institute, WV, killing two employees and sickening six volunteer firefighters. The blast was felt 10 miles away, and a tank weighing several thousand pounds "rocketed 50 feet through the plant." The tank luckily did not go in the direction of a tank holding methyl isocyanate, or MIC, the same chemical that killed thousands in the 1984 chemical plant explosion in Bhopal, India.[1]

In October 2006, an after-hours chemical fire at a hazardous waste handling facility in Apex, North Carolina triggered multiple explosions, and created a toxic gas cloud that forced officials to evacuate 17,000 residents. Low winds and steady rain

[1] House Energy and Commerce Committee Majority Staff, MEMORANDUM: Supplemental Information Regarding the 2008 Bayer Chemical Plant Explosion, April 21, 2009.

helped rescue the town by suppressing the toxic cloud. It truly was a miracle that no one died or was seriously injured.[2]

The safety and security of America's communities should not be a question of good fortune or circumstance. The United States needs comprehensive chemical plant security legislation that includes safer and more secure technologies as the most effective way to reduce chemical threats. Despite repeated attempts since 1999, Congress has been unable to pass a comprehensive chemical security bill. With security experts listing chemical plants as a vulnerable and deadly part of our Nation's infrastructure, the implications of this delay are at once ominous and a missed opportunity.

Across the country, there are more than 7,000 chemical facilities that each put any of 1,000 or more people at risk of serious injury or death in the event of a chemical release from the facility. In March 2008, the Congressional Research Service reported that 100 of these plants each put more than 1 million people at such risk.

In 2006, the House Homeland Security Committee passed a strong bipartisan bill. Regrettably, that effort was derailed in favor of a much weaker temporary program set to expire in October of this year. The interim chemical security law enacted in 2006 does little to eliminate the risks to our communities from these facilities. It prohibits the Department of Homeland Security from requiring safer more secure chemicals or processes that can eliminate or dramatically reduce the consequence of an attack. It also exempts thousands of chemical facilities such as water treatment facilities. We urge the committee to work quickly to pass a protective and comprehensive bill before the expiration of the existing CFATS program.

Congress should pass, and the President should sign, a chemical security bill that dramatically enhances security by:

- Reducing the consequence of an attack through the use of safer, more secure chemicals and processes where feasible;
- Involving plant employees including hourly workers and their representatives in developing plant security programs;
- Ensuring that both chemical companies and Government are accountable;
- Allowing States to set more protective security standards;
- Including all categories of facilities such as water treatment plants.

Enacting a comprehensive law will provide essential protections to millions of workers and communities now living in the shadow of preventable disasters.

Any legislation that Congress considers should replace dangerous toxics with safer alternatives where feasible and set a floor, not a ceiling, for stronger State chemical security laws. A May 2006 National Academy of Sciences study found that "the most desirable solution to preventing chemical releases is to reduce or eliminate the hazard where possible, not to control it." This means that the most certain way to make chemical plants safer and more secure is, where feasible, to eliminate the toxic chemicals that are the source of the danger by switching to safer and more secure technologies.

Fortunately, many safer alternatives are readily available. Hundreds of water treatment plants, power plants, and manufacturers have already switched to safer technologies and eliminated toxic exposure threats from these facilities to an estimated 38 million Americans. Most chemical manufacturing facilities have not adopted available safer technologies, and we need a chemical security bill that addresses these remaining chemical threats.

A deliberate or accidental release of toxic chemicals could have grave consequences, and action is long overdue to address these preventable chemical hazards. We urge the committee to pass chemical plant safety and security legislation that uses American ingenuity to substitute available safer and more secure alternatives for toxic chemicals where feasible and prevents preemption of State chemical security laws.

CHEMICAL PLANT THREATS ARE WIDESPREAD AND OMINOUS

Chemical plants pose a unique and serious threat because they are widely distributed in hundreds of communities across the country, and a single strategic strike could release toxic chemicals capable of killing thousands.

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[2] CASE STUDY: Fire and Community Evacuation in Apex, North Carolina, Environmental Quality Company, April 16, 2008, available at *http://www.csb.gov/investigations/detail.aspx?SID=15&print=y*.

Of the more than 15,000 chemical plants in the United States, the Environmental Protection Agency (EPA)[3] estimates that 100 put any of more than 1 million Americans at risk of death or serious injury from the release of toxic chemicals. Another 700 facilities place at least 100,000 in harm's way, and an additional 3,000 facilities put 10,000 or more at risk. Stephen Flynn with the Council on Foreign Relations described[4] chemical plant dangers as "[t]he equivalent of weapons of mass destruction prepositioned in some of the most congested parts of our country."

CURRENT CHEMICAL SECURITY LEGISLATION

The bill before the committee establishes a more protective program that requires an assessment of safer and more secure chemicals by the facilities posing a risk to American communities and would require, in certain limited circumstances, implementation by the facilities in the two highest-risk tiers. The bill is the product of months of work by the staff of the committee with input from our "blue-green" coalition of labor, public health, first responder, environment, and other public interest organizations, as well as the input of a variety of other stakeholders.

SERIOUS THREATS CALL FOR REAL SOLUTIONS

Legislation passed by Congress must adhere to three principal concepts if it is to effectively protect against loss of human life by securing chemical plants.

- *It must reduce the consequence of an attack at a facility through the use of safer more secure chemicals and processes.* This encompasses a broad array of technological improvements including safer and more secure chemicals, real-time production methods that use up hazardous chemicals without accumulation, process redesign, reducing hazardous pressures or temperatures, and improving chemical use efficiency. Such technological improvements make chemical plants less attractive terrorist targets. Because physical security measures alone are not failsafe, safer more secure chemicals and processes offer the best protection for local communities by incorporating measures that will reduce or eliminate the loss of human life in the event of a successful attack.
- *It must involve plant employees, including hourly workers and their representatives, in developing plant security programs.* Workers at the facility have a vested interest in a safer and more secure facility because, simply put, they would be hurt first and worst in the event of an attack on the facility. Because of their intimate knowledge of their own workplaces they are also able to identify ways to reduce the consequences of an attack. Employees and their representatives should also be afforded basic rights to join inspections.
- *It must require Government oversight of chemical security.* As with other anti-terrorism efforts, oversight of security at chemical plants should be a collaborative effort between Federal, State, and local governments. Specifically, Federal legislation must preserve the authority of States to establish more stringent security standards when necessary. States occupy a superior position to determine when local circumstances dictate additional security measures. State and local governments can also develop innovative security approaches, such as those already adopted by New Jersey and Maryland, which can instruct other State and Federal efforts.

EXPERTS HAVE REPEATEDLY WARNED OF CHEMICAL PLANT THREATS

For years, Government and private security experts have repeatedly warned of the inherent threats at chemical plants. Prior to 2001, the focus of concern was on catastrophic chemical accidents, such as the 1984 Union Carbide accident in Bhopal, India[5] that killed thousands of people and serious injured countless more. Since September 11, expert warnings have increased in frequency and gravity, and now include the realistic potential for tactical terrorist attacks on chemical plants.

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[3] *Voluntary Initiatives Are Under Way at Chemical Facilities but the Extent of Security Preparedness Is Unknown,* United States General Accounting Office, Mar. 2003, available at *http://www.gao.gov/new.items/d03439.pdf.*

[4] Angie C. Merek, *The Toxic Politics of Chemicals. Securing chemical plants: legislation and obfuscation,* U.S. News and World Report, Jan. 15, 2006, available at *http://www.usnews.com/usnews/news/articles/060123/23chemical.htm.*

[5] Edward Broughton, "The Bhopal disaster and its aftermath: a review", *Environmental Health,* 2005; 4:6. May 10, 2005, available at *http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1142333.*

- The Justice Department[6] repeatedly warned of the terrorist threats at chemical facilities and concluded that the risk of an attempt in the foreseeable future to cause an industrial chemical release is both real and credible.
- In 2002, the U.S. Army Surgeon General concluded[7] that as many as 2.4 million people could be killed or injured in a terrorist attack against a chemical plant in a densely populated area.
- Since 2003, the Department of Homeland Security (DHS) and the Environmental Protection Agency (EPA)[8] have consistently stated that exclusive reliance on voluntary security efforts by the chemical industry are not sufficient to assure protection of public health and safety.
- In 2004 Stephen Flynn of the Council on Foreign Relations wrote in his book, *America the Vulnerable,*[9] that "[t]he chemical industry deserves urgent attention because the stakes are high, the opportunities for terrorists are rich, and no credible oversight process exists. It is the very ubiquity of the U.S. chemical industry that gives it potential to be a serious source of national alarm."
- Appearing before the Senate Homeland Security and Government Affairs Committee in January 2005, President Bush's former Deputy Homeland Security Adviser Richard Falkenrath[10] testified that "[o]f all the various remaining civilian vulnerabilities in America today, one stands alone as uniquely deadly, pervasive and susceptible to terrorist attack: toxic-inhalation-hazard industrial chemicals . . . To date the federal government has made no material reduction in the inherent vulnerabilities of hazardous chemical targets inside the United States."
- In a February 2008 news release, Association of American Railroads President & CEO Edward R. Hamberger said, "We can no longer continue to risk the lives of millions of Americans by using, transporting and storing highly toxic chemicals when there are safer alternatives commercially available. It is time for the nation's big chemical companies to stop making the dangerous chemicals that can be replaced by safer substitutes or new technologies currently in the marketplace."

STATES ACTING TO FILL THE CHEMICAL SECURITY VOID

In the absence of Federal efforts to secure chemical plants, three States, New Jersey, Maryland, and New York, have taken actions to improve the security and safety of chemical plants within their borders.

- In October 2001 New Jersey became the first State to begin to assess and address chemical plant security. Under the Domestic Security Preparedness Act, the New Jersey Department of Environmental Protection established best security practices for the State's 140 chemical facilities. These best practices include requirements to assess and remedy security vulnerabilities, and to conduct a review of the potential for adopting inherently safer technologies that could dramatically reduce or eliminate chemical plant threats.
- In July 2004, New York adopted chemical plant security measures when it passed the Anti-Terrorism Preparedness Act. Pursuant to the Act, the New York Office of Homeland Security oversees the development of vulnerability assessments at certain chemical plants. Although the New York law takes an important first step, it does not give the State any authority to require specific security improvements and is therefore weaker than the Maryland program.

SAFER AND MORE SECURE CHEMICALS AND PROCESSES

The most effective method to secure chemical facilities is to replace dangerous chemicals and processes with safer alternatives when such alternatives are feasible and cost-effective. Safer chemicals and processes can effectively reduce the consequences of a successful terrorist attack.

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[6] See Note 3.
[7] Pianin, Eric. *Study Assesses Risk of Attack on Chemical Plant.* The Washington Post. Mar. 12, 2002, available at *http://www.washingtonpost.com/ac2/wp-dyn/A10616-2002Mar11.*
[8] See Note 3.
[9] Flynn, Stephen. *America the Vulnerable: How Our Government is Failing to Protect Us from Terrorism.* New York: HarperCollins, 2004.
[10] Department of Homeland Security Oversight: Hearing Before the Senate Committee on Homeland Security and Governmental Affairs, 109th Congress (2005). (Statement of Richard A. Falkenrath, Visiting Fellow, The Brookings Institution), available at *http://hsgac.senate.gov/public/__files/HSGACFalkenrathStatement.pdf.*

- The National Research Council asserts that "[t]he most desirable solution to preventing chemical releases is to reduce or eliminate the hazard where possible, not to control it."[11]
- According to the Government Accountability Office, "[i]mplementing inherently safer technologies potentially could lessen the consequences of a terrorist attack by reducing the chemical risks present at facilities, thereby making facilities less attractive terrorist targets."[12]
- According to report prepared for EPA, four toxic gases account for 55% of the chemical processes that pose off-site consequences to surrounding communities.[13] These toxics substances are chlorine gas, anhydrous ammonia, hydrogen fluoride and sulfur dioxide. All four chemicals have readily available and proven safer alternatives that are cost effective.[14] Alternatives typically include: using alternate chemical or process, using the chemical in a less dangerous form (a less concentrated one, or aqueous instead of gaseous, for example), or generating the chemical as needed on-site without storage. For example:
  - More than 200 water treatment facilities (including Washington, DC) have converted to safer alternatives such as ultraviolet light, eliminating the use of chlorine and sulfur dioxide gas. But over 100 water treatment plants still threaten more than 100,000 people.[15]
  - Ninety-eight petroleum refineries use safer alternatives to hydrogen fluoride (HF). But 50 refineries still threaten millions people with the use of HF.[16]

CONCLUSION

We commend you, Mr. Chairman, for conducting this important hearing. We hope that you find our comments helpful. We look forward to working with you and your committee staff to move legislation addressing these concerns forward. We would also be happy to discuss other possible actions under the committee's jurisdiction to protect Americans against unnecessary risk from highly toxic chemicals in their communities.

Chairman THOMPSON. The Chair now recognizes the gentleman from New Jersey for 5 minutes, Mr. Pascrell.

Mr. PASCRELL. Thank you, Mr. Chairman.

Mr. Chairman, I have a different definition of mission creep. That is when you listen to citizens' phone calls without justifiable reason or a court order. That is mission creep.

We have been discussing this issue for 4 years. We have had bipartisan support, moving in a very specific direction to try to resolve problems rather than create them.

Now, the question I have for the deputy under secretary and madam assistant secretary of Homeland Security deals with the subject of delegating oversight responsibility to State governments.

Now, New Jersey, which has a large chemical industry, it is a standard-bearer nationally for chemical security protections. I believe that in many ways the Federal Government is catching up to New Jersey through the critical legislation we are considering today, which I totally support.

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[11] Terrorism and the Chemical Infrastructure, National Research Council, May 2006, available at *http://www.nap.edu/catalog.php?record_id=11597#toc.*

[12] *DHS Is Taking Steps to Enhance Security at Chemical Facilities, but Additional Authority Is Needed,* Government Accountability Office, Jan. 2006, available at *http://gao.gov/new.items/d06150.pdf.*

[13] Belke, James C., *Chemical accident risks in U.S. industry—A preliminary analysis of accident risk data from U.S. hazardous chemical facilities,* Environmental Protection Agency, Sept. 2000, available at *http://www.epa.gov/ceppo/pubs/stockholmpaper.pdf.*

[14] *Preventing Toxic Terrorism: How Some Chemical Facilities Are Removing Danger To American Communities,* Center for American Progress, Apr. 2006, available at *http://www.americanprogress.org/issues/2006/04/b681085_ct2556757.html.*

[15] *Preventing Toxic Terrorism: How Some Chemical Facilities Are Removing Danger To American Communities,* Center for American Progress, Apr. 2006, available at *http://www.americanprogress.org/issues/2006/04/b681085_ct2556757.html.*

[16] *Needless Risk: Oil Refineries And Hazard Reduction,* U.S. PIRG, August 2005, available at *http://www.uspirg.org/home/reports/report-archives/healthy-communities/healthy-communities/needless-risk-oil-refineries-and-hazard-reduction#5B_967IsFWvKGMKfKGZkNw.*

In fact, New Jersey passed the Toxic Catastrophic Prevention Act of 1986, when I imagine few people even believed chemical security was an issue. It is an issue, but New Jersey has successfully implemented these standards in a State that is not only the most densely populated in the Nation and amongst the most active in commerce, but also in a State that has 800 different chemical facilities, including 45 facilities that manage extraordinary hazardous materials. As we all know, New Jersey is home to the most dangerous 2 miles in America, just to get the picture here.

You know, beyond special interests of a specific industry, we ought to consider the safety interests of the American people, specifically those who live near these chemical facilities. I think that is important.

We have seen over the last 4 years what happens, God forbid, if there is any kind of a man-made or just an accident disaster, the toxic chemicals that would affect many lives and kill many people, not only in those 2 miles.

I believe that the States should play a greater role, Mr. Chairman, in the oversight of this new and much-needed chemical security regime. A similar relationship is shared between the States and the EPA, the Environmental Protection Agency, with regards to environmental protections. It already exists.

So, Mr. Under Secretary and Madam Assistant Secretary, let me ask you both: Do you believe that the Department of Homeland Security can support permissive enabling language delegating some oversight responsibility to State governments in the Chemical Facility Anti-Terrorism Act of 2009? I would ask you to be specific.

Thank you.

Mr. REITINGER. So I will take a crack at that first, sir. The current statutory regime authorizes States to go beyond CFATS, in the sense that it does not pre-empt State regulation that is more restrictive and does not conflict with the basic purposes of CFATS, and the regulations do the same.

So States, in essence, already have the capability if they want to go farther than CFATS to do it. At the same time, I think it is important to have a comprehensive and baseline national regime that sets a floor across the country or a baseline that ensures that we have a sufficient level of protection in order to address the risk of a terrorist act to protect the public around the country.

The other thing I would say is that we are working very effectively with States—and with New Jersey in particular—on not only the CFATS regime, but in the case of New Jersey, ensuring that there is sufficient outreach to the private entities in the State so that we can have a greater degree of assurance that everyone who is subject to CFATS and should submit a top screen is aware of that requirement and does so.

With that, let me ask Ms. Armstrong if she would like to supplement the answer.

Ms. ARMSTRONG. Thank you. I would just add that, at this stage in CFATS, the program itself, we are working to manage risk at the national level, and we are also working to implement the program at the national level. By that, I mean ensuring consistency in our interactions with covered facilities, particularly when we do

inspections. So I think it is important to ensure that there is a national level oversight of the program as we move forward.

I would also add that, indeed, one of the witnesses that you will be hearing from next from New Jersey helped us in a pilot that we did both with New York and New Jersey to come up with a way to engage States to help us identify facilities that perhaps should be in compliance with CFATS, but for whatever reason are not at this point in time.

Mr. PASCRELL. Just in conclusion, Mr. Chairman, thank you both. I am not in any way suggesting do not have a national baseline. What I am suggesting is a delegation of some of the oversight responsibility—everybody has skin in this game. This is critical. This is important. This is life and death. I think we ought to take a look at that.

Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much.

The Chair now recognizes the gentleman from Ohio for 5 minutes, Mr. Austria.

Mr. AUSTRIA. Do you believe that these authorized amounts for grants are adequate in accomplishing what we are setting out to do and we will achieve the desired effects we are trying to accomplish with this plan?

Mr. REITINGER. Sir, I would need, I think, to spend more time with the bill before I could do a full cost analysis and prepare a budget proposal for what implementation of the regime would be.

As Ms. Armstrong said before, we are actively budgeting and working to fulfill our mission under the existing regime and under whatever changes Congress may impose.

Ms. ARMSTRONG. I don't have anything to add. I concur.

Mr. AUSTRIA. Okay. Again, I think it is important that we make sure while we are going through this difficult time that we are not burdening the industry with duplicative and nebulous regulations that are going to hurt businesses during a difficult economic time.

Mr. Chairman, if it is all right, I will just submit the rest of my statement, for the record.

Chairman THOMPSON. Thank you very much.

The Chair now recognizes the gentlelady from Texas for 5 minutes, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, let me thank you very much. Maybe I should say it: Thank you, thank you, thank you.

Because as I have been briefed and listened to some of the questioning, I respect greatly the interest and concern. As I have lived through the legislative process in this Nation, I realize that we work through compromise. We work through collaboration. We seek a bipartisan solution.

As I know this new administration, I think they have been the marker for bipartisan collaboration. We are delighted to be able to work with the administration to get this right. We want to work with the industry of which a number of representatives will be on the second panel.

But might I suggest, in the words of a wonderful icon of this Nation, Dr. Martin Luther King, if not now, then when? When are we going to wake up that we are only sitting on the fringes of a potential Bhopal? How many times have we seen an incident and we

speak to the words of, "We wish we could have, would have, and should have"?

The tragedy of 9/11, the horrific tragedy of 9/11, got us to thinking about aviation security. It began to analyze our border entry process, and we made changes, but 3,000-plus souls lost their life.

Before Three Mile Island in the United States, how many of us thought about nuclear spills and the catastrophe that would happen to a nuclear plant? I don't know how many of us were focused. We lived with Three Mile Island. It was a neighbor of that community. Didn't expect anything to happen.

So, frankly, I want the industry—of which I have had the pleasure of speaking before a number of organizations—to call us to speak to you again, because this has to happen. The synergy and the timing is here and now.

The Chairman of the Energy and Commerce Committee is an original cosponsor with myself, Mr. Markey, and Chairman Thompson. Frankly, it is now time to move on this legislation.

We have worked for a period of time. I have visited particularly, Mr. Reitinger and Ms. Armstrong, wastewater plants sitting comfortably in the midst of residential neighborhoods, in rural communities, seemingly tranquil and mild and unapproachable. I have not been necessarily impressed with the security there, because they don't think about those issues.

But we in the Congress are the ones that are supposed to think about the security of America. We have to be the forward-thinking individuals.

So let me just pose these questions to both of you. I noticed that the President extended his budget request—a 1-year extension was sought in the anticipation that Congress would act on a free-standing legislation for CFATS to make CFATS permanent.

My question then is, is the 1-year extension to work with Congress so that we can act on a free-standing legislation to make CFATS permanent, is that correct, this 1-year extension in the President's budget? Do you have that understanding?

Mr. REITINGER. The 1-year extension is to provide time to work with Congress—for the Department to work with Congress on a longer reauthorization.

Ms. JACKSON LEE. So we can collaborate.

Let me quickly go to—Ms. Armstrong, do you have that understanding?

Ms. ARMSTRONG. Yes, ma'am.

Ms. JACKSON LEE. Thank you. Let me quickly go to dealing with wastewater. There is a concern that this has had the effect of making an uneven security landscape. I am talking about the regulations under CFATS and the Maritime Transportation Security Act.

If these facilities are included under CFATS—and I am speaking of water and wastewater facilities—or in the case of drinking water facilities regulated by EPA—using regulations similar to CFATS, can your office—and I want both of you—effectively coordinate and cooperate with the Coast Guard and the EPA to ensure that security grants are met without duplication or contradiction, as is required in this bill?

It is important, especially in the case of the Maritime Transportation Security Act facilities, that companies are not caught in be-

tween the Coast Guard and infrastructure protection and that they will continue to deal directly with the Coast Guard, there be one face from DHS for security regulations for these facilities.

Mr. Reitinger, you mentioned earlier you don't want to speak for the Coast Guard. I don't ask you to speak for them, but I want to know, if we get this right, if we get wastewater and water treatment in the bill working the way it should be, can we expect from this administration a collaborative effort to make this work to secure America, Mr. Reitinger and Ms. Armstrong?

Mr. REITINGER. So they are a little different. Let me respond to both of them ma'am.

With regard to working with the Coast Guard, either under the existing regime or any follow-on regime, you can expect the National Protection and Programs Directorate to work effectively and cooperatively with the Coast Guard to ensure we are providing the most effective protections for the regulated facilities and not randomizing our stakeholders by working towards harmonization of regimes so we have a consistent level of protection.

With regard to the wastewater and water treatment facilities, you can expect us to work effectively with EPA. I think we both agree that there is a gap with regard to coverage of those types of facilities right now that needs to be addressed.

Ms. JACKSON LEE. Ms. Armstrong.

Ms. ARMSTRONG. I would just add that I take very seriously my responsibility to work within the Department and with other Federal agencies to harmonize regulatory programs.

Ms. JACKSON LEE. Mr. Chairman, did I just ask them—if we have this in this legislation, can you work—will you be working with those respective parties, if this regulation—if this language on wastewater and water get in this legislation or in this legislation?

Mr. REITINGER. I apologize, ma'am. I thought I answered the question, but let me be clearer.

Under the existing regime or on any follow-on regime, including this legislation, we will work those parties.

Ms. ARMSTRONG. I agree. We are currently working with the Coast Guard actively. If we need to because of the provisions of this bill, we will certainly work alongside EPA.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

I yield back.

Chairman THOMPSON. Thank you very much.

I thank our first panel of witnesses for their valuable testimony and the Members for their questions.

Before being dismissed, I would remind our first panel of witnesses that the Members of the committee may have additional questions for you. We will ask you to respond expeditiously in writing to those questions. Thank you very much.

I now ask the clerk to prepare the witness table for our second panel of witnesses.

Mr. PASCRELL [presiding]. Okay. We are into the second panel. I want to welcome you all.

First, Mr. Paul Baldauf. Mr. Chairman, Ranking Member, it is my pleasure to introduce Mr. Baldauf. He serves as assistant director for radiation protection and release prevention, New Jersey Department of Environmental Protection. He is the assistant director.

He manages three bureaus devoted to various aspects of radiation protection, one bureau charged with preventing the release of toxic and hazardous substances from industry. These duties include a substantial role in the development and implementation of homeland security initiatives.

He holds a B.S. degree in mechanical engineering from Pennsylvania State University, an M.S., a master of science degree in civil and environmental engineering from Rutgers University, correct?

I want to point out that he has a very rare credential, in that he has an M.A., master's degree in homeland security studies from the Naval Postgraduate School, which is under sponsorship of the Federal Department of Homeland Security. I think it is testament to Paul's commitment to his work. Mr. Baldauf is also a licensed professional engineer in the States of New Jersey and New York and in Pennsylvania.

Our second witness will be Mr. Martin Durbin. Mr. Martin Durbin serves as the vice president of Federal affairs for the American Chemical Council. During his tenure with the ACC, Mr. Durbin has served as the head of the site, cyber, and value chain security through the business of security. You must be very busy.

Our third witness is Dr. Neal Langerman. Dr. Langerman serves as the principal scientist and CEO for Advanced Chemical Safety, Incorporated. His experience includes working with companies to improve chemical-handling practices, developing emergency response teams, and upgrading industrial safety procedures. He has been a member of the American Chemical Society for 45 years.

Then, fourth is the final witness. It will be Mr. Martin Jeppeson. Mr. Jeppeson serves as the director of the regulatory affairs for the California Ammonia Company, the majority supplier of ammonia in California. His experience includes work on issues of safety, health, transportation, environmental issues and government, labor, and education.

Without objection, the witnesses' full statements will be inserted in the record. We say that because we like you to speed up the process if you want to summarize.

I want to recognize Mr. Baldauf to summarize his statement for 5 minutes.

Mr. Baldauf.

STATEMENT OF PAUL BALDAUF, ASSISTANT DIRECTOR, RADIATION PROTECTION AND RELEASE PREVENTION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Mr. BALDAUF. Thank you.

Good morning, Chair, Ranking Member, and the committee Members. It is an honor to testify here today.

I would like to focus my testimony on New Jersey's experience in implementing a homeland security program over the past 6 years, with special attention to our requirement for inherently safer technology evaluation.

In a very quick summary, New Jersey adopted its security statute in October 2001, formerly adopted chemical sector best practices in September 2003, and formerly adopted chemical standards in November 2005.

At this point, we have 6 years of on-the-ground experience implementing our best practices and standards for our universe of approximately 800 chemical facilities.

In addition, the Toxic Catastrophe Prevention Act, which regulates sites that store extraordinarily hazardous substances, are also required to conduct inherently safer technology analysis.

IST analysis, if you are subject to them, you are required to evaluate reducing the amount of extraordinarily hazardous substances you have on-site, substituting less hazardous materials if possible, using extraordinarily hazardous substances in a least hazardous process condition or form, and, lastly, designing equipment and processes to minimize the potential for equipment failure or human error.

We have been extremely pleased over the years with the compliance levels we have seen to our standards. Initially, IST evaluation was required of 45 TCPA facilities out of a total universe of 157 chemical facilities that were subject to our standards.

All 45 of those facilities conducted an IST evaluation. All those facilities documented having implemented some form of IST or similar risk reduction initiatives over time.

Thirty-two percent provided a specific schedule for implementing additional IST. An additional 19 percent identified additional IST measures, but have yet to submit the implementation schedule.

It is very clear to us that IST evaluation is not overly burdensome to the chemical sector and simply represents good business practice for any facility storing or utilizing extraordinarily hazardous materials from an economic, workers' safety, and regulatory compliance standpoint.

In May 2008, the DEP took one additional regulatory step to require all companies subject to the TCPA program to evaluate IST. Beyond chemical plants, this rule covers additional sectors, such as food, water, wastewater, refineries, and energy.

Forty-two water, wastewater, food, petroleum and energy facilities are required to submit an IST evaluation to the Department by September 2008. All of the 19 chemical reports evaluated to date were found to be deficient. The most common deficiencies include a failure to identify all potential IST alternatives and failure to provide justification for determination of infeasible option.

IST in some form has been a practice in the chemical sector for many years, but it is a relatively new concept to the other covered sectors, so we expect long-term compliance in the non-chemical sector areas to happen, and it will compare favorably, but there is going to be a lead time, we believe, to bringing these other sectors up to speed.

Briefly, with respect to the Chemical Facility Anti-Terrorism Act of 2009, some comments. Section 2109, Federal pre-emption, we fully support this language since States retain the unqualified authority to adopt enhanced security requirements based upon risk and consequence factors within their State.

The proposed act would capture chemical facilities currently exempt from the existing CFATS, expand the universe of regulated sites, and require assessments of methods to reduce the consequences of a terrorist attack at high-risk sites. Overall, the act

addresses many of the comments previously submitted by New Jersey.

One final policy point we would like to respectfully make. We strongly recommend consideration of permissive enabling language toward delegating oversight responsibility to State governments, along with appropriate levels of Federal funding to support homeland security efforts.

This is standard practice and the way most Federal environmental laws have worked through the years, where U.S. EPA or U.S. NRC may at its discretion delegate program implementation responsibility to qualified States.

In our case, we have a maturing State oversight program already in place and, frankly, know our facilities much better than DHS, in our opinion. We feel well qualified to undertake delegated responsibilities and would ask for consideration in adding such permissive authority to the draft bill.

I would like to once again thank the Chairman, Ranking Member, and Members of the committee for this opportunity to address you. We would happy to entertain any questions you may have and are available at any time should additional information be valuable to the critical work of your committee.

Thank you.

[The statement of Mr. Baldauf follows:]

PREPARED STATEMENT OF PAUL BALDAUF

JUNE 16, 2009

Good morning Chairman Thompson, Ranking Member King and Members of the House Committee on Homeland Security. My name is Paul Baldauf and I serve as the Assistant Director of Radiation Protection and Release Prevention for the New Jersey Department of Environmental Protection (DEP). I have lead responsibility along with DEP Director of Operations Gary Sondermeyer for implementation of New Jersey's homeland security program for chemical facilities under the direction of DEP Acting Commissioner Mark N. Mauriello and Director Richard L. Cañas of our Office of Homeland Security and Preparedness (OHSP). I would first like to thank the committee for the opportunity to appear before you to discuss the Chemical Facility Anti-Terrorism Act of 2009 and specifically the on-going inherently safer technology and chemical sector security initiatives within the State of New Jersey.

Chemical plant security is a subject that Governor Jon S. Corzine has maintained as a top priority while serving in the United States Senate and over the past 3½ years as our Governor. We view our Chemical Standards, including requirements for inherently safer technology evaluation, as vital to providing New Jersey with an accurate reflection of our current state of security preparedness, as I will further outline in my testimony.

In response to the risks posed by a possible terrorist attack on New Jersey's chemical facilities, New Jersey has taken significant steps to strengthen the security precautions at these plants. At this point we have close to 6 years of on-the-ground experience in implementing a homeland security program for all chemical facilities operating in our State. Best Security Practices were adopted for the Chemical Sector working cooperatively with industry leaders through the Infrastructure Advisory Committee on September 18, 2003. Since November 2005, New Jersey went further and adopted enforceable plant security practices for its chemical facilities as well as requirements for facility security assessments to evaluate potential security threats and vulnerabilities. The facilities that pose the most significant risks are subject to the State's Toxic Catastrophe Prevention Act (TCPA) program, which incorporates EPA's Risk Management Program but is stricter and broader in scope. I shall begin with a brief overview of New Jersey's domestic security preparedness activities, and then turn to the specific reasons why the evaluation of inherently safer technologies in the chemical industry is of vital importance.

OVERVIEW OF NEW JERSEY'S DOMESTIC SECURITY PREPAREDNESS EFFORT

New Jersey's unique vulnerabilities have made us a leader among States in initiating and implementing measures to counter potential terrorist operatives, to reduce the risk of attack at critical infrastructure facilities, and to reduce the potential impacts to public health and safety if any such attacks should occur in the future. New Jersey undertakes these efforts through our Domestic Security Preparedness Task Force (Task Force), chaired by Director Richard L. Cañas of our OHSP.

As Assistant Director of Radiation Protection and Release Prevention, I serve as the DEP liaison to the chemical, nuclear, and petroleum sectors of our critical infrastructure. Through the Task Force and the OHSP, I also participate in New Jersey's preparedness and response effort for other sectors. In addition, I serve as a subject matter expert to the State, Local, Tribal, and Territorial Government Coordinating Council's Chemical Vulnerability Information Working Group.

The Task Force has undertaken a comprehensive program to reduce terror risk, to ensure preparedness at critical infrastructure facilities, and to test the efficacy of both public agencies and the private sector in responding to acts of terrorism. Every Task Force agency and every sector of our critical infrastructure has developed, through public-private collaboration, a series of "Best Practices" for domestic security. Each set of Best Practices was reviewed and approved by the Task Force and the Governor. Every Task Force agency and every sector of our critical infrastructure has also participated in appropriate exercises to test the strengths and limits of terror detection and response capability.

NEW JERSEY'S TOXIC CATASTROPHE PREVENTION ACT (TCPA) PROGRAM

New Jersey has managed an oversight program to increase safety at chemical plants and other facilities that store or utilize extraordinarily hazardous materials for over 20 years. The Toxic Catastrophe Prevention Act (TCPA) program was created in 1986 as a result of a chemical accident in Bhopal, India that killed thousands of nearby residents. Several chemical facilities in New Jersey had experienced minor accidents prior to this time, clearly indicating that a similar risk existed in New Jersey. The TCPA requires facilities that handle extraordinarily hazardous substances above certain inventory thresholds to prepare and implement risk management plans. The plans must include detailed procedures for safety reviews of design and operation, operating procedures, maintenance procedures, training activities, emergency response, process hazard analysis with risk assessment and self-auditing procedures. An extraordinarily hazardous substance is defined as a substance, which if released into the environment would result in a significant likelihood of causing death or permanent disability.

In 1998 the program adopted USEPA's 112(r) Accidental Release Prevention Program (40 CFR 68) by reference. This program included additional toxic substances and highly flammable substances. It also required each facility to complete a worst-case scenario analysis. The worst-case scenario models the resultant toxic cloud to a predetermined concentration. The USEPA end-point concentrations are approximately one-tenth of the concentration that would cause death to persons exposed.

On August 4, 2003, the re-adoption of the TCPA rules added reactive hazards substances to the list of extraordinarily hazardous substances covered under the program. Industrial accidents in New Jersey resulting from reactive hazards demonstrated the need to include reactives under the TCPA program. Owners and operators having listed reactive hazard substances in quantities that meet or exceed thresholds are required to develop risk management plans to reduce the risk associated with these unstable substances. In addition, and the focus of this testimony, this re-adoption included a requirement that owners and operators evaluate inherently safer technology for newly designed and constructed covered processes.

In April, 2007 the DEP proposed amendments to the TCPA rule to require all companies subject to the program to evaluate the potential of incorporating inherently safer technology at their facility. This proposal also covers many sectors such as food, water/wastewater, petroleum, and energy which are outside the chemical industry. A relatively small number of facilities within these sectors store threshold amounts of extraordinarily hazardous substances. A final rule requiring the evaluation of inherently safer technology at all TCPA sites was adopted on May 5, 2008.

CHEMICAL SECTOR BEST PRACTICES STANDARDS

New Jersey recognizes that facilities in the Chemical Sector are diverse in size, complexity, and potential for off-site impacts to the community and therefore a blanket approach to addressing security concerns may not be practical. The Best Practices represent a risk-based approach to security consisting of a site-specific vulner-

ability assessment that evaluates threats to a facility's operation, its particular vulnerabilities and likely consequences of a chemical release, and the physical and procedural security measures already in place. The Chemical Sector Best Practices were predominantly derived from the Security Code of the American Chemistry Council's Responsible Care program.

Subsequently the Task Force determined that additional measures were necessary to ensure that appropriate prevention and response measures are implemented by the chemical sector to address emerging domestic security threats. As a result, Chemical Sector Best Practices Standards (Standards) were put in place on November 21, 2005.

The Standards require chemical sector facilities to, among other things:

- comply with the Chemical Sector Security Best Practices;
- conduct a terrorism-based security vulnerability assessment; and
- develop a prevention, preparedness, and response plan to minimize the risk of a terrorist attack.

In addition, chemical sector facilities subject to TCPA are required to conduct a review of the practicability and potential for adopting inherently safer technology.

INHERENTLY SAFER TECHNOLOGY

Facilities required to conduct an inherently safer technology review must evaluate:

- reducing the amount of extraordinarily hazardous substances materials that potentially may be released;
- substituting less hazardous materials;
- using extraordinarily hazardous substances in the least hazardous process conditions or form; and,
- designing equipment and processes to minimize the potential for equipment failure and human error.

I must emphasize that the inherently safer technology requirement under the Standards represents a practicability test; it is not mandatory that a covered facility implement IST, only that they evaluate. The results of the evaluations are held at the facility site, and are made available to DEP inspectors during an on-site visit.

Compliance with the Standards was required within 120 days of the effective date, March 21, 2006. We have been extremely pleased with the compliance levels we have seen to our standards. Compliance of the New Jersey requirements exceeded 98 percent. The Standards applied to facilities that are subject to either the Toxic Catastrophe Prevention Act (TCPA) or the Discharge Prevention, Containment, and Countermeasure (DPCC) program, and report under certain Standard Industrial Classification (SIC) or North American Industrial Classification System (NAICS) codes. Of the total 157 facilities covered under the Standards, 45 are regulated TCPA facilities required to perform IST analysis. In all cases, facilities required under the Standards to conduct IST review have done so. All of these facilities have documented that they have previously implemented IST or similar risk reduction measures. Thirty-two percent of the facilities have provided a schedule to implement additional IST or other risk reduction measures, and 19 percent have identified additional IST or risk reduction measures but have not yet scheduled their completion. The remaining 49 percent of the facilities had no additional recommendations. It should be noted that these are facilities that have been regulated under the TCPA program for many years resulting in the past implementation of IST and risk reduction measures.

The TCPA rule amendment requiring IST evaluation required all sites, regardless of their industry sector affiliation, to submit IST evaluations to the DEP by September 2, 2008. The total universe of all covered facilities in New Jersey is 87. The IST rule covered, for the first time, 42 water, wastewater, food, petroleum, and energy sector sites. The 45 chemical sector sites which had previously conducted an IST evaluation were required to submit their previous evaluation to achieve compliance. All TCPA sites completed and submitted their IST evaluation to the DEP. The DEP prioritized the review of the reports by sector to ensure consistency and efficiency. The water/wastewater sector includes 13 TCPA sites in New Jersey. It is important to note that the TCPA program has evolved from regulating over 300 water/wastewater facilities in 1987 to our current number of 13. The majority of these facilities have already deregistered from the TCPA program through a combination of IST implementation and consolidation over the last 20 years.

The DEP has completed the initial review of 19 of the 42 new IST evaluations with the remaining 23 expected to be completed by July 31, 2009. All of the 19 non-chemical sector reports evaluated to date were found to be deficient with each owner being granted 60 days to rectify outstanding issues. The most common deficiencies

included failure to identify all potential IST alternatives and failure to provide justification for determination of an infeasible option. In terms of feasibility, sufficient documentation was not provided to support statements of economic, public health and safety, and technological infeasibility. It is important to note that IST in some form has been a practice in the chemical sector for many years, but is a relatively new concept to many of the other covered sectors. However, we do expect that in the long term the results of the non-chemical sector sites will compare favorably with those of the chemical industry subject to the Standards.

I believe that our compliance results clearly indicate that the evaluation of inherently safer technology is not overly burdensome on industry and is an effective tool for critically evaluating the risk reduction opportunities available at a specific facility. It is clear to us that IST analysis is simply good business practice for any facility storing or utilizing extraordinarily hazardous materials from an economic, worker safety and regulatory compliance standpoint.

But these measures alone are merely a starting point. Our knowledge of both the threat and the appropriate response is evolving daily. As we implement the "Best Practices" and work with facilities on site-by-site review of security vulnerabilities, we also have begun a process to review what additional regulatory measures may be appropriate to harden potential targets, to reduce risk to surrounding communities, and to involve workers and communities in the process.

CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2009

New Jersey has expressed serious concerns on a number of occasions about any language in Federal regulations that has the potential to preempt existing State chemical security initiatives or limit future State actions to address unique vulnerabilities. Section 2109, Federal Preemption, clearly allows States to adopt or enforce any regulation, requirement, or standard of performance with respect to a covered chemical facility that is more stringent than a regulation, requirement, or standard of performance issued under Title XXI. We fully support this language since States retain the unqualified authority to adopt enhanced security requirements based upon risk and consequence factors within that State.

The proposed Act would capture chemical facilities currently exempt from the existing Chemical Facility Anti-Terrorism Standards, 6 CFR Part 27, expand the universe of regulated sites, and require assessments of methods to reduce the consequences of a terrorist attack at high-risk sites. Overall, the Act addresses many of the comments previously submitted by New Jersey on 6 CFR Part 27.

Section 2106, Timely Sharing of Threat Information, requires the owner or operator of a covered chemical facility to provide information in a timely manner about any significant security incident or threat to their facility. To ensure a similar timely notification to local law enforcement and emergency response organizations, an additional requirement to notify the appropriate fusion center for that jurisdiction is warranted.

As we have testified in the past, we do continue to strongly recommend consideration of permissive enabling language toward delegating oversight responsibility to State governments, along with appropriate levels of Federal funding to support homeland security efforts. This would include a petition process to DHS by interested State governments and granting of delegated authority on a discretionary basis. In the case of New Jersey, the actions taken in chemical security preparedness since September 11 have left the State well qualified to undertake such delegated responsibilities. State security (Office of Homeland Security and Preparedness and New Jersey State Police) and the chemical process safety experts (Department of Environmental Protection) are intimately familiar with the chemical facilities in question and have conducted multiple security and safety inspections at each site over the last 6 years. Leveraging and augmenting State resources is vital to ensuring that our chemical facilities are adequately protected from acts of terrorism.

CONCLUSION

Although New Jersey took critical steps to address chemical facility security well over 5 years ago, we recognize that most States have not taken formal regulatory action and therefore, Federal regulations to create minimum national chemical facility security standards are essential. At the same time, it is also important not to penalize those pro-active States and allow the States to retain the authority to adopt enhanced security requirements if States determine they are necessary. No two States are alike, and the risks posed by every facility present unique challenges based on location, population size, and other factors. Security standards that are appropriate to safeguard a facility in a rural area, for example, may not be sufficient

for a facility located in one of the most densely populated and heavily traveled sections of the country. Simply put, one size does not fit all.

New Jersey's critical infrastructure concentration and high population density may have no comparison in the United States; our State needs to retain the ability to go beyond any Federal security baseline standard to ensure that our preparedness is measured in line with our potential vulnerabilities. We need Federal standards, but they must be a floor ensuring a base level of protection, not a ceiling that constrains our ability to protect our citizens, as well as our neighbors. Governor Corzine has gone on record previously to express his concern for the safety of New Jersey's residents. In serving Governor Corzine, it is our duty to protect the citizens of our State and it is imperative that Federal legislation enhances New Jersey's ability to protect our chemical sector critical infrastructure.

I once again would like to thank you Chairman Thompson, Ranking Member King and Members of the House Committee on Homeland Security. On behalf of DEP Acting Commissioner Mark N. Mauriello and Director of Homeland Security and Preparedness Richard L. Cañas, I sincerely want to thank you for the opportunity to share some of New Jersey's experience in implementing our chemical security and inherent safety program. We would be happy to entertain any questions you may have and are available at any time should additional information be valuable to the critical work of your committee.

Mr. PASCRELL. Thank you, Mr. Baldauf.

Mr. Durbin.

STATEMENT OF MARTY DURBIN, VICE PRESIDENT, FEDERAL AFFAIRS, AMERICAN CHEMISTRY COUNCIL

Mr. DURBIN. Thank you, Mr. Chairman, Ranking Member, and Members of the committee. Thanks for the invitation to be here today to testify on this important topic on behalf of the American Chemistry Council.

In short, security in all its dimensions is a top priority for ACC members, and our record of accomplishment and cooperation with Congress, DHS, other Federal and State agencies is well established. Since 2001, ACC's member companies have invested $7.7 billion in security enhancements under our own responsible care security code.

The effectiveness of ACC's mandatory security program has been broadly recognized. In fact, our code not only provided a model for State-level chemical security programs in New Jersey, New York, and Maryland, but was deemed equivalent to the Coast Guard's Maritime Transportation Security Act.

While we are understandably proud of our members' performance under the code, it is important to acknowledge that many non-ACC member companies out there have also taken aggressive action to enhance security through industry programs.

But turning to the DHS regulatory program, we believe CFATS is by far the most robust, comprehensive, and demanding chemical security program to date. CFATS is a strong regulatory program that takes an effective approach, set a high bar through performance-based standards, and then holds facilities accountable.

This approach allows facilities to utilize a full range of potential security measures to address vulnerabilities identified by the Department's assessment tool.

The ACC not only called for the legislation that established these regulations, but at each step of the process our member companies volunteered to pilot core program elements and assisted DHS in rapidly and successfully developing the tools needed to implement the program and meet the regulatory deadlines.

DHS should be commended for the speed with which they have developed and implemented this comprehensive program, and DHS staff demonstrated outstanding commitment and effort. So we would urge Congress to provide the agency with the resources necessary to fully and quickly implement this important program.

The legislation being considered by this committee, we believe, represents an important step in making CFATS permanent. We are pleased to see that H.R. 2868 reflects many of the security measures that have been and will be implemented under CFATS. We appreciate the efforts made to minimize duplication of effort by facilities that have already acted and will take further action under the program.

However, I would like to highlight a few provisions that we have discussed with the committee where we continue to have questions and concerns. For example, we believe the provision that would give DHS authority to mandate methods to reduce consequences is unnecessary.

Through its use of risk-based performance standards, CFATS essentially drives each facility to consider all possible risk-reduction options when developing a site security plan, including methods to reduce consequences or inherently safer approaches.

Further, the highest-risk facilities subject to CFATS have a strong incentive to implement security enhancements that could move the facility to a lower-risk tier or potentially even move it out of the program. While you can't mandate innovation, CFATS allows DHS to unleash the ingenuity, expertise, and resources of the chemical sector.

In addition, there has been much discussion already this morning, but we feel the provision that provides for citizen suits is both unnecessary and potentially counterproductive. Unlike an environmental statute, CFATS is not a series of prescriptive, statutory measures, like emissions standards or discharge limitations. It will therefore be difficult for a citizen or a judge to ascertain if a standard is being met or to decide what needs to be done to address an alleged deficiency.

We also share the agency's stated concern about the potential for disclosure of sensitive or classified information in judicial proceedings.

However, let me be clear that we fully support strong enforcement of the act, so we would, again, urge Congress to provide DHS with necessary staff and resources to ensure compliance.

Now, while we have strong views on these issues, I want to acknowledge the willingness of both this committee and the Energy and Commerce Committee to seek our input and consider our viewpoint. We have had constructive discussions, and I remain hopeful that our concerns can be addressed as the legislative process continues.

The crucial partnership between our industry and the Federal Government requires each of us to do our part. ACC and its member companies are committed to safeguarding our facilities, and we will continue to work with Congress and DHS in that spirit.

Thank you.

[The statement of Mr. Durbin follows:]

PREPARED STATEMENT OF MARTY DURBIN

Mr. Chairman, Ranking Member King, and Members of the committee, my name is Marty Durbin, and I am Vice President, Federal Affairs for the American Chemistry Council (ACC). Thank you for this opportunity to again speak with you on behalf of the Council's members on the important subject of security in the business of chemistry, a critical sector of America's infrastructure.

My testimony today will highlight three primary points as we present our view of the pending legislation:

1. Security is and will remain a top priority for our members. Following 9/11, ACC members launched the mandatory Responsible Care Security Code® to enhance physical and cyber security at their facilities and throughout their supply chain. When it comes to security, our members are committed to a process of continuous improvement.
2. Since passage of Federal chemical security legislation in 2006—an effort ACC strongly supported—the Department of Homeland Security (DHS) has moved swiftly to set meaningful, risk-based standards for the entire industry under the Chemical Facility Anti-Terrorism Standards (CFATS). Along with thousands of our industry partners, ACC members continue the steady implementation of CFATS.
3. ACC welcomes the efforts of both Congress and DHS to make CFATS permanent, review how the program is working, and ensure DHS has the resources required to do its job.

1. SECURITY AND SAFETY—ACC'S TOP PRIORITIES

ACC represents 140 leading companies who manufacture approximately 85 percent of basic industrial chemical production in the United States. The business of chemistry is an important part of our Nation's economy and employs more than 850,000 Americans, and produces 19 percent of the world's chemicals. ACC member companies manufacture essential products critical to everyday items that keep the economy moving and are essential to developing the greener, cleaner, more competitive economy the Nation seeks. More than 96 percent of all manufactured goods are directly touched by the business of chemistry. Our members provide the chemistry that is used to produce life-saving medications and medical devices, body armor used by our military and law enforcement officers, light weight components for vehicles, energy-saving insulation and windows, silicon for solar panels, wind turbine blades and so much more.

Because of our critical role in the economy and our responsibility to our communities, security is a priority for ACC members. In 2001, our members adopted an aggressive security program that became the Responsible Care Security Code® (RCSC). It is part of the overall Responsible Care initiative which is ACC's signature program of ethical principles and management systems designed to continuously improve our members' safety, health, environmental, and security performance.

Implementation of Responsible Care is mandatory for all members of the American Chemistry Council, as well as for Responsible Care Partner companies, who represent chemical transporters, distributors, warehouses, logistics planners and others along the supply chains. In developing the Code, we consulted closely with first responders and government agencies at all levels. With its risk-based provisions, the RCSC provided a model for State-level chemical security regulatory programs in New Jersey, New York, and Maryland and was deemed equivalent to the U.S. Coast Guard's Maritime Transportation Security Act program.

To date, ACC members have invested $7.7 billion in security enhancements under the RCSC which requires an assessment of security risks; implementation of protective measures at facilities; and evaluation and protection of products throughout a company's value chain. Certification of the management system is conducted by independent, credentialed third-party auditors.

The Code has won praise from Congress, senior DHS officials, and the media. While we are understandably proud of our member's performance under our Code, it is important to acknowledge that non-ACC members have also taken aggressive action to enhance security at their facilities through similar industry programs.

Our Security Code also covers the crucial area of cyber security, to protect our highly automated operations from being attacked electronically. Here again, the efforts of ACC members provide a model to other industries employing similar automated systems.

We were gratified that the Obama administration has made cybersecurity a top priority. Along with physical security, ACC members actively addressed cybersecurity issues immediately following 9/11 and by June 2002, they developed and began

implementation of the Chemical Sector Cyber Security Strategy. Additionally, the ACC's Chemical Sector Cyber Security Program created a Cyber Security Guidance Document, which not only was referenced by the Bush administration's National Strategy to Secure Cyberspace of 2003, it is still in use today. A 2009 Program Update can be found on the Obama administration's Web site—"Making Strides to Improve Cyber Security in the Chemical Sector."

ACC participated in the White House 60-Day Cyber Policy Review and our professionals work closely with the DHS National Cyber Security Division (NCSD) in many areas including: National Cyber Storm exercises, information sharing pilot programs, development of the Roadmap to Control Systems Security for the Chemical Sector.

In short, security in all its dimensions is a top priority for ACC, and our record of accomplishment and cooperation with Congress, DHS and other agencies is well established.

2. DHS IS MOVING AGGRESSIVELY TO ENFORCE REGULATIONS, AND CHEMICAL FACILITIES ARE MOVING AGGRESSIVELY TO COMPLY

Last month, DHS issued its site security plan requirements and *Risk-Based Performance Standards Guidance* to assist high-risk chemical facilities in selecting and implementing the specific measures they will adopt to meet the DHS performance standards.

This guidance makes it perfectly clear that the current DHS chemical security rules are tough yet appropriately flexible. "Among other things, CFATS established eighteen Risk-Based Performance Standards (RBPSs) that identify the areas for which a facility's security posture will be examined, such as perimeter security, access control, personnel surety and cyber security," DHS explains.

The Department adds, "To meet the RBPSs, covered facilities are free to choose whatever security programs or processes they deem appropriate, so long as they achieve the requisite level of performance in each applicable area." DHS inspectors will review each of these submitted plans and only approve them when they meet the established performance level.

For ACC members, this is exactly what a strong regulatory approach must do—set a high bar through performance-based standards and then hold facilities accountable. The approach taken by CFATS allows facilities to utilize a full range of potential security enhancements—including "methods to reduce consequences" or "inherently safer" approaches—to address potential security vulnerabilities identified by the Department's assessment tool.

CFATS is by far the most robust, comprehensive, and demanding chemical security regulatory program to date. It will require significant additional investment from ACC member company facilities deemed "high risk." In fact, DHS anticipates that an additional $8 billion will be needed to implement CFATS over the first 8 years of the program.

Yet, despite the cost and other requirements for compliance, ACC not only called for these regulations, but at each step of the process our member companies volunteered to pilot core program elements and assist DHS in rapidly and successfully developing the tools needed to implement the program and swiftly meet their regulatory deadlines.

While most regulatory programs can take years to develop, DHS, with the support of the industry, has proposed and finalized a comprehensive regulation, evaluated the risk of over 35,000 facilities, required detailed risk assessments from over 7,000 of these facilities that were deemed high-risk, and now has those high-risk sites implementing security measures—all within the 3 years currently granted for this program—a significant accomplishment. ACC members are committed to security and to working with DHS and Congress to protect the Nation's chemical infrastructure, and we are grateful DHS has developed an effective program.

3. CONGRESS MUST PROVIDE DHS WITH ALL RESOURCES REQUIRED TO PROTECT CHEMICAL FACILITIES AND MAKE CFATS PERMANENT

CFATS lays out clear, comprehensive requirements for covered chemical facilities on an aggressive timeline, and DHS and these sites are implementing the rule as rapidly as possible. DHS personnel have already conducted reviews of site-specific vulnerability information and are now assisting facilities as they develop site security plans. DHS is in the process of visiting the regulated sites to review and approve each of these security plans. This will include assessing how each facility has addressed the applicable risk-based performance standards for facilities in its risk tier—a complex, site-specific, evaluation.

While DHS has gotten off to a solid start, there is a crucial need for Congress to support DHS' budget requests and make CFATS permanent. DHS staff has demonstrated outstanding commitment and effort to date, so we urge Congress to provide the agency with the necessary resources to handle the workload and to ensure that chemical facility security is properly implemented in a timely manner.

4. ACC COMMENTS ON "THE CHEMICAL FACILITY ANTITERRORISM ACT OF 2009"

The legislation drafted by Chairman Thompson and the committee represents an important first step to establishing permanent chemical facility security regulations. ACC clearly supports that goal. We're pleased to see the draft bill reflect many of the security measures that will be implemented under CFATS, and we appreciate the efforts made to minimize duplication of effort by facilities that have already acted or will take further action under the program.

However, I'd like to highlight a few provisions we've discussed with the committee where we continue to have questions and concerns. For example, we believe the provision that would give DHS authority to mandate process changes is unnecessary. Through its use of risk-based performance standards, CFATS essentially drives each facility to consider all possible risk reduction options—including "methods to reduce consequences" or "inherently safer" approaches when developing a site security plan. We believe that Congress should not abandon a strategy to enhance security that employs performance-based security standards to avoid the potential for shifting risk, and allows DHS to unleash the ingenuity, expertise, and resources of the chemical sector. The reason this occurs is that the highest risk facilities subject to CFATS face significant cost to implement the stringent requirements and thus have a strong incentive to implement enhancements that could move the facility to a lower-risk tier, or potentially even move it out of the program. This is a substantial incentive to reduce regulatory requirements.

A fair amount of discussion around inherently safer approaches and chemical security has tended to focus on the consideration of chemical substitution. It is important to remember the inherent value or benefit of chemicals like chlorine to modern society. For example, there are no chlorine-free processes that produce silicon of the purity required for products such as integrated circuits. Nor is there an economically viable chlorine-free route to the production of titanium. In these instances, you cannot simply eliminate potential security risks, you must work to manage or mitigate them.

In addition, we feel the provision that provides for "Private Right of Action" is counterproductive to the ultimate success of CFATS. Unlike environmental statutes, CFATS is not a series of prescriptive statutory measures with which compliance is mandatory, like emission standards or discharge limitations, and therefore it is much more difficult for an outsider—whether it be a citizen or judge—to ascertain if a standard is being met or to decide what needs to be done to address an alleged deficiency.

In its earliest stages, one of the goals of the program is to have more secure sites through a collaborative effort between DHS and the regulated community. Creating a litigious environment will most certainly undermine such an effort. If Congress truly believes that DHS will have a problem with running the program, it should ensure that it has staff and resources to do the job and allow DHS to have a tight grip on compliance.

IN CONCLUSION

We agree with Congress that our shared priority is to enhance security at sites Nation-wide. CFATS is already driving over 7,000 high-risk facilities toward that goal as we speak. We ask that Congress provide DHS the support necessary to implement the current program.

The crucial partnership between our industry and the Federal Government requires each of us to do our part. ACC and its member companies are committed to safeguarding America's chemical facilities, and will continue to work with Congress and DHS in that spirit.

Mr. PASCRELL. Thank you, Mr. Durbin.

Dr. Langerman.

STATEMENT OF NEAL LANGERMAN, PRINCIPLE SCIENTIST AND CHIEF EXECUTIVE OFFICER, ADVANCED CHEMICAL SAFETY, INC.

Mr. LANGERMAN. Thank you, Chairman Pascrell, Ranking Member, Members of the committee.

I am Neal Langerman. I am a Ph.D. chemist. I have 30 years of experience as a consultant helping industrial clients handle chemical safety and regulatory issues.

I have worked on these issues for 20 years through my professional organization, the American Chemical Society, a scientific and educational organization of 154,000 chemists and chemical engineers.

I would like to share the society's policy recommendations on the use of inherently safer technologies and on the regulation of research labs and give an example to help put these recommendations in context.

Inherently safer technologies are vital to the goals of homeland security to secure the Nation's chemical infrastructure and safeguard against the consequences of terrorist attack.

Achieving these goals requires research, development, technology investments. In particular, ACS has long advocated Federal support of green chemistry research and development as a means to develop safer technologies.

ACS has also been concerned about the role that regulations play in slowing down innovation, particularly in laboratory settings, when regulations intended for industrial settings are inappropriately applied. For example, the proposed CFATS rule under the 2006 law unintentionally captured most research and academic laboratories into the top screen process.

The proposed legislation adds the requirement to assess inherent safety options at covered facilities. It should be noted that changing processes to eliminate inherent risk is only one of many approaches to achieve risk reduction, and its application is complex and nuanced. Professionals in the real-world context need to apply IST principles and processes where appropriate.

This can perhaps best be appreciated through a recently published example. In order to reduce the quantity of nitrogen oxide air pollutants emitted from a boiler, a design team chose an ammonia-based catalytic reducer to convert nitrogen oxide to nitrogen and water.

The initial design proposed bringing liquid ammonia to the reactor through a 600-foot pipe. Ammonia is toxic if inhaled, and inherent safety strategies suggested that a less hazardous solution of ammonia and water, also known as ammonium hydroxide, be substituted.

As the formal safety review proceeded, it was determined that ammonium hydroxide option had the potential to release 7,900 pounds of ammonia, while the liquid ammonia process could only release 530 pounds. Further, the liquid ammonia process provided better overall operating efficiency. The design team ultimately concluded the original plan was the safer option.

This example illustrates several issues for this committee to consider. Existing internal process safety engineering programs and

the existing regulatory structure provides strong incentives to examine and implement the safest possible options.

The review of the design options in this example was conducted as part of the company's process hazardous analysis. It met the requirements of the OSHA standard but was not driven by them.

The chemical enterprise has considerable experience advancing in inherent safety, training chemists and engineers with the concept, incorporating it into internal process safety management programs. Ideally, an IST approach is integrated into the original designs of a process that can also be achieved when experts familiar with the plant modify existing technology.

This distinction must be noted, as much of the proposed legislation's emphasis is on existing facilities, some constructed several decades ago. Great care must be taken to ensure that the new processes do not create unrecognized health, safety, or environmental impacts. Careful application of IST options requires addressing multiple technical issues, including the volume and hazard of the materials and the frequency, consequence and severity of potential releases.

Considerable effort must also be expended to develop, scale up, test, and install new, safer processes. ACS believes that the most effective steps to further infrastructure protection will likely include incentives such as grants, tax incentives, preferential government purchasing, and award programs.

The law must provide sufficient flexibility to both DHS and the regulated community to enhance security in an efficient and efficient manner. I thank you for the opportunity to share these thoughts today, and I look forward to answering your questions.

[The statement of Mr. Langerman follows:]

PREPARED STATEMENT OF NEAL LANGERMAN

JUNE 16, 2009

Good morning. My name is Dr. Neal Langerman. I am a Ph.D. chemist and I have more than 30 years of experience in the field of chemical safety. I helped establish and run my first consulting firm, Chemical Safety Associates, in 1980 and am now the Principal Scientist and CEO of Advanced Chemical Safety, Inc., which I founded and have led since 1997. In that role, I provide training to industrial clients in all areas related to chemical management and consulting on chemical, safety, and regulatory issues.

I have authored numerous manuals, peer-reviewed publications, and reports, and led seminars, workshops, and meeting symposia on topics related to chemical safety, and serve on the editorial board of the Journal of Chemical Health & Safety.

I have also worked on these issues for 20 years through my professional organization, the American Chemical Society (ACS). I am a past chair and now the treasurer of ACS's Division of Chemical Health and Safety and serve as a consultant to the ACS Committee on Chemical Safety.

The American Chemical Society is a scientific society of chemists and chemical engineers. It was created in 1876 and today is the world's largest scientific society with a membership of more than 154,000. It also has the distinction of having a national charter of incorporation passed by Congress in 1937 and signed by President Franklin Delano Roosevelt.

I'm here to share some of the thoughts ACS has developed on the use of Inherently Safer Technologies [1] and on the regulation of research labs.[2]

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[1] The official American Chemical Society Position Statement on Inherently Safer Technology for Chemical and Related Industrial Process Operations is presented in Attachment 1.

[2] The official American Chemical Society Position Statement on Regulation of Laboratory Waste is presented in Attachment 2.

Inherently safer industrial technologies for the production, transport, and use of industrial and agricultural chemicals, pharmaceuticals, and both commodity and advanced materials is vital to homeland security, including the protection of the public and of critical infrastructure. Achieving these goals requires research, development, and technology investments to help secure the Nation's chemical infrastructure and safeguard against the consequences of a terrorist attack.

For many years, ACS has encouraged the Federal Government to take a leading role in developing technology. In particular, ACS has long advocated Federal support of green chemistry research & development as a means to develop safer technologies. ACS has also been concerned about the role that regulations play in slowing down innovation, particularly in laboratory settings, when regulations intended for industrial settings are inappropriately applied.

While many industrial processes and sectors use various definitions of inherently safer technologies, the term collectively captures a group of processes and technologies that improve safety by greatly reducing or eliminating hazards through a permanent and inseparable element of the process. Thus, safety is built into the process from the outset, not added on, and hazards are reduced or eliminated, not simply controlled. This is not a new or recent idea. In fact, industries have applied this concept for many decades.

Many organizations involved in the chemical, pharmaceutical, and related process industries have strongly advocated and advanced inherent safety, supporting the work of professional societies and academic institutions, utilizing the concept in training chemists and engineers, and incorporating it into internal process safety management programs. Inherent safety is a well recognized engineering process concept that is based on the belief that a hazard can be moderated or eliminated, thereby reducing risk and possibly removing the risk altogether.

There is a rich literature addressing the technical aspects of IST. The publications of Dennis Hendershot,[3] for example, discuss methods of implementation as well as limitations and circumstances wherein IST may not produce the safest design. Many of the publications of the Center for Chemical Process Safety, such as "Inherently Safer Chemical Processes: A Life Cycle Approach, 2nd Edition" discuss design and operations considerations for reducing the risks associated with chemical processes. These publications and many others show that inherently safer systems and technologies can make adverse events less likely and (when an event occurs) less severe. They also show that other important factors must be taken into consideration.

IST may include engineering changes, material substitution, or quantity reduction, and is only one of many approaches that may be employed to achieve risk reduction. A successful approach to changing technology in this area comes through an application of system safety analysis that extends from the top to the bottom of the organization. Designing safer systems also includes safer practices and an organizational prejudice toward safety.

Ideally, an IST approach is integrated into the original design and engineering of a process to lower operational risk. This is best done at the initial conceptual design stage, but can also be achieved by modifying existing technology. The distinction must be noted, as much of the emphasis of the Chemical Facility Antiterrorism Act of 2009 is aimed at existing facilities—some constructed several decades ago.

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[3] Hendershot, D.C. (2008). "Incorporating Inherent Safety into Process Hazard Studies." *1st Latin American Process Safety Conference and Exhibition,* May 27–29, 2008, Buenos Aires, Argentina.

Amyotte, P.R., A.U. Goraya, D.C. Hendershot, and F.I. Khan (2007). "Incorporation of Inherent Safety Principles in Process Safety Management." *Process Safety Progress* 26, 4 (December), 333–346.

Hendershot, D.C. (2007). "Rethink Your Approach to Process Safety." *Chemical Processing* 70, 9 (September), 36–40.

Hendershot, D.C. (2006). "An Overview of Inherently Safer Design." *Process Safety Progress* 25, 2 (June), 98–107.

Hendershot, D.C., J.A. Sussman, G.E. Winkler, and G.L. Dill (2006). "Implementing Inherently Safer Design in an Existing Plant." *Process Safety Progress* 25, 1 (March), 52–57.

Hendershot, D.C., and J.P. Gupta (2004). "Inherently Safer Design." *Lees' Loss Prevention in the Process Industries,* 3rd Edition. ed. M.S. Mannan, 32/1–32/24. Oxford, UK: Butterworth-Heinemann.

Hendershot, D.C. (2004). "Engineering Design for Safety: Inherently Safer Design." *Annual Ramazzini Days 2004, International Scientific Conference, Preventing Chemical Accidents: Lessons Learned Since the Bhopal Disaster in 1984,* October 28–29, 2004, Session IV: Advances in Preparation. Carpi, Italy: Collegium Ramazzini.

Hendershot, D.C. (2004). "Inherently Safer Design." Accident Precursor Analysis and Management: Reducing Technological Risk Through Diligence, ed. J.R. Phimister, V.M. Bier, and H.C. Kunreuther, 103–117. Washington, DC: The National Academies Press.

The chemical enterprise has considerable experience in developing and implementing inherently safer systems and welcomes creative approaches for encouraging additional IST research and development. Several recent industry association security codes require member companies to conduct vulnerability assessments of their facilities as a condition of continued membership. These codes recommend consideration of inherently safer and more secure technologies, especially during facility design, redesign, or modernization.

The proposed legislation adds a strong requirement for implementing something like Inherently Safer Technologies at facilities covered under the Chemical Facility Antiterrorism Act. However, application of IST is a complex and nuanced process. Professionals, in a real-world context, need to apply these principles and processes where appropriate. This can perhaps be appreciated through some examples.

INHERENTLY SAFER DESIGN

It is generally thought that designing a unit to achieve the maximum inherent safety is straightforward. The design team is typically guided by the strategies of "minimize", "substitute", "moderate", and "simplify" and chooses the design which provides the best balance of process safety with production efficiency. This approach seems reasonable when one considers the meaning of the four terms. "Minimize" refers to reducing the quantities of hazardous substances to the lowest practical amount, consistent with production requirements. "Substitute" refers to using a less hazardous material. "Moderate" refers to using safer conditions, such as lower temperature or pressure. And, "simplify" refers to designing the process to reduce the potential for human and operating errors and making the unit by design more tolerant of upset conditions.

A case study recently published in the peer-reviewed *Journal of Hazardous Materials* illustrated the complexity of achieving a reasonable balance of safety and efficiency in its discussion [4] of modifications to an existing boiler.

The facility was working to meet new environmental regulations that required the reduction of nitrogen oxides (NO_X) air pollutants emitted from the boiler. A design team chose the technology to clean-up the emissions: a reactor that used ammonia gas to reduce the NO_X. The initial design proposed bringing liquid ammonia approximately 600 ft through a 2-inch pipe to a vaporizer which would convert the liquid ammonia to its gaseous form. The gas would then be injected into the reactor, reducing the NO_X into simple nitrogen and water vapor. Due to process safety concerns related to piping the liquid ammonia over 600 feet, the design was reviewed using the strategies of inherently safer design/technologies.

"Substitute" and "moderate" strategies were investigated to lower the overall risk. The design team proposed to replace the liquid ammonia, which is toxic if inhaled, with a less hazardous solution of ammonium hydroxide in water.

However, as the formal hazard and safety review proceeded, it was determined that the ammonium hydroxide in water option had the potential to release 7,900 lbs of ammonia while the liquid ammonia process would only release 530 lbs. Further, the liquid ammonia process provided better overall operating efficiency. The design team ultimately selected liquid ammonia as the lower risk, inherently safer process, even though the initial consideration suggested this was not the "safer" alternative.

This example illustrates that deciding among several designs requires evaluating a variety of metrics, including volume of hazardous materials, area affected by and frequencies of releases, consequence and severity of releases, and the life-cycle costs. This particular review of the design options for inherently safer characteristics was conducted as part of the company's process hazard analysis. It met "management of change" requirements of OSHA's Process Safety Management standard, in which "contemplated changes to a process must be evaluated to fully assess their impact on employee safety and health."[5] However, it was not driven by the OSHA requirements.

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[4] Study, K. (2007), "A real-life example of choosing an inherently safer process option", *J. Hazardous Materials,* 142, 771–775.

[5] "Process Safety Management." U.S. Department of Labor, Occupational Safety and Health Administration. OSHA 3132. 2000, 22.

MINIMIZATION OF HAZARDOUS MATERIALS[6]

While my last example illustrated the complexity of decisions about inherent safety, the next example should showcase its benefits.

A facility brought in a design team to study the replacement of a large aging bromine gas storage tank with smaller bromine cylinders. The design team was instructed to evaluate the overall hazards associated with bulk storage versus the smaller cylinders, which require increased frequency of transportation. After review, the design team recommended that the cylinders option be implemented. The existing tank had a capacity of 100 cubic feet (19,000 lbs) and was refilled once every couple of months from a 15,000-lb highway tanker. The transfer from the tanker to the storage tank was done outside, using low pressure nitrogen to drive the liquid. The bulk tank was inside a containment building, protected with a caustic scrubber.

The proposed replacement used the "minimize" strategy of IST. Two 16-cubic-foot (3,100-lb) cylinders of bromine, the size of helium cylinders used to fill balloons in grocery stores and parties, would replace the 1,000 cubic foot tank. This would reduce the overall quantity of bromine on-site by 67%. It would require the truck to deliver a single 16-cubic-foot cylinder about once per month. In addition, the quantity change resulted in the facility no longer being regulated under the U.S. EPA Risk Management Program.

The design team performed both "consequence analysis" and a "quantitative risk assessment". The results of these studies clearly supported the reduced risk approach, and the decision was made to switch to the smaller cylinders.

UNINTENDED CONSEQUENCES

Finally, I want to offer a word of caution about unintended consequences of some of the measures that may be considered in these discussions.

The draft wording of the Chemical Facility Anti-Terrorism Standards (CFATS) regulations under the 2006 law unintentionally captured most research and academic laboratories into the Top Screen process. Had this wording remained in force, much effort would have been expended by both DHS and the research community which would not have enhanced security. In cooperation with a number of organizations, including ACS, a task force worked with DHS to modify the Appendix A list and thereby reduce the number of research institutions which were required to file a Top Screen report.

ACS endorses regulations targeted specifically to research laboratories in academia, Government, and industry, rather than regulations that accidentally capture labs in rules developed for industrial settings. In applying regulations designed to address large-scale industrial operations to smaller laboratories, disproportionate environmental regulatory burdens are inappropriately placed on many academic, commercial, and Government laboratories. By applying an industrial regulatory scheme to laboratories, unintended, ineffective, and inappropriate burdens are placed on these facilities, thus slowing U.S. innovation.

Unfortunately, substantive issues remain unresolved. For instance, the screening threshold for nitric acid, a very common laboratory reagent, requires that a campus with fewer than 50 bottles of the acid distributed among more than 1,000 teaching and research laboratories scattered across a campus must file a Top Screen report, and possibly be required to implement the same security vulnerability reviews and procedures as that of a major chemical facility. The security vulnerability tools and procedures applicable to a chemical manufacturing facility are not well-suited to an academic campus. A performance model similar to OSHA's "Laboratory Standard" would be better.

These illustrations are only a few examples among many which demonstrate several issues for this committee to consider. First, existing process safety engineering programs, performed under both regulatory and corporate umbrellas, are adequate to invoke and implement an IST approach when appropriate. Second, the implementation of one or more IST strategies at a particular process unit may or may not result in enhanced security. The only justification for implementing a technology must be in solid engineering and science. Third, the law must provide sufficient flexibility to both the DHS and the regulated community to enhance security in an efficient and effective manner.

ACS has consistently supported research and development initiatives that promote advancements in inherent safety and risk reduction. For example, ACS is a strong supporter of the Green Chemistry Research and Development Act, which has been passed by the House in the last three Congresses and is expected to be consid-

[6] Hendershot, D.C., J.A. Sussman, G.E. Winkler, and G.L. Dill (2006). "Implementing Inherently Safer Design in an Existing Plant." *Process Safety Progress* 25, 1 (March), 52–57.

ered in the Senate this year. The Act seeks to promote green chemistry by authorizing a coordinated green chemistry research and development program at the National Science Foundation, the Department of Energy, and other agencies. Such a program would enhance green engineering, which is the practical application of green chemistry to develop simpler, more cost efficient, and generally safer and environmentally benign processes. It also recognizes that the elimination of all hazardous industrial materials and processes is not currently feasible, but that methods to minimize the risks associated with their use can be employed.

POLICY RECOMMENDATIONS

- ACS supports increased attention on safer technologies and believes the focus should be on a broad portfolio of timely and effective methods of reducing risk and mitigating potential damage.
  The portfolio of risk reduction methods and tools should include IST and other inherent safety techniques. However, when risk analyses require replacing or significantly modifying current process technologies, considerable effort must be expended to develop, scale-up, test, and install new, safer processes. Great care must be taken to ensure that the new processes do not result in inferior products or create unrecognized health, safety, or environmental impacts.
  While scientists and engineers have made great strides in understanding the impacts of industrial processes and products over the past several decades, there is still no guaranteed formula for developing inherently safer production processes. In the future, chemical, and related industries will benefit greatly from increased educational and professional development and training of scientists and engineers in the disciplines of green chemistry and engineering, risk analysis, and industrial ecology.
- ACS supports involvement of Federal agencies in researching and facilitating the advancement of safer technologies.
  Several Federal agencies, including but not limited to the Environmental Protection Agency (EPA), Department of Homeland Security (DHS), the Occupational Safety and Health Administration (OSHA), actively work with the manufacturing sector to promote safer and more secure facilities. These agencies, through their collaborations and oversight of the manufacturing sector, have a keen understanding of private-sector efforts being developed and implemented to further the advancement of safer and more secure facilities. ACS believes that these agencies should support and encourage research and development—both in the public and private sector—to foster cost-effective, inherently safer chemistries and chemical processes. ACS also believes that these agencies, in collaboration with other appropriate agencies should evaluate, and where appropriate, make recommendations on potential incentives and disincentives that would best encourage the private sector to advance continued improvement in their safety and security performance. The National Research Council has made similar recommendations,[7] stating, among other recommendations, that:
  - "DHS should support research and development to foster cost effective, inherently safer chemistries and chemical processes," and;
  - "DHS should support research to determine the combinations of incentives and disincentives that would best encourage the private sector to invest in safety and security. This will require research to identify the nature of the interdependencies and weak links in the supply chain and consideration of public-private partnerships to encourage voluntary adoption of protective measures by the weakest links in the chain."

In the long term, both the public and industry will benefit from the discovery of economically viable, inherently safer technologies. The benefits to the public of safer technology are obvious. For industry, moving towards a safer industrial model will lead to lower insurance and risk costs while ensuring the safety of customers and employees and protecting investors from excessive risk. ACS also supports examination of the potential of public-private partnerships to encourage voluntary adoption of protective measures.

CONCLUSION

In conclusion, the existing regulatory structure, under the U.S. EPA Risk Management Program and the U.S. OSHA Process Safety Management standard, provide strong incentives to examine and implement IST. These programs work in natural conjunction with Homeland Security's mandate to enhance infrastructure secu-

[7] "Terrorism and the Chemical Infrastructure: Protecting People and Reducing Vulnerabilities", (2006), The National Academic Press.

rity. The provisions of the Chemical Facility Antiterrorism Act of 2006 provide a sufficient legislative framework for this purpose.

The most effective steps to further infrastructure protections will likely include incentives, rather than new regulations. Tools that the Government could and should invoke to this end include the following:

- Grants in support of research by universities, industry, and Government to develop inherently safer and environmentally benign processes and technologies, renewable energy, fuels, and chemical feedstocks, and other research needs.
- Tax incentives that encourage private investment in research and development of inherently safer technologies and processes.
- Tax incentives and patent subsidies that allow safer technologies to compete in the market, particularly when their up-front costs and risks are higher than for conventional technologies.
- Guaranteed preferential Government purchasing of safer and more sustainable technologies.
- Award programs, such as the Presidential Green Chemistry Challenge Awards, that recognize businesses that incorporate sustainability and safety principles into their overall goals and objectives. Such recognition will help foster replication by others in industry.

The ACS believes that support for research guided by the principles of sustainability, green chemistry, and green engineering, combined with industrial incentives for the adoption of safer technologies and new regulatory strategies that promote safer products and processes, will be instrumental in meeting the challenges of enhancing national and homeland security, protecting human health and the environment, and strengthening the economy.

I would like to thank the committee for the opportunity to share these thoughts here today, and I am ready to answer any questions committee members may have. Thank you.

ATTACHMENT 1

INHERENTLY SAFER TECHNOLOGY FOR CHEMICAL AND RELATED INDUSTRIAL PROCESS OPERATIONS

ACS POSITION

Inherently safer industrial technologies for the production, transport, and use of industrial and agricultural chemicals, pharmaceuticals, and both commodity and advanced materials is a vital concept that is currently the focus of significant activity in a wide range of forums in the industrial, academic, and governmental arenas. While many industrial processes and sectors use various definitions of this term, collectively, they capture a group of processes and technologies that improve safety by greatly reducing or eliminating hazards through a permanent and inseparable element of the process. Thus, safety is built into the process, not added on, and hazards are reduced or eliminated, not simply controlled.

Where feasible, inherently safer process technology can greatly reduce potential threats to public and worker safety, health, the environment and plant and public infrastructure from a variety of scenarios that might result in the release—fugitive or otherwise—of hazardous and toxic materials.

Many organizations involved in the chemical, pharmaceutical, and related process industries have strongly advocated and advanced inherent safety, supporting the work of professional societies and academic institutions, utilizing the concept in training chemists and engineers, and incorporating it into internal process safety management programs. Inherent safety is a well-recognized engineering process concept that is based on the belief that a hazard can be moderated or eliminated, thereby reducing risk and possibly removing the risk altogether. Certainly an inherently safer system or technology can make hazardous events less likely and less intense if there is an accident.

Change in "technology" is one aspect of inherent safety. The term inherently safer technology (IST) has received considerable attention in recent years, but it is only one of many approaches that may be employed to achieve risk reduction. A successful approach to changing technology in this area will come about through a holistic application of safety analysis that extends from the top to the bottom of the organization, designing safer systems which include safer practices and an organizational prejudice toward safety.

ACS has consistently supported research and development initiatives that promote advancements in inherent safety and risk reduction. For example, ACS is a strong supporter of the Green Chemistry Research and Development Act, which is now being considered by Congress. The Act seeks to promote green chemistry by au-

thorizing a coordinated green chemistry research and development program at the National Science Foundation, the Department of Energy, and other agencies. Such a program would enhance green engineering, which is the practical application of green chemistry to develop simpler, more cost-efficient, and generally safer and environmentally benign processes. It also recognizes that the elimination of all hazardous industrial materials and processes is not currently feasible, but that methods to minimize the risks associated with their use can be employed.

The Federal Government has made homeland security, including the protection of the public and critical infrastructure, a priority. To achieve that goal, it is necessary to make research, development, and technology investments that would help secure the Nation's chemical infrastructure and safeguard against the consequences of a terrorist attack.

The chemical enterprise has considerable experience in developing and implementing inherently safer systems and should welcome creative approaches for encouraging additional IST research and development. Several recent industry association security codes require member companies to conduct vulnerability assessments of their facilities. These codes recommend consideration of inherently safer and more secure technologies, especially during facility design or redesign.

ACTION REQUESTS

- The American Chemical Society (ACS) supports increased attention on safer technologies and believes the focus should be on a broad portfolio of timely and effective methods of reducing risk and mitigating potential damage.
  The portfolio of risk reduction methods and tools should include IST and other inherent safety techniques. However, when risk analyses require replacing or significantly modifying current process technologies, considerable effort must be expended to develop, scale-up, test and install new, safer processes. Great care must be taken to ensure that the new processes do not result in inferior products or create unrecognized health, safety, or environmental impacts.
  While scientists and engineers have made great strides in understanding the impacts of industrial processes and products over the past several decades, there is still no guaranteed formula for developing inherently safer production processes. In the future, chemical and related industries will benefit greatly from increased educational and professional development and training of scientists and engineers in the disciplines of green chemistry and engineering, risk analysis, and industrial ecology.
- ACS supports involvement of Federal agencies in researching and facilitating the advancement of safer technologies.
  Several Federal agencies, including but not limited to the Environmental Protection Agency (EPA), Department of Homeland Security (DHS), the Occupational Safety and Health Administration (OSHA), actively work with the manufacturing sector to promote safer and more secure facilities. These agencies, through their collaborations and oversight of the manufacturing sector, have a keen understanding of private-sector efforts being developed and implemented to further the advancement of safer and more secure facilities. ACS believes that these agencies should support and encourage research and development—both in the public and private sector—to foster cost-effective, inherently safer chemistries and chemical processes. ACS also believes that these agencies, in collaboration with other appropriate agencies should evaluate, and where appropriate, make recommendations on potential incentives and disincentives that would best encourage the private sector to advance continued improvement in their safety and security performance. Similar actions have also recently been recommended by the National Research Council.[1]
  In the long term, both the public and industry will benefit from the discovery of economically viable, inherently safer technologies. The benefits to the public of safer technology are obvious. For industry, moving towards a safer industrial model will lead to lower insurance and risk costs while ensuring the safety of customers and employees and protecting investors from excessive risk. ACS also supports examination of the potential of public-private partnerships to encourage voluntary adoption of protective measures.

[1] Terrorism and the Chemical Infrastructure: Protecting People and Reducing Vulnerabilities, The National Academies Press, 2006.

ATTACHMENT 2—PUBLIC POLICY STATEMENT 2006–2009

REGULATION OF LABORATORY WASTE

ACS POSITION

In applying regulations designed to address large-scale industrial operations to laboratories, disproportionate environmental regulatory burdens are inappropriately placed on many academic, commercial, and Government laboratories. Research, development, instructional, and service laboratories generate a broad range of small quantities of hazardous wastes, but are forced to individually manage each type of waste with the same rigor applied to those who create large amounts of relatively few wastes. By applying an industrial regulatory scheme to laboratories, unintended, ineffective, and inappropriate burdens are placed on these facilities.

The American Chemical Society is committed to environmental, health, and safety in all of the operations of the chemical enterprise, but excessive regulation of laboratories hampers their efficiency and effectiveness and slows the progress of science and technology. To this end, the American Chemical Society makes the following recommendations.

Consistent Interpretation of Regulations by State and Federal Agencies

The U.S. regulatory system involves multiple Federal and State regulators. This often leads to inconsistent interpretations and makes development of "best practices" for waste management treatment difficult. State regulations must be at least as stringent as related Federal ones. For consistency, when a State regulation is identical to the Federal, that regulation should be interpreted and enforced in an identical manner.

- ACS encourages consistent interpretation and enforcement of regulations at the State and Federal levels.

Simplification of Paperwork

In the current regulatory system, laboratories are burdened by duplicative, unnecessary, and ineffective paperwork. As an example, laboratories are required to notify waste disposal facilities of EPA's disposal requirements for each waste. This requirement for land disposal restriction notification is duplicative because these disposal facilities already know how they are required to handle the wastes and any information relevant to health and safety issues is transmitted by the laboratories on other required forms. The burden of this useless form is almost exclusively placed on laboratories since it must only be completed once for each type of waste. Major industrial facilities disposing of large amounts of routine waste complete the form only at the inception of a new process, but laboratories have to treat most wastes as unique and fill out the paperwork for each shipment

- ACS recommends the elimination of unnecessary paperwork and encourages the use of more efficient transfer of information through means such as electronic systems.

Hazardous Waste Identification

Identifying regulated hazardous waste is a challenging task in the laboratory setting. Currently, some jurisdictions effectively require that research scientists perform these tasks. This can lead to inconsistency in making these determinations. EPA and State agencies should issue policies that clarify that other qualified individuals are empowered to make these waste determinations based on appropriate information supplied by the laboratory scientists.

- ACS recommends that regulatory interpretations and implementation be established that clearly allow scientists and other qualified personnel to work together to identify and minimize hazardous waste generated in laboratories. This proposal could provide the basis for solving many of the problems discussed herein.

Treatment of Hazardous Waste in the Laboratory Without A Permit

Current Environmental Protection Agency (EPA) and State regulations have been interpreted to require costly permits or burdensome conditions for the treatment of even very small quantities of waste in a laboratory. Allowing laboratories the ability to treat limited quantities on-site would minimize waste and reduce costs.

- ACS recommends that legislation, rulemaking, and guidance allow qualified laboratory personnel to treat small quantities of hazardous waste without a permit.

One EPA ID Number Per Campus

EPA requirements have created a situation where hazardous waste generators on the same campus have an identification (ID) number for each city block. Institutions with many laboratory buildings separated by roads are required to obtain different site ID numbers for different parts of their property. This inhibits centralized hazardous waste management and requires redundant record-keeping.

- ACS recommends that the definition of "on-site" be modified to allow generators with multiple laboratory buildings on contiguous properties to have a single EPA ID number.

Waste Accumulation Times for Efficiency and Pollution Prevention

Unlike most other generators, laboratories generate very small quantities of many types of waste. Multiple shipments of small quantities are expensive. Accumulation of larger waste quantities enables cost-effective pollution prevention. EPA has set precedents by allowing flexibility for longer accumulation times of 180 to 270 days to achieve specific policy goals.

- ACS recommends that laboratories be allowed to accumulate hazardous wastes for longer periods in order to allow more efficient waste shipments and cost-effective pollution prevention.

Redundant Regulation of Mixed Waste

Laboratories in academic, medical, and pharmaceutical research facilities generate mixed wastes that contain both low-level radioactive and hazardous chemical components. EPA and the Nuclear Regulatory Commission (NRC) have ended the unnecessary and inefficient dual regulation of most mixed wastes from laboratories. However, common radiation-containing laboratory solvents that could be ignited are still redundantly regulated for both radioactive and flammable components in spite of the fact they could be safely and efficiently managed under a single scheme.

- ACS proposes that the NRC and EPA avoid the unnecessary and inefficient dual regulation of laboratory mixed waste. Specifically, ACS proposes that NRC and EPA modify their rules to allow disposal of laboratory solvents with negligible levels of radioactivity under a single scheme.

Mr. PASCRELL. Mr. Jeppeson.

STATEMENT OF MARTIN JEPPESON, DIRECTOR OF REGULATORY AFFAIRS, CALIFORNIA AMMONIA COMPANY

Mr. JEPPESON. Thank you, Mr. Chairman, Ranking Member, and distinguished Members of the committee.

I am Martin Jeppeson, director of regulatory affairs for the California Ammonia Company, CALAMCO, and I have worked there since 1996. Prior to that, I served in the United States Army, and I retired as a lieutenant colonel in the special forces branch.

Thank you all for the opportunity to provide you with my views and concerns regarding the Chemical Facility Antiterrorism Act of 2009.

CALAMCO is a member of the Fertilizer Institute, and we are a nonprofit farmer cooperative made up of approximately 1,200 growers and fertilizer dealers throughout California.

We specialize in providing nitrogen fertilizers, such as anhydrous ammonia, ammonium hydroxide, and liquid ammonium nitrate to these agricultural entities. We are only one of two ammonia terminals in the State of California and account for approximately 80 percent of all the ammonia used in California.

Fertilizer is essential to food production, and it accounts for 40 percent to 60 percent of the food—of the percent of the world's food supply. Because food production depletes the soil's nutrients, farmers really rely on fertilizer to keep the soil productive harvest after harvest.

DHS's Chemical Facilities Anti-Terrorism Standards, CFATS, regulates facilities that possess several fertilizers, including anhy-

drous ammonia, ammonium hydroxide, ammonium nitrate, potassium nitrate, and sodium nitrate, if threshold quantities are exceeded.

The result: Every aspect of the fertilizer industry falls under the DHS regulation, manufacturer, wholesaler, retailer, and potentially the farmer.

This morning, I would like to focus my comments on inherently safer technology. We believe the requirement for all regulated facilities to assess the use of product substitution as proposed could have a devastating impact on American agriculture.

The chemistry behind the production of nitrogen fertilizer limits the manufacturer of options with regards to IST. Anhydrous ammonia must be produced before other nitrogen fertilizers can be produced. As a result, there is no IST which could eliminate anhydrous ammonia at the manufacturing level.

The applicability of these provisions to an agricultural retail operation is different, however. Their options are similar to those available to CALAMCO: Either switch to a safer product or reduce the quantity on site. Both options potentially remove several CFATS-regulated products from the farmer's agronomic toolbox.

Only with the broad understanding and analysis of the fertilizer supply chain can we conclude that it is not economically feasible to switch to alternative products. An individual retailer may determine that it is feasible to switch from anhydrous ammonia or ammonium nitrate to an unregulated product such as urea, but it is unreasonable to assume that each regulated entity can adequately analyze the impact of their IST decisions on the rest of the fertilizer supply chain.

Because of that, we believe it is the responsibility of this committee to understand and address the impact of these potential requirements.

As the Center for American Progress stated in its report entitled "Chemical Security 101," what you don't have can't leak or be blown up by terrorists. Similarly, in agriculture, what you don't have can't help you grow our Nation's food supply.

I am also concerned about the impact of an IST assessment on smaller businesses. It is unknown how the process described in Section 2111 will be implemented. We anticipate that the team analyzing ISTs would require a chemical engineer, a process safety engineer, and a legal and risk-management perspective.

While a manufacturing facility may have these individuals on staff, a facility such as CALAMCO, that only employs 34 individuals, or a small agricultural retailer will not. We anticipate that the cost to perform such an assessment will be substantial.

Due to strong regulation by the Coast Guard, facilities regulated under MTSA were exempted by statute from CFATS authorizing legislation. The current draft legislation acknowledges and maintains the Coast Guard's important role with regards to security, but we are distressed that facilities which have been successfully regulated, inspected, and secured for more than 5 years, such as our facility in Stockton, would have additional requirements imposed by this legislation.

In closing, I would encourage the committee to simply reauthorize the existing regulations for a 3-year period and allow DHS to

complete the first phase of implementation before altering the existing program.

Thank you for allowing me to provide my perspectives on this legislation, and I look forward to answering your questions.

[The statement of Mr. Jeppeson follows:]

PREPARED STATEMENT OF MARTIN JEPPESON

JUNE 16, 2009

Good morning Chairman Thompson, Ranking Member King and distinguished Members of the committee. I am Martin Jeppeson, director of regulatory affairs at the California Ammonia Company—CALAMCO. I have been with CALAMCO for more than 10 years and am responsible for all aspects of regulatory compliance, including safety, security, and environmental regulation. I was previously in the U.S. Army for 24 years and reached the rank of lieutenant colonel. I am a Certified Safety Professional, Associate in Risk Management and Certified in Homeland Security Level 5.

I appreciate the opportunity to appear before you this morning and look forward to providing you with my views and concerns regarding the "Chemical Facility Anti-Terrorism Act of 2009," as currently in draft form.

CALAMCO is a non-profit farmer cooperative made up of approximately 1,150 grower-members throughout California, and we also have 42 fertilizer dealer stockholders. We are headquartered in Stockton, Calif., and operate terminals at the Port of Stockton and in Sycamore. CALAMCO specializes in providing nitrogen fertilizers to its grower members and authorized dealers, including anhydrous ammonia, ammonium hydroxide (or aqua ammonia) and liquid ammonium nitrate. We are one of only two ammonia terminals in the State of California and account for approximately 80 percent of all of the ammonia used in California. Our authorized fertilizer dealers are located throughout California and distribute our product to our farmer customers and shareholders.

CALAMCO's mission is to reduce fertilizer costs for our farmer owners and ensure a reliable supply of nitrogen. We import approximately 225,000 tons of anhydrous ammonia, primarily from Trinidad, via bulk vessel into the Port of Stockton, where we transload the product into large storage vessels, and subsequently to rail cars or trucks for delivery to our authorized dealers.

CALAMCO is a member of The Fertilizer Institute (TFI), the leading voice of the Nation's fertilizer industry, representing manufacturers, wholesale distributors, importers, retailers, and transporters of fertilizer. TFI and its members have worked closely with the Department of Homeland Security (DHS) to establish appropriate standards and ensure compliance with the Chemical Facility Anti-Terrorism Standards (CFATS).

FERTILIZER

Fertilizer is essential to food production. The use of fertilizer currently accounts for 40 to 60 percent of the world's food supply. Because food production depletes the soil's supply of nutrients, farmers rely on fertilizer to keep the soil productive harvest after harvest.

The three main fertilizer nutrients are nitrogen, phosphorous, and potassium. My testimony today will focus on the nitrogen industry. To make nitrogen fertilizer, fertilizer manufacturers take nitrogen out of the atmosphere and convert it into a form plants can easily use by combining the nitrogen with hydrogen from natural gas to form anhydrous ammonia. Anhydrous ammonia is then used to create other nitrogen fertilizer products, such as ammonium nitrate, urea, urea ammonium nitrate and aqua ammonia, to name a few. Ammonia can also be directly applied as a fertilizer. It is the cheapest and most widely used form of nitrogen.

THE FERTILIZER SUPPLY CHAIN

The fertilizer supply chain is made up of manufacturers, importers, wholesale terminals, such as CALAMCO, and the agricultural retailer or farm supply store, which provides product directly to the farmer customers. In the past decade, much of the nitrogen industry in the United States has shut down primarily due to the high cost of energy, increasing our reliance on foreign sources of nitrogen and increasing the importance of terminals such as CALAMCO. Because of CALAMCO's role in distributing ammonia in California, I believe I am in a unique position to identify the impact of proposed changes to the existing CFATS regulations, both to

our terminal operations, our authorized retailer dealers and in the end, our farmer customers.

THE FERTILIZER INDUSTRY AND SECURITY

The fertilizer industry has a long history of protecting our products and the facilities where we produce and store those products. Much of the fertilizer supply chain was regulated in 2002, with the passage of the Maritime Transportation Security Act of 2002. For example, CALAMCO's facility at the Port of Stockton falls under these regulations.

From the time it was first introduced until it was signed into law by President George W. Bush in December 2007, TFI supported the "Secure Handling of Ammonium Nitrate Act." TFI appreciates the support of the Chairman for his leadership in securing a common sense set of rules and regulations for the safe sale of ammonium nitrate. The fertilizer industry further looks forward to working with DHS to ensure this important product is monitored throughout the distribution chain.

CFATS

As you are aware, Congress authorized DHS to regulate the Nation's highest risk chemical facilities in October 2006. In the regulation, which became effective on November 20, 2007, DHS subjects to regulation several fertilizers if designated quantities are exceeded. These include: anhydrous ammonia, 10,000 lb. screening threshold quantity (STQ); aqua ammonia, 20,000 lb. STQ; ammonium nitrate, 2,000 lb. STQ; potassium nitrate, 400 lb. STQ; and sodium nitrate, 400 lb. STQ.

With the thresholds set at these levels, every aspect of the fertilizer industry falls under the DHS regulation—the manufacturer, the wholesale terminal, the agricultural retailer and potentially, the farmer. In TFI's May 8, 2007, comments to DHS on the proposed list of chemicals and thresholds, TFI requested clarification on the applicability of CFATS to the farming community, commenting, "An average nurse tank contains approximately 1,000 gallons, which is equivalent to more than two tons of anhydrous ammonia [4,000 lbs.]. An eighty-acre field would require the application of four nurse tanks of anhydrous ammonia, bringing into regulation [every] farm with an eighty-acre field."

In a Dec. 21, 2007, letter from Assistant Secretary for Infrastructure Protection Robert Stephan, DHS chose to stay the regulation with respect to the fertilizer industry's farmer customers, stating, "DHS intended to limit the coverage of that requirement, as related to farmers and other agricultural users of the chemicals of interest, by revising screening thresholds and counting rules for certain chemicals. Since publication of the final list of CFATS chemicals, however, additional questions and concerns have been raised regarding the applicability of the Top-Screen requirement to agricultural facilities and operations." This decision by DHS left the entire fertilizer supply chain regulated, with the exception of the industry's farmer customers.

TFI and its member companies support DHS in its efforts to implement regulations, such as CFATS, that ensure the security of crop nutrients that are produced, transported, and distributed by the fertilizer industry. What is important to recognize and analyze, however, is the impact of changes to the CFATS regulation on not just fertilizer manufacturers, but all aspects of the fertilizer supply chain and still, potentially, our farmer customers.

DHS has acted aggressively to establish a comprehensive regulatory regime which we support. While neither of CALAMCO's operations is regulated under CFATS, I can assure you that our industry is regulated and many of CALAMCO's authorized dealers are regulated. It is with this understanding that I now provide you with specific comments about the impact of problematic provisions in the legislation before the committee.

INHERENTLY SAFER TECHNOLOGIES

We fundamentally disagree with the notion that chemical facility security legislation should mandate the use of inherently safer technologies (IST), and we do recognize that IST is a part of every day life in the manufacturing portions of our industry. We believe the requirement for all regulated facilities to assess the use of product substitution, including manufacturers, wholesale distributors, and retailers, as proposed in the draft legislation, could have a devastating impact on American agriculture. Such a mandate could jeopardize the availability of lower-cost sources of plant nutrient products, which our farmer customers depend on for specific agronomic reasons. I would now like to explain how a mandate to assess or implement IST could impact each aspect of the fertilizer supply chain.

As defined in Sec. 2101, IST or "methods to reduce the consequence of a terrorist attack" means, "the elimination or reduction in the amount of a substance of concern . . . through the use of alternative substances, formulations or processes; the modification of pressures, temperatures or concentrations of a substance of concern; and the reduction or elimination of on-site handling of a substance of concern through improvement of inventory control and on-site handling."

The chemistry behind the production of nitrogen fertilizer limits a manufacturer's options with regards to IST. Manufacturers of nitrogen fertilizer must produce anhydrous ammonia, a toxic by inhalation chemical, before they can produce any other form of nitrogen fertilizer. As a result, there is currently no IST which could result in the elimination of anhydrous ammonia at the manufacturing level. This determination is simple to come by, when there are no other options for producing nitrogen fertilizer. Our industry's primary concern, therefore, is not the ability of the owner or operator of a covered manufacturing facility to continue the business of its facility. Our industry's concern is the impact of an IST assessment or mandate on the fertilizer supply chain.

The ability to make changes to formulations, processes, pressures, and temperatures does not apply throughout the supply chain. The only alternative which exists when a facility's business is to sell products to the farmer or to move products through the supply chain is the use of safer nitrogen fertilizer products, or to store less on-site. These provisions therefore, when applied to CFATS-regulated terminal or agricultural retailers, implicitly and explicitly discourage the use of products which are vital to our Nation's food production.

Within a wholesale distribution facility, such as CALAMCO, our options are to decrease the product stored on-site or switch to a "safer" alternative. As I previously mentioned, CALAMCO meets approximately 80 percent of California's anhydrous ammonia needs. As such, our facility is a major import terminal. Even the Center for American Progress report recognized that a major "marine cargo terminal which receives, stores and transfers several hundred million pounds of anhydrous ammonia each year" has "no single-facility alternative." Furthermore, even given the minor protections that were included in the draft legislation, which I have reviewed, it would be difficult for DHS to force our facility to switch to an alternative product. After all, the business of our facility isn't just to supply a crop nutrient to farmers; it is to supply the State of California with anhydrous ammonia. Were our facility, however, to be a major fertilizer terminal, the protections included in the legislation would apply with far less certainty.

The applicability of these provisions to an agricultural retail operation is different, however. The options for IST at this level are similar to the options which are applicable to CALAMCO. The choices presented to the retailer are to switch to a "safer" product or reduce the amount of product on-site at the facility. If these facilities are regulated in the highest tiers, DHS could even force an agricultural retailer to switch to a "safer" nitrogen fertilizer product, potentially removing CFATS-regulated products, such as anhydrous ammonia, aqua ammonia, ammonium nitrate, potassium nitrate, and sodium nitrate from the farmer's agronomic tool box. The protections which apply to the ammonium nitrate producer or the anhydrous ammonia terminal do not apply in the same way to our agricultural retail operation. The business of our authorized dealers, the agricultural retailers, and farm supply stores, is to provide fertilizer to the farmer. Not a specific fertilizer, but fertilizer in general. The limited protections in this legislation therefore do not adequately protect an agricultural retailer from being forced to eliminate the use of anhydrous ammonia or ammonium nitrate at their facilities. As long as these facilities will be able to continue to sell a fertilizer, not necessarily a fertilizer needed by the community which they supply, but any fertilizer, DHS will have the ability to mandate the implementation of IST, which in this population segment means the elimination of products.

We are further concerned about the assessment of IST in this segment of the agricultural community. Given the liabilities that could result from continuing to sell a DHS-regulated product as opposed to switching to a safer alternative, the lack of understanding at a small agricultural facility regarding the meaning of an IST assessment and the poor communication about requirements for this portion of the regulated community, it is unknown exactly what impact a mandate to assess the use of safer products will have on the farmers which we supply, the terminals like CALAMCO that are responsible for moving the products and the manufacturers which produce the products which we move.

It is only with this broad understanding and analysis of the fertilizer supply chain, and the supply chains of other segments of the regulated community, that we can conclude understand that it is not economically feasible to switch to alternative products that would threaten our Nation's economy and food supply. It is rea-

sonable to assume that an individual agricultural retailer may determine that it is "economically feasible" to switch away from anhydrous ammonia and ammonium nitrate to unregulated products such as urea, but it is unreasonable to assume that each regulated entity, including the manufacturers, terminals, and retailers, can adequately analyze the impact of their IST decisions on the rest of the fertilizer supply chain. We believe it is the responsibility of this committee to understand and address the impact of these potential requirements on each regulated supply chain, especially ours, which accounts for 40 to 60 percent of the world's food supply. As the Center for American Progress stated in its November 2008 report entitled *Chemical Security 101,* "What you don't have can't leak, or be blown up by terrorists."[1] Similarly, in agriculture, what you don't have can't help grow our Nation's food supply.

I would now like to provide an analysis of the estimated economic impact on the fertilizer supply chain.

If an agricultural retailer were to switch from anhydrous ammonia to a different nitrogen fertilizer product, the likely alternative would be urea. Anhydrous ammonia is the cheapest form of nitrogen and often the most appropriate for certain crops. In California, anhydrous ammonia is most commonly applied on corn, wheat, alfalfa, tomatoes, cotton, and onions. Similarly, in the Midwest, you find anhydrous ammonia applied to our Nation's corn crop. The additional cost for a typical 1,000-acre corn farm utilizing urea instead of anhydrous ammonia, given the current cost and nitrogen content of each product, would exceed $15,000. However, this does not provide an accurate and fully comprehensive picture as this cost increase would only hold true if there was ample additional urea available at today's prices. The United States, however, is already the world's largest importer of nitrogen fertilizer and the second largest importer of urea, accounting for a full 17 percent of urea traded in the world. If the United States had to turn to the world market to import an additional 7,576,066 tons of urea to replace the nitrogen in anhydrous ammonia—a 116 percent increase (more than double) from our level of imports in the latest fiscal year 07/08—it would drive the world price of urea sky high. A higher imported urea price would mean significantly higher urea prices paid by U.S. farmers, as the U.S. currently imports 75 percent of its total solid urea supply. This would result in a significant increase from the $15,000 estimate, which I previously noted for a typical 1,000-acre corn farm.

Furthermore, we estimate that the cost for a U.S. manufacturer of nitrogen fertilizers to alter an existing facility to accommodate for the change in demand would be substantial. To build a 1,000-ton-per-day urea liquor plant on an existing site would cost approximately $120 million. It would cost an additional $60 million to granulate, dry, and store the dry urea. To build a 1,500-ton-per-day urea ammonium nitrate (UAN) solution plant, you would need both a urea liquor and nitric acid facility. In addition to the $120 million urea liquor plant, you would need a nitric acid plant at the approximate cost of $60 million. On-site storage for a 50,000-ton UAN tank would cost an additional $8 million. The upgrades described above would likely take 2 years from the point of ground-breaking to complete and the essential production equipment would need to be imported.

While nitrogen manufacturers do not typically employ more than 170 individuals, these jobs tend to be staples within the foundation of their communities, averaging an annual salary of $70,000, often in communities where ours are the best-paying jobs.

I am also concerned about the impact of an IST assessment on small businesses and non-profit entities such as CALAMCO. It is unknown how the process described in Sec. 2111 will be implemented, including which individuals will need to participate or the legal liabilities that will exist due to the assessment. The legislation describes a process which must consider the technical viability, costs, avoided costs (including liabilities), saving, and applicability of each IST method which is considered. We anticipate that the team responsible for analyzing the ISTs would require a chemical engineer, process safety engineer, and a legal and risk management presence. While a manufacturing facility may have these individuals on staff, and a facility such as CALAMCO that employs 34 individuals may have some of these individuals on staff, a small agricultural retailer will not. We anticipate that the cost to perform such an assessment will be substantial for a facility of this size.

Specifically, the overwhelming majority of retail facilities do not store quantities of regulated products that would result in being placed in a tier level where they are considered a high-security risk to their community. As a result, the majority of agricultural retailers in California can not afford to maintain regulatory compliance or risk specialists at each facility. Under such a mandate, these retailers would have

[1] Paul Orum, "Chemical Security 101," Center for American Progress. November 2008.

to hire consultants to assess whether the products they carry could be replaced by IST. Since retailers can not afford to maintain risk specialists, the perception of risk from products identified as products that should be assessed for IST, would likely drive retailers to alternative products that may be more costly and less efficacious than their original products at delivering essential plant nutrients. Replacement products would also place retailers in jeopardy of not qualifying for State environmental initiatives, such as the agricultural truck rule provisions of the California State Air Resources Board's Diesel Engine Replacement regulations. Finally, in a highly litigious State like California, the perception of risk would likely lead to high insurance rates for retailers. All of these examples translate into higher costs to retailers and as a consequence, their grower customers.

We ask that you not misinterpret our position with regards to security. Our concern regarding the mandate to assess the use of ISTs and products does not mean that we do not take the protection of our products and the fertilizer supply chain seriously. We believe, however, that our facilities can be protected without implicitly or explicitly discouraging the use of our products in legislative text.

MARITIME TRANSPORTATION SECURITY ACT REGULATED FACILITIES

As stated earlier, CALAMCO's port facility in Stockton, Calif., is regulated under the Maritime Transportation Security Act of 2002 (Pub. L. No. 107–295). Due to the regular shipment of bulk fertilizers by barge and vessel, many TFI members, including manufacturers, wholesalers, and retailers, have facilities regulated by the Coast Guard under MTSA. In addition, two fertilizer products are classified as Certain Dangerous Cargo (CDC), bringing under jurisdiction of MTSA many retail and wholesale warehouses on our Nation's inland water system.

Due to the strong regulation by the Coast Guard, facilities regulated under MTSA were exempted, by statute, from CFATS-authorizing legislation. While we understand that the current draft legislation acknowledges and maintains the Coast Guard's important role with regards to security at MTSA facilities, we are discouraged that facilities, which have been successfully regulated, inspected, and secured, would have any additional requirements imposed by this legislation. TFI supports maintaining this exemption.

If the Infrastructure Security Compliance Division, the agency within DHS which is responsible for the CFATS regulations, chooses to enter into a memorandum of understanding (MOU) to encourage information sharing with the Coast Guard, TFI would support these provisions. We cannot support, however, any additional requirements on MTSA facilities which have successfully complied with the Coast Guard's regulation over the past several years. We are further concerned that the requirements of Sec. 2111 would apply at Coast Guard-regulated facilities. As we have previously addressed, agricultural facilities at our Nation's port facilities have limited alternatives, other than increased shipments of fertilizer products or the elimination of products.

PRIVATE RIGHT OF ACTION

Section 2115 of the proposed legislation includes provisions allowing for private rights of action against regulated parties and against DHS to enforce compliance with applicable requirements. Such private rights of action provisions have proven extremely problematic in other statutory schemes and have fostered enormous amounts of litigation in other contexts. We first and foremost believe that these provisions are not only unnecessary but could prove detrimental to the task at hand—protecting our Nation's critical infrastructure.

Agency desires to avoid citizen suits often result in agencies taking less cooperative and more adversarial approaches towards the regulated community in order to ensure compliance. The more adversarial and aggressive the agency action, the less likely a citizen plaintiff will view the action as adequate and file its own suit to enforce compliance.[2] The agency thereby avoids the cost of litigation, but at the expense of essential cooperation with the regulated facility. Such aggressive actions are counterproductive, particularly in situations, such as counterterrorism, where cooperation between Government and private interests is critical.

Additionally, citizen suits would be unnecessarily redundant with third-party common law claims. Furthermore, the broad discovery rights enjoyed by a plaintiff in a judicial action increases the likelihood of disclosure to the public of sensitive information, which could be used in terrorist activities. The legislation only provides that DHS shall take measures to prevent disclosure, but does not provide any mech-

[2] Matthew D. Zinn, "Policing Environmental Regulatory Enforcement," 21 Stan. Envtl. L.J. 81 (2002).

anisms to prevent disclosure of sensitive information in the context of a judicial challenge where broad discovery would be necessary to bring and defend any claim. We also believe that potential personal liabilities associated with being named in citizen suits would provide a disincentive for chemical facility employees to take responsibility for implementing the requirements of CFATS.

Finally, citizen suit provisions create incentives to litigate fiercely, but none to encourage citizen plaintiffs to pick their battles in an effort to achieve socially-optimal compliance and enforcement. Where citizen litigants are reimbursed for their litigation expenses and fees (as they would be under the legislation), they have little budgetary incentive to eschew enforcement. Citizen plaintiffs will also bring suit to attract members, increase their public profile or contributions. Citizen plaintiffs tend to be ideologically predisposed to aggressive enforcement, as they have no ongoing relationship with the facility (as the agency would) necessitating a cooperative relationship. Indeed, studies have indicated that citizen suits do not achieve optimal enforcement levels but instead result in excessive numbers of claims and excessive penalties.[3]

FEDERAL PREEMPTION

Sec. 2109 allows any State or political subdivision thereof to adopt or enforce any regulation that is more stringent than the Federal regulation. We are concerned that the legislation before this committee will encourage the creation of a patchwork of conflicting rules that stretch across Federal, State, and local lines. We believe that CFATS should preempt inconsistent State and local chemical security laws and rules by preempting State or local requirements only if there is an actual conflict between the two, or the State or local program "frustrates the purpose" of the Federal program. Current State chemical facility security laws have not been found to conflict with Federal CFATS regulation. Therefore, changes to the existing conflict preemption standards should not be made.

MISCELLANEOUS ISSUES

Finally, I would like to quickly describe a few additional provisions which raise concern and I believe could easily be amended.

Sec. 2103 discusses training for employees. While CALAMCO, due to its size, may provide each employee with a full knowledge of these aspects of the facility's security, we believe it is inappropriate to provide this level of detail to every individual who may work within the confines of our facility. The prescriptive nature of this provision would result in every contractor, including temporary contractors during manufacturing plant turn-around, interns, front desk staff, and other temporary employees, having an intimate knowledge of the potential consequences of a terrorist incident and the facility's ability to respond. While we recognize the need for employees at a facility to be aware of the certain vulnerabilities and the methods which may be used to mitigate an incident at a facility, we do not believe that all individuals have a need to know the information which is mandated in Sec. 2104. We encourage you to review and alter these provisions so that they are not only performance-based, but allow the owner or operator to determine which information is appropriate for distribution.

Sec. 2105 mandates that a covered facility with one or more certified bargaining agents provide an employee representative, as defined in Sec. 2101, with a copy of any security vulnerability assessment or site security plan. We fundamentally believe that this information should only be provided to employees at the facility with a specific need to know. The definition of "employee representative" does not clarify whether or not this individual must be an employee of the facility. Furthermore, Sec. 2105 would require that the employee representative ensure that security vulnerability assessments and site security plans are properly handled; but it does not specify that an employee representative must keep any information received stored at the covered chemical facility. An owner or operator of a covered chemical facility, or an employee with security responsibilities at multiple facilities may have a need to transfer or transport sensitive security information, removing these documents from the facility should not be permitted by the employee representative.

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[3] See David R. Hodas, "Enforcement of Environmental Law in Triangular Federal System," 54 Md. L. Rev. 1552 (1995); see also Barry Boyer & Erroll Meidinger, "Privatizing Enforcement," 34 Buff. L. Rev. 833 (1985); Ross MacFarlane & Lori Terry, "Citizen Suits: Impacts on Permitting and Agency Enforcement," Nat. Resources & Env't J. (Spring 1997).

CONCLUSION

We encourage the committee to take decisive action to extend the existing CFATS authority, which expires in September 2009, but we remain concerned about many of the provisions which are included in the draft legislation. We encourage you to maintain the existing regulations and allow DHS to complete the first phase of implementation before altering the existing program. We ultimately believe that DHS could effectively implement their regulation with 3-year extension.

I would like to once again thank you for allowing me to provide my perspective on the impact of this legislation at CALAMCO and to the broader fertilizer industry supply chain. I look forward to answering any questions which you may have.

Mr. PASCRELL. Thank you for your testimony.

Without objection, the witnesses' full statements will be inserted in the record. So now we are going to go to questions.

I have a question for Mr. Baldauf. As a Member of the Homeland Security Committee, as well as a Member of the Ways and Means Committee, I believe strongly that we need to implement rigorous security standards without unduly impeding commerce. I think you believe in the same thing; I have heard you speak before.

But it could be a difficult balance to maintain. The legislation we are considering today would implement a new, more stringent chemical security regime for the entire Nation. But we have often heard the refrain from the chemical industry that these standards would significantly restrict its ability to do business.

Now, Mr. Baldauf, as I pointed out earlier in New Jersey, that that State has been implementing many of these chemical standards, security standards for years, including the assessment of inherently safer technologies, which we have heard mentioned a few times in the testimony of the gentlemen.

The chemical industry has vigorously opposed this in the past. As I mentioned before, there is 800 chemical facilities in New Jersey, 45 of them have extraordinarily hazardous materials.

So, Mr. Baldauf, quite simply, has the ability of the chemical industry in New Jersey to do business really been stunted? That is my first question. Has the sky fallen on the chemical industry in New Jersey since you implemented tougher chemical security standards, including IST?

Then I have a follow-up question. When he is finished, gentlemen, jump in. We need to hear from everybody. This is not meant to be pedantic. Go ahead.

Mr. BALDAUF. Thank you.

We actually heard the same concerns in 2005 and 2008. In 2005 and 2008, we actually heard the same concerns before we enacted our standards and our IST rule.

What experience has shown since 2005 is, no, it has not been overly burdensome for the chemical facility, the chemical sector to comply with our standards and complete the IST evaluations.

The main reason, I believe, for that is that, on the IST evaluation side, there is a feasibility test. If it is not feasible to do the IST work, it is not going to be done. If it is feasible, then they can go forward. I think that is the key there. It is an evaluation we require, and you have to meet a feasibility test to go forward.

Mr. PASCRELL [continuing]. More efficient?

Mr. BALDAUF. I don't think there is any question. I don't think there is any question.

Mr. PASCRELL. Can you cite any specific cases that come to your mind?

Mr. BALDAUF. Well, I think if you look at the IST reports that we have reviewed over the years, they pay very close attention to the types of chemicals they bring in, the timing, the frequency, the amount, and they stage things so they aren't in a position to have more than what they need on-site at a given time. That helps their bottom line in the long run, also, in many times because it is just by demand when necessary.

Mr. PASCRELL. Would I be exaggerating if I said that the chemical industry in the State of New Jersey, which is one of the most robust in the entire Nation, have been extremely cooperative with these standards?

Mr. BALDAUF. I think we went through a very long process. Yes, I would like to say that it is a cooperative relationship we have had.

Mr. PASCRELL. Just one more brief question before I turn it over to the Ranking Member. Just give me a brief summation of this feasibility that you have talked about and referred to in your testimony. This is very critical, I think, to the entire discussion of whether we should have stronger standards or weaker standards or whatever.

Mr. BALDAUF. Okay. How it works is, it is up to the company, the facility, to explore the possible IST options that may be available to them. So they basically start with a clean slate, and they come up with, let's say for argument, 10 things that are possible.

Then feasibility goes through, is it economically feasible? Is it technologically feasible? Do you have space for it? There are multiple things that we include in the rule.

So, at the end of the day, if you come up with 10 things that are possible, you also come up with 10 reasons why they are or are not feasible, and you make that argument back to us, and we review it to make sure that we agree with the steps taken and their evaluation.

Mr. PASCRELL. Any—yes, Mr. Durbin?

Mr. DURBIN. If I could——

Mr. PASCRELL. Absolutely.

Mr. DURBIN [continuing]. Because I don't want to leave the impression here that the industry, at least speaking for ACC member companies, have been adversarial to what New Jersey has done or that we are on——

Mr. PASCRELL. No, your record has been pretty clear.

Mr. DURBIN. I think that, you know, for ACC members—and, again, a lot of other non-ACC members, as well—the idea of considering inherently safer approaches, again, it is required as part of our responsible care security code.

As I think Mr. Baldauf in his written statement acknowledges, you know, the initial best practices in New Jersey were modeled on responsible care security code. I will say, I believe we have a very cooperative relationship between the industry and the State, and we have 70,000 employees in your State, as you said——

Mr. PASCRELL. How many is that?

Mr. DURBIN. Seventy thousand. So, you know, we take our responsibility seriously. I think that it really does, you know, show some—there are some models here on how to move forward.

Mr. PASCRELL. Thank you.

Mr. Langerman, do you have any comment?

Mr. LANGERMAN. Well, as I said, the ACS position is that inherent safer technology is certainly part of the overall process for reducing the inherent risk associated with the unit, which overall improves both safety and security.

It is a holistic approach that requires a relatively high level of expertise to design and implement and a relatively high level of expertise to review, if you will, at a State or a Federal regulatory agency.

Mr. PASCRELL. Mr. Langerman, do you know of any facility that would not be able to sustain operations as they exist right now if this legislation was passed, yes or no?

Mr. LANGERMAN. That is going to have to be answered on a—literally a case-by-case basis. There are facilities that I have been involved with as a consultant in my professional career that would be hard-pressed economically to make changes.

I certainly am aware of facilities that have chosen to move out of my home State, California, because of regulatory oversight.

Mr. PASCRELL. Okay, and that is the purpose of having feasibility.

Mr. Jeppeson. Put your mic on, please. Thank you.

Mr. JEPPESON. If you look at it from the perspective of our particular facility, as I mentioned earlier on, there does not appear to be—anhydrous ammonia. If we were regulated out of that business, i.e., we had to get rid of the anhydrous ammonia, we would basically be out of business.

Mr. PASCRELL. Anyone else?

Thank you.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

With all due respect, Mr. Chairman, it is easy for us to ask whether a bill could legislate something out of existence. Now in California as a result of Federal law, we have had implementation by a Federal judge to protect the Delta smelt. So we have turned off the water to central California. Currently, we have some communities with as high as 40 percent unemployment. Some of the greatest farmland in the world is now going dry because of the United States Federal Government, with the Congress passing laws that wouldn't put anybody out of business, and it is having dire consequences.

But we cannot do anything, because a Federal judge has made a determination that the pumps have to go off and species Homo sapien is considered subservient to species that are included in the Delta smelt.

So I am very, very concerned about the impact of Federal legislation that we just grandly say will have no impact whatsoever. It sounds like we have found the magic bullet. We have found the holy grail. It is called IST, inherently safer technology.

Is that the answer to everything, Mr. Baldauf?

Mr. BALDAUF. No, I would say it certainly isn't. In my opinion, IST is a process, one of many processes, that would help ensure

that everything is being evaluated to get the facilities to a point where they are as safe as possible. But certainly it is not the final answer.

Mr. LUNGREN. New Jersey does not mandate it, does it?

Mr. BALDAUF. No, strictly evaluation.

Mr. LUNGREN. Strictly evaluation.

Mr. BALDAUF. Yes.

Mr. LUNGREN. Which is different than mandating it under the authority of the secretary of DHS.

Mr. Durbin, what are your comments on IST?

Mr. DURBIN. Again, we believe that IST is an important tool to be used, as you have been developing your site security plan. It is a requirement under ACC's responsible care security code.

Again, we, too, believe that it is not appropriate to mandate, that the decision is best left to the—you know, the process——

Mr. LUNGREN. Why isn't it the silver bullet?

Mr. DURBIN. No, I didn't mean to say it was the silver bullet.

Mr. LUNGREN. No, but why isn't it the silver bullet?

Mr. DURBIN. Why isn't it?

Mr. LUNGREN. Yes.

Mr. DURBIN. Because it doesn't——

Mr. LUNGREN. It sounds great, inherently safer technology. Who could be against inherently safer technology?

Mr. DURBIN. Well, it does sound great. Frankly, you know, if you can institute those types of changes in your process, it is good business. It is good business. You know, it makes things more efficient. It makes things safer, what have you. But——

Mr. LUNGREN. You don't have confidence that we on the Federal level can mandate it in the circumstances that we think it ought to be mandated?

Mr. DURBIN. Our view is that those decisions are best left to the security and process safety experts.

Mr. LUNGREN. Dr. Langerman.

Mr. LANGERMAN. First, let me thank you for defending the water. I live at the end of the water supply.

Mr. LUNGREN. Well, you don't have to worry about getting wet.

Mr. LANGERMAN. No, in fact, we are in a stage two drought right now.

You chose very good words in is—in your question, is IST a silver bullet? Absolutely not. I would urge the Members of this historic legislative body to look back to the history of the language, inherently safer technology. It traces back to a colleague, Trevor Kletz, in the United Kingdom, who invoked it as one of a large group of engineering processes which, taken as a whole, can build into a process unit safety and, in fact, security, as a part of the unit, not as a Band-Aid or an add-on.

Professor Kletz and all of my chemical and engineering colleagues who have worked on this and myself have recognized it is just one of the tools in a relatively rich tool box that we can bring to bear to make our units operate safer.

The example that I gave in both my oral and my written testimony was chosen very carefully, because it points out a case in which all of our preliminary judgment said substitute, substitute, substitute. That seems to be what inherent safer technology focuses

on, the language, where when we did the detailed, quantitative risk assessment, looked at the process in detail, and we did a consequence analysis, we got these amazing results, 7,900-pound release was possible when the alternative was implemented versus 538-pound release if the original were implemented, which, in fact, was the safer.

Mr. LUNGREN. See, I remember when the Federal Government, the Congress mandated MTBE as the additive to gasoline. We made the determination here that it needed to be used. What did we find out? MTBE turned out to be a disaster for the environment, almost ruining places like Lake Tahoe and other areas where it was used as gasoline and an additive for marine vehicles.

We are mandating corn-based ethanol at greater and greater levels here in the Federal Government, and it is my concern when we come up with an idea that came out of the industry, using inherently safer technology, as a process, and as one of the tools, then latching on to it and saying, "My god, we have found it, the holy grail, and we are going to mandate it."

It will have a devastating impact, in my judgment, if we go overboard with it. I thank the gentlemen for your testimony.

Mr. PASCRELL. Does anyone else want to respond to what you have already heard?

Mr. JEPPESON. If I may make a comment, sir? Talking about IST, let's just take, for instance, an example of it, if a farmer did have to switch from anhydrous ammonia to an alternative product.

There are a number of costs involved in that to the farmer. We will take a 1,000-acre corn farm, since you, sir, mentioned corn in your comments there. Given the current nitrogen costs that are on the market, the results of that farmer would be an additional $15,000 of expenses. Those expenses would only be true if there were additional urea in the marketplace, in the supply chain in order to provide that farmer with a product that he needed.

Currently, we are the largest supplier—the largest importer of nitrogen fertilizer in the world. We are the second largest importer of urea, according for about 17 percent of the total world production.

Our estimate is that it would take an additional 7.6 million tons of urea to replace the ammonia that would not be used in order to get similar production levels. So that is about 116 percent increase in imports from the latest fiscal year of 2007–2008.

We think that that would probably drive the prices of urea sky high. That is assuming that there is enough urea there to take the place of what is needed. In order to get that additional urea, then obviously additional plants would have to be put in place.

Mr. PASCRELL. Mr. Jeppeson, I just want to make it clear that in this legislation, the one we are talking about today, not the Delta smelt, we are talking about a very specific legislation. You are bringing comparison of apples and oranges here.

But in this particular legislation, nothing in this bill that I know of mandates any particular process. Nothing in the bill mandates any particular process.

Anybody else have any comments?

Mr. Cleaver.

Mr. CLEAVER. Thank you, Mr. Chairman.

I am on the Financial Services Committee. It used to be called the Banking Committee. I painfully remember hearings like this a couple years ago, as the ABA and others from the financial services industry argued that, if we try to do any tightening of regulations, that there would be unintended consequences, the world would essentially collapse, and the Washington Nationals would win games, all kinds of things would—were going to go wrong.

[Laughter.]

So, as a result, now that we have seen—we have walked to the precipice of a collapse of the world economy, and a part of the reason has been the failure to do, I think, congressional responsibility, in terms of regulations.

I am wondering, if something tragic should happen, who do you think will get the blame because we refused to take action on this legislation? How many of you would volunteer to say, "Well, I stood up and asked them not to do anything"?

Mr. DURBIN. Mr. Cleaver, I would answer in a different way. I think we have stepped up and——

Mr. CLEAVER. No, no, no, no. I appreciate what you are saying, but before you say that, if you would answer my question. You said you would answer it another way. What I would like for you to do is not—I am not trying to be too mean—is to answer it the way I asked, which is whether or not who you—who do you think will receive the blame?

Mr. DURBIN. Likely we will.

Mr. CLEAVER. Well, that is not quite the way I see it, based on history. We would get beat up, as usual, and then we would hear all the things—lobbyists, they control everything, and people wouldn't make decisions. Am I wrong?

Mr. DURBIN. Well, again, if I could, I think this is a case where, you know, you had—and speaking for the American Chemistry Council, this was a group—I am a lobbyist, so I will go ahead and take the mantle there.

I have come before this committee several times and other committees encouraging and supporting the passage of legislation to regulate chemical facilities for security. Thankfully, Congress did so in 2006. I am here today to say, we want to make that program permanent, that we want to continue to work with DHS.

So I guess I would look at it a little differently. We are not starting from scratch. You know, we have an industry that has already invested $8 billion in security. We want to make sure the program that is in place, being implemented now is going to be even stronger.

This is a responsibility we all have. Frankly, we are never going to be done. We are going to have to continue to work at this and improve our ability to make sure that we can meet the threats that are out there.

So I do understand what you are saying, but I think that we are in a better position in that we do have a collaborative relationship here to actually address this concern.

Mr. CLEAVER. You know, Mr. Langerman, before you answer that question, let me—to follow up, the IST is sometimes dismissed as safety masquerading as security. I believe that if we are going to lower overall risk, which is usually defined as a product of threat

times vulnerability times consequences, and that we should, Mr. Langerman, try to reduce each of these three, including consequences, if we are going to reduce overall risk. Do you agree with that?

Mr. LANGERMAN. Thank you, Representative. First, the American Chemical Society fully concurs with Mr. Durbin. He has just stated, so I am not going to repeat that.

To address your follow-up question, if I may, inherent—the process, the engineering process that runs under the mantle of inherently safer technologies is aimed at reducing the built-in risk, the inherent risk of a unit. By doing that, it improves both safety and security.

So in that sense, I do concur with your statement.

Mr. CLEAVER. My time is running out, and I have a lot more stuff. But I yield back, Mr. Chairman.

Mr. PASCRELL. Thank you.

Mr. McCaul.

Mr. MCCAUL. Thank you, Mr. Chairman.

I ask that the Chair recognize Dr. Broun for 5 minutes, as he has a conflicting hearing, and then perhaps come back to me.

Mr. PASCRELL. The gentleman from Georgia is recognized.

Mr. BROUN. Well, thank you, Mr. McCaul, for your indulgence in this. I owe you one, sir. I say that for the record.

Mr. Jeppeson, as a former farmer, I understand that inherently safer technology requirements would significantly increase the cost for the majority of small businesses, such as agricultural retailers, and specifically for hiring consultants to perform assessments, due to the costs of switching to more expensive uncovered products, increased insurance rates, et cetera.

Would it be fair to say that some small businesses struggling with these increased compliance cost may be forced out of business?

Mr. JEPPESON. I think, sir, that probably would be a good statement. I think what might also happen is that those smaller retailers could very possibly switch away from those products that are more dangerous, if you will, and also go to much less costly products, which may not serve the farmer quite as well.

So I think there is a possibility that if they were—if these assessments were imposed upon them at fairly large expense, there is a possibility some of them may go under.

Mr. BROUN. I believe very firmly that a nation cannot feed itself, and cannot clothe itself, if it is not energy independent, so that it is not a secure nation. As we go to these other modalities of trying to grow our crops which are much costlier, I think it will drive our food costs up making us more dependent upon foreign food sources, which is not in our best security interests as a Nation.

So I agree with Mr. Lungren. I am very concerned about the mandatory requirements that this legislation would cost. I understand Mr. Cleaver's questions, but we cannot be entirely risk-free.

It is my understanding that the purpose of IST requirements is to increase facility safety by reducing the on-site volume of a covered chemical. But wouldn't reducing the on-site amount of a product result in increased truck, rail, and barge traffic to ensure continued and adequate supply?

Therefore, wouldn't these IST requirements merely shift the risk to other, perhaps more vulnerable entities in the supply chain, resulting in increased Government regulation without any additional protection against terrorist activities, thus further increasing the cost to everybody in America?

Mr. JEPPESON. I think that is a very true position on that, sir. Take, for instance, we have Product A, which is a dangerous product, and we decide to replace it with Product B, but we need three times as much of Product B as we did of Product A to serve the farmer, and we are putting three times as many trucks on the road, three times as many rail cars on the rails, and three times as many ships on the high seas. So, yes, we are definitely increasing the risk there.

Mr. BROUN. Then, also, increasing carbon emissions and other things that the folks concerned with so-called climate change or global warming are talking about.

I thank the panel for coming, and I appreciate all of your testimonies.

Mr. Chairman, I yield back the balance of my time.

I thank Mr. McCaul for his indulgence.

Mr. PASCRELL. Thank you, the gentleman from Georgia.

Just one quick point. In the direct language of the—I wasn't sure, but now I am sure. The substance, the secretary, the Department of Homeland Security—homeland security secretary can require implementation of a high risk, if it would significantly reduce the risk of death, injury, serious, adverse, et cetera, and is technically and economically feasible to be incorporated into the facility's operations, and would not significantly impair the ability of the facility to sustain operations at its current location. A high-risk facility that cannot comply with an implementation order is required to provide a written explanation to the secretary within 60 days of receipt.

Oh, do you want to ask questions?

Mr. MCCAUL. Yes, Mr. Chairman. Thank you.

For clarification, Mr. Baldauf, in New Jersey, you have an IST review process that seems to be working fairly well, but it is not a mandatory process, correct?

Mr. BALDAUF. It is mandatory that you have to do the evaluation, but the results of your evaluation, you are not required to implement them. So, basically, at the end of the day, you have to put feasible alternatives on the table, but you aren't forced to implement any of them.

Mr. MCCAUL. So the implementation is not mandated, is this what you are saying?

Mr. BALDAUF. Correct. Correct.

Mr. MCCAUL. Okay. I just wanted clarification on that.

Mr. Durbin, I know you were quoted today in the BNA Daily Environmental Report as saying that you would like to make the IST provision more manageable for facilities to deal with. There is a Texas A&M report that talks about the subjectivity involved with IST.

First of all, explain your quote. Then, do you agree with the Texas A&M report, that this is a very subjective standard?

Mr. DURBIN. I haven't read the Texas report, but I do think—again, as I think I had maybe been quoted there, that IST does require subjective decisions there.

But, no, my—the point of my quote this morning and, you know, consistent with my testimony here today, you know, we continue to believe that the provision is unnecessary, that the current regulations, you know, provide the encouragement, in fact, that is essentially going to require you, you know, to consider all different types of security enhancements, including methods to reduce consequences, and that there is a strong incentive to implement those, because you may end up putting yourself into a lower tier or perhaps coming—taking yourself out of the program.

Having said that, you know, the provision that is in the bill that was introduced yesterday is essentially the same provision that was in the bill last year, which was approved by this committee. It is very similar to a provision that was in the bill in the previous Congress that was approved by this committee.

So from a practical standpoint, if the committee is going to move forward with a provision that is going to give authority to DHS to mandate IST, we clearly would like to see changes to that provision to make sure that it is a more robust definition, that it entails risk, you know, not just consequence, that it has a more robust process involved, both for the determination by the agency and the facility's ability to appeal that process.

Mr. PASCRELL. Would the gentleman yield for one second?

Mr. MCCAUL. I will yield to the Chair.

Mr. PASCRELL. Thank you. We have to make it clear, don't we, Mr. Durbin, that this legislation does not prescribe a specific methodology?

Mr. DURBIN. Correct, Mr. Chairman. As I said, it provides the authority to the secretary, to—correct.

Mr. MCCAUL. The current arrangement seems to be a cooperative arrangement between industry and the Government. It actually seems to be working fairly well, according to your testimony.

In fact, the current President and current administration seem to think so as well, but they have asked this Congress to delay for another year so they can work with the Congress on any further legislation. Is that correct?

Mr. DURBIN. That is my understanding, based on——

Mr. MCCAUL. We heard that testimony from the previous panel. Mr. Chairman, I don't know why we are not listening to the President and the administration in this instance rather than forcing this legislation upon the Congress.

I think this is one instance where I agree with the President and the administration. I think it is a more reasonable approach to work with the industry and with the Congress on delaying this by 1 year.

Let me ask another question. With respect to civil liability, this bill opens up the industry to civil lawsuits and DHS to third-party lawsuits. Mr. Durbin, can you comment upon the impact that this could potentially have not only on your industry, but also on the information that should be protected?

Mr. DURBIN. Well, as I mentioned in my testimony, we do share the concerns that DHS expressed this morning, that—about the po-

tential release of sensitive and classified information in judicial settings.

I think, more broadly, and to your point and as others have noted this morning, as well, you know, success of a security regime here and a risk-based program really does require an atmosphere of trust and collaboration between the DHS and the regulated community here.

As I said, we are—in no way want to be perceived of apologizing for either a facility or the agency if they are not complying with the regulations of the—you know, of the statute. However, we simply think that litigation is the wrong way to go about making sure that that occurs and succeeds.

Mr. MCCAUL. By opening this up to litigation, would that in any way damage the level of cooperation and trust between the industry and the Government?

Mr. DURBIN. That is one of our fears, that it would end up undermining that trust that we think really has been built, both, frankly, at the State level and at the Federal level.

Mr. MCCAUL. Mr. Jeppeson, a final question, if the Chair would indulge. I know the Farm Bureau has come out openly against this bill. Can you elaborate on the impact this would have on all the farmers in my district and elsewhere?

Mr. JEPPESON. I think from our facility perspective to start with, one of the concerns that we really have is the sharing of information, as has been voiced by other members of the panel and homeland security people before.

So if the bill goes through as written, then we are required to share facility security plans and facility security assessments with people that we don't feel should be privy to that type of information.

As to the effect on the members of your district, sir, any changes in the costs from the manufacturer down to the distributors, such as—to the transporters down to the retailers is obviously going to have an impact on the farmer, the end user.

So, to answer your question, it is going to have an impact if there is an additional cost on the front end of it.

Mr. MCCAUL. They are having a pretty tough time right now, from what I gather. So I thank the Chair for indulging me.

Mr. PASCRELL. The gentleman from Texas needs to be aware I want to update him that the administration did have some question about the implementation, but was not knowledgeable at the time of the progress that we have made in negotiations with all the entities.

So as far as the administration—and correct me if I am wrong, staff—the administration is perfectly happy with moving along if we have, you know, all our eggs in place.

Mr. MCCAUL. If the gentleman will yield——

Mr. PASCRELL. Sure.

Mr. MCCAUL. The testimonies we heard from the prior panel of representatives from the Department of Homeland Security, specifically stated that a 1-year extension would be in the best interest of the administration.

Mr. PASCRELL. Well, Congress opposes and the executive disposes. So that is where we are at this particular time——

Mr. SOUDER. In all fairness, they have had only 2 days to look at it.

I want to put on the record a couple of things for clarification, because I am comparing apples to apples. In the earlier example, the American banking industry was regulated, and that 60 percent wasn't the problem. It was the 40 percent that didn't have any regulations at all, the non-bank sector, and the banks that got into the non-bank sector.

Here we have a regulated sector, and we more closely resemble the banking industry arguing over how regulated they should be, rather than whether they should be like the non-banks that caused the financial sector problems.

Second, Mr. Lungren almost convinced me maybe, because I like ethanol, that maybe the Government should make regulations, but I will try to hang loose here and not get into an ethanol debate.

The third question I want to get into is this process about which I thought Mr. Langerman made a good point. Mr. Baldauf, if New Jersey recommends to a company that this is a process that could, in fact, save them money, those savings are presumably over the life of the process?

Mr. BALDAUF. Yes.

Mr. SOUDER. Do you take into consideration whether that company has the cash to do it? Dr. Langerman made a very good point that sometimes things don't appear the way they actually are, whether it is the layout of the building, or whether it is the mix of the processes that are confidential.

Unless we are going to set up a TARP program to fund IST, part of the challenge right now for more marginal companies is, a question of feasibility, whether they have the cash, since the long term is irrelevant. In the bill, the only thing it said is that the owner of the chemical is to "continue in business". The bill does not indicate whether money is lost, or if it gradually gets lost putting the owner in a risky position. This will simply say "continue in business."

Mr. PASCRELL. Would the gentleman let the witness answer the question? I want to refer you to Section 2111, which talks specifically about the costs and a technical liability. It is in the bill.

Mr. BALDAUF. In New Jersey's experience, we in no way, shape or form recommend IST options or force them on a company. It is possible, if we are aware that Company B does something in a different State, you should look into this, but we would not force it or recommend it.

However, if it was on the company's list of recommendations and the company came to us and said, "Feasibility this is going to put us out of business. We can't afford it"——

Mr. SOUDER. I didn't say it necessarily put the company out of business. I said it would cash strap them further. I was in the retail franchise business. People would walk in and go, "Improve the lighting. It will increase your sales. Improve your radio advertising. It will increase your sales. Improve your distribution, or painting on the trucks. It will improve your sales." If you do them all, you will go out of business.

The challenge here is, infeasibility. It is not whether they will go out of business, but rather what other tradeoffs do they have? Is this truly essential to its security? Or is it just a preference?

What is the marginal potential gain versus the cost to the industry, not whether they will go out of business, but rather within the range of their activities and within the realm of competitive and international business, for example issues that Mr. Jeppeson raised in the tradeoffs of farmers' yield, by ending use of the product?

Technically, this doesn't cover transportation, so just-in-time inventory may be better for the company to reduce costs, however, we are putting more chemicals on the road more frequently without even the jurisdiction to cover that area.

My specific question is, in terms of feasibility, do you look at questions of cash flow, management, timing, and implementation as opposed to just whether or not companies will go out of business?

Mr. BALDAUF. The answer is——

Mr. PASCRELL. Can I read that section of the bill, please, before you answer?

Mr. SOUDER. Mr. Pascrell, can I ask my question?

Mr. PASCRELL. All right. You answer, and then I will read the bill to you.

Mr. SOUDER. Then we can——

Mr. PASCRELL. It is obvious you didn't read it. Go ahead.

Mr. BALDAUF. The answer is——

Mr. SOUDER. I asked him about——

Mr. BALDAUF [continuing]. Yes, we do look at all those areas when we are looking at the feasibility. From our experience, the facilities that have done IST at their site as a part of our review to our knowledge have not put themselves at a competitive disadvantage because of IST options they have implemented since our rules came in place.

Mr. SOUDER. Is it true, that only 45 of the 157 chemical companies in New Jersey are evaluated? In other words, have you done a risk assessment, rather than doing this with every company?

Mr. BALDAUF. A risk assessment, an IST evaluation were the 45 chemical ones that were done, where 42 additional TCPA sites are doing the IST evaluations now, so there will be a total of 87 IST evaluations done in the State at sites.

Mr. SOUDER. How did you determine which ones were assessed?

Mr. BALDAUF. They were the high risks. They were the ones in our toxic catastrophe prevention program, our State version of EPA's 112(r) program.

Mr. SOUDER. So in the State of New Jersey, which is being held up as a model here, about half will eventually at some point be targeted, because you are doing a risk assessment. You don't make mandatory recommendations. You don't have the Department of Homeland Security making an arbitrary decision and then letting the company appeal with the Department of Homeland Security as the judge and jury.

You try to limit mandates—as a State model. However, that really isn't what this bill is doing. Would you like to allow civil lawsuits in New Jersey? Do you think that would be helpful?

Mr. BALDAUF. The way——

Mr. SOUDER. Would you like to be sued?

Mr. BALDAUF. The way TCPA is delegated from EPA, EPA has that citizen suit language in it. It tracks pretty close. I am not a lawyer, but it seems to track pretty close. TCPA, over the almost, well, 20-some years we have had it, we haven't had an instance where the citizen suit was—we got to that point.

Mr. PASCRELL. So, in other words, we have—time is up. We are going to go vote.

But, in other words, Mr. Baldauf, there has not been a flood of litigation in the State of New Jersey. True or false?

Mr. BALDAUF. I can speak for the TCPA program, and that is true. There has not been.

Mr. SOUDER. Mister——

Mr. PASCRELL. Thank you. The committee has received written testimony——

Mr. SOUDER. Mr. Chairman, when you ask a question that contradicts some of my testimony, may I respond?

Mr. PASCRELL. Go right ahead.

Mr. SOUDER. As I understand it, you said that you had delegated potential lawsuits coming off of EPA. There is not a statute that says they can sue you directly. It is a presumed right; is that correct?

Mr. BALDAUF. That is correct.

Mr. PASCRELL. There hasn't been. There hasn't been, period. We are talking about how many years, 20?

Mr. BALDAUF. 1986.

Mr. SOUDER. He doesn't have a clause in the bill that says that—the attorneys would have to go through their EPA-designated transferred authority.

Mr. PASCRELL. My friend from Indiana, are you finished? Thank you.

The committee has received written testimony from Greenpeace. Without objection, it will be added to the hearing record.

Hearing no objections, so ordered.

[The information follows:]

PREPARED STATEMENT OF RICK HIND, LEGISLATIVE DIRECTOR, GREENPEACE

JUNE 16, 2009

HOMELAND SECURITY REGULATIONS (CFATS) ARE WHOLLY INADEQUATE

COMPREHENSIVE LEGISLATION IS ESSENTIAL TO SECURITY

INHERENTLY SAFER TECHNOLOGIES WILL ELIMINATE THE CATASTROPHIC CONSEQUENCES OF AN ATTACK

"I feel very comfortable that we've taken all the reasonable steps, but obviously if someone wants to fly an airplane into a plant, it's very hard to guard against it."—*Charles O. Holliday, Jr., Chief Executive Officer, DuPont, June, 2007.*

"You know, the threat is just staring us in the face. I mean, all you'd have to do is to have a major chemical facility in a major metropolitan area go up and there'd be hell to pay politically. People will say, 'Well, didn't we know that this existed?' Of course, we knew."—*Former Senator Warren Rudman (R–NH), November, 2003.*

The September 11 terrorist attacks successfully used our own infrastructure against us with tragic results. They also demonstrated that tight perimeter security, such as in the case of the Pentagon, is incapable of preventing such attacks. Should a chemical plant be targeted, a truck bomb, a small plane, helicopter, or a high-powered rifle would easily render the industry's current reliance on fence-line security

totally useless. In fact, U.S. chemical facilities have been referred to as "pre-positioned" weapons of mass destruction (WMD).

Reports during the summer of 2007 of renewed terrorist's capacity to carry out attacks inside the United States are a sobering reminder of the nearly 6 years of neglect following the 9/11 attacks. The vulnerability of U.S. chemical plants to terrorism and serious accidents such as the 1984 disaster in Bhopal, India have been widely recognized. The potential magnitude of these risks surpasses the 9/11 attacks. Once released these chemicals and gases can remain dangerous for up to 14 miles in an urban area (20 miles in a rural area) and put the lives of millions of people at risk.

The nature of these risks meets any definition of a weapon of mass destruction. The manner in which people would be killed and injured is terrifying. Poison gases such as chlorine will literally melt the lungs of its victims causing them to drown in their own lung fluid (pulmonary edema). Survivors could be left with life-long disorders.

Following the 9/11 attacks it was reported that 9/11 ringleader, Mohamed Atta, visited a Tennessee chemical plant asking lots of questions (December 16, 2001 Washington Post).

In the first 6 months of 2007 at least five successful terrorist attacks in Iraq used relatively small (150 to 250 pound) cylinders of chlorine gas to kill dozens of people. As a result the DHS began briefing local bomb squads and chemical plants across the country (April 24, 2007 USA Today).

In February and April, 2007 thefts of 150-pound cylinders of chlorine gas occurred in California prompting questions by Members of this committee to the DHS about their response to these thefts, any other thefts, and plans to eliminate these vulnerabilities by using inherently safer technologies.

U.S. chemical facilities were not built or designed to defend against terrorist attacks. And predicting where an attack will take place is a fool's errand. No one predicted that Timothy McVeigh would attack the Federal Building in Oklahoma City in 1995, killing 168 innocent people.

On June 25, 2007, DuPont Chairman Charles O. Holliday Jr. told the media that he worries most about a computer system failure or a security breach at one of the company's chemical plants around the world. "I feel very comfortable that we've taken all the reasonable steps, but obviously if someone wants to fly an airplane into a plant, it's very hard to guard against it," said Holliday.

The Nation's most infamous example of this threat is the Kuehne Chemical Company in South Kearny, New Jersey. According to Kuehne's own reports to the U.S. Environmental Protection Agency (EPA), their plant puts 12 million people in the Newark-New York City region at risk in the event of a catastrophic release of chlorine gas stored on-site. This is the largest single chemical plant risk in the Nation, but according to the DHS more than 3,000 other plants each put 1,000 or more people at risk. More than 100 U.S. plants each put a million or more people at risk, according to their reports to the EPA.

What makes the Kuehne plant inherently dangerous is the use of large quantities of chlorine gas to produce relatively harmless liquid bleach (sodium hypochlorite). While Kuehne's largest business is water disinfection, there are many safer alternatives to chlorine, including ultra-violet light, ozone, and liquid bleach. A company in the very same business as Kuehne, K2pure Solutions, plans to build multiple facilities in the United States using a new just-in-time process for producing chlorine gas that will not only eliminate the need for any bulk shipments of chlorine gas but will also limit on-site storage of chlorine gas to approximately 50 pounds at any one time. More details on their technology are at: *http://www.k2pure.com/*.

WHAT HAPPENS WHEN PERIMETER SECURITY FAILS?

Continuing negligence by industry or Government will not be judged kindly by posterity. Stephen Flynn, Senior Fellow in National Security Studies at the Council on Foreign Relations wrote in his book, *America the Vulnerable,* "The morning after the first terrorist strike on this sector, Americans will look around their neighborhoods and suddenly discover that potentially lethal chemicals are everywhere, and be aghast to learn that the U.S. Government has still not developed a plan to secure them. The subsequent political pressure to shut down the industry until some minimal new safeguards can be put in place—as we did with commercial aviation following the 9/11 attacks—will be overwhelming."

- In July, 2004, the Homeland Security Council estimated that an attack on a single chlorine facility could kill 17,500 people, severely injure an additional 10,000 and result in 100,000 hospitalizations and 70,000 evacuations.

- In January, 2004, the U.S. Naval Research Laboratory testified before the Washington, DC City Council warning that 100,000 people could be killed or injured in the first 30 minutes of a catastrophic release of a tank car of chlorine or similar chemical within blocks of Capitol Hill. They further estimated that people could "die at rate of 100 per second."
- In June, 2003 FBI specialist on weapons of mass destruction, Troy Morgan, in a speech at a chemical industry conference warned, "You've heard about sarin and other chemical weapons in the news. But it's far easier to attack a rail car full of toxic industrial chemicals than it is to compromise the security of a military base and obtain these materials."

THE 2006 INTERIM CHEMICAL SECURITY LAW AND REGULATIONS ARE FATALLY FLAWED

The best that can be said for the new Department of Homeland Security (DHS) chemical security regulations, "Chemical Facilities Anti-Terrorism Standards" (CFATS) is that they represent an official recognition of the widespread vulnerability of U.S. chemical plants to terrorism.

The new DHS rules are based on a 744-word "rider," Sec. 550 of the Homeland Security Appropriations Act 2007. Sec. 550 authorizes "interim" regulations that will expire on October 4, 2009. It was enacted with the expectation that Congress would expeditiously enact permanent, comprehensive legislation to "supersede" Sec. 550's regulations.

The DHS rules finalized on November 20, 2007 fail to provide adequate protection for the Nation and communities living in the shadow of thousands of U.S. chemical plants.

THE INTERIM CHEMICAL SECURITY LAW AND DHS RULES (CFATS)

- Prohibit the DHS from requiring any "particular security measure" including safer technologies that can reduce or eliminate the magnitude of an attack at virtually any chemical facility.

To satisfy the chemical lobby, this was added to Sec. 550(a) to prevent the use of safer technologies as a security measure but it also undermines the effectiveness of the entire statute by undercutting the DHS to credibly require ANY "particular security measure."

- Fail to ensure priority protection of the 3,400 to 4,391 facilities each of which put 1,000 or more people at risk according to the DHS.

The DHS reports that they now have approximately 6,000 facilities in one of the four risk tiers with 140 in risk tier 1 and 680 in tier 2. This leaves approximately 5,000 in the lower two tiers with risk profiles that likely put 1,000 or more people at risk. Furthermore, Sec. 550 gives the Secretary of the DHS full discretion in determining which facilities will be considered to "present high levels of security risk." Clearly more guidance is needed in prioritizing high-risk facilities.

- Fail to protect approximately 2,600 U.S. water treatment plants as well as several other exempted categories. Approximately 100 water treatment plants each put 100,000 or more people at risk.

This exemption, also in Sec. 550(a), covers public water systems regulated by the Safe Drinking Water Act and the Federal Water Pollution Control Act, the Maritime Transportation Security Act of 2002, facilities owned or operated by the Department of Defense, Department of Energy or regulated by the Nuclear Regulatory Commission. In June 2007 Secretary Chertoff spoke to water facilities operators warning them that even though they are exempt under the interim law they are "on the hook because you're going to have to do this yourselves because the consequences of ignoring risks . . . will be quite severe." Once again this gap needs to be closed with comprehensive legislation.

- DHS asserted the authority to prohibit States from establishing stronger security standards.

Without any explicit statutory authority, the DHS asserted the authority to preempt State programs that "frustrate" their regulations. Although no State has yet been cited, this policy could have had a chilling effect on new programs and appears aimed at serving a chemical industry agenda to prevent States, such as New Jersey, from requiring safer more secure technologies. However, this provision was reversed in an amendment to Sec. 550 by Senator Frank Lautenberg (D–NJ) in the DHS omnibus spending bill in December 2007. However, the interim law expires in October 2009 and permanent legislation must retain the right of States to set more protective standards than the Federal Government.

- Fail to protect the public's right-to-know by asserting authority to classify previously public information as secret, including information used in civil or criminal enforcement actions.

Sec. 550(c) and resulting new DHS regulations overreach by going beyond protecting common-sense security plans and vulnerabilities into undermining enforcement and covering up governmental incompetence or corporate liability.

- Fail to require meaningful involvement of plant employees in developing Security Vulnerability Assessments and Site Security Plans.

The DHS responded to comments saying that "there is nothing in the rule that prohibits chemical facilities from involving employees in their security efforts." While we should be thankful for that, such a policy fails to tap the expertise of a workforce that is formally trained in chemical hazard protection, accident prevention and emergency response. Employees are the first line of defense and the eyes, ears, and noses of chemical facilities. The failure to formally involve employees in developing vulnerability assessments and security plans is foolish from both a security and scarce resource perspective.

- Fail to include whistleblower protections that would enhance enforcement.

The DHS rules promise to set up an anonymous tip line but ignores the long history of whistleblowers who have exposed waste, fraud, and abuse. And in this case they could save thousands of lives.

- Fail to enhance enforcement by allowing citizens to sue to enforce the law, while allowing companies liberal appeals procedures to challenge DHS orders and decisions.

Sec. 550(d) prevents anyone but the DHS from suing a plant owner or operator to enforce any provision of this law. Once again, the law is balanced in favor of protecting the rights of recalcitrant facilities and/or violators and leaving innocent citizens facing overriding lethal risks with no legal recourse.

- Prohibit the public from knowing which facilities are "high-risk" or "Top Tier" plants.

Both DHS and corporate credibility will be in jeopardy if communities cannot determine if a local chemical plant that poses a threat is being dealt with or is in violation or is resisting orders by the DHS. Nor will communities have the peace of mind of knowing whether a plant has voluntarily converted to safer technologies and no longer poses a threat to their community.

PRIORITIZE THE MOST DANGEROUS CHEMICALS

The largest category of hazardous substances that can be transformed into chemical weapons of mass destruction (WMDs) are toxic-by-inhalation (TIH) gases. According to the U.S. EPA just four TIH gases account for 55 percent of all chemical processes that threaten communities Nation-wide. These are:

- anhydrous ammonia—32.5% (8,343 processes);
- chlorine—18.3% (4,682 processes);
- sulfur dioxide—3% (768 processes);
- hydrogen fluoride—1.2% (315 processes).

Unfortunately, the DHS has set dangerously high threshold quantities for many of these substances such as: Anhydrous Ammonia—10,000 lbs.; Chlorine—500 to 2,500 lbs.

Given the successful terrorist attacks in Iraq using small quantities of chlorine (approximately 150 lbs.) and recent thefts in the United States, it would be prudent to establish lower threshold quantities for such ubiquitous hazardous substances. Lower thresholds won't necessarily trigger more regulations, they simply give the DHS a more complete picture of where hazards are. Regulations should be driven by populations at risk.

SAFER PROCESSES & TECHNOLOGIES ELIMINATE THE CONSEQUENCES OF AN ATTACK

While these chemical processes deserve high priority because of their prevalent use at thousands of facilities, especially at high-threat facilities, there are widely available safer alternatives for each of them. For example, the Center for American Progress (CAP) conducted an analysis of EPA's Risk Management Program data and identified 284 facilities that have converted since 1999. See full report at: *http://www.americanprogress.org/issues/2006/04/b681085_ct2556757.html*.

Examples of conversions from these chemicals and continuing threats include:

- More than 200 water treatment facilities (including Washington, DC) converted to safer alternatives such as ultraviolet light, eliminating the use of chlorine and sulfur dioxide gas. But over 100 water treatment plants still threaten more than 100,000 people.
- Ninety-eight petroleum refineries use safer alternatives to hydrogen fluoride (HF). But 50 refineries still threaten millions of people with the use of HF.

- At least 36 electric power plants use safer alternatives to anhydrous ammonia gas such as dry urea. But 166 power plants still use anhydrous ammonia gas each threatening an average of 21,506 people.

While the CAP analysis proves the technological feasibility of safer alternatives, CAP estimates that at this rate of conversion, without any new regulatory requirements, it will take 45 years to eliminate hazards that pose the highest risk to America's hometowns.

The CAP analysis shows that 87% of the converted facilities spent less than $1 million and half spent less than $100,000. Clearly these conversion costs pale in comparison to the cost of disaster response, relocating communities, defending against personal injury law suits or resolving environmental clean up liability or even conventional security costs.

A 2006 GAO report (GAO–06–150), *Homeland Security: DHS Is Taking Steps to Enhance Security at Chemical Facilities, But Additional Authority Is Needed,* concluded, "Implementing inherently safer technologies potentially could lessen the consequences of a terrorist attack by reducing the chemical risks present at facilities, thereby making facilities less attractive targets."

A Government Accountability Office report (GAO–05–165) identified chlorine gas and 90-ton chlorine rail cars as "among the top five terrorist-related wastewater system vulnerabilities." Among the top three recommendations: "Replacing gaseous chemicals used in wastewater treatment with less hazardous alternatives." In addition, the largest majority of experts gave replacing these chlorine facilities the highest priority for Federal funding.

EXAMPLES OF SAFER TECHNOLOGIES AT WATER FACILITIES

For example, the Blue Plains sewage treatment plant in Washington, DC halted its use of chlorine and switched to safer chemicals just 8 weeks after the 9/11 attacks due to fears of another attack. The plant had seven rail cars of chlorine onsite following the 9/11 attacks. The conversion only cost approximately $0.50 per year for each water customer. In other words, by using safer technologies we can neutralize and eliminate targeting by terrorists and prevent catastrophic accidents as well at negligible costs.

Switching to safer "drop-in" chemicals, such as relatively harmless sodium hypochlorite (liquid bleach) without a long-term plan can leave lingering risks in communities where the bleach is produced. While switching to bleach at a sewage plant clearly eliminates the immediate hazard at that facility, the bleach formulators who use and store large quantities of chlorine gas to make bleach still pose serious risks to workers and surrounding communities.

A new North American company, K2pure Solutions, have announced plans to build multiple facilities in California and other States using a new just-in-time process for producing chlorine gas that will not only eliminate the need for any bulk shipments of chlorine gas but will also limit on-site storage of chlorine gas to approximately 50 pounds at any one time. More details on their technology are at: *http://www.k2pure.com/*.

Bleach and water disinfectant formulators are also well positioned to guide their customers toward other safer alternatives such as ozone and ultra-violet light (UV) which are widely available and do not pose catastrophic hazards. UV is superior to chlorine or chlorine bleach because it also kills deadly anthrax and the parasite cryptosporidium which chlorine does not. In 1993 more than 100 people were killed and 400,00 were made sick by cryptosporidium when it overwhelmed the chlorine treated drinking water system of Milwaukee, Wisconsin.

Q&A ON METHODS TO REDUCE THE CONSEQUENCES IN SEC. 2111 OF THE JUNE 9, 2009 HOMELAND SECURITY COMMITTEE DISCUSSION DRAFT OF "THE CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2009"

Question. Does the bill require ALL chemical facilities to adopt "methods to reduce the consequences of a terrorist attack"?

Answer. No, this requirement is conditional and only covers the highest-risk (Tiers 1 & 2) facilities selected by the Department of Homeland Security (DHS). As of May 2009, the DHS designated approximately 820 facilities in the two highest risk tiers.

The conditions for implementing safer methods and technologies are:

- They must significantly reduce the risk of death or injury;
- They must not shift risks to other U.S. facilities;
- The must be technically feasible;
- They must not impair the plant's ability to do business at that location.

Question. Will wastewater facilities be regulated and therefore be required to implement safer methods or technologies?

Answer. Yes, the bill does include wastewater facilities. Only those water facilities that are designated in the highest risk tiers by the DHS would be conditionally required to implement safer methods or technologies.

Question. Will this requirement burden facilities with unacceptable costs?

Answer. No, a survey by the Center for American Progress identified 284 facilities that switched to safer methods since 1999. They found that 87 percent spent less than $1 million, and one half reported spending less than $100,000. And 34% of facilities expected "cost savings or improved profitability." Washington, DC converted its sewage treatment plant within 90 days after the 9/11 attacks for less than $0.50 per water customer per year. The bill also authorizes funding for 3 years to defray the cost of implementing safer methods and technologies.

Question. Will this requirement result in job losses?

Answer. No, plants that invest in the safety and security of their infrastructure invest in American communities and eliminate or reduce their: liability, regulatory costs and improve workplace safety. Major trade unions, such as the United Steelworkers, United Auto Workers, International Chemical Workers/UFCW and Communication Workers of America support the bill.

Question. Will the use of safer technologies shift risks locally or nationally?

Answer. No, the bill specifically prohibits the shifting of these risks to other facilities in the United States.

Question. Does the bill micro-manage chemical facilities by requiring them to adopt a specific safer technology?

Answer. No, each high-risk facility is free to choose the most appropriate technology or process for their facility.

Question. Should Government require safer design and technologies to be used in the private sector?

Answer. Yes, the Federal Aviation Administration (FAA) has required airplane security and safety standards for decades. The feasibility and cost-effectiveness are balanced against security and safety needs. After 9/11 all commercial airliners were required to harden cockpit doors and X-ray machines for airline baggage were installed at hundreds of airports.

Question. Is this requirement more appropriate for environmental legislation than security legislation?

Answer. No, in 2006 the GAO (GAO–06–150), concluded that "Implementing inherently safer technologies potentially could lessen the consequences of a terrorist attack by reducing the chemical risks present at facilities, thereby making facilities less attractive targets." And a June 2006 National Academy of Sciences study endorsed the adoption of safer technologies as "the most desirable solution to preventing chemical releases" from a terrorist attack.

In a February 27, 2008 statement the Association of American Railroads said, "It's time for the big chemical companies to do their part to help protect America. They should stop manufacturing dangerous chemicals when safer substitutes are available. And if they won't do it, Congress should do it for them in the Chemical Facility Anti-Terrorism Act of 2008."

Question. Can different types of chemical facilities use safer methods to reduce the consequences of risks at more than 6,000 regulated facilities?

Answer. Yes, many types of facilities are among the 284 facilities that have already converted since 1999. Most facilities (89 percent) are "users" of chemicals rather than chemical makers. These plants can often switch to safer methods even faster than chemical makers.

ADDITIONAL EXPERT OPINIONS ON SAFER TECHNOLOGIES

2006 GAO report (GAO–06–150), *Homeland Security: DHS Is Taking Steps to Enhance Security at Chemical Facilities, But Additional Authority Is Needed,* concluded, "Implementing inherently safer technologies potentially could lessen the consequences of a terrorist attack by reducing the chemical risks present at facilities, thereby making facilities less attractive targets."

May 2006 report by the National Academy of Sciences, "Terrorism and the Chemical Infrastructure: Protecting people and Reducing Vulnerabilities," recommended more research on new technologies but stated, "The most desirable solution to preventing chemical releases is to reduce or eliminate the hazard where possible, not to control it. This can be achieved by modifying processes where possible to minimize the amount of hazardous material used, lower the temperatures and pressures

required, replace a hazardous substance with a less hazardous substitute, or minimize the complexity of a chemical process."

"Railroads agree, and strongly support efforts aimed at finding and utilizing 'inherently safer technologies' as substitutes for hazardous materials, especially TIH."—Association of American Railroads (AAR) President, and CEO Edward R. Hamberger in testimony before the House Transportation and Infrastructure Committee's Railroad Subcommittee.

Retired Rohm and Haas engineer, Dennis Hendershot advised, "The first solution to a process safety problem should always be to get rid of the hazard, not control it."

Trever Kletz, formerly with Imperial Chemical Industries (ICI) said, "The very best way to prevent an explosion is to simply replace the material that explodes with one that does not or at least keep the stock down so low that it hardly matters if it all leaks out."

STATE PREEMPTION

As the DHS acknowledged in their proposed rule, "Sec. 550 was silent on preemption" of States' authority to set stronger security standards. However, the DHS chose to assert Federal preemption without statutory authority in an apparent effort "to preserve chemical facilities flexibility to choose security measures." Fortunately, this provision was reversed in an amendment to Sec. 550 by Senator Frank Lautenberg (D–NJ) in the DHS omnibus spending bill in December 2007. However, the interim law expires in October 2009. Any permanent legislation must clearly retain the right of States to set more protective standards than the Federal Government.

While few would argue that the Federal Government should not preempt States' authority to establish minimum standards, it is self-defeating to bar States from setting stronger security standards by establishing a Federal limit or ceiling on security protections.

The Federal Government should welcome every State pitching in to address the unique situation it faces. New Jersey was the first State to implement a chemical security program that requires an assessment of safer, more secure technologies. According to Governor Corzine, a Federally mandated roll-back of New Jersey's protections "could have the effect of weakening chemical security and leaving New Jersey and its neighbors—including New York City—more vulnerable to devastation from a terrorist attack on our chemical facilities."

RISK-BASED PERFORMANCE STANDARDS AND SAFER TECHNOLOGIES

A safer technology provision was contained in the 2006 and 2008 House Homeland Security Committee passed bills, H.R. 5695 and H.R. 5577 respectively. Those bills required priority chemical facilities to utilize safer, more secure technologies, where feasible and cost-effective to reduce or eliminate the magnitude of an attack on a chemical facility. By substituting inherently dangerous chemicals or processes with inherently safer technologies (IST) the risk of a catastrophic release at a chemical plant can be eliminated or dramatically reduced. IST is the best tool available to completely mitigate facility vulnerabilities and safe guard communities.

The DHS has had wide discretion to establish "risk-based performance standards." The DHS could have chosen to establish performance standards that deter an attack or mitigate the consequence of an attack by safeguarding, reducing, or eliminating the risk or desirability of the facility as a target. This could have been achieved by issuing guidance to suggest that counter measures include the use of safer, more secure technologies to meet the performance standard or opt out of the regulations entirely.

In fact, the DHS mentioned in their *Federal Register* notice of proposed rule making, Annex B, page 78315, that a "security event may be larger than the typical EPA Risk Management Program (RMP) worst-case analysis." In a 2001 U.S. Army Surgeon General study estimated that 900,000 to 2.4 million people could be killed or injured in a terrorist attack on a U.S. chemical plant in a densely populated area. According to the Environmental Protection Agency (EPA), 106 chemical plants threaten a million or more people. Chlorine gas is the most common industrial chemical hazard at the 100 highest risk plants. According to the Chlorine Institute, a chlorine gas cloud can drift through a city and remain dangerous for at least 14 miles and 20 to 25 miles in rural areas.

These alternatives include a wide range of options such as process changes, chemical substitutions, smaller storage vessels or any other measures that will reduce or eliminate the inherent hazard posed by the facility's storage, use, or production of an ultra-hazardous substance. This range of options is far from requiring any

"particular security measure," it is up to the plant operator to choose which safer technology, process, chemical, or storage vessel reduces or eliminates these risks.

Only about 13 percent of the universe of facilities in the EPA's Risk Management Program (RMP) are members of the chemical manufacturers trade association, the American Chemistry Council. Whereas the overwhelming majority of RMP facilities are chemical users, including: Petroleum refineries that use hydrogen fluoride; power plants that use anhydrous ammonia; and water treatment plants that use chlorine and sulfur dioxide gas. All of these have safer alternatives already widely in use at hundreds of facilities.

BENEFITS OF SAFER TECHNOLOGIES

The use of safer technologies offers a more competitive and stable business plan with fewer regulations, potentially zero liability, sustainable profitability, better relationships with workers and neighboring communities, and no threat of a catastrophic attack or accident. Specifically, the use of safer technologies will likely result in a facility no longer being subject to DHS's CFATS regulations.

Obviously, chemical facilities located on-site at nuclear power plants, water treatment works, iconic facilities such as Disney World, Camp David, etc. also need to be considered for priority protection. However, using safer technologies as a countermeasure at these facilities will lessen the lethality that an attack on them would pose.

Given DHS's finite resources and the late start the Nation has in addressing chemical security it is urgent that we use safer technologies to mitigate the consequence of an attack. By doing so we eliminate risks, safeguard communities and save scarce money and resources to protect targets that cannot be so neutralized (airports, U.S. Capitol, etc.).

The Annex in the DHS proposed rule suggests that plant owners and operators should assume that "international terrorism" is possible at every facility. A better assumption would be to recognize that every plant could be the target of someone no one anticipated. The bombing of the Federal Building in Oklahoma City in 1995 was initially thought to be committed by "Middle Eastern terrorists." It turned out to be the insane act of a U.S. Army trained Gulf War veteran. How many more Americans have been trained in the art of war since then? Other incidents and threats ranging from Columbine, to international drug cartels and the spectacularly failed intelligence leading up to the 9/11 attacks, makes guessing where such an attack will come from nothing more than a fool's errand. The only prudent thing to do is attempt to remove unnecessary vulnerabilities as soon as technically feasible. Even without terrorist attacks, we will save countless lives in accident prevention.

TOP-TIER HIGH-RISK FACILITIES

According to a June 2005 Congressional Research Service report examining EPA's RMP database, the EPA has identified 6,883 facilities that each put 1,000 or more nearby residents at risk and 553 of these put 100,000 or more people at risk.

However, using a methodology that includes only one-sixth the area surrounding a plant, the Department of Homeland Security (DHS) has estimated at different times a range of 3,400 to 4,391 chemical facilities that each put 1,000 or more people at risk. Of these, DHS identified 272 facilities that each put 50,000 or more people at risk. The DHS calculation looks at a 60 degree "kill zone" down wind from a facility. The EPA's RMP program uses a methodology that creates a 360 degree "vulnerability zone" around a facility. Under the RMP, chemical plant owners and operators submit worst-case disaster scenarios using U.S. Census data to calculate the number of people living in each "vulnerability zone." In Annex B of the DHS proposed rule on FR page 78315 warns, "the security event may be larger than the typical EPA RMP worst case analysis."

At a minimum, any facility that endangers 1,000 or more people should be considered a "top tier" or "high-risk" facility.

ALTERNATIVE SECURITY PLANS (ASPS)

ASPs were written by and for oil and chemical industry trade associations. All of them avoid requiring safer technologies and do not represent the best way to safeguard communities at risk. Congress should not allow the DHS to substitute ASPs for Site Security Plans for high priority facilities.

CONSULTATION WITH OTHER AGENCIES

As a new department with minimal resources, the DHS should routinely collaborate and consult with other more experienced Government agencies. In their Janu-

ary 2006 report (GAO–06–150) the Government Accountability Office concluded, "By tapping EPA's expertise on chemical facilities and general facility safety issues, DHS can enhance its efforts to identify high-priority facilities and assess facility vulnerabilities as well as better target Government resources to those facilities posing the greatest risk."

Congress should require the DHS to consult with the EPA as the GAO recommended and develop guidance documents to rapidly identify high-risk facilities and promote the use of inherently safer technologies as a mitigation and countermeasure technique to reduce risks and safeguard communities. Similar consultation with the U.S. Chemical Safety and Hazard Investigation Board, which has enormous experience in diagnosing chemical accidents and recommending mitigation techniques, should be aggressively pursued.

BUFFER ZONES

According to the EPA (Belke, 2000), the high number of facilities that put residents at risk as far as 14 to 25 miles away from a release "is primarily due to the prevalent use of 90-ton rail tank cars for chlorine storage." The Chlorine Institute pamphlet 74, "Estimating the Area Affected by a Chlorine Release" (1998), shows a plume can be hazardous up to 41.5 miles.

The Bureau of Alcohol Tobacco, Firearms, and Explosives regulations (27 CFR 555.218) prohibits the storage of a similar quantity of explosives within 2,010 feet of inhabited buildings.

In 2006 the Netherlands and Akzo Nobel completed a $270 million program to relocate chlorine production facilities within Holland to a location that will eliminate the transport of chlorine by rail in the Netherlands.

Given the large potential plume of toxic-by-inhalation substances and large quantities of some flammables such as propane, a much larger buffer zone is called for with regard to high-risk TIH facilities.

Without the use of safer technologies to convert existing plants into safer functioning plants, relocating them to more remote areas should be a an option, especially if an owner/operator insists that there is no safer alternative.

Short of relocation, the DHS should be required to issue guidance to mitigate these threats by using smaller storage vessels that would help reduce risks, deter, and discourage potential attackers. In addition, the DHS should facilitate owner/operator collaboration with local government and emergency responders to conduct practice evacuation drills. If a plant cannot substantially reduce its risks, the owner/operators and Government agencies have an obligation to ensure that at-risk citizens can reasonably be evacuated.

New facilities should be prohibited from locating in densely populated areas.

BRIEF HISTORY OF FEDERAL INACTION

While the DHS proposed rule issued December 28, 2006 contained a "Brief History of Federal Pre-Existing Chemical Security and Safety Programs," it ignored the "general duty clause" in 13 Section 112(r) of the 1990 Clean Air Act which gives the President and the Environmental Protection Agency (EPA) broad authority to require chemical facilities to prevent catastrophic releases of poison chemicals. After drafting legislation, guidance, and regulations in June 2002, the administration withdrew its proposals, in part, under pressure from the oil and chemical industry.

On July 22, 2004 "The 9/11 Commission Report" identified four failures in preventing an attack by the U.S. Government, the first of which was the failure of "imagination." A continuing lack of imagination today exposes millions of Americans to Bhopal magnitude risks largely because new laws or regulations have not yet been adopted to clarify the chemical industry's obligation to prevent catastrophic releases at U.S. chemical plants. In June, 2002 a promising proposal drafted by the EPA could have completed the first phase of such a program by the middle of 2003 but it was derailed by the White House in the fall of 2002. It was not unlike a bill (S. 1602) authored in 2001 by Senator Jon Corzine (D–NJ) and based on a bill introduced by Senator Frank Lautenberg (D–NJ) in 1999.

The EPA's 2002 proposal included "substituting less hazardous chemicals for extremely hazardous ones." The conversion of Washington, DC's main sewage treatment plant from chlorine to safer chemicals, just 8 weeks after 9/11, exemplifies the feasibility of such a strategy. At the time of the attacks they had 7 90-ton rail cars of chlorine stored on-site.

Of the 15,000 facilities required to report their worst-case chemical disaster scenarios to the EPA's RMP, 7,728 plants pose an "off-site consequence" (OSC) to more than 1,000 people. Approximately 100 facilities reported an OSC to the EPA putting 1 million or more people at risk. Approximately 65 percent of these facilities' "worst-

case scenarios" are chlorine disasters. Rather than address these risks through the new regulations suggested by the EPA, the DHS used a new methodology that downsized the priority list of chemical plants by 43 percent to 3,400 facilities that put 1,000 or more people at risk.

EPA's 2002 chemical security proposal was slated for a media "rollout" at the White House. According to draft documents, "higher priority chemical facilities should be able to complete a vulnerability assessment and address security vulnerabilities as described in the guidance in 12–18 months." In other words many facilities could already have eliminated or reduced their hazards by early 2004.

EPA's 2002 documents included a question and answer sheet for EPA Administrator Whitman which said, "Using existing authority under the Clean Air Act, we believe that the guidance and regulation I have announced today are the quickest paths to improving chemical facility security . . . If we later find that there are legislative gaps, then we will consider seeking legislation."

Ultimately, the reversal by the Bush administration and the lobbying pressure by the industry (American Chemistry Council, American Petroleum Institute, etc.) paid off and chemical security legislation was excluded from the Homeland Security Act signed into law in November 2002.

In March, 2003 a report by the General Accounting Office (GAO) concluded "EPA has not attempted to use these Clean Air Act provisions [because] EPA is concerned that such an interpretation would pose significant litigation risk . . . ". The GAO concluded that chemical facility security would be more effectively addressed by passage of specific legislation.

In December 2003 President Bush further undermined EPA's authority and issued a directive (Directive/HSPD–7) limiting EPA's role on chemical security to "drinking water and water treatment systems." Under questionable legal authority, this directive attempts to shift responsibility for 15,000 chemical plants to the DHS, which at the time had no legislative authority, experience, or inclination to regulate this industry.

In January 2005, former White House homeland security deputy, Richard Falkenrath told the Senate Homeland Security and Governmental Affairs Committee, "the federal government has made no material reduction in the inherent vulnerability of hazardous chemical targets inside the United States. Doing so should be the highest critical infrastructure protection priority for the Department of Homeland Security in the next two years."

In his book, "America the Vulnerable" Stephen Flynn, of the Council on Foreign Relations warned, "The chemical industry deserves urgent attention because the stakes are high, the opportunities for terrorists are rich, and no credible oversight process exists. It is the very ubiquity of the U.S. chemical industry that gives it potential to be a serious source of national alarm."

In 2006 an intensive industry lobbying campaign successfully killed comprehensive chemical security legislation (H.R. 5695 and S. 2145) that was voted out of the authorizing committees in the House and Senate in 2006. Instead, the industry worked closely with Republican leaders to draft a 740-word "rider" to the 2007 DHS Appropriations bill. The only major concession they made was to keep it an "interim" 3-year statute until Congress enacts permanent legislation. In 2007, the industry is urging Congress NOT to change this temporary statute.

To better understand the lobbying resources the industry used to derail legislation since 2001 we surveyed the lobbying records of the relevant industries in the Office of the Secretary of the Senate at: *http://sopr.senate.gov*.

Greenpeace identified 238 industry lobbyists that listed chemical security as part of their portfolio in 2007. Based on their lobby reports we estimate that industry lobbyists spent approximately $12 million to lobby on chemical plant security legislation in 2007. Lobby organizations identified included trade associations such as the American Chemistry Council (ACC), American Petroleum Institute (API), U.S. Chamber of Commerce and companies such as Dow Chemical, DuPont, ExxonMobil and Halliburton and lobby firms such as Bob Moss, Ogilvy and Holland & Knight.

Alternatively, member companies of the Association of American Railroads (AAR), such as CSX, BNSF & Norfolk Southern, are members of trade associations lobbying with the chemical industry, yet the AAR issued a statement in February 2008 saying, "It's time for the big chemical companies to do their part to help protect America. They should stop manufacturing dangerous chemicals when safer substitutes are available. And if they won't do it, Congress should do it for them."

DEADLY ACCIDENTS

The 1984 Union Carbide's Bhopal, India plant had the worst industrial accident in history. Forty tons (half a rail car) of methyl isocyanate (MIC) leaked into the

community at midnight killing 8,000 people within days and claiming another 12,000 lives since.

In June, 2004, three people were killed in a train accident in a remote area southwest of San Antonio, Texas when a tank car carrying chlorine broke open in the 25 mph crash, releasing a portion of the tank car contents.

On January 6, 2005 ten people were killed, 58 hospitalized and hundreds sought treatment in Graniteville, South Carolina when chlorine was released again when one train slammed into a parked train in the middle of the night. The cars involved were allegedly state-of-the-art construction.

Both of these tragedies could have resulted in a much higher number of fatalities and injuries if they had occurred in densely populated areas.

COMPREHENSIVE AND PERMANENT CHEMICAL SECURITY LEGISLATION IS URGENTLY NEEDED

We have lost over 6 years since the 9/11 attacks. Legislation in name only will not protect communities. Programs limited to fence-line or perimeter security will not prevent an attack or eliminate the consequence of a successful attack.

A key test of whether chemical facility security legislation will protect the millions of Americans still at risk is whether it contains minimum standards and truly protective provisions that:

- Require all plants to assess the feasibility of safer more secure methods and technologies that can eliminate the consequences of an attack on a chemical plant.
- Require "high-risk" facilities to use safer methods, technologies, or chemicals.
- Insure that the 3,400 to 4,400 facilities that DHS identified as posing a risk to 1,000 or more people are included in the "high-risk tier."
- Includes protection of approximately 3,000 U.S. water treatment plants and other chemical facilities currently explicitly exempted by the temporary law.
- Expedite deadlines by when DHS will require and approve Site Security Plans.
- Require meaningful involvement of plant employees in developing Security Plans.
- Include whistle-blower protections to enhance enforcement.
- Provide basic information to the public on facility compliance or non-compliance of the law.
- Ensure the right of all States to establish stronger security standards.
- Enhance enforcement by allowing citizen suits.

NOTE: See April 14, 2009 blue-green coalition letter to U.S. House of Representatives from 52 organizations in Appendix A on page 18.

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U.S. Naval Research Laboratory, testimony before the City Council of Washington, DC by Dr. Jay P. Boris, Chief Scientist and Director of the Laboratory for Computational Physics and Fluid Dynamics, October 6, 2003.

APPENDIX A.—LETTER*

APRIL 14, 2009.

DEAR REPRESENTATIVE: U.S. chemical plants remain one of the sectors of America's infrastructure most vulnerable to terrorist attacks. The Department of Homeland Security (DHS) has identified approximately 7,000 high-risk U.S. chemical fa-

*Submitted by: International Chemical Workers Union Council/UFCW; Sierra Club United Steelworkers (USW); International Brotherhood of Teamsters; United Automobile Aerospace and Agricultural Implement Workers of America (UAW); American Federation of State, County and Municipal Employees (AFSCME); Communications Workers of America (CWA); Physicians for Social Responsibility; OMB Watch; Greenpeace; NJ Work Environment Council; U.S. Public Interest Research Group; Environmental Health Fund; Advocates for Environmental Human Rights; American Association on Intellectual and Developmental Disabilities; Clean New York; Environment America; Clean Water Action; Connecticut Coalition for Environmental Justice; Empire State Consumer Project; Ecology Center Healthy Building Network; Environmental Health Strategy Center; Healthy Schools Network; Environmental Justice Action Group of WNY Kentucky Environmental Foundation; Citizens' Environmental Coalition; Michigan Environmental Council; Mossville Environmental Action Now; Service Employees International Union (SEIU); Natural Resources Council of Maine; Sciencecorps; Silicon Valley Toxics Coalition; US Campaign for Justice in Bhopal; Friends of the Earth Commonweal; Deep South Center for Environmental Justice; National Refinery Reform Campaign; National Bucket Brigade Coalition; Center for International Environmental Law; Environmental Working Group; Institute for Children's Environmental Health International; Association of Fire Fighters (IAFF); Detroiters Working for Environmental Justice; Green Harvest Technologies; Alliance@IBM; Environmental Defense Fund Maryland Pesticide Network; Beyond Pesticides; Strategic Counsel on Corporate Accountability; Natural Resources Defense Council; Maine People's Alliance.

cilities. However, unless Congress replaces a flawed temporary law with a comprehensive chemical security program, millions of Americans will remain at risk.

The statute Congress passed in 2006 temporarily authorized "interim" regulations that are wholly inadequate to protect communities. Furthermore these rules expire on October 4, 2009 leaving the 111th Congress only 6 months to enact truly protective legislation. Congress must pass comprehensive legislation before the temporary law expires.

Among the fatal flaws in the "interim" statute:

- It prohibits the DHS from requiring the most ironclad security measures. DHS cannot require any specific "security measure," including the use of safer and more secure chemical processes that can eliminate catastrophic hazards posed by poison gas, even when cost-effective alternatives are readily available.
- It explicitly exempts thousands of chemical facilities, including approximately 2,650 water treatment facilities, some of which put major cities at risk.
- It fails to involve plant employees in the development of vulnerability assessments and security plans or protect employees from excessive background checks.

In March 2008 the House Homeland Security Committee adopted the "Chemical Facility Anti-Terrorism Act of 2008" (H.R. 5577) in a bipartisan vote. H.R. 5577 addresses many of the flaws in the interim law. However, the chemical manufacturers lobby opposed it and favors making the interim law permanent.

The price of failure could be staggering. According to a 2008 Congressional Research Service review of EPA data, 100 U.S. chemical plants each put 1 million or more people at risk. In 2004 the Homeland Security Council projected that an attack on a chemical facility would kill 17,500 people, seriously injure 10,000 more people and send an additional 100,000 people to the hospital.

The good news is that most of these hazards are preventable. Since 2001 more than 220 chemical facilities have switched to safer and more secure chemicals or processes which have eliminated risks to millions of people. Cost-effective safer technologies are used in a wide variety of facilities including water treatment plants, power plants, oil refineries, and other manufacturers. Many facilities, however, have yet to adopt safer technologies. More than 7 years after the 9/11 attacks we need chemical security standards that put all high-risk facilities on an even playing field.

President Obama raised this issue in his campaign and was a leader on chemical security in the Senate. In a March 2006 floor statement, he said, " . . . there are other ways to reduce risk that need to be part of the equation. Specifically, by employing safer technologies, we can reduce the attractiveness of chemical plants as a target . . . Each one of these methods reduces the danger that chemical plants pose to our communities and makes them less appealing targets for terrorists."

To that end, Congress should pass, and the President should sign, chemical security legislation that at a minimum:

(1) Reduces the consequence of an attack through the use of safer and more secure chemicals and processes;

(2) Includes all categories of facilities such as water treatment plants;

(3) Involves plant employees in developing plant security programs and gives employees protection from excessive background checks;

(4) Ensures equal enforcement for chemical facilities and accountability for Government;

(5) Allows States to set more protective security standards;

(6) Requires collaboration between the DHS, EPA and other agencies to avoid regulatory redundancy, inconsistency, or gaps in supply chain security.

In the face of potentially ruinous liability from a catastrophic chemical release, some business leaders agree. In February 2008, the Association of American Railroads said, "It's time for the big chemical companies to do their part to help protect America. They should stop manufacturing dangerous chemicals when safer substitutes are available. And if they won't do it, Congress should do it for them." We look forward to working with you on this critical legislation.

Sincerely,

Holly Hart, United Steelworkers (USW); Rick Hind, Greenpeace; Elizabeth Hitchcock, U.S. Public Interest Research Group; LaMont Byrd, International Brotherhood of Teamsters; Tracey Easthope, Ecology Center; John Morawetz, International Chemical Workers Union Council/UFCW; Ed Hopkins, Sierra Club; Kristen Welker-Hood, ScD, MSN, RN; Physicians for Social Responsibility; Shawnee Hoover, Friends of the Earth; Rick Engler, New Jersey Work Environment Council; Charles Loveless, American Federation of State, County, and Municipal Employees (AFSCME); Brian Turnbaugh, OMB Watch; Daniel Rosenberg, National Resources Defense Council; Judith Robinson, Environmental Health Fund; Kathleen A. Curtis, Clean New York, a Project of Women's Voices for the Earth; Elizabeth Crowe, Kentucky Environmental

Foundation; Monique Harden, Advocates for Environmental Human Rights; Edgar Mouton, Jr., Mossville Environmental Action Now, Inc.; Christy Leavitt, Environment America; Bill Borwegen, Service Employees International Union, CTW, CLC (SEIU); Lynn Thorp, Clean Water Action; Aquene Freechild, U.S. Campaign for Justice in Bhopal; Michael Belliveau, Environmental Health Strategy Center; Kathleen Burns, PhD, Sciencecorps; Judy Braiman, Empire State Consumer Project; Barbara Warren, Citizens' Environmental Coalition; Claire Barnett, Healthy Schools Network, Inc.; Richard Denison, Environmental Defense Fund; Matt Prindiville, Natural Resources Council of Maine; Lauren Ornelas, Silicon Valley Toxics Coalition; Bill Walsh, Healthy Building Network; Mark A. Mitchell, MD, Connecticut Coalition for Environmental Justice; Judith M. Anderson, Environmental Justice Action Group of WNY; Laura Abulafia, American Association on Intellectual and Developmental Disabilities; Denny Larson, National Refinery Reform Campaign & National Bucket Brigade Coalition; Daryl Ditz, Center for International Environmental Law; Sandra Schubert, JD, MA, Environmental Working Group; Elise Miller, M.Ed., Institute for Children's Environmental Health; Chris Kolb, President, Michigan Environmental Council; Barry Kasinitz, Director of Governmental Affairs, International Association of Fire Fighters; Dave LeGrande, Communications Workers of America (CWA); Alan Reuther, Legislative Director, International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW); Sharyle Patton, Commonweal; Beverly H. Wright, PhD, Deep South Center for Environmental Justice, Inc.; Donele Wilkins, Detroiters Working for Environmental Justice; David Levine, Green Harvest Technologies; Rick White, Alliance@IBM; Ruth Berlin, LCSW–C, Maryland Pesticide Network; Jay Feldman, Beyond Pesticides; Sanford Lewis, Attorney, Strategic Counsel on Corporate Accountability; Ryan Tapping-Spitz, Maine People's Alliance.

Mr. PASCRELL. I thank all our witnesses for their very valuable testimony and the Members for all of their questions.

I would remind our second panel of witnesses that the Members of this committee may have additional questions for you. We will ask you to respond expeditiously in writing to those questions.

There being no further business, the committee stands adjourned. Thank you very much.

[Whereupon, at 12:54 p.m., the committee was adjourned.]

APPENDIX

QUESTIONS FROM HONORABLE CHRISTOPHER P. CARNEY FOR PHILIP REITINGER, DEPUTY UNDER SECRETARY, NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, DEPARTMENT OF HOMELAND SECURITY AND SUE ARMSTRONG, DIRECTOR, INFRASTRUCTURE SECURITY COMPLIANCE DIVISION, OFFICE OF INFRASTRUCTURE PROTECTION, DEPARTMENT OF HOMELAND SECURITY

Question 1. As I understand, under the present regulations and tiering structure, about 10% of underground natural gas reservoirs are subject to additional CFATS security requirements because of their excess amounts of methane (primary component in natural gas). TSA and PHMSA already recommend and monitor security practices at these underground storage sites. As you can imagine, this presently leads, and will to continue to lead, to a lot of redundant and conflicting security requirements for these underground gas reservoirs who must comply with TSA, PHMSA, and CFATS. Practically speaking, can you explain how implementation of the CFATS regulation of the natural gas is different from TSA's and PHMSA's security requirements of the facilities which store the natural gas? Especially, when the only way you can get to the natural gas stored 2,000 feet below surface is through the pipelines which are already governed by TSA and PHMSA?

Question 2. Do you believe these underground storage reservoirs were a part of the intended purpose of CFATS, which is to "enhance security and protect against acts of terrorism against chemical facilities"?

Answer. The preliminary determination to include or not include a facility in the group of high-risk facilities is made based on information submitted to the Department by the facility itself using a data-collection instrument called a "Top-Screen." Facilities that are preliminarily deemed high-risk based on Top-Screens are required to provide a more detailed assessment using an instrument called the Security Vulnerability Assessment (SVA) and, based on that more detailed information, may or may not be finally determined to be "high risk." Only the final high-risk facilities are then required to comply with the more substantive requirements of CFATS (i.e., to submit Site Security Plans meeting the CFATS risk-based performance standards).

Using this process, a small number of natural gas underground storage facilities have been deemed "high risk" and are thus regulated under CFATS. In general, there are two reasons why such a facility would remain inside the regulatory scope of CFATS after analysis of Top-Screen and SVA data:

- The facility has surface extraction points for methane (a chemical of interest under CFATS) that are close enough to a civilian population and/or critical infrastructure that radiated heat from burning methane being released at the extraction point would pose a clear danger; or
- The facility has other chemicals of interest onsite, not stored underground, that pose a clear danger to the civilian population or critical infrastructure or both.

To date, we have not included any underground natural gas storage facility in the CFATS regulatory community for reasons of economic criticality, but we do intend to examine them for economic criticality in the near future and may determine that some underground natural gas storage facilities are high-risk based on their economic criticality.

Under CFATS, underground natural gas storage facilities that are finally determined to be high-risk are required to include security measures in their Site Security Plans that address the 18 risk-based performance standards under CFATS, such as perimeter security, cybersecurity, and personnel security.

Some degree of regulatory overlap may be unavoidable where Congress authorizes or directs more than one agency to regulate various aspects of a given industry or function—for example, the Department of Transportation regulates some aspects of chemicals in transit, as do the U.S. Coast Guard and TSA under their respective statutory authorities. Such overlapping programs do not necessarily present a sig-

nificant concern, provided that the relevant agencies reasonably exercise their respective authorities in such a way as to avoid or minimize potentially inconsistent or duplicative requirements. In this case, the preamble to the CFATS final regulation expressly stated that DHS does not intend CFATS to impede the authorities of other Federal agencies and that DHS will work closely with other Federal agencies to ensure that regulated facilities can comply with applicable regulations while minimizing any duplication

Moreover, with respect to regulation of underground natural gas facilities, there are legal and practical differences between CFATS and other agencies' regulatory authorities. CFATS is designed to require high-risk facilities to meet security performance standards. TSA, on the other hand, is responsible for the security and functionality of the Nation's transportation systems, not for fixed chemical facilities—although TSA does provide some security advice to pipeline operators. Pipeline and Hazardous Materials Safety Administration (PHMSA) supervises and regulates the safety and integrity of the National's pipeline infrastructure including certain storage facilities and tanks and while this can include surface piping at underground gas storage facilities, PHMSA does not currently regulate underground starage and has only a limited role in security. In providing authority to DHS to regulate the security practices of high-risk chemical facilities, Congress recognized the need for regulation of many different types of facilities possessing potentially dangerous chemicals. Congress was aware that some of those facilities are or could be regulated by other agencies and expressly exempted certain facilities from regulation under CFATS (e.g., facilities regulated by the U.S. Coast Guard under the Maritime Transportation Security Act, facilities regulated the Nuclear Regulatory Commission, facilities owned or operated by the Departments of Defense or Energy). Congress did not, however, exempt natural gas storage facilities regulated by TSA or PHMSA. DHS has concluded that certain natural gas storage facilities should be regulated under the CFATS program due to the potentially high-risk they pose from possession of methane or other chemicals of interest. Of course, DHS also recognizes the need to coordinate our activities with all of our components (NPPD, TSA) and other Federal agencies such as PHMSA in order to avoid any inconsistencies and to eliminate or minimize any potentially unnecessary or duplicative requirements.