

**H.R. 3258, THE DRINKING WATER SYSTEM SECURITY ACT OF 2009, AND H.R. 2868, THE CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2009**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON ENERGY AND ENVIRONMENT  
OF THE  
COMMITTEE ON ENERGY AND  
COMMERCE  
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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**H.R. 3258, THE DRINKING WATER SYSTEM SECURITY ACT OF 2009, AND H.R. 2868, THE CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2009**

**THURSDAY, OCTOBER 1, 2009**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ENERGY AND ENVIRONMENT,  
COMMITTEE ON ENERGY AND COMMERCE,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 10:00 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Edward Markey [Chairman of the Subcommittee] presiding.

Members present: Representatives Markey, Butterfield, Melancon, McNerney, Green, Capps, Gonzalez, Barrow, Waxman (ex officio), Upton, Stearns, Shimkus, Pitts, Walden, Sullivan, Burgess and Scalise.

Staff present: Greg Dotson, Chief Counsel, Energy and Environment; Jackie Cohen, Counsel; Melissa Bez, Professional Staff Member; Alison Cassady, Professional Staff Member; Caitlin Haberman, Special Assistant; Peter Kethcham-Colwill, Special Assistant; Dave Leviss, Chief Oversight Counsel; Karen Lightfoot, Communications Director, Senior Policy Advisor; Lindsay Vidal, Special Assistant; Earley Green, Chief Clerk; Matt Eisenberg, Staff Assistant; Jerry Couri, Minority Professional Staff; Mary Neumayr, Minority Counsel; and Garrett Golding, Minority Legislative Analyst.

**OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS**

Mr. MARKEY. Good morning, ladies and gentlemen. We welcome you to the Subcommittee on Energy and Environment and this very important hearing which we are going to conduct today.

My congressional district is one that harbored Mohamed Atta and the other nine who hijacked the two planes from Boston on 9/11. They walked the streets. They scoped out Logan Airport. They took whatever actions it took and for however long it took in order to then successfully hijack those two planes with 150 citizens on them. It was very clear to me that they spent a lot of time trying to determine what the line of least resistance is in their efforts to attack our country, and at the end of those two plane trips unfortunately they were thousands of others who perished as well. We have spent much of the last 8 years in trying to develop strategies in order to reduce opportunities for terrorists to exploit our vulnerabilities. Since 9/11, we have enacted legislation to secure the aviation, maritime, rail, mail transit, nuclear energy and other

sectors. But what we have yet to do is to act on comprehensive legislation to secure the facilities that make or store dangerous chemicals. Instead, we have relied on the incomplete and inadequate legislative language that was inserted into the 2007 appropriations bill behind closed doors that amounted to little more than a long, run-on sentence.

The chemical sector represents the best of American technological might. Its products help to purify our water, make the microchips used in our computers, cell phones and military technologies, refine our oil and grow our food. But these same chemicals could also be turned into a weapon of mass destruction, something that we were reminded of last week when we learned of a disrupted terrorist plot to use hydrogen peroxide purchased in Colorado for use as a bomb in New York. Yet the incomplete 2007 legislation that gave the Department of Homeland Security interim authority to regulate chemical facilities included several glaring security loopholes. It exempted all drinking and wastewater facilities. It exempted all maritime facilities. It prevented the Department from requiring any specific security measure at any facility. So if there was a hole in a fence, DHS couldn't order it to be fixed, and if there was a cost-effective alternative to a particular chemical or process that greatly would reduce the risk the facility posed to the surrounding community, DHS couldn't order that either, and it prevented citizens living around these facilities from being able to ensure that regulations were being met or enforced.

At the beginning of this Congress, Energy and Commerce Committee Chairman Henry Waxman and Homeland Security Committee Chairman Bennie Thompson agreed on the need to quickly act to comprehensively and permanently ensure the security of all facilities containing dangerous chemicals. The chairman agreed to work together on two separate pieces of legislation. First, we would craft comprehensive chemical security legislation to require the Department of Homeland Security to build on the good work it has already begun but do so in a manner that closed the loopholes included in the interim authority Congress provided several years ago. The Chemical Facility Anti-Terrorism Security Act of 2009 was introduced following 5 months of bipartisan Energy and Commerce and Homeland Security staff negotiations and has the support of a wide range of labor and environmental organizations.

Second, we would craft legislation to provide EPA with the enhanced authority to ensure the security of drinking water facilities in recognition of the unique public health role these facilities play in providing a safe supply of drinking water. The Drinking Water System Security Act of 2009, which is exclusively within the jurisdiction of the Energy and Commerce Committee, has the support of the environmental and labor communities and also the Association of Metropolitan Water Agencies whose member utilities provide safe drinking water to more than 125 million Americans.

Though the two pieces of legislation provide authority to two different agencies, their intent and purpose is very similar. The bills require EPA and DHS to coordinate efforts with one another to minimize duplication in order to ensure that we make an assignment to one of four risk-based tiers and implement the bills' requirements. We want to work together with all of the members of

the committee as we move forward in this process so that we can act wisely and we do so in a way that is consistent with the traditions of the committee.

[The information appears at the conclusion of the hearing.]

Mr. MARKEY. Let me now turn and recognize the ranking member of the Committee, the gentleman from Michigan, Mr. Upton, for an opening statement.

**OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN**

Mr. UPTON. Thank you, Mr. Chairman.

Like every member on this Committee and in the communities, homeland security is a concern and certainly a priority, and today we are examining two bills that deal with the security implications of facilities that use various chemicals. I do have a number of concerns with the bills before us today. However, I will primarily focus my remarks on H.R. 2868, the Chemical Facility Anti-Terrorism Security Act.

There have been disagreements about how chemical facilities should be regulated to address security issues but Congress was able to enact provisions to authorize the DHS to regulate security at designated chemical facilities. Rather than enact new legislation, we should give DHS the opportunity to fully enact the laws that we have already passed. I believe that it is too soon for Congress to start over with new regulations. I support a 3-year extension of the existing law to give DHS the time to finalize implementation of the security regs and allow Congress to determine what works and what doesn't, and I prefer that to what we are looking at perhaps today.

We must legislate from a body of experience and accumulated evidence, not ideological notions of what sounds like a good idea, especially when it means stranding billions of dollars in investments at a time when we have frozen domestic financing market with the struggling economy. I have been made aware of a few real tangible examples on the impacts of this legislation, and I recommend to the members of this subcommittee that they talk to companies in their districts and States about how the legislation would impact them. This legislation is not just about chemical facilities. It also covers facilities with chemicals too. It isn't something that it just going to hit the big guys. Small businesses will be swept in too, then perhaps even swept overseas.

A recent study looked at the impact of inherently safer technology, IST, mandate on oil refineries. IST may sound good but it is in reality a government-mandated product substitution. The study found that in certain terrorist situations, sulfuric acid, the mandated IST, can be just as dangerous as hydrofluoric acid, which is commonly used today. But under the federally mandated IST, the refining process would require roughly 250 times more sulfuric acid than hydrofluoric. To put this into scale, we are talking about the difference between one and two truckloads per month versus three to four truckloads each day. The IST, which doesn't make us safer, costs between \$45 million to \$150 million per refinery and an increase in operating costs of between 200 to 400 percent. What do you think would happen to gas prices with refineries moving

abroad? Between this and cap and trade, we will be stuck importing virtually every single gallon of gasoline from overseas.

The problems with this legislation extend beyond the economic realm. The citizen lawsuit provisions in the chemical plant security bill are completely inappropriate for national security legislation. Allowing these types of lawsuits could harm security at these facilities, not make it stronger. Citizen supervisions in the bill are an over-the-top example of why we should not be rushing, especially considering that terrorists hire lawyers and could use them. Citizen suits are not used in a national defense context and shouldn't be used here. Folks should not be able to compel the release of roadmaps to destruction by simply using the legal discovery process.

Additionally, the information protection language rolls back traditional protections of information that Congress has employed since 9/11. It eliminates penalties against those who recklessly disclose sensitive information to the public. Even though we have been blessed not to have been attacked since 9/11, we should not relax our resolve to sanction violators swiftly or aggressively.

In closing, H.R. 2868 would increase costs and send jobs abroad without bolstering national security. In fact, an argument can actually be made that it weakens our security. Chemical manufacturers have already invested millions of dollars in chemical security upgrades to ensure that the communities where they operate are safe, secure and efficient. The requirements in this bill will not improve that security. It will only shift the security risks to other sectors such as transportation or manufacturing while hindering the economic profitability in the process. Hundreds of thousands of jobs have been lost over the past year, resulting in plant closures and other facilities operating on the margins. Michigan's unemployment is still about 15 percent. The chemical industry has been hit hard by the economic recession and now is not the time to jeopardize those jobs while weakening our national security. This isn't the right prescription for making our country stronger. We need a bill that secures the economy, not just re-engineers and exports. I yield back my time.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the chairman of the full Committee, the gentleman from California, Mr. Waxman.

**OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

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

Since 2001, federal officials, the Government Accountability Office, and outside experts have warned that the Nation's drinking water utilities and chemical facilities remain vulnerable to terrorist attack. The risk that hazardous, but useful, chemicals can be wielded against us is not theoretical or abstract. Just last week, we read news accounts that the FBI arrested an individual suspected of plotting to blow up a federal building using common chemicals purchased at a beauty supply store. It doesn't take much imagination to be concerned about what a motivated terrorist group could do with access to a facility containing large quantities of lethal substances.

The bills we will learn more about today are unfinished business from 9/11. They are critical not only to homeland security but to the safety of workers at these facilities and overall public health.

First, I would like to note the process by which this legislation was developed. At the beginning of this Congress, I sat down with Homeland Security Committee Chair Bennie Thompson. We agreed that our committees needed to work together to address the vulnerability of chemical facilities to terrorist attack and other intentional acts.

The Chemical Facility Anti-Terrorism Act, H.R. 2868, is the product of these discussions. This legislation will establish a chemical security program to address the threat posed by the Nation's vulnerable chemical facilities. Committee staffs on both sides of the aisle spent hundreds of hours methodically working through these issues.

The second bill we are discussing today, H.R. 3258, the Drinking Water System Security Act, creates a security program for drinking water facilities similar to the chemical security program. While this legislation is exclusively within the jurisdiction of our committee, it also is the product of dozens of discussions on both sides of the aisle at the staff level. I cannot claim we have achieved consensus on these bills but they are well considered and respond to each of the concerns raised. I would like to highlight what each of these bills will do.

The Chemical Facility Anti-Terrorism Act begins with the recognition that DHS has made tremendous progress in developing a strong chemical security program and gives DHS permanent authority to strengthen security at America's chemical facilities. It then fills in some important gaps in the existing program. The bill requires all covered chemical facilities to assess whether they can adopt safer chemicals, processes or technologies to reduce the consequences of a terrorist attack. The bill gives the Secretary the authority, under certain circumstances, to mandate that the riskiest facilities adopt safer technology. This is a commonsense policy that will help make facilities reduce the likelihood that they will become an attractive terrorist target.

We have also added an important citizen enforcement tool to the chemical facility security program where citizens can use the provisions to hold DHS accountable for failing to perform their duties.

H.R. 3258, the Drinking Water System Security Act, authorizes EPA to create a security program for drinking water facilities similar to the chemical security program under DHS. There are a couple of important aspects in that bill that deserve to be highlighted.

First, the bill makes permanent EPA's authority under the Drinking Water Act to regulate security at drinking water facilities. Second, just like the chemical facility bill, this bill requires all covered water systems that use a certain amount of dangerous chemicals to assess whether they can switch to safer chemicals or processes. Since States play a unique role in implementing the Safe Drinking Water Act and are most familiar with local drinking water concerns, we give the States—not EPA—the authority, under certain circumstances, to require the riskiest facilities to adopt safer technology.

We worked closely with the water sector to balance the needs of safe drinking water with homeland security concerns, and I am pleased that the Association of Metropolitan Water Agencies has endorsed H.R. 3258. AMWA is an organization representing the largest publicly owned drinking water systems in the United States, and we will hear from one of its members on the second panel.

We still have some significant issues to work through on these bills and I hope we can find common ground to close these security gaps once and for all to make our country safer. Thank you, Mr. Chairman.

Mr. MARKEY. Great. The gentleman's time has expired. The Chair recognizes the gentleman from Florida, Mr. Stearns.

**OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA**

Mr. STEARNS. Thank you, Mr. Chairman.

I would say to you, Mr. Chairman, and to Mr. Waxman, in 2002 we passed the Drinking Water Security Act, part of Title IV of the Bioterrorism Act. And then we also passed the Chemical Plant Security Act in 2006, so I really think we should just extend those bills and see if the industry can comply. I think the industry is having difficulty complying with what we have already passed so I agree with the ranking member, Mr. Upton, when he said just have an extension for 3 years and not start all over, let industry comply with what we passed, and as Mr. Upton said, see what works and what doesn't work and just correct it. You know, frankly, we haven't had a terrorist attack. We have had attempts but we really have not had enough to drive these two bills to ask urgent passage, you know, and this is particularly a concern of mine when millions of Americans have already lost their jobs due to economic slowdown and so you put these two bills in place, I think they will have a negative effect on raising prices for everyday products including food, water, pharmaceutical drugs, fertilizers, energy at a time when people can least afford the price increase.

The proposed legislation goes beyond increasing security protections by imposing mandates on American manufacturers as to which products and processes they will use without any regard for practicality and availability or cost. Absent federal preemption and a uniform national standard, this legislation would create overlapping and conflicting security requirements that would cause disruption of federal security standards, increase government red tape and obviously create more economic instability.

So I am here at this hearing, Mr. Chairman, but based upon what we passed in 2002 and 2006, I think the simple thing to do, as Mr. Upton pointed out, just extend the bill, see what works, what doesn't work, because these folks are having a hard time complying with what we already passed. Thank you, Mr. Chairman.

Mr. MARKEY. Great. The gentleman's time has expired. The Chair recognizes the gentleman from Louisiana, Mr. Melancon.



**OPENING STATEMENT OF HON. CHARLIE MELANCON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA**

Mr. MELANCON. Thank you, Mr. Chairman. I appreciate the opportunity to do an opening statement.

I too would like to thank you, Mr. Markey, and Chairman Waxman for your efforts to bring attention to this very important issue.

My State is particularly affected by the proposals in this legislation. Louisiana is home to 61 chemical manufacturing companies that have 96 sites and at least 10 refineries throughout the State. These sites employ thousands of hardworking men and women, oftentimes multiple generations in the same plant. These jobs are not minimum-wage employment. These jobs pay good salaries and offer a strong set of balances. People are paying attention to this bill in Louisiana, not only because of its potential impact on jobs and employment but plant workers in the communities surrounding the facilities are also concerned for their safety. My son, Seth, works within the confines of one of those chemical plants along the Mississippi River in my district as a safety supervisor, and what I have come to learn through the years and especially since he has become active in the industry is that the key to every one of these facilities is safety, safety, safety. That is the number one priority to all of them, management and workers.

Despite existing rigorous safety protocols in these plants, there are still national and community security considerations addressed in this bill. Some of the chemicals we use every day in this country such as chlorine are used to make drinking water safe but can also represent a real security hazard in the wrong circumstances. As we continue to work toward a final bill, we must balance national security with the means to ensure that we do not create mandates that will threaten the jobs of tens of thousands of workers who are the backbone of this vital industry. We must make certain that our efforts do not shift rather than eliminate risk. We must examine existing models and learn from the success of State chemical security plants. Finally, we must guarantee that critical security information is not made available to those who might use it to harm us.

The chemical facility security bill being considered today has considerable expansions on the original authorization passed in 2006 and the motivation for this broadened initiative is commendable. However, I encourage my colleagues on this committee to keep an open dialog with all parties affected by the statute, and remember that while our responsibility to secure this Nation from terrorist attacks is paramount, we must also have a duty to legislate responsibly and consider all sides of the matter.

I would like to take the opportunity to applaud the groups such as American Chemical Council and Crop Life America for their contributions in recent months and constructive viewpoints from the industry perspective, and I would also like to recognize the Blue Green Alliance for their diligence in making sure that there are strong protections for both the facility employees and surrounding communities. Lastly, I would like to thank the Committee staff and the staff of Representative Markey for working so hard to try and

accommodate the interests of this wide variety of affected parties. With that, I yield back my time.

Mr. MARKEY. Great. We appreciate that. The Chair recognizes the gentleman from Texas, Mr. Burgess.

**OPENING STATEMENT OF HON. MICHAEL C. BURGESS, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. BURGESS. Thank you, Mr. Chairman, and thank you for having a hearing on this important issue.

Securing our Nation's drinking water and chemical facilities should be a priority for every Member of Congress, indeed, every Congressional district. There is little doubt that these are centers where great damage could be inflicted on the communities and surrounding areas. It does seem that there is disagreement how to go most effectively go about ensuring the safety of these facilities while at the same time protecting their economic viability. Imposing regulations on facilities that are still in the process of implementing Congress's last round of regulations does appear to be ill advised at this time. Congress last addressed this issue of chemical facility security in the homeland security for fiscal year 2007 in the appropriations bill. The regulations put in place following the enactment of this legislation are in the process of being implemented and the Department of Homeland Security has yet to make any on-site assessments regarding the covered facilities' compliance with the regulations. It seems to me a prudent course of action, indeed, if any further regulations are necessary, would be to wait until the Department of Homeland Security has had an opportunity to report back to Congress, study their recommendations and look at the success or failure of the current regulations. Chemical manufacturing facilities are some of the most highly regulated entities in the country, and in many cases for good reason. Moving the ball every few years by piling on additional regulations without assessing how well the existing rules and recently created regulations are working creates both confusion and uncertainty for these entities. Having to redo and rewrite the security plan every year or two Congress keeps changing course means businesses cannot focus on their core mission and indeed on their bottom line growing their operations and creating more jobs.

Congress should tread carefully when we consider extending security regulations to drinking water facilities including facilities that serve relatively small amounts of people. I think it is important that we have the dialog that we will have today but more investigation is needed as to how to properly craft any legislation that would impose new burdens on drinking water facilities which are already struggling to meet the demands of growing population, specifically in rural areas and specifically in rural areas that I represent back in Texas.

My concerns on both pieces of legislation that we will be discussing today center around the mandate of using inherently safer technology but it is not always necessarily a one-size-fits-all application for all facilities. Further, the provisions allowing citizens to bring suits against covered facilities pose potential for placing an additional burden on our court system and tying up the facilities'

resources in court proceedings rather than simply making their plants safer.

I hope the hearing today will be productive and we will enter into a dialog of how we may best go about keeping the American people safe and keeping chemical plants secure and drinking water supplies safe. I look forward to listening to the testimony of the panels today and working with others on the dais on these matters. Thank you, Mr. Chairman. I will yield back.

Mr. MARKEY. Great. The gentleman's time has expired. The gentleman from Texas, Mr. Green, is recognized.

**OPENING STATEMENT OF HON. GENE GREEN, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. GREEN. Thank you, Mr. Chairman, for holding the hearing today on H.R. 2868 and H.R. 3258, the legislation that seeks to protect chemical facilities and drinking water systems across the country.

Chemical facility security is especially important to the protection of public health and safety and particularly in our Congressional district. The Houston Ship Channel area is the heart of the largest petrochemical complex in our country that stretches along the Texas Gulf Coast, producing many essential products for modern life. People who live near and work in these facilities deserve the best security possible to prevent the risk of death or injury. Our industry, federal, State and local law enforcement have been working together since 2001 to do this. Chemical facilities have already invested nearly \$8 billion in security improvements since 2001 and are fully complying with DHS's Chemical Facility Anti-Terrorism Standards, or CFATS, which is not yet fully implemented.

Today, DHS continues to review thousands of security vulnerability assessments to determine the Nation's highest risk facilities that require appropriate risk-based security measures. Our hearing should shed some light on the progress of existing regulations for chemical and drinking water facilities so we can learn what is working and what isn't from these programs. We need to understand the impact of these pieces of legislation on the various responsibilities of EPA, DHS and the Coast Guard, which regulates many of the chemical facilities in our district under the Maritime Transportation Security Act, or MTSA. In 2006, the appropriations rider that authorized CFATS exempted MTSA facilities to avoid unnecessary duplication. We should continue to avoid overlap of the existing security programs including and regarding background checks for employees. We have the same agency, Homeland Security and Coast Guard looking at one plant that is on the waterside and a neighboring plant that may not have a waterside. Those security standards should be the same.

The hearing is also a good opportunity to learn more about the risk government concept and inherently safer technology, or IST, which is already in use in various chemical facilities today. If available, IST can be the most efficient step to improve security. The difficulties with IST is whether or how to involve government agencies like DHS that have few, if any process safety experts, chemical engineers or other qualified staff. Hopefully we can promote the

adoption of inherently safer technology while avoiding unqualified judgments and unintended consequences.

I also question whether broad, private right-to-sue authorities similar to civil suit provisions found in environmental statutes are appropriate for the security legislation. It should at least limit the affected party including the neighbors and employees that live near a facility.

Mr. Chairman, I look forward to the testimony of today's witnesses so we can learn how to protect our communities with feasible and affected standards, and I yield back my time.

Mr. MARKEY. Great. The gentleman's time has expired. The Chair recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

More regulation, more costs, more uncertainty, less jobs. It is curious that we would try to move more legislation when we haven't fully enacted the previous legislation nor do we have a full handle or facilities have been inspected, and that is the frustrating thing in this environment that we would move to do so. We are talking about more than—based upon language, we are talking more than just chemical plants. We are talking about farms, hospitals, universities, deep underground wells. Based upon this terminology of substance of concern, I call it terminology of concern because it is undefined. Chemical facility security efforts are not a branch of environmental law. The use of inherently safer technology is not a protection panacea against terrorism. Citizen suits are not used in national defense context and should not be used here.

The last thing is the preemption regime in these bills allows States and localities to enact more stringent laws. That is obviously problematic. And with that, Mr. Chairman, I think we have a long way to go. We shouldn't rush since the budget has a year extension and there are folks who are pushing for time to look and review the process that is going on, and I yield back my time.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentlelady from California, Ms. Capps.

**OPENING STATEMENT OF HON. LOIS CAPPS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mrs. CAPPS. Thank you, Mr. Chairman.

Today we will hear about the threat posed by toxic chemicals and the need to ensure the security of those chemicals. As has been stated, we will have testimony on two bills that seek to provide essential protections to millions of workers and communities now living in the shadow of preventable chemical disasters.

Since 2001, we have had to reorder our priorities as a number of issues have taken on new urgency. The security of toxic chemicals and our drinking water remains very high on this list. Security experts continue to list the Nation's chemical and drinking water plants as vulnerable and a deadly part of our Nation's infrastructure. The threat is very real and it requires immediate action, and that is why Congress must act quickly to pass protective and comprehensive legislation.

H.R. 3258, the Drinking Water System Security Act, is an excellent start. This legislation will help us protect and secure our Nation from potential acts of terrorism against our Nation's drinking

water facilities. It advances the use of safer, more secure chemicals and technologies where feasible and, importantly, involves plant employees in developing security programs. I am pleased this bill has the support of the Nation's largest water utilities as well as environmental and labor groups. This broad coalition shows that this bill provides a commonsense approach to securing American's drinking water.

Mr. Chairman, just let me say that I understand the value of chemicals in our society. We are not here to question whether or not we need chemicals, but as a public health nurse, I am well aware of the fact that what we need to do is protect those chemicals, especially the most hazardous ones, and also protect the employees that handle them every day from terrorist threats. Action is long overdue to address these preventable chemical disasters. All of us have a responsibility to make sure we do all we can to keep this country safe. I hope we can enact this legislation as soon as possible to eliminate that threat, and I yield back.

Mr. MARKEY. Great. The gentlelady's time has expired. The Chair recognizes the gentleman from Oklahoma, Mr. Sullivan.

Mr. SULLIVAN. I would like to waive my opening statement, and I will submit a statement for the record.

[The prepared statement of Mr. Sullivan follows:]

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**Opening Statement of**  
**Congressman John Sullivan (OK-01)**  
**Before the Subcommittee on Energy and the Environment**  
**Hearing on**  
**H.R. 3258, the Drinking Water System Security Act of 2009, and**  
**H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009**

October 1, 2009

Mr. Chairman,

I appreciate you hosting this hearing about an issue, which we all agree, is vitally important to the safety and security of our nation. Our nation's drinking water supplies and chemical facilities are high interest targets for those who seeking to harm our nation.

In 2007, the U.S. Department of Homeland Security issued the Chemical Facility Anti-Terrorism Standards (CFATS) to ensure the protection of at risk facilities. Today, we are examining additional reforms that may negatively impact many companies, including several in my district.

I have significant concerns about the implementation of any new program, considering the existing program has not been fully implemented. I am also concerned about the cost to the companies affected by these changes. The costs of switching to inherently safer technologies will increase the operating costs of these businesses leading to a loss of jobs in the long run. While the United States fights back from financial turmoil, I cannot approve of any legislation that eliminates more jobs through increased government regulation.

I am curious to learn if the legislation under consideration will truly serve its intended purpose and I look forward to the testimony of our distinguished panel.

Mr. MARKEY. The gentleman's time will be preserved. The Chair recognizes the gentleman from Pennsylvania, Mr. Pitts.

**OPENING STATEMENT OF HON. JOSEPH R. PITTS, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA**

Mr. PITTS. Thank you, Mr. Chairman. I would like to thank you for convening this hearing today on H.R. 2868, the Chemical Facility Anti-Terrorism Act, and H.R. 3258, the Drinking Water System Security Act.

I think we can all agree that there is a great need to protect our chemical facilities from terrorist attacks. To this end, 3 years ago Congress enacted section 550 of the Department of Homeland Security Appropriations Act for 2007. This section authorizes DHS to regulate security at designated chemical facilities. Though the law sunsets in a few days, there has not been enough time to fully implement the program. Realizing this, the Obama Administration's fiscal year 2010 budget recommended a straight 1-year extension of section 550, which was included in the fiscal year 2010 Department of Homeland Security Appropriations Act. However, there are several new provisions in H.R. 2868 that are very concerning.

First of all, the application of inherently safer technology, IST, is not a protection panacea against terrorism. The National Petrochemical and Refiners Association says, "IST is not a technique or procedure, it is an engineering philosophy. There is no valid method for objectively characterizing whether a process is as inherently safe as it can be." I do not believe it is Congress's role to mandate engineering philosophies or chemical substitutions as a security cure-all.

In addition, regarding the citizen suits provisions, there is a great concern that every person including terrorists could use these types of suits to threaten litigation. Citizen suits are not used in a national defense context and should not be used here.

Finally, as I mentioned earlier, the existing program under section 550 has not yet been fully implemented. We need a full record of what works, what doesn't, what lessons we have learned before we change the rules. Mr. Chairman, there is no need to race legislation through this committee. Let us allow the existing law to be fully implemented, then take a careful, reasoned assessment of it.

I appreciate the witnesses' coming today, and I look forward to hearing their testimony. I yield back.

Mr. MARKEY. Great. The gentleman's time has expired. The Chair recognizes the gentleman from California, Mr. McNerney.

Mr. MCNERNEY. Thank you, Mr. Chairman. I believe I will waive my opening statement.

Mr. MARKEY. The chair recognizes the gentleman from North Carolina, Mr. Butterfield.

**OPENING STATEMENT OF HON. G.K. BUTTERFIELD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA**

Mr. BUTTERFIELD. Thank you very much, Mr. Chairman, for convening this important hearing. You told us at the beginning of the

session that we would have these hearings and they would be forward thinking, and today is certainly an example of that.

Mr. Chairman, one of the outcomes of that fateful day in 2001 was our expanded awareness of potential threats and vulnerabilities. In the wake of that tragedy on September 11, we found renewed responsibility to secure chemical facilities and water treatment plants from intentional harm. We are exercising that responsibility in the consideration of these two pieces of legislation. Though my support for securing these facilities is unequivocal, I would be remiss not to convey concerns that I have received from some of my constituents with regard to the proposed legislation. The authority that grants the Secretary of Homeland Security to mandate inherently safer technologies troubles many of these constituents that I represent. I am appreciative of the language for highlighting the Secretary's need to factor economic and cost concerns into the final determination on the need for ISTs. I urge that the economic consideration provision be as strong as possible, given existing incentives and CFATS for covered facilities to improve their security.

Fertilizer producers and retailers in particular have expressed concern that the IST provision could be detrimental to their businesses. The 1st District in North Carolina is in large part agrarian and with many people dependent upon the farm economy. Yes, it is farm country for their livelihood. Fertilizer is a major input for these farmers and increasing the cost of fertilizer has enormous consequences for the bottom line of the family farm. This is just one example, Mr. Chairman, of economic concerns, and I do hope that we keep these concerns and other concerns in mind as we go forward.

I thank you for convening the hearing. I yield back.

Mr. MARKEY. We thank the gentleman very much. All time for opening statements has been completed. We will now turn to our panel, our very distinguished first panel, and we will hear first from Rand Beers, who serves as the under secretary for National Protection and Programs Directorate at the U.S. Department of Homeland Security. In this role, Mr. Beers oversees the coordinated operational and policy functions of the directorate's sub-components which include infrastructure protection, risk management and analysis, cybersecurity and communications. Mr. Beers previously served on the National Security Council staff under Presidents Reagan, Bush, Clinton and George W. Bush. So we welcome you, sir. Whenever you are ready, please begin.

**STATEMENTS OF HON. RAND BEERS, UNDER SECRETARY, NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, DEPARTMENT OF HOMELAND SECURITY; AND HON. PETER SILVA, ASSISTANT ADMINISTRATOR, OFFICE OF WATER, ENVIRONMENTAL PROTECTION AGENCY**

**STATEMENT OF RAND BEERS**

Mr. BEERS. Thank you, Chairman Markey, Ranking Member Upton and distinguished members of this Committee. It is a pleasure to appear before you today as the committee considers H.R. 3258, the Drinking Water System Security Act of 2009. This Act is



intended to close the security gap at drinking water facilities that possess substances of concern.

We have enjoyed a constructive dialog with Congress including this Committee as it works on new authorizing legislation. The Department recognizes the significant work of this Committee and others, particularly the House Committee on Homeland Security, that you all have devoted to drafting this legislation to reauthorize the CFATS program and to address chemical security at the Nation's water systems. We appreciate this effort and look forward to continuing the constructive engagement with Congress on these important matters.

CFATS is enhancing security today by helping to ensure high-risk chemical facilities throughout the country have security postures commensurate with the levels of risk. We have made significant progress since the implementation of CFATS in 2007. CFATS currently covers approximately 6,200 high-risk facilities nationwide. The current state of coverage reflects changes related to chemicals of interest that facilities have made since receiving preliminary tiering notifications in June of 2008 including security measures implemented and the consolidation or closure of some facilities.

The following core principles guided the development of the CFATS regulatory structure: securing high-risk chemical facilities in a comprehensive undertaking that involves a national effort including all levels of government and the private sector, risk-based tiering that ensures that resources are appropriately deployed, reasonable, clear and equitable performance standards that will lead to enhanced security, and recognition of the progress many companies have already made in improving facilities that leverages that advantages.

It is important to note that the Administration has developed a set of guiding principles for this reauthorization of CFATS and for addressing the security of our Nation's wastewater and drinking water treatment facilities. These principles are that the Administration supports a permanent chemical facility security authority and a detailed and deliberate process in so doing. Hence, our preference for a full-scale process that will be completed in fiscal year 2010. Nonetheless, CFATS single-year reauthorization in this session prevents an opportunity to promote the consideration and adoption of inherently safer technology among high-risk chemical facilities. We look forward to working with this committee and others on this important matter.

CFATS reauthorization also presents an opportunity to close the existing security gap for wastewater and drinking water facilities by addressing the statutory exemption of these facilities from CFATS. The Administration supports closing this gap. The Administration believes that EPA should be the lead agency for chemical security for both drinking water and wastewater systems with DHS supporting EPA's efforts with its security expertise and the leveraging of the CFATS process and structure to include the risk-based performance standards, tiering methodology, compliance tools, inspector training and other support. This will ensure that the water facilities identified as high-risk chemical facilities are ad-

dressed consistently nationwide with modification where necessary to reflect the unique characteristics of such facilities.

With regard to policies surrounding inherently safer technology, the Administration had established the following policy principles in regard to IST at high-risk chemical facilities. The Administration supports consistency of IST approaches for facilities regardless of sector, and DHS will be responsible for ensuring such consistency. The Administration believes that all high-risk chemical facilities, that is tiers 1 through 4, should assess IST methods and report the assessment in the facility security plans. Furthermore, the appropriate regulatory entity should have the authority to require facilities posing the highest degrees of risk, that is, tiers 1 and 2, to implement IST methods if such methods enhance overall security are feasible, and in the case of water sector facilities especially, though obviously not exclusively, that such methods consider public health and environmental requirements. With respect to tier 3 and 4 facilities, the appropriate regulatory entity should review the IST assessment contained in the site security plan and the entity should be authorized to provide recommendations on implementing ISTs but that entity would not require those facilities to implement those IST methods. The Administration believes that flexibility and staggered implementation would be required in implementing this new IST policy. Clearly, this process could not happen overnight and care and the collection of good data will be necessary. DHS in coordination with EPA would develop an IST implementation plan for timing and phase-in at water facilities designated as high-risk chemical facilities. DHS would develop an IST implementation plan for other high-risk chemical facilities in all other applicable sectors.

The Administration recognizes that further technical work to clarify policy positions regarding IST and water treatment security facility is required. The policy positions discussed above represent starting points in renewed dialog in these important areas. DHS and EPA staff are ready to engage in technical discussions with the committee staff, affected stakeholders and others to work out remaining technical details. 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 resulted in considerable success.

Again, I thank you for the opportunity to discuss these issues with the Subcommittee and look forward to answering your questions on this important issue.

[The prepared statement of Mr. Beers follows:]

Statement for the Record

Rand Beers  
Under Secretary  
National Protection and Programs Directorate  
Department of Homeland Security

Before the  
Subcommittee on Energy and Environment  
Committee on Energy and Commerce  
United States House of Representatives

October 1, 2009

Thank you, Chairman Markey, Ranking Member Upton, and distinguished Members of the Committee. It is a pleasure to appear before you today as the Committee considers H.R. 3258, the Drinking Water System Security Act of 2009. This Act is intended to close the security gap at drinking water facilities that possess substances of concern.

We have made significant progress since the implementation of the Chemical Facilities Anti-Terrorism Standards (CFATS). We have reviewed over 36,900 facilities' Top-Screen consequence assessment questionnaires, and in June 2008, we notified 7,010 preliminarily-tiered facilities of the Department's initial high-risk determinations and of the facilities' requirement to submit Security Vulnerability Assessments (SVAs). We received and are reviewing almost 6,300 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 6,200 high-risk facilities nationwide. The current state of coverage reflects changes related to chemicals of interest that facilities have made since receiving preliminary tiering notifications in June 2008, including security measures implemented and the consolidation or closure of some facilities.

**Chemical Security Regulations**

Section 550 of the FY2007 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. 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. Consequently, the Department published an Interim Final Rule, known as CFATS, on April 9, 2007. 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 as defined by 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 exempts facilities owned or operated by the Departments of Defense and Energy, as well as certain facilities subject to regulation by the Nuclear Regulatory Commission (NRC).

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

- 1) Securing high-risk chemical facilities is a comprehensive 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 infrastructure, 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, as the regulated facilities bridge multiple industries and critical infrastructure sectors. By working closely with experts, members of industry, academia, 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 risk and could endanger the greatest number of lives.

3) Reasonable, clear, and equitable performance standards will lead to enhanced security.

The current 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 at high-risk chemical facilities.

Appendix A of 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 consequences 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 one or more of these ways.

**Implementation Status**

Implementation and execution of the CFATS regulation require 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 that facilities can use to conduct SVAs and to develop SSPs. CSAT is a suite of online 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 initially identifies and sorts facilities based on their associated risks.

If a facility is initially identified during the Top-Screen process as having a level of risk subject to regulation under CFATS, 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 so, of the facility's final tier assignment. To date, the Department has received over 6,300 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 (ASP). DHS's final determinations as to which facilities are high-risk are based on each facility's individual consequentiality and vulnerability as determined by its 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 approximately 140 final tiering determination letters to the highest risk (Tier 1) facilities, confirming their high-risk status and initiating their 120-day time

frame for submitting an SSP. In June and July, we notified approximately 826 facilities of their status as final Tier 2 facilities and the associated due dates for their SSPs. Most recently, on August 31, 2009, we notified approximately 137 facilities of their status as either a final Tier 1, 2, or 3 facility and the associated due dates for their respective SSPs. Following preliminary authorization of the SSPs, the Department expects to begin performing inspections in the first quarter of FY 2010, starting with the Tier 1-designated facilities.

Along with issuing the final tiering determination notifications for Tier 1 facilities in May, the Department launched two additional measures to support CFATS. The first is 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, as it depends on its risk level, security issues, characteristics, and other factors. Therefore, the SSP tool collects information 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, cybersecurity, training, and response. The SSP tool is designed to take into account the complicated nature of chemical facility security and allows facilities to describe both facility-wide and asset-specific security measures, as the Department understands that the private sector in general, and CFATS-affected industries in particular, are dynamic. The SSP tool also allows facilities to involve their subject-matter experts from across the facility, company and corporation, as appropriate, in completing the SSP and submitting 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. Through a review of the SSP, in conjunction with an on-site inspection, 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.

Also issued with the final Tier 1 notifications and the SSP tool was the *Risk-Based Performance Standards Guidance* document. The Department developed this guidance to assist high-risk chemical facilities subject to CFATS in determining appropriate protective measures and practices to satisfy the RBPS. It is designed to help facilities comply with CFATS by providing detailed descriptions of the 18 RBPS as well as examples of various security measures and practices that would enable facilities to achieve the appropriate level of performance for the RBPS at each tier level. The *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 whichever security programs or processes they choose, 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 facility is required to appropriately restrict the area perimeter, which may include preventing breach by a wheeled vehicle. To meet this standard, the facility is able to consider numerous security measures, such as cable anchored in concrete block along with movable bollards at all active gates or perimeter landscaping (e.g., large boulders, steep berms, streams, or other obstacles) that would thwart vehicle entry. As long as the measures in the SSP are sufficient to address the performance standards, the Department does not mandate specific measures to 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 ensure that our security partners are aware of its requirements. As part of this dedicated outreach program, the Department has regularly updated the Sector and Government Coordinating Councils of industries most 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 and, where appropriate, to reflect that feedback in our implementation activities, such as adjustments made to the SSP template.



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 36,900 facilities have submitted Top-Screens to the Department via CSAT.

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

We are also working with the private sector as well as all levels of government in order to identify facilities that may meet the threshold for CFATS regulation but that 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 these pilots to design an approach that all States can use to identify facilities for our follow up. Further, we are in the process of commencing targeted outreach efforts to certain segments of industry where we believe compliance may need improvement.

Internally, we are continuing to build the Infrastructure Security Compliance Division that is responsible for 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. The FY 2010 budget request contains an increase to allow the hiring, training, equipping, and housing of additional inspectors to support the CFATS program as well as to continue deployment and maintenance of compliance tools for covered facilities.

**New Legislation**

We have enjoyed a constructive dialogue with Congress, including this Committee, as it works on new authorizing legislation. The Department recognizes the significant work that this Committee and others, particularly the House Committee on Homeland Security, have devoted to drafting legislation to reauthorize the CFATS program and to address chemical security at the Nation's water systems. We appreciate this effort and look forward to continuing the constructive engagement with Congress on these important matters. CFATS is enhancing security today by helping to ensure high-risk chemical facilities throughout the country have security postures commensurate with their levels of risk.

The Department supports a permanent authorization of the program. Given the complexity of chemical facility regulation, the Department is committed to fully exploring all issues before the program is made permanent. To that end, the President's FY 2010 budget includes a request for a one-year extension of the statutory authority for CFATS, which will allow the time needed to craft a robust permanent program while avoiding the sunset of the Department's regulatory authority on October 4, 2009. Further, as this one year extension is considered, we urge Congress to provide adequate time and resources to implement any new requirements under the prospective legislation and to ensure that new requirements would not necessitate 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, the Department has communicated a series of issues for consideration as part of any CFATS legislative proposal.

It is important to note that the Administration has developed a set of guiding principles for the reauthorization of CFATS and for addressing the security of our Nation's waste water and drinking water treatment facilities. These principles are:

- 1) The Administration supports permanent chemical facility security authorities and a detailed and deliberate process in so doing, hence our preference for that process to be completed in FY10.

- 2) Nonetheless, CFATS single year reauthorization in this session presents an opportunity to promote the consideration and adoption of inherently safer technologies (IST) among high-risk chemical facilities. We look forward to working with this Committee and others on this important matter.
- 3) CFATS reauthorization also presents an opportunity to close the existing security gap for waste water and drinking water treatment facilities by addressing the statutory exemption of these facilities from CFATS. The Administration supports closing this gap.

As DHS and EPA have stated before, we believe that there is a critical gap in the U.S. chemical security regulatory framework—namely, the exemption of drinking water and wastewater treatment facilities. We need to work with Congress to close this gap in order to secure substances of concern at these facilities and to protect the communities they serve; drinking water and wastewater treatment facilities that meet CFATS thresholds for chemicals of interest should be regulated. We do, however, 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 another facility under CFATS would have significant public health and environmental consequences when applied to a water facility. The Administration has established the following policy principles in regards to regulating security at water sector facilities:

- The Administration believes that EPA should be the lead agency for chemical security for both drinking water and wastewater systems, with DHS supporting EPA’s efforts. Many of these systems are owned or operated by a single entity and face related issues regarding chemicals of concern. Establishing a single lead agency for both will promote consistent and efficient implementation of chemical facility security requirements across the water sector.
- To address chemical security in the water sector, EPA would utilize, with modifications as necessary to address the uniqueness of the sector, DHS’ existing risk assessment tools and performance standards for chemical facilities. To ensure consistency of tiering

determinations across high-risk chemical facilities, EPA would apply DHS' tiering methodology, with modifications as necessary to reflect any differences in statutory requirements. DHS would in turn run its Chemical Security Assessment Tool and provide both preliminary and proposed final tiering determinations for water sector facilities to EPA. EPA and DHS would strive for consensus in this tiering process with EPA in its final determination, attaching significant weight to DHS' expertise.

- EPA would be responsible for reviewing and approving vulnerability assessments and site security plans as well as enforcing high-risk chemical facility security requirements. Further, EPA would be responsible for inspecting water sector facilities and would be able to authorize states to conduct inspections and work with water systems to implement site security plans. It is important to note that any decisions on IST methods for the water sector would need to engage the states given their primary enforcement responsibility for drinking water and wastewater regulations.
- DHS would be responsible for ensuring consistency of high-risk chemical facility security across all 18 critical infrastructure sectors.

CFATS currently allows, but does not require, high-risk facilities to evaluate transferring to safer and more secure chemicals and processes. 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). The Administration supports, where possible, using safer technology, such as less toxic chemicals, to enhance the security of the nation's high-risk chemical facilities. However, we must recognize that risk management requires balancing threat, vulnerabilities, and consequences with the cost to mitigate risk. Similarly, the potential public health and environmental consequences of alternative chemicals must be considered with respect to the use of safer technology. In this context, the Administration has established the following policy principles in regards to IST at high-risk chemical facilities:

- The Administration supports consistency of IST approaches for facilities regardless of sector.

- The Administration believes that all high-risk chemical facilities, Tiers 1-4, should assess IST methods and report the assessment in the facilities' site security plans. Further, the appropriate regulatory entity should have the authority to require facilities posing the highest degree of risk (Tiers 1 and 2) to implement IST method(s) if such methods enhance overall security, are feasible, and, in the case of water sector facilities, consider public health and environmental requirements.
- For Tier 3 and 4 facilities, the appropriate regulatory entity should review the IST assessment contained in the site security plan. The entity should be authorized to provide recommendations on implementing IST, but it would not require facilities to implement the IST methods.
- The Administration believes that flexibility and staggered implementation would be required in implementing this new IST policy. DHS, in coordination with EPA, would develop an IST implementation plan for timing and phase-in at water facilities designated as high-risk chemical facilities. DHS would develop an IST implementation plan for high-risk chemical facilities in all other applicable sectors.

Because CFATS and MTSA both address chemical facility security, there certainly should be harmonization, where applicable, between these programs. We of course continue to work closely within the Department with the Coast Guard to review the processes and procedures of both programs. We also support further clarification in the statute concerning the type of NRC-regulated facilities exempt from CFATS.

In the area of enforcement, we have expressed in our testimony on HR 2868 the Department's support for eliminating the requirement that an Order Assessing Civil Penalty may only be issued following an Administrative Order for compliance. This change would greatly streamline the civil enforcement process, enhancing the Department's ability to promote 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. We note, however, that the enforcement provisions this Committee has proposed in HR 3258 would subject drinking water facilities to a lower maximum penalty as compared to chemical facilities regulated under HR

2868 if enforcement is pursued through a civil penalty action in district court. This could result in inconsistent enforcement between facilities.

The Department notes that the Drinking Water System Security Act of 2009 would give the Administrator discretion in divulging information about the reasons for placing a facility in a given tier. This provision is preferable to the provision in Title I of HR 2868 which mandates that the Department disclose specific information to tiered facilities that could include classified information.

The Department also notes that HR 3258 and HR 2868 contain provisions that require covered facilities and government agencies to comply with all applicable state and Federal laws and exclude from protection “information that is required to be made publicly available under any law.” While the Department supports current requirements for facilities to report certain information to Federal and state agencies under other statutes, DHS is concerned that this language as written could increase the likelihood that sensitive information could be inappropriately disclosed to the general public. The Department would like to work with the Committee to explore what other Federal statutes and information might be affected by this language in order to ensure that there are no inconsistencies that could undermine the important goal of protecting sensitive information from unwarranted disclosure, while still protecting the public right-to-know about information that may affect public health and the environment, as embodied in these other statutes. We will also consult with our partner agencies that administer the affected Federal statutes.

## **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, our other Federal partners, States, and localities to get the job done.

The Administration recognizes that further technical work to clarify policy positions regarding IST and water treatment facility security is required. The policy positions discussed above represent starting points in renewed dialogue in these important areas. DHS and EPA staff are ready to engage in technical discussions with Committee staff, affected stakeholders, and others to work out the remaining technical details. 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 resulted in 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.

Mr. MARKEY. Thank you, Mr. Beers, very much.

Our next witness is Peter Silva. He serves as the assistant administrator for water at the Environmental Protection Agency where he supervises water office programs, implementing laws that include the Safe Drinking Water Act and the Clean Water Act. Mr. Silva is a civil engineer with 32 years of experience in the field of water and wastewater management. We welcome you, sir. Whenever you are ready, please begin.

#### STATEMENT OF PETER SILVA

Mr. SILVA. Thank you. Good morning, Mr. Chairman, Ranking Member Upton and member of the Subcommittee. I welcome this opportunity to discuss EPA's efforts to promote security and resiliency in the water sector with an emphasis on our role in addressing chemical security at drinking water facilities.

I will also reiterate with my colleague from DHS our shared conclusion that a critical gap exists with respect to the water sector and the framework for regulating the security of chemicals in the United States. The subcommittee has demonstrated both leadership and thoughtfulness in drafting a bill, the Drinking Water System Security Act of 2009, with the intention of closing this gap for drinking water systems. In my remarks, I will offer some comments on this bill as well as the importance of EPA coordinating with DHS in addressing chemical security at water and wastewater facilities.

EPA has worked over the last several years to support the water sector in improving security and resiliency, and I am pleased to report that the sector has taken its role very seriously. EPA has been entrusted with important responsibilities for coordinating the protection of the water sector through Congressional authorization under the Bioterrorism Act of 2002 and through Presidential mandates under Homeland Security Presidential Directives 7, 9 and 10.

Promoting the security and preparedness of the Nation's water infrastructure is a priority of this Agency in a post-9/11 and post-Hurricane Katrina world. A loss of water service can seriously jeopardize the public health, economic vitality and general viability of a community. In working with the water sector, we have emphasized a multi-layered approach to security consisting of prevention, detection, response and recovery. We support the Drinking Water System Security Act of 2009 because it will enable us to reduce the risks associated with chemical security in the water sector without compromising the public health and environmental protection standards. We also support the structure of the bill as to its tiering process, vulnerability and assessments, site security plans, risk-based performance standards and other provisions that are consistent with the proposed CFATS reauthorization language of H.R. 2868.

With respect to the inherently safer technology issue, the EPA and DHS support the bill's requirement for covered systems that use substances of concern above threshold levels to conduct assessment methods to reduce consequences, or MRCs. This requirement should promote the sector's consideration and adoption of safer methods.



Further, we concur with authorizing the regulatory agency to require the highest-risk facilities to implement MRCs under certain conditions. Although we find much to support in the bill, EPA and DHS share a significant concern that the bifurcation of the water sector under two separate bills with wastewater facilities covered under H.R. 2868 and drinking water facilities covered under H.R. 3258. We urge the committee to authorize EPA in coordination with DHS to regulate chemical security at both drinking water and wastewater facilities.

The Committee's bill correctly recognizes the importance of coordination between EPA and DHS in regulating chemical security in the water sector. EPA and DHS have each acquired valuable insight through their respective experience with both the water and wastewater sectors. We recommend that EPA utilize DHS's chemical security risk assessment tools and performance standards and modify as necessary for the water sector.

In implementing H.R. 3258, we envision that DHS would conduct initial reviews of vulnerability assessments and recommend risk tier assignments for water and wastewater facilities to EPA. DHS also would support EPA's evaluation of site security and train inspectors to ensure consistency of inspections nationwide. EPA also supports authority for the States to implement certain provisions including a prominent role in MRC determinations in both auditing and inspections.

In conclusion, we have made significant progress in enhancing the security of our Nation's drinking water and wastewater systems. With respect to chemical security, we look forward to continuing to work with members of the Committee on legislation that ensures the security of substances of concern at water and wastewater facilities while supporting the critical mission of these facilities for public health protection.

Thank you again for the opportunity to testify about our role in water security. I look forward to answering your questions.

[The prepared statement of Mr. Silva follows:]

TESTIMONY OF  
Peter S. Silva  
ASSISTANT ADMINISTRATOR  
FOR WATER  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE  
SUBCOMMITTEE ON ENERGY AND THE ENVIRONMENT  
COMMITTEE ON ENERGY AND COMMERCE  
U.S. HOUSE OF REPRESENTATIVES

October 1, 2009

Introduction

Good morning Mr. Chairman, Ranking Member Upton, and Members of the Subcommittee. I am Peter Silva, Assistant Administrator for Water at the United States Environmental Protection Agency. I welcome this opportunity to discuss EPA's efforts to promote security and resiliency in the Water Sector with an emphasis on our role in addressing chemical security at drinking water facilities.

I will also reiterate with my colleague from the Department of Homeland Security (DHS) our shared conclusion that a critical gap exists with respect to the Water Sector in the framework for regulating the security of chemical facilities in the United States. The Subcommittee has demonstrated both leadership and thoughtfulness in drafting a bill, the Drinking Water System Security Act of 2009, with the intention of closing this gap for drinking water systems. EPA supports the general structure and approach of this bill. In my remarks, I will offer some comments on this bill, as well as how EPA would coordinate with DHS in addressing chemical security at water and wastewater facilities.

EPA has worked over the last several years to support the Water Sector in improving security and resiliency, and I am pleased to report that the sector has taken its charge seriously. EPA has been entrusted with important responsibilities for coordinating the protection of the Water Sector through Congressional authorization under the *Public Health Security and Bioterrorism Preparedness and*

*Response Act of 2002* (the Bioterrorism Act), and through Presidential mandates under Homeland Security Presidential Directives (HSPD) 7, 9 and 10.

Promoting the security and preparedness of the Nation's water infrastructure remains a priority of the Agency in a post-9/11 and post-hurricane Katrina world. A loss of water service can seriously jeopardize the public health, economic vitality, and general viability of a community. In working with the Water Sector, we have emphasized a multi-layered approach to security consisting of prevention, detection, response, and recovery so that we can assist water facilities in avoiding incidents and, should an incident occur, in quickly identifying and recovering from such events.

#### **Implementation of Section 1433 of the Safe Drinking Water Act**

Existing statutory requirements address chemical security at drinking water systems to a degree. Section 1433 of the Safe Drinking Water Act (added by the Bioterrorism Act of 2002) required each community water system providing drinking water to more than 3,300 persons to conduct a vulnerability assessment, certify its completion, and submit a copy of the assessment to EPA. These vulnerability assessments addressed security at water systems comprehensively, from water collection to treatment and distribution, and they specifically included the use, storage, or handling of chemicals. In addition, Section 1433 required each water system to prepare or revise an emergency response plan that incorporates the findings of the vulnerability assessment and to certify to EPA that the system has completed such a plan.

Since 2003, EPA has received 100% of the vulnerability assessments and emergency response plan certifications from large and medium community water systems. Over 99% of small community water systems serving between 3,300 and 50,000 people have submitted their vulnerability assessments and emergency response plan certifications.

**EPA's Role in Chemical Security for Drinking Water Utilities**

EPA's current approach for addressing chemical security in the Water Sector involves a long-standing effort to promote the voluntary adoption of countermeasures by water facilities. Before I discuss some of these activities, however, I would like to take a step back to consider the broader implications of chemical security for the Water Sector. It is of paramount importance for us to acknowledge in this discussion that the primary purpose of drinking water systems is the delivery of safe drinking water to consumers. In fact, the effective treatment of drinking water to control infectious diseases like typhoid and cholera has been hailed by the U.S. Centers for Disease Control as one of the great public health achievements of the twentieth century.

Therefore, authorizing language should allow for a consideration of this essential public health mission, particularly with respect to any provision which may require a facility to consider alternative water treatment processes. In other words, chemical security regulations when applied to the Water Sector should enable a reasoned balance of multiple, important factors so that we can achieve the joint policy goal of protecting public health while enhancing security. Such factors include: efficacy of treatment in meeting public health and environmental requirements, security concerns, reliability of treatment, source water characteristics, feasibility, and operator safety.

***Tools and Technical Assistance***

EPA has worked closely with the Water Sector to assess and reduce the risks associated with hazardous chemicals. To this end, EPA and industry associations, often in partnership, have developed tools, training and technical assistance to help drinking water utilities identify and mitigate those risks. A few examples of our efforts are as follows:

1. We developed tools that assist drinking water systems with assessing vulnerabilities, including chemical storage and handling. Examples of the tools include:
  - The *Vulnerability Self Assessment Tool (VSAT™)* – a software package that supports water and wastewater utility vulnerability assessments using a qualitative risk assessment methodology;
  - The *Security Vulnerability Self-Assessment Guide for Small Drinking Water Systems* – a manual specifically designed to help small water systems conduct vulnerability assessments; and
  - The *Security Vulnerability Self-Assessment Guide for Very Small (<3,300) Systems*, which assists these systems in assessing their critical components and identifying security measures that should be implemented.
2. Under the Bioterrorism Act of 2002, EPA created a document to “provide baseline information to community water systems...regarding which kinds of terrorist attacks or other intentional acts are the probable threats to: (A) substantially disrupt the ability of the system to provide a safe and reliable supply of drinking water; or (B) otherwise present significant public health concerns.” The baseline threat document addressed vulnerabilities related to the use, transfer and storage of chemicals, including the evaluation of different disinfection options. EPA provided this document to drinking water facilities to assist them in conducting their vulnerability assessments.
3. The National Association of Clean Water Agencies (NACWA) has worked with the Department of Homeland Security (DHS) and EPA to create a Chlorine Gas Decision Tool for Water and Wastewater Utilities. The Tool is designed to provide utilities with a user-friendly, but thorough, means of evaluating alternatives to chlorine gas disinfection.

4. EPA created a series of Security Product Guides that assist water facilities with making enhancements to reduce risks and protect against man-made and naturally occurring events. These guides provide recommendations for improving physical security, such as the use of barriers, placement and security of aboveground equipment, selection of fencing materials, and the use of visual surveillance monitoring systems, all of which can help to secure hazardous chemicals used by water facilities.
5. We funded a cooperative agreement with the American Society of Civil Engineers, the American Water Works Association, and the Water Environmental Federation to develop Voluntary Physical Security Standards for drinking water and wastewater systems. Completed in December 2006, these voluntary standards address storage of hazardous or toxic chemicals, including chlorine and ammonia gas.
6. EPA developed ALOHA (Aerial Locations of Hazardous Atmospheres) – software that models the dispersion and health effects of hazardous substances. DHS uses this tool in its Chemical Facilities Anti-Terrorism Standards (CFATS) program.

### ***Risk Management Plans***

In addition to the above activities, EPA's Chemical Accident Prevention Provisions (40 CFR 68.1 - .220), developed under the authority of the Clean Air Act, Section 112(r), requires utility processes containing certain levels of specific hazardous substances to implement an accident prevention program, conduct a hazard assessment, prepare and implement an emergency response plan, and submit to EPA a summary report known as a risk management plan (RMP). The RMP must describe the facility's accidental release prevention and emergency response policies, the regulated substances handled at the facility, the worst-case release scenario(s) and alternative release scenario(s), the 5-year accident history of the facility, the Emergency Response Plan, and planned changes to improve safety at the facility (see 40 CFR Part 68). Hazardous chemicals of most relevance to the Water Sector, including gaseous chlorine, ammonia, sulfur dioxide, and chlorine dioxide, trigger RMP regulatory requirements if they exceed certain threshold quantities.

### **Drinking Water System Security Act of 2009**

To turn to the proposed bill, I first and foremost want to commend the Committee and your staff for developing a bill for the purpose of addressing the regulatory gap on security at water sector facilities. In commenting on the bill, it would be remiss of me not to acknowledge all of the effort and thoughtfulness which you have invested in it.

While the focus of the discussion is on the chemical security provisions of the bill, it is important to underscore that the bill also addresses water security risks in general. The bill, for example, requires all drinking water facilities serving over 3,300 people to update their vulnerability assessments and emergency response plans every five years. Under the bill, these assessments and plans are not limited to chemical security, but cover the full array of potential water system vulnerabilities, from pipes and constructed

conveyances to storage facilities and electronic systems. As such, the bill provides statutory authority for EPA to continue to promote the risk reduction goals of the 2002 Bioterrorism Act.

*Considerations on the Bill*

It is important to note that the Administration has developed a set of guiding principles for the reauthorization of CFATS and for addressing the security of our Nation's wastewater and drinking water treatment facilities. These principles are:

- 1) The Administration supports permanent chemical facility security authorities and a detailed and deliberate process for doing so, hence our preference for that process to be completed in FY10.
- 2) Nonetheless, CFATS single year reauthorization in this session presents an opportunity to promote the consideration and adoption of inherently safer technologies (IST) among high risk chemical facilities. We look forward to working with this Committee and others on this important matter.
- 3) CFATS reauthorization also presents an opportunity to close the existing security gap for wastewater and drinking water treatment facilities by addressing the statutory exemption of these facilities from CFATS. The Administration supports closing this gap.

As DHS and EPA have stated before, we believe that there is a critical gap in the U.S. chemical security regulatory framework—namely, the exemption of drinking water and wastewater treatment facilities. We need to work with Congress to close this gap in order to secure substances of concern at these facilities and to protect the communities they serve; drinking water and wastewater treatment facilities that meet CFATS thresholds for chemicals of interest should be regulated. We do, however, 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 another facility under CFATS would have significant public health and environmental consequences when applied to a water facility. The Administration has established the following policy principles in regards to regulating security at water sector facilities:



- The Administration believes EPA should be the lead agency for chemical security for both drinking water and wastewater systems, with DHS supporting EPA's efforts. Many of these systems are owned or operated by a single entity and face related issues regarding chemicals of concern. Establishing a single lead agency for both will promote consistent and efficient implementation of chemical facility security requirements across the water sector.
- To address chemical security in the water sector, EPA would utilize, with modifications as necessary to address the uniqueness of the sector, DHS' existing risk assessment tools and performance standards for chemical facilities. To ensure consistency of tiering determinations across high-risk chemical facilities, EPA would apply DHS' tiering methodology, with modifications as necessary to reflect any differences in statutory requirements. DHS would in turn run its Chemical Security Assessment Tool and provide both preliminary and proposed final tiering determinations for water sector facilities to EPA. EPA and DHS would strive for consensus in this tiering process with EPA, in its final determination, attaching significant weight to DHS' expertise.
- EPA would be responsible for reviewing and approving vulnerability assessments and site security plans as well as enforcing high-risk chemical facility security requirements. Further, EPA would be responsible for inspecting water sector facilities and would be able to authorize states to conduct inspections and work with water systems to implement site security plans. It is important to note that any decisions on IST methods for the water sector would need to engage the states given their primary enforcement responsibility for drinking water and wastewater regulations.
- DHS would be responsible for ensuring consistency of high-risk chemical facility security across all 18 critical infrastructure sectors.

CFATS currently allows, but does not require, high-risk facilities to evaluate transferring to safer and more secure chemicals and processes. 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). The Administration supports, where possible, using safer technology, such as less

toxic chemicals, to enhance the security of the nation's high-risk chemical facilities. However, we must recognize that risk management requires balancing threat, vulnerabilities, and consequences with the cost to mitigate risk. Similarly, the potential public health and environmental consequences of alternative chemicals must be considered with respect to the use of safer technology. In this context, the Administration has established the following policy principles in regards to IST at high-risk chemical facilities:

- The Administration supports consistency of IST approaches for facilities regardless of sector.
- The Administration believes that all high-risk chemical facilities, Tiers 1-4, should assess IST methods and report the assessment in the facilities' site security plans. Further, the appropriate regulatory entity should have the authority to require facilities posing the highest degree of risk (Tiers 1 and 2) to implement IST method(s) if such methods enhance overall security, are feasible, and, in the case of water sector facilities, consider public health and environmental requirements.
- For Tier 3 and 4 facilities, the appropriate regulatory entity should review the IST assessment contained in the site security plan. The entity should be authorized to provide recommendations on implementing IST, but it would not require facilities to implement the IST methods.
- The Administration believes that flexibility and staggered implementation would be required in implementing this new IST policy. DHS, in coordination with EPA, would develop an IST implementation plan for timing and phase-in at water facilities designated as high-risk chemical facilities. DHS would develop an IST implementation plan for high-risk chemical facilities in all other applicable sectors.

In addition to articulating these principles, I also would like to comment on two aspects of the bill which have significant relevance to its successful implementation. The first issue pertains to resources. Passage of the bill would impose new resource demands on both EPA and most of the states. Appropriations commensurate with the new authorities under this Title would be necessary to ensure successful implementation of the regulations.

The second comment concerns the division of regulatory labor between EPA and the states. Consistent with the Committee's bill, EPA supports authority for the states to implement certain provisions, including a prominent role in IST determinations and auditing/inspections. This approach would leverage long established EPA-state relationships under the drinking water and wastewater programs, as well as the states' expertise and familiarity with individual water facilities.

### **CONCLUSION**

Over the past several years, we have made progress in ensuring the security of our nation's drinking water and wastewater systems. We have produced a broad array of tools and assistance that the Water Sector is using to assess its vulnerabilities, reduce risk, and prepare for emergencies, including chemical theft and release. In developing these tools, we have worked effectively with our partners within the sector, and also reached out to build new relationships beyond the sector, to ensure that water utilities can be prepared to prevent, detect, respond and recover from intentional incidents and natural disasters.

With respect to security at water sector facilities, we look forward to continuing to work with members of the Committee on legislation that ensures the security of drinking water and wastewater facilities while supporting the critical mission of these facilities for public health protection.

Thank you again for the opportunity to testify about our role in water security. I would be happy to answer any questions you may have.

Mr. MARKEY. Thank you very much, Mr. Silva, and again, we thank the witnesses for all their hard work and their work with our staff in moving towards today. And for the purposes of the question-and-answer period, Mr. Beers will be joined by Sue Armstrong from the DHS and Mr. Silva will be joined by Cynthia Dougherty from the EPA staff if they would like to come up to the table, and we welcome you both.

The Chair will now recognize him and we will begin with you, Mr. Beers. There has been, Mr. Beers, many inaccurate statements made about the language in the bill that requires facilities to assess whether there are safer practices or technologies that they could use and for facilities in the two highest risk tiers, the language that provides DHS with the authority to require them to be used in some cases. Some have said that the provision might shift the security risk because a company could change the location of the dangerous chemical or store it outside the facility's fence. H.R. 2868 says that before DHS can require a facility to adopt a safer process or technology that it needs to find that there wouldn't be this kind of risk shifting. Do you think it makes sense to ensure that risk is not shifted?

Mr. BEERS. Mr. Chairman, we certainly are of the view at DHS that as we look at any issue with respect to security, be it under the mandate that this committee is seeking with respect to inherently safer technology or the screening and assessment process that DHS already undertakes, that measures to reduce risk are not shifting of risk to other areas. That is a basic bedrock position that DHS has held up to this point and would like to see continued as we consider any kinds of security measures.

Mr. MARKEY. OK. Thank you.

Mr. BEERS. It does not help us otherwise.

Mr. MARKEY. Thank you. And H.R. 2868 says that before DHS can require a facility to adopt a safer process or technology that it needs to find that the facility would be able to stay in business at its current position. Do you think that it makes sense for the Department to consider the cost before requiring a facility to adopt a safer chemical or process?

Mr. BEERS. Sir, as we look at any kind of legislative impact, be it the existing CFATS legislation or what this committee has under consideration, we believe quite strongly that we have to take into account a number of factors including economic considerations in any move to seek facilities to change their practices. So in moving forward in an area of concern with inherently safer technology, we would certainly want to be able to take that into account.

Mr. MARKEY. Thank you. Now, there have been some proposals to exempt small businesses from some of the requirements to assess and implement safer chemicals or processes. Do you believe that the risk to the surrounding community is smaller just because the business is smaller if al-Qaeda could launch a successful attack on a chemical facility that was unprotected?

Mr. BEERS. Sir, the risk process that we undertake in reviewing facilities looks at the risk as the risk exists. It is not an issue of whether a business is large or small, and the risk to a community is not determined by the size of the business, it is determined by the size of the risk. So as we look at these issues, we would be

looking at the size of the risk. As I said in answer to my previous question, we would also take into account economic considerations, but risk is risk, and that is no difference between the size of the business.

Mr. MARKEY. In your opinion, is it reasonable to assume that Mullah Omar and Osama bin Laden in Pakistan right now have plans if they could implement them to strike at the United States once again?

Mr. BEERS. Sir, it is the view of our intelligence community that al-Qaeda and its affiliate organizations still represent a risk to the homeland of the United States. We have not deviated from that view across a change of Administration and the recent events in New York clearly suggest that that risk is alive.

Mr. MARKEY. And could chemical facilities be a high priority target for al-Qaeda within the United States if security was inadequate?

Mr. BEERS. We certainly believe that chemical facilities represent a potential target. That was the purpose behind the original CFATS legislation and we continue to believe that that is the case.

Mr. MARKEY. Thank you, Mr. Beers, very much.

Let me turn and recognize the gentleman from Michigan for his questions.

Mr. UPTON. Thank you, Mr. Chairman.

Mr. Beers, you know, the Congress passed in 2006 and funded the chemical facility anti-terrorism bill and the 2007 appropriations bill. How many facilities are actually impacted by the legislation in the United States, about? I don't know if you know the exact number or not.

Mr. BEERS. I am going to turn to my colleague here, Sue Armstrong, to answer that detailed question.

Ms. ARMSTRONG. Good morning, I will apologize in advance for my voice today.

Mr. UPTON. Sounds fine to me.

Ms. ARMSTRONG. There are currently 6,156 covered facilities in the four CFATS tiers.

Mr. UPTON. And if those 6,156 facilities, how many of them have been inspected since the bills passed?

Ms. ARMSTRONG. Well, the first regulatory deadline under CFATS was January 22, 2008, to file top screen, which is the initial consequence screening that a facility possessing appendix A chemicals of interest must file with the Department, and at that point in time we had 29,453 top screens in. In June of last year, June 23, 2008, we notified 7,010 facilities nationwide that they were preliminarily tiered under CFATS and needed to do a security vulnerability assessment, again under the program, and—

Mr. UPTON. And then you dropped it down to 6,156?

Ms. ARMSTRONG. Yes.

Mr. UPTON. And of those 6,156, how many of them have you actually gone to visit?

Ms. ARMSTRONG. Well, we have done a number of compliance assistance visits over the past year or so to, number one, make sure we understand what we are seeing in a security vulnerability assessment or if a facility requests a visit we will pay them one.

Mr. UPTON. So has that happened? Have you actually visited any of these sites?

Ms. ARMSTRONG. Yes, sir. Compliance assistance visits have been occurring regularly. Facilities are also able to visit us in Washington for a technical consultation regarding their tiering if they want to. We have not begun inspections formally yet. We expect to do so in December. The first site security plans for a group of tier 1 facilities that were notified of their final tiering status this May were due September 15.

Mr. UPTON. OK. The reason I ask that is that I know that in the budget request, the President's budget request that was made, he sought a 1-year extension of the bill, which as I understand it, the Homeland Security appropriation bill is going to comply with that. I think there is a 1-year extension in both the House and the Senate bill. And as a former OMB official, I know that this is about the time of year that the agencies submit their requests for the next budget to be presented early next year. Can you tell us where the Department of Homeland Security is as they look at the 2011 budget? Are they going to pursue a 1-year extension again?

Mr. BEERS. No, that is not our intention. That was a good-faith effort to indicate that it was our preference that we work with the Houses of Congress on a permanent reauthorization during fiscal year 2010.

Mr. UPTON. Are you aware from receiving the information from these 6,000-some facilities that there are any shortcomings in their compliance?

Ms. ARMSTRONG. We have not taken any enforcement actions under the program at this point in time. We did receive approximately 6,300 total security vulnerability assessments and we have been in the process of reviewing those since they were due at the beginning of—or late last year and the beginning of this year. We have tier 1, 2 and 3 reviewed pending new submissions of top screen and we are reviewing the tier 4 vulnerability assessments at this time and continuing to make final tiering determination notification.

Mr. UPTON. Mr. Beers, you said in response to Mr. Markey's question, you wanted to take into account economic considerations of the changes that they are making. Do you have any estimate of what these facilities have done financially to comply with the regulations that are on the books now? Do you have any total costs?

Ms. ARMSTRONG. While I don't have a total cost, I do know, and you can see from the numbers, 7,010 initial preliminary tiering notifications and a covered population of 6,156 at this point in time. To me, that says that facilities are taking a look at their chemical holdings. They are taking a look at their internal corporate supply chain and security posture and making change. The rule specifically provides that when a facility makes a material modification, it needs to refile its top screen with us. So we have had thousands of top screen resubmissions. We have received 36,960 top screens as of this date. So facilities are looking at their holdings, looking at their practices and—

Mr. UPTON. I know my time is expired but do you have any idea what the cost has been on these facilities to comply?

Ms. ARMSTRONG. I do not at this point.

Mr. UPTON. Thank you.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Louisiana, Mr. Melancon.

Mr. MELANCON. I will waive questions for right now. Thank you.

Mr. MARKEY. The Chair recognizes the gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

Mr. Beers, as you know, H.R. 2868 requires DHS to review facilities of IST assessment. In your testimony, you mentioned that the infrastructure security compliance is responsible for implementing the CFATS, has hired in the process over 125 people. Can you tell me how many of those 125 people who are either on board or in the process are experts in the field of chemical engineering, chemical process, safety, design and engineering or occupational health, which are only a few fields that would be required under IST? Do you have that information for us?

Ms. ARMSTRONG. We have approximately at this point in time 130 people either on board or in the selection process. Of those, we have a number, five or six, who are either civil or physical engineers or chemical engineers. We have a chemist on site—on staff, sorry—and we have several inspectors who joined us from industry.

Mr. GREEN. I have to admit, with the state of the industry right now, it is probably not a bad time to be out seeking someone with a chemical engineering degree, at least in my area. What type of expertise do you feel is necessary, DHS, to make the IST determinations?

Ms. ARMSTRONG. Well, I think as with everything we have done with the CFATS program, it needs to be an inclusive process. It needs to include industry. It needs to include DHS security expertise, which we have on staff. It needs to include academia. It needs to include the covered facilities themselves so we envision as we move forward if this legislation is enacted working with the covered community as closely as we have in standing up the CFATS program.

Mr. GREEN. And that gives me some comfort. And I know you are not here representing the Coast Guard, and I have some questions regarding the Coast Guard's current security regimen under the Maritime Transportation which has been cooperative between the industry in my area and the Coast Guard. MTSA's requirement is to prevent maritime transportation security incidents defined as any incident that results in a significant loss of life, environmental damage, transportation system disruption or economic disruption in a particular area. Do you see this vision significantly different from what H.R. 2868 seeks to prevent in chemical facilities that may not be waterside or under MTSA?

Mr. BEERS. The Secretary of Homeland Security as she was becoming familiar with the activities of the Department of Homeland Security was informed early on in her tenure of the potential for differing enforcement with respect to the Coast Guard's responsibilities under MTSA and the NPPD responsibilities under CFATS and asked the commandant of the Coast Guard and myself to ensure that we work together over the course of this year to seek full harmony in terms of the implementation between our two regulatory regimes. As a result of that, Sue, on behalf of NPPD and a senior

flag officer of the Coast Guard have a committee that has met and is in the process of trying to ensure that those two regulatory regimes are in full harmony.

Mr. GREEN. Great. Let me—I only have 5 minutes. Do you believe this legislation is absolutely clear that MTSA facilities only have to deal with one federal agency or one subagency of DHS as the Coast Guard, and to follow up, right now, and I think a number of members have bought our TWIC card, because I spend a lot of times on plant sites in our district, it kind of concerns me that a chemical worker at, say, ABC Chemical Company at waterside uses a TWIC card, and yet if they go to their plant facility at another location it may not have waterside but have to have a different set of regimens. Is there any way through this legislation or through DHS we can harmonize that so it will just make it much more efficient, you know, using the TWIC card as a basis?

Mr. BEERS. I understand your concern, Congressman, and that is one if the areas obviously that we want to look very carefully at to ensure that we have if not a single regulatory regime at least a fully harmonized regulatory regime. That card issue is an issue that is much broader than just these two regimes as well.

Mr. GREEN. I know, you know, it covers not only workers. I have five refineries and I would say a boatload of chemical facilities in my area and I appreciate DHS partnering with our community over the years, both the local law enforcement and federal law enforcement, to make sure we safeguard.

Thank you, Mr. Chairman.

Mr. MARKEY. Great. We thank the gentleman very much. There are three roll calls that we will have to attend to as members out on the House Floor and so we will take a brief recess after we recognize the gentleman from Illinois, Mr. Shimkus, for his 5 minutes of questioning.

Mr. SHIMKUS. Thank you, Mr. Chairman, and this kind of follows up to my opening statement. I appreciate you all being here. One of the comments I made was that we are talking about farms, hospitals, universities, deep underground wells, basically anyone anywhere who possesses a, quote, unquote, substance of concern as defined by the legislation. At a June 29, 2009, meeting to update the chemical sector security summit, a leading official at the Department of Homeland Security stated that the Department is doing targeted outreach to colleges, universities and medical and public health facilities. Does this mean that you consider—and this is for Mr. Beers—that you consider colleges and universities to be in the high-risk tiers?

Ms. ARMSTRONG. I was actually the official who made that statement, so I will elaborate. What I was announcing is that we are beginning some targeted outreach for awareness purposes in certain segments of industry, colleges and universities and public health and health care facilities among them. There are currently colleges and universities and other health care facilities that are tiered under CFATS. We want to make sure that those communities understand the CFATS programs and their potential requirements under it and our willingness to work with them to incorporate into their security plans their unique circumstances.

Mr. SHIMKUS. So the answer is yes?



Ms. ARMSTRONG. The answer is yes, they are.

Mr. SHIMKUS. OK. So if yes, they are tiered—

Ms. ARMSTRONG. Some of them.

Mr. SHIMKUS [continuing]. We are talking about colleges and universities, are they in tier 1 or tier 2?

Ms. ARMSTRONG. They are in actually at this point in time lower tiers, primarily 3 and 4.

Mr. SHIMKUS. Does that mean that DHS considers hospitals and other public health clinics or facilities, you are saying that they are falling into the lower risk tiers, not in 1 and 2?

Ms. ARMSTRONG. Correct.

Ms. SHIMKUS. According to this presentation, DHS considers certain federal facilities to be outliers. Section 550 exempted many federal facilities. Since DHS is having trouble implementing section 550 before it expires, what is the Department doing chasing entities that it considers outliers when you don't have the legal authority to do anything about it?

Ms. ARMSTRONG. Well, we do have the authority to identify facilities as high risk based on other considerations and their submission of top screen. That is in our rule. What the reference to outliers was getting at was, we have worked with two States in particular, New York and New Jersey, to have them based on their knowledge help us identify facilities in their jurisdictions who may have not have filed top screen and need to do so.

Mr. SHIMKUS. Going back to the opening statement, so we have addressed hospitals and universities. What about the issue of the terminology, substance of concern, for farms and deep underground wells?

Mr. BEERS. The current policy is that there is an extension of those entities having to file. That is ongoing.

Mr. SHIMKUS. And when will you make a determination?

Mr. BEERS. We have begun a data gathering effort. We expect to be issuing some data calls to supplier firms in the not-too-distant future. That will be the beginning of the process of collecting information in order to make a determination. This will be all done publicly and transparently so that affected or potentially affected entities will be fully aware of what is happening.

Mr. SHIMKUS. OK, Mr. Chairman. That is all I have. Thank you very much.

Mr. MARKEY. The gentleman's time is expired. What we are going to do right now is to take a brief recess and we should be back here in about 15 minutes to reassemble and to continue the questioning. So the committee stands in recess.

[Recess.]

Mr. MARKEY. Welcome back, everybody, and we thank you for your patience. There was an extended period of time for the roll call. Let me turn and recognize the gentlelady from California, Ms. Capps.

Mrs. CAPPS. I am still out of breath, Mr. Chairman.

Mr. MARKEY. No, good, you made the right decision, though. Getting back here first is a big payoff.

Mrs. CAPPS. Thank you very much.

As has already been referenced, and this is for Under Secretary Beers again, recent events have demonstrated that we live in a

world where terrorists can go to a beauty supply store in Colorado to secure chemicals for a bomb they intend to use for an attack in New York City. Incidents like this illustrate how security vulnerabilities in one place can result in injuries or deaths all the way across the country. My questions are going to be in the area of citizen suit provisions. The Administration has not taken a position on this. Am I right?

Mr. BEERS. That is correct.

Mrs. CAPPS. Well, I would like to frame this in a broader context then. Do you agree that broad enforcement of CFATS requirements is central to our security?

Mr. BEERS. We certainly believe that the ability to work with industry to increase the security and safety for the country is absolutely critical. If that requires some kind of leverage, then we are prepared to consider it. Obviously we prefer not to have to use it—

Mrs. CAPPS. Well, let me just sort of work up to that. Is it fair to say that the Department perhaps lacks the personnel and resources to observe for all violations at all regulated facilities at all times?

Mr. BEERS. I am sorry?

Mrs. CAPPS. Would it be fair to say that the Department lacks personnel and resources to observe for violations at all regulated facilities at all times?

Mr. BEERS. Oh, that goes without question. I mean, our intent is to be able to visit each of the tier 1 sites in this fiscal year and 50 percent of the tier 2 sites based on the current resources that we have.

Ms. CAPPS. Well, that isn't everywhere at every time. I mean, that is kind of omniscient if you were able to do that. So that leads me to say, is it possible that neighbors who live around a chemical facility and observe it in their neighborhood every day may be in a position to spot evidence of security violations that the Department of Homeland Security may not be aware of on any particular day?

Mr. BEERS. That is possible, yes.

Mrs. CAPPS. Well, that is what I am leading to in the area of concerns that many neighborhoods have raised about their opportunities to recommend and have their concerns addressed in this way. Can I ask you what you feel should be done about this?

Mr. BEERS. Well, we have a system now in which citizens can report their issues or concerns to the Department of Homeland Security and it appears at this particular point in time to be working. Sue, do you want to add anything?

Mrs. CAPPS. Yes, and I would like to add, what are the steps that are taken and what kind of guarantee would neighbors have that there would be the kind of follow-up that they would know about too?

Ms. ARMSTRONG. Well, what we have done in CFATS implementation is to, number one, have a very publicly accessible Web site where people can get information about the program. It is a subset of the DHS main Web site. And we have also established a tip line where an individual can either call anonymously or call and iden-

tify themselves if they would like to be contacted in follow-up to report any kind of security concerns.

Mrs. CAPPS. Would they have any assurance or is there any feedback, is there a procedure that they know this is being addressed?

Ms. ARMSTRONG. Well, if they identify themselves and request follow-up, one of our staff will get back to them.

Mrs. CAPPS. And is there record of this having happened?

Ms. ARMSTRONG. Yes.

Mrs. CAPPS. So that it is possible that there is a record of citizens—well, how about if they are not satisfied with the answer. Is there a possibility for legal action?

Mr. BEERS. At this particular point in time, they can certainly go to you as their Congressperson or to someone like that, but we are dealing with information here in some cases where the information that is relevant to the decision that we might take for inaction or different action from what they were suggesting or requesting. We are not in a position to reveal to them the basis for which we would undertake to act differently than they thought we ought to act.

Mrs. CAPPS. So if they feel that their reporting has not been followed up upon to their satisfaction, they have no further recourse at this time?

Mr. BEERS. They can come to you.

Mrs. CAPPS. They can come to their Member of Congress? Well, I am not going to pursue it any further, but this committee has a long history with citizen enforcement and citizen suit provisions. For close to 40 years this Committee has included citizen enforcement provisions in each of our environmental laws from the Clean Air Act to the Safe Drinking Water Act, and we have now ascertained that this is a valuable tool in enforcing our laws. I appreciate your thoughts on this matter.

Thank you very much, Mr. Chairman.

Mr. MCNERNEY [presiding]. Thank you. The gentlelady's time has expired. The Chair recognizes himself for 7 minutes.

Mr. SILVA, I just want to say, my father is a civil engineer and I appreciate the work civil engineers do to make our country work, and this is certainly an important part of it. In your testimony, you mentioned that there was a security gap or that a security gap exists. I am going to ask you sort of an open-ended question here. What is not part of the security gap? In other words, what do you feel good about in terms of the security of our Nation's water supplies?

Mr. SILVA. Well, right now I think that the gap is just in terms of the fact that we don't have coverage in both the water and wastewater sectors, and so with this bill and hopefully with further action by the committee, as was mentioned, EPA would take the lead in ensuring that those two sectors would be covered for security purposes.

Mr. MCNERNEY. OK, but is there anything you feel good about in terms of what part of our water infrastructure do you feel is secure and we don't need to worry too much about in terms of terrorist attack or so on?

Mr. SILVA. Well, again, right now we do have existing site security plans and assessments that we do as part of the Safe Drinking

Water Act, but again, we feel that there could be a gap and so, you know, we would feel more comfortable working with DHS to ensure that all facilities are covered and that there are more of the tier 1 and tier 2-type facilities out there that they could be covered under this.

Mr. MCNERNEY. All right. What are some of the more significant challenges that the EPA might face in meeting the obligations under this legislation and do you think that they are adequately addressed in H.R. 3258?

Mr. SILVA. Well, I think some of the more principal ones probably would be funding for communities to perform the inspections, to do the plans and also to carry out any kind of changes that would come out of any IST type of review, and so we comfortable if we get the legislation through and that we have the funding that is available in the legislation that we could work with States and communities to fund those types of requirements.

Mr. MCNERNEY. So you don't have any particular recommendations then on improving the legislation?

Mr. SILVA. Well, no, again, the recommendation would be again to be able to cover both water and wastewater and somehow get those two under the same umbrella through EPA, again, working with DHS.

Mr. MCNERNEY. OK, you did mention that in your testimony. I appreciate that.

Mr. Beers, I am going to follow up on a question that Mr. Markey asked or a similar question regarding exemptions for small businesses, and I understand the need for small businesses to be able to move forward and work without too much hindrance but I see a potential for a significant risk with regard to small business in terms of risk to the population. How can you address that?

Mr. BEERS. As I tried to convey, we have a process that currently exists in which we are prepared to work with each of the facilities that are covered for them to present their assessments to work with them with respect to their development of responses and plans in order that we can do this in a way that both protects public safety and security and at the same time doesn't undermine the economic viability of the small-business concern. My point earlier, though, was, this is not an issue of defining whether the risk is less important because the size of the firm is small. The risk doesn't change with respect to the size of the firm.

Mr. MCNERNEY. Well, earlier I think the testimony was that there are 6,156 facilities. I think that was the number that was given. That is a large number. Do you feel that this legislation will increase the risk of layoffs or some of these facilities closing because of regulatory burdens that are being placed on them by this legislation?

Mr. BEERS. It is certainly not our intention to enforce any legislation that Congress should pass that would automatically have that effect. We will try to work with all of the concerned facilities not to have that kind of an economic impact. That is certainly where we start from.

Mr. MCNERNEY. And Mr. Silva and Mr. Beers, you see opportunity for cooperation between your two agencies. There is not too

much reason why there wouldn't be any hurdles or personalities that will cause problems in enforcing this new legislation?

Mr. BEERS. One of the, I think, benefits of the process with respect to working with this committee is the agreement that our two agencies have come to, to think through how we would work together and cooperate. Obviously the devil is in the details and we will have some other issues that we will want to have to work through but I think we have got a really solid start here, an ability to work together with EPA in the lead.

Mr. SILVA. I would definitely concur with that.

Mr. MCNERNEY. Well, thank you. That is all the questions I have.

Mr. Upton, do you have any additional questions?

Mr. UPTON. I just want to say, I know Dr. Burgess had some questions, and they have a weekly Texas meeting, Texas delegation lunch, and I might just ask that we keep the record open for questions for members that did not come back so we might be able to forward those questions to both of you for a response and allow that to be placed into the record if I might.

Mr. MCNERNEY. Without objection.

Mr. UPTON. No one is here to object.

Mr. MCNERNEY. That concludes our first panel. Thank you for coming out here to testify today.

We now welcome the second panel starting with Brian Ramaley. Mr. Ramaley serves as president of the Association of Metropolitan Water Agencies, the AMWA, which is an organization representing the largest publicly owned drinking water providers in the United States. Mr. Ramaley is also a director of the Newport News Waterworks in Newport News, Virginia, which provides drinking water to more than 400,000 customers. He previously served as chairman of EPA's National Drinking Water Advisory Council from 2004 to 2007. Thank you, Mr. Ramaley. Martin Durbin, who is vice president of federal affairs for the American Chemistry Council, where he is responsible for directing federal legislative advocacy. In his previous tenure leading the ACC's security program, Mr. Durbin was responsible for public policy, advocacy, communications and operational activities of the association as related to site, cyber and value chain security for the business of chemistry. Welcome aboard. Thank you for coming. Darius Sivin, Dr. Darius D. Sivin. Dr. Darius Sivin served as the legislative representative for the international union UAW since November 2007. His work with the UAW includes 5 years in the UAW health and safety department where he conducted numerous workplace entries to investigate health and safety issues at a wide variety of facilities. Prior to joining the UAW, he was employed by the Occupational Safety and Health Administration and by the Washington State OSHA program. Dr. Sivin received his Ph.D. in environmental and occupational health from the Johns Hopkins School of Public Health and his master's in environmental studies from Evergreen State College. Thank you for participating. Stephen Poorman. Mr. Poorman presently serves as the manager of environmental health, safety and security for the Fujifilm Imaging Colorants. He also chairs the Society of Chemical Manufacturing Affiliates' safety and security committee and has been actively involved in chemical security

issues while serving in this capacity. Mr. Poorman's previous experience includes serve as a program supervisor at the Ohio Environmental Protection Agency and EHS manager with responsibility for chemical security at chemical manufacturing sites and corporate headquarters. Thank you for participating.

I will begin our panel's testimony with Mr. Ramaley. You have approximately 5 minutes. Begin when you are ready.

**STATEMENTS OF BRIAN RAMALEY, DIRECTOR, NEWPORT NEWS WATERWORKS, AND PRESIDENT, BOARD OF DIRECTORS, ASSOCIATION OF METROPOLITAN WATER AGENCIES; MARTY DURBIN, VICE PRESIDENT, FEDERAL AFFAIRS, AMERICAN CHEMISTRY COUNCIL; DARIUS SIVIN, LEGISLATIVE REPRESENTATIVE, CWA-UAW LEGISLATIVE ALLIANCE; AND STEPHEN POORMAN, INTERNATIONAL EHS MANAGER, FUJIFILM IMAGING COLORANTS, AND CHAIR, SAFETY AND SECURITY COMMITTEE, SOCIETY OF CHEMICAL MANUFACTURERS AND AFFILIATES**

#### **STATEMENT OF BRIAN RAMALEY**

Mr. RAMALEY. Good afternoon, Mr. Chairman and members of this Committee. My name is Brian Ramaley and I am the director of Newport News Waterworks which, as you indicated, provides drinking water to more than 400,000 people each day in southeastern Virginia. I am also the president of the Association of Metropolitan Water Agencies, or AMWA, an organization that represents the largest publicly owned drinking water providers in the United States.

In my testimony today, I am going to focus on H.R. 3258, the Drinking Water System Security Act. AMWA understands that H.R. 2868, the Chemical Facility Anti-Terrorism Act, is not intended to apply to drinking water systems. However, we opposed similar legislation last year, H.R. 5577, that would have subjected drinking water systems to federally mandated inherently safer technologies through the DHS CFATS program and we would do so again this year if such a bill were proposed.

Turning to the Drinking Water System Security Act of 2009, while H.R. 3258 is not perfect, there are several components of the bill that enable AMWA to offer it support for that legislation. First, it continues EPA's regulation of drinking water system security, thus avoiding duplicative requirements with DHS. Second, the bill maintains the important concept of local choice in water disinfectant and does not allow EPA or any other federal entity to broadly force drinking water systems across the country to change their disinfection methods or chemicals. Instead, the bill requires drinking water systems that employ certain chemicals to evaluate the feasibility of potential IST operations and decide on their own whether the utility will begin using those alternates in the future. Only a State drinking water enforcement agency, not EPA, is given a direct opportunity to review a utility's analysis and mandate the change in disinfectants after considering factors such as feasibility, cost and possible water quality implications. I must point out that AMWA's acceptance of this State-level review is based on our expectation and experience that State drinking water enforcement

agencies, which have an awareness of local water utility operations, will act responsibly when reviewing a utility's disinfectant choice. AMWA could not support this approach if EPA or another federal agency had the direct ability to dictate a State or local water disinfection decision.

Additionally, the bill reflects AMWA's request that the current civil penalty, criminal penalties, I should say, of up to 1 year in prison and substantial fines be maintained for individuals found to have unlawfully distributed protected utility information. Any weakening of the penalties for the unlawful disclosure of protected information would increase the chances of an unauthorized leak of sensitive utility security documents and such a leak could provide terrorists and criminals with a detailed account of where and precisely how a utility's security could best be compromised.

The legislation does direct EPA to formulate standards to facilitate the appropriate sharing of protected information with entities such as local first responders, certain water utility employees and their union representatives. AMWA looks forward to participating in EPA's development of standards that will set the ground rules for how this information may be accessed.

Some suggested improvements: AMWA hopes to continue working with the committee and other members of Congress to further strengthen H.R. 3258. For example, the legislation should include an appeals process that a utility may initiate if they disagree with their primary State agency's order to adopt an alternate water disinfection method. Because the decision on water disinfectants is so critical to public health and public health protection, I believe the opportunity to be heard in an appeal process is a reasonable request.

AMWA also remains concerned that the legislation would apply only to the Nation's drinking water systems while H.R. 2868 as approved by the House Homeland Security Committee would regulate the security of wastewater utilities under DHS CFATS program. I think we have heard today that there is some agreement that that should fall under EPA as well. This approach would be especially problematic for municipalities that operate both water and wastewater systems as do many AMWA members as it would force the employees of such systems to comply with two varying sets of security rules issued by two different federal entities. To resolve this issue, AMWA recommends and supports that the security of wastewater utilities be regulated under the same EPA program that this legislation would apply to drinking water systems and that both drinking water and wastewater utilities remain explicitly exempt from CFATS.

In closing, I want to thank the Committee for working with AMWA on H.R. 3258. Because of the improvements made to the bill, AMWA is pleased to offer its support and hopes to continue to work with the Committee to further strengthen the bill in the weeks and months ahead.

That concludes my testimony, and I will defer answering questions until the rest of the panel speaks, if that is your choice.

[The prepared statement of Mr. Ramaley follows:]



Testimony of Brian Ramaley  
Director  
Newport News Waterworks

President  
Association of Metropolitan Water Agencies

Before the  
U.S. House of Representatives  
Committee on Energy and Commerce  
Subcommittee on Energy and the Environment

Hearing on  
H.R. 3258, the  
“Drinking Water System Security Act of 2009”

and  
H.R. 2868, the  
“Chemical Facility Anti-Terrorism Act of 2009”

October 1, 2009



**Summary of Major Points of the Testimony of Brian Ramaley  
October 1, 2009**

- Since the enactment of the Public Health Protection and Bioterrorism Preparedness and Response Act of 2002, the Environmental Protection Agency has regulated the physical security of the nation's drinking water systems. Given the need to coordinate security rules with the public health requirements of the Safe Drinking Water Act, AMWA believes that EPA should continue oversight of any new or updated water security program, and the water sector's exemption from the Department of Homeland Security's CFATS program should continue.
- If EPA continues to regulate the security of drinking water systems, it should also regulate wastewater utility security under a similar program. Any regulatory approach that divides water sector security among different federal agencies could lead to confusing and contradictory standards – especially for utilities that provide both drinking water and wastewater service to a community.
- AMWA understands that H.R. 2868, the "Chemical Facility Anti-Terrorism Act," is not intended to apply to drinking water systems. AMWA opposed similar legislation in the 110<sup>th</sup> Congress (H.R. 5577) that would have subjected drinking water systems to federal "IST" mandates through CFATS. The Association has strong concerns that H.R. 2868 as written would apply CFATS and "IST" mandates to wastewater utilities.
- H.R. 3258, the "Drinking Water System Security Act," represents an improvement over previous water security proposals because it maintains the ability of local water system experts to choose the most effective disinfectant chemical and would not allow the federal government to broadly dictate water disinfection methods to the nation's drinking water systems.
- Sensitive drinking water system security information such as vulnerability assessments and site security plans must be strongly protected against public disclosure. To this end, AMWA appreciates that H.R. 3258 maintains current criminal penalties that apply to individuals who unlawfully release protected utility information.
- H.R. 3258 directs EPA to engage in rulemaking to formulate appropriate standards for the sharing of protected information with individuals and groups such as first responders, utility employees, and union representatives. If enacted, AMWA will work with EPA to ensure that sensitive information is not shared more broadly than is necessary to facilitate a coordinated response to a utility security incident.

Good morning Mr. Chairman, Ranking Member Upton, and distinguished members of the Committee. My name is Brian Ramaley, and I am currently the Director of Newport News Waterworks in Newport News, Virginia. The Waterworks provides clean and safe drinking water to more than 400,000 customers every day in Hampton, Newport News, Poquoson, and parts of York and James City counties. The utility uses ozone – not gaseous chlorine – as the primary disinfectant to kill microorganisms such as bacteria and viruses, but operates one gaseous chlorine facility for the purpose of residual disinfection in the water distribution system. While my utility already has plans to convert this facility to a non-gaseous form of chlorine, it still has strong concerns about allowing the federal government to broadly dictate water disinfection chemicals to individual utilities.

In addition, I currently serve as the President of the Association of Metropolitan Water Agencies, or “AMWA,” which is an organization representing the largest publicly owned drinking water providers in the United States. AMWA’s members provide clean and safe drinking water to more than 125 million Americans from Alaska to Puerto Rico. AMWA has a strong interest in enacting water security legislation that does not jeopardize the ability of local utilities to properly disinfect drinking water, and in my testimony today I will explain the Association’s position on H.R. 3258, the “Drinking Water System Security Act.”

**H.R. 5577, H.R. 2868, and the Chemical Facility Anti-Terrorism Standards**

To begin, I want to thank the Committee for crafting water facility security legislation that represents a significant improvement over similar proposals that Congress has recently considered. Last year’s version of the “Chemical Facility Anti-Terrorism

Act” (H.R. 5577 in the 110<sup>th</sup> Congress) would have allowed the Department of Homeland Security, through its “Chemical Facility Anti-Terrorism Standards” program, or “CFATS,” to force drinking water utilities across the country to replace their use of critical water disinfectant chemicals with alternate substances – without regard for the public health, environmental, or cost consequences that could result. The blanket promotion of these alternates, sometimes referred to as “inherently safer technologies,” or “IST,” fails to recognize the complex process that all water utilities must undertake to evaluate potential disinfection options that maintain the utility’s compliance with the Safe Drinking Water Act and facilitate the delivery of clean and safe drinking water to millions of customers.

The legislation also could have conflicted with federal security measures put in place at drinking water systems through the Public Health Protection and Bioterrorism Preparedness and Response Act of 2002. Following the 9/11 terrorist attacks, this new law created a drinking water security program at the Environmental Protection Agency (through Section 1433 of the Safe Drinking Water Act) and required all drinking water utilities serving more than 3,300 customers to prepare vulnerability assessments and emergency response plans to identify weaknesses in their security posture and prepare for security-related incidents.

In light of the EPA-based security requirements and subsequent unilateral measures taken by drinking water utilities (such as security upgrades, increased training, and chemical reduction and substitution when feasible), in 2006 Congress exempted drinking water systems from duplicative facility security regulation through the Department of Homeland Security’s CFATS. Because of these existing EPA security

programs and the inherent differences between drinking water systems and chemical facilities, H.R. 3258 as introduced continues the drinking water sector's explicit exemption from the DHS CFATS regulations.

Including drinking water facilities within the CFATS program would subject them to duplicative and potentially contradictory federal security regulations, and could also allow DHS officials in Washington to force local water systems to adopt alternate disinfection chemicals without regard for or knowledge of the public health and environmental consequences that could result. Considering EPA's strong track record in implementing Section 1433 of SDWA, AMWA believes that any new water security legislation approved by Congress must continue the Agency's oversight of water system security.

For these and other reasons, AMWA strongly opposed H.R. 5577 when it was introduced in 2008. We understand that this year's version of the legislation (H.R. 2868) is not intended to apply to drinking water utilities, but we would oppose any effort to amend the bill to allow DHS to impose "IST" mandates on drinking water utilities through the CFATS program.

In addition, AMWA would be uncomfortable with any regulatory scheme that subjected the drinking water sector to DHS' CFATS but charged EPA with enforcing the regulations on drinking water systems. Such a plan would be a recipe for confusion, as the lines between agencies would be blurred and individual water systems would be left uncertain as to which federal agency was ultimately responsible for their oversight.

#### **The "Drinking Water System Security Act"**

The "Drinking Water System Security Act," introduced in July as H.R. 3258, is

the product of months of cooperative work between the Energy and Commerce Committee staff, AMWA and other water sector associations, and other stakeholders. While the legislation is not perfect, AMWA believes that it represents a workable compromise that addresses our most serious concerns. Importantly, the bill would maintain the drinking water sector exemption from CFATS, but while also subjecting water systems to EPA-based security regulations that are consistent with the framework of CFATS (which includes tiering facilities based on risk and requiring compliance with risk-based performance standards). As a result, AMWA believes that this legislation adequately addresses fears of a water sector security “gap” that EPA and DHS officials have previously cited in testimony before Congress.

It has long been AMWA’s position that all drinking water disinfection choices are best made by utility experts at the local level, so it is critical that the “Drinking Water System Security Act” maintains this important concept of local choice. Specifically, the bill does not allow EPA or any other federal entity to broadly require drinking water systems across the country to change their chosen water disinfection methods or chemicals. Instead, H.R. 3258 would require individual drinking water systems that employ certain hazardous chemicals to evaluate the feasibility of potential “IST” options, and decide on their own whether the utility will begin using these alternate disinfection options in the future.

To respond to the Committee’s concerns about water systems that may fail to adequately consider potential alternate disinfectants, the legislation would direct the state agency charged with primary enforcement of the federal Safe Drinking Water Act to review the “IST” determinations of utilities at the highest risk of attack. If the state

agency agrees with the utility's assessment, then this is the end of the process, and the utility continues to disinfect its water with its chosen chemicals. Alternately, if the state agency believes that an "IST" should be implemented at a particular utility, then the state may direct the utility to do so after the state considers factors such as feasibility, cost, and possible water quality implications. EPA would only have the ability to directly review the "IST" decisions of utilities in states without SDWA enforcement primacy (Wyoming and the District of Columbia), and therefore lacking a state-level enforcement agency.

I must point out here that it is a major concession by AMWA to agree to have individual utilities' disinfection choices subject to review by an outside government agency through this program. As I previously stated, the drinking water community continues to believe that local water utility experts are best equipped to make appropriate disinfection chemical choices based on their expertise on factors such as source water quality, disposal of disinfection byproducts, supply chain reliability, and treatment facility size and location. However, Newport News Waterworks and other drinking water utilities across the country work closely with state enforcement agencies, and this relationship has invested our state enforcement agency with a significant degree of understanding of our operations. Because of our joint concern for public health and safety, I am confident that state enforcement agencies would act responsibly when reviewing a utility's disinfectant choice, and generally defer to the water treatment determinations made by local water experts.

I would not, however, have the same confidence if EPA or any other federal department or agency were to be invested with the power to broadly and directly mandate the adoption of "IST," as there is virtually no way that a federal agency in Washington

could make a sound judgment about what disinfectants are and are not realistic options for my utility, as well as each and every other drinking water utility in the United States. This compromise therefore ensures that there is a state-level review in place to protect against a hypothetical situation where a water system may overlook the clear and easily attainable security benefits of changing disinfectant chemicals, while also preventing the federal government from inserting itself into local water treatment decisions or broadly directing all of the nation's water systems to end their use of necessary disinfectants such as gaseous chlorine. Additionally, because the legislation will require many drinking water systems to explore the feasibility of "ISTs" that they otherwise may not have considered as a disinfection alternative, it will lead to increased knowledge and awareness of alternate disinfection processes within the drinking water community.

Other areas of the "Drinking Water System Security Act" represent mostly sensible updates to the requirements of SDWA's Section 1433. For example, while that law required the one-time completion of facility vulnerability assessments and emergency response plans, H.R. 3258 would require water systems to update these documents at least once every five years. While some utilities, like mine, have voluntarily updated their plans, this legislation will require that all covered utilities do so. This will ensure that the assessments and response plans kept on-hand by water systems are current and take into account changing circumstances such as the completion of a new treatment plant or a change in security procedures. Additionally, H.R. 3258 would require water systems to complete (and keep updated) site security plans that explain how security vulnerabilities at the system are being addressed. And similar to the CFATS framework, EPA would place different water systems in different "tiers" of risk, based upon the

potential public health consequences of a successful terrorist strike against the water facility. Water systems in the highest-risk tiers would have to meet a stricter combination of security standards, but systems would be able to select layered security measures that, taken together, would meet the requirements of their tier.

I would also like to commend the Committee for omitting language that would have allowed the federal government to shut down the operations of a drinking water system for failure to comply with a portion of the new security requirements. Last year's H.R. 5577 would have granted DHS such shut-down authority over drinking water systems, but this provision failed to recognize that if a local water utility does shut down, for example, basic fire protection and sanitation services are immediately suspended, thereby leading to a significantly increased public health risk or even the evacuation of the community. AMWA appreciates that the Committee recognized that the public health and environmental costs of allowing the federal government to close a community water system – even temporarily – would far outweigh any potential security-related benefits.

Finally, the information protection provisions of this legislation represent an improvement over language in H.R. 5577 and H.R. 2868 that would have forced the distribution of water utility security plans to outside groups – significantly weakening existing protections of sensitive utility information against public disclosure. A utility's vulnerability assessment could provide a terrorist or a criminal with a roadmap of how to exploit the facility's weaknesses, so this bill properly exempts these documents from disclosure under the Freedom of Information Act or a similar state or local law. H.R. 3258 also reflects AMWA's request that current criminal penalties and substantial fines



remain an option for individuals found to have unlawfully distributed protected utility information. Any weakening of the penalties for the unlawful disclosure of protected information would increase the chances of an unauthorized leak of sensitive utility security information, and such a leak that put this information in the public domain would provide terrorists and criminals with a detailed account of where and how a utility's security could best be compromised. Because such an outcome could put millions of water customers at permanent risk, it is crucial that Congress maintains these penalties that for nearly seven years have prevented this information from being illegally released.

While this sensitive information will continue to be protected against unauthorized disclosure, the legislation does provide an avenue for additional individuals to access portions of the data. Specifically, EPA is directed to formulate standards to "facilitate the appropriate sharing of protected information" with entities such as local first responders, certain water utility employees, and their union representatives. While the Association remains skeptical of broadening access to this sensitive information, AMWA looks forward to participating in EPA's development of standards that will set the ground rules for how certain information may be accessed under appropriate conditions that will facilitate an effective response to a security incident. During this process we will seek to ensure that this sensitive information remains closely guarded and is not unnecessarily shared with outside entities that would not be directly involved with the response to a security incident at a water facility.

#### **Suggested Improvements**

Despite the improvements that this legislation represents, AMWA still hopes to continue working with the Committee and other members of Congress to further

strengthen H.R. 3258. For example, one such clarification that should be added to the bill is a clear definition of a “covered water system.” While I believe that it is the intent of the Committee to limit the bill’s application to operations within the fence line of a drinking water system’s treatment plant and chemical storage facility, H.R. 3258 could be read to apply to the far reaches of a utility’s water distribution system – and thus require additional measures that would do little to increase the security of hazardous chemicals that are stored on-site.

Additionally, the new requirement that drinking water systems annually provide at least eight hours of security training to certain employees is an arbitrary mandate that fails to recognize that some large water systems may have more comprehensive security training requirements than other, smaller systems. AMWA supports annual security training for relevant employees, but recommends that the eight-hour minimum be removed.

Another potential improvement is the addition of an appeals process that a utility may instigate if they disagree with their primacy state agency’s order to adopt an alternate water disinfection method. Because the decision on water disinfectants is so critical to public health and safety, I believe the opportunity to be heard in an appeal is reasonable before a utility may be forced to make a change.

Finally, and most importantly, more work remains to be done to streamline these new drinking water facility regulations with those that are likely to be imposed upon wastewater systems. AMWA’s membership remains concerned that H.R. 3258 would apply only to the nation’s drinking water systems, while H.R. 2868 as approved by the House Homeland Security Committee would regulate the security of wastewater utilities

separately under the DHS CFATS program. This approach would be especially problematic for municipalities that operate both drinking water and wastewater systems, as it would force the employees of such systems to comply with two varying sets of security rules issued by two different federal entities.

AMWA understands that part of the reason for the current structure of the program is a result of the jurisdictional framework among committees in the House of Representatives. However, all members of Congress need to understand that dividing security regulations of drinking water and wastewater systems would impose severe burdens on many utilities across the country, and unevenly apply federal security standards that should apply uniformly to municipal operations. In short, I think we can all agree that municipal wastewater systems are much more similar to municipally-operated drinking water systems than they are to privately owned and operated chemical manufacturing facilities. Therefore, because H.R. 3258 would charge EPA with regulating the security of drinking water systems, we also believe that the security of wastewater systems should be regulated under the same (or a similar) EPA-based program. I hope that members of the Energy and Commerce Committee will work with their colleagues on the Homeland Security and Transportation and Infrastructure panels to accomplish this request that will protect public health and avoid duplicative layers of federal requirements on local communities.

In closing, on behalf of AMWA I want to thank the members of the Committee for drafting a reasonable update of the federal security standards that apply to the nation's drinking water systems. Nearly two year's worth of work by the Association and congressional staff have led to this bill. While it is not perfect, the legislation recognizes

the expertise of local water utility managers in choosing appropriate disinfectants while also requiring them to properly consider alternate disinfectant chemicals and methods that may pose a reduced risk to their customers and the surrounding community.

Moreover, the bill reflects AMWA's longstanding insistence that the federal government not have the power to broadly dictate disinfection methods or shut down local water systems for noncompliance with security regulations. Because of these factors, AMWA is pleased to offer its support for H.R. 3258 as introduced, and hopes to continue to work cooperatively with the Committee and other stakeholders in the weeks and months ahead to further improve the proposal.

Thank you again for the opportunity to testify, and I would be happy to respond to any questions that members of the Committee may have.

Mr. MCNERNEY. Thank you, Mr. Ramaley.  
Mr. Durbin, you may begin.

**STATEMENT OF MARTY DURBIN**

Mr. DURBIN. Mr. Chairman, Mr. Upton, thank you very much for the opportunity to again speak with you on this very important subject on behalf of the members of the American Chemistry Council.

Having worked on this issue for 8 years and testified before Congress on numerous occasions, I know that this issue is always accompanied by heated rhetoric and emotion. Regardless of what I consider to be significant actions taken by all those involved, enormous progress has been made. So while there are clearly differences on how best to achieve the objectives of securing our Nation's chemical facilities, I think it is useful to reflect on what has been accomplished.

First, after September 11, ACC and many others in the chemical industry stepped up and implemented serious, stringent security programs at their facilities before there was any specific government direction. Second, Congress stepped in and enacted national legislation to ensure that these assets, their workers and the communities where they operate are protected. And third, DHS has acted swiftly to develop and implement comprehensive security regulations. CFATS is by far the most robust, comprehensive and demanding chemical security program to date and DHS should be commended. ACC believes CFATS provides a solid foundation and that Congress should provide DHS the necessary staff and resources to ensure continued success.

As Congress now analyzes CFATS and identifies areas for improvement, ACC is committed to being a constructive partner. While our views are not always in alignment, I want to acknowledge the willingness of the Energy and Commerce Committee and its staff to seek our input and consider our viewpoint. We have had constructive discussions and we hope to continue working together to make a smart regulatory program even better. I believe our common goal is greater than our differences.

ACC's record of accomplishment and cooperation with Congress, DHS and other agencies is well established. Since 2001, our members have invested nearly \$8 billion in security enhancements under our own Responsible Care Security Code and we continue to support strong federal chemical security regulations. Our security code not only provided a model for chemical security programs in New Jersey, New York and Maryland but it was also recognized as an alternative security plan under the U.S. Coast Guard's Maritime Transportation Security Program.

Turning to the DHS program, at each step of the regulatory development process, our members 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 deadlines. CFATS is a tough yet flexible program that allows facilities to utilize a full range of potential security enhancements including inherently safer approaches to address potential security vulnerabilities. This is exactly what a strong, smart regulatory ap-

proach must do: set a high bar through performance-based standards and then hold facilities accountable.

The legislation being considered today by this committee represents an important step toward making CFATS permanent. We are pleased to see H.R. 2868 reflects 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 would like to highlight just a few provisions we have discussed with the committee where our members 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 drives each facility to consider all possible risk reduction options including inherently safer approaches while developing a site security plan. While you can't mandate innovation, CFATS does allow DHS to unleash the ingenuity, expertise and resources of the chemical sector.

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

Also, since employees are the first line of defense when it comes to chemical security, we appreciate provisions that address employee involvement. One of the core components of ACC's Responsible Care Security Code stresses employee involvement including training, drills and guidance, so we would like to continue to work with the committee to ensure that the right people with the right knowledge are involved in our efforts to secure chemical facilities.

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 we will continue to work with Congress and DHS in that spirit. Thank you.

[The prepared statement of Mr. Durbin follows:]



**Statement of  
Marty Durbin  
Vice President, Federal Affairs  
American Chemistry Council**

**before the**

**United States House of Representatives  
Energy and Commerce Subcommittee on Energy and  
the Environment**

**Legislative Hearing on  
H.R. 2868  
“The Chemical Facility Antiterrorism Act of 2009”**

**October 1, 2009**

Mr. Chairman, Ranking Member Upton, and Members of the Committee, my name is Marty Durbin, and I am vice president of Federal Affairs for the American Chemistry Council (ACC). Thank you for this opportunity to speak with you again on the important topic of security in the business of chemistry, a critical sector of America's infrastructure.

First and foremost, I would like to acknowledge the willingness of this committee to seek our input, and both to consider and understand our viewpoint. We have had constructive discussions that I hope will continue as we work together and the legislation progresses.

My testimony today will highlight three primary points:

1. Security is and will remain a top priority for our members. Since 2001, our members have invested nearly \$8 billion in security enhancements under ACC's mandatory Responsible Care Security Code<sup>®</sup>. When it comes to security, our members demonstrate each day an unflagging commitment to protect their facilities, employees and communities.
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 implement the most robust, comprehensive and demanding chemical security program to date, the Chemical Facility Anti-Terrorism Standards (CFATS). Along with thousands of our industry partners, ACC members continue 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 necessary to do its job. The legislation being considered by this committee represents an important step toward that goal.



## 1. Security and Safety - ACC's Top Priorities

ACC represents 140 leading companies who account for approximately 85 percent of basic industrial chemical production in the U.S. The business of chemistry is an important part of our nation's economy, directly employing nearly 850,000 Americans and producing 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 in the U.S. 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, lightweight 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, product stewardship, 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 Security 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 nearly \$8 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 members' performance under the Code, it is important to acknowledge that non-ACC members have also taken aggressive action to enhance security at their facilities.

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

We are gratified that the Obama Administration has made cyber security a top priority. Along with physical security, ACC members didn't hesitate following 9/11 as they actively addressed cyber security issues 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 was referenced by the Bush Administration's National Strategy to Secure Cyberspace of 2003, and is still in use today. A 2009 Program Update can be found on the White House website - "Making Strides to Improve Cyber Security in the Chemical Sector."

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

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.**

In recent months, 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. DHS has notified all Tier 1 and 2 facilities, which comprise the highest-risk facilities, of their obligation to develop site security plans and submit these plans for DHS inspectors to review and approve. In addition, DHS has begun to notify Tier 3 facilities of their requirements.

This guidance makes it perfectly clear that the current DHS chemical security rules are tough, yet appropriately flexible. “Among other things, CFATS established 18 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, smart regulatory approach must do: *set a high bar through performance-based standards and then hold facilities accountable*. Or, as explained in the report, *The Forgotten Homeland*, co-authored by DHS Undersecretary Rand Beers, “Smart regulation focuses on results or end-states rather than dictating how those results should be achieved.”

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 by 2015, implementation costs for CFATS will exceed \$8.5 billion.

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.

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. 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 deemed high risk and now has those high risk sites implementing security measures – all within the three years – a significant accomplishment.

### **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 enjoyed 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. As an important step, we were pleased to see Congress approve the recent DHS budget request and include an extension for CFATS to ensure that the program can continue to move forward for an additional year even as a permanent program is being fashioned.

#### **4. ACC Comments on “The Chemical Facility Antiterrorism Act of 2009”**

H.R. 2868 represents an important first step toward establishing permanent chemical facility security regulations. ACC clearly supports that goal. We're pleased to see the legislation 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 has already demonstrated that it 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. 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. While you can't mandate innovation, CFATS allows DHS to unleash the ingenuity, expertise and resources of the chemical sector. Congress should not abandon a strategy to enhance security that employs performance-based security standards to hold facilities accountable but avoids the potential for shifting risk.

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. We also share concerns raised by DHS regarding the potential for disclosure of sensitive or classified information in judicial proceedings.

Citizens' suit provisions are absent from federal statutes regulating maritime security, airline security, railroad and motorcarrier security. The regulation of security at chemical facilities should not be treated differently and singled out to bear the counterproductive burden of being subject to citizens' suits.

In its earliest stages, one of the goals of the program was 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. Congress should not delegate its oversight authority to courts. If Congress truly believes that DHS will have a problem enforcing 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 nationwide. 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.

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Mr. MCNERNEY. Thank you, Mr. Durbin.

Mr. Sivin, would you please begin your testimony? Now, we just got called so we have about 10 or 15 minutes before we need to leave, so there is plenty of time.

#### STATEMENT OF DARIUS SIVIN

Mr. SIVIN. Mr. Chairman, Ranking Member Upton, members of the Subcommittee, thank you for the opportunity to testify today. I am Dr. Darius Sivin representing the CWA-UAW Legislative Alliance. We represent more than 2 million active and retired workers who are members of the Communications Workers of America and of the international union UAW. Both unions represent members who work at facilities potentially covered by the legislation before us today. The CWA and the UAW strongly support H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009, and H.R. 3258, the Drinking Water System Security Act of 2009. We urge the subcommittee and the entire House to grant prompt and favorable consideration to these two bills. We would not like to see delay beyond the 1-year reauthorization already in process. We have heard how enhancing the regulation now might strand some costs. Additional delay will offer the opportunity for further costs which will ultimately be sunk and stranded.

Chemical security is an issue of great importance to organized labor because our members get hurt first and worst in case of any attack. CWA and UAW believe that government should have the authority to require the higher-risk tiers to implement their own plans to reduce the consequences of an attack. We have heard examples supposedly of how this would result in bad solutions being imposed on industries that would increase risk. We disagree because the language of the bill clearly says that a solution cannot be imposed unless it would reduce risk. The only thing that would have to happen is a facility would have to submit an analysis showing that a solution would not reduce risk and then they would not have to implement it.

We are very pleased that members on both sides of the aisle are concerned about protecting our jobs. Nothing is more important to the men and the women of the labor movement than the protection of jobs. We want to make it clear that we do not believe that anything in the MRC provisions of this legislation, H.R. 2868, as introduced is a threat to jobs. There does not need to be any additional requirement for analysis or administrative law review to protect jobs. We think that the addition of additional requirements to the bill as introduced would only make it harder to implement necessary security measures and would not add any protection of jobs.

Further, we would like to strongly support Under Secretary Beers' statement that the size of the risk is not related to the size of the business. We would like the subcommittee to move very, very carefully if it seeks to protect small businesses. For example, using the Small Business Administration's definition of a small business could exempt very high-risk facilities including one that puts 12 million people at risk. We think it is very important that government be able to give weight to the degree of the security risk as well as the size of the security.



We are quite concerned about some of the background checks because we think they could provide an opportunity for rare but very real unscrupulous employers to go on fishing expeditions, and if a fishing expedition is undertaken in the name of security, it would be very difficult to question it.

We would like to see the following improvements made to H.R. 2868. First, adverse employment decisions should be made only pursuant to a determination by DHS that an individual's offenses could cause the individual to be a terrorism security risk. Second, employees subject to adverse employment decisions should be informed of the basis of the decision and that they have a right to appeal and/or file for a waiver as provided by H.R. 2868. Third, an employee subject to an adverse employment decision should have the option to exercise any rights they have under a collective bargaining agreement without losing the right to appeal. We are pleased with the language that supports participation of employee representatives in both bills. We would like to see in the water bill the additional thing whereby employee representatives would have a right to a copy of the MRC provisions after they are jointly developed, and we do not believe there should be any additional stipulations as to how employee representatives should be chosen and we do not believe employee representatives should be subject to criminal penalties for disclosing vulnerability information to those who have a legitimate role in fixing problems.

We think that H.R. 2868 should be amended to give employees and their representatives the right to accompany an inspection similar to that which they have under OSHA. We also believe that to develop public confidence, there needs to be additional information made available to the public to allow for government accountability for enforcement.

Finally, I want to reiterate that we support favorable action on both these bills and we look forward to continuing to work with the Committee to improve them. Thank you on behalf of the Communications Workers of America and the international union UAW.

[The prepared statement of Mr. Sivin follows:]

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**TESTIMONY OF**

**DARIUS D. SIVIN, PhD**

**LEGISLATIVE REPRESENTATIVE**

**CWA-UAW LEGISLATIVE ALLIANCE**

**on the subject of**

**THE CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2009 (H.R. 2868)**

**and**

**THE DRINKING WATER SYSTEM SECURITY ACT OF 2009 (H.R. 3258)**

**before the**

**SUBCOMMITTEE ON ENERGY AND THE ENVIRONMENT**

**COMMITTEE ON ENERGY AND COMMERCE**

**UNITED STATES HOUSE OF REPRESENTATIVES**

**OCTOBER 1, 2009**

Chairman Markey, Ranking Member Upton and Members of the Subcommittee, thank you for the opportunity to testify today. I am Dr. Darius Sivin, a Legislative Representative for the CWA-UAW Legislative Alliance, which represents more than two million active and retired workers who are members of the Communications Workers of America (CWA) and the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). I have been serving as a legislative representative for the UAW for approximately two years. Before that, I worked in the UAW Health and Safety Department as an industrial hygienist.

The CWA-UAW Legislative Alliance appreciates the opportunity to testify before this Subcommittee on the Chemical Facility Anti-Terrorism Act of 2009 (H.R. 2868) and the Drinking Water System Security Act of 2009 (H.R. 3258). We strongly support these two important measures, and urge this Subcommittee and the entire House to give them prompt, favorable consideration.

#### **Importance of Chemical Security**

Chemical security is an issue of great concern for organized labor because our members will get hurt first and worst in the case of an attack. It is a matter of concern to the UAW and the CWA because both unions represent members at facilities potentially covered by this legislation. The UAW represents members at approximately 15 facilities that are required to file EPA risk management plans are therefore potentially covered by H.R. 2868 or H.R. 3258. These include a wastewater facility in Detroit and a chemical manufacturer in Adrian, MI, both of which use chlorine gas by the rail car. Many of our members live and work in the vulnerability zone of the Detroit wastewater facility, which includes over 2 million people. We have additional members in the vulnerability zone of the Adrian facility, which includes 350,000 people. The CWA represents water treatment facilities in New Jersey and Massachusetts and its IUE division represents a number of chemical facilities that are likely to be covered by the legislation.

Our members are concerned that their workplaces and communities are not adequately protected from deadly terrorist attacks on chemical facilities and drinking water systems. The Department of Homeland Security (DHS) has identified approximately 7,000 high-risk U.S. chemical facilities and classified them into four tiers. According to a 2008 Congressional Research Service review of Environmental Protection Agency (EPA) data<sup>1</sup>, 100 U.S. chemical plants each put 1 million or more people at risk, including the Detroit wastewater plant, where UAW members work.

**Requiring Facilities to Implement Their Own Plans  
to Reduce the Consequences of a Terrorist Attack**

The CWA-UAW Legislative Alliance believes the government should have the authority to require a facility to implement its own plans to reduce the potential consequences of a terrorist attack. The bipartisan Partnership for a Secure America (PSA), whose advisory board includes Howard Baker, Warren Rudman, Zbigniew Brzezinski and other prominent Democrats and Republicans known for their national security expertise, has called for the use of safer and more secure technologies to reduce the consequences of a terrorist attack as a national security priority. In a report entitled *Chemical Terrorism: US Policies to Reduce The Chemical Terror Threat*<sup>2</sup> (which we have submitted for the record), PSA has stated:

[I]t is essential to reduce the risk that terrorists could attack an industrial chemical facility as a means to cause the release of a plume of toxic vapor and inflict mass casualties, or to inflict economic damage by destroying a key element of the nation's critical infrastructure.

PSA also stated that "the development of inherently safer, economically beneficial, and efficient technology should be prioritized."

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<sup>1</sup> Shea DA (2008). *Memorandum to Honorable Edward Markey Re: RMP Facilities in the United States as of February 2008*. Washington DC: Congressional Research Service.

<sup>2</sup> Kosal ME (2008). *Chemical Terrorism: US Policies to Reduce the Chemical Terror Threat*. Washington DC: Partnership for a Secure America.

### Protecting Jobs

Requiring implementation of a facility's own proposed methods to reduce the potential consequences of a terrorist attack will not pose a threat to jobs. A European study of a broader category of technological changes that includes safer and more secure technologies found that these changes had no significant impact on employment<sup>3</sup>. We also have the specifically-documented case of a Schweitzer-Mauduit paper mill in New Jersey, which converted from using rail cars of chlorine gas to generating chlorine dioxide on site. No jobs were lost as a result of this conversion<sup>4</sup>. In contrast, jobs can be lost when disasters strike facilities, whether intentionally or unintentionally caused. On July 7, 2009 the Delco Times, a Philadelphia area newspaper, reported that 40-50 jobs will be lost because Sunoco has decided not to rebuild an ethylene unit that was damaged in an explosion that took place on May 17 of this year<sup>5</sup>.

The CWA-UAW Legislative Alliance believes that H.R. 2868 contains all the language necessary to protect jobs. Specifically, the bill requires the Secretary of Homeland Security to show that implementation of methods to reduce the consequences of a terrorist attack "would not significantly and demonstrably impair the ability of the owner or operator of the covered chemical facility to continue the business of the facility at its location." We believe this language is adequate to protect jobs. Adding more analysis or administrative law review will simply hinder the implementation of necessary security measures without truly protecting jobs.

In addition, the CWA-UAW Legislative Alliance urges the Subcommittee to move very carefully if it seeks to craft any special provisions for small businesses. Exempting

<sup>3</sup> Getzner M (2002). The quantitative and qualitative impacts of clean technologies on employment. *Journal of Cleaner Production* 10: 305-319.

<sup>4</sup> Patel D Engler R and Coyle D. (2008). *Still at Risk: Protecting New Jersey Jobs, Families, and Hometowns From Toxic Chemical Disasters*. Trenton: New Jersey Work Environment Council. <http://www.njwec.org/PDF/Still%20at%20Risk%20Report%20Oct%2008.pdf>

<sup>5</sup> <http://www.delcotimes.com/articles/2009/07/07/opinion/doc4a5328eaf27dd959040181.txt> (Accessed July 20, 2009)

businesses that meet the Small Business Administration's definition of small business could potentially result in exempting some of the highest risk facilities in the country, including one that puts 12 million people at risk. Moreover, it was a small business in South Carolina that released the ammonia that killed a woman and sent five employees and two others to the hospital on Wednesday, July 15 of this year<sup>6</sup>. Any help provided to small businesses should be narrowly tailored and make it possible for the government to give substantial weight to the degree of the security risk, as well as the size of the facility.

#### **Protection Against Abuse of Background Checks**

The CWA-UAW Legislative Alliance recognizes the reasons why DHS believes that background checks are a necessary part of security. However, because it is extraordinarily difficult to question actions taken in the name of security, we believe the language needs to be carefully written so as not to provide an opportunity for unscrupulous employers to go on fishing expeditions. The purpose of H.R. 2868 is not to enhance or diminish the legal rights of employers to conduct general background checks or to use the information for reasons other than protecting facilities from terrorist attacks.

We are partially satisfied with the protections and the redress processes that have been put in H.R. 2868 to prevent abuse of background checks and the information collected in such checks. In particular, we are pleased that the only crimes that can form the basis of an adverse employment decision are felonies. We are pleased with the limits as to how far in the past an employee's background can be investigated and we are pleased with the limits on the information collected. We are also pleased that persons subject to an adverse employment decision will receive full wages and benefits until their appeals are exhausted. We believe that Section 550 of the Homeland Security Appropriations Act of 2007, which is the statutory basis for the existing Chemical Facility Anti-Terrorism Standard (CFATS), does not provide adequate protection against abuse

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<sup>6</sup> [http://www.nytimes.com/2009/07/16/us/16brfs-AMMONIACLOUD\\_BR.html](http://www.nytimes.com/2009/07/16/us/16brfs-AMMONIACLOUD_BR.html) (Accessed June 20, 1009).

of background checks. If H.R. 2868 is to replace Section 550, it needs additional language to correct that deficiency. One example of the problems with Section 550 is the DHS Guidance document, promulgated under Section 550, that encourages companies to interview friends, neighbors and family members and investigate misdemeanors, credit history, military service, civil court records and education<sup>7</sup>.

We believe that the following crucial improvements to H.R. 2868 still need to be made to correct deficiencies in the protection provided against abuse of background checks:

1. *Clarify that, with the exception of permanent disqualifying offenses, adverse employment decisions under the Chemical Facility Anti-Terrorism Act should be made only pursuant to a determination by DHS that an individual's offenses could cause the individual to be a terrorism security risk.* This is similar to what is done in the transportation sector. It would be a significant step back to say that, in the chemical sector, an employer can make an adverse employment decision WITHOUT a security threat determination. It is important that decisions made under the Chemical Facility Anti-Terrorism Act be made on the basis of a terrorism security risk so that the national interest in guarding against terrorism is served. But this legislation should not create a refuge for unscrupulous employers on fishing expeditions. It is equally important that this determination not be made by the employer in order to ensure that it is based on an objective analysis of the evidence. DHS has the capacity, experience and expertise to do so.
2. *Require that an employee subject to an adverse employment decision be informed of the basis for that decision and of the right to appeal and/or file for a waiver.* The National Employment Law Project has found that nearly 100% of the appeals filed by port transportation workers on the grounds that information

<sup>7</sup> United States Department of Homeland Security: Office of Infrastructure Protection, Infrastructure Security Compliance Division (DHS, 2009). *Risk-Based Performance Standards Guidance: Chemical Facility Anti-Terrorism Standards*. Washington, DC: DHS.  
[http://www.dhs.gov/xlibrary/assets/chemsec\\_cfats\\_riskbased\\_performance\\_standards.pdf](http://www.dhs.gov/xlibrary/assets/chemsec_cfats_riskbased_performance_standards.pdf)

reported in the background check was inaccurate were successful. Similarly, almost all of the waivers filed on the grounds that the individual had been rehabilitated since the crime and no longer posed a security risk were successful. Yet 13,000 individuals suffered adverse employment decisions because they were unaware of how to gain access to the appeal and waiver process<sup>8</sup>.

3. *Grant any employee who is subject to an adverse employment decision the option to exercise any rights the employee has under a collective bargaining agreement without foregoing the right to appeal or file for a waiver as guaranteed by H.R. 2868.* Such language would prevent the use of this bill to undermine protections that are recognized in collective bargaining agreements.
4. *Add to the annual report by DHS to Congress, required by H.R. 2868, a section requiring the Department to report the number workers subject to background checks, the number of adverse employment decisions, number of appeals and waivers pending, number of successful appeals and waivers, and the number of appeals and waivers denied.* The purpose of this is to enable Congress to effectively evaluate the impact of the background check provisions.
5. *Codify in statute the existing DHS regulatory language that protects individuals who have had a fully equivalent federal background check from having to undergo a second background check.* This will render the process more efficient and protect workers from unnecessary delays.

### **Worker Participation**

The CWA-UAW Legislative Alliance believes that vulnerability assessments and security plans can benefit from workers' direct and current knowledge and experience of

<sup>8</sup> National Employment Law Project (NELP, 2009). *A Scorecard on the Post-9/11 Port Worker Background Checks: Model Worker Protections Provide a Lifeline for People of Color, While Major TSA Delays Leave Thousands Jobless During the Recession.* New York: NELP.  
[http://nelp.3cdn.net/0714d0826f3ecf7a15\\_70m6i6fwb.pdf](http://nelp.3cdn.net/0714d0826f3ecf7a15_70m6i6fwb.pdf)



plant operations, and from the knowledge of union staff, who enter multiple facilities in the course of their work and can bring the best non-proprietary ideas from one facility to another. Including workers and their representatives in this process will enhance security and protect against terrorist attacks at chemical facilities. For these reasons, we are pleased that both H.R. 3258 and H.R. 2868 grant employees and their representatives the right to participate in vulnerability assessments and site security plans, including participation in assessment of methods to reduce the consequences of a chemical release from an intentional act.

The CWA-UAW Legislative Alliance also is pleased that H.R. 2868 requires facilities to provide copies of the vulnerability assessment and site security plan as submitted to DHS to the employees and representatives who participated. However, we are disappointed with the limited provision of these documents under the H.R. 3258. The bill directs the EPA Administrator to provide procedures for sharing all portions of a vulnerability assessment and site security plan relating to the roles and responsibilities of employees with the employees and/or employee representatives who participated in their creation. Unfortunately, it lacks a clear requirement that the assessment of methods to reduce the consequences of a chemical release from an intentional act must be shared with employees and/or employee representatives who participated in their creation. This would allow an unscrupulous employer to change the assessment prior to submitting it to EPA. Those who had participated in the assessment would have no way to know this.

The CWA-UAW Legislative Alliance does not believe there should be any restrictions on which employees or representatives can be chosen to participate in vulnerability assessments and site security plans. No matter how well-intended the criteria, it is not possible to anticipate, in the halls of Congress, exactly which kind of expertise will be most suited to a particular facility. We fear that placing restrictions in the statute will permit a rare but all-too-real obstructionist employer to block a chosen employee representative on the grounds that that representative's particular knowledge, experience, training or education was not listed in the statute.

Both H.R. 2868 and the H.R. 3258 grant government inspectors the right of access to employees and employee representatives. But unlike the Occupational Safety and Health Act of 1970, they grant no rights to employees or to their representatives. The CWA-UAW Legislative Alliance believes that employees and their representatives should have a right to accompany a chemical security inspection. If this right is not written into law, neither employees nor their representatives may be notified of an inspection or offered a meaningful chance to participate. Employees and their representatives routinely participate in OSHA inspections, where their legal rights are explicit.

#### **Employee Training**

The CWA-UAW Legislative Alliance is pleased with the employee training language in H.R. 2868. We oppose any attempt to remove the language requiring employees to be trained in methods to reduce the consequences of a terrorist attack. We believe such training will make employees very valuable partners in reducing facility vulnerability.

H.R. 3258 includes language providing for a worker training grant program. A similar program was included in the version of H.R. 2868 reported by the Committee on Homeland Security. The CWA-UAW Legislative Alliance trusts that a similar program will be included in H.R. 2868 when it is reported by this Subcommittee.

#### **Information for Accountability**

The CWA-UAW Legislative Alliance would like to see the provisions in the bill related to government accountability strengthened in a number of ways. As important as it is not to let damaging information get into the wrong hands, it is equally important to let the public get access to enough information so it can know that our government, our potentially vulnerable facilities and other responsible parties are doing everything required to protect us from terrorist attacks. For this reason it is important to ensure that

access to basic facility identification and regulatory status information not be restricted. Such basic information will help develop public confidence in the chemical security program by allowing people to know that the chemical facility and drinking water facility security programs are working as they should to keep us secure.

In addition, the number of facilities that have been assigned to different tiers or are no longer regulated due to implementation of a method to reduce the consequences of a terrorist attack should be reported annually to Congress along with descriptions of the types of methods implemented. For example, a report might indicate that, in the past year, ten previously regulated facilities switched from chlorine gas to liquid chlorine bleach while twelve switched to ultraviolet light. This will not disclose any protected information. In addition, we recommend adding to the H.R. 3258 a requirement for reporting on procurement policies for water utilities that, if applied, would reduce or eliminate reliance on a threshold quantity for a substance of concern.

H.R. 3258 provides for criminal penalties of up to a year in jail for those who disclose protected information about the vulnerability of a drinking water system to terrorist attack. Yet for the owners and operators of a facility who leave the employees and the public vulnerable by non-compliance, there are only civil penalties. We believe this disparity should be corrected. Our members should be able to communicate about pressing safety and security concerns, so long as their communication does not directly replicate materials in vulnerability assessments and security plans, or is derived from sources other than vulnerability assessments or security plans.

Many parties play a role in improving industrial practices, including regulatory agencies, academic institutions, state and local governments, employees and employee representatives, national laboratories, inventors, private sector safety and security experts, and vendors of alternate technologies. For this reason, information on alternative technologies should be made available to these parties to the maximum extent consistent with security and with intellectual property law.

In conclusion, the CWA-UAW Legislative Alliance believes that now is the time to ensure the security of our chemical facilities and drinking water systems and the Americans who work in them and live near them. The existing CFATS regulations are inadequate. It is imperative that Congress move forward on true chemical and drinking water security. We strongly support passage of H.R. 2868 and H.R. 3258. We urge the Subcommittee to act now to protect America from a terrorist attack on our chemical facilities and drinking water systems. The CWA-UAW Legislative Alliance looks forward to working with the Members of this Subcommittee and the entire House to address this crucial problem. Thank you.

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Mr. MARKEY. Well, thank you so much, and we have time to get in the final opening statement of our witnesses, Mr. Poorman, and then we are going to recess again to attend to the roll calls on the House Floor and we will then return to complete the session.

So whenever you are ready, please begin.

#### **STATEMENT OF STEPHEN POORMAN**

Mr. POORMAN. Good afternoon, Chairman Markey, Ranking Member Upton, members of the Subcommittee, I am pleased to testify before you regarding H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009.

I speak today on behalf of the Society of Chemical Manufacturers and Affiliates. SOCMA represents the batch and custom chemical manufacturing industry. Over 70 percent of SOCMA's members are small businesses that employ more than 100,000 workers nationwide. From pharmaceuticals to cosmetics, soaps to plastics and all manner of industrial and construction products, SOCMA members make materials that save lives, make our food supply safe and abundant and enable the manufacture of literally thousands of other products. For over 88 years SOCMA has partnered with the federal, State and local governments to protect America's critical infrastructure.

SOCMA encourages Congress to make the current risk-based CFATS program permanent, or at least to reauthorize it for another year. The CFATS program protects our Nation from terrorist attacks by requiring thousands of chemical facilities nationwide to deploy hardened security measures. Our members have spent billions of dollars before and now under CFATS to secure their facilities and operations.

We support those aspects of H.R. 2868 that would codify the current CFATS program but we have serious concerns about two aspects of the bill: the requirement for mandatory implementation of inherently safer technology and the citizen suit provision. These provisions are inherently unwise and potentially counterproductive to our shared goal of preventing terrorist incidents. They would slow and possibly undo the progress that industry and DHS have made thus far.

First, inherently safety is not a simple technology or fix despite what you may hear today. Inherent safety is a philosophy by which engineers, operations and management work together to reduce the level of risk that may be associated with a chemical process lifecycle. Inherent safety analysis must be conducted very thoughtfully by people who understand the process. Empowering even well-intentioned regulators to second-guess the judgments of the engineers who know their processes best could result in actually increasing or transferring overall risks. It could also wreak economic havoc on regulated facilities, especially small businesses. Makers of active pharmaceutical ingredients and other federally regulated substances would be most at risk. For example, one SOCMA member is a small business regulated under both CFATS and the rules of the Food and Drug Administration. This company produces an active pharmaceutical ingredient used in the treatment of life-threatening bacterial infections. If a mandated safer manufacturing process was outside the terms of the FDA's approval, the company

would likely be forced to discontinue production, lay off workers and increase our Nation's vulnerability to grave health threats. Production of that crucial ingredient would likely shift to foreign countries where FDA is less able to monitor quality standards. The world's experts in chemical engineering have told Congress that there is no consensus methodology to measure whether one process is inherently safer than another. For this reason and others, they have consistently recommended against regulating inherent safety for security purposes.

Today, the Administration now supports mandating IST for tier 1 and tier 2 facilities when unspecified key criteria are met. We acknowledge that DHS officials are sincerely trying to do their very best under ever-mounting political pressure but it is imperative for Congress to listen to chemical engineers and not political scientists. Consistent with the experts' recommendations, Congress should direct DHS to submit to a report that explains in detail how DHS intends to compare various IST alternatives. Such a report should be developed with broad participation by the expert community and stakeholders. DHS should be allowed to focus all its other resources on completing the current CFATS program.

Secondly, we strongly oppose applying environmental laws citizen suit provisions to security laws. We are concerned that no matter what protections courts impose, sensitive security information inevitably will be disclosed and could be used by terrorists to target a facility and its surrounding communities. A citizen suit provision will also divert needed resources from DHS's efforts to finish implementing and enforcing CFATS. If people believe they see security weaknesses, they have effective options now such as calling the CFATS tip line at 1-877-FYI-4DHS.

Again, SOCMA supports permanent risk-based chemical site security standards and we urge Congress to authorize the existing CFATS program. I look forward to your questions.

[The prepared statement of Mr. Poorman follows:]



Testimony of Stephen Poorman  
International EHS Manager  
FUJIFILM Imaging Colorants Ltd.

*on behalf of the*

Society of Chemical Manufacturers and Affiliates

*before the*

Subcommittee on Energy & the Environment

*of the*

U.S. House of Representatives  
Committee on Energy & Commerce

*on*

The Chemical Facility Anti-Terrorism Act of 2009 (H.R. 2868)

October 1, 2009

Good morning, Chairman Markey, Ranking Member Upton, and members of the Subcommittee. My name is Stephen Poorman, and I am the International Environment, Health & Safety Manager for FUJIFILM Imaging Colorants Ltd. I am pleased to provide this testimony regarding H.R. 2868, the “Chemical Facility Anti-Terrorism Act of 2009.” I speak before you today on behalf of the Society of Chemical Manufacturers and Affiliates (SOCMA), of which FUJIFILM is a member.

Americans recently observed the ninth anniversary of 9/11. Three short years ago, and working in a bipartisan manner, Congress enacted a strong chemical security regulatory program that was finally in place on that painful day of remembrance. The U.S. Department of Homeland Security (DHS) and thousands of regulated facilities are deep in the middle of implementing this vital program in a focused, cooperative manner. We urge you not to upset – and further delay – this important process by sending DHS and regulated facilities back to the drawing board.

SOCMA strongly supports DHS’s current Chemical Facility Anti-Terrorism Standards (CFATS) program. This demanding program is now requiring thousands of chemical facilities nationwide to develop and deploy meaningful security enhancements. Congress should reauthorize the underlying statute for another year, or simply make the current program permanent.

In large measure, H.R. 2868 essentially codifies the existing CFATS program, and SOCMA supports it to that extent. However, the bill contains several features that are fundamentally unwise and potentially counterproductive to our shared goal of preventing terrorist incidents at chemical facilities. After sharing with you what steps SOCMA and its members have taken before and within the CFATS program, I will explain why we respectfully, but strongly, oppose:

- Any mandate that facilities implement so-called inherently safer technology (“IST”); and
- A citizen suit provision in chemical facility security legislation.

## **I. SOCMA and the Current State of Chemical Facility Security**

### ***SOCMA***

SOCMA is the leading trade association representing the batch and custom chemical manufacturing industry. SOCMA’s nearly 300 member companies employ more than 100,000 workers across the country and produce some 50,000 products – valued at \$60 billion annually – that make our standard of living possible. From pharmaceuticals to cosmetics, soaps to plastics and all manner of industrial and construction products, SOCMA members make materials that save lives, make our food supply safe and abundant, and enable the manufacture of literally thousands of other products. Over 70% of SOCMA’s active members are small businesses.



ChemStewards® is SOCMA's flagship environmental, health, safety and security (EHS&S) continuous performance improvement program. It was created to meet the unique needs of the batch, custom, and specialty chemical industry, and reflects the industry's commitment to reducing the environmental footprint left by members' facilities. As a mandatory requirement for SOCMA members engaged in the manufacturing or handling of synthetic and organic chemicals, ChemStewards is helping participants reach for superior EHS&S performance.

#### *SOCMA's Security Achievements to Date*

Maintaining the security of our facilities has always been a priority for SOCMA members, and was so before September 11. After the tragic events of 9/11, SOCMA members did not wait for new government regulations before researching, investing in and implementing additional and far-reaching facility security measures to address these new threats. Under the ChemStewards initiative, SOCMA members were required to conduct security vulnerability assessments (SVAs) and to implement security measures. SOCMA designed an SVA methodology specifically for specialty and batch chemical facilities that was approved by the Center for Chemical Process Safety (CCPS) as meeting its requirements for an effective methodology. SOCMA members have spent billions of dollars and have devoted countless man-hours to secure their facilities and operations. These investments will naturally continue for the foreseeable future.

Many (though by no means all) SOCMA member company facilities are encompassed by the CFATS program. These facilities have completed and submitted their Top-Screens and SVAs and, as notified by DHS, have initiated or completed their Site Security Plans. These plants are implementing any additional required security measures and are being (or will soon be) inspected by DHS to verify the adequacy of those plans and their conformance to them. Many of our member companies' other facilities comply with the Coast Guard's facility security requirements under the Maritime Transportation Security Act (MTSA).

Looking well beyond regulatory requirements, our members have also partnered with DHS on many important voluntary security initiatives and programs, including the Risk Assessment Methodology for Critical Asset Protection (RAMCAP), the Buffer Zone Protection Plans, and the Homeland Security Information Network (HSIN). SOCMA is a key member of the Chemical Sector Coordinating Council, which has served as a model for how critical infrastructure sectors should work together and with DHS.

Through these councils and other avenues, we and our members have developed close and open working relationships with DHS and other federal agencies, and with state and local governments, to exchange information and coordinate roles in maintaining the security of our critical chemical facility infrastructure. These actions have included holding joint training exercises and conducting annual security conferences that involve federal and state government officials with security expertise. Industry personnel from the largest companies to the smallest have shared best practices at association meetings and conferences.

### ***Preserving the Progress under CFATS***

While we will leave a detailed progress report on the CFATS program to DHS, SOCMA wants to emphasize that we regard the program thus far as a success. Almost 40,000 facilities have submitted Top-Screens, close to 7,000 have completed SVAs, and DHS has now requested SSPs from three of the four tiers of facilities under the program. Tier 1 SSPs are being actively reviewed and inspections will follow soon. Of perhaps greatest interest to many members of this panel, we understand that some 600 facilities – roughly 10 percent of the initial Top-Screen population- have changed processes or inventories in ways that have enabled them to screen out of the program. Thus, as predicted, CFATS is driving facilities to reduce inherent hazards, where doing so is in fact safer and does not transfer risk to some other point in the supply chain, and makes economic sense.

To fully understand the effectiveness of the CFATS program, Congress should allow it to be fully implemented – for all tiered facilities to fully comply (or be brought into compliance). Thus, Congress should reauthorize the underlying statute for another year or simply make the current program permanent.

Two provisions of H.R. 2868 would jeopardize the progress that industry and DHS have made together under CFATS. First, the requirement for mandatory implementation of IST would shift DHS's focus from securing our industry against terrorism to conducting engineering and chemistry assessments, while potentially phasing out legitimate products that improve our daily lives and enhance our safety. Second, the citizen suit provision would promote litigation that would increase security risks through the advertent or inadvertent disclosure of sensitive security-related information that could draw a roadmap for terrorists. Each of these concerns is explained in greater detail below.

## **II. Mandatory IST Is an Inherently Risky Proposition**

As established by H.R. 2868, Section 2111 of the CFATS statute would require Tier 1 and 2 facilities to implement “methods to reduce the consequences of a terrorist attack” – i.e., IST – whenever DHS made specified findings about risk reduction and technical and economic feasibility. However commonsense such a mandate might appear on the surface, it is fundamentally a bad idea in the security context. Inherent safety is a superficially simple but truthfully very complex concept, and one that is inherently unsuited to regulation. Any IST mandate is bound to create situations that will *actually increase or transfer overall risks*. It would also wreak economic havoc on regulated facilities, notwithstanding the findings DHS would have to make. Makers of active pharmaceutical ingredients, common fuels and other federally-regulated substances would be most at risk of such economic damage.

### ***What Inherent Safety Really Is and Why Mandating It Is Not Inherently Better***

First and foremost, it is important to clarify a common misunderstanding about inherent safety. Quite simply, IST is a process-related engineering concept, not a security one. It is premised on the belief that, if a particular chemical process hazard can be reduced, the

overall risk associated with that process will also be reduced. In its simplicity, it is an elegant concept, but reality is almost never that simple. A reduction in hazard will reduce overall risk if, and only if, that hazard is not displaced to another time or location, or result in the creation of some new hazard. Inherent safety is only successful if the sum total of all risks associated with a process life cycle is reduced. This is rarely a simple calculation, and to some extent it is an irreducibly subjective one (for example, a substitute chemical that may reduce explosion risks may also pose chronic health risks). The calculation becomes even more difficult when it is being done not solely for reasons of process safety (where accident probabilities can be estimated with some degree of confidence) but also for reasons of security (where the probability of terrorist attack is highly uncertain but certainly low). In fact, there is no agreed-upon methodology to measure whether one process is inherently safer than another process. This is why the world's foremost experts in IST and chemical engineering consistently recommend against regulating inherent safety for security purposes.

Several examples of how difficult it can be to reduce overall risk when attempting to reduce hazard follow:

*Eliminating the use of a hazardous catalyst*

A chemical company wants to eliminate the use of a hazardous catalyst, which is typically used in small amounts. The catalyst serves as a booster to start a chemical reaction to make a building block for a drug used to treat cancer. Catalysts tend to be hazardous by nature, which reduces the number of available alternatives. The only way the company can initiate the reaction without using a hazardous catalyst is to increase the temperature and pressure of the system. The overall risk of the new system, aggravated by increasing the temperature and pressure, may actually be greater than the risk associated with use of the catalyst, because catalysts are typically used in small amounts and the likelihood of an accident is remote.

*Reducing the amount of a chemical stored on site*

A manufacturing plant is considering a reduction in the volume of a particular chemical stored on site. The chemical is used to manufacture a critical nylon additive, which is sold to another company and used to make seat belts stronger. Because it is a critical component for nylon strength and seatbelt production cannot be disrupted, the production schedule cannot change. If the amount stored on site is reduced, the only way to maintain the production schedule is to increase the number of shipments to the site. This leads to more deliveries (an increase in transportation risk) and more transfers of chemical from one container to another (an increase in transfer risk). Economic risks are also increased since there is now a greater chance that production could be disrupted by a late shipment.

*How location and individual circumstance affect risk perception*

It is difficult to describe a scenario in which moving a hazard does not result in a simple transfer of risk from one location to another. For example, location can highlight different

risk perspectives, such as the use of chlorine, a hazardous gas that comes in various types of containers. A commonly used example compares the inherent safety of a rail car, which typically holds up to 90 tons, versus storage in one-ton cylinders. Residents near the facility would probably view the one-ton cylinder as inherently safer than a rail car. On the other hand, workers who have to connect and disconnect the cylinders 90 times, instead of just once for the rail car, would probably consider the rail car inherently safer.

### *IST's Impact on Pharmaceuticals and Microelectronics*

One of SOCMA's greatest concerns with Section 2111 is the real possibility that it will negatively restrict the production of active pharmaceutical ingredients (APIs), many of the key raw materials of which are included on DHS's Appendix A of covered chemicals. APIs are used in prescription and generic drugs, life saving vaccines and over-the-counter medicines. They are thoroughly regulated by the FDA and must meet demanding quality and purity requirements. Substituting chemicals or processes used for the production of APIs would likely violate the conditions of their FDA approvals. Requiring IST could delay clinical trials while new replacement chemicals are identified or invented, and would force API manufacturers and their customer drug manufacturers to reapply for FDA approval of their products because of the significant change in the manufacturing.<sup>1</sup> The lengthy 1 - 4 year approval timeline for a new or equivalent replacement chemical would be a high price to pay for American consumers, many of whom rely on ready access to pharmaceuticals. To meet continuing consumer demand, API production would likely shift to foreign countries, where the FDA is less able to monitor conformance to quality standards.

Many SOCMA members' products are also vital to the manufacture of microelectronics. Below, we offer several examples, provided by SOCMA members, of how IST could cripple the pharmaceutical and microelectronics industries.

#### *Lifesaving Antibiotics: Company A*

Company A is a minority-owned small business regulated by DHS under CFATS. It produces an active pharmaceutical ingredient critical to specific antibiotics used in the treatment of a life-threatening bacterial infection. For this purpose, the company is also regulated by the FDA. Since the product's specifications are likely not to be attainable via any chemical substitution or altered process, if a "safer" manufacturing process alternative was mandated, the company would likely be forced to discontinue production, lay off workers and increase our nation's vulnerability to bacteriological threats. The impact of a mandatory alternative would thus be swift and direct.

#### *Common Pain Reliever: Company B*

Company B manufactures the active pharmaceutical ingredient Ibuprofen. Ibuprofen is a non-steroidal anti-inflammatory drug (NSAID) used to treat pain and relieves symptoms

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<sup>1</sup> See 21 U.S.C. § 351(a)(2)(B).

of arthritis such as inflammation, swelling, stiffness, and joint pain. It is one of the world's most successful and widely-used pain relievers, and is listed on the World Health Organization's model list of medicines.<sup>2</sup> Changing the raw materials, and consequently the process, used to manufacture it presents a risk to public health and a substantial cost for re-qualification from a technical, regulatory, and potentially clinical perspective.

Company B's 31-year old process to manufacture Ibuprofen bulk active is well characterized and controlled, and consistently makes a safe and efficacious product. The process-characteristic impurity profile, specified under the prevailing USP and European Pharmacopoeia compendia, is proven to have no impact to public health by its use by millions of people worldwide. The costs derived from IST, if it impaired production quantities or product quality, would ultimately be felt by consumers.

#### *Microelectronics: Company C*

Company C manufactures two Appendix A chemicals of interest targeted by industry critics. First, Company C uses small amounts of hydrochloric acid (HCl) in a very high purity, aqueous form (37%) to manufacture a product that represents almost half of the company's revenue worldwide (~\$30 million/yr). The product is used in the microelectronics industry to manufacture integrated circuits and LCD displays. If HCl were not available, Company C would be unable to make its largest product, resulting in at least a 50% reduction in workforce, which would equate to losing 60 jobs. If the company chose to continue the business, alternatives would have to be developed and implemented to continue manufacture of those products, which could easily require billions of dollars of research, development and implementation, resources that small companies like Company C, which include many of SOCMA's members, do not have. Additionally, Company C uses HCl to protect the environment: its use brings the pH of the company's wastewater into the range dictated by its wastewater permit.

The company also uses small volume products using aqueous (49%) hydrofluoric acid (HF) that are sold into the microelectronics industry. Customers of Company C that need HF for their products require Company C to undergo specific certification standards as a product supplier. If Company C was forced to use a substitute, it would immediately be out of compliance with its customers' product standards, which (obviously) would negatively impact Company C's business. In some cases, the HF is being used as a safer alternative to replace hydroxylamine (HA), the use of which has been reduced due to the multiple explosions at HA manufacturing facilities. In some cases, anhydrous HF may be necessary as water may be incompatible with the manufacturing process. If manufacturers of microelectronics were denied a supply of HF, there would be a negative consequence to the domestic manufacture of integrated circuits and LCD displays.

#### *Experts Agree IST Should Not Be Mandated*

As these examples demonstrate, a "simple" reduction in hazard may not necessarily result in a reduction of overall risk, and a poorly constructed or incomplete analysis could result

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<sup>2</sup> World Health Organization, *WHO Model List of Essential Medicines* (March 2005).

in a “safer” alternative producing more harm than good. That is why government agencies and experts who really understand inherent safety have consistently opposed giving government the power to mandate it. This includes:

- Neal Langerman, representing the American Chemical Society – the majority’s own technical witness at the Homeland Security Committee hearing in June.<sup>3</sup>
- Sam Mannan, Director of the Mary Kay O’Connor Process Safety Center at Texas A&M University, in testimony before the Homeland Security Committee on December 12, 2007.<sup>4</sup>
- Dennis Hendershot, testifying on behalf of the Center for Chemical Process Safety before the Senate Environment & Public Works Committee on June 21, 2006.<sup>5</sup>

<sup>3</sup> See <http://homeland.house.gov/SiteDocuments/20090616103505-95857.pdf>, page 7:

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 security. 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.

<sup>4</sup> Go to <http://homeland.house.gov/Hearings/index.asp?ID=108>, click on “Dr. Mannan’s testimony,” pp. 6-7:

[I]n developing inherently safer technologies, there are significant technical challenges that require research and development efforts. These challenges make regulation of inherent safety very difficult. . . . Instead of prescriptive requirements for inherently safer technology and approaches, facilities should be allowed the flexibility of achieving a manageable level of risk using a combination of safety and security options. . . . Over the past 10-15 years, and more so after 9/11, consideration of Inherently Safer Technology (IST) options and approaches has effectively become part of industry standards, with the experts and persons with know-how assessing and implementing inherently safer options, without prescriptive regulations that carry risks (both as trumping other tools or potentially shifting risk). A better approach for applying IST in security is by allowing the companies to assess IST as part of their overall safety, security and environmental operations and therefore, cannot be prescriptive.

<sup>5</sup> See [http://epw.senate.gov/109th/Hendershot\\_Testimony.pdf](http://epw.senate.gov/109th/Hendershot_Testimony.pdf), at 4-8, esp. 5-6:

There are tens of thousands of chemical products manufactured, most of them by unique and specialized processes. The real experts on these technologies, and on the hazards associated with the technology, are the people who invent the processes and run the plants. In many cases they have spent entire careers understanding the chemistry, hazards, and processes. They are in the best position to understand the best choices, rather than a regulator or bureaucrat with, at best, a passing knowledge of the technology.

It is likewise instructive that the state of New Jersey, whose chemical facility security program is regularly contrasted with the CFATS program, only requires consideration of IST – *it does not require facilities to implement it*. It is even more telling that the companion bill the Subcommittee is now considering avoids the politically sensitive question of whether to require public drinking water systems to implement IST by deferring the decision to EPA and the states.<sup>6</sup> Congress should not require DHS to do what all these experts have concluded is unwise, and what it is unwilling to do directly when the public is picking up the tab.

***Conditioning the IST Mandate on “Key Criteria” Does Not Solve the Problem***

SOCMA is aware that the Administration now supports mandating IST for Tier 1 and 2 facilities when unspecified “key criteria” are met. But that approach does not address our fundamental objections to the concept, which is that it would take IST decisions away from the process safety experts who know their own processes the best and would allow their judgments to be second-guessed by busy government officials sitting miles away reviewing documents. While these officials may be sincerely trying to do their best, we simply do not trust that their judgments will be better than ours. We also fear the prospect of liability if a “safer” process or chemical that one of our member companies is compelled to use ends up causing an accident or some other harm. Will the federal government indemnify facilities in the cases where it overrules their judgments regarding inherent safety? And even if a facility ultimately succeeds in persuading DHS to allow it to retain its proposed approach, that process will inevitably have costs in time and resources.

Preceding all these concerns, moreover, is an even more basic one: no one knows how to compare the “inherent safety” of two processes. Here is what the experts have told Congress:

- I do not believe that the science currently exists to quantify inherent safety. . . . The first challenge is simply to measure the degree of inherent safety in a way that allows comparisons of alternative designs . . . .<sup>7</sup>
- Inherently safer design is not a specific technology or set of tools and activities at this point in its development. . . . Current books and other literature on inherently safer design . . . describe a design philosophy and give examples of implementation, but do not describe a methodology.<sup>8</sup>
- 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

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<sup>6</sup> See 42 U.S.C. § 300i-2(g)(3), (5), as proposed to be modified by H.R. 3258, § 2(a).

<sup>7</sup> Testimony of Sam Mannan, *supra* note 4, at 6.

<sup>8</sup> Testimony of Dennis Hendershot, *supra* note 5, at 1-2.

guaranteed formula for developing inherently safer production processes.<sup>9</sup>

The experts at the National Research Council concluded recently: “Inherently safer chemistry . . . offers the potential for improved safety at chemical facilities. While applications show promise and have found use within the chemical industry, these applications at present are still quite limited in scope.”<sup>10</sup>

While it may be feasible to develop a technical consensus methodology for measuring and comparing inherent safety, none exists at present. Before Congress and the Administration could even consider mandating IST implementation, they would need to know that methodologies exist to compare various alternatives from the standpoint of inherent safety. Congress should direct DHS to submit a report to it that explains in detail what methodologies DHS would propose to use. Such a report should be developed with broad participation by the expert community, most of which works for the chemical industry. This will require a year at least. It would also allow DHS to devote some time to completing its implementation of the current CFATS program, rather than being completely sidetracked by trying to regulate with concepts that even the experts do not yet agree on.

### **III. Citizen Suits Have No Place in a Security Regime**

As revised by H.R. 2868, Section 2116 of the CFATS legislation would authorize literally “any person” to file suit against either

- anyone who the plaintiff believed was violating some requirement of the new law; or
- DHS, if the plaintiff believed that DHS had failed to take some nondiscretionary action the law required it to take.

Both of these prospects would be bad security policy, as explained below.

#### ***Facilities should not be subject to suit under H.R. 2868***

Section 2116 is very closely modeled on the citizen suit provisions of environmental and natural resource statutes. One of the main reasons that citizen suit provisions are found in some such laws is because the obligations – and the compliance status – of regulated entities under them is a matter of public record. It is relatively easy to get access to facilities’ permits, and their compliance data is normally also made public as a matter of law – in many cases, on the Internet. Also, citizen enforcement is generally thought to promote the purposes of these laws. By adding citizen oversight to EPA and state

<sup>9</sup> Testimony of Neal Langerman, *supra* note 3, at 6-7.

<sup>10</sup> National Research Council, Board on Chemical Sciences & Technology, *Terrorism and the Chemical Infrastructure: Protecting People and Reducing Vulnerabilities* (2006), at 106.



enforcement, Congress believes it can help eliminate or reduce emissions, discharges, etc. of pollution.

Citizen oversight of enforcement of security laws, by contrast, would actually be counterproductive to the purposes of those laws. Currently – and under H.R. 2868 – the only fact about a facility’s regulation under the CFATS program that a citizen might be able to obtain legally is that fact that the facility *is* regulated. Every other item of information that the facility or DHS has developed under the law – the facility’s tier level, vulnerability assessment, security plan, list of security measures, etc. – is prohibited from being released to the general public (for example, under the Freedom of Information Act), both under current law and under H.R. 2868. And for good reason: if this information were publicly available, terrorists could use that information to target the facility and its surrounding community. Because this information is protected (currently as “Chemical-terrorism Vulnerability Information” or “CVI”), there is no way that “any person” could evaluate the compliance status of a facility. Indeed, it is questionable whether such a person, relying on publicly-available information, could even form the reasonable belief regarding noncompliance that would be required to file a lawsuit in federal court under Rule 11(b) of the Federal Rules of Civil Procedure.

Because H.R. 2868 also limits routine public availability of compliance-related information, it would appear that the drafters of the bill expect that plaintiffs under Section 2116 would have to attempt to obtain information regarding noncompliance from DHS or regulated facilities through the process of pretrial discovery, presumably under protective orders.<sup>11</sup> To create an expectation that this could occur routinely would be misleading. Even under the more relaxed standard that the bill would create for access to “protected information” in litigation – equivalent to that now applicable to “sensitive security information” or “SSI” -- the bill would still make it fairly difficult to obtain such information. The plaintiff would have to show a need equivalent to that required currently to obtain fact work product, the plaintiff’s counsel would have to complete a background check, and the court would have to issue a protective order after concluding that access to the information did not present a risk of harm.<sup>12</sup> SOCMA understands that courts have rarely, if ever, approved the release of SSI under this regime. It would be highly irregular for Congress to establish a presumptive right of action that could not, in many cases, ever be exercised.<sup>13</sup>

<sup>11</sup> See the Homeland Security Committee’s report on H.R. 2868 (H. Rep. No. 111-205, pt. 1, July 13, 2009), at 49 (referring to the Committee’s expectations regarding “information provided during such proceedings”).

<sup>12</sup> See P.L. 109-295, § 525(d), referenced in new 6 U.S.C. § 2110(c).

<sup>13</sup> SOCMA also notes that the Report seems to promise greater protection of information than the bill itself provides, as the Report says “[t]he Committee expects that information provided during [citizen suit] proceedings should be maintained in accordance with existing protections for classified and sensitive materials including but not limited to the protections set forth in Section 2110 of this title.” Report at 49 (emphasis added).

On the other hand, if the drafters of the bill expect that it *will* lead to wide access to protected information in citizen suits, or if that is what will in fact occur, SOCMA is even more concerned. We simply do not trust that the information protection regime established under the bill will operate successfully if it is routinely allowing security-sensitive information to be released under protective orders. These cases are likely to be so politicized, and so high-profile, that sensitive information is bound to leak out. Congress should not create weak spots in the web of applicable legal protections that could allow CVI to be disclosed in random citizen suits. Unlike the environmental laws, CFATS is one area where citizen enforcement could actually work against, not support, the protective purpose of the law.

It is for this reason that DHS Deputy Under Secretary Reitingger – a former senior DOJ official – expressed “concern” about the citizen suit provision in the Homeland Security Committee’s hearing on June 16. He stated that, “no matter what the protections are,” protected information “inevitably” would be disclosed over time.

Supporters of applying the citizen suit model to CFATS may argue that regulated facilities have large amounts of dangerous chemicals onsite – the same hazard that might make them regulated under environmental laws – and thus that H.R. 2868 should have the same citizen suit feature as those laws. H.R. 2868 confirms,<sup>14</sup> however, that it would not displace any environmental laws, and any information that a facility has to make public under those laws would remain publicly available under the bill – as it is under the current CFATS program. Citizens who want access to that information can get it, and those who think that environmental laws are not being followed at a facility can attempt to enforce those laws. But the bill should not create a litigation tool to go beyond those authorities to obtain security-related information.

Relatedly, SOCMA disputes the view, regularly asserted by proponents of a citizen suit provision, that such provisions are normal features of any federal regulatory statute. Such provisions are in fact not common: they are not contained in statutes regulating food and drugs, aviation safety, consumer product safety, bank safety & soundness, transportation safety, or any of the myriad substantive areas that the federal government regulates, aside from environment and natural resources. Nor has the Supreme Court inferred a private right of action in ages.<sup>15</sup> Most important, citizen suit provisions are absent from federal statutes regulating the security of ports, port facilities, vessels, aircraft, railroads, or motor vehicles. As the listing on page 49 of the Homeland Security Committee’s report on H.R. 2868 (the “Report”) makes clear, citizen suit provisions are exclusively an environmental/natural resources phenomenon. And chemical facility security is a security matter, not an environmental matter.

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<sup>14</sup> See new Section 2110(d).

<sup>15</sup> Thus SOCMA is troubled by the Report’s curious description of the citizen suit provision as “remov[ing] the current restrictions on citizen suits” from a statute that is silent on the topic. Report at 21.

***DHS should not be subject to suit either***

DHS has been working night and day to implement CFATS, and has developed a credible program under very tight deadlines. There is no reason to believe that DHS would have done a better job if it were acting under judicial supervision – indeed, having to defend itself in court would only distract from its ability to get the CFATS program up and running. Deputy Under Secretary Reitingger alluded to this potential for “diversion from existing labors” in his responses to questions on June 16. Again, as noted above, there is no way that average citizens should be able to determine whether DHS has acted correctly or incorrectly in approving a facility’s site security plan or otherwise complying with a CFATS obligation – that information is CVI. And again, environmental laws are a bad model for a law that deals with protected, rather than public, information.

SOCMA must point out that the Report is incorrect in stating on page 49 that “the Nuclear Regulatory Commission, which, like the Department [of Homeland Security] is a security agency, is subject to suits brought by citizens.” The NRC is subject to citizen suits under environmental laws in the same way as any other federal agency that operates facilities that are regulated under such laws. But the Atomic Energy Act does not authorize citizen suits against the NRC for violating or failing to take required action under the AEA. If DHS operated hazardous waste treatment plants, it would be subject to citizen suits under RCRA for its operation of those plants. But that is not a basis for saying it should be subject to suit under its own organic statute.

For these reasons, Congress should drop Section 2116 and references to it such as in proposed new Section 2108(e)(1)(D)-(F).

**IV. Conclusion**

SOCMA supports permanent chemical site security standards that are risk-based and realistic, and we urge Congress to reauthorize the existing CFATS program. Mandating inherently safer technology as a security measure will inevitably create negative unintended consequences, and Congress should not require DHS to do so. Citizen suits have no place in chemical facility security regulation.

On behalf of SOCMA, I appreciate this opportunity to present the association’s views on these important issues. I look forward to your questions.

Mr. MARKEY. Great. Thank you so much, Mr. Poorman.

Again, we apologize. We will have to take a recess for—why don't we schedule about 15 minutes from now and then we will come back. I think it will be 15 minutes this time. The Committee stands in recess.

[Recess.]

Mr. MARKEY. Welcome back, everyone, and we apologize for having the United States House of Representatives meet simultaneously with this hearing. It is an unavoidable conflict that unfortunately is characteristic of my life in 33 years in the institution. It would be so much better if they would plan their lives around ours rather than the other way around but like so many other things in life, as William Shakespeare said, the will is infinite but the execution is confined. And so we are confined by these roll calls on the House Floor and we return here to complete the hearing with our gratitude to the witnesses and to everyone else, the remaindermen of history who are still sitting out in our audience and whatever C-SPAN audience we still have left for this vitally important issue. There is kind of a "get a life" quality to this hearing at this point for anyone who is still watching and we appreciate the attention which is being paid for whoever is out there in a non-somnolent state.

So let us turn, let me recognize the ranking member, Mr. Upton, if he would like to ask his questions at this time.

Mr. UPTON. Well, thank you, Mr. Chairman. I do have a number of questions.

First I would like to put a couple of letters into the record and ask unanimous consent that that happen.

[The information appears at the conclusion of the hearing.]

Mr. MARKEY. Without objection.

Mr. UPTON. I have a number of questions, and I talked to a number of members on the Homeland Security Committee during this last series of votes and I know that they have marked up their bill earlier this year, and I don't know if we have a date of when you are thinking about what the next step is, but the questions that I have do relate to the economic consideration of these facilities and I accept the statement that was made on the last panel. Mr. Durbin, in your read of this bill, what does this do to your membership? Do we see as some have suggested that a number of companies will pull up stakes and go someplace else? What is the economic impact as it relates to jobs? And certainly I want these jobs to stay here but what is your sense as you have talked to your members?

Mr. DURBIN. Well, Mr. Upton, let me take a step back first and let you know what our member companies have done to date, you know, because they really looked at the issue of security at their facilities as their responsibility and a cost of doing business and to date have already before having to implement under CFATS have invested \$8 billion to—

Mr. UPTON. Billion?

Mr. DURBIN. Billion, to enhance security at their facilities, and we represent roughly 2,000 facilities around the country. So these are obviously investments that have already been made. We do expect that the CFATS program will require some additional invest-

ment. It is kind of hard to put a number on exactly what that will be. You know, DHS in some of their earlier testimony have estimated, you know, an additional \$8 billion across the industry, across all of the regulated facilities to implement CFATS. But as far as what additional costs will come about through CFATS or through this bill, again, many of those investment decisions have been made, are being made and have been part of the plan. The extent to which additional requirements might add to that, I can't say that they won't. I think it certainly is going to—there will be more resources that will have to be put into further analysis and potentially further investments. But again, at this point there is no way of quantifying, here is what the cost will be or here is how many facilities will or will not, you know, end up having to make significant changes or consider not operating anymore.

Mr. UPTON. Now, Mr. Poorman, you ended your testimony talking about the citizen lawsuits and the potential for what is pretty secure information relating to the security of these facilities to be in fact opened up. Is that right?

Mr. POORMAN. Yes. The concern that we have is that the information that is put into DHS through their secure information systems would be leaked out and could get into the wrong hands and create situations that obviously would not be desirable.

Mr. UPTON. Is any of that information now available to folks, I mean in terms of security relating to any of these thousands of facilities that are out there? Is it pretty difficult to be able to obtain at this point?

Mr. POORMAN. Yes, it is, and it has been that way even since when we did other pieces of legislation and regulatory programs such as RMP. The Justice Department made sure that that information was protected as well because it does have a security aspect.

Mr. UPTON. Dr. Sivin, is the UAW or the Communication Workers taking a position as it relates to the release of information as to the secure aspects of those facilities? Do they have a position on that part of this bill?

Mr. SIVIN. If you mean facility-specific information such as that contained in security vulnerability assessments and site security plans, the only people we favor having access to that information are those employees and their representatives who participate in developing those plans. If you mean other types of government accountability information such as is a particular facility covered by the statute and the regulations, in a general sense is it in compliance, we believe that the public at large needs to have that kind of information in order to know that all responsible parties are doing their jobs.

Mr. UPTON. I know my time is expiring rapidly here but is it your sense that if this bill were to move forward ultimately to the President's desk, what impact would it have on your membership in terms of being able to continue to operate as they are doing now? Do you think that this in fact would provide as an incentive for companies to move someplace else outside of the United States borders?

Mr. SIVIN. Reading from the language of the bill, sir, it says that the Secretary of Homeland Security must show that implementa-

tion of methods to reduce the consequences of a terrorist attack would not significantly and demonstrably impair the ability of the owner or operator of the covered chemical facility to continue the business of the facility at its location. That is to say if a facility could show that it would have to move from Adrian, Michigan, to Toledo, Ohio, the Secretary of Homeland Security has no authority to require implementation and certainly if a facility could show that it would have to close its doors. Therefore, I expect zero impact on employment.

Mr. UPTON. Dr. Durbin, do you accept that?

Mr. DURBIN. Well, thank you for promoting me to doctor.

Mr. UPTON. Oh, I am sorry.

Mr. DURBIN. That is quite all right. I would just say that, you know, again, there are provisions in that bill that we continue to have concerns with that we think would be more difficult to operate and as I mentioned in my testimony about the civil lawsuits and the IST provisions. However, we are eager and anxious to continue working with the committee to make changes to the bill as it moves forward.

Mr. UPTON. Thank you. I yield back.

Mr. MARKEY. Great. You didn't just call him Mr. Chairman by accident, did you? Because the fact that he can make you a phony doctor can't make him—

Mr. UPTON. Once the chairman, always the chairman. Isn't that what it is?

Mr. MARKEY. Let me turn and recognize the gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman, and I always heard when I was a State legislator, once a State senator, always a State senator, but I don't get called that in D.C. very much, only in Austin.

Mr. Durbin, H.R. 2868, you mentioned in your testimony has civil suits for an uninjured party, and in my open statement you may have heard that I have some concern about that. Would you feel more comfortable if we actually limit it to someone who could show harm, whether it be an employee or a neighbor, similar or what current law is, you know, someone who had actually been harmed?

Mr. DURBIN. Well, I think that is certainly true that—I think one of the complications you have is being able to show harm under a security statute as opposed to environmental statute as we have discussed before, but certainly finding ways of limiting the applicability is going to improve that.

Mr. GREEN. Well, and maybe you can comment because I am familiar with our public's right to know statutes that all my plants have their committees that they meet with and I don't have any problem with plants and people who live near the plants or work there knowing what is going on. I do have some problem with someone across the world or somewhere else who really shouldn't be interested in what is going on in a chemical plant or refinery in my district but the folks who live there because of the security issue. That is why I know the security issue is something—and we had to deal with that after 9/11 that we wanted, in fact we crafted legislation to show that someone living near there had that right but someone in a cave in Afghanistan looking on the Internet

shouldn't have that capability, and so that is why hopefully we will be able to deal with that in this bill.

I know sometimes IST is confused as a new concept but inherently safer technology has been around for many years and I know most businesses in production or manufacturing use that. Is the chemical industry opposed to legislation that requires companies to assess IST?

Mr. DURBIN. Well, again, I will only speak for ACC. I think because ACC members are already required to assess inherent safety in their own operations under the security code, under the Process Safety Code that existed prior to 9/11, and I would hasten to add that in the State of New Jersey they require consideration of IST. Our companies operate there as well. That program frankly has been very effective that ACC members would be comfortable with a requirement to consider because again, I would also say we think that the regulations as they are today, when you are trying to meet performance-based standards, you are going to have to consider all the options on the table.

Mr. GREEN. Well, and I know New Jersey, the State does mandate—the State of New Jersey doesn't have where they can mandate the IST, they just can mandate the consideration.

Mr. DURBIN. Correct.

Mr. GREEN. Dr. Sivin, in your testimony, several recommendations you believe on the importance to approve the legislation, particularly in the background checks. Can you elaborate on your suggestion the bill should codify statutory language that protects individuals who have fully equivalent federal background checks? And you heard my comments earlier. If I have a plant that, you know, is under Maritime and they have the TWIC card, transport worker identification card, and yet they have a plant that is not covered by that, would you feel comfortable with the TWIC card or that background check that the TWIC card should also stand in the place of what is now CFATS or this legislation?

Mr. SIVIN. Sir, that is precisely the kind of thing we were thinking. If someone has already undergone a background check and has a TWIC card and let us say they are transferred from the plant with the waterfront to the other plant, we think since they have already undergone a background check they shouldn't have to undergo another one under CFATS. That is exactly the kind of thing we were thinking of.

Mr. GREEN. I would hope this legislation would give that guidance to Homeland Security because they are actually the same agency. I mean, Coast Guard obviously works with Homeland Security, and like I said, in our district in Houston after 9/11 if we didn't have Homeland Security partnering with us with the Port of Houston and our local law enforcement, federal enforcement and our refinery and chemical industry, we wouldn't be near as safe as we are today because there has been great cooperation in East Harris County on what we try to do, I mean obviously for the folks who live and work there.

Mr. Ramaley, I have heard concerns from drinking water systems about unfunded mandates that arise from this bill. If the State regulatory agency directs a drinking water system to implement IST, do you feel the legislation provides enough assistance to

water systems to defray the cost of any of the inherently safer technology requirements?

Mr. RAMALEY. I think you are asking me if I would consider the imposition of IST on water and wastewater utilities an unfunded mandate, and at this stage I am not aware of programs that would provide money to water utilities for making technology switches to accommodate chemical changes and things like that. So yes, it will have some impact, and I don't believe that there is adequate funding. I know there is not adequate funding to cover those costs at some of the Nation's largest drinking water utilities where those costs would be significant.

Mr. GREEN. And I have shared this concern with a lot of other folks. You know, I have part of the city of Houston, which is a huge water supplier, but I also have very small water suppliers, some of my smaller communities, and the city of Houston may be able to do some of the things but some of my smaller suppliers can't do it because their tax base is not near as large as the city of Houston.

In your testimony you mentioned the EPA should be the lead agency for chemical security on both drinking water and wastewater, and you know the two pieces before us today place drinking water systems under EPA and wastewater systems under DHS. How many facilities nationwide have joint drinking and wastewater systems and what kind of regulatory burden would arise if these facilities were shifted to two different security regimens?

Mr. RAMALEY. I can't give you a precise number but I can tell you that many municipalities around America operate both a water and the wastewater facilities. My guess would be tens of thousands.

Mr. GREEN. And I know in my area everyone who has—you know, we may have a freshwater district that may not have wastewater but the municipalities all do it themselves.

Mr. RAMALEY. Many of the very large and countless small cities and towns have both water and wastewater operations. What was the second part of your question?

Mr. GREEN. Well, what regulatory burden would arise with these facilities being subject to two different security regimens, you know, what EPA may require as compared to the Department of Homeland Security?

Mr. RAMALEY. In those situations where you have utilities, municipal utilities in particular, that are both responsible for both facilities, you would have to have staff trained in both sets of procedures. There are other complicating factors as well. For example, the Information Sharing and Analysis Center that both water and wastewater facilities depend on for security information would have to be up to speed in both the DHS and EPA requirements to provide that information because that is shared and accessed by both water and wastewater systems. So there are a number of complicating factors—personnel training, investments, different procedures. There are quite a few complications.

Mr. GREEN. Mr. Chairman, I know you have been patient, and thank you.

Mr. MARKEY. I thank the gentleman very much, and the Chair will recognize himself for some questions.



And I will just begin by pointing out that on page 40 of the bill in dealing with the handling of sensitive information in judicial proceedings that on page 40 it says "in a proceeding under this title, protected information described in subsection G or related vulnerability or security information shall be treated in any judicial or administrative action in a manner consistent with the treatment of sensitive security information under section 525 of the Department of Homeland Security Appropriations Act of 2007," in other words, those protections that in 2006 were put in by the Republican Congress and signed by George Bush. So the provision actually states that that should be the standard and I think that was a good standard that we agreed upon in a bipartisan fashion back then, and I just wanted to make sure that everyone understood that those safeguards will still be in place because there is a little bit of confusion on that.

I would also add that we just talked about funds for implementing IST, and on page 36 of the legislation we authorized \$125 million for the EPA to be able to ensure that there are grants to water systems to assist them with cost as well as more funds for other costs of compliance, so I just want to make sure that everyone understands that is also in the legislation.

Mr. Ramaley.

Mr. RAMALEY. Yes, I would just comment, \$125 million spread over the Nation's largest water and wastewater utility systems in my opinion would not go very far, but I appreciate that information.

Mr. MARKEY. Well, you know, we have looked at the question. We think that can do the job. And so that is our perspective on it. But we can continue to talk about this in terms of what the proper funding is.

As you know, I have been a longstanding advocate for the use of inherently safer technologies. I have spent the last 5 years attempting to ensure that comprehensive chemical security legislation includes language that reduces the consequences of terrorist attacks by requiring facilities to switch to safer chemicals or processes when it is economically and technologically possible for them to do so, and I met many of you during my 6 years on the Homeland Security Committee making the amendments on IST and making the amendments on water safety and all of down the line so we have a long relationship at this point since 9/11 with my membership on the Homeland Security Committee. So I would like to thank all of you for being here and for your colleague, Judah Prero, for all of your work and efforts on trying to narrow differences and to come up with potential solutions, and I want to continue to work with you towards that goal.

First of all, isn't it true that all ACC companies are required to assess already whether they could utilize safer chemicals or processes under your Responsible Care Code and that the American Chemical Council therefore is supportive of including that requirement in the legislation?

Mr. DURBIN. Mr. Chairman, first of all, let me also acknowledge what a great discussion we have had with your staff as well and I think we have been able to make some real progress trying to find some common ground but as I was saying to Mr. Green as

well, yes, within the ACC security code, member companies do have to analyze inherent safety as they are doing vulnerability assessments and putting their plans together, and also in the State of New Jersey are operating under where they are required to consider IST and that program is considered to be working very effectively and the State of New Jersey I think will tell you the same. So yes, our membership at this point is comfortable with the idea of mandatory consideration of IST as we are already doing.

Mr. MARKEY. Thank you. The Department of Homeland Security puts facilities into different risk-based tiers based on the type of risk the chemicals at the facilities pose. If the chemicals are highly toxic and the facility is located in a densely populated area, the facility would be tiered because an attack to cause the release of those chemicals might be the greatest risk. If the chemicals are highly toxic but the facility isn't located near any residential community, the facility would be tiered because a terrorist would be more likely to steal those chemicals and blow them up somewhere else. Do you think that we should be looking at the type of risk that facilities pose as we consider which facilities should be subject to authority to mandate the use of safer chemicals or processes, Mr. Durbin?

Mr. DURBIN. Yes, in general, ACC members would clearly say that risk should always be used to help determine the priority levels of which facilities should be taking which actions.

Mr. MARKEY. Do you agree with that, Mr. Poorman?

Mr. POORMAN. Yes, we do agree with that.

Mr. MARKEY. Dr. Sivin.

Mr. SIVIN. Yes.

Mr. MARKEY. And Mr. Ramaley.

Mr. RAMALEY. Yes.

Mr. MARKEY. Great. Thank you. So I think it makes a lot of sense to look at risk obviously, and that will help us then to obviously put different facilities in the correct tiers. Do you think that limiting the authority to mandate the use of safer chemicals or processes to the tier 1 and 2 facilities that have been deemed by DHS to pose a risk of a chemical release might be a more targeted way for Congress to proceed, Mr. Durbin?

Mr. DURBIN. Well, again, as the Administration has now made very clear that they are going to—you know, they have taken a position in favor of having some limited IST mandate on implementation, we certainly want to continue to be part of the discussion on how best to do that so yes, by limiting it in that way that would certainly be a more focused way of getting to that solution.

Mr. MARKEY. And we want to work with you and all the other parties here to make sure that we accomplish that goal.

During the Homeland Security Committee markup, an amendment was offered that would allow a facility to appeal to an administrative law judge if it felt that the Department of Homeland Security's initial IST determination was inaccurate. It seems to me that given the highly technical nature of the safer processes and chemicals involved that a more suitable appeal might be more scientific in nature. Would you like to talk about that, Mr. Durbin?

Mr. DURBIN. Certainly, and I think again, as our members look at this issue, as I said, we are very comfortable with the idea of

mandatory consideration. Going further than that, one of the concerns that we have expressed with regard to the provisions in the bill was the lack of a robust appeals process if there were a determination. So by adding one, I think that is helpful and I would certainly agree that having folks who are technically proficient in the technologies available here and the chemical engineering and the process safety and health and what have you is going to be a more appropriate way of handling that.

Mr. MARKEY. Thank you. I appreciate that. You know, I remember in my first year of college there were 200 of us in pre-law and then you had the 200 over there in theology and philosophy and then you had the 200 kids who were going to be doctors, so it was 200, 200, 200. And then they had organic chemistry freshman year for those future doctors and then sophomore year we had 300 people in pre-law, and then when the additional chemistry and other courses were given they kept building the number of lawyers, and while I am one of those people who became history and political science majors, our technical capacities are more limited, let us say, than those people who stayed the course. So I think it would be helpful for us to find a way to have scientific determinations be made even on appeal that reflect scientists making these evaluations so that we don't wind up having some court process where, with all due respect to myself and any others in this room that might be offended by my comments, making the determinations. So we thank you for that.

I tell you what I am going to do. Let us give each 1 minute to summarize to us what you would like the committee to remember as we are moving forward on the creation of this legislation just so that we have got your kind of summary statements in our brain. So we will begin with you, Mr. Poorman.

Mr. POORMAN. Thank you once again for allowing us to be here today. Really, the summary would be that we really would like to see the CFATS program extended. A lot of good work has been done. We want to continue that good work. In regards to the IST issue, we want to just be cognizant of the myriad of programs that we are subject to. Our membership in particular, we have a lot of different chemical processes represented there, and when we make our material, we are making it under registration of different agencies, and if we are asked by DHS to discontinue the use of a chemical compound, it could have ripple effects that could reach out into even consumer safety where certain active ingredients for drugs won't be available. So we want you to keep that in mind, and also make sure that as you said, we agree that there needs to be really a technical review and we feel our people, our engineers, our chemists are best qualified to determine that per process.

Mr. SIVIN. In my summary I would like to point out again that the only thing that the bill authorizes the Department of Homeland Security to require implementation of is a facility's own plan. I cannot imagine that some of the examples we have heard today, a plan that would violate the FDA or a plan that would actually make the facility more dangerous would ever be in a facility's plan. I would like to reemphasize that we do not believe that the ability to mandate this because of the language that already exists in the bill is a threat to jobs. I also would like to emphasize that we are con-

cerned about the background-check language in the bill and we do believe it needs to be improved to provide adequate protection against unfair adverse employment decisions. And finally, I want to emphasize that I think that certain parts of the employee participation need to be enhanced.

Mr. MARKEY. Thank you, Doctor, very much.

Mr. Durbin.

Mr. DURBIN. Thank you, Mr. Chairman. At its core I think ACC members firmly believe that the CFATS program that is in place now is a very solid foundation, a good program, and we want to make sure we can continue the success of that program and are committed to working constructively with you on finding areas that may need improvement. Again, with regard to the IST provisions in here, our members continue to have concerns about that but we are willing and eager to continue working with you and the Committee on those issues, and as I mentioned in my testimony, we as well continue to have concerns on the civil lawsuit provisions, but again, I think there is much more common ground here than there are differences to help us get to the objective of protecting these facilities.

Mr. MARKEY. Thank you very much.

And you have the final word, Mr. Ramaley.

Mr. RAMALEY. Yes. First of all, I appreciate the working relationship between AMWA and the Committee staff in developing the legislation. As you know AMWA supports 3258. A few points. We believe EPA should continue its oversight of the drinking water sector and our exemption from DHS's CFATS and IST programs must continue. We also believe that wastewater should be included under EPA as we testified. We think that security information resulting from vulnerability assessments and gathered information must be protected and must be strongly protected against public disclosure. We believe the bill now does that. And maintaining the current criminal penalties is important and we do look forward to working with EPA to formulate the appropriate standards for the sharing of that information as needed. Thank you.

Mr. MARKEY. Thank you, Mr. Ramaley, and we thank each of you for working with the committee thus far and again we would like to keep a close working relationship with you and work with the minority as well on these issues. It has been 8 years since al-Qaeda attacked and obviously I am very sensitive to it because Mohamed Atta and the other nine were right there in Boston in my district preparing for that attack. And in 2000, I will be honest with you, Abdul Ghani Misqini, who was one of the millennium bombing plotters for the LAX, he came in from Algeria off of an LNG tank and just jumped off in Everett, Massachusetts, as did other al-Qaeda into the United States into my district, and that was an LNG facility that was unprotected. Now, they had a different plan and it involved the L.A. airport and thank God that they were apprehended before that happened but I am very sensitive to that huge LNG facility, to the port, to Boston, to what happened and to my constituents who were on those planes and who actually were working in New York City at the time. So it is something that I focused on very closely and why I asked the Speaker to put me on the Homeland Security Committee so I could make sure that we

did in protections that nuclear weapons could not be put on ships that could then be detonated in the harbor of Boston but any harbor in the United States, that we screen for cargo on planes that we weren't screening. We were screening the shoes that people wore and the computers that they were putting through but not the cargo that went under their feet of passengers who weren't even on the plane, and chemical security into this as does water security. We know they are out there. We know they want to hit. We know that they would in fact implement their plan if somehow or other they could get through our outer security perimeters overseas and here, and so we must balance because the impact, for example, just on Boston alone of that successful attack was, we had a 27 percent reduction in air travel out of Boston for 3 or 4 years. That kills jobs. That kills the economy. That alters people's lives so they cannot be successful. So we have to find a formula here that works. And by the way, airports across the country might have gone down an average of 10 percent just as a derivative of what happened in Boston and in New York City and down here in Washington on September 11. But all of it was profound in terms of its economic impact.

So we have to make sure that they are not allowed to successfully implement a terrorist attack because that is what terror does. It scares people. They don't fly, they don't move, they don't buy things, and everyone suffers as a result. And we know that chemical facilities are on their list. We just have enough security information to be well aware that they are very near the very top of the al-Qaeda terrorist target list. And so our responsibilities are great, and we must make sure that especially in urban areas where these chemical facilities, where these water facilities might be located, you know, if we could all do it again we would not put them right there in the middle of downtown Boston right on the harbor and other cities across the United States. We would make those beaches or waterfront parks if we could do it all over again, but we didn't do it that way. They are there. They are in densely populated areas. We have to deal with it realistically, try to put together a formula that works, doesn't hurt industry and comes up with something that does protect the American people. That is our goal.

We very much enjoyed working with all of you so far and we look forward to the relationship. With that, this hearing is adjourned. Thank you.

[Whereupon, at 2:00 p.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

*Opening Statement of the Honorable Joe Barton*  
*Ranking Member, Committee on Energy and Commerce*  
*Hearing on H.R. 2868 and H.R. 3258 by the Subcommittee on Energy and*  
*Environment*  
*October 1, 2009*

Thank you Mr. Chairman.

I do not share the enthusiasm for the bills we are discussing today that many of my colleagues on the other side do. Before I even get to the substance of the bills, I am concerned that we are racing to make significant changes to a chemical facility security program that has not even been fully implemented. If there are reviews that would indicate a need to change existing law, I don't know of them.

The chemical facility security program applies to a broad swath of the American economy – from hospitals to farms to factories – and therefore we should at least identify and understand the problem we are trying to fix before we rush headlong into legislation. Unfortunately, we again seem to be approaching this from the perspective of crafting a solution that is in search of a problem.

The current law will soon be expiring. However, we should not use the law's sunset provision as an excuse to radically change a program that the Department of Homeland Security is still working to finalize implementation, and that has not even been subject to a compliance inspection yet.

Mr. Chairman, unemployment is up around 10 percent and there are many challenges affecting new project financing right now. Congress should not be cavalierly making changes to chemical plant security laws that could chill future capital investments and strand previous industry capital investments, simply because it sounds like a good idea. We need to understand what works, what doesn't, and what lessons we have learned before we change the rules for these companies and impose new, additional costs.

I applaud my colleagues, Congressman Dent and Lungren, who have introduced legislation to simply extend the existing chemical facility program at the Department of Homeland Security for three (3) years. This simple legislation would allow DHS to finalize implementation, and would also give Congress the time to properly determine what works and doesn't work and make meaningful, educated, reforms to the existing program.

Turning to the guts of these bills, I have no problem with requiring risk-based vulnerability assessments, site security plans, and emergency response plans. In fact, existing laws like the Emergency Planning and Community Right to Know Act already have a viable template for how to inform and coordinate local responders for attacks. In addition, the Risk Management Plans in Section 112 of the Clean Air Act also are helpful guides to preparing for good management.

That said, chemical facility security is not a branch of environmental law. We have plenty of laws on environmental issues. Terrorism is not an accident. It is the intentional infliction of death and destruction. If they're going to be effective, security decisions should be focused solely on efforts to protect human lives, physical infrastructure, and economic growth from the effects of a terrorist attack.

For example, some people think that the use of "inherently safer technologies" or IST will be a sort of protection panacea against terrorism. I do not.

As an engineer, and someone who comes from a state that is one of the largest chemical producers in the country, I recognize IST is an



engineering philosophy. I think it is inappropriate for Congress to mandate engineering philosophies or chemical substitutions on companies as a security cure-all.

I am also troubled by the insertion of citizen-lawsuit language in this bill. These provisions mimic Section 7002 of the Solid Waste Disposal Act, and they give uninjured parties the right to sue either the government or anyone covered by this bill for violations or lack of enforcement. As everybody here understands, citizen-lawsuit language exists chiefly to enrich the trial bar. For what I think are obvious reasons, our nation has wisely avoided allowing it to apply in a national defense context. Legal discovery in a court case would be a remarkably efficient tool for exposing our security preparations to those who want to thwart them. As I said earlier, chemical plant security is not, and should not be, just another environmental law, and these provisions to help the trial bar have no place in this type of legislation.

On a similar matter, I'm happy that the legislation maintains the exemption from the Freedom of Information Act, but I am concerned about the interpretations about what is covered. I would hate to have documents procured through this loophole and used to harm Americans.

Further, I am troubled that we have eliminated penalties against those people who “recklessly” disclose sensitive information. Even though we are blessed to have thwarted all the planned terrorist attacks since 9-11, the threat hasn’t evaporated with the passage of time.

I have concerns as well about the new regime this bill creates for pre-emption of federal law. In another attempt to apply environmental law to security issues, the bill allows states and localities with more “stringent” laws to have them stand in place of the Federal law. In an environmental context, more “stringent” seems pretty straight-forward. But the idea of letting states set the standard for national security is at least puzzling and probably makes almost no sense. I want to know why we need to have a “stringency” standard that could hinder, pose obstacles to, conflict with, or frustrate the purpose of the federal law. It would be like inviting 50 state appointees to override a unified federal plan with 50 different security ideas. We shouldn’t do that any more than we should disband the Army and give its tanks and machine guns to the governors. Texas could manage, of course, but I fear for others.

Finally, I am more than a little curious about all the new labor language that has been added to this legislation. Some of these ideas seem fine, but others seem designed to cause labor-management friction. We need provisions that enhance security at individual chemical plants, not create or further an adversarial relationship between workers and management in a bill that is supposed to solidify security.

Mr. Chairman, I wish I could be more supportive. This bill will unquestionably impose new costs without increasing security very much. It is the product of a view that chemical facilities are a necessary evil instead of a national asset, and that they cannot be trusted to protect themselves from certain harm. This bill will result in an atmosphere where operators worry less about security, innovation, and job creation, and more about lawsuits, conflicting regulations, and giving everyone a happy feeling that things are just fine.

I believe the opposite. Protecting our critical infrastructure is not a feel-good exercise, it is serious business. I urge our entire committee to fully understand what the fully implemented CFATS program can accomplish before we abandon it for this new scheme.

I yield back the balance of my time.

## **Section-by-Section Summary**

### **Drinking Water System Security Act of 2009 (H.R. 3258)**

The Drinking Water System Security Act of 2009 replaces Section 1433 of the Safe Drinking Water Act (SDWA).

#### **Subsection (a). Risk-Based Performance Standards; Vulnerability Assessments; Site Security Plans; Emergency Response Plans.**

This subsection requires the EPA Administrator to issue regulations establishing risk-based performance standards for covered drinking water systems. The EPA Administrator also must establish deadlines and requirements for developing and updating vulnerability assessments, site security plans, and emergency response plans and providing training to employees of covered water systems.

Covered water systems, by definition, include community water systems serving more than 3,300 people and other public water systems that the EPA Administrator, in her discretion, determines present a security risk.

In developing and implementing the regulations under this section, the EPA Administrator must consult with states exercising primary enforcement responsibility for public water systems (hereafter “states with primacy”) and other persons, including the Secretary of the Department of Homeland Security.

The EPA Administrator may designate any chemical as a “substance of concern” for the purposes of this section. When the Administrator designates a substance of concern, she must establish for each substance a threshold quantity for the release or theft of the substance. In making this designation, the Administrator must take into account Appendix A of the Chemical Facility Anti-Terrorism Standards (CFATS), which lists the Department of Homeland Security’s “chemicals of interest.”

This subsection requires the EPA Administrator to provide covered water systems with baseline information about probable threats to disrupt the safe and reliable supply of water, cause a release of a substance of concern, or steal, misuse, or misappropriate a substance of concern.

#### **Subsection (b). Risk-Based Performance Standards.**

This subsection requires the EPA Administrator to develop risk-based performance standards for covered water systems to use in developing their site security plans. The standards should be more stringent for systems in higher-risk tiers. In developing these standards, the Administrator must take into account the risk-based performance standards in the CFATS program.

**Subsection (c). Vulnerability Assessment.**

This subsection requires each covered water system to assess the system's vulnerability to a range of intentional acts, including a release of a substance of concern that causes death or injury or other adverse effects. As part of its vulnerability assessment, the covered water system must review its pipes, physical barriers, water distribution facilities, computer systems, storage of substances of concern, and other factors.

**Subsection (d). Risk-Based Tiers.**

The EPA Administrator must establish four risk-based tiers for covered water systems, with Tier 1 representing the highest-risk tier.

The EPA Administrator may require each covered water system to submit information in order to assign (or reassign) the system to one of the risk-based tiers. In assigning a covered water system to a tier, the EPA Administrator must consider the potential consequences of an intentional act to cause a release of a substance of concern, to introduce a contaminant into or otherwise disrupt the drinking water supply, and to steal, misuse, or misappropriate substances of concern.

This subsection requires the EPA Administrator to provide to each covered water system her reasons for assigning the system to a particular tier and advise the system whether it is required to assess the potential for implementing methods to reduce the consequences of a chemical release from an intentional act under subsection (g).

**Subsection (e). Development and Implementation of Site Security Plans.**

This subsection allows each covered water system to select layered security measures that address the security risks identified in the vulnerability assessment and meet the applicable risk-based performance standards.

**Subsection (f). Role of Employees.**

In the site security plan and emergency response plan, each covered water system must describe the roles and responsibilities of system employees (including contractor employees) in deterring or responding to an intentional act at that system.

This subsection requires each covered water system to provide at least eight hours of security-related training each year to employees with roles and responsibilities in deterring or responding to an intentional act.

This subsection also requires each covered water system to include employees and appropriate employee representatives when developing, revising, or updating the vulnerability assessment, site security plan, and emergency response plan.

**Subsection (g). Methods to Reduce the Consequences of a Chemical Release from an Intentional Act.**

The term “methods to reduce the consequences of a chemical release from an intentional act” means a measure at a covered water system that reduces or eliminates the potential consequences of a release of a substance of concern due to an intentional act. Such measures include using alternate substances, formulations, or processes to reduce the amount of a substance of concern on-site; modifying pressures, temperatures, or concentrations of a substance of concern; and improving inventory control or chemical use efficiency to reduce on-site handling of a substance of concern.

This subsection requires any covered water system that uses or stores a substance of concern in excess of the release threshold to complete an assessment of whether it can implement “methods to reduce” and include this assessment as part of its site security plan. The covered water system must provide this assessment to EPA and the state with primacy, if any, for that system. In preparing the assessment, the system must describe the methods it considered; the degree to which each method, if implemented, could reduce the consequences of an intentional act; whether each method, if implemented, could affect the presence of contaminants in the drinking water, human health or the environment; whether each method, if implemented, is feasible; the costs (and avoided costs) associated with implementing each method; and, based on these factors, whether the system plans to implement any such methods. A covered water system that does not use or store a release threshold quantity of a substance of concern does not have to complete an assessment.

If the EPA Administrator finds that the covered water system did not submit a complete or thorough assessment, she must inform the system and state with primacy for that system and require the system to submit a revised assessment. If the covered water system fails to complete such assessment in accordance with the deadline set by the Administrator, the Administrator may take appropriate enforcement action.

With respect to a covered water system that has a release threshold quantity of a substance of concern and is assigned to one of the two highest risk-based tiers, the state with primacy for this covered water system must determine, based on an evaluation of the system’s assessment, whether to require such system to implement the methods to reduce and report this determination to the EPA Administrator. For covered water systems in states without primacy (Wyoming and D.C.), the Administrator must make this determination. A covered water system that does not use or store a release threshold quantity of a substance of concern and is not in one of the two highest risk-based tiers will not be subject to any requirement to implement the methods to reduce.

Before requiring a covered water system in one of the highest two risk-based tiers to implement methods to reduce, the state with primacy (or EPA Administrator for covered water systems in states without primacy) must examine whether implementing these methods would significantly reduce the consequences of a release of a substance of concern; would not increase the interim storage of a substance of concern by the covered water system; would not put the water system

out of compliance with SDWA or state and local drinking water standards; and is technologically and financially feasible for the water system.

If a state with primacy fails to determine whether to require a high-risk covered water system to implement one or more methods to reduce within a timeline set by the EPA Administrator, the Administrator can step in and make the determination. If the Administrator finds that a state with primacy has not enforced the state's own determination that a high-risk covered water system implement one or more methods to reduce, the EPA Administrator can step in and enforce the determination. The EPA Administrator may consider the failure of a state to make or enforce a determination when considering whether a state should retain primary enforcement responsibility under SDWA.

**Subsection (h). Review by Administrator.**

This subsection requires the covered water system to submit its vulnerability assessment and site security plan to the EPA Administrator for review. The EPA Administrator must review each vulnerability assessment and site security plan and, in consultation with the states with primacy, as appropriate, determine whether each vulnerability assessment complies with the regulations and whether each site security plan addresses the system's vulnerabilities and meets the risk-based performance standards. EPA also must require each system to correct significant deficiencies, if any, in its vulnerability assessment or site security plan.

This subsection also states that a covered water system does not have to provide state and local governments with copies of its vulnerability assessment and site security plan just by virtue of a state or local law requiring that a system turn over to the state or local government all documents that it provides to EPA.

**Subsection (i). Emergency Response Plan.**

This subsection requires each covered water system to prepare or revise an emergency response plan and certify completion to the EPA Administrator. This plan must include plans and procedures for responding to an intentional act at the covered water system and mitigating the impact of intentional acts on public health and safety. The covered water system must provide appropriate information to local first responders and law enforcement officials to ensure an effective response in the event of an emergency.

**Subsection (j). Maintenance of Records.**

This subsection requires each covered water system to maintain an updated copy of its vulnerability assessment, site security plan, and emergency response plan.

**Subsection (k). Audit; Inspection.**

This subsection requires the EPA Administrator, or a duly designated representative of the Administrator, to audit and inspect covered water systems to determine compliance with this



section of the Act. The Administrator or duly designated representative must have access to the system operators, employees and employee representatives during the audit or inspection.

**Subsection (l). Protection of Information.**

This subsection exempts protected information from disclosure under the Freedom of Information Act and state and local information disclosure laws. This subsection also requires the EPA Administrator to develop standards for sharing protected information with and between state and local governments, first responders, employees, employee representatives, and others with security responsibilities at the covered water system.

Protected information cannot be shared except in accordance with these standards. Any person who purposefully publishes, divulges, discloses, or makes known protected information in any manner or to any extent not authorized by these standards can face criminal penalties.

In judicial or administrative proceedings, protected information will be treated similarly to Sensitive Security Information to protect it from public disclosure.

Nothing in this section relieves a covered water system from complying with other laws, including laws requiring disclosure of information to federal, state or local governments or other persons, except as stated in subsection (h). Nothing in this section authorizes the withholding of information from Congress. Nothing in this section may prevent a federal, state or local government from disclosing information that it obtains from a covered water system as authorized by another law.

“Protected information” includes vulnerability assessments and site security plans and portions of documents, records, orders, notices, and letters that would be detrimental to the security of one or more covered water systems if disclosed and are developed exclusively for the purposes of this section. Protected information does not include information that is required to be made publicly available under any law; information that a covered water system has lawfully disclosed elsewhere; and other information that, if disclosed, would not be detrimental to the security of one or more covered water systems.

**Subsection (m). Relation to Chemical Security Requirements.**

Public water systems are exempt from regulation under the chemical security regulations promulgated by the Department of Homeland Security.

**Subsection (n). Preemption.**

States and political subdivisions thereof can enact security standards for drinking water systems that are more stringent than provided in this section.

**Subsection (o). Violations.**

For a covered water system that violates any requirement of this section, the EPA Administrator can issue an order assessing an administrative penalty or commence a civil action in district court. Civil penalties cannot exceed \$25,000 per day. With regard to “methods to reduce,” EPA’s enforcement authority is limited to the terms detailed in subsection (g).

**Subsection (p). Report to Congress.**

The EPA Administrator must produce a report to Congress no later than three years after the effective date of the regulations promulgated under this section and every three years thereafter. The report will be publicly available.

**Subsection (q). Grant Programs**

This subsection requires the EPA Administrator to award grants to, or enter into cooperative agreements with, states to assist these states in implementing this section; to award grants to, or enter into cooperative agreements with, non-profit organizations to provide research, training, and technical assistance to covered water systems; and to award grants to, or enter into cooperative agreements with, covered water systems to assist these systems in preparing assessments and plans and implementing methods to reduce the consequences of an intentional act. This subsection also requires the EPA Administrator to establish a grants program to award grants for the training of employees and first responders.

**Subsection (r). Authorization of Appropriations.**

This subsection authorizes \$315 million for FY2011, including \$30 million for administrative costs incurred by the Administrator or states and \$125 million for implementation of methods to reduce. This subsection authorizes such sums as may be necessary for FY2012 through FY2015.

The bill also contains provisions that require the EPA Administrator to promulgate regulations within two years after the enactment of this bill. The bill also ensures that the current Section 1433 of SDWA and its accompanying regulations apply until the effective date of the new regulations. Nothing in this section affects the application of Section 1433 of SDWA to any violations of Section 1433 occurring before such effective date.

**Section by Section Analysis of H.R. 2868,  
Chemical Facility Anti-Terrorism Act of 2009**

**Section 1. Short Title**

This Act may be cited as the “Chemical Facility Anti-Terrorism Act of 2009”

**Section 101. Findings and Purpose**

Congress finds that the Nation’s chemical facilities represent a terrorist target that must be protected. The Secretary currently has authority to regulate chemical facilities under the Chemical Facility Anti-Terrorism Standards (CFATS) issued pursuant to section 550 of the Department of Homeland Security Appropriations Act, 2007 (P.L. 109-295). The purpose of this Act is to modify and give permanent status to CFATS.

**Section 102. Extension, Modification, and Re-codification of the Authority of the Secretary to Regulate Security Practices at Chemical Facilities**

This section amends the Homeland Security Act of 2002 to include: Title XXI “Regulation of Security Practices at Chemical Facilities.”

**Section 2101. Definitions****Section 2102. Risk-Based Designation and Ranking of Chemical Facilities**

This section grants authority the Secretary to designate a chemical substance as a “substance of concern” and determine the regulated “threshold” quantities of these identified chemicals that are used, stored, manufactured, processed or distributed by a chemical facility. Factors for consideration are the potential for death, injury, or serious adverse effects to human health, the environment, critical infrastructure, homeland security, national security, or the national economy from a terrorist-related release. The Secretary may use the current Appendix A list under CFATS to fulfill this requirement.

The Secretary is required to maintain a list of chemical facilities that have more than a threshold quantity of a “substance of concern” and pose a sufficient security risk based on certain criteria, including the potential threat or likelihood of a terrorist attack at the facility; the potential harm to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy, from a terrorist incident; and the proximity of the facility to large population centers. The Secretary may require a facility to submit information regarding the facility’s possession of substances of concern to determine whether it is “covered” under this title. The Secretary may use the current Top Screen process under CFATS to fulfill this requirement.

The Secretary will assign each such covered chemical facility to one of at least four risk-based tiers with at least one tier being a high-risk tier. Facilities will be notified within 60 days of their designation or any change in their designation. The Secretary must review the tiering

periodically, and the Secretary may add, remove, or change the tier assignment for each facility.

The Secretary shall provide relevant information regarding probable threats to facilities.

#### **Section 2103. Security Vulnerability Assessments and Site Security Plans**

This section requires the Secretary to develop regulations to establish risk-based, performance-based standards, protocols, and procedures for mandatory security vulnerability assessments (SVAs) and site security plans (SSPs) and set deadlines by tier for completing the SVAs and SSPs. Facilities must include employees and their representatives when developing SVAs and SSPs. Upon request, the Secretary shall provide assistance and guidance to facilities conducting SVAs and SSPs to the extent that resources permit. The Secretary must approve or disapprove SVAs and SSPs within 180 days of receipt.

Facilities must review and resubmit SVAs and SSP at least every 5 years. In addition, facilities are required to notify the Secretary if they change their use or storage of a substance of concern or modify operations in a way that could affect the security vulnerability assessment or site security plan previously submitted.

All SSPs must set forth the roles and responsibilities of employees to deter and respond to a terrorist attack. Covered facilities must provide employees with a minimum of 8 hours of training annually in chemical facility security.

The Secretary is required to establish risk-based security performance standards for SSPs. The security performance standards are to be increasingly stringent according to the tier and allow a facility to choose a combination of security measures that together meet the security performance requirements. In addition, facilities closely located may develop and implement coordinated SVAs and SSPs.

The Secretary may accept, in whole or in part, the submission of an alternate security program (ASP) that was prepared by the facility for some other reason for purposes of fulfilling the regulatory requirements to complete an SVA or SSP as long as it meets the requirements of this title and provides an equivalent level of security to the level of security established under the regulations. The Secretary also may accept an ASP from an accredited non-profit personnel surety accrediting organization. The Secretary must review and approve or disapprove each ASP.

This section requires facilities subject to the Maritime Transportation Safety Act (MTSA) to submit to the Secretary information necessary to determine whether such a facility would be designated as a covered chemical facility under CFATS. For those so designated, the Coast Guard may require a MTSA facility to update the SVA or SSP it completed under MTSA to obtain an equivalent level of security as provided under CFATS. The Coast Guard and the Office of Infrastructure Protection are required to enter into a formal agreement detailing the roles and responsibilities of each in carrying out their chemical security responsibilities. The Coast Guard will be responsible for ensuring that MTSA facilities are in compliance with the requirements of the CFATS program.

The Secretary is required to coordinate with the Attorney General (the Bureau of Alcohol, Tobacco, and Firearms) on facilities that import, manufacture, distribute, or store explosive materials and are required to be licensed under §18 USC 40.

**Section 2104. Site Inspections**

The Secretary or her designee shall have the right of entry at reasonable times and shall conduct security verifications and inspections. The Secretary shall have access to the facility owners/operators, employees, and employee representatives during the inspections. For tier 1 and 2 facilities, the Secretary also will conduct unannounced inspections to ensure and evaluate compliance with regulations, security standards, and requirements under this title in a manner so as not to affect the actual security, physical integrity, or safety of the facility.

**Section 2105. Records**

The Secretary may require the submission of, or access to, a facility's records in order to review such facility's SVA or SSP or their implementation. Facilities also must provide the SVAs and SSPs to employee representatives, if any. Such records must be handled in accordance with the information protection provisions of this title.

**Section 2106. Timely Sharing of Threat Information**

The Secretary is required to provide information concerning a threat that is relevant to a specific covered chemical facility, in as timely a manner, to the maximum extent practicable. The covered chemical facility is required to report to the Secretary any threat, significant security incident, or penetration of the facility's cyber or physical security, whether successful or not.

**Section 2107. Enforcement**

This section requires the Secretary to disapprove a facility's SVA or SSP if it does not comply with the CFATS standards or if the facility's implementation of the SSP is insufficient to address identified vulnerabilities or meet relevant security performance standards.

The Secretary must give a notice of disapproval within 14 days of such a determination that clearly explains the deficiencies and requires the owner or operator to revise the SVA or SSP. After providing the owner or operator the opportunity for consultation, the Secretary may issue an order assessing a civil penalty or commence a civil action to force compliance from a covered chemical facility.

If a facility continues to be in non-compliance, the Secretary may issue an order to cease operations. The Secretary may not, however, issue a cease operations order to a wastewater treatment facility. The Secretary may also issue civil penalties of up to \$50,000 per day or administrative penalties of up to \$25,000 per day for non-compliance.

**Section 2108. Whistleblower Protections**

The Secretary shall establish a process for any person to report to the Secretary any deficiencies or vulnerabilities at a covered chemical facility. The identity of such a person shall be kept confidential. The Secretary shall acknowledge receipt of the information and address, where appropriate, any reported deficiencies or vulnerabilities. Retaliation against whistleblowers is prohibited.

**Section 2109. Federal Preemption**

Any State or local government may issue a regulation, requirement, or standard of performance for chemical facility security that is more stringent than the Federal statute.

**Section 2110. Protection of Information**

This section identifies the types of information that must be protected and the procedures for safeguarding it.

Protected information is exempt from disclosure under the Freedom of Information Act and State and local information disclosure laws.

This section requires the Secretary to provide standards for the appropriate sharing of protected information with Federal, State, and local governments, law enforcement and first responders, and designated chemical facility personnel. This section also requires that protected information be treated as Sensitive Security Information (SSI) in administrative or judicial proceedings.

This section does not relieve an owner or operator of any obligation to comply with other Federal, State, or local laws requiring submission of information. This section does not prohibit the sharing of information with Congress. Any authority or obligation of a Federal agency to protect or disclose a record or information under any other law is not affected. Protected information does not include information that is otherwise publicly available, has already been lawfully disclosed, or information that, if disclosed, would not be detrimental to the security of the facility.

**Section 2111. Methods to Reduce the Consequences of a Terrorist Attack**

This section requires that the site security plan include an assessment of methods to reduce the consequences of a terrorist attack on that facility. The assessment must include a description of methods assessed, the degree to which each method would reduce consequences, the technical viability of the method, costs, avoided costs (including liabilities), savings, and applicability of implementing each method to reduce consequences.

Methods to reduce consequences include substitution of chemicals (or forms of chemicals), changes in processes, storage or use of less of a substance of concern on site, and improvements in inventory control and handling of substances of concern.

A tier 1 or tier 2 facility is required to implement such method(s) to reduce the consequences of a terrorist attack if the Secretary determines that such method(s): would significantly reduce the risk of death, injury, or serious adverse effects to human health from an attack on that facility and would not result in another facility being placed into a high-risk tier; is technically and economically feasible to be incorporated into the facility's operations; and would not significantly and demonstrably impair the ability of the facility to sustain operations at its current location.

When the Secretary makes a determination that implementation is required at a tier 1 or tier 2 facility and that facility determines that it cannot comply, the facility must submit a written explanation to the Secretary within 60 days. The Secretary shall then have 60 days, after receipt to review the written explanation. If the Secretary still determines that implementation is necessary, the facility shall be required to begin implementation within 180 days.

This section requires the Secretary to provide information on method(s) to reduce the consequences of a terrorist attack. Information that is made available to the public shall not identify any specific facility and must comply with the protection of information requirements of section 2110.

This section allows the Secretary to make funds available to facilities that are required by the Secretary to implement methods to reduce the consequences of a terrorist attack to help defray the cost of implementation.

#### **Section 2112. Applicability**

This section clarifies that this title shall not apply to any facility owned and operated by the Department of Defense, or all or part of chemical facility that is subject to regulation of security by the Nuclear Regulatory Commission (NRC) or an NRC agreement state, and has been designated by the NRC, the Secretary, and the agreement state (if applicable) as exempt. This title does not apply to the transportation in commerce (including incidental storage) of a substance of concern that is regulated as a hazardous material under Chapter 51 of title 49 of the U.S. Code.

#### **Section 2113. Savings Clause**

This section specifies that nothing in this title affects section 112 of the Clean Air Act (42 U.S.C. 7412), the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.), the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Occupational Safety and Health Act (29 U.S.C. 651 et seq.), the National Labor Relations Act (29 U.S.C. 151 et seq.), the Emergency Planning and Community Right to Know Act of 1996 (42 U.S.C. 11001 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Maritime Transportation Security Act of 2002 (Public Law 107-295), the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.), and the Toxic Substances Control Act (15 U.S.C. 2601 et seq.). In addition, nothing in this title shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance relating to

environmental protection, health, or safety.

#### **Section 2114. Office of Chemical Facility Security**

This section establishes an Office of Chemical Facility Security, administered by a Director, within the Department of Homeland Security. It sets forth qualifications for the Director of the Office of Facility, requirements for the selection process, and the responsibilities of Director.

#### **Section 2115. Security Background Checks of Covered Individuals at Certain Chemical Facilities**

This section requires the Secretary to issue regulations requiring covered chemical facilities to establish personnel surety for individuals with access to restricted areas or the facility's critical assets and describe the appropriate scope and applications of security background checks. A facility shall not make an adverse employment decision and attribute such decision to the requirements of this Act unless the individual in question has been convicted of, found not guilty by reason of insanity, or is under want, warrant, or indictment, or incarcerated for a specific crime as detailed under part 1572 of title 49, CFR.

The Secretary must provide an adequate redress process for an individual subjected to an adverse employment decision because of a background check and has the authority under this section to order a remedy, if warranted. A chemical facility may not misrepresent to an employee or labor arbiter the background check rules and regulations issued by the Secretary.

Nothing in this section affects the right and responsibility of a person subject to a background check or an employer under another Federal, State, local, or tribal law or collective bargaining agreement. This section does not preempt any other Federal, State, tribal, or local law that requires background checks.

#### **Section 2116. Citizen Suits**

Any person may commence a civil action against a covered chemical facility or the Secretary alleging that there has been a violation of this law, or against the Secretary for failure to enforce this law. The Federal court with jurisdiction over the matter shall be the U.S. District Court of the district wherein the violation is alleged to have occurred or the U.S. District Court of the District of Columbia. That court shall have authority to enforce the requirements of this Act. Relief to a person who prevails in a citizen suit is limited to the issuance of a court order requiring performance by a Secretary or facility and civil penalties set forth in Section 2107.

No person may commence a civil action without a 60 day notice to the Secretary and/or the facility alleged to be in violation, or if the Secretary is addressing the matter by seeking a civil or criminal remedy or an administrative order. When not a party, the Secretary has the right to intervene in any civil action under this section. The court may award court costs to the prevailing side, when appropriate, and may require the filing of a bond (or its equivalent) in accordance with the Federal Rules of Civil Procedure. Nothing in this section shall restrict any right that any person (or class of persons) may have under any statute or common law.



**Section 2117. Annual Report to Congress**

This section requires a report to Congress on the progress of implementation of this title not later than one year from the date of enactment and annually for the next four years and biennially thereafter. This report must include a qualitative discussion of how covered chemical facilities have reduced their risk of chemical facility terrorist incidents and a quantitative summary of the number of facilities that submitted information to DHS, the number of facilities in each tier, the number of SVAs and SSP submitted and approved or disapproved, changes in tier due to implementation of methods to reduce consequences, number of compliance orders or penalties issued by the Secretary, and any other information deemed necessary by the Secretary. The report will be made publicly available.

**Section 2118. Authorization of Appropriations**

This section authorizes \$325 million for fiscal year (FY) 2011 to carry out the requirements of this Act, which includes \$225 million for Departmental expenditures in carrying out this Act and \$100 million for facilities to fund capital costs incurred from implementing methods to reduce the consequences of a terrorist attack. The section authorizes \$300 million for FY 2012, with \$225 million for Departmental expenditures and \$75 million for consequence reduction, and \$275 million for FY 2013, with \$225 million for Departmental expenditures and \$50 million for consequence reduction.

**Outside of the Quotes:**

The following sections do not amend the Homeland Security Act of 2002. They appear for clerical reasons:

**(b) Clerical Amendment**

This section updates the table of contents for of the Homeland Security Act of 2002 to reflect the amendments made by this bill.

**(c) Conforming Repeal**

Section 550 of the Department of Homeland Security Appropriations Act, 2007 (Public Law 109–295) is struck on October 1, 2009.

**(d) Treatment of CFATS Regulations**

It is the sense of Congress that the DHS Secretary was granted the authority to regulate security at chemical facilities pursuant to section 550 of P.L. 109-295, and that such authority will sunset on October 1, 2009. Under that authority, the Secretary promulgated the CFATS regulations. In carrying out the requirements of this Act, the Secretary may use whatever parts of CFATS and tools developed under CFATS that are relevant in carrying out this Act, and shall amend CFATS in order to carry out new requirements that the current CFATS regulations do not cover.

**(e) Facilities Covered by CFATS**

Owners or operators of facilities currently that are covered by CFATS (in place pursuant to

section 550 of P.L. 109-295) shall update their previously-approved SVAs and SSPs in order to comply with the requirements of this Act on a timeline determined by the Secretary.

**(f) Consultation With Other Persons**

The Secretary shall consult with the Administrator of the Environmental Protection Agency, and other appropriate persons regarding the designation of substances of concern, methods to reduce the consequences of a terrorist attack, security at co-owned or co-operated drinking water and wastewater facilities, treatment of protected information, and other such matters that the Secretary deems appropriate.

**(g) Deadline for Regulations**

The Secretary shall promulgate a proposed rule within 6 months of passage of this Act, and, after a notice and comment period, shall promulgate a final rule within 18 months of passage of this Act.



**AMERICAN FOREST & PAPER ASSOCIATION**  
Office of the President

September 30, 2009

The Honorable Henry A. Waxman  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Joe Barton  
Ranking Member  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Waxman and Ranking Member Barton:

We write to express our concerns about H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009" as your Committee prepares to begin its consideration of this legislation.

The American Forest & Paper Association is the national trade association of the forest products industry, representing pulp, paper, packaging, and wood products manufacturers, and forest landowners. Our companies make products essential for everyday life from renewable and recyclable resources that sustain the environment. The forest products industry accounts for approximately 6 percent of the total U.S. manufacturing GDP, putting it on par with the automotive and plastics industries. Industry companies produce \$200 billion in products annually and employ approximately 1 million people earning \$54 billion in annual payroll. The industry is among the top 10 manufacturing sector employers in 48 states.

As one of the leading manufacturers and employers in rural America, we take seriously the need to protect our nation's chemical plants, storage facilities, and infrastructure against security threats and potential terrorist attacks. The nation's forest products industry continues to take proactive steps to properly secure our facilities from the threat of potential terrorist acts. We have worked closely with Department of Homeland Security (DHS) officials in order to establish appropriate site security plans which meet the performance-based standards required by the Chemical Facility Anti-Terrorism Standards (CFATS).

We remain concerned that the legislation under consideration in the House, H.R. 2868, the "Chemical Facility Anti-Terrorism Security Act of 2009" would seriously disrupt the current partnership that exists between DHS and the private sector. We believe the proposed legislation would increase unnecessarily the regulatory burdens on many industries that use vital chemical compounds in their manufacturing processes. These burdens would come at a time of unprecedented economic distress in our industry. Since 2006, falling demand for wood and paper products has led to the loss of over 350,000 jobs in our industry, over a quarter of our workforce. Adopting a costly new approach to chemical security – particularly one that puts DHS in the untenable position of substituting its judgment for private business decisions about the most effective technology to meet production needs – would exacerbate these job losses. Key areas of concern include the following:

The Honorable Henry A. Waxman  
The Honorable Joe Barton  
September 30, 2009  
Page Two

**Methods to Reduce Consequences of Terrorist Attacks (Inherently Safer Technology):** Inherently safer technology (IST) is an engineering concept used to better design production processes to ensure that the safest, most effective technologies are used at manufacturing facilities. We are concerned that this concept is being inappropriately applied to security issues. We believe an important distinction must be made between plant safety and security. Furthermore, where appropriate, IST is already incorporated into the federal Occupational Safety and Health Administration's Process Safety Management (PSM) program. The requirements of H.R. 2868 go beyond what is required under PSM and are duplicative for facilities which currently comply with PSM. In our view, the current CFATS program is already leading companies to consider, and in many cases adopt, safer methods of operation because doing so allows them to move facilities to a lower-risk tier (or out of the program all together) if risk profiles are reduced and vulnerabilities are minimized. The ability to make this choice should be left with the facilities.

**Private Rights of Action:** We believe that DHS should be the sole responsible agency for determining when and how to enforce federal chemical security regulations. State and local governments and third-party litigants should not have the ability to bring suit to enforce any of the DHS chemical security provisions. In June, Deputy Undersecretary Phillip Reitinger stated that he had "significant concerns" about the citizen suit provisions, and expressed "concern about the potential disclosure of sensitive or classified information in such proceedings." We share these concerns and believe these suits could easily be used as fishing expeditions by litigants with agendas that could impede securing the nation's chemical facilities.

**Inclusion of MTSA Regulated Facilities:** The Maritime Transportation Security Act (MTSA) of 2002 is designed to protect our nation's ports and requires port facilities, including chemical facilities, to conduct vulnerability assessments and develop security plans. These facilities, which are currently regulated by the U.S. Coast Guard, were exempted by statute from the CFATS regulations. To continue to maintain this successful program and avoid re-regulation and duplication, it is necessary to maintain the MTSA exemption. H.R. 2868 fails to clearly continue this exemption.

For all of these reasons, we strongly urge the committee to remove IST and citizen suit provisions from H.R. 2868, while continuing to explicitly exempt facilities already covered under MTSA from the CFATS regulations. Thank you for your consideration of our concerns.

Best Regards



Donna A. Harman  
President and Chief Executive Officer



**American Water Works  
Association**

The Authoritative Resource on Safe Water <sup>SM</sup>

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*Advocacy  
Communications  
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Education and Training  
Science and Technology  
Sections*

August 11, 2009

The Honorable Henry A. Waxman  
Chair  
The Honorable Joe Barton  
Ranking Member  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C.

Dear Mr. Chairman and Mr. Ranking Member,

As the House Committee on Energy and Commerce addresses the issue of chemical security at our nation's drinking water utilities via H.R. 3258, the American Water Works Association (AWWA) would like to thank you for meeting with us in the development of this legislation, and to share our thoughts about ways in which the bill could be even further improved. We would appreciate this letter being included in the Committee's hearing record on this bill.

First, AWWA thanks the Committee for the open manner in which chemical security legislative language has been developed over the past few months. We appreciate having been able to provide some input to the issues contained in the bill. We have seen significant improvements in the legislation as it was being drafted. We still have concerns, but we look forward to continuing this dialogue with the Committee in a constructive manner.

In particular, we thank the Committee for two significant improvements in the draft bill. First, we appreciate the fact that disclosure of sensitive information is now a criminal violation in the bill rather than merely a civil one. The public disclosure of a vulnerability assessment or a site security plan is equivalent to publishing a handbook on how to sabotage a specific drinking water treatment plant or distribution system, thereby endangering employees and local citizens. Prohibiting the disclosure of this information is extremely important, and criminal penalties are appropriate for its unauthorized disclosure.

Second, we also believe the provisions of H.R. 3258 under "Methods to Reduce the Consequences of a Chemical Release from an Intentional Act" have been improved. Early drafts gave the U.S. Environmental Protection Agency the ability to decide which materials and processes a local utility would use in treating and distributing drinking water. As currently drafted, the bill would place the final decision on this matter with state drinking water primacy agencies. State regulators do have greater working knowledge of environmental and other local

issues affecting the choice of disinfectant chemicals and processes than do federal officials. Having said that, we continue to have significant concerns over this provision and believe further changes would significantly improve the bill.

For example, the states will likely be unable to exercise their authority over the choice of disinfectants absent a significant commitment of federal resources to support this work. The bill promises an unspecified amount, and only for the first year. We urge you to work with the Association of State Drinking Water Administrators to ensure that adequate funds are authorized for states to exercise these provisions, if they remain in the bill.

There are also significant limitations on state authority built into the bill, such as federal (not state) determination of when a utility "methods" analysis is complete, and federal authority to override the state if EPA determines that the state has not made a timely decision.

Finally and very importantly, the factors the states are allowed to consider in making its decision are limited, and do not allow for a full consideration of risk-risk tradeoffs, risk shifting, and unintended consequences for community impacts and for public health. These must be taken into account, given the serious potential consequences of altering long-established disinfection practices without fully considering all aspects of the change.

#### **An Informed Local Decision is the Best Approach**

AWWA continues to strongly believe the best approach to the issue of reducing the consequences of an intentional release is to require local officials to make an informed decision concerning disinfectant chemicals and processes after a full analysis. Drinking water utilities tailor their treatment and distribution processes according to regulatory obligations (such as the federal requirement to use chlorine in some form and to achieve certain levels of disinfection), to critical variations in source water characteristics (such as temperatures, pH, pathogens, etc.), and to other local factors (such as delivery options for disinfectant chemicals, the need to maintain reserve supplies in the event of supply interruption, spatial limitations at the plant site, local ambient temperatures that affect the "shelf life" of chemicals and the attendant chemical degradation and breakdown products, etc.). Another issue that may be of concern to the Committee is the "energy profile" of disinfection alternatives. For example, many alternatives require significantly greater electricity inputs, compared to gas chlorine, and would thus work contrary to efforts to reduce the utility's carbon footprint. All of these factors and others must be taken into account in selecting disinfectant processes.

We want to emphasize that many utilities can change disinfection processes without compromising the safety of the community drinking water supply. Indeed, many have already done so. But where that has been done, it has been done as an informed local decision after careful study and full consideration of many important local factors, such as those identified above. Local officials are in the best position to evaluate these factors and to weigh the risk tradeoffs, feasibility, and full range of consequences associated with the available disinfection processes. So while having the state approve this decision is better than having EPA do it, we think the decision is so dependent on local factors and so critical to water safety, that it is vastly better to require an informed local decision.

In order to help utilities and local elected officials undertake an analysis of disinfectant choices and reach an informed decision, AWWA has recently released guidance titled "Selecting Disinfectants in a Security-Conscious Environment" to aid utilities with this decision process. We believe that this guide substantially advances the Committee's objectives on this issue, and

we offer it to the Committee to cite in bill report language as an example of a tool utilities can use in conducting assessments of alternative materials and processes.

The bill could also be improved in a number of other respects:

**An Appeal Process is Needed**

If the decision of whether to implement alternative methods or materials in water treatment is to remain with state officials, we believe a state-level administrative appeals process should be included in the bill to address disagreements between a water utility and the state. We would be willing to work with the Committee and representatives of state agencies to find an appropriate administrative appeals process, as is found in other environmental laws.

**Sensitive Information Must be Better Protected**

As noted above, disclosure of sensitive information under H.R. 3258 would be approximately equivalent to a Class A misdemeanor, meaning those found guilty of such a crime would face not more than one year in prison and a fine up to \$10,000. AWWA believes it would be more appropriate to consider such a disclosure as tampering with a water system, consistent with the provisions of 42 USC 300i-1, as amended by the 2002 Bioterrorism Act. This would mean that conviction would result in imprisonment for not more than 10 years and a civil penalty of not more than \$1,000,000 for such tampering, or not more than \$100,000 for attempting or threatening such actions. This would provide an appropriate level of deterrence to such dangerous disclosures.

**One Federal Agency Should Oversee Water and Wastewater**

Many local governments, such as cities or townships, operate drinking water and wastewater utilities under a single agency or department. In some instances, communities are served by a joint drinking water/wastewater utility that is privately owned or investor owned. In either case, we urge the Committee on Energy and Commerce to work with other House committees to place both drinking water and wastewater utilities under the jurisdiction of one federal entity for the purposes of this bill, respecting, of course, the role of state agencies. This would enable more efficient implementation at the local level, and eliminate the need for officials at joint water and wastewater utilities to operate under the jurisdiction of two different federal agencies for chemical security.

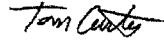
**Outsider Participation is Not Appropriate**

We agree that supervisory and non-supervisory employees should be included in the development of vulnerability assessments and site security plans because of their hands-on, working knowledge of a facility's operation. However, we do not agree with H.R. 3258's specific inclusion in these processes of employee bargaining agents that may not themselves be employees of the utility. As mentioned earlier, there is very sensitive information involved. Therefore, access to this information must be restricted to as few people as necessary, and only to those for whom there is a direct "need to know." Many entities, including AWWA, have significant expertise, tools and guidance in the area of security and preparedness, and make these accessible to utilities and their employees. However, we do not seek – and cannot support provisions – to mandate the participation of specific types of organizations and/or their representatives from outside the utility itself. If employee safety is a concern with regard to this issue, we note that water utilities already must comply with extensive regulations for employee safety and training under the Occupational Safety and Health Act and the Clean Air Act.

Again, we thank the Committee for the opportunity to comment and we offer the expertise of our membership as the Committee's work continues. AWWA is an international non-profit, scientific

and educational society dedicated to the improvement of drinking water quality and supply. Our 60,000 members include more than 4,600 utilities that supply roughly 80 percent of the American people with safe drinking water. Many of our utility members also provide sewer and sanitation services.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Curtis".

Tom Curtis  
Deputy Executive Director for Government Affairs

Cc/Members, House Committee on Energy and Commerce



September 28, 2009

The Honorable Henry Waxman  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Joe Barton  
Ranking Member  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Waxman and Ranking Member Barton:

As the leading chemical and petrochemical manufacturers, purchasers, distributors, and related organizations in the United States, we write to express our concerns about H.R. 2868, the “Chemical Facility Anti-Terrorism Act of 2009.”

Our industries recognize and take seriously the need to protect our nation’s chemical plants, storage facilities, and infrastructure against security threats and potential terrorist attacks. Since 2006, businesses have spent approximately \$4 billion to enhance the security of our own chemical facilities and systems.\* Given the importance of these safety issues, we generally have supported the federal government’s efforts to develop and implement reasonable risk-based and performance-oriented security standards that focus on facilities posing the greatest risk to our workers, communities, and national security interests. To that end, we have worked constructively with the U.S. Department of Homeland Security (DHS) in providing valuable input for the Chemical Facility Anti-Terrorism Standards (CFATS) program and are actively working to implement these new standards.

Notwithstanding our support for DHS’s effort to implement the CFATS, however, we have significant concerns with three provisions in the “Chemical Facility Anti-Terrorism Act of 2009,” currently pending before the House Energy and Commerce Committee.

First, we believe the legislation’s anti-preemption provision (Section 2109), which would permit state and local governments to adopt or enforce standards more stringent than those required by federal law, would greatly burden industry with no concomitant benefits for public safety. As reflected in the title and findings of H.R. 2868, the protection of chemical facilities against terrorist activities is a matter of national security.

Thus, as with other national security issues – such as nuclear, hazmat transportation, aviation, and port security – chemical facility security should be regulated solely by the federal government.

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\* See Regulatory Assessment for the Chemical Facility Anti-Terrorism Standards (CFATS), DHS-2006-0073, April 1, 2007, U.S. Department of Homeland Security. The Assessment estimates that the cost of complying with the CFATS interim final rule could be approximately \$9 billion over the period 2006-2015.

Federal preemption is critical to the legislation's overarching goals. Absent uniform national standards, businesses will be subject to a patchwork of differing and possibly conflicting regulations. Such an approach would force facilities to sort through a dizzying maze of potentially contradictory regulations and could divert scarce resources to complying with disparate requirements that do not necessarily advance national security interests. This patchwork of state and federal regulation would breed confusion for the myriad companies operating in multiple states.

Second, we also have strong concerns about the bill's "citizen suit" provision (Section 2116), which would allow any person – even those who have not suffered any harm – to bring suit against regulated facilities or the DHS to enforce compliance with the act. Although such private rights of action are common in environmental statutes, the performance-oriented requirements of the CFATS are not well suited to enforcement by citizen suits. This is so because CFATS's performance-based standards provide facilities the flexibility to decide which security measures or technologies to adopt. Allowing layperson litigants rather than DHS security specialists to challenge a facility's selection of security measures will not enhance security in any meaningful way.

Furthermore, we share the DHS's concerns that broad discovery rights in federal lawsuits could lead to public disclosure of classified or highly sensitive information that could assist terrorists. Such information likely would include the types and amounts of chemicals stored at a facility, the specific locations of the chemicals, and the security measures in place to protect the chemicals. As DHS Deputy Under Secretary Philip Reitingger testified in June before the House Homeland Security Committee:

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.

In short, the citizen suit provision will not enhance enforcement of the chemical facility regulations or promote the objectives of the "Chemical Facility Anti-Terrorism Act of 2009." To the contrary, the provision will only encourage costly lawsuits, divert resources from implementation of the CFATS and compliance with the act, and enrich lawyers at the expense of national security interests.

Finally, we strongly oppose the bill's provision (Section 2111) requiring all covered chemical facilities to assess so-called "inherently safer technologies" (ISTs) and mandating that chemical facilities assigned to "tier 1" or "tier 2" actually implement ISTs, if so ordered by DHS. This provision essentially provides DHS the authority to implement manufacturing process changes, an action that is unnecessary and potentially very disruptive to many chemical facilities. The performance-based CFATS already provide chemical facilities with powerful incentives to implement enhanced safety measures, improve processes, and substitute safer chemicals. Notably, the CFATS program allows facilities to move to a lower-risk tier (or out of the program all together) if risk profiles are reduced and vulnerabilities are minimized. Mandating adoption of government-selected ISTs would gut the core of the CFATS without reducing real risks.

The cost of assessing ISTs also would be unduly burdensome for smaller chemical facilities and could hinder overall efforts at improving security. Smaller facilities that use or store relatively modest amounts of chemicals (rather than manufacturing them) would be required to retain expensive consultants and chemical safety engineers simply to assess the existence and feasibility of ISTs. These operations, already suffering from the ongoing economic crisis, will have even fewer resources to dedicate to actual security enhancements if forced to conduct costly IST assessments.

In addition, an IST mandate, if enacted, could lead to disruption in our nation's food supply. In the agriculture industry, such a directive could jeopardize the availability of lower-cost sources of plant nutrient products or certain agricultural pesticides used by farmers.

For all of these reasons, we strongly urge the committee to remove the anti-preemption, citizen suit, and IST provisions from H.R. 2868.

Sincerely,

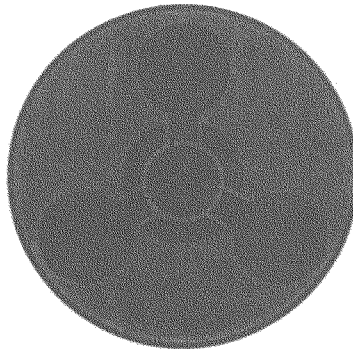
Agricultural Retailers Association  
American Farm Bureau Federation  
American Forest & Paper Association  
American Petroleum Institute  
American Trucking Associations  
Association of Oil Pipe Lines  
Chemical Producers and Distributors Association  
Consumer Specialty Products Association  
Environmental Technology Council  
Institute of Makers of Explosives  
International Association of Refrigerated Warehouses  
International Liquid Terminals Association  
International Warehouse Logistics Association  
National Agriculture 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 Association  
National Propane Gas Association  
North American Millers' Association  
Petroleum Equipment Suppliers Association  
Petroleum Marketers Association of America  
The Fertilizer Institute  
U.S. Chamber of Commerce

# **CHEMICAL TERRORISM**

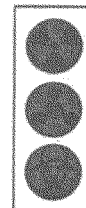
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## **US Policies to Reduce The Chemical Terror Threat**

**- Professor Margaret E. Kosal -  
September 2008**



In Support of PSA's  
REPORT CARD ON WMD  
TERROR PREVENTION





Professor Margaret E. Kosal  
Sam Nunn School of International Affairs  
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*The Partnership for a Secure America (PSA) is dedicated to recreating the bipartisan center in American national security and foreign policy.*

Past decades have witnessed a hardening of partisan divisions on national security and foreign policy, limiting productive debate and blocking effective action by Congress and the Executive Branch on critical policy issues. This rising partisanship has soured working relationships among policymakers and their counterparts across the aisle at all levels of government, and our national security and foreign policy discourse has suffered as a result.

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## CRITICAL INFRASTRUCTURE

**P**olicies to reduce the threat of a terrorist attack against industrial chemical facilities - critical infrastructure with the potential to cause mass casualties - have been driven by incomplete and, in some cases, unrealistic assumptions. Yet it is essential to reduce the risk that terrorists could attack an industrial chemical facility as a means to cause the release of a plume of toxic vapor and inflict mass casualties, or to inflict economic damage by destroying a key element of the nation's critical infrastructure.<sup>32</sup>

The worst-case scenario for a terrorist attack on a domestic industrial chemical facility would result in up to 2.4 million people killed or injured, as calculated by the U.S. Army Surgeon General's Office.<sup>33</sup> More than 15,000 facilities throughout the U.S. produce, store, and transport industrial chemicals in substantial quantities.<sup>34</sup> In 1996, the U.S. Environmental Protection Agency (EPA) determined that "a worst-case release" could endanger more than one million people located near one of the 123 identified chemical facilities.<sup>35</sup> More recent assessments assert, "at present, about 600 facilities could potentially threaten between 100,000 and a million people. About 2,000 facilities could potentially threaten between 10,000 and 100,000 people."<sup>36</sup> The numbers are staggering.

The Union Carbide disaster in Bhopal, India, in December 1984 is illustrative of the scale of catastrophe that is possible from a terrorist attack on a chemical industry plant. This incident, whose cause remains uncertain, resulted in over 3,800 fatalities from the initial release of the toxic gas methyl isocyanate, and well over 200,000 exposed individuals who have suffered chronic symptoms over the ensuing twenty years. Possible motivations for attacking chemical industry infrastructure include economic terrorism, disruption of the government in power, protest of a single incident or event, or protest of U.S. foreign policy.<sup>37</sup>

Current analysis and policy on protecting chemical industry facilities from terrorist attack has focused - *to an almost myopic extent* - on reducing vulnerability.<sup>38</sup> Too many analysts and observers have emphasized the potential for sabotage and focused on the perceived "insider" threat: "Possibly the most serious threat is posed by external adversaries aided by insiders."<sup>39</sup> Most preparedness and response plans have dealt mainly with human security (employees, contractors, and workers); for example, "obvious strategies" advocated by chemical industry representatives include the "use of employee identification cards, background checks for employees and contractors, and additional surveillance in the form of obvious cameras as well as the more covert."<sup>40</sup> The only physical security upgrade that is often mentioned is "additional fencing." While widely perpetuated, there does not appear to be any evidence or indication of sophisticated attempts to infiltrate an industrial chemical facility as a temporary employee or to co-opt a permanent employee in or-



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der to cause a mass-casualty toxic chemical release. Only minor, speculative accounts of subterfuge by terrorists motivated to attack chemical infrastructure appear in the historical record. Additionally, data on the causes of industrial incidents over a thirty year period indicates that only 1% was attributable to sabotage or arson: the leading cause of accidents was found to be mechanical failure (44%).<sup>41</sup> A survey of U.S. workers by the Paper, Allied-Industrial, Chemical & Energy Workers International Union (PACE) found that fewer than 17% of chemical industry facilities have enacted "fundamental changes that would lower the impact of an accident or attack by making chemical processes inherently safer or by storing smaller amounts of hazardous materials on-site."<sup>42</sup> Increasing basic perimeter security to prevent a bomb or other incendiary device from impacting a facility and the development of inherently safer, economically beneficial, and efficient technology should be prioritized.

The risk associated with a terrorist attack on chemical plants has been singled out as "one of the most urgent threats to our safety" that has not been given adequate attention in U.S. government efforts to increase domestic security.<sup>43</sup> According to an editorial in the *New York Times*, "the nation's chemical plants are still a horrific accident waiting to happen. And Washington has caved to pressures from interest groups, like the chemical industry, that have fought increased security measures."<sup>44</sup>

**Washington has caved to pressures from interest groups, like the chemical industry, that have fought increased security measures.**

Another component of critical infrastructure protection is the need to reduce risks associated with the commercial transportation of chemicals, whether by road or rail. Approximately 1 millions tons of "hazardous materials," along with another 3 million tons of highly toxic, corrosive chlorine, are transported by rail each year.<sup>45</sup> These materials are routinely transported through a variety of major metropolitan areas, including Washington, D.C., Newark (adjacent to New York City), Los Angeles, and Atlanta.

In late 2006, the Department of Transportation proposed revisions to the current requirements in the Hazardous Materials Regulations for the transportation of hazardous chemicals by rail.<sup>46</sup> Of particular note is the proposed requirement that rail carriers compile annual data on certain shipments of chemicals. This information would then be used to conduct safety and security assessments, assess alternative routing options, and make routing decisions based on the annual findings. A final rule has yet to be issued because of "unanticipated issues requiring further analysis."<sup>47</sup> The Transportation Security Administration (TSA) has been tasked with overseeing the development and implementation of a system to track the location of rail cars carrying certain toxic chemicals.<sup>48</sup> Included among the Implementing Recommendations of the 9/11 Commission Act of 2007, signed into law by President Bush in August 2007, were the major legislative points of the Surface Transportation and Rail Security (STARS) Act of 2007 (as Title XIII & XV of the "9/11





Bill”), which authorized new rail security assessments, grant programs, research and development initiatives, and requested specific plans to address transportation of hazardous materials. For the first time, the Act provides a statutory framework for the nation’s rail security efforts setting specific goals, tasks, and timelines for security improvements.

The final component of this pillar concerns chemical facilities that are part of the nation’s critical infrastructure. The chemical industry is the largest U.S. exporter (more than \$80 billion in 2001 alone), accounting for more than 10 percent of all exports by dollar.<sup>49</sup> This \$454 billion a year industry employs more than one million people domestically, is responsible for one of every seven U.S. patents, and contributes more than \$31 billion annually to research and development (more than double the R&D contribution from the entire biotechnology industry).<sup>50</sup>

The raw chemicals, specialty chemicals, life-science products, and consumer products manufactured by the chemical industry are part of a nation’s critical infrastructure.<sup>51</sup> This industry affects agriculture through fertilizers and pesticides, and the aerospace and defense industries through composite materials, coatings, and chemical feedstocks. If the ability of the U.S. chemical industry to produce raw and fine chemicals were compromised, it would have a major deleterious impact on U.S. defense, economic security, and short-term sustainability. Because chemical industry sites generate products that contribute to the maintenance of domestic security, public health, and the economy, they are considered part of the U.S. criti-

cal infrastructure.<sup>52</sup> Targeted attacks on a few discrete chemical industry facilities that play a critical role in the nation’s economy, general welfare, and defense could have disabling effects far exceeding the immediate death and destruction.<sup>53</sup>

In 2007, the Department of Homeland Security finally issued the interim final rule on Chemical Facility Anti-Terrorism Standards (CFATS), which established risk-based performance standards for physical security at chemical facilities holding threshold amounts of 342 chemicals.<sup>54</sup> Until January 2006, DHS had not received a congressional mandate to implement and enforce industry-wide security measures.<sup>55</sup> Industry-backed pressure and lack of strong advocacy from the administration had prevented the adoption of stronger Congressional Committee-reported bills, such as S.2145 and HR.5695. In 2006, a compromise was incorporated into the FY2007 DHS Appropriations Bill, which was backed by the chemical industry and the administration but was opposed by many chemical safety proponents. Federal representatives have estimated that fewer than 1,000 facilities will be assessed to fall into the highest risk categories, called Tier 1 and Tier 2 facilities.<sup>56</sup> Another 5,000-8,000 chemical facilities are anticipated to fall into the Tier 3 and Tier 4 categories. The regulations incorporate flexibility through multiple options, such as the Alternate Security Programs (ASPs).

Nevertheless, a strong emphasis remains on the perceived risk of the insider threat, rather than strengthening external barriers or providing incentives for the adoption of safer, alternative chemical manufacturing



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technologies and processes to reduce the use of highly toxic materials and thereby reduce risks. Other criticisms include the lack of milestones for compliance, the lack of whistleblower protections, potential conflicts with stricter state or local regulations, and the lack of applicability to water- and waste-treatment facilities that utilize chlorine.<sup>57</sup>

## **CRITICAL INFRASTRUCTURE:**

# **C+**



## RECOMMENDATIONS

### Improving Recognition and Prevention

**1:** The threat of chemical weapons terrorism - traditional, improvised, and novel - must be recognized as real rather than dismissed as a relic of history. Traditional and innovative new approaches to nonproliferation and counterproliferation are key elements of a policy to reduce the risk of chemical terrorism. The US should support efforts to strengthen the international regime to control transfers of dual-use chemicals and expand the list of scheduled chemicals.

### Preparing the First Response: Strengthening Detection, Resilience, and Mitigation

**2:** While individual program managers across the federal government may coordinate extensively on individual programs, higher level strategic interagency coordination is needed. The Departments of Homeland Security and Defense should advocate assertively for investments in basic research that will enable revolutionary science and technology capabilities that engage academia and the private sector and Congress should fund them.

### Protecting Critical Infrastructure

**3:** The federal government is late on implementing policies with respect to reducing the threat of terrorism directed at industrial chemical facilities. Execution of such policies is yet to be observed. It is strongly recommended that vulnerability and the myth of the insider threat be de-emphasized and that the concept of fostering development of inherently safer, economically beneficial, and efficient technology be supported. Information on the Transportation Security Administration (TSA) tracking system for rail cars carrying certain toxic chemicals should be made available for review and oversight.

### Ensuring Weapons Elimination

**4:** Increase funding and accelerate destruction of the aging U.S. chemical stockpile, particularly the Blue Grass Army Depot and Pueblo Chemical Depot, in order to reduce risk of accidental on-site release of lethal materials and targets for terrorists. The Defense Department should implement the Government Accountability Office (GAO) recommendations on improving management of its chemical weapons demilitarization and disposal program. Funding for Cooperative Threat Reduction Programs should be increased and new programs should be initiated to address the ongoing challenges of destruction of the Russian and Libyan chemical stockpiles.



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United Automobile Aerospace and Agricultural Implement Workers of America (UAW)  
 American Federation of State, County and Municipal Employees (AFSCME)  
 United Food and Chemical Workers – United Steelworkers (USW) – Communications  
 Workers of America (CWA) – International Chemical Workers Union Council/UFCW  
 International Association of Fire Fighters (IAFF) – International Brotherhood of Teamsters  
 Service Employees International Union (SEIU)  
 Earthjustice – Environmental Defense Fund – Friends of the Earth – Greenpeace  
 League of Conservation Voters – Physicians for Social Responsibility – Sierra Club  
 U.S. Public Interest Research Group – OMB Watch – NJ Work Environment Council  
 Alaska Community Action on Toxics – Beyond Pesticides – Ecology Center  
 Center for Health, Environment and Justice – Center for International Environmental Law  
 Citizens' Environmental Coalition Clean New York – Clean Water Action  
 Connecticut Coalition for Environmental Justice – Empire State Consumer Project  
 Deep South Center for Environmental Justice – Environmental Health Fund  
 Environmental Health Strategy Center – Environmental Justice Action Group of WNY  
 Environmental Working Group – Green Education and Legal Fund, Inc.  
 Healthy Building Network – International Campaign for Justice in Bhopal  
 Louisiana Bucket Brigade Maine People's Alliance – National Bucket Brigade Coalition  
 Northwest Atlantic Marine Alliance – Oregon Center for Environmental Health  
 Oregon Toxics Alliance – Parents Against Lindane – Prevention Is The Cure, Inc.  
 Science and Environmental Health Network – Sciencecorps – Worksafe, Inc.  
 Silicon Valley Toxics Coalition – Strategic Counsel on Corporate Accountability  
 Toxics Action Center – Vermont PIRG (VPIRG) – Women's Voices for the Earth

August 19, 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 6,350 high-risk U.S. chemical facilities. As President Obama said in 2006, "these plants are stationary weapons of mass destruction spread all across the country."

The interim statute Congress passed in 2006 temporarily authorized the Chemical Facility Anti-Terrorism Standards (CFATS) which are wholly inadequate to protect the more than 100 million Americans still at risk. Although CFATS is scheduled to expire on October 4, 2009, a temporary extension in the proposed 2010 FY DHS appropriations bill will give the 111<sup>th</sup> Congress one more year to enact truly protective permanent legislation. Given the years of delay since 9/11/2001, we urge Congress to act quickly to enact a comprehensive program.

Among the fatal flaws in the "interim" statute:

--- It prohibits the DHS from requiring any specific "security measure," including the most ironclad: the use of safer and more secure chemical processes that can cost-effectively eliminate catastrophic hazards posed by poison gas.

--- 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 June, House Homeland Security Chairman Thompson (D-MS) and House Energy and Commerce Committee Chairman Waxman (D-CA) were joined by Representatives Jackson Lee (D-TX) and Markey (D-MA) in introducing the "Chemical Facility Anti-Terrorism Act of 2009" (H.R.



2868). In July, Representatives Waxman (D-CA), Markey (D-MA), Pallone (D-NJ), Sarbanes (D-MD), Schakowsky (D-IL) and Capps (D-CA) introduced the "Drinking Water System Security Act of 2009" (H.R. 3258). Taken together, H.R. 2868 and H.R. 3258 address the many flaws in the interim law. However, the chemical manufacturers lobby 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, eliminating risks to 38.5 million Americans. 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. Nearly eight 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."**

We urge you to support H.R. 2868 and H.R. 3258 along with any strengthening amendments that ensure that the resulting program will:

- 1) Reduce the consequence of an attack through the use of available, cost-effective safer and more secure chemicals and processes
- 2) Include all categories of facilities such as water treatment plants
- 3) Involve plant employees in developing plant security programs, including participation in workplace investigations, and protect employees from excessive background checks
- 4) Ensure equal enforcement for chemical facilities and accountability for government
- 5) Allow states to set more protective security standards
- 6) Require 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 with these solutions. 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.

Pam Miller  
**Alaska Community Action on Toxics**

Cynthia Bradley  
**American Federation of State, County  
and Municipal Employees (AFSCME)**

Jay Feldman  
**Beyond Pesticides**

Mike Schade  
**Center for Health, Environment and  
Justice**

Daryl Ditz  
**Center for International  
Environmental Law**

Barbara Warren  
**Citizens' Environmental Coalition**

Kathy Curtis  
**Clean New York**

Lynn Thorp  
**Clean Water Action**

Dave LeGrande  
**Communications Workers of America  
(CWA)**

Mark A. Mitchell  
**Connecticut Coalition for  
Environmental Justice**

Beverly H. Wright  
**Deep South Center for Environmental  
Justice**

Emily Enderle  
**Earthjustice**

Tracey Easthope  
**Ecology Center**

Judy Braiman  
**Empire State Consumer Project**

Richard Denison  
**Environmental Defense Fund**

Andy Igrejas  
**Environmental Health Fund**

Michael Belliveau  
**Environmental Health Strategy  
Center**

Judith M. Anderson  
**Environmental Justice Action Group  
of WNY**

Ken Cook  
**Environmental Working Group**

Fred Millar  
**Friends of the Earth**

Mark A. Dunlea  
**Green Education and Legal Fund, Inc.**

Rick Hind  
**Greenpeace**

Bill Walsh  
**Healthy Building Network**

Barry Kasinitz  
**International Association of Fire Fighters  
(IAFF)**

LaMont Byrd  
**International Brotherhood of  
Teamsters**

Aquene Freechild  
**International Campaign for Justice in  
Bhopal**

John Morawetz  
**International Chemical Workers  
Union Council/UFCW**

Tiernan Sittenfeld  
**League of Conservation Voters**

Anne Rolfes  
**Louisiana Bucket Brigade**

Ryan Tipping-Spitz  
**Maine People's Alliance**

Denny Larsen  
**National Bucket Brigade Coalition**

Rick Engler  
**NJ Work Environment Council**

Niaz Dorry  
**Northwest Atlantic Marine Alliance**

Brian Turnbaugh  
**OMB Watch**

Mari Anne Gest  
**Oregon Center for Environmental Health**

Dona Hippert  
**Oregon Toxics Alliance**

Pamela LaBrake  
**Parents Against Lindane**

Kristen Welker-Hood  
**Physicians for Social Responsibility**

Karen Joy Miller  
**Prevention Is The Cure, Inc.**

Ted Schettler  
**Science and Environmental Health Network**

Kathleen Burns  
**Sciencecorps**

Bill Borwegen  
**Service Employees International Union**

Ed Hopkins  
**Sierra Club**

Lauren Ornelas  
**Silicon Valley Toxics Coalition**

Sanford Lewis  
**Strategic Counsel on Corporate Accountability**

Meredith Small  
**Toxics Action Center**

Liz Hitchcock  
**U.S. Public Interest Research Group**

Alan Reuther  
**United Automobile Aerospace and Agricultural Implement Workers of America (UAW)**

Jo Deutch  
**United Food and Chemical Workers**

Holly Hart  
**United Steelworkers (USW)**

Charity Carbine  
**Vermont PIRG (VPIRG)**

Erin Switalski  
**Women's Voices for the Earth**

Gail Bateson  
**Worksafe, Inc.**

<b>Question#:</b>	1
<b>Topic:</b>	Appropriations
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Michael Doyle
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Though the Homeland Security Appropriations Act of 2007 provided the Department of Homeland Security (DHS) with authority to regulate the security of high risk chemical facilities, the Aviation & Transportation Security Act (Pub.L. 107-71) gives DHS Transportation Security Administration (TSA) regulatory authority specifically over pipeline security. TSA has established oil and natural gas pipeline security guidelines, which require pipeline operators to have a baseline security program for all facilities, and enhanced security program for critical facilities. Does their authority cover all segments of the pipeline facility, including wellheads and wells required for the operation of underground natural gas storage?

**Response:** Under the Aviation and Transportation Security Act (Pub.L. 107-71), the Transportation Security Administration (TSA) was given the regulatory authority for security over all modes of transportation, including pipelines. TSA's authority covers all segments of the pipeline, including underground natural gas storage.

<b>Question#:</b>	2
<b>Topic:</b>	PHMSA
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Michael Doyle
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** The Department of Transportation's Pipeline and Hazardous Materials Administration (PHMSA) has regulatory authority over pipeline safety, which takes into account public safety. Would you say that combined, the programs of PHMSA and TSA, ensure natural gas pipeline infrastructure (including underground storage) protection, product protection, and public protection?

**Response:** The Transportation Security Administration and the Pipeline and Hazardous Materials Safety Administration are committed to working together to ensure the safety and security of the natural gas pipeline infrastructure. The protection of the infrastructure, products, and the public are the foremost objectives of the agencies' programs.

<b>Question#:</b>	3
<b>Topic:</b>	CFATS
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Michael Doyle
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** In drafting the current Chemical Facility Anti-Terrorism Standards (CFATS) regulation, did ISCD engage in comprehensive discussions and technical sessions with the natural gas industry regarding underground natural gas storage? If so, what were the results?

**Response:** In developing the Chemical Facility Anti-Terrorism Standards (CFATS), the Department of Homeland Security (DHS) received and reviewed comments in response to both an Advance Notice of Rulemaking and a tentative list of Chemicals of Interest (COI) in Appendix A to CFATS. The American Gas Association (AGA), an industry association advocating on behalf of more than 200 members of the natural gas industry, provided comments on both. In its comments, AGA recommended that DHS exempt from CFATS regulation natural gas pipelines and utility facilities regulated by the Department of Transportation's (DOT's) Pipeline and Hazardous Materials Safety Administration (PHMSA). AGA argued that, because natural gas pipelines and associated storage facilities are transportation infrastructure, their security was or would be adequately addressed by programs under the Transportation Security Administration and the DOT PHMSA. Additionally, AGA noted that the Environmental Protection Agency (EPA) exempted transportation modes, including "storage incident to transportation," from the EPA's Risk Management Program and recommended that DHS do the same under CFATS.

After considering these and other comments, DHS issued an interim final rule ([see](#) 72 FR 17688) and a final list of Chemicals of Interest ([see](#) 72 FR 65396) consistent with AGA's recommendations regarding long-haul pipelines. DHS explained in the preamble to the interim final rule that DHS had decided not to require long-haul pipelines to complete Top-Screens, prepare Security Vulnerability Assessments, or develop Site Security Plans. DHS did note, however, that chemical facilities otherwise covered by CFATS and with pipelines within their boundaries must treat those pipelines like any other facility asset (i.e., include measures in their Site Security Plans addressing the security of their pipelines). The final Appendix A rule also expressly addresses natural gas storage associated with pipelines. CFATS explicitly requires peak shaving facilities that store natural gas or liquefied natural gas containing COI above screening threshold quantities to submit Top-Screens. In the preamble to the Appendix A final rule, however, the Department committed itself to, and has been, coordinating with other Federal entities, such as TSA, on the application and enforcement of CFATS relative to other regulatory programs. [See, e.g.,](#) 72 FR 65399.

<b>Question#:</b>	3
<b>Topic:</b>	CFATS
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Michael Doyle
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

In addition, both prior to and following the release of the final CFATS rules, DHS engaged the Oil and Gas Sector Coordinating Council, of which AGA is a member, in discussions related to chemical facility security in general and CFATS in particular.

<b>Question#:</b>	4
<b>Topic:</b>	underground
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Michael Doyle
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Would H.R. 2868 impact underground natural gas storage facilities?

Would underground natural gas storage facilities be subjected to requirements intended for high-risk above-ground chemical facilities (i.e. perimeter fencing, guards, etc)?

**Response:** Underground natural gas storage facilities, which are currently regulated under the Chemical Facility Anti-Terrorism Standards (CFATS) program, potentially could continue to be subject to regulation under H.R. 2868. As a point of reference, most underground natural gas storage facilities that possessed a sufficient amount of any CFATS Chemical of Interest to require filing of Top-Screens were preliminarily determined by the Department to be Tier 4 high-risk facilities (the lowest-risk tier of regulated facilities) or were determined not to be high-risk at all and thus not subject to regulation.

All high-risk facilities currently regulated under CFATS, including underground natural gas storage facilities determined to be high-risk facilities, are required to develop, submit to the Department for review and approval, and ultimately implement Site Security Plans (SSPs) containing security measures and practices that meet applicable risk-based performance standards developed by the Department. These performance standards include areas such as perimeter security, access control, response planning, and training; however, the Department is prohibited from requiring facilities to implement any specific security measure or practice, such as perimeter fencing or guards. As a result, each regulated facility has great flexibility in designing an SSP with security measures and practices that make sense given its security risks, physical layout, geographic location, and other pertinent factors. DHS would expect such flexibility to continue if H.R. 2868 were enacted



<b>Question#:</b>	5
<b>Topic:</b>	universe
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Please help me understand this bill's regulated universe:

What about universities? Are any of them tier 1 or tier 2 facilities?

Are there health care facilities that are regulated facilities? Are any of them tier 1 or 2?

What about small businesses?

How about tractor supply stores and small fertilizer distributors?

**Response:** Much like the current practice under the Chemical Facility Anti-Terrorism Standards (CFATS), the Department envisions identifying high-risk chemical facilities under H.R. 2868 through a multi-step process based on the substances possessed onsite and the risks they present, rather than the type of facility per se. Consequently, the Department expects that a wide spectrum of facilities – potentially including some universities, health-care facilities, and small businesses – would be considered high-risk and become part of the bill's regulated universe.

As a frame of reference, based on an analysis of the North American Industry Classification System (NAICS) codes provided by covered facilities under CFATS, there are currently 99 colleges/universities considered high-risk, of which 24 have received a final tiering of Tier 1 or Tier 2. There are also currently nine health care facilities covered under CFATS, one of which has received a final tiering of Tier 2. Of the more than 6,000 facilities that have received preliminary or final tiering letters under CFATS, approximately 1,400 meet the definition of small business for their respective NAICS code. Finally, there are currently 439 facilities covered under CFATS whose NAICS code matches the code used for small fertilizer distributors or tractor supply stores. Of those 439 facilities, only three have received a final tiering of Tier 1 or Tier 2.

<b>Question#:</b>	6
<b>Topic:</b>	DHS and EPA
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Since DHS & EPA both participated in the White House Interagency Policy Committee (IPC) discussions, perhaps you could inform us if small business concerns were raised and how they were addressed when arriving at the decision to require mandatory IST assessments and implementation for tier 1 and 2 facilities?

**Response:** The Department of Homeland Security (DHS) is sensitive to any potential regulatory burden to small businesses, but it regulates facilities under the Chemical Facility Anti-Terrorism Standards (CFATS) program based on risk. The size and type of facility does not explicitly factor into DHS' decision-making when determining risk. As we implement Inherently Safer Technology programs under new chemical security authorities, DHS will take into account the impact on small businesses, consistent with security risk and to the maximum extent allowed under law.

<b>Question#:</b>	7
<b>Topic:</b>	IST
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** We've been told that an IST assessment could cost \$10,000 to \$100,000 per facility because of the breadth such an analysis might require. Has DHS done any cost estimates for how much an IST analysis might cost?

**Response:** DHS has not performed estimates of the cost facilities would have to incur to conduct IST assessments, and we caution the Committee that any such estimates it has received likely are highly speculative at best. DHS expects the cost of individual IST analyses to vary considerably based on the specifics of the facility conducting the analysis, including the chemical(s) of concern located at the facility, the complexity of the processes performed by the facility, and a variety of other factors.

<b>Question#:</b>	8
<b>Topic:</b>	CFATS
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** In one state that has an unemployment rate approaching 10%, over 50% of the CFATS regulated facilities have 50 or fewer employees. Did the IPC consider how an expensive IST assessment might impact these small businesses and their ability to create, or simply maintain jobs?

**Response:** The Department of Homeland Security (DHS) is sensitive to any potential regulatory burden to small businesses, but it regulates facilities under the Chemical Facility Anti-Terrorism Standards (CFATS) program based on risk. The size and type of facility does not explicitly factor into DHS' decision-making when determining risk. As we implement Inherently Safer Technology programs under new chemical security authorities, DHS will take into account the impact on small businesses, consistent with security risk and to the maximum extent allowed under law.

<b>Question#:</b>	9
<b>Topic:</b>	pandemic guidance
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** The DHS pandemic guidance for the water sector recommends maintain a 12 week supply of critical materials, including disinfectant and other chemicals. Gaseous chlorine represents the only disinfectant that can reasonably achieve this target. Can you guarantee me that the IST provisions in these bills won't prevent necessary chemicals from being on site for these facilities to tackle pandemics?

**Response:** One of the main principles that guided the development of the Chemical Facility Anti-Terrorism Standards (CFATS) was ensuring that security never comes at the cost of safety. A corollary to this is the principle that security requirements under CFATS must not endanger the ability of critical facilities to operate in times of national emergencies, such as pandemics. In fact, the Department has the authority under CFATS, and intends to use that authority to identify facilities that might knowingly or unknowingly be high risk because of their mission criticality (i.e., national security or economic criticality), and to ensure that any such high-risk facilities implement security measures meeting CFATS risk-based performance standards. Meeting those standards would help those facilities prevent any disruption to the critical mission that they support. Along those lines, whether or not any new chemical facility security legislation includes Inherently Safer Technology provisions, the Department will work closely with the regulated community to help ensure that mission-critical facilities are prepared to fulfill their role in responding to any national emergency. We note, however, that drinking water and wastewater treatment facilities are statutorily exempt from CFATS and that under H.R. 3258, the Environmental Protection Agency would be the lead authority over water facilities. EPA does not believe that the IST provisions in H.R. 3258 would prevent necessary chemicals from being on site for drinking water facilities to operate during a pandemic. Supply chain reliability is a critical attribute for disinfection and other treatment processes at drinking water systems. Thus, supply chain reliability should be included in an IST assessment (i.e., an assessment of Methods to Reduce the Consequences of a Chemical Release from an Intentional Act) as a factor appropriate to the system's security, public health, or environmental mission, as provided for in H.R. 3258, Section 1433(g)(2). An assessment of supply chain reliability, including the appropriate amount of materials to be stored on site, is specific to a particular water system, locale, and disinfection process. However, EPA would only support an IST decision that achieved a high level of supply chain reliability. EPA also recognizes that risk management requires balancing threat, vulnerabilities, and consequences with the cost to mitigate risk.

<b>Question#:</b>	10
<b>Topic:</b>	truck traffic
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Does the Administration believe that increasing truck traffic in a community is a reasonable tradeoff given the increased potential for highway related accidents? For example, a 90-ton rail car of chlorine is equivalent to 70 tractor-trailer loads of hypochlorite.

**Response:** The hypothetical presented in the question does not contain enough information for the Department to make an educated decision on the value of the proposed tradeoff, nor is the Department willing to make a blanket statement regarding whether increasing truck traffic is a good or bad idea. Answers to questions such as these are heavily fact dependent. That said, the Department does not support solutions that simply shift risk from a facility to the surrounding community, even if they appear to be “inherently safer” from the perspective of the facility alone.

<b>Question#:</b>	11
<b>Topic:</b>	chemical method
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Do you know of any methods that have been developed to measure the inherent safety of a chemical or chemical process?

I understand many experts do not believe there is a valid method in which to measure the inherent safety of a process. How would you propose to enforce a regulatory mandate to implement inherently safer technology? How would you record this on your Government Performance Results Act reporting?

**Response:** To the best of our knowledge, there are no generally accepted metrics or methods to “measure” the inherent safety of a process. Insofar as there is no unit of measurement for “risk” or for “safety,” such a metric does not appear likely to be developed in the short term; however, a scoring methodology for Inherently Safer Technology (IST) measures that could be adopted in response to a need to manage security risk does appear feasible, especially if the Department is allowed to take a phased approach to implement the Administration’s preferred approach toward IST.

The essential element in developing a reasonable scoring methodology is a well-informed understanding of the expected efficacy of a modification in managing and/or reducing security risk. That level of understanding can be built over time by focusing on valid approaches to security risk management through the implementation of IST and by eliciting a range of expert opinion and analysis concerning the efficacy of the feasible subset of IST options as applied to the issue of security. Until such a methodology is developed by the Department, we would prefer not to speculate on how its results would be recorded on our Government Performance Results Act reporting.

<b>Question#:</b>	12
<b>Topic:</b>	CFATS regulations
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** I understand that 7,010 facilities were initially tiered by DHS as higher risk under the current CFATS regulations. However, I also understand that since the initial tiering, nearly 900 facilities have fallen out of the tiering and are no longer of higher risk.

How have those facilities reduced their risk?

Have some of those facilities adjusted their on site storage or production lines which resulted in the new tiering? Did DHS force these companies to do this as a condition of approval?

Isn't this what IST all about? Doesn't it appear that some companies are taking actions to reduce their risk because it makes sense for them without the government being the one to them to do it?

**Response:** There are a variety of potential reasons why a facility that was preliminarily tiered as high-risk under the Chemical Facility Anti-Terrorism Standards (CFATS) might no longer be considered high-risk based on DHS review of the facility's revised Top-Screen, including:

- The facility closed.
- The facility reduced onsite quantities of any Chemicals of Interest (COI) it possessed to levels that no longer warrant a high-risk determination for any one of a variety of reasons (e.g., switched to a substitute chemical; ceased the process that required the substance; decided that a lesser amount onsite was sufficient; the parent company of the facility decided to consolidate all of its holdings of that particular COI at another site).
- The facility originally reported incorrectly that it possessed a COI and corrected the mistake in its revised Top-Screen.
- The facility reported a sabotage COI in its original Top-Screen but later clarified that it does not ship that COI offsite (so it is not susceptible to sabotage as defined under CFATS).

In none of these cases has the Department required the facility to take any of the above actions, nor does the Department have the authority to do so under Section 550. These were all voluntary decisions made by the facility. Because facilities are not required to



<b>Question#:</b>	12
<b>Topic:</b>	CFATS regulations
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

report details regarding the actions they took, the Department cannot state for certain whether some of these actions are what is often called “Inherently Safer Technology,” nor can the Department make definite conclusions regarding the motives behind any of these actions.

<b>Question#:</b>	13
<b>Topic:</b>	IST Provisions
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** The way I read the IST provisions in these bills, the language does not allow for any discretion or variance as it relates to currently well-secured facilities. Is it your view that, under these bills, if you protected a facility regulated under this bill, with mine fields, 100 foot barricades, a moat, and Special Forces personnel, that these bills would still require IST assessments and, in the case of a tier 1 or tier 2 facility, mandate changes to operations or other practices? In other words, is it your reading of the bill that no matter how secure a facility is, it would still have to assess and possibly implement IST? Is that also the position of the Obama Administration?

Can you guarantee me that this bill, with its provisions on IST will not result in any job losses? Have you modeled this bill or its policy features enough to be able to substantiate your answer?

**Response:** The Administration's position is that all tiered facilities must include an assessment of potential Inherently Safer Technology (IST) methods in their site security plans, regardless of the facility's tier or security posture. A facility designated in Tier 1 or 2 must either implement identified IST methods or explain why the methods will not be implemented, and this decision is subject to review by the Department (or by EPA or a state in the case of a water facility). DHS may mandate the implementation of an IST measure over the objections of a Tier 1 or 2 facility. DHS' review would include, among other things, whether it believes the potential IST method assessed is feasible and cost effective so that the facility could remain viable in its location, and does not significantly shift security risks. The approaches contemplated in H.R. 2868 and H.R. 3258 appear to be generally consistent with the Administration's position.

DHS has not studied the IST measures' potential effects on employment. As we implement Inherently Safer Technology programs under new chemical security authorities, DHS will take into account the impact on small businesses, consistent with security risk and to the maximum extent allowed under law.

<b>Question#:</b>	14
<b>Topic:</b>	Company's business model
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Let's say that a company's business model is to standardize its design, operations, and other processes design at all its facilities. Let's further say that one facility is in a very rural area and one is near an urban center. Since all things about the plant are the same except for their location, is it possible that one plant could tier into a high risk category and another into a lower risk category?

**Response:** Two plants with similar operations and chemicals *could* be placed into different CFATS risk tiers based on their location. For instance, a facility tiered based on its possession of a significant quantity of a release hazard chemical of interest may tier higher if located in a highly-populated urban area as opposed to a sparsely populated rural area, as a much higher number of individuals would likely be affected by an uncontrolled offsite release if the facility is located in the highly-populated urban area. Note, however, that location is but one factor in final tier determinations. Other factors – such as the security issues (e.g., release; theft/diversion; sabotage) associated with the chemicals of interest possessed by the facility, the vulnerability of the facility to attack, and threat information – also factor into a facility's risk tier. These factors may or may not be affected by the environment in which the facility is located. For example, the potential offsite consequences of a theft/diversion of a chemical of interest are generally independent of whether the facility is located in a rural or urban location.

<b>Question#:</b>	15
<b>Topic:</b>	product substitution
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Many industry and company specific studies show massive costs to substitute chemical products. Has there been any DHS analysis on the cost to mandate product substitution for chemical facilities? Has there been any analysis on potential job loss from mandating such product substitution?

**Response:** The Department of Homeland Security (DHS) has not conducted analysis into either of the questions posed. We note, however, that the bill as offered does not “mandate substitution” in the manner suggested. Both H.R. 2868 and H.R. 3258 define an Inherently Safer Technology (IST) measure to include not only “the elimination or reduction in the amount of a substance of concern possessed or planned to be possessed by a [facility] through the use of alternate substances, formulations, or processes” but also “the modification of pressures, temperatures, or concentrations of a substance of concern” and “the reduction or elimination of onsite handling of a substance of concern through improvement of inventory control or chemical use efficiency.”

DHS further notes that some facilities affected by the existing CFATS program have modified their processes by reducing inventories or by implementing chemical substitutions, providing initial indications that such product substitutions may be cost-effective in certain circumstances.

<b>Question#:</b>	16
<b>Topic:</b>	record keeping requirements for CFATS
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** The record-keeping requirements for CFATS are pretty detailed and go above and beyond what Federal records retention policies require. This legislation does not cover certain pieces of security related information that are required to be created or retained. This would include: records of drills and exercises including any lessons learned which may improve the Site Security Plan; security threats, which could include information about the identity of terrorists that the government would not want made public until they caught the guys; or testing of security equipment, which could include whether an intrusion detection system was working. Don't you think we should protect this kind of information from potential attackers?

**Response:** The information identified above—records of drills and exercises; security threats; and the testing of security equipment—all are Chemical-terrorism Vulnerability Information protected from disclosure under CFATS, and the Department believes that such information should continue to be protected.

<b>Question#:</b>	17
<b>Topic:</b>	levies penalties
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** H.R. 3258 levies penalties on persons that purposefully disseminate information that is protected. According to the Model Penal Code, the levels of culpability from highest to lowest are purposely, knowingly, recklessly, and negligently. This means that H.R. 3258 picks the most difficult legal standard to meet in proving that a violation occurred. Don't you think that when it comes to keeping terror roadmaps a secret that we should make punishment easier, not harder to achieve?

**Response:** The Administration has not taken a position on whether the criminal liability provision in H.R. 3258 should be included and, if so, what the appropriate standard of culpability would be when an individual discloses sensitive information relating to the security of water sector facilities.

Under existing Chemical Facility Anti-Terrorism Standards (CFATS) regulations, 6 C.F.R. Part 27, § 27.400(j) provides that violation of a requirement relating to protection of Chemical-terrorism Vulnerability Information (CVI) "is grounds for a civil penalty and other enforcement or corrective action by the Department [including] issuance of an order requiring retrieval of CVI to remedy unauthorized disclosure or an order to cease future unauthorized disclosure of an order to cease future unauthorized disclosure." In addition, 6 C.F.R. 27.300(b)(3) provides that a chemical facility that violates an order related to noncompliance with CFATS is liable for a civil penalty of up to \$25,000 for each day the violation continues. The Department of Homeland Security (DHS) believes that these provisions provide a strong deterrent against disclosure of sensitive information relating to chemical facility security.

DHS notes that H.R. 2868 does not provide for criminal liability when an individual discloses sensitive information relating to the security of chemical facilities not within the scope of H.R. 3258. The enforcement provisions in H.R. 2868 and H.R. 3258 also differ in several other areas. DHS looks forward to working with Congress to harmonize the two bills to ensure consistent enforcement for chemical facilities in all critical infrastructure sectors.

<b>Question#:</b>	18
<b>Topic:</b>	protected information
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Under the Information Protection regimes in HR 2868 and H.R. 3258 protected information is defined as, among other things, other documents and records developed exclusively for the purposes of this section. I am interested in the type of facility that works on cyber-security plans as part of a water system review. Are you concerned that using the term exclusively for the purposes of this section is too narrow and could inadvertently make this vulnerability information public when it should otherwise be worthy of protection?

What other national security provisions have citizen suit language as a precedent?

**Response:** The Department of Homeland Security (DHS) believes that an appropriate balance must be struck between protecting sensitive information related to security from disclosure and granting a facility covered under H.R. 3258 and H.R. 2868 the ability to use or share information developed for reasons unrelated to security (e.g., routine business documents such as daily inventory controls).

<b>Question#:</b>	19
<b>Topic:</b>	IST policy change
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** I understand the Obama Administration, after convening an inter-agency process decided that all chemical companies need to assess for IST and that the top two tiers of facilities should be required to make changes. I am concerned that political staff was making decisions without regard to the practicality of the situation. When the White House issued past Homeland Security Presidential Directives, it used an inter-agency process, but never mandated implementation of IST. Since the only thing I am aware of is a change in political leadership, can you tell me what other specific factors dictated this change in policy on IST?

**Response:** The Administration acknowledges that its approach toward Inherently Safer Technology differs from that of the previous Administration, but respectfully submits that this new approach is driven by legitimate policy judgments rather than a mere change in political leadership. The Administration believes that it has developed a reasonable and feasible approach toward reducing the risks associated with the operation of high-risk chemical facilities.



<b>Question#:</b>	20
<b>Topic:</b>	inspectors
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** At a June 29, 2009 meeting to update the Chemical Sector Security Summit, a leading official at the Department of Homeland Security stated that the Department is adding inspectors and other staff in 2009 and 2010, to total of 223 full time equivalents.

How many compliance inspectors does the Department believe it needs to effectively and efficiently carry out its responsibilities under either the existing CFATS or the one proposed in H.R. 2868?

How many inspections of facilities regulated under Section 550 has DHS made?

How many chemical engineers does DHS believe it needs to have in its employ to effectively and efficiently carry out its responsibilities under either the existing CFATS or the one proposed in H.R. 2868?

How many chemical engineers does DHS currently have in its employ?

**Response:** The Department believes that 229 inspectors are required to ensure compliance with the current Chemical Facility Anti-Terrorism Standards (CFATS) regulation and that the same level of inspector support would be required under H.R. 2868. To date, the Department's current inspector cadre has completed 52 Compliance Assistance Visits (CAVs), of which 29 were at Tier 1 facilities. Compliance inspections will commence in Fiscal Year 2010 for designated high-risk chemical facilities, beginning with Tier 1 facilities.

To carry out the current CFATS regulation, the Department believes it requires a minimum of four chemical engineers. The Department likely would have to hire additional chemical engineers to support H.R. 2868, although it does not have a specific estimate for that requirement at this time. The Department currently has two of its four chemical engineer positions filled and is aggressively seeking two additional chemical engineers.

<b>Question#:</b>	21
<b>Topic:</b>	IST specialists
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** On June 16, 2009, Philip Reiting, Deputy Undersecretary of the DHS National Protection and Program Directorate, testified before the House Homeland Security Committee that DHS does not currently have any IST specialists on staff and that if DHS were to be responsible for judging whether IST should be imposed, DHS would need to hire experts to be able to effectively fulfill that mission. Doesn't the need for IST specialists, and the lack of any such employees within DHS, suggest that DHS see this as not so much a plant security issue so much as a process systems issue that should be handled by a facility's process safety chemical engineer?

**Response:** Expertise from various areas is required to perform a review of an Inherently Safer Technology (IST) assessment. For example, depending on the proposed IST solution, the review of an IST assessment from a refinery may require experts in flammability, fire fighting, refinery operations, safety systems, process safety engineering, physical security, and more. As far as we know, there is no such thing as an IST "specialist" and certainly not one who can speak to every imaginable IST issue across all facilities that would be regulated under pending chemical facility security legislation. However, this is not an insurmountable challenge, nor is it a new challenge to the Department, as this type of cross-cutting expertise is currently needed in the analysis of Site Security Plans (SSP) submitted for review under CFATS. As the types of facilities, associated security risks, chemicals of interest, and measures in place or under consideration can be very broad; DHS would have to employ teams of reviewers with varied areas of expertise to evaluate SSPs. A similar approach would need to be used for assessment of IST alternatives.

<b>Question#:</b>	22
<b>Topic:</b>	MTSA study
<b>Hearing:</b>	H.R. 3258, The Drinking Water System Security Act of 2009, and H.R. 2868, The Chemical Facility Anti-Terrorism Act of 2009
<b>Primary:</b>	The Honorable Joe L. Barton
<b>Committee:</b>	ENERGY & COMMERCE (HOUSE)

**Question:** Has there ever been any analysis or study completed demonstrating that the MTSA is not working or that MTSA facilities are not safe?

**Response:** No, there have not been any studies or analyses indicating the implementing regulations of the Maritime Transportation Security Act (MTSA) of 2002 are not working or that MTSA facilities are not safe.

The regulatory regime under the MTSA is one part of the multi-layered approach to maritime security which has improved the security of the nation's vital maritime infrastructure while supporting international trade and U.S. economic viability. Additionally, the MTSA regulations establish U.S. compliance with international treaty obligations on maritime security, including the International Ship and Port Facility Security Code under the International Convention for the Safety of Life at Sea (SOLAS), 1974. The Coast Guard internally reviews operations and lessons learned to continuously improve the execution of its security responsibilities. The security measures under the MTSA, which now include the Transportation Worker Identification Credential, have continued to strengthen the nation's maritime security posture.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 11 2009

OFFICE OF  
WATER

The Honorable Henry Waxman  
Chairman  
Energy and Commerce Committee  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Waxman:

This letter sets forth my responses to the Energy and Commerce Committee's questions for the record, pursuant to the October 1, 2009 hearing before the Subcommittee on Energy and Environment on H.R. 3258, the Drinking Water System Security Act of 2009, and H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009.

If you have further questions, please contact me or your staff may call Greg Spraul in EPA's Office of Congressional and Intergovernmental Relations at 202-564-0255.

Sincerely,

A handwritten signature in dark ink, appearing to read "Pet Silva".

Peter S. Silva  
Assistant Administrator

1. *In reading H.R. 3258, I believe I have found a non-delegation problem. Could you please tell me what standard is created in H.R. 3258 under proposed Safe Drinking Water Act Section 1433(h)(2)? Can you assure me that this provision will pass constitutional muster?*

EPA response: There is no constitutional problem with Section 1433(h)(2). Section 1433(h)(2) provides that a vulnerability assessment (VA) or site security plan (SSP) "has a significant deficiency" if the Administrator, in consultation, as appropriate, with the State determines that the VA doesn't comply with regulations developed under 1433(a)(1) or the SSP fails to address vulnerabilities identified in the VA or fails to meet "applicable risk-based performance standards," which are to be developed as part of the regulations under 1433(a)(1). Therefore, the "significant deficiency" standard in 1433(h)(2) is based on the regulations that EPA will be required to develop under Section 1433(a). We believe that Section 1433(a) provides sufficient direction to the Agency on the content of the regulations such that whether there is a "significant deficiency" will not be left entirely to the Administrator's discretion.

2. *The DHS pandemic guidance for the water sector recommends the maintenance of a 12 week supply of critical materials, including disinfectant and other chemicals. Gaseous chlorine represents the only disinfectant that can reasonably achieve this target. Can you guarantee me that the IST provisions in these bills won't prevent necessary chemicals from being on site for these facilities to tackle pandemics?*

EPA response: EPA does not believe that the IST provisions in H.R. 3258 would prevent necessary chemicals from being on site for drinking water facilities to operate during a pandemic. Supply chain reliability is a critical attribute for disinfection and other treatment processes at drinking water systems. Thus, supply chain reliability should be included in an IST assessment (i.e., an assessment of Methods to Reduce the Consequences of a Chemical Release from an Intentional Act) as a factor appropriate to the system's security, public health, or environmental mission, as provided for in H.R. 3258, Section 1433(g)(2). An assessment of supply chain reliability, including the appropriate amount of materials to be stored on site, is specific to a particular water system, locale, and disinfection process. However, EPA would only support an IST decision that achieved a high level of supply chain reliability. EPA also recognizes that risk management requires balancing threat, vulnerabilities, and consequences with the cost to mitigate risk.

3. *Has EPA done any analyses of the range of costs that may be imposed on community water systems as a result of implementing the drinking water bill (H.R. 3258)?*

EPA response: EPA has not analyzed the range of costs that may be imposed on community water systems as a result of implementing H.R. 3258. EPA has not analyzed compliance costs for drinking water systems from implementing site security plans, methods to reduce the consequences of a chemical release from an intentional act, and other provisions in the bill. If this bill becomes law, EPA will

conduct a detailed analysis of costs associated with implementing it as part of the regulatory development process.

4. *What is the range of costs that may be imposed on community water systems to comply with the requirements of the bill? In particular:*
  - (a) *What would be the range of costs for assessments?*
  - (b) *And the range of costs for making mandatory IST changes for Tier 1 or 2 facilities?*
  - (c) *Are the potential costs for making mandatory IST changes for Tier 1 or 2 facilities essentially open ended? If not, what would be the upper limit in terms of anticipated costs?*

EPA response: As stated in response to question 3, EPA has not analyzed these costs, but would do so as part of the regulatory development process if the bill became law.

5. *The way I read H.R. 3258, there is no way to appeal a decision on IST other than by hauling the EPA or DHS or the State to the Courthouse. As I understand it, there are 870 affected facilities under these two bills. In the extreme, you could be jointly facing 870 litigants. Don't you think it would be wise to have an internal or administrative appeals process that would help resolve IST disputes matters so you can worry about security and not legal motions?*

EPA response: Under the version of H.R. 3258 reported out of the House Energy and Commerce Committee on October 21, 2009, Section 1433(g) (3)(D) requires EPA, or the State if it has primacy, to provide water systems "an opportunity to appeal" EPA or the State's determination to require implementation of a method to reduce consequences of a chemical release from an intentional act. This language does not mandate that the appeal process use the federal or state court system. EPA and States could meet the requirements of this section by providing systems an opportunity to appeal the determination using an administrative appeals process. EPA agrees that an administrative process would help resolve disputes more expeditiously than using the court system. EPA notes that the Agency has not determined that there are 870 affected facilities under H.R. 3258 and H.R. 2868, as stated in the question.

6. *Many people who support use of IST in a drinking water context do so because they want to remove "chlorine gas" as a treatment method because they fear the effects of gas into the air. These folks prefer pushing liquid bleach, also known as sodium hypochlorite, and powder and tables made of calcium hypochlorite. I have some technical questions:*
  - (a) *Is the handling and use of (1) chlorine gas or (2) liquid bleach and calcium hypochlorite tablets and powder more regulated by Federal and state entities?*
  - (b) *Isn't it true that all forms of chlorine can turn gaseous, including liquid bleach (sodium hypochlorite) and powder and tablets (calcium hypochlorite)?*
  - (c) *Isn't it true that "off gassing" or the inhalation of vapors which occur when calcium and sodium hypochlorite containers are opened at a water facility are serious sources of complaints at drinking water plants?*

*(d) Isn't it true that bleach is flammable and tablets are explosive and spontaneously combust when combined with oxidizers and other contaminants?*  
*(e) Which substance is responsible for more accidents and successful thefts, chlorine gas or liquid bleach and calcium hypochlorite tablets and powder?*  
 (NOTE) Based on 1998 data compiled by the American Association of Poison Control Centers, of all the chlorine related accidents in one year, 78 percent were from sodium hypochlorite (bleach), 13 percent were from calcium hypochlorite (tablets and powder), and 9 percent were from chlorine gas.

EPA response:

(a) The transportation, storage, and usage of chlorine gas, liquid bleach, and calcium hypochlorite are all subject to regulation by multiple federal agencies and states. EPA has not done an analysis for the purpose of establishing which form of chlorine is "more" regulated. However, chlorine gas is subject to federal regulations, such as EPA's Clean Air Act Risk Management Program, that do not apply to sodium hypochlorite or calcium hypochlorite.

(b) Yes, sodium hypochlorite and calcium hypochlorite can form chlorine gas, particularly at low pH conditions.

(c) EPA has not compiled information on complaints from drinking water plants due to the inhalation of vapors when calcium and sodium hypochlorite containers are opened. "Off gassing" in this context typically refers to the formation of oxygen gas from the decomposition of sodium hypochlorite into sodium chloride and oxygen. Equipment used for the storage, piping, and pumping of sodium hypochlorite should be designed for the safe venting of off-gasses. Further, proper materials handling and safety procedures must be followed in the use of any chlorine product.

(d) Bleach (sodium hypochlorite) is not flammable and will not support combustion. Tablets (calcium hypochlorite) are a powerful oxidizing agent and can react explosively with reducing agents, acids, or combustible materials.

(e) EPA has not compiled data on accidents and successful thefts of chlorine gas or sodium or calcium hypochlorite. General data from poison control centers on chlorine related accidents may not be indicative of product safety at water utilities. Bleach (sodium hypochlorite) is frequently used by individuals for laundry and cleaning, and calcium hypochlorite is widely used by individuals as a disinfectant for pools and other applications. In contrast, chlorine gas is used only in commercial applications, which are far fewer in number than individuals using bleach and calcium hypochlorite and which would be expected to have much better adherence to safety protocols than individual users.

7. *What is the comparative greenhouse gas footprint for chlorine vs. bulk hypochlorite vs. onsite generation (OSG)? Has the Agency modeled this practice or considered it as part of its endangerment finding? How does the administration value the risk tradeoff between the increased Green House Gases from transporting bulk hypochlorite versus the greater power need for OSG?*

EPA response: EPA has not done a comprehensive analysis of greenhouse gas emissions associated with the use of chlorine vs. bulk sodium hypochlorite vs. onsite

generation of sodium hypochlorite. However, such an analysis would not be expected to show significant differences in total greenhouse gas emissions between the three processes. The production of chlorine and bulk hypochlorite by a chemical manufacturer and the onsite generation of hypochlorite at a utility all involve the electrolysis of purified brine solutions, which accounts for the majority of energy usage. Chlorine requires less energy to transport (on a per pound of chlorine basis) than bulk hypochlorite because chlorine is more concentrated, but the operation of chlorine disinfection processes at utilities uses somewhat more energy than operation of bulk hypochlorite disinfection. Further, relative greenhouse gas emissions between the three processes would vary depending on local circumstances (e.g., shipping distances).

8. *What is the expected role [of] the state primacy agency in implementing the IST provisions? Can you assure me that the Agency will never threaten to rescind, explicitly or implicitly, a state's primacy delegation over concerns that the state was not being aggressive enough in promoting IST at drinking water facilities?*

EPA response: EPA's expectation for the role of the state primacy agency in implementing IST provisions is the role specified in H.R. 3258, Section 1433(g)(3)-(5), which is as follows: primacy states would review IST assessments by their covered water systems (i.e., assessments of methods to reduce the consequences of a chemical release from an intentional act); for a system in one of the two highest risk tiers that decides not to implement IST, the state would determine whether to require the system to implement IST after considering factors appropriate to the security, public health, feasibility, and environmental missions of the system and report this determination to EPA. The state would also provide the system with an opportunity to appeal the determination.

If EPA found that a primacy state failed to determine whether to require a covered water system to implement IST, EPA would notify the State and system. If the State failed to make the determination within 30 days after being notified, EPA would make the determination. If EPA found that a water system in a primacy state had failed to implement IST when required by the State or EPA, then EPA could take enforcement action against the system if the state did not do so within 30 days. In these situations, EPA could consider the failure of the State to make a determination or to bring enforcement action when determining whether a State should retain primary enforcement responsibility. However, EPA's strong preference is to work with states to address any concerns regarding implementation rather than to rescind primacy.

9. *What does EPA believe are measures to reduce consequences, i.e., how do they define IST? If a utility takes reasonable precautions to ensure the security of the facility and its materials, as well as appropriate safety precaution under OSHA and the Clean Air Act's Section 112(r), would the agency force a utility to change disinfectant?*



EPA response: EPA's definition of IST (i.e., methods to reduce the consequences of a chemical release from an intentional act) for drinking water systems is that provided in H.R. 3258, Section 1433(g)(1) – a measure that reduces or eliminates the potential consequences of a release of a substance of concern from an intentional act, such as the elimination or reduction in the amount of a substance of concern; the modification of pressures, temperatures, or concentrations of a substance of concern; and the reduction or elimination of onsite handling of a substance of concern.

Before requiring implementation of an IST, H.R. 3258, Section 1433(g)(3)(C) requires EPA or a primacy state to consider “factors appropriate to the security of public health and environmental missions of covered water systems” including whether the method (1) would significantly reduce the risk of death, injury, or serious adverse effects from a chemical release; (2) would not increase the interim storage of a substance of concern; (3) would not render the system unable to comply with other federal or state requirements; and (4) is feasible. Under H.R. 3258, primacy states, rather than EPA, would make this determination for their systems, unless the primacy state failed to act, in which case EPA would make the determination. Compliance with existing federal requirements would not exempt a system from a possible state or EPA determination to implement IST.

10. *Under the Information Protection regimes in H.R. 3258, protected information is defined as, among other things, “other documents and records developed exclusively for the purposes of this section.” I am interested in the type of facility that works on cyber-security plans as part of a water system review. Are you concerned that using the term “exclusively for the purposes of this section” is too narrow and could inadvertently make this vulnerability information public – when it should otherwise be worthy of protection”*

EPA response: We appreciate the concern that cyber-security plans related to any water system review should be protected from unauthorized disclosure just as other documents and records developed for purposes of the Drinking Water System Security Act are protected. EPA does not consider the use of the term “exclusively for the purposes of this section” to be too narrow to adequately protect vulnerability information. If “exclusively” were to be struck from the term “exclusively for the purposes of this section,” there could be unnecessary confusion over what information is meant to be protected.

11. *I think we would all agree that allowing sensitive information about the security at or vulnerabilities of the facilities covered in H.R. 3258 is akin to gift wrapping the blue-prints for a terrorist attack at that facility. Since we consider tampering a felony, don't you think we would want something stronger than a misdemeanor to apply if someone recklessly discloses this information?*

EPA response: The Administration has not taken a position on the criminal liability provisions in H.R. 3258 (now Title II of the House passed HR 2868). The

Administration supports the dual goals of protecting sensitive information from unwarranted disclosure, while still encouraging sharing of necessary information with those who "need to know" (e.g., first responders) and protecting the public right-to-know about information that may affect public health and the environment. The Administration believes that the penalties should be the same for all three sectors covered by the HR 2868.

12. *Would EPA have personnel dedicated to ensuring that protected information was not inadvertently disclosed by the agency?*

EPA response: All EPA personnel (and contractors) are required to take annual information security training. In addition, EPA staff in the Water Security Division and other program offices that handle non-public critical infrastructure information and vulnerability assessments are instructed in security procedures for that information. Such information is maintained in secured locations and overseen by document control officers who are responsible for tracking sensitive documents in order to maintain their security.

13. *Title IV of the Bioterrorism Act requires utilities to examine "chemical, biological, and radiological" threats to community water systems that would be posed by a terrorist act. H.R. 3258 does not include an explicit reference to "chemical, biological, and radiological" threats. Rather, it only asks community water systems to protect against substances of concern, as listed in the Clean Air Act's regulatory appendix for hazardous chemical releases to the air. Can you assure me that, if enacted, the provisions of H.R. 3258 would also protect me from "biological and radiological" threats?*

EPA response: Under H.R. 3258, as reported out of the House Energy and Commerce Committee on October 21, 2009, vulnerability assessments and site security plans are not limited to substances of concern. Rather, per Section 1433(c), they must address "vulnerability to a range of intentional acts, including an intentional act that results in a release of a substance of concern" and must include a review of "pipes and constructed conveyances; physical barriers; water collection, pretreatment, treatment, storage, and distribution facilities, including fire hydrants; electronic, computer, and other automated systems that are used by the covered water system; the use, storage, or handling of various chemicals, including substances of concern; the operation and maintenance of the covered water system; and the covered water system's resiliency and ability to ensure continuity of operations in the event of a disruption caused by an intentional act." These provisions in H.R. 3258 are consistent with those in the 2002 Bioterrorism Act, and would address intentional acts involving biological and radiological, as well as chemical, threats. EPA also notes that under H.R. 3258, Section 1433(a)(5), the designation of substances of concern does not reference the Clean Air Act.

14. *I am concerned that the language in H.R. 3258 short changes rural water systems. Under Title IV of the Bioterrorism Act, rural water systems received grant money to*

*help them perform the vulnerability assessments and site security plans. These systems are much smaller and do not have the rate base to support, or technical expertise to manage, any exercises required under this bill – including selection for IST actions by the Administrator. While I understand that there may be access to funding in this bill for some compliance issues, I am troubled that this money will be gobbled up by large cities with sizeable rate bases. Don't you think that there should be a dedicated pot of funding for rural areas so they don't slip through the cracks?*

EPA response: H.R. 3258, as reported out of the House Energy and Commerce Committee on October 21, 2009, provides for several grant programs in Section 1433(q), including grants to covered water systems to prepare vulnerability assessments, site security plans, and emergency response plans; assess and implement IST (methods to reduce the consequences of a release of a substance of concern from an intentional act); and implement any other required security reviews and enhancements. Under H.R. 3258, priority for these grants is to be given to water systems with the greatest need and security risk.

EPA recognizes that rural water systems do not have the funding base or technical expertise of larger systems. These challenges faced by rural water systems would be considered in the need-based prioritization for grant funding as provided for under H.R. 3258. EPA and states will work together to ensure that all water systems, including those in rural areas, are able to successfully comply with the requirements of H.R. 3258.

Response to Questions Submitted to:

**Brian Ramaley**  
**Director**  
**Newport News Waterworks**  
**Testifying on the behalf of Association of Metropolitan Water Agencies (AMWA)**

Regarding

**Hearing on H.R. 3258, the Drinking Water System Security Act of 2009, and  
H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009  
October 1, 2009**

1. Your testimony calls for strong information protection provisions and robust penalties. Under H.R. 3258, in order to face sanction for disclosing protected, sensitive information, the government would have to prove that you “purposefully” meant to disclose the information. This is a much harder standard to prove than what currently applies to security information from drinking water plants. Doesn't it make sense to have a legal standard for penalties that is at least as workable as what we have now if we want to deter people from leaking these terror roadmaps?

*During the formulation of H.R. 3258, AMWA raised strong objections to early drafts of the bill that would have completely eliminated the existing criminal penalties in Section 1433 of SDWA that may be imposed on individuals who unlawfully release or distribute sensitive utility information, such as vulnerability assessments. Instead, earlier drafts of the bill would have capped the penalties at a civil fine of \$10,000, and contained no requirement that a federal official found guilty of this offense be fired.*

*Eventually, AMWA was able to work with the Committee to maintain Section 1433's existing maximum criminal penalties (one year in jail and a \$100,000 fine, and loss of job for a federal official). However, some members of the Committee majority expressed opposition allowing criminal penalties to be applied to individuals who “knowingly or recklessly” distribute utility security information. We were told of concerns that this language could be used to convict someone for an honest mistake.*

*To ensure the maintenance of criminal penalties in the statute, AMWA agreed that the language which permits these criminal penalties to be imposed against “any person who purposefully publishes, divulges, discloses, or makes known” protected information in violation of the law was appropriate. Following the advice of our counsel, we are confident that this change would make little difference in the case of an individual who is proven to have intentionally disclosed sensitive utility information in violation of the law.*

2. A major, unstated change to drinking water systems under H.R. 3258, which was not an issue in the existing Title IV program, is that you are now subject to the citizen suit provisions in Section 1449 of the Safe Drinking Water Act.
  - a. Based on your experience with Newport News Reservoir and the suit brought by the Chesapeake Bay Foundation, do you consider this a wise policy choice?

*The issue of citizen suits is of interest, but the opportunity to expand those with standing to file suit in such cases is a true policy dilemma. While we support most measures that enhance transparency and public input, these positives must be weighed against the imperative to have a review process with some reasonable level of predictability and affordability, while maintaining the security of critical drinking water infrastructure.*

- b. Does AMWA support citizen suits - and their legal discovery processes - applying to their plants' security activities?

*Under the existing Section 1449 of SDWA, "any person may commence a civil action on his own behalf" against water systems and other entities "alleged to be in violation of any requirement prescribed by or under" SDWA. These citizen action provisions have applied to Section 1433 since the Bioterrorism Act added Section 1433 to SDWA. H.R. 3258 does not change this. To the best of my knowledge, no citizen suit has ever been filed against a drinking water system in relation to an alleged violation of Section 1433.*

*However, the manager's amendment to the Chemical Facility Anti-Terrorism Act (H.R. 2868) deleted language in that bill that would have allowed individual citizens to sue chemical facilities for non-compliance with the CFATS regulations. In its place, the amendment inserted new "citizen petition" language that would direct DHS to establish a process through which individuals can report alleged CFATS violations to DHS for investigation, but not take legal action against a chemical facility. In the interest of ensuring consistency in the law in regards to the ability of citizens to sue in response to alleged security violations at facilities that possess certain chemicals, AMWA believes Congress should consider formulating similar "citizen petition" language for application to Section 1433 of SDWA.*

3. The fourth bullet point of your testimony's summary claims that H.R. 3258 allows a drinking water system to choose its disinfectant. However, if your facility falls into a higher risk tier, under H.R. 3258, the state primacy agency or U.S. EPA makes the final decision on which chemicals you can use based on your security vulnerability assessment and site security plan. If you need this sign off, how are you making the decision?

*The fourth bullet point of my prepared testimony explains that H.R. 3258 "maintains the ability of local water system experts to choose the most effective*

*disinfectant chemical and would not allow the federal government to broadly dictate disinfection methods to the nation's drinking water systems." This is an accurate reflection of the provisions of the legislation.*

*Under H.R. 3258, all covered drinking water systems that possess a "substance of concern" above defined threshold levels must conduct a review of alternate chemicals or processes, and decide whether or not they will adopt an alternate. However, the bill includes no mandate requiring any facility to adopt an alternate chemical if certain conditions are met. Therefore, the text of the bill does not include a broad federal "IST" implementation mandate.*

*The evaluations of covered water systems in the top two tiers of risk must be reviewed by the utility's state primacy agency (or EPA in the case of the District of Columbia and Wyoming, which do not have primacy agencies). The primacy agency is then required to do only two things: determine whether to require the water system to implement an alternate chemical or process, and report the decision to EPA. If the state decides to accept the utility's decision against adopting "IST," no further justification or analysis is required, and EPA is unable to review or contest the decision. There is no requirement directing states to force "IST" implementation at a utility if certain conditions are met.*

*However, additional work by the state would be required if it decided to direct a utility to adopt "IST" over the utility's objections. In this case, the state would have to consider several factors, such as feasibility, amount of reduced risk, and compliance with SDWA and state/local law. The state would also have to ensure that an avenue for a utility to appeal this decision is in place.*

*As a result, it is AMWA's view that the legislation makes it very simple for a state to concur with a utility's disinfectant decision, but only requires further work by the state if the state believes that a utility should do something different.*

4. Please point me to the provision in HR 3258 that will allow you to use chlorine gas to disinfect your water supply if that is what you want, but the regulators in your state or at US EPA have other ideas?

*If a state regulator (or US EPA in the case of the District of Columbia or Wyoming) wants to require a drinking water system to adopt an alternate disinfectant, then the legislation does provide them with an avenue to do so. However, states or EPA may only do this on a case-by-case basis, after considering the impacts of a change in chemicals, and providing utilities with an opportunity to appeal the decision. The bill prevents states (or EPA) from broadly determining that a certain "IST" is feasible for multiple water systems, and from imposing a blanket requirement that multiple utilities begin using the "IST." This framework, while far from perfect, is much preferable to the standard that H.R. 2868 would apply to chemical facilities, which would require chemical facilities to implement "IST" if the federal government determines that*

*it is feasible and would reduce the consequences of a terrorist attack.*

*I should also point out that state primacy agencies, including the Virginia Department of Health, currently have the ability, through their issuance of operating permits to water utilities (or similar process), to review and approve any significant change to water treatment techniques, including disinfectant chemicals and methods.*

5. Your testimony mentions the heightened concern you and other AMWA members would have about a Federal IST role. Are you concerned that EPA, notwithstanding the construct of HR 3258, would use its existing ability under the Safe Drinking Water Act to withdraw primacy delegations for states or change the terms of state primacy in order to impose a more aggressive IST regime on drinking water utilities under this bill?

*Section 1413 of SDWA lists the conditions that states must meet in order to gain and maintain primary enforcement responsibility. H.R. 3258 would also allow EPA to "consider" a state's failure to review a utility's "IST" decision when determining whether a state may retain primacy, but would not allow EPA to consider a state's actual decision on a utility's "IST" use when making this determination. AMWA does not anticipate that EPA will begin revoking state SDWA primacy in order to have an opportunity to directly review the "IST" decisions of certain drinking water utilities.*

6. You talk about how a water system might overlook a "clear and easily attainable security benefit of changing disinfectant chemicals." This statement raises larger questions about the competency of local drinking water utility officials and their ability to be thorough with their water chemistry. Is this a problem that you are seeing amongst your members? Do AMWA and other industry water officials regularly work to improve their knowledge of disinfection processes through conferences, certifications, or other processes?

*My written testimony explained a state-level review of individual utility "IST" decisions is much preferable to a broad federal "IST" implementation mandate because it addresses the concerns among some in Congress about "a hypothetical situation where a water system may overlook the clear and easily attainable security benefits of changing disinfectant chemicals, while also preventing the federal government from inserting itself into local water treatment decisions or broadly directing all of the nation's water systems to end their use of necessary disinfectants such as gaseous chlorine."*

*AMWA's member utilities are quite active in reviewing their own use of disinfectant chemicals. In fact, an informal survey conducted by the Association last year revealed that many utilities successfully use a range of disinfectant chemicals, including gaseous chlorine, bulk sodium hypochlorite, chloramines, and ozone. What's more, about sixty-five percent of survey respondents reported*

*that they considered adopting an alternate disinfectant chemical within the previous five years, and about forty-six percent actually began using an alternate at one or more water treatment facilities. The fact that our members have made these decisions independently (and without subsequent negative public health impacts) demonstrates their competency, and shows why it is advisable for water systems to not be subject to broad federal "IST" mandates.*

*AMWA member utilities and other water industry officials work very hard to stay abreast of the latest factors that should influence water disinfection decisions. For example, the American Water Works Association (of which I am also a member) recently published Selecting Disinfectants in a Security-Conscious Environment, which serves as a guide to help water utility managers make these critical decisions with current security and public health considerations in mind.*

7. One of the biggest issues in the IST discussion is the costs imposed on folks that are forced to convert. Your testimony mentions your own utility's use of ozone treatment as well as plans to convert a gaseous chlorine facility to non-gaseous chlorine.

- a. When did you decide to switch and what was the reasoning for doing so?

*The City of Newport News has two water treatment complexes that serve more than 400,000 customers. In the mid-1990's one of these plants was replaced and upgraded. As part of that project it was converted from liquid chlorine to ozone and sodium hypochlorite for disinfection purposes. Because the entire plant was being replaced it was a relatively minor additional cost to utilize liquid sodium hypochlorite instead of liquid chlorine to meet the secondary disinfectant needs of the plant. Ozone was added to both treatment plants to improve primary disinfection (in anticipation of new water quality standards promulgated under stage II of the microbial and disinfection byproduct rules) while also reducing disinfectant-by-products.*

- b. How much, if I may ask, will it cost for this conversion?

*The approximate cost for the addition of ozone facilities at both plants was between \$15 million and \$20 million including engineering and construction. The cost of the hypochlorite facilities at the plant that was completely replaced was several million dollars (as would have been the cost of liquid chlorine facilities had they been installed) and retrofit costs at the other plant are estimated in the same range. We believe our operation and maintenance costs are slightly higher with hypochlorite. These capital improvements were financed using low-interest general obligation bonds.*

- c. What has this cost done to your rates, i.e. have you been able to pass them through to your customers or are you financing it some other way?

*We have not calculated the specific impact of these particular improvements on*



*our rates but the operating costs and debt service for disinfection make up less than 5% of our total annual budget. Disinfection costs are passed on directly through our rates to our customers.*

- d. Have your energy profile or greenhouse gas output changed? If so, how?

*Ozone uses considerably more power (on site generation) than does chlorine. Delivery of large volumes of sodium hypochlorite via tanker trucks also requires more energy than liquid chlorine, and poses some safety concerns in and of itself.*

*In summary, the decision to use ozone was based on a desire to enhance water quality. The decision to use sodium hypochlorite at the new plant, in place of liquid chlorine, was prompted by security and safety concerns as there are several schools in close proximity and the fact that it could be incorporated at minimal additional cost during plant construction. Conversion to hypochlorite at the other plant is less pressing as it is more isolated but is expected to be completed within the next several years.*

8. While AMWA, which represents about 125 million customers, is supportive of H.R. 3258; the other drinking water associations - representing more than 200 million American customers and more than 30,000 utilities have been a bit more cool to this proposal. Is AMWA's position of support for H.R. 3258 shared by the National Rural Water Association, the American Water Works Association, and the National Association of Water Companies?

*To my knowledge, the National Rural Water Association (NRWA), the American Water Works Association (AWWA), and the National Association of Water Companies (NAWC) have each thus far not expressed a formal position for or against H.R. 3258. However, in an August 11, 2009 letter to the Energy and Commerce Committee, AWWA thanked the Committee for "significant improvements" to the bill, including the inclusion of criminal penalties for the illegal disclosure of protected information and the removal of the broad federal "IST" mandate. These are improvements, among others, that were formulated during direct discussions between AMWA and Energy and Commerce Committee staff. So while AMWA believes that the legislation remains imperfect, we are pleased to offer our support for the bill to ensure that these improvements are maintained.*

*Additionally, I should note that the Association of California Water Agencies (ACWA), whose 450 members are collectively responsible for 90 percent of the water delivered to cities, farms and businesses in California, endorsed H.R. 3258 in July. I also understand that the National Association of Clean Water Agencies (NACWA), which represents the nation's wastewater utilities, is currently working with the Transportation and Infrastructure Committee to formulate security legislation - similar to H.R. 3258 - that would apply to wastewater utilities.*

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MARTY DURBIN  
VICE PRESIDENT  
FEDERAL AFFAIRS



November 3, 2009

The Honorable Joe Barton  
Ranking Member  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Representative Barton:

Below please find my answers to written questions for the record following the October 1, 2009 legislative hearing before the Subcommittee on Energy and Environment on HR 2868, the Chemical Facility Anti-Terrorism Act of 2009. I appreciate your inquiry and would be pleased to further discuss any of the issues raised.

Please feel free to contact me directly.

Sincerely,

A handwritten signature in black ink that reads "Martin J. Durbin".

Martin J. Durbin  
Vice President, Federal Affairs

Cc: The Honorable Henry A. Waxman

**1. Does the ACC believe mandating implementation of IST is essential to guarantee security at a chemical plant?**

No. As we stated in our testimony we believe providing DHS authority to mandate IST is unnecessary. Through its use of risk-based performance standards, CFATS has already demonstrated that it 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. 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. While you can't mandate innovation, CFATS allows DHS to unleash the ingenuity, expertise and resources of the chemical sector.

**2. Does the ACC believe that IST should be mandated by the federal government, or is it the position of the ACC that the IST decision is best left to the process safety chemical engineer?**

ACC members are concerned that providing government with authority to direct process changes or product substitutions could result in making critical products unavailable throughout our country, with potentially significant impact on our companies and our customers. ACC believes process safety experts at chemical facilities – working in conjunction with security experts – are in the best position to weigh all options and decide on the best approach that will maximize safety and security. The IST provision in the bill approved by the Energy and Commerce Committee, however, does reflect input from ACC and directs DHS to focus on risk. In addition, the creation of an IST technical appeal process which factors unique facility characteristics into the DHS decision making process recognizes that IST implementation is a complicated and complex issue faced by our companies.

**3. From a business perspective, maintaining the best safety and security means less risk and liability to business operations, employees and communities. With this in mind, wouldn't it be fair to say that facilities housing potentially hazardous chemicals are already motivated to use the most innovative, safest, and most cost-effective technologies available to ensure safety and reduce liability?**

Our members have demonstrated that providing for the security and the safety of their facilities, products and communities is a responsibility and a cost of doing business. Prior to any government action, our members instituted ACC's mandatory Responsible Care Security Code. To date, our members have invested more than \$8 billion enhancing security and the Code has become the gold standard for the industry and model for states like New Jersey when they developed their regulatory program.

4. **I want to understand something you mentioned in your written statement. You said that the existing CFATS is a “strong, smart regulatory approach” that allows regulated companies to utilize a wide range of potential security enhancements --- including IST. Actually, since Section 550 prohibits IST implementation, your member companies would be free to work with DHS on their own to develop processes that worked without the threat of government intervention. Does this mean that ACC considers this arrangement workable and a wise one?**

Section 550 does not prohibit implementation of IST by a facility, but prohibits DHS from disapproving an SSP for failure to implement any *specific* security measure, including IST. As stated above, however, we believe giving DHS the authority to mandate process changes is unnecessary. Through its use of risk-based performance standards, CFATS has already demonstrated that it 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. 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. Thus, we do believe that fostering a collaborative relationship between DHS and regulated facilities in development of site security plans is workable and wise.

5. **Does ACC think of itself or the government and its regulators as the better body to further innovation and create jobs?**

We do not believe the government can mandate innovation, but CFATS does allow DHS to unleash the ingenuity, expertise and resources of the chemical sector. ACC believes that Congress should not abandon a strategy to enhance security that employs performance-based security standards to hold facilities accountable but avoids the potential for shifting risk.

Darius D. Sivin, PhD  
CWA-UAW  
Legislative Alliance

Response to Questions Posed by  
Honorable Joe Barton, Ranking Member  
House Committee on Energy and Commerce

1. *What guarantees does a company have under HR 2868 that it will recoup the cost of full wages and benefits if its adverse action is deemed legitimate and therefore the employee was not entitled to those wages and benefits?*

Existing law provides numerous methods for a company to recover this money, such as garnishment of future wages.

2. *Is it standard in labor law that an employee who is subject to adverse action receive full pay and benefits until all appeals are exhausted, as opposed to back pay, upon a finding that the employer action was not legitimate?*

The CWA-UAW legislative alliance believes employees should be considered innocent until proven guilty.

3. *Your testimony was confident that requiring IST in H.R. 2868 will not cost any jobs. You cite language spelling out a requirement that IST cannot "significantly and demonstrably impair" the ability of the owner to continue in business at its location. Could you please tell me what this legal standard is and how easy it would be to meet? If I am an employer and I layoff a bunch of worker to save money and pay for the IST conversion at my plant and I stay in my current location, would I still need to do IST, or do you think DHS would consider this action enough to meet the exception of "significantly and demonstrably impair"?*

This hypothetical is unrealistic. IST (inherently safer technology, otherwise known as methods to reduce the consequences of a terrorist attack) is a capital investment. It is not common to pay for capital investments by cutting operating costs like labor costs. If the company is in sound financial shape, it should be able to get loans at reasonable rates of interest to pay for this. If it is not in sound financial shape or, for some other reason, servicing the loans would be a crippling financial burden, the language of H.R. 2868 prevents DHS from requiring IST.

Darius D. Sivin, PhD  
CWA-UAW  
Legislative Alliance

Response to Questions Posed by  
Honorable Joe Barton, Ranking Member  
House Committee on Energy and Commerce

4. *You mention that IST can be done without risks to jobs. Specifically, you call out the Schweitzer-Mauduit paper mill in New Jersey. As I understand it, New Jersey requires only a plant assessment of IST, not the conversion mandate in the bills we are considering. What evidence do you have that New Jersey's chemical security program would still be the success many consider it to be if the requirements for IST were mandatory instead of voluntary?*

If New Jersey were to make IST mandatory in a manner similar to H.R. 2868, some of the highest risk facilities in New Jersey would potentially be affected but the rest would not. For the affected facilities, the reasons why they would not have to lay off significant numbers of employees are the same as in answer 3 above.

5. *Your testimony asks that owners and operators of a chemical facility be subject to criminal penalties for non-compliance with paperwork requirements or other duties because that's what everyone else gets if they release sensitive information disclosure. How do you justify equal treatment of sanction for someone who releases a terror road map and for someone who doesn't file their paperwork properly or timely?*

The question reflects a misunderstanding of both the result sought in the CWA-UAW testimony and the reasons for it. It is the existence of a hazard, not the information about the hazard, that creates the risk. If there are no criminal penalties for a facility owner who allows the continued existence of a hazard by failing to have developed and implemented a site security plan deemed satisfactory by DHS or by EPA, there should not be criminal penalties for the secondary act of having released information about the hazard.

