CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2008

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CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2008

Tuesday, February 26, 2008

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

The committee met, pursuant to call, at 10:09 a.m., in Room 311, Cannon House Office Building, Hon. Bennie G. Thompson [Chairman of the committee] presiding.

Present: Representatives Thompson, Sanchez, Markey, Jackson Lee, Etheridge, Cuellar, Carney, Pascrell, King, McCaul, Dent, Brown-Waite, Davis of Tennessee and Broun.

Chairman THOMPSON. We would like to call the hearing to order.

The committee meeting today will receive testimony on the Chemical Facility Anti-Terrorism Act of 2008.

I now recognize myself for purposes of the opening statement.

When I assumed the Chairmanship of this committee last January I highlighted the need to shield the Nation's critical infrastructure from foreign and domestic terrorism as one of my eight goals in charting the course toward freedom from fear. That is why this committee has dedicated considerable resources toward drafting legislation to extend DHS's authority over chemical plants beyond October, 2009, when it is slated to expire.

Today, we are meeting to discuss a draft bill that this committee has been working on for the past several months, the Chemical Facility Anti-Terrorism Act of 2008. It is important to me that we have worked in an open and bipartisan manner to develop this legislation.

I would especially like to acknowledge the fine work of the chairwoman of the Subcommittee on Transportation Security and Infrastructure Protection, Ms. Jackson Lee of Texas, for her efforts to move this process forward.

I would also like to thank the Ranking Member of that subcommittee, Mr. Lungren of California, for his cooperation and leadership.

In this Congress, the Transportation Security and Infrastructure Protection Subcommittee has held two hearings on the topic of chemical facilitated security, in July and December. At those hearings, the committee heard from Assistant Secretary Stephan, whose Infrastructure Protection Division is responsible for implementing the current Chemical Facility Anti-Terrorism Standards, or CFATS.

Those hearings also allowed us to hear from a wide range of witnesses representing all sides of this issue. We have talked to large

chemical manufacturers who are regulated under CFATS; a representative from the State of New Jersey, which is also regulating security at chemical facilities—and they now have Mr. Pascrell on the committee, who handles the New Jersey end of that aspect. We welcome him here again, also—representatives from labor unions that represent chemical facility workers, and also academic and other experts.

Today's hearing will continue in that spirit. We will receive an update from Assistant Secretary Stephan and testimony from Dr. David Pulham from Siegfried, a small chemical manufacturer, as well as Mr. Kevin Wattier from the Long Beach Water Department.

Dr. Pulham is here to help us understand the impact of the chemical security legislation on smaller facilities, as well as tell us how his facility is complying with the State of New Jersey's chemical security requirements; and Mr. Wattier is here to give us the feedback from a water facility about the legislation, especially given that it would subject water facilities to the same chemical security framework as is in place for all other chemical facilities.

It is worth noting that DHS considers water facilities to be at risk and therefore justifiably regulated along with other facilities that hold large volumes of toxic chemicals.

In addition to other testimony, the committee has maintained an open dialog with the Department, environmental groups, labor representatives, large and small chemical manufacturers, fertilizer manufacturers, petroleum and propane manufacturers and distributors, as well as water facilities.

I decided to use the vehicle of a Committee Print rather than an introduced bill because of the flexibility it offers us. This way, every time we hear a good idea on how to make the legislation better, we can incorporate it.

I want to thank Ranking Member King and his staff for working in such a cooperative manner through the many iterations of the bill, and I am confident that we will have a legislative product we can all support.

Securing our chemical facilities against an attack advances my commitment to making sure that our Government can provide the American people security, accountability and, most importantly, freedom from fear. I look forward to hearing from our witnesses, and I thank you for contributing to this process.

The Chair now recognizes the Ranking Member of the full committee, the gentleman from New York, Mr. King, for an opening statement.

Mr. KING. Thank you very much, Chairman Thompson.

I want to, at the outset, join you in pointing out the bipartisan nature of the process so far and the process which I am sure will continue. Obviously, when we are talking about chemical plants, it certainly has the opportunity to become a very partisan or divisive issue. It is easy for either side to use scare tactics or to try to accuse the other of bad motives. That has not been the case here at all.

I want to thank Chairwoman Sheila Jackson Lee for her efforts and also Ranking Member Dan Lungren, who is right now recovering from knee surgery, for their efforts at the subcommittee level.

I also want to commend the Department for the rapid progress they have made, I believe, in implementing the legislation that we adopted in the previous Congress. I think it is important to acknowledge that.

Obviously, this is all a work in progress. It is a very new world that we live in, but it is important to give credit where credit is due, and I think the Democrat majority certainly deserves credit as this process is going forward.

I believe the Congress and this committee overall observed progress from what went on in the past, but especially the Department also deserves credit for taking the legislation and moving forward with it. No one has prior authorship here. We should just continue to meet with various represents from the industry, from labor, from the overall Homeland Security community; and, of course, I look forward to the testimony of the Department today as to what they have done and what they expect to be doing as we go forward.

I would note just one situation. The Committee Print does address background checks to a certain degree, but it does not address them to the extent that Ms. Brown-Waite did as far as screening individuals at high-risk facilities against the terrorist watch list and the immigration status database, and I hope that we give more close attention to that as this goes forward.

But, again, the legislation we adopted was not the end. We should build on it, and we should also be careful not to disrupt what the Department is trying to do as it goes forward.

So, with that, Mr. Chairman, I yield back the balance of my time and look forward to the testimony.

Chairman THOMPSON. Thank you very much, Mr. King.

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

[The statement of Honorable Brown-Waite follows:]

PREPARED STATEMENT OF HON. GINNY BROWN-WAITE

FEBRUARY 26, 2008

Thank you Chairman Thompson and Ranking Member King for holding this hearing today.

To begin, let me echo a point Ranking Member King has raised several times already before the full committee: this committee must begin work on a Department of Homeland Security authorization bill. Passing an authorization bill is a primary responsibility of this committee and we cannot overlook this duty.

America's chemical facilities are a critical part of America's infrastructure. As we are all well aware, if terrorists were able to exploit weaknesses in this industry's security measures, there would be far-ranging, disastrous consequences.

While I applaud taking responsible steps to ensure the security of chemical plants and facilities, our guiding principle must be a focused effort not to undermine any progress already made to keep these facilities safe.

My major concern with the language before us involves the issue of background checks. I was upset to see that while there are extensive criteria for conducting background checks on those with access to high-risk facilities outlined, there is no requirement to conduct these checks in the first place.

It seems utterly backward to outline a detailed appeals and waivers process before actually requiring the background checks themselves. Accordingly, I offered an amendment in subcommittee markup to address this problem and require background checks against immigration status and the terrorist watchlist.

Today, I look forward to examining this issue further, as the committee pursues meaningful ways to ensure the security of our chemical facilities.

Thank you.

Chairman THOMPSON. I now welcome our panel of witnesses.

Our first witness, Mr. Robert Stephan, is Assistant Secretary for Infrastructure Protection at the Department of Homeland Security, which is responsible for carrying out the Chemical Facility Anti-Terrorism Standards. Our second witness is Mr. Kevin Wattier, General Manager of Long Beach Water Department; and our third witness is Mr. David Pulham, Director of Compliance with Siegfried, Incorporated.

I welcome you here today and look forward to hearing your testimony.

Without objection, the witnesses' full statements will be inserted in the record. I now ask each witness to summarize his or her statement for 5 minutes, beginning with Mr. Stephan.

STATEMENT OF ROBERT B. STEPHAN, ASSISTANT SECRETARY, INFRASTRUCTURE PROTECTION, DEPARTMENT OF HOMELAND SECURITY

Mr. STEPHAN. Thank you Mr. Chairman, Ranking Member King and distinguished Members of this committee. It is a pleasure to appear before you today to address the Department's efforts in securing the chemical sector through the implementation of our CFATS regulation.

I would also like to echo the sentiment that I recently heard. Without the bipartisan cooperation on this issue that this committee and its subcommittees have achieved with the Department, we absolutely could not be achieving the progress that we have made today with respect to implementing this regulation, a very, very difficult task; and, sincerely, we do appreciate the continued leadership and support as we move through this effort.

As you all know, the fiscal year 2007 appropriations act directed the Department to develop and implement a regulatory framework addressing the high level of security risk posed by certain chemical facilities across the country. Consequently, DHS published an Interim Final Rule, known as CFATS, on April 9, 2007. Section 550 of the Act authorized the Department to require high-risk chemical facilities to complete vulnerability assessments, develop security plans and implement protective measures necessary to meet risk-based performance measures established by the Department.

The following core principles guided the development of this regulatory structure and remain in place:

No. 1, securing high-risk chemical facilities is an immense undertaking that involves a national effort, including all levels of government and the private sector in a security partisanship.

No. 2, risk-based tiering of chemical facilities that represent a high level of risk will ensure that resources are appropriately deployed and the appropriate measures put in place to protect them.

No. 3, reasonable, clear and equitable performance standards will lead to enhanced security across the partnership.

Finally, recognition of the progress many companies have already made in improving facility security helps leverage achievements and past investments.

In terms of progress, DHS published Appendix A to the CFATS Interim Final Rule in November of last year. Appendix A contains

a list of chemicals of interest and their screening threshold quantities.

Possession of one or more of these chemicals of interest at or above the screening threshold triggers a requirement for the facility to complete and submit an on-line consequence assessment known as a Top-Screen. The data gathered to the Top-Screen tool then informs the Department's determination of a facility's level of risk and the potential need for the facility to comply with follow-on substantive requirements of the regulation.

In formulating the appendix the Department included chemicals based on three principal risk vectors: release, hazards, theft and diversion hazards, and sabotage contamination hazards. The Department established again a screening threshold quantity for each chemical based on its potential to create significant adverse consequences in terms of public health and safety, human lives and injury.

To implement the requirements under the regulation, the Department developed the Chemical Security Assessment Tool, or the CSAT, to identify potentially high-risk facilities and provide a methodology that the facilities can use to conduct their vulnerability assessments and develop site security plans that are more uniform across the country. Through the previously discussed Top-Screen process the Department can identify which facilities do or do not have to or represent a significantly high risk and then move on in the process. Those facilities that are deemed high risk must complete a site vulnerability assessment for submission to the Department, and then that will in turn again inform the Department's final determination of the risk-based tier in which the facility will be placed.

Following the site vulnerability assessment, a regulated facility must develop a security plan that will be based upon 19 risk-based performance standards which are broad and designed to promote a great deal of flexibility in how a facility approaches meeting the standards applicable to it.

Although all high-risk facilities must comply with the risk-based performance standards, the measures necessary to meet these standards will vary across the four risk tiers under the CFATS framework.

Outreach and partnership efforts have been a very important part of an overall approach to this problem to date. Since the release of CFATS in April, the Department has made a concerted effort to inform our security partners of CFATS and its requirements and to engage them very productively.

As of last week, approximately 28,000 facilities across the country have submitted a Top-Screen consequence assessment that is currently undergoing analysis. That analysis will be complete, I believe, by the end of next month. Approximately 7,800 facilities have requested and received a Top-Screen filing extension which will expire on approximately March 22 of this year.

In addition, after the release of Appendix A, we granted Top-Screen filing extensions to those owners and operators of chemicals of concern in the agricultural world that possess certain chemicals for agricultural use, mainly fertilizers and pesticides. This extension will allow the Department to engage agribusiness distributors

and end-users in a productive dialog to narrow the CFATS program focus onto truly high-risk operations in the food and agricultural world. DHS will then determine whether any modification of the Top-Screen requirements might be warranted, particularly the approach toward chemicals of interest, again in the chemical world.

The Department has also been committed to fostering a solid working relationship with State and local officials or first responders in jurisdictions with high-risk facilities, and we have a initial cadre of 40 inspectors that we have deployed across the country to begin this process.

In terms of our fiscal year 2008 requirements or deliverables, we are looking at reviewing submitted site vulnerability assessments for final tiering determinations, yielding final populations of a regulated community; developing the CSAT site security plans; reviewing the site security plans and beginning Tier 1 and Tier 2 inspections; enhancing the CSAT suite of applications in a CSAT version 2.0, and in developing a comprehensive case management system; and, finally, very much engaging the State and local partners in terms of pushing this down to the grassroots level across the country.

In closing, on the subject of proposed new legislation, I believe that it is critical that any new legislation on chemical security should be carefully crafted to continue the forward momentum and the success of the CFATS program, continue the initiative and the partnership across the various stakeholder groups, prior and existing efforts by the Department, and, most importantly, the compliance activities already implemented or under way by the regulated community should be carried forward with any new legislative authority.

The Department and industry have invested a significant amount of resources and time into information collection, consequence assessment and risk mitigation activities and those efforts should be validated by incorporation or continuation to the maximum extent possible in any new legislation.

Again, ladies and gentlemen, we are interested in carrying the momentum forward, carrying the progress forward and bridging the current structure from one administration to the next. My personal goal is to hand over a 100-percent-squared-away operation to the next executive and congressional leadership team that will take office in January 2009.

Sir, subject to your follow-on questions, I have now completed the initial part of my testimony.

[The statement of Mr. Stephan follows:]

PREPARED STATEMENT OF ROBERT B. STEPHAN

FEBRUARY 26, 2008

Thank you, Chairman Thompson, Ranking Member King, and distinguished Members of the committee. It is a pleasure to appear before you today to address progress on the implementation of the Department's authority over security at high-risk chemical facilities through the Chemical Facility Anti-Terrorism Standards (CFATS) program, as well as provide insight regarding a transition of the existing regulatory program to a permanent authorization. In terms of CFATS, there is significant activity to report on a recent regulatory deadline—the deadline for chemical facilities to submit to the Department a completed Top-Screen questionnaire.

CHEMICAL SECURITY REGULATIONS

The fiscal year 2007 Department of Homeland Security Appropriations Act directed the Department to develop and implement a regulatory framework to address the high level of security risk posed by certain chemical facilities. Consequently, the Department published an Interim Final Rule, known as the Chemical Facility Anti-Terrorism Standards (CFATS) on April 9, 2007. Specifically, Section 550(a) of the Act authorizes the Department to require high-risk chemical facilities to complete Security Vulnerability Assessments (SVAs), develop Site Security Plans (SSPs), and implement protective measures necessary to meet risk-based performance standards established by the Department of Homeland Security.

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

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

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

(3) Reasonable, clear, and equitable performance standards will lead to enhanced security.—The interim final rule includes enforceable risk-based performance standards. Facilities have the flexibility to select among appropriate site-specific security measures that will effectively address risk, which leads to a Site Security Plan (SSP). The Department will analyze each facility's SSP, and, if it satisfies the CFATS performance standards, approve. If an SSP does not meet the CFATS performance standards, DHS will disapprove the plan and 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, and building on that progress in implementing the CFATS program will raise the overall security baseline of high-risk chemical facilities.

APPENDIX A: CHEMICALS OF INTEREST LIST

The Appendix A final rule to the CFATS, published in the *Federal Register* on November 20, 2007, contains a list of chemicals and their Screening Threshold Quantities. Possession of one or more of these chemicals of interest at or above the applicable threshold quantity triggers a requirement for the facility to complete and submit an online consequence assessment known as a Top-Screen. The data gathered through the Top-Screen tool informs the Department's determination of the facility's level of risk and the potential need for the facility to comply with the substantive requirements of the CFATS.

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

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

(2) *Theft/Diversion*.—Chemicals that have the potential, if stolen or diverted, to be used or converted into weapons; and

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

The Department established a Screening Threshold Quantity for each chemical based on its potential to create significant adverse consequences for human life, given the above three listed security issues.

CHEMICAL SECURITY ASSESSMENT TOOL

Implementation and execution of the CFATS regulation requires the Department to identify which facilities it considers high-risk. The Department developed the Chemical Security Assessment Tool (CSAT) to identify potentially high-risk facilities and to provide methodologies facilities can use to conduct security vulnerability assessments (SVAs) and to develop site security plans (SSPs). CSAT is a suite of four tools: facility registration, an SVA tool, an SSP template, and the initial consequence-based screening tool called the Top-Screen. The Top-Screen builds on the voluntary assessment tool referred to as the Risk Analysis and Management for Critical Asset Protection (RAMCAP), which the Department developed with technical input from industry. Through the Top-Screen process, the Department can identify which facilities do or do not have a significant potential to be the source of negative consequences (that is, those that are or are not high-risk) and can then "screen out" those facilities across the country that are not high-risk.

The Department requires facilities that possess a chemical of interest at or above the listed Screening Threshold Quantity to complete the Top-Screen within 60 calendar days of the publication of Appendix A (or within 60 calendar days of coming into possession of a chemical of interest at or above the applicable Screening Threshold Quantity after publication of Appendix A). As Appendix A was published on November 20, 2007, the due date for initial Top-Screen submissions was January 22, 2008. By that date, the Department had received 23,264 Top-Screen submissions from chemical facilities.

If a facility is not screened out during the Top-Screen process, the Department will assign the facility to a preliminary risk-based tier. Those facilities must then complete the Security Vulnerability Assessments and submit them to the Department. Results from this SVA will inform the Department's determination of a facility's final tier assignment. This represents the very next phase of the CFATS process.

All high-risk facilities fall into one of four risk-based tiers. These high-risk facilities will be required to develop Site Security Plans that address their identified vulnerabilities and address the performance standards and the security issues presented by the facility. The higher the risk-based tier, the more robust the security measures and the more frequent and rigorous the inspections will be. For example, Tier 1 facilities will have more rigorous requirements than Tier 4 facilities. Inspections will both validate the adequacy of a facility's Site Security Plan and verify the implementation of the plan's measures.

RISK-BASED PERFORMANCE STANDARDS

CFATS promulgated 19 risk-based performance standards for compliance. The standards themselves are broad and designed to promote a great deal of flexibility in how a facility approaches meeting standards applicable to it. Although all high-risk facilities must comply with the risk-based performance standards, the measures necessary to meet these standards will vary for the different tiers. For example, a Tier 1 facility with a release hazard security issue would be required to satisfy the performance standards for perimeter control, personnel access, cyber security, intrusion detection, and all other standards applicable to that security issue at a level appropriate for Tier 1 facilities.

How the facility chooses to meet the required performance standard in its Site Security Plan is at the facility's discretion. In the example of the Tier 1 facility with a release hazard security issue, the "restrict area perimeter" performance standard at the Tier 1 level may involve, for example, the facility establishing a clearly defined perimeter that cannot be breached by a wheeled vehicle. To meet the performance standard, the facility is able to consider a vast number of security measures and might ultimately choose to install cable anchored in concrete block along with movable bollards at all active gates. As long as the specific measures are sufficient to address the performance standard, the Department would approve the plan. Or, the facility might choose to "landscape" its perimeter with large boulders, steep berms, streams, or other obstacles that would thwart a wheeled vehicle. Again, as long as the proposed measures are sufficient, the Department would approve this plan.

PHASED APPROACH TO CFATS IMPLEMENTATION

The Department is using a phased approach for implementation of the CFATS regulation. In advance of the release of Appendix A, the Department began Phase 1 of CFATS implementation at certain facilities that the Department believed, based on available information, are likely to be high-risk. Following initial outreach at the

corporate level, the Department sent letters to approximately 90 facilities, informing them of their selection for participation in Phase 1, and advising those facilities of the requirement to submit a Top-Screen. The facilities were to complete the Top-Screen in advance of the release of Appendix A and receive technical assistance from Department inspectors. The Department, after receiving the majority of Phase 1 Top-Screens, reviewed these submissions for risk determinations. Those Phase 1 facilities determined to be high-risk will receive written notification from the Department informing them of the Department's determination and instructing these facilities on their requirements to complete a Security Vulnerability Assessment (SVA) for departmental review. The Department will provide technical assistance to those Phase 1 high-risk facilities as they conduct the SVA process.

In addition to the above, publication of the final Appendix A initiated Phase 2, the full implementation of the CFATS program. Phase 2 covers all facilities that possess chemicals of interest at or above the listed Screening Threshold Quantities listed in Appendix A. For Phase 2, most facilities have completed the Top-Screen, although a number of facilities received filing extensions. Those facilities subsequently determined to be high-risk will receive preliminary tiering decisions and will be instructed to complete SVAs. Upon receipt of a facility's SVA, the Department will review it for purposes of final tiering determinations, and covered facilities will be required to develop SSPs. The Department will review those SSPs and conduct on-site facility inspections to ensure compliance with the submitted plan.

OUTREACH AND PARTNERSHIP EFFORTS

Since the release of CFATS in April, the Department has made a concerted effort to publicize the rule and make sure that our security partners are aware of CFATS and its requirements. As part of a dedicated outreach program, the Department has presented at numerous security and chemical industry conferences, participated in a variety of other meetings of relevant security partners, issued several press releases regarding the regulations, published and distributed full copies of the regulations as well as various facts sheets summarizing critical aspects of the regulations, and developed and continually update a DHS.gov Chemical Security Web site. We believe these efforts are definitely having an impact. As of February 10, 2008:

- 24,891 facilities have submitted a completed Top-Screen;
- Approximately 7,800 facilities have requested and received a Top-Screen filing extension; and
- Agricultural operations possessing COI for agricultural use have received a Top-Screen filing extension.

Partially stemming from the implementation issues surrounding the ammonium nitrate security-related provisions within the fiscal year 2008 Omnibus Appropriations Act, the Department granted an extension to a category of agricultural operations possessing COI for agricultural use. This extension will allow the Department to engage agri-business distributors and end users in dialog to narrow the CFATS program's focus on the truly high-risk operations. DHS is currently gathering more information about these issues to determine whether any modification of the Top-Screen requirements might be warranted. As a result of this research and dialog, DHS will review its approach toward COIs used in agricultural operations.

Additionally, the Department intends to focus efforts on fostering solid working relationships with State and local officials and first responders in jurisdictions with high-risk facilities. To meet the risk-based performance elements under CFATS, facilities are likely to develop active, effective working relationships with local officials in the areas of delaying and responding to potential attacks and a clear understanding of roles and responsibilities during an elevated threat situation.

In terms of staffing the chemical security program, the National Protection and Programs Directorate has launched an aggressive hiring effort in order to meet a wide variety of program requirements by the end of fiscal year 2008. In addition, the chemical security regulatory program has embarked on a course to fulfill in fiscal year 2008 the following deliverables:

- Review submitted SVAs for final tiering determinations, yielding the population of facilities subject to the substantive security requirements of the CFATS regulatory program;
- Develop the CSAT SSP template for use by regulated facilities, as well as review of Phase 1 facility SSPs and conduct inspections for those facilities;
- Review SSPs, along with a select number of inspections for Tier 1 facilities;
- Enhance the CSAT suite of applications, by developing requirements for CSAT version 2.0, which will: (1) Provide chemical facilities with the ability to conduct "what if" analyses within the SVA based on risk assessments; (2) host a portal for a personnel surety capability; (3) maintain Top-Screen and SVA analytical

capabilities; and (4) host a case management system for tracking CSAT usage; and

- Engage State and local officials and chemical facilities to plan, train, and exercise activities related to delay and response performance standards.

In addition, as the committee is aware, the Department has recently submitted a fiscal year 2009 budget request that further details the chemical security regulatory program's requirements for future years, including additional inspector personnel to upgrade outreach, plan approval, inspection, and audit capabilities; further outfit the program's adjudications and appeals component; and further enhance CSAT by developing an economic modeling tool for the chemical sector, as well as accomplish other important program objectives.

AMMONIUM NITRATE REGULATIONS

In addition to the previously legislated chemical security regulatory authority discussed above, in the fiscal year 2008 Omnibus Appropriations Act, Congress amended the Homeland Security Act of 2002 (6 U.S.C. 361 et seq.) by adding a Subtitle J, Secure Handling of Ammonium Nitrate (AN). Subtitle J authorizes the Department to regulate the sale and transfer of AN and requires that DHS develop a regulatory program that oversees or requires: (1) The registration of AN Facilities and AN Purchasers with DHS; (2) Point-of-Sale verification of AN purchasers; (3) recordkeeping requirements for AN sales transactions, with penalties for failing to maintain records appropriately; (4) theft or loss reporting requirements; (5) compliance inspections conducted by DHS; (6) guidance materials and informational posters for the benefit of both AN facilities and AN purchasers; (7) an appeals process. Subtitle J also provides DHS with the authority to levy civil penalties of up to $50,000 per violation of the subsequent regulation.

One of the key principles of any subsequent DHS regulatory program resulting from Subtitle J will be to ensure that the AN-specific regulations are complementary to the CFATS regulations, especially as CFATS applies to AN facilities (that is, facilities that meet CFATS criteria for submitting Top Screens and high-risk facilities that must submit SVAs and SSPs). The goal is to ensure the secure handling of AN without unduly burdening buyers and sellers of AN.

Prior to initiating the rulemaking process, Congress directed the National Protection Programs Directorate (NPPD) to develop a report that would discuss how the Department would implement and fund a program incorporating the above requirements within the current budget. DHS is currently in the process of developing that implementation report, which will estimate the magnitude of the costs that AN facility owners and operators, AN purchasers, and DHS may incur in the implementation of and compliance with the Act. The report is presently undergoing intra-Departmental review and will be presented to Congress in the near future.

In addition to this new authority, the Department is currently engaged in a variety of efforts, both regulatory (e.g., CFATS and the U.S. Coast Guard's Maritime Transportation Security Act program) and voluntary (e.g., National Infrastructure Protection Plan's Chemical Sector efforts, Transportation Security Administration's security action items), aimed at securing the chemical supply chain, including ammonium nitrate.

As discussed above, the Department is currently analyzing the various regulatory approaches that could be used to accomplish the activities required by Subtitle J. Our intent is to harmonize the new security authorities for ammonium nitrate with existing chemical security supply chain authorities, including CFATS, MTSA, and the rail transportation security regulations. To that end, DHS is working to ensure that there are no duplicative or overlapping regulatory requirements, and is seeking to avoid unnecessarily burdening both the private sector and the Federal Government.

NEW LEGISLATION

Any new legislation on chemical security should be carefully crafted to continue the forward momentum and success of the CFATS program. Prior and existing efforts by the Department, and most important, the compliance activities already implemented or underway by the regulated population, should be carried forward with the enactment of any new legislative authority. The Department and industry have invested a significant amount of resources and time into information collection and consequence assessment activities, and those efforts should be validated by incorporation or continuation to maximum extent in any new legislation.

CONCLUSION

The Department is collaborating extensively with the public, including members of the chemical sector and environmental groups, to actively work toward achieving our collective goals under the CFATS regulatory framework. In almost every case, 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 as partners with industry, States and localities to get the job done.

We must focus our efforts on implementing a risk- and performance-based approach to regulation and, in parallel fashion, continue to pursue the voluntary programs that have already borne considerable fruit. In doing so, we look forward to collaborating with the committee to ensure that the chemical security regulatory effort is sufficiently defined in order to achieve success in reducing risk throughout 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 might have.

Chairman THOMPSON. Thank you very much for your testimony.

I now recognize Mr.—I hope I am pronouncing it right—Wattier to summarize his statement for 5 minutes.

STATEMENT OF KEVIN L. WATTIER, GENERAL MANAGER, LONG BEACH WATER DEPARTMENT

Mr. WATTIER. Chairman Thompson, Ranking Member King, distinguished Members of the committee, my name is Kevin Wattier; and I am the General Manager of the Long Beach Water Department, an urban retail water supply agency of the city of Long Beach, California. I am a licensed professional engineer and a certified Grade 5 Water Treatment Operator in the State of California. I have been General Manager of the Long Beach Water Department since July 2001; and over a decade of my career was spent with the Metropolitan Water District of Southern California, the largest supplier of drinking water in the country, where for part of that time I had the responsibility for managing the organization's water treatment and distribution facilities throughout southern California.

I would like to thank the committee for its consideration of chemical security oversight at our Nation's water treatment facilities and for inviting me to be here this morning to share my experience and opinion on this important policy matter.

My testimony before you this morning will focus specifically on Department of Homeland Security regulation of chemical security practices at water treatment plants and the handling and storage of gaseous chlorine at the Long Beach groundwater treatment plant. This testimony represents my professional opinion as a licensed professional engineer and water treatment operator, and it is based on the responsibility I have as a water official of the city of Long Beach.

All water treatment plants throughout the country use some form of chorine for at least part of their disinfection process. The disinfection of drinking water with chlorine is widely regarded as one of the greatest public health achievements of the 20th century. While the use of gaseous chlorine is often the most cost-effective and efficient method of water disinfection, the risks associated with the handling, transport and storage of large amounts of gaseous

chlorine must be considered within the broader context of current security interests.

I have closely reviewed the draft Chemical Facility Anti-Terrorism Act of 2008 before you today and strongly support the proposed Department of Homeland Security risk and performance based regulation of chemical security practices at U.S. water treatment facilities. While it is imperative that this new regulation in no way interferes with the existing Safe Drinking Water Act compliance at our Nation's drinking water plants, the additional expertise which the Department of Homeland Security can provide to this critical element of our Nation's infrastructure is greatly needed. Close coordination between the Department of Homeland Security, the U.S. Environmental Protection Agency and the associated State and local agencies will ensure that our drinking water treatment plants will continue to provide clean, reliable, affordable drinking water while safeguarding the neighborhoods surrounded these plants.

I also believe that alternatives to the handling storage, transport and storage of gaseous chlorine at these facilities should be encouraged, considered and implemented where feasible, without impairing critical operations. Federal funding to encourage the consideration and implementation of alternative disinfection treatment methods on a voluntary basis will provide the necessary stimulus to enable certain agencies to move forward toward implementation of inherently safer technologies.

The city of Long Beach gets its water from two primary sources. Half of our supply is treated imported water we purchase from the Metropolitan Water District of Southern California, and half is local groundwater treated at our groundwater treatment facility, which is one of the largest groundwater treatment plants in the country, if not the largest. This facility employs conventional filtration processes, which are typical of processes used in treatment of surface water. Our treatment operations currently use gaseous chlorine as the primary disinfectant.

Our groundwater treatment plant is located in a densely populated urban area in California's fifth largest city. The Los Angeles/Long Beach area is the most populated metropolitan area in the country. Our facility is immediately adjacent to the city of Long Beach Emergency Operations Command Center; the Long Beach Airport, where it sits under the flight path of incoming commercial aircraft and across the street from the control tower; the north and southbound lanes one of the 405 freeway, one of the busiest freeways in the United States; the Long Beach Unified School District food distribution center; a professional business center; the Greater Long Beach Regional Red Cross headquarters, two medical buildings; and many other business and residential units.

Like all other large water utilities throughout the country, we conducted a vulnerability assessment of our critical facilities following the terrorist attacks of September 11, 2001. While we have implemented significant security improvements to control site access, detect, deter and delay potential terrorist incidents and numerous other security enhancements, the consequences of an intentional attack by a highly motivated terrorist on our chlorine supplies merit further consideration.

It is clear to us in Long Beach that the most effective way to protect against such an intentional attack is to eliminate the target. We are in the process of doing just that.

To eliminate this vulnerability, the Long Beach Water Department has integrated and since March 2004 has been conducting operations of a demonstration-scale 700-pound per day on-site chlorine generation system. On-site gaseous chlorine generation is a relatively new process, and I believe Long Beach may be among the first in the United States to begin integrating such a system into our water treatment operations. We are pleased with the results of our demonstration-scale project and have now begun to increase the capacity of the system to 2,000 pounds per day, which is Phase 1 of an eventual 6,000-pound-per-day on-site generation system. The total capital cost of completely eliminating the handling and storage of gaseous chlorine and bringing on-site chlorine generation on-line at the Long Beach groundwater treatment plant is estimated to cost between $2 million and $3 million.

While Long Beach is pursuing this particular alternative chlorination method, it is important for this committee to understand that there are numerous commercially available alternative disinfection technologies that exist that have been successfully implemented at various water and wastewater treatment operations across the United States. However, numerous local considerations and other critical site-specific factors must be considered on a strict case-by-case basis to determine feasibility of integrating any of these alternative technologies. In a few cases, it may be infeasible to integrate any of these alternative technologies into treatment operations. Any consideration of alternative technologies must include assurances that maintain reliability of water systems as well as the flexibility needed to enable water treatment operators to adhere to strict Federal and State water quality standards.

I would propose that the committee amend its current draft to include an authorization of appropriations for voluntary integration of technologies that reduce or eliminate the risk posed by transport and storage of containerized gaseous chlorine. Federal participation in voluntary demonstration-scale projects of this type would have a profound impact on the United States water treatment industry.

I want to thank the committee again for allowing me to give you my thoughts on these matters. My organization and I make ourselves available for any further discussion on these and any other matters related to the Chemical Facility Anti-Terrorism Act of 2008 upon your request.

I would be happy to answer any of your questions. Thank you.

Chairman THOMPSON. Thank you very much. For the record, we have already incorporated that suggestion in the print.

Mr. WATTIER. Thank you sir.

[The statement of Mr. Wattier follows:]

PREPARED STATEMENT OF KEVIN L. WATTIER

FEBRUARY 26, 2008

Chairman Thompson, Ranking Member King, distinguished Members of the committee, my name is Kevin Wattier, and I am the General Manager of the Long Beach Water Department, an urban, retail water supply agency of the city of Long Beach, California. I am a licensed Professional Engineer and certified Grade 5

Water Treatment Operator in the State of California. I've been General Manager of the Long Beach Water Department since July 2001. Over a decade of my career was spent with the Metropolitan Water District of Southern California, the largest supplier of drinking water in the country, where for part of that time I had responsibility for managing the organization's water treatment and distribution facilities throughout southern California.

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All water treatment plants throughout the country use some form of chlorine for at least part of their disinfection process. The disinfection of drinking water with chlorine is widely regarded as one of the greatest public health achievements of the 20th century. While the use of gaseous chlorine is often the most cost-effective and efficient method of water disinfection, the risks associated with the handling, transport and storage of large amounts of gaseous chlorine must be considered within the broader context of current national security interests.

I have closely reviewed the draft "Chemical Facility Anti-Terrorism Act of 2008" before you today, and strongly support the proposed Department of Homeland Security risk- and performance-based regulation of chemical security practices at U.S. water treatment facilities. While it is imperative that this new regulation in no way interferes with the existing Safe Drinking Water Act compliance at our Nation's drinking water treatment plants, the additional expertise which the Department of Homeland Security can provide to this critical element of our Nation's infrastructure is greatly needed. Close coordination between the Department of Homeland Security, the USEPA, and the associated State and local agencies will ensure that our drinking water treatment plants will continue to provide clean, reliable, affordable drinking water while safeguarding the neighborhoods surrounding these plants.

I also believe that alternatives to the handling, transport and storage of gaseous chlorine at these facilities should be encouraged, considered, and implemented where feasible, without impairing critical operations. Federal funding to encourage the consideration and implementation of alternative disinfection treatment methods, on a voluntary basis, would provide the necessary stimulus to enable certain agencies to move toward implementation of inherently safer alternatives.

The city of Long Beach gets its water from two primary sources. Half of our supply is treated imported water we purchase from the Metropolitan Water District of Southern California, and half is local groundwater treated at our groundwater treatment facility, which is one of the largest groundwater treatment facilities in the United States, if not the largest. This facility employs conventional filtration processes, which are typical of processes used in the treatment of surface water. Our treatment operations currently utilize gaseous chlorine as the primary disinfect.

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tion is a relatively new process and I believe Long Beach may be among the first in the United States to begin integrating such a system into its water treatment operations. We are pleased with the results of our demonstration-scale project and have now begun work to increase the capacity of the system to 2,000 lbs/day, which is Phase 1 of an eventual 6,000 lb/day on-site generation system. The total capital cost of completely eliminating the handling and storage of gaseous chlorine, and bringing on-site chlorine generation on-line at the Long Beach Groundwater Treatment Plant is estimated to cost between $2 million and $3 million.

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I want to thank the committee again for allowing me to give you my thoughts on these matters. My organization and I make ourselves available for any further discussion on these and any other matter related to the "Chemical Facility Anti-Terrorism Act of 2008" upon your request.

I would be happy to answer any of your questions.

Chairman THOMPSON. Dr. Pulham.

STATEMENT OF DAVID C. PULHAM, PH.D., DIRECTOR OF COMPLIANCE, SIEGFRIED (USA), INC.

Mr. PULHAM. Good morning, Chairman Thompson, Ranking Member King and distinguished Members of the committee. My name is Dr. David Pulham, Director of Compliance at Siegfried (USA) in Pennsville, New Jersey. Prior to joining Siegfried, I spent 27 years with the Food and Drug Administration as a National Expert Investigator. My responsibilities with FDA included inspecting pharmaceutical facilities around the world and assessing foreign regulatory agencies. As Director of Compliance at Siegfried, I am responsible for ensuring FDA, DEA, EPA, OSHA and DHS compliance.

Thank you for this opportunity to share with you my company's perspective on the Chemical Facility Anti-Terrorism Act of 2008, specifically with regard to inherently safer technology. My remarks will address generally the issue of inherently safer technology, reference our experience with the State of New Jersey security provisions and conclude with our recommendation on the bill going forward.

Siegfried's Pennsville, New Jersey, facility has been in existence for over 70 years and manufactures both exclusive and generic bulk pharmaceuticals with over 150 employees. Most of Siegfried's products are controlled substances and are therefore highly regulated by the Drug Enforcement Administration. Due to Siegfried's commitment to compliance in all areas, Siegfried takes great pride in the sterling compliance record it has developed with virtually all Federal and State agencies.

Siegfried is a member of the Synthetic Organic Chemical Manufacturers Association, SOCMA, which is the leading chemical industry organization representing the batch, custom and specialty chemical industry since 1921. As a member of SOCMA, Siegfried adheres to the principles of the ChemStewards program, which is an environmental, health, safety and security management system. This self-imposed program requires companies to develop systematic approaches to environmental and chemical risk management with independent, third-party verification. ChemStewards incorporates SOCMA security vulnerability assessment methodology, which is recognized by the Center for Chemical Process Safety and is accepted by the Department of Homeland Security for Tier 4 facilities under the Department's Chemical Facility Anti-Terrorism Standards. SOCMA makes this methodology publicly available in its effort to serve as a leading industry resource for assessing security vulnerabilities at chemical facilities.

New Jersey recently amended its Toxic Catastrophe Prevention Act to require existing facilities to complete an inherently safer technology review. Siegfried's assessment of this process is that it was essentially a paperwork exercise to document in great detail steps and considerations that we take as a normal part of our process. Simply put, inherently safer technology is a concept that the chemical industry invented; and we consider it continuously as we design, modify and enhance our production processes.

Securing our products is an ongoing responsibility. So is complying with the comprehensive system of existing State and Federal laws. These regulatory regimes require extensive process hazard analysis, risk management planning and public reporting on chemicals we handle on-site and, in some cases, prior to handling them on-site. We feel that these regulations, complemented by our own process-safety decisionmaking, provide a concrete and meaningful level of consequence reduction at all stages of the product lifecycle.

Speaking specifically of existing Federal rules, Siegfried supports DHS's existing Chemical Facility Anti-Terrorism Standards, which do not include any IST mandates. These rules require comprehensive vulnerability assessments and security plans, and those plans have to meet almost 20 rigorous security performance standards. We encourage the committee to support the current approach.

Mr. Chairman, I have heard people say that since the industry already considers inherently safer technology in its decisionmaking process and since we are already bound by regulated regulatory regimes it should be easy for us to comply with a new layer of IST regulation. In fact, it is never a simple task to integrate a new set of rules imposed by a new regulatory entity with the numerous engineering and compliance programs we already have to manage. An IST mandate would complicate and in some cases could undermine existing practices or compliance. Mandating IST for companies like Siegfried that manufacture hundreds of batches of specialty batched products every year is a much greater exercise than what may appear on the surface. Having to debate which approach is inherently safer in any given case would slow down our ability to meet customer needs, and it could be dangerous if we are compelled to accept and go along with an approach that we personally

think may not be the lowest-risk approach. With all due respect, this issue is vastly more complicated than most people appreciate.

Thank you for the opportunity to share with you Siegfried's perspective on inherently safer technology and existing Federal security rules. I look forward to your questions.

[The statement of Mr. Pulham follows:]

PREPARED STATEMENT OF DAVID C. PULHAM

FEBRUARY 26, 2008

Good morning Chairman Thompson, Ranking Member King, and distinguished Members of the committee. My name is Dr. David C. Pulham, Director of Compliance at Siegfried (USA), Inc. in Pennsville, New Jersey. I spent 27 years with the Food and Drug Administration as a National Expert Investigator. Part of this responsibility required inspecting pharmaceutical facilities around the world and qualifying foreign regulatory agencies. As Director of Compliance at Siegfried, my responsibilities include FDA, DEA, EPA, OSHA, and DHS compliance.

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like Siegfried that manufacture hundreds of specialty batch products every year is a much greater exercise than what may appear on the surface. Having to debate which approach is inherently safer in a given case would slow down our ability to meet customer needs. And it could be dangerous, if we are compelled to accept, or go along with, an approach that we personally think may not be the lowest-risk approach. With all due respect, this issue is vastly more complicated than most people appreciate.

Thank you for the opportunity to share with you Siegfried (USA)'s perspective on inherently safer technology and existing Federal security rules. I look forward to your questions.

Chairman THOMPSON. I thank all the witnesses for their testimony.

I remind each Member that he or she will have 5 minutes to question the panel.

Before I start my questions, I would like to ask unanimous consent to submit four statements for the record. One is a statement from the National Propane Gas Association, one a statement from the Chemical Bill Coalition, one a statement from Greenpeace and finally a statement from the Industrial Safety Training Council. Without objection, the statements are inserted into the record.

[The statements follow:]

STATEMENT OF THE NATIONAL PROPANE GAS ASSOCIATION

FEBRUARY 26, 2008

The National Propane Gas Association (NPGA) appreciates the opportunity to submit the following statement on the proposed Chemical Facility Anti-Terrorism Act of 2008.

NPGA is the national trade association of the LP-Gas (principally propane) industry with a membership of about 3,600 companies, including 39 affiliated State and regional associations representing members in all 50 States. The single largest group of NPGA members are retail propane marketers whose total membership is approximately 3,000 companies, the vast majority of which are small businesses. These companies operate approximately 10,000 retail facilities that serve propane customers in every State and county in the United States. Customers use propane in residential and commercial installations, in agricultural applications, in industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and nonroad engines such as those used in forklifts.

The proposal has been released in draft in several different forms, the latest being dated February 19, 2008. In general, the bill would extend and revise the authority of the Department of Homeland Security (DHS) to administer the Chemical Facility Anti-Terrorism Standards (CFATS), which have been in their final form for less than 100 days. In fact, the initial round of determinations of facility risk performed through the Top Screen process have not been issued by DHS to our knowledge. Nevertheless, the bill proposes to make major changes to the legal environment in which the CFATS are written and administered. NPGA urges Congress to exercise extreme caution not to enact provisions that increase confusion in the private sector with no increase in security.

THE PROPANE INDUSTRY IS HIGHLY REGULATED FOR BOTH SAFETY AND SECURITY

The propane industry is one of the most highly regulated industries in the United States. The industry's commitment to the safety and security of industry personnel and customers is paramount, and leads us to support appropriate provisions at the Federal, State, and local levels.

Since 1931, NPGA's primary mission has been to increase the safety of propane use. Since September 11, 2001, NPGA's scope of activities has broadened to include security considerations. Our efforts began with intensive outreach to industry members to facilitate their interaction with Federal officials representing agencies such as the Department of Transportation's (DOT) FMCSA and RSPA (now known as PHMSA) and the Department of Defense. We distributed DOT's Security Awareness Training CD–ROM to the industry and invited key policymakers to address our association meetings. In addition, the propane industry sits on the Oil and Natural Gas Sector Coordinating Council providing direct interaction with other industries and Federal security personnel.

The industry supports background checks of industry personnel, and performs detailed security plans required by the Department of Transportation. These security plans are broad in scope and address personnel security, the en route security of delivery trucks, and the security of the propane storage facilities themselves against unauthorized access. Perhaps the most important initiative, however, has been the modernization of the primary propane safety standard to include security measures. National Fire Protection Association (NFPA) Standard 58, LP-Gas Code, is updated triennially to make continual improvements in safety for the storage and handling of propane. This standard is adopted by reference or by transcription in all 50 States and has included security-specific language since the 2004 edition. Section 6.16.5 of NFPA 58 prescribes requirements for the security and protection against tampering for propane systems. It also requires the facility operator to provide security measures to minimize entry by unauthorized persons and, at a minimum, security awareness training. Other requirements cover industrial-type fencing, guard service, lighting and ignition source control.

CONGRESS SHOULD NOT ENACT POLICIES THAT CONFLICT WITH CURRENT FEDERAL TAX POLICIES ENCOURAGING PROPANE STORAGE

Federal tax policy, both directly and indirectly, has been encouraging increased storage capacity for propane for many years. Since 1992, Federal tax law has directly encouraged increasing the use and storage of alternative fuels, including propane. From 1992 until 2005, Section 179A of the U.S. Tax Code provided for a special deduction for certain clean fuel refueling property, including the storage of propane. In 2005, this deduction was succeeded by a new Federal tax credit (Section 30C), again designed to increase the storage capacity for alternative fuels, including propane.

Additionally, in 2005, Federal tax law added a credit for alternative fuels (Section 6426) and alternative fuel vehicles (Section 30B). Again, these credits included propane as a recognized alternative fuel. These credits for propane fuel and propane vehicles encourage the increasing of propane storage capacity in a logically indirect way. Indeed, all three credits (fuel, vehicles, and storage) work together to advance each particular piece of the equation necessary to sustain propane vehicle technology. The more propane vehicles you have, the more propane fuel you need. The more propane fuel you need the more propane storage capacity is necessary to store that fuel. The more storage and fuel available the more likely manufacturers will want to produce propane vehicles. This all adds up to increased use of a clean burning alternative fuel that helps address today's environmental concerns. Thus all these credits work to accentuate each other.

Other aspects of Federal tax policy also encourage propane storage, also in an indirect manner. A high percentage of propane retailers are small- to mid-size businesses. As such they are highly sensitive to how tax law treats capital investments, such as storage. Thus dramatic increases in expensing (the amount that a business may deduct for capital investments immediately rather than depreciate over time) can often dictate whether a small business will proceed with a new capital investment. For years, the standard expensing figure has been in the range of $25,000. However, since 2002 that figure has been increased substantially to $125,000 and in the recently enacted Economic Stimulus Package that figure was increased to $250,000 for the year 2008 only.

Moreover, businesses both big and small can benefit from "Bonus Depreciation" which has been enacted for various periods of time over the past 10 years, again most recently in the 2008 Economic Stimulus Package. The provision would allow business to write off 50 percent percent of the cost of depreciable property (capital expenditures) acquired in 2008.

Both the expensing and depreciation provisions, in addition to the previously mentioned credits, serves as a clear indication to the propane industry that the Federal Government is strongly encouraging the overall increase of propane storage capacity.

The Federal Government has consciously chosen to favor increased storage capacity for propane in general. While we have already mentioned the advantages as far as encouraging the use of alternative fuel vehicles, there is another important element related to propane use for heating and appliances. Propane used as heating fuel is largely centered in rural and agricultural areas throughout the country due primarily to its portable properties. In the winter when demand is at its peak, prices for propane, as with other fuels such as natural gas, can fluctuate greatly. Therefore, encouraging increased storage capacity for propane makes sense for the many consumers using propane, particularly in heating and agricultural applica-

tions. Congress should not enact policies that will simultaneously encourage and discourage propane storage.

CONCERNS WITH DIRECTION OF REAUTHORIZATION

NPGA has a number of concerns with the direction being taken by the committee in drafting the DHS reauthorization legislation.

1. DHS Should Retain An Ability To Make Determinations Based Upon Risk (Section 2102)

NPGA is pleased that the most recent draft of the bill recognizes that DHS needs the authority and the flexibility to use judgment in deciding which facilities to regulate. Under the CFATS, DHS administers the Top Screen process so that it can make judgments about whether particular facilities need additional scrutiny and must therefore be placed in a risk-based tier. Eliminating this ability and forcing DHS to automatically place all facilities storing more than threshold quantities will swamp DHS in data, making it harder for them to target resources toward high-risk facilities.

2. Inherently Safer Technology (IST) Policy Creates an Explicit Need To Consider Fuel Switching

NPGA is very concerned that Congress is setting forth a mechanism by which facilities storing propane will be required to consider other technologies or energy sources in place of those currently listed by CFATS.

Strictly from a customer perspective, the bill requires propane consumers to report on the possibility of substituting propane with another fuel, using a less hazardous fuel, using smaller quantities, or reducing propane storage. In doing so, the Government effectively tells propane customers to create their own "roadmap" for switching from propane to other fuels. With every new legislative or regulatory mandate, the incentive to switch from clean-burning propane to less environmentally friendly fuels such as diesel fuel or electricity ratchets up as customers seek to remain unregulated. Worse still, energy sources competing with propane remain largely unregulated from a homeland security perspective, when they are not inherently safer or more secure than propane.

Propane is a common fuel used safely by millions of homes, farms, and businesses around the Nation. We are concerned that the "inherently safer technology" assessment required in Section 2110(b) will make propane marketers and customers either reduce their propane storage or switch from propane to other fuels not covered by the CFATS. Specifically, the IST requirement would require propane marketers and customers to assess, among other things, the following as it applies to their locations: (1) Process redesign; (2) Input substitution; (3) Use of less hazardous or benign substances; (4) Use of smaller quantities of substances of concern; and (5) Reduction or elimination of storage, transportation, handling, disposal, and discharge of substances of concern.

All of these factors, but particularly Item 5, are troubling to propane retailers and customers. By requiring propane marketers to address reducing or eliminating propane storage, the Government is, in effect, asking marketers to choose between proven industry safety concerns and a supposedly more secure way of doing business. Considering the favorable tax treatment extended by Congress to propane discussed above, it is inappropriate at best for Congress to establish a national policy encouraging the reduction of propane storage. NPGA believes this is no choice at all. The safest portion of the propane distribution chain is stationary storage, the very aspect that Congress is suggesting could be "inherently safer" if it were reduced.

Enacting a policy that encourages reductions in propane storage will have other negative impacts in the field. First, it will reduce safety by requiring retailers to make more deliveries of smaller quantities throughout the heating season. Not only will more trucks need to be on the road to serve the existing demand, but it will increase the number of transfer operations. Less on-site fuel storage will also lead to supply bottlenecks, particularly in the busy winter heating season, because fuel supplies will run out faster. Any disruption to the fuel delivery infrastructure, such as winter snow and ice storms that slow down or stop truck deliveries, could severely impact essential deliveries of heating and cooking fuel to rural America as well as jeopardize vital agricultural operations. Ironically, when fuel shortages (due to bad weather, or man-made supply chain problems) leave people without power and crops without proper care, Congress will be the first to call into question the propane storage and delivery system.

In the name of safety, fairness, fuel neutrality, and consistency with existing tax preferences, NPGA strongly urges the committee to eliminate fuels, such as pro-

pane, from inherently safer technology reporting requirements in the draft legislation.

3. Weakening Preemption Will Weaken National Consistency of Regulation

NPGA also strongly opposes the limits the legislation seeks to impose on Federal preemption in Section 2107. Allowing 50 individual States and tens of thousands of localities to write more stringent laws or regulations than currently exist at the Federal level will lead to a hodge-podge of State chemical facility security laws, all with differing procedures, compliance requirements and enforcement mandates. The propane industry is already highly regulated at the State and local level. In fact, providing States and localities the freedom to go their own way on security will jeopardize the entire system of propane safety regulations, since fire and building codes regulating propane are administered at the State level. Adding numerous new State chemical facility security laws will only create more red tape, and more confusion. Furthermore, propane companies and customers—most of them small businesses—will need to dedicate new financial and personnel resources to comply with all the overlapping security requirements. To avoid this, NPGA urges a strong statement from Congress in support of Federal preemption of State homeland security laws.

4. There Is No Compelling Reason To Act Now

Finally, NPGA is confused as to why there is a rush to seek such substantive changes to the DHS Chemical Facility Anti-Terrorism Standards (CFATS). We understand that the authority to administer the rules expires in October 2009, but they have only recently finished the CFATS Top-Screen process which determines which chemical facilities will be regulated and which will not (compliance letters to be sent soon). Nonetheless, the committee via this legislation seems determined to rewrite how DHS will administer chemical facility regulations before DHS has a chance to test the utility of current regulations. The new requirements in this legislation will only slow down the process of securing vital chemical facilities as DHS will be forced to go back through the regulatory process to address new congressional priorities. At most, Congress should enact a simple reauthorization without significant changes to the program.

NPGA appreciates this opportunity to submit comments to the House Homeland Security Subcommittee on Transportation and Infrastructure Protection. Should you have questions or require further information, please contact us anytime.

STATEMENT OF THE CHEMICAL BILL COALITION

FEBRUARY 26, 2008

Member of Congress, we represent American agriculture, food processing, energy, forest products, chemistry, medicine, transportation, building materials and other businesses and local city services that make up our national infrastructure. Protecting our communities and complying with Federal security standards is a top priority to us.

We are concerned that the "Chemical Facility Anti-Terrorism Security Act" would cause disruptions of new Federal security standards in the short term, and weaken infrastructure protection and economic stability in the long term.

The Department of Homeland Security (DHS) began enforcement of landmark new chemical security standards last month. Companies in thousands of communities are just beginning to comply with these significant new requirements while continuing to provide essential products and services for our daily lives. Our industries and DHS are investing time, training and other resources to adapt to comprehensive security standards. However, this bill would detract from compliance efforts and, in some cases, impede progress that is underway. We believe that counter-productive, mid-stream adjustments to the current law would undermine security at facilities all around the country.

Our primary concern is that the bill goes beyond requiring security protections based on risk by creating a mandate to change products and processes to a Government-selected "safest" technology. Congressional testimony has stated that this would possibly increase risk and weaken the businesses that it intends to protect. Such a standard is not measurable and would likely lead to confusion and prohibitive legal liability. The bill would also weaken protections for sensitive security information and create overlapping and conflicting security requirements.

Making extensive changes now is also premature. The DHS security regulations being implemented are protecting thousands of facilities that provide the food, water, energy, pharmaceuticals and other chemical manufacturing that are essential for our national security and economic vitality. Rushing approval of this bill would

significantly disrupt the recently implemented chemical security standards and create economic uncertainty in many communities. We urge you to reconsider this approach. While we would support straightforward legislation to remove the sunset date and make the chemical security regulations permanent, we strongly urge Congress to refrain from overhauling the program at least until it has been given a fair chance to be implemented and evaluated.

Thank you for your consideration of our views.

Agricultural Retailers Association; American Farm Bureau Federation; American Forest & Paper Association; American Frozen Food Institute; American Petroleum Institute; Beer Institute; Calorie Control Council; Chemical Producers & Distributors Assn; Consumer Specialty Products Assn; Croplife America; Environmental Technology Council; Independent Liquid Terminals Assn; Institute of Makers of Explosives; Int'l Assn of Refrigerated Warehouses; International Food Additives Council; Midwest Food Processors Association; National Agricultural Aviation Assn; National Assn of Chemical Distributors; National Association of Manufacturers; National Assn of Truck Stop Operators; National Cotton Council of America; National Mining Association; National Oilseed Processors Assn; National Paint and Coatings Assn; Nat'l Petrochemical & Refiners Assn; Petroleum Equipment Suppliers Assn; Petroleum Marketers Assn of America; The Carpet and Rug Institute; The Fertilizer Institute; U.S. Chamber of Commerce; USA Rice Federation.

STATEMENT OF RICK HIND, LEGISLATIVE DIRECTOR, GREENPEACE TOXICS CAMPAIGN, GREENPEACE

FEBRUARY 26, 2008

CURRENT LAW AND DEPARTMENT OF HOMELAND SECURITY REGULATIONS (CFATS) ARE INADEQUATE; PERMANENT LEGISLATION IS ESSENTIAL TO SECURITY

INHERENTLY SAFER TECHNOLOGIES CAN ELIMINATE CATASTROPHIC CONSEQUENCES OF A TERRORIST ATTACK

"We don't want a chemical plant sitting somewhere in a place like Boston become a bomb because it is not properly secured,"—*Secretary Chertoff, February 7, 2008*.

"You know, the threat is just staring us in the face. I mean, all you'd have to do is to have a major chemical facility in a major metropolitan area go up and there'd be hell to pay politically. People will say, 'Well, didn't we know that this existed?' Of course, we knew."—*Former Senator Warren Rudman (R–NH), November 2003*.

The September 11 terrorist attacks successfully used our own infrastructure against us with tragic results. They also demonstrated that tight perimeter security, such as in the case of the Pentagon, is incapable of preventing such attacks. Should a chemical plant be targeted, a truck bomb, a small plane, helicopter or a high powered rifle would easily render the industry's current reliance on fence-line security totally useless. In fact, U.S. chemical facilities have been referred to as "pre-positioned" weapons of mass destruction (WMD).

Reports during the summer of 2007 of renewed terrorist's capacity to carry out attacks inside the United States are a sobering reminder of the nearly 6 years of neglect following the 9/11 attacks. The vulnerability of U.S. chemical plants to terrorism and serious accidents such as the 1984 disaster in Bhopal, India have been widely recognized. The potential magnitude of these risks surpasses the 9/11 attacks. Once released these chemicals and gases can remain dangerous for up to 14 miles in an urban area (20 miles in a rural area) and put the lives of millions of people at risk.

The nature of these risks meets any definition of a weapon of mass destruction. The manner in which people would be killed and injured is terrifying. Poison gases such as chlorine will literally melt the lungs of its victims causing them to drown in their own lung fluid (pulmonary edema). Survivors could be left with life-long disorders.

Although we would all like to believe the threat of a terrorist attack is unlikely, U.S. intelligence officials now believe terrorist attacks are more likely today than before the United States invaded Iraq in 2003 (September 24, 2006, N.Y. Times). More recently on July 10, Department of Homeland Security (DHS) Secretary Michael Chertoff told the media that he had a "gut feeling" that "we are entering a period this summer of increased risk."

Following the 9/11 attacks it was reported that 9/11 ring leader, Mohamed Atta, visited a Tennessee chemical plant asking lots of questions (December 16, 2001, Washington Post). In the first 6 months of 2007 at least five successful terrorist at-

tacks in Iraq used relatively small (150 to 250 pound) cylinders of chlorine gas to kill dozens of people. As a result the DHS began briefing local bomb squads and chemical plants across the country (April 24, 2007, USA Today).

In February and April 2007 thefts of 150 pound cylinders of chlorine gas occurred in California prompting questions by members of this committee to the DHS about their response to these thefts, any other thefts and plans to eliminate these vulnerabilities by using inherently safer technologies.

U.S. chemical facilities were not built or designed to defend against terrorist attacks. Predicting where an attack will take place is a fool's errand. No one predicted that Timothy McVeigh would attack the Federal Building in Oklahoma City in 1995, killing 168 innocent people.

On June 25, 2007, DuPont Chairman Charles O. Holliday Jr. told the media that he worries most about a computer system failure or a security breach at one of the company's chemical plants around the world. "I feel very comfortable that we've taken all the reasonable steps, but obviously if someone wants to fly an airplane into a plant, it's very hard to guard against it," said Holliday.

The Nation's most infamous example of this threat is the Kuehne Chemical Company in South Kearny, New Jersey. According to Kuehne's own reports to the U.S. Environmental Protection Agency (EPA), their plant puts 12 million people in the Newark-New York City region at risk in the event of a catastrophic release of chlorine gas stored on-site. This is the largest single chemical plant risk in the Nation, but according to the DHS more than 3,000 other plants each put 1,000 or more people at risk. More than 100 U.S. plants each put a million or more people at risk, according to their reports to the EPA.

What makes the Kuehne plant inherently dangerous is the use of large quantities of chlorine gas to produce relatively harmless liquid bleach (sodium hypochlorite). While Kuehne's largest business is water disinfection, there are many safer alternatives to chlorine, including ultra-violet light, ozone and liquid bleach. A competitor of Kuehne, KIK Custom Products, wrote Representative Edward Markey (D–MA) a Member of the House Homeland Security Committee on July 26, 2006. In their letter KIK committed to converting to a safer technology that produces "high strength liquid bleach in one continuous operation thereby eliminating the need to ship or store chlorine" on-site and therefore eliminating the risks posed by large quantities of chlorine gas. KIK is the second largest producer of household bleach in North America. More details on their technology is at: *http://www.k2pure.com/*.

What Happens When Perimeter Security Fails?

Continuing negligence by industry or Government will not be judged kindly by posterity. Stephen Flynn, Senior Fellow in National Security Studies at the Council on Foreign Relations wrote in his book, America the Vulnerable, "The morning after the first terrorist strike on this sector, Americans will look around their neighborhoods and suddenly discover that potentially lethal chemicals are everywhere, and be aghast to learn that the U.S. Government has still not developed a plan to secure them. The subsequent political pressure to shut down the industry until some minimal new safeguards can be put in place—as we did with commercial aviation following the 9/11 attacks—will be overwhelming."

- In July, 2004, the Homeland Security Council estimated that an attack on a single chlorine facility could kill 17,500 people, severely injure an additional 10,000 and result in 100,000 hospitalizations and 70,000 evacuations.
- In January, 2004, the U.S. Naval Research Laboratory testified before the Washington, DC City Council warning that 100,000 people could be killed or injured in the first 30 minutes of a catastrophic release of a tank car of chlorine or similar chemical within blocks of Capitol Hill. They further estimated that people could "die at rate of 100 per second."
- In June, 2003 FBI specialist on weapons of mass destruction, Troy Morgan, in a speech at a chemical industry conference warned, "You've heard about sarin and other chemical weapons in the news. But it's far easier to attack a rail car full of toxic industrial chemicals than it is to compromise the security of a military base and obtain these materials."

THE 2006 INTERIM CHEMICAL SECURITY LAW AND REGULATIONS ARE FATALLY FLAWED

The best that can be said for the new Department of Homeland Security (DHS) chemical security regulations, "Chemical Facilities Anti-Terrorism Standards" (CFATS) is that they represent an official recognition of the widespread vulnerability of U.S. chemical plants to terrorism.

The new DHS rules are based on a 744-word "rider," Sec. 550 of the Homeland Security Appropriations Act 2007. Sec. 550 authorizes "interim" regulations that

will expire on October 4, 2009. It was enacted with the expectation that Congress would expeditiously enact permanent, comprehensive legislation to "supersede" Sec. 550's regulations.

The DHS rules finalized on November 20, 2007 fail to provide adequate protection for the Nation and communities living in the shadow of thousands of U.S. chemical plants.

The Interim Chemical Security Law and DHS Rules (CFATS)

- Prohibit the DHS from requiring any "particular security measure" including safer technologies that can reduce or eliminate the magnitude of an attack at virtually any chemical facility.

To satisfy the chemical lobby, this was added to Sec. 550(a) to prevent the use of safer technologies as a security measure but it also undermines the effectiveness of the entire statute by undercutting the DHS to credibly require ANY "particular security measure."

- Fail to ensure priority protection of the 3,400 to 4,391 facilities each of which put 1,000 or more people at risk according to the DHS.

Sec. 550 gives the Secretary of the DHS discretion to determine which facilities will be considered to "present high levels of security risk." With regard to high priority facilities, the DHS rules call for a Top Screen process that considers the consequences of an attack but the Security Vulnerability Assessment also factor in "threat assessments." If the likelihood of an attack was considered small it could de-prioritize high-risk facilities. Over the last 4 years, the DHS has never identified more than a few hundred (360 to 272) facilities as the sites of greatest concern (putting 50,000 or more people at risk). Given resource constraints and other anti-regulatory tendencies, the DHS's record has been to focus on chemical plant risks that are an order of magnitude higher than the loss of life following the 9/11 attacks.

- Fail to protect approximately 3,000 U.S. water treatment plants as well as several other exempted categories.—Approximately 100 water treatment plants each put 100,000 or more people at risk.

This exemption, also in Sec. 550(a), covers public water systems regulated by the Safe Drinking Water Act and the Federal Water Pollution Control Act, the Maritime Transportation Security Act of 2002, facilities owned or operated by the Department of Defense, Department of Energy or regulated by the Nuclear Regulatory Commission. In June 2007 Secretary Chertoff spoke to water facilities operators warning them that even though they are exempt under the interim law they are "on the hook because you're going to have to do this yourselves because the consequences of ignoring risks . . . will be quite severe."

- DHS asserted the authority to prohibit States from establishing stronger security standards.

Without any explicit statutory authority, the DHS asserted the authority to preempt State programs that "frustrate" their regulations. Although no State has yet been cited, this policy could have had a chilling effect on new programs and appears aimed at serving a chemical industry agenda to prevent States, such as New Jersey, from requiring safer more secure technologies. However, this provision was reversed in an amendment to Sec. 550 by Senator Frank Lautenberg (D–NJ) in the DHS omnibus spending bill in December 2007. However, the interim law expires in October 2009 and permanent legislation must retain the right of States to set more protective standards than the Federal Government.

- Fail to protect the public's right-to-know by asserting authority to classify previously public information as secret, including information used in civil or criminal enforcement actions.

Sec. 550(c) and resulting new DHS regulations over-reach by going beyond protecting common sense security plans and vulnerabilities into undermining enforcement and covering up governmental incompetence or corporate liability.

- Assert the right to "displace" other Federal right-to-know statutes including, the Emergency Planning and Community Right to Know Act, Clean Air Act of 1990, Clean Water Act and CERCLA.

This directly contradicts the savings clause in Sec. 550(f) which says, "Nothing in this section shall be construed to supersede, amend, alter, or affect any Federal law that regulates the manufacture, distribution in commerce, use, sale, other treatment, or disposal of chemical substances or mixtures."

- Fail to require meaningful involvement of plant employees in developing Security Vulnerability Assessments and Site Security Plans.

The DHS responded to comments saying that "there is nothing in the rule that prohibits chemical facilities from involving employees in their security efforts." While we should be thankful for that, such a policy fails to tap the expertise of a workforce that is formally trained in chemical hazard protection, accident preven-

tion and emergency response. Employees are the first line of defense and the eyes, ears and noses of chemical facilities. The failure to formally involve employees in developing vulnerability assessments and security plans is foolish from both a security and scarce resource perspective.

- Fail to include whistleblower protections that would enhance enforcement.

The DHS rules promise to set up an anonymous tip line but ignores the long history of whistleblowers who have exposed waste, fraud and abuse. And in this case they could save thousands of lives.

- Fail to enhance enforcement by allowing citizens to sue to enforce the law, while allowing companies liberal appeals procedures to challenge DHS orders and decisions.

Sec. 550(d) prevents anyone but the DHS from suing a plant owner or operator to enforce any provision of this law. Once again, the law is balanced in favor of protecting the rights of recalcitrant facilities and/or violators and leaving innocent citizens facing overriding lethal risks with no legal recourse.

- Prohibit the public from knowing which facilities are "high-risk" or "Top Tier" plants.

Both DHS and corporate credibility will be in jeopardy if communities cannot determine if a local chemical plant that poses a threat is being dealt with or is in violation or is resisting orders by the DHS. Nor will communities have the peace of mind of knowing whether a plant has voluntarily converted to safer technologies and no longer poses a threat to their community.

In their *Federal Register* Notice of rulemaking, the DHS said, "The Department will continue to work with Congress on chemical security matters." However, neither the President nor the Secretary of Homeland Security has asked for additional authority from the 110th Congress to fill in the huge gaps in Sec. 550 or to correct provisions that will undermine its effectiveness and enforcement. Meanwhile the chemical industry argues for waiting a few years even though Sec. 550 regulations will expire on October 4, 2009.

The failure of the Bush administration and DHS to ask Congress for broader permanent statutory authority to correct the deficiencies in the temporary law is irresponsible.

Prioritize the Most Dangerous Chemicals

The largest category of hazardous substances that can be transformed into chemical weapons of mass destruction (WMDs) are toxic-by-inhalation (TIH) gases. According to the U.S. EPA just four TIH gases account for 55 percent of all chemical processes that threaten communities Nation-wide. These are:

- anhydrous ammonia—32.5 percent (8,343 processes);
- chlorine—18.3 percent (4,682 processes);
- sulfur dioxide—3 percent (768 processes);
- hydrogen fluoride—1.2 percent (315 processes).

Unfortunately, the DHS has set dangerously high threshold quantities for many of these substances such as: Anhydrous Ammonia: 10,000 lbs.; Chlorine: 500 to 2,500 lbs.

Given the successful terrorist attacks in Iraq using small quantities of chlorine (approximately 150 lbs.) and recent thefts in the United States, it would be prudent to establish lower threshold quantities for such ubiquitous hazardous substances. Lower thresholds won't necessarily trigger more regulations, they simply give the DHS a more complete picture of where hazards are. Regulations should be driven by populations at risk.

SAFER TECHNOLOGIES CAN ELIMINATE THE CONSEQUENCES OF AN ATTACK

While these chemical processes deserve high priority because of their prevalent use at thousands of facilities, especially at high threat facilities, there are widely available safer alternatives for each of them. For example, the Center for American Progress (CAP) conducted an analysis of EPA's Risk Management Program data and identified 284 facilities that have converted since 1999. See full report at: *http://www.americanprogress.org/issues/2006/04/b681085_ct2556757.html*.

Examples of conversions from these chemicals and continuing threats include:

- More than 200 water treatment facilities (including Washington, DC) converted to safer alternatives such as ultraviolet light, eliminating the use of chlorine and sulfur dioxide gas. But over 100 water treatment plants still threaten more than 100,000 people.
- Ninety-eight petroleum refineries use safer alternatives to hydrogen fluoride (HF). But 50 refineries still threaten millions of people with the use of HF.

- At least 36 electric power plants use safer alternatives to anhydrous ammonia gas such as dry urea. But 166 power plants still use anhydrous ammonia gas each threatening an average of 21,506 people.

While the CAP analysis proves the technological feasibility of safer alternatives, CAP estimates that at this rate of conversion, without any new regulatory requirements, it will take 45 years to eliminate hazards that pose the highest risk to America's hometowns.

The CAP analysis shows that 87 percent of the converted facilities spent less than $1 million and half spent less than $100,000. Clearly these conversion costs pale in comparison to the cost of disaster response, relocating communities, defending against personal injury lawsuits or resolving environmental clean up liability or even conventional security costs.

A 2006 GAO report (GAO–06–150), *Homeland Security DHS Is Taking Steps to Enhance Security at Chemical Facilities, But Additional Authority Is Needed*, concluded, "Implementing inherently safer technologies potentially could lessen the consequences of a terrorist attack by reducing the chemical risks present at facilities, thereby making facilities less attractive targets."

A Government Accountability Office report (GAO–05–165) identified chlorine gas and 90-ton chlorine rail cars as "among the top five terrorist-related wastewater system vulnerabilities." Among the top three recommendations: "Replacing gaseous chemicals used in wastewater treatment with less hazardous alternatives." In addition, the largest majority of experts gave replacing these chlorine facilities the highest priority for Federal funding.

Examples of Safer Technologies at Water Facilities

For example, the Blue Plains sewage treatment plant in Washington, DC halted its use of chlorine and switched to safer chemicals just 8 weeks after the 9/11 attacks due to fears of another attack. The plant had seven rail cars of chlorine on site following the 9/11 attacks. The conversion only cost approximately $0.50 per year for each water customer. In other words, by using safer technologies we can neutralize and eliminate targeting by terrorists and prevent catastrophic accidents as well at negligible costs.

Switching to safer "drop-in" chemicals, such as relatively harmless sodium hypochlorite (liquid bleach) without a long-term plan can leave lingering risks in communities where the bleach is produced. While switching to bleach at a sewage plant clearly eliminates the immediate hazard at that facility, the bleach formulators who use and store large quantities of chlorine gas to make bleach still pose serious risks to workers and surrounding communities. In July 2006, KIK Custom Products, which operates 23 plants in the United States and Canada, announced plans to commercialize a new process that will eliminate the need to receive large shipments of chlorine gas. See details at: *http://www.k2pure.com/*.

These bleach and water disinfectant formulators are well positioned to guide their customers toward other safer alternatives such as ozone and ultra-violet light (UV) which are widely available and do not pose catastrophic hazards. UV is superior to chlorine or chlorine bleach because it also kills deadly anthrax and the parasite cryptosporidium which chlorine does not. In 1993 more than 100 people were killed and 400,00 were made sick by cryptosporidium when it overwhelmed the chlorine-treated drinking water system of Milwaukee, Wisconsin.

State Preemption

As the DHS acknowledged in their proposed rule, "Sec. 550 was silent on preemption" of States' authority to set stronger security standards. However, the DHS chose to assert Federal preemption without statutory authority in an apparent effort "to preserve chemical facilities flexibility to choose security measures." Fortunately, this provision was reversed in an amendment to Sec. 550 by Senator Frank Lautenberg (D–NJ) in the DHS omnibus spending bill in December 2007. However, the interim law expires in October 2009. Any permanent legislation must clearly retain the right of States to set more protective standards than the Federal Government.

While few would argue that the Federal Government should not preempt States' authority to establish minimum standards, it is self-defeating to bar States from setting stronger security standards by establishing a Federal limit or ceiling on security protections.

The Federal Government should welcome every State pitching in to address the unique situation it faces. New Jersey was the first State to implement a chemical security program that requires an assessment of safer, more secure technologies. According to Governor Corzine, a federally mandated rollback of New Jersey's protections "could have the effect of weakening chemical security and leaving New Jersey

and its neighbors—including New York City—more vulnerable to devastation from a terrorist attack on our chemical facilities."

The DHS appeared more concerned about protecting industry exposure to State tort liability when it asked: "How could State tort law impose liability for actions specifically approved under a Federal program?" Is DHS attempting to shield chemical facilities from State tort suits? How does this contribute to the safeguarding of communities from existing and preventable threats?

Risk-Based Performance Standards & Safer Technologies

A safer technology provision was contained in the 2006 House Homeland Security Committee passed bill, H.R. 5695. That bill required priority chemical facilities to utilize safer, more secure technologies, where feasible and cost effective to reduce or eliminate the magnitude of an attack on a chemical facility. By substituting inherently dangerous chemicals or processes with inherently safer technologies (IST) the risk of a catastrophic release at a chemical plant can be eliminated or dramatically reduced. IST is the best tool available to completely mitigate facility vulnerabilities and safeguard communities.

The DHS has wide discretion to establish "risk-based performance standards." The DHS could have chosen to establish performance standards that deter an attack or mitigate the consequence of an attack by safeguarding, reducing or eliminating the risk or desirability of the facility as a target. This could have been achieved by issuing guidance to suggest that counter measures include the use of safer, more secure technologies to meet the performance standard or opt out of the regulations entirely.

In fact, the DHS mentioned in their *Federal Register* notice of proposed rulemaking, Annex B, page 78315, that a "security event may be larger than the typical EPA Risk Management Program (RMP) worst-case analysis." In a 2001 U.S. Army Surgeon General study estimated that 900,000 to 2.4 million people could be killed or injured in a terrorist attack on a U.S. chemical plant in a densely populated area. According to the Environmental Protection Agency (EPA), 106 chemical plants threaten a million or more people. Chlorine gas is the most common industrial chemical hazard at the 100 highest-risk plants. According to the Chlorine Institute, a chlorine gas cloud can drift through a city and remain dangerous for at least 14 miles and 20 to 25 miles in rural areas.

These alternatives include a wide range of options such as process changes, chemical substitutions, smaller storage vessels or any other measures that will reduce or eliminate the inherent hazard posed by the facility's storage, use or production of an ultra-hazardous substance. This range of options is far from requiring any "particular security measure," it is up to the plant operator to choose which safer technology, process, chemical or storage vessel reduces or eliminates these risks.

Only about 13 percent of the universe of facilities in the EPA's Risk Management Program (RMP) are members of the chemical manufacturers trade association, the American Chemistry Council. Whereas the overwhelming majority of RMP facilities are chemical users, including: petroleum refineries that use hydrogen fluoride; power plants that use anhydrous ammonia and water treatment plants that use chlorine and sulfur dioxide gas. All of these have safer alternatives already widely in use at hundreds of facilities.

Benefits of Safer Technologies

The use of safer technologies offers a more competitive and stable business plan with fewer regulations, potentially zero liability, sustainable profitability, better relationships with workers and neighboring communities and no threat of a catastrophic attack or accident. Specifically, the use of safer technologies will likely result in a facility no longer being subject to DHS's CFATS regulations.

Obviously, chemical facilities located on-site at nuclear power plants, water treatment works, iconic facilities such as Disney World, Camp David, etc. also need to be considered for priority protection. However, using safer technologies as a countermeasure at these facilities will lessen the lethality that an attack on them would pose. DHS will also be able to better utilize its limited resources ($25 million for fiscal year 2008) for more effective use of conventional security measures to defend against and respond to attacks on targets even where a chemical risk is removed.

Given DHS's finite resources and the late start the Nation has in addressing chemical security it is urgent that we use safer technologies to mitigate the consequence of an attack. By doing so we eliminate risks, safeguard communities and save scarce money and resources to protect targets that cannot be so neutralized (airports, U.S. Capitol, etc.).

The Annex in the DHS proposed rule suggests that plant owners and operators should assume that "international terrorism" is possible at every facility. A better

assumption would be to recognize that every plant could be the target of someone no one anticipated. The bombing of the Federal Building in Oklahoma City in 1995 was initially thought to be committed by "Middle Eastern terrorists." It turned out to be the insane act of a U.S. Army-trained Gulf War veteran. How many more Americans have been trained in the art of war since then? Other incidents and threats ranging from Columbine, to international drug cartels and the spectacularly failed intelligence leading up to the 9/11 attacks, makes guessing where such an attack will come from nothing more than a fool's errand. The only prudent thing to do is attempt to remove unnecessary vulnerabilities as soon as technically feasible. Even without terrorist attacks, we will save countless lives in accident prevention.

Top Tier High-Risk Facilities

According to a June 2005 Congressional Research Service report examining EPA's RMP database, the EPA has identified 6,883 facilities that each put 1,000 or more nearby residents at risk and 553 of these put 100,000 or more people at risk.

However, using a methodology that includes only ⅙th the area surrounding a plant, the Department of Homeland Security (DHS) has estimated at different times a range of 3,400 to 4,391 chemical facilities that each put 1,000 or more people at risk. Of these DHS identified 272 facilities that each put 50,000 or more people at risk. The DHS calculation looks at a 60 degree "kill zone" downwind from a facility. The EPA's RMP program uses a methodology that creates a 360-degree "vulnerability zone" around a facility. Under the RMP, chemical plant owners and operators submit worst-case disaster scenarios using U.S. Census data to calculate the number of people living in each "vulnerability zone." In Annex B of the DHS proposed rule on FR page 78315 warns, "the security event may be larger than the typical EPA RMP worst-case analysis."

At a minimum, any facility that endangers 1,000 or more people should be considered a "top tier" or "high-risk" facility.

Alternative Security Plans (ASPs)

The new DHS rule allows the high priority facilities in Tier 1 and 2 to use ASPs for their Site Security Plans. However, these same facilities cannot use ASPs for their Security Vulnerability Assessments.

ASPs were written by and for oil and chemical industry trade associations. All of them avoid requiring safer technologies and do not represent the best way to safeguard communities at risk. Congress should not allow the DHS to substitute ASPs for Site Security Plans for high priority facilities.

Consultation With Other Agencies

As a new department with minimal resources, the DHS should routinely collaborate and consult with other more experienced Government agencies. In their January 2006 report (GAO–06–150) the Government Accountability Office concluded, "By tapping EPA's expertise on chemical facilities and general facility safety issues, DHS can enhance its efforts to identify high-priority facilities and assess facility vulnerabilities as well as better target Government resources to those facilities posing the greatest risk."

Congress should require the DHS to consult with the EPA as the GAO recommended and develop guidance documents to rapidly identify high-risk facilities and promote the use of inherently safer technologies as a mitigation and countermeasure technique to reduce risks and safeguard communities. Similar consultation with the U.S. Chemical Safety and Hazard Investigation Board, which has enormous experience in diagnosing chemical accidents and recommending mitigation techniques, should be aggressively pursued.

Buffer Zones

According to the EPA (Belke, 2000), the high number of facilities that put residents at risk as far as 14 to 25 miles away from a release "is primarily due to the prevalent use of 90-ton rail tank cars for chlorine storage." The Chlorine Institute pamphlet 74, "Estimating the Area Affected by a Chlorine Release" (1998), shows a plume can be hazardous up to 41.5 miles.

The Bureau of Alcohol Tobacco, Firearms, and Explosives regulations (27 CFR 555.218) prohibits the storage of a similar quantity of explosives within 2,010 feet of inhabited buildings.

In 2006 the Netherlands and Akzo Nobel completed a $270 million program to relocate chlorine production facilities within Holland to a location that will eliminate the transport of chlorine by rail in the Netherlands.

Given the large potential plume of toxic-by-inhalation substances and large quantities of some flammables such as propane, a much larger buffer zone is called for with regard to high risk TIH facilities.

Without the use of safer technologies to convert existing plants into safer functioning plants, relocating them to more remote areas should be a an option, especially if an owner/operator insists that there is no safer alternative.

Short of relocation, the DHS should be required to issue guidance to mitigate these threats by using smaller storage vessels that would help reduce risks, deter and discourage potential attackers. In addition, the DHS should facilitate owner/operator collaboration with local government and emergency responders to conduct practice evacuation drills. If a plant cannot substantially reduce its risks, the owner/operators and government agencies have an obligation to ensure that at-risk citizens can reasonably be evacuated.

New facilities should be prohibited from locating in densely populated areas.

Brief History of Federal Inaction

While the DHS proposed rule issued December 28, 2006 contained a "Brief History of Federal Pre-Existing Chemical Security and Safety Programs," it ignored the "general duty clause" in Section 112r of the 1990 Clean Air Act which gives the President and the Environmental Protection Agency (EPA) broad authority to require chemical facilities to prevent catastrophic releases of poison chemicals. After drafting legislation, guidance and regulations in June 2002, the administration withdrew it's proposals, in part, under pressure from the oil and chemical industry.

On July 22, 2004 "The 9/11 Commission Report" identified four failures in preventing an attack by the U.S. Government the first of which was the failure of "imagination." A continuing lack of imagination today exposes millions of Americans to Bhopal magnitude risks largely because new laws or regulations have not yet been adopted to clarify the chemical industry's obligation to prevent catastrophic releases at U.S. chemical plants. In June, 2002 a promising proposal drafted by the EPA could have completed the first phase of such a program by the middle of 2003 but it was derailed by the White House in the fall of 2002. It was not unlike a bill (S. 1602) authored in 2001 by Senator Jon Corzine (D–NJ) and based on a bill introduced by Senator Frank Lautenberg (D–NJ) in 1999.

The EPA's 2002 proposal included "substituting less hazardous chemicals for extremely hazardous ones." The conversion of Washington, DC's main sewage treatment plant from chlorine to safer chemicals, just 8 weeks after 9/11, exemplifies the feasibility of such a strategy. At the time of the attacks they had 7 90-ton rail cars of chlorine stored on-site.

Of the 15,000 facilities required to report their worst-case chemical disaster scenarios to the EPA's RMP, 7,728 plants pose an "off-site consequence" (OSC) to more than 1,000 people. Approximately 100 facilities reported an OSC to the EPA putting 1 million or more people at risk. Approximately 65 percent of these facilities' "worst-case-scenarios" are chlorine disasters. Rather than address these risks through the new regulations suggested by the EPA, the DHS used a new methodology that downsized the priority list of chemical plants by 43 percent to 3,400 facilities that put 1,000 or more people at risk.

EPA's 2002 chemical security proposal was slated for a media "rollout" at the White House. According to draft documents, "higher priority chemical facilities should be able to complete a vulnerability assessment and address security vulnerabilities as described in the guidance in 12–18 months." In other words many facilities could already have eliminated or reduced their hazards by early 2004.

EPA's 2002 documents included a question-and-answer sheet for EPA Administrator Whitman which said, "Using existing authority under the Clean Air Act, we believe that the guidance and regulation I have announced today are the quickest paths to improving chemical facility security . . . If we later find that there are legislative gaps, then we will consider seeking legislation."

Ultimately, the reversal by the Bush administration and the lobbying pressure by the industry (American Chemistry Council, American Petroleum Institute, etc.) paid off and chemical security legislation was excluded from the Homeland Security Act signed into law in November 2002.

In March, 2003 a report by the General Accounting Office (GAO) concluded "EPA has not attempted to use these Clean Air Act provisions [because] EPA is concerned that such an interpretation would pose significant litigation risk". The GAO concluded that chemical facility security would be more effectively addressed by passage of specific legislation.

In December 2003 President Bush further undermined EPA's authority and issued a directive (Directive/HSPD–7) limiting EPA's role on chemical security to "drinking water and water treatment systems." Under questionable legal authority, this directive attempts to shift responsibility for 15,000 chemical plants to the DHS, which at the time had no legislative authority, experience or inclination to regulate this industry.

In January 2005, former White House homeland security deputy, Richard Falkenrath told the Senate Homeland Security and Governmental Affairs Committee, "the Federal Government has made no material reduction in the inherent vulnerability of hazardous chemical targets inside the United States. Doing so should be the highest critical infrastructure protection priority for the Department of Homeland Security in the next 2 years."

In his book, "America the Vulnerable" Stephen Flynn, of the Council on Foreign Relations warned, "The chemical industry deserves urgent attention because the stakes are high, the opportunities for terrorists are rich, and no credible oversight process exists. It is the very ubiquity of the U.S. chemical industry that gives it potential to be a serious source of national alarm."

In 2006 an intensive industry lobbying campaign successfully killed comprehensive chemical security legislation (H.R. 5695 & S. 2145) that was voted out of the authorizing committees in the House and Senate in 2006. Instead, the industry worked closely with Republican leaders to draft a 740-word "rider" to the 2007 DHS Appropriations bill. The only major concession they made was to keep it an "interim" 3-year statute until Congress enacts permanent legislation. In 2007, the industry is urging Congress NOT to change this temporary statute.

To better understand the lobbying resources the industry used to derail legislation in 2006 we surveyed the lobbying records of the relevant industries in the Office of the Secretary of the Senate at: *http://sopr.senate.gov*.

Greenpeace identified 215 industry lobbyists that listed chemical security as part of their portfolio in 2006. Based on their lobby reports we estimate that industry lobbyists spent between $16.4 and $74.5 million (less than half of their total reported spending) to lobby on chemical plant security legislation in 2006. Lobby organizations identified included 13 trade associations such as the American Chemistry Council (ACC), American Petroleum Institute (API), U.S. Chamber of Commerce (including CEO Thomas Donahue), Edison Electric Institute (EEI), 30 member companies such as Dow Chemical, ExxonMobil and Halliburton and 13 lobby firms such as Akin & Gump and Holland & Knight.

In comparison, the 2007 fiscal budget for chemical security at the DHS was only $10 million. DHS is asking for an increase of $15 million for a total of $25 million for their 2008 fiscal budget on chemical security.

Our survey of lobbying records may have underestimated industry spending because we excluded lobbyists who did not specifically list chemical security legislation on their lobby reports. A notable example, the National Association of Manufacturers (NAM) was not included in the survey even though they registered to lobby on chemical security in 2005, signed on to industry letters in 2006, and formally commented on DHS proposed regulations in 2007. As a result, none of NAM's 56 lobbyists and $15 million budget were not counted as part of this lobbying campaign. It is unclear whether this is a violation of the LDA or the result of a split within the NAM.

Alternatively, member companies of the Association of American Railroads (AAR), such as CSX, BNSF & Norfolk Southern, are also members of NAM. Yet the AAR testified in support of the use of safer chemicals as a way to eliminate industry vulnerability and liability to potential terrorist attacks on rail cars carrying hazardous chemicals.

Of the 215 chemical security lobbyists we identified, 90 directly represent the ACC (the trade association of major chemical manufacturers), or its member companies. However, the 2,000 chemical plants owned and run by ACC members account for only 13 percent of the 15,000 chemical facilities the EPA has identified as posing a risk to communities. Most of the rest are "users" of chemicals such as refineries, water treatment plants, power plants and paper mills. It is in these sectors where more than 200 plants have converted to safer chemicals or processes since 9/11.

Our survey also identified chemical front groups and allies such as the Agricultural Retailers Association (ARA), led by Dow and other large firms and the Farm Bureau. Every lobbyist registered with the ARA as well as the Farm Bureau also reported lobbying on chemical security in 2006 even though most high-risk plants are not located in rural areas.

Deadly Accidents

The 1984 Union Carbide's Bhopal, India plant had the worst industrial accident in history. Forty tons (half a rail car) of methylisocyanate (MIC) leaked into the community at midnight killing 8,000 people within days and claiming another 12,000 lives since.

In June, 2004, three people were killed in a train accident in a remote area southwest of San Antonio, Texas when a tank car carrying chlorine broke open in the 25 mph crash, releasing a portion of the tank car contents.

On January 6, 2005 ten people were killed, 58 hospitalized and hundreds sought treatment in Graniteville, South Carolina when chlorine was released again when one train slammed into a parked train in the middle of the night. The cars involved were allegedly state-of-the-art construction.

Both of these tragedies could have resulted in a much higher number of fatalities and injuries if they had occurred in densely populated areas.

Comprehensive and Permanent Chemical Security Legislation Is Urgently Needed

We have lost over 6 years since the 9/11 attacks. Legislation in name only will not protect communities. Programs limited to fence-line or perimeter security will not prevent an attack or eliminate the consequence of a successful attack.

A key test of whether chemical facility security legislation will protect the millions of Americans still at risk is whether it contains minimum standards and truly protective provisions that:

- Require all plants to assess the feasibility of safer more secure methods and technologies that can eliminate the consequences of an attack on a chemical plant.
- Require "high-risk" facilities to use safer methods, technologies or chemicals.
- Ensure that the 3,400 to 4,400 facilities that DHS identified as posing a risk to 1,000 or more people are included in the "high-risk tier."
- Includes protection of approximately 3,000 U.S. water treatment plants and other chemical facilities currently explicitly exempted by the temporary law.
- Expedite deadlines by when DHS will require and approve Site Security Plans.
- Require meaningful involvement of plant employees in developing Security Plans.
- Include whistle-blower protections to enhance enforcement.
- Provide basic information to the public on facility compliance or non-compliance of the law.
- Ensure the right of all States to establish stronger security standards.
- Enhance enforcement by allowing citizen suits.

Q & A on Sec. 2110 "Methods to Reduce the Consequences of a Terrorist Attack"

Are all facilities required to use or implement safer methods or technologies?

No. Only facilities in the "high-risk" tier would be required to implement safer methods or technologies. Other facilities would merely be required to assess safer methods.

What if it is not feasible or too costly to implement safer methods or technologies?

No facility would be required to implement safer technologies if they are either infeasible or too costly or would result in greater risks.

Will converting high-risk plants to safer methods or technologies financially burden chemical facilities?

No. A survey by the Center for American Progress identified 284 facilities that switched to safer methods since 1999. They found that 87 percent spent less than $1 million, and one half reported spending less than $100,000. Thirty-four percent of survey participants expected to save money or improve profitability because safer methods reduce the need for barriers, secondary containment, security training, and liability concerns. The Washington, DC sewage treatment plant converted 90 days following the 9/11 attacks for less than $0.50 per water customer per year.

Will this result in shifting risks rather than reducing them?

No. Safer methods will not be required unless they "significantly reduce" the consequences of an attack. The DHS will also ensure that facilities use methods that significantly reduce risks at a plant and do not accept halfway steps that merely shift risks elsewhere. In fact, there are now hundreds of real-world examples of water treatment, electric power plants and petroleum refineries that have already switched without shifting risks.

Will requiring high-risk facilities to use safer methods put the DHS in the business of micromanaging chemical facilities?

No. Facilities are free to choose any of their own methods or opt out if they can show the DHS that there is no feasible, cost-effective or safer method for their facility (see list of examples below).

Is it the role of government to require safer methods to be used in the private sector?

The FAA has issued regulations on security and safety for decades. The feasibility and cost-effectiveness are routinely considered and balanced against security and safety needs. For example, after 9/11 detailed regulations to harden cockpit doors were sped into force for thousands of different jet liners and airplanes, and X-ray machines for all airline baggage were mandated at hundreds of airports.

Is this proposal more appropriate in environmental legislation than in a security bill?

No. The June 2006 National Academy of Sciences study, commissioned by the DHS, endorsed the adoption of safer technologies as "the most desirable solution to preventing chemical releases" from terrorist attack. The Association of American Railroads in testimony before Congress said, "Railroads agree, and strongly support efforts aimed at finding and utilizing 'inherently safer technologies' as substitutes for hazardous materials, especially TIH."

Range of Examples of Safer Methods Included but not Limited to in Sec. 2110

"METHOD TO REDUCE THE CONSEQUENCES OF A TERRORIST ATTACK.—For purposes of this section, the term 'method to reduce the consequences of a terrorist attack' includes—

(1) input substitution;
(2) catalyst or carrier substitution;
(3) process redesign (including reuse or recycling of a substance of concern);
(4) product reformulation;
(5) procedure simplification;
(6) technology modification;
(7) use of less hazardous substances or benign substances;
(8) use of smaller quantities of substances of concern;
(9) reduction of hazardous pressures or temperatures;
(10) reduction of the possibility and potential consequences of equipment failure and human error;
(11) improvement of inventory control and chemical use efficiency; and
(12) reduction or elimination of the storage, transportation, handling, disposal, and discharge of substances of concern."

Additional Expert Opinions on Safer Technologies

2006 GAO report (GAO–06–150), *Homeland Security DHS Is Taking Steps to Enhance Security at Chemical Facilities, But Additional Authority Is Needed*, concluded, "Implementing inherently safer technologies potentially could lessen the consequences of a terrorist attack by reducing the chemical risks present at facilities, thereby making facilities less attractive targets."

May 2006 report by the National Academy of Sciences, "Terrorism and the Chemical Infrastructure: Protecting People and Reducing Vulnerabilities," recommended more research on new technologies but stated, "The most desirable solution to preventing chemical releases is to reduce or eliminate the hazard where possible, not to control it. This can be achieved by modifying processes where possible to minimize the amount of hazardous material used, lower the temperatures and pressures required, replace a hazardous substance with a less hazardous substitute, or minimize the complexity of a chemical process."

"Railroads agree, and strongly support efforts aimed at finding and utilizing 'inherently safer technologies' as substitutes for hazardous materials, especially TIH."—Association of American Railroads (AAR) President, and CEO Edward R. Hamberger in testimony before the House Transportation and Infrastructure Committee's Railroad Subcommittee.

Retired Rohm and Haas engineer, Dennis Hendershot advised, "The first solution to a process safety problem should always be to get rid of the hazard, not control it."

Trever Kletz, formerly with Imperial Chemical Industries (ICI) said, "The very best way to prevent an explosion is to simply replace the material that explodes with one that does not or at least keep the stock down so low that it hardly matters if it all leaks out."

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STATEMENT OF RUSSELL MELANCON, PRESIDENT AND CEO, INDUSTRIAL SAFETY TRAINING COUNCIL

FEBRUARY 26, 2008

I. INTRODUCTION

My name is Russell Melancon and I am the President and Chief Executive Officer of the Industrial Safety Training Council (ISTC). I want to thank you Mr. Chairman and Members of the committee for this opportunity to submit written testimony re-

garding the proposed Chemical Facility Anti-Terrorism Act of 2008. This testimony supports the ISTC's legislative recommendations to accomplish the following four goals:

- Make explicit that a chemical facility that is also a regulated facility under the Maritime Transportation Security Act (MTSA) must comply with the Chemical Facility Anti-Terrorism Act of 2008 and/or related regulations for personnel surety purposes;
- Provide legislative authority for public and private sector entities, which obtain a personnel surety Alternative Security Program (ASP) designation, to submit names to the Department of Homeland Security (DHS), or a designated agency such as the Transportation Security Administration (TSA), for processing against the Consolidated Terrorist Watch List;
- Provide legislative authority for public and private sector entities, which obtain a personnel surety ASP designation, to submit fingerprints to the Criminal Justice Information Service (CJIS) at the Federal Bureau of Investigation (FBI) so as to supplement the ISTC's existing identification verification process and also supplement the ISTC's existing criminal history background check; and
- Establish a method by which public and private sector entities, which obtain a personnel surety ASP designation, may submit names to the appropriate Federal agency in order to perform a range of immigration status checks.

II. BACKGROUND

The ISCT is a 501(c)3 not-for-profit training and educational organization located in Southeast Texas. The ISTC and thirteen other safety councils, located throughout Texas, the Gulf Coast, and several other States, comprise the Safety Council Security Consortium (SCSC). Both the ISTC and the SCSC are key parts of the highly regulated chemical industry. Together, the ISTC and the SCSC operate an established, highly successful and comprehensive identification verification and background screening process for contractors and their employees as well as facility employees working at over 75 chemical and refining facilities. The ISTC also provides safety training and site-specific job safety orientations for facility workers.

The ISTC/SCSC identification verification employs a layered identification process using several identifiers, including Social Security numbers, dates of birth, and a visual comparison of an individual against a photograph on a Government-issued identification document. The identity verification portion of the ISTC/SCSC process is completed in an average of 20 minutes. The ISTC/SCSC has conducted identification verification checks on more than 300,000 workers seeking admittance to chemical and refining facilities.

The ISTC/SCSC has also conducted comprehensive criminal history background checks on almost 200,000 of these workers. When a participating chemical or refining facility hires a contractor or new employee, the facility sends the worker to the appropriate safety council for training and background screening. The ISTC/SCSC utilizes a nationally recognized consumer reporting agency (CRA) to conduct these background checks. This CRA is experienced in conducting name-based background screening and is fully compliant with all of the privacy and consumer protections in Federal and State Fair Credit Reporting Acts.

The background check searches criminal history records on Federal, State, and local levels, including physical searches of court-based State and local criminal history records. All criminal history checks search felony and misdemeanor convictions (from the previous 7 years), pending arrests, outstanding warrants, and deferred adjudications. Additionally, the screening process includes a search of motor vehicle reports as well as a Patriot Act search against the Office of Foreign Assets Control (OFAC) lists, which contain the names of individuals who are "specially designated nationals," and who are "blocked" from conducting business with U.S. persons for various reasons.

The rejection rate for the baseline background screening process is 5 to 8 percent. The ISTC/SCSC screening program works rapidly to provide the results of a full screen in an average of 2 days time, allowing workers to begin jobs quickly. This is especially important due to the near reliance on transient workers at chemical and refining facilities. The ISTC/SCSC background screening process is both thorough and timely, but it is also cost-effective. The ISTC/SCSC is able to perform the identification verification and background screening process for an initial fee of about $55 per worker.

The ISTC/SCSC process also provides, in addition to the rigorous baseline background screening, a customized series of additional services, which allow chemical and refining facilities and their contractors to obtain various types of background checks based upon the facility's and/or the contractor's specific security needs and

preferences in view of an individual's expected duties and responsibilities at a facility. These additional checks can include:

- Civil records of lawsuits filed by or against the applicant;
- Educational verification;
- Prior employer verification;
- Military records checks;
- Credit checks;
- Professional licenses and registration checks;
- Numerous other categories of background data including license verification and workers' compensation reports; and
- Background screens run by the previous employers of an applicant.

Once the identification verification and background screen is complete, the ISTC/SCSC process returns a graded or tiered report, which chemical and refinery facility owners and operators use to make a risk-based determination of whether the individual's background is appropriate for a particular assignment.

The ISTC/SCSC graded reports present an individual's grade using a number scale:

- An individual with a clear record, or no hits, would receive a grade of "00;"
- An individual with hits for non-violent misdemeanors would receive a grade of "01;"
- An individual with hits for violent misdemeanors would receive a grade of "02;"
- An individual with hits for lesser felonies would receive a grade of "03;"
- An individuals with hits for 03 felonies, and 02 misdemeanors would receive a grade of "04;"
- An individual with hits for more serious felonies would receive a grade of "05;"
- An individual with hits for 05 felonies, and 02 misdemeanors would receive a grade of "06;" and
- An individual that showed hits on the Patriot Act (OFAC) search would receive a grade of "07."

Most applicants have a clear record, or a record with only non-violent misdemeanors:

- About 77 percent of the graded background screens return a grade of 00;
- About 11 percent return a grade of 01;
- About 4 percent return a grade of 02;
- About 1 percent return a grade of 03;
- Less than 1 percent return a grade of 04;
- About 5 percent return a grade of 05;
- About 1 percent return a grade of 06; and
- Less than 1 percent return a grade of 07.

Finally, the ISTC/SCSC background check process from the initial application to the graded report is privacy-protective and applicant-friendly. Because the ISTC/SCSC background screening program represents an industry, non-governmental solution incorporating a national CRA, the process is fully compliant with State and Federal Fair Credit Reporting Act (FCRA) requirements, as well as all relevant State and Federal privacy protections. In compliance with State and Federal FCRAs:

- Criminal history information older than 7 years is not reported.
- Only open arrests and criminal convictions are reported.
- Potential employers provide applicants with "pre-adverse action" notification if the report returns information that would preclude the applicant from receiving a job or being denied access to a chemical or refining facility site based on information in the screen results. This notice must be sent before the employer takes any adverse action.
- The applicant has rights under the FCRA to dispute negative information and have inaccurate information corrected.
- The employer must allow a "reasonable" time for the applicant to dispute negative information before taking an adverse action.

III. LEGISLATIVE RECOMMENDATIONS

Section 550 of the Chemical Facility Act required DHS to promulgate regulations "establishing risk-based performance standards for security of chemical facilities." Pub. L. 109–295, sec. 550. Accordingly, on April 2, 2007, DHS expressly and appropriately adopted a regulatory approach in the DHS Chemical Facility Anti-Terrorism Standards (CFATS) regulations that increases the level of security as the level of risk increases. This risk-based, tiered approach to security reflects the fact that the working environment in chemical and refining facilities is unique to the chemical industry and presents unique challenges.

A private sector solution to personnel surety requirements is consistent with the "alternative security program" (ASP) approach in the CFATS regulations. The ISTC/SCSC recommends an ASP system that allows the chemical industry to use authorized third parties to help meet personnel surety requirements. The ISTC/SCSC process is a uniform and consistent credentialing system with high recognition value in the areas in which the ISTC/SCSC process operates. More than 75 chemical and refining facility owners and 2,240 contractor companies participate in the ISTC/SCSC process. As described earlier, the ISTC/SCSC process is comprehensive and proven to provide its chemical industry participants with an appropriately high level of security. The ISTC/SCSC technologies are already in place, and the system has been producing successful results for many years. Chemical and refining facilities should be permitted to continue using established personnel surety solutions under any new regulatory regime.

However, in order for the ISTC/SCSC process and other private sector personnel surety alternatives to be approved by DHS as an ASP, the private sector must be able to demonstrate that the ASP can provide a level of security equal to or greater than that provided by a Government-based approach. Therefore, in order for the ASP system to have any meaningful effect, private sector entities require the same level of access to necessary security information as is provided under other Government-based personnel surety solutions. In order to preserve the highly effective personnel surety processes currently in place at chemical and refining facilities Nationwide, the ISTC recommends that the proposed Chemical Facility Anti-Terrorism Act include provisions that:

- Make explicit that a chemical facility should be regulated as a chemical facility and not as a maritime facility for personnel surety purposes;
- Allow private sector ASPs to submit names to DHS for processing against the Consolidated Terrorist Watch List;
- Allow private sector ASPs to submit fingerprints to the FBI's Criminal Justice Information Service (CJIS) database for identification verification and a criminal history background check; and
- Establish a method by which private sector ASPs may submit names to the appropriate Federal agency in order to perform immigration status checks.

A. Regulate Chemical Facilities as Chemical Facilities

In compliance with the existing CFATS regulations, the ISTC/SCSC process provides a robust, nuanced, responsive, privacy-sensitive and inexpensive identification verification and background check that satisfies the risk-based performance standards set forth in CFATS. The chemical industry should be permitted to continue to use personnel surety processes and procedures developed to satisfy the industry's unique security challenges. The ISTC/SCSC believes that applying outside solutions, such as the Transportation Worker Identification Credential (TWIC) program to ISTC/SCSC participating chemical and refining facilities would be inappropriate because TWIC lacks many characteristics of the existing ISTC/SCSC process.[1]

- The strength of the ISTC/SCSC process allows chemical and refinery owners and operators greater flexibility to decide whether an individual should be permitted any unescorted access within the facility or whether the individual should be restricted to employment in non-sensitive areas. TWIC merely provides a pass/fail clearance for a worker to access the entire facility without distinguishing which workers may enter more sensitive areas within the facility. Under TWIC, an individual who is denied a credential is also denied the possibility of any form of employment.
- As stated under the DHS Chemical Regulations, DHS believes that the level of screening for employees should be commensurate with the level of access provided. The ISTC/SCSC screening process provides exactly this kind of nuanced approach. The TWIC enrollment program merely identifies whether an applicant is eligible or ineligible to receive a TWIC. Industry stakeholders have expressed concerns that certain disqualifying offenses may be too stringent under TWIC and could lead to employees unnecessarily losing their jobs regardless of the level of security risk which their particular employment may present.
- As discussed earlier, the chemical industry's heavy and necessary reliance on transient workers requires that these workers be credentialed quickly. According to the TWIC proposed rule, it could take 30 to 60 days for the TSA to per-

[1] On October 13, 2006, the President signed into law the Security and Accountability for Every Port Act (SAFE Port Act) amending the Maritime Transportation Security Act of 2002. These laws require DHS to develop a biometric credential to serve as a transportation security card allowing individuals to gain access to secure areas of a vessel or maritime facility. The TWIC process was developed to implement the SAFE Port Act.

form background checks, produce the TWIC cards, and issue these cards to employees.

- Because of the transient nature of chemical industry employment, neither employees nor employers find it financially attractive to invest significant moneys on a credential that an employee may carry for only a few short months. In contrast to the ISTC/SCSC baseline check at a cost of $55, a new TWIC card must be purchased by the employee for $132.
- The ISTC/SCSC process is in place right now and continues to process thousands of prospective workers each week. It is a proven process with many years of recorded success. TSA has made progress toward full implementation of the TWIC program, but only in the maritime sector and without a strict timeline for completion. TWIC is not ready for full-scale implementation in chemical and refining facilities across the country.

Implementation of the TWIC process for personnel surety could well result in a personnel surety gap while facilities wait for the TWIC process to become fully operational. Distribution of access cards to employees through an incomplete TWIC process without adequate compliance with personnel surety requirements could allow persons who pose a terrorist threat to compromise a chemical or refining facility. Chemical facility security requires a risk-based and performance-based approach that is not met by the standards set for the maritime sector.

B. The Consolidated Terrorist Watch List

In order to ensure that private sector entities have a meaningful ability to provide the level of security necessary to qualify as an ASP under the proposed legislation, the ISTC/SCSC recommends that the proposed legislation permit ASPs to submit names for checking against all Federal watch lists and anti-terrorist databases. DHS already provides a process for TWIC vendors to submit names to the TSA to be checked against the Consolidated Terrorist Watch List. DHS should assure that the same comprehensive terrorist watch list check is conducted for applicants and employees of chemical facilities, contractor employees, and visitors requiring unescorted access to chemical facilities.

The ISTC and the SCSC have already submitted a request to DHS to enhance the ISTC/SCSC's ability to check for terrorist ties. DHS has indicated that it will, "designate a secure portal or other method for the submission of application data for each employee or contractor." The ISTC and the SCSC look forward to working with DHS to incorporate this step into the existing ISTC/SCSC process. The ISTC/SCSC recommendation would authorize DHS to move forward with any plans to allow owners and operators and their designated third party agents to submit names to be checked against the combined terrorist watch lists.

C. CJIS

The ISTC is planning to implement a fingerprint-based, live-scan "gatekeeper" system into its existing process. Under this system, individuals who qualify for an ISTC credential would obtain an identification card that includes a digitized representation of their fingerprints. That card, prior to entrance into a secure portion of the chemical facility, would be processed through a live-scan system which compares the digitized print on the card with the live fingerprint of the person seeking admittance.

To make the collection and use of worker biometric information more than just a tool for identification verification, the ISTC/SCSC supports inclusion of language in the proposed bill that would allow the ISTC and all ASPs providing personnel surety solutions the authority to submit to CJIS the fingerprints of workers and other individuals requiring unescorted access to chemical and refining facilities. The ISTC advocates that all approved ASPs have the ability to include a search of FBI criminal history records to supplement already robust identification verification and criminal history background check processes.

D. Immigration Checks

The ISTC/SCSC process has the ability to include a customized series of immigration checks that can supplement the baseline search. However, as additional Federal programs are developed to monitor various immigration records, such as immigration status and employment eligibility, the ISTC/SCSC endorses legislative language that would ensure that private sector ASPs may participate in these programs.

IV. CONCLUSION

Today, the need to maintain high levels of security at chemical and refining facilities is self-evident. The ISTC/SCSC recommends that if a chemical or refining facility has identified a private sector solution that can meet the personnel surety needs

and legal requirements at a particular facility, that customized solution should be preserved as an ASP under any proposed chemical facility security legislation. Chemical facilities should be regulated by chemical laws and regulations that reflect the unique needs of the industry. Thus, private sector ASPs that provide personnel surety programs should be enabled with access to the information necessary to fully and comprehensively perform these security functions.

The ISTC and the SCSC appreciate the opportunity to provide this written testimony, and we urge you to contact us if we can provide additional information concerning this vitally important matter.

Chairman THOMPSON. Mr. Stephan, I want to talk a little bit about the current CFATS regulation, and I want to talk a little bit about an example. Since our Ranking Member is here from the New York area and Mr. Pascrell is here from New Jersey, I will be a little more specific.

As I understand it, a plant that produces industrial chemicals like chlorine and is located 5 miles outside of New York City would be subject to chemical security regulations. Is that correct?

Mr. STEPHAN. Sir, that would depend on the chemical of interest that was part of the Appendix A list of approximately 322 chemicals at or above a certain threshold quantity defined in that appendix.

Chairman THOMPSON. All right. Now if that same plant was just outside of Manhattan but instead was a water treatment facility, would it have to implement chemical security safeguards?

Mr. STEPHAN. Sir, the CFATS regulatory program by congressional exemption does not apply to any wastewater or water treatment—wastewater or water facilities across the country.

Chairman THOMPSON. But I think you see where we are headed. That is a significant potential target of a facility such as that——

Mr. STEPHAN. Yes, sir.

Chairman THOMPSON [continuing]. And I think we are just trying to establish that as part of the record.

Mr. Wattier, do you have any opinion on that?

Mr. WATTIER. Well, I think I stated in my statement, sir, that we think it is a significant——

Chairman THOMPSON. Speak directly into the mike.

Mr. WATTIER. We think it is a significant issue, and that is why we are here today—at least I am here today—to suggest that the Homeland Security Department ought to have some authority over this matter to secure the chlorine.

Chairman THOMPSON. Can you share with us how you think IST has benefited your facility?

Mr. WATTIER. Well, in addition to obviously reducing the risk, which is our primary motivation, there would be a lot of other benefits of reducing the storage of chlorine on-site. There are a number of regulatory requirements that go along with the storage of gaseous chlorine that involve everything from worker training to there is obviously the public information aspect of this that would be much preferable if chlorine was not stored on-site. So there are a whole host of regulatory requirements that come in when you are handling gaseous chlorine that I think would be eliminated or streamlined by reducing or eliminating the amount of chlorine that you have on-site, the chlorine gas.

Chairman THOMPSON. Thank you.

Dr. Pulham, are those facilities owned by Siegfried presently in compliance with all New Jersey laws?

Mr. PULHAM. Yes, we are.

Chairman THOMPSON. In pursuit of those compliance laws I would assume that you committed considerable capital resources and man hours toward meeting those requirements?

Mr. PULHAM. We have, Mr. Chairman. But, in our business, pharmaceutical manufacturing, it is integrated with a process. So in developing a process and understanding its optimization IST is part of the process. It is not new to us. It is something that we have always done and have had to do to make our products safe not only for patients but also from exposure to employees.

Chairman THOMPSON. So as a normal, everyday business practice you look for, obviously, the safest technology possible?

Mr. PULHAM. Yes, sir. We look to optimize the processes. But, as I said in my comments, it is not that easy. Because we are regulated by FDA, we are regulated by DEA, our customers are also regulated by FDA. So for us to effect a change in a process can take from 2 to 3 years because of all the approvals that a change has to go through. But inherent in that review or the change in a process is, absolutely, safety and environmental concerns. It is all part of our daily development and optimization of chemical manufacturing.

Chairman THOMPSON. Thank you.

Mr. Stephan, we put in this proposed print a budget of about $325 million; and that basically takes into consideration moneys you are spending already. Have you had an opportunity to look at that number and do you have an opinion on it at this point?

Mr. STEPHAN. Sir, I have not had an opportunity to view any of the possible pieces of legislation or had any number associated with them so far.

As you know, we have put in a 2009 request for $63 million to cover current CFATS requirements in the current regulated community, which assumes around 5,000 facilities. If we would add, for example, water and wastewater treatment facilities, we could probably double or more the number of high-risk facilities that would enter the CFATS framework; and I am not certain whether or not that number includes new requirements dealing with Ammonium Nitrate point-of-sale registration and regulation.

Chairman THOMPSON. As well as some red team exercises and some other things?

Mr. STEPHAN. Yes, sir.

Chairman THOMPSON. I yield 5 minutes to the Ranking Member.

Mr. KING. Thank you, Mr. Chairman.

Secretary Stephan, let me just follow up on a point the Chairman was making before.

Let me also, at the outset, again commend you for the outstanding work I think you have done in your position. It is a thankless job. You are doing a terrific job at it, I believe, so I wanted to put that on the record.

Just to be clear, following up with what the Chairman said, do you believe it is important to include water and wastewater treatment facilities in the legislation?

Mr. STEPHAN. Sir, I think the additional regulatory authority is a very complex issue. But I think, as the Chairman or Secretary Chertoff has stated numerous times, that we do believe we have a gap in terms of the water sector or the wastewater sector across certain facilities. Just let me give you an example what I mean by that. This is kind of the same situation we had with the chemical industry writ large prior to CFATS.

Lots of people in the water and wastewater business have made important security investments and significant security investments since September 11. Others have not. For those that have made security investments, it is very difficult for me to measure the effectiveness of those investments against various or multiple terrorist threat vectors or hazards. So I do not have the knowledge of understanding that I do underneath the CFATS framework with respect to the water and wastewater world.

But we do have elements of that community, major elements of that community that are taking this very seriously. They have probably one of the best information-sharing networks that we have across our sectors. They have probably the best education, training and awareness programs for their sector members at the facility level of all the 17 critical infrastructure sectors, some of the most committed leadership on the part of the other Federal agencies, like the EPA, DHS, the FBI, State and local associations and the water sector or private council sector members themselves.

So, again, a complex situation, but we do believe there is a security gap inherent with the fact that these pieces do fall outside any established regulatory framework. It just makes them less-known quantities to us.

Mr. KING. Dr. Pulham, if I could ask you at a very practical level, is there any conflict in complying with New Jersey's inherently safer technology, regulations and DHS's regulations?

Mr. PULHAM. I don't see a conflict. I just don't quite understand the need, to be honest. As I said, this IST is so inherent in our business. We went through the assessment that the State of New Jersey required us to do, and it was about a week-long exercise with 10 to 15 of our people facilitated by a safety expert, and there were no recommendations. So the measures that we take just to run a pharmaceutical chemical business incorporates these provisions.

Mr. KING. I guess the point I was trying to make from our perspective is, whether we like it or not or you like it or not, New Jersey is an activist—I am just wondering, is there anything the Department is doing interfering with that? Is there anything New Jersey is doing interfering with the Department and do you feel that both are in sync and can you work with both? Whether you want to or not, as a practical matter, can you do it and are you doing it?

Mr. PULHAM. I think, practically, we could.

Again, I am not so sure that I quite appreciate the need, but I think certainly that if it were a requirement we would do it, obviously.

Mr. KING. On the issue of background checks, Secretary Stephan, have you had a chance to look at the Committee Print as to how far it goes, it doesn't go?

Mr. STEPHAN. Sir, I believe there are a lot of parallels in a previous edition. I understand there is an edition of the Committee Print that came out last night or early this morning. I have not yet seen that document. But in previous editions I think there are some pretty close parallels between what you have in your proposed legislation and what we have currently inside the CFATS regulation.

Mr. KING. I would like to yield to Ms. Brown-Waite, if she wants to follow-up on that issue, because she is very concerned with it.

Ms. BROWN-WAITE. I thank the gentleman for yielding.

We have got to be concerned that the draft that we have seen of the bill actually doesn't have the specific language in there requiring background checks. It sets up the parameters for the background checks but doesn't actually require the background checks. I think all Americans need to be concerned. How can we believe that these chemical facilities are really safe if we are not requiring background checks on those who are at the highest-risk facilities?

I would appreciate your comment on that.

Mr. STEPHAN. Yes, ma'am, we agree with you.

I, again, have not seen the latest version of—as this is a very continuously-evolving draft piece of legislation. Trying to keep up with this has been a bit of a challenge.

But inside the current CFATS regulation there is a mixture of things that have to be considered as part of the facility security plan. They include personal identification, verification and authentication, you are who you say you are; a background check against commercially available private sector databases to do a criminal records-type investigation; verification of validation of right to work or authorization to work under the I–9 process; and then a check against a system that would verify whether or not the individual of concern would have unrestricted, unfettered access to key elements or assets inside a facility's perimeter against a possible terrorist nexus or terrorist ties. We feel all those four components are critical in terms of the personnel surety function of a security plan.

Ms. BROWN-WAITE. And the criminal background checks?

Mr. STEPHAN. Yes, ma'am, the criminal background checks using publicly or commercially available databases, that is a requirement in the current CFATS regulation.

Mr. KING. Ms. Brown-Waite, I would like to reclaim my time.

I would just like to say, Mr. Chairman, again, as this process goes forward, and speaking for Mr. Lungren, we look forward to working with you and Ms. Jackson Lee and also the Department to make sure we get it right; and all indications are that this is going forth the way both sides would like it to.

With that I thank you, and I yield back.

Chairman THOMPSON. Thank you. I can assure you we will take the background situation into consideration.

If I am not mistaken, Dr. Pulham, for the record, background checks for all your employees at your company is mandatory?

Mr. PULHAM. Yes, sir, for employees, contractors, anyone who comes on-site and customers.

Chairman THOMPSON. Mr. Wattier.

Mr. WATTIER. Preemployment background checks are required for all of our employees at the city of Long Beach, yes, sir.

Chairman THOMPSON. Thank you very much.

I yield 5 minutes to the gentlelady from California, Ms. Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman, and thank you for holding such an important hearing; and thank you, gentlemen, for being before us.

Assistant Secretary Stephan, in your testimony, you provided an overview of the consultation and outreach that the Department conducted as it began to implement the Chemical Facility Anti-Terrorism Standards as required by the fiscal year 2007 Homeland Security Appropriations Act; and you mentioned initial outreach at the corporate level, publicity of the role to security partners, presentations at chemical industry conferences and coordination with the State and local officials. I think that is all great. But my concern was did you mention any—you didn't mention any direct outreach to labor, the people who actually work in your facilities and would be directly affected by any security threat and who would also in a sense be the first responders or be the direct attacks and would be the first ones at the incident and the first ones to have some type of response to that.

So my question is, did the Department do any outreach, request any information, have anybody at the table that will be from, for example, labor unions during this initial and ongoing implementation of the CFATS?

Mr. STEPHAN. Yes, ma'am. I think through two principal means. First, through the publication of this regulation in its advance notice form and the Appendix A draft piece. We did that through the *Federal Register* process and received a number of comments from labor unions, environmental groups and others that would have the concerns that you mention.

We also, in concert with the leeway we have to conduct listening sessions, basically invited lots of folks with interest in this ongoing evolution of the regulation and the Appendix A piece to come and provide their comments to us.

I would have to go back and check with my staff to verify that labor union representatives or environmental groups were indeed among those audiences. I don't have personal knowledge of everybody that was in those listening sessions. But I think principally through the *Federal Register* process, as well as the listening sessions, we were able to gather sufficient comments from those types of organizations.

Ms. SANCHEZ. So what you are saying is you basically left it up to labor unions to look through the *Federal Register* to figure out that they were going to be involved in the process. You didn't really make an outreach to the workers' groups to see if they—I mean, they have a direct—as I said, they have a direct effect to this and they are the first responders, in a sense.

Mr. STEPHAN. A member of my staff advised me—that does have personal knowledge—that we did make two outreach efforts and conducted two listening sessions specifically with labor union groups and their representatives during the final rule development as well as the Appendix A piece.

Ms. SANCHEZ. Great. I would like to get that information, for you to go back and to document for me how you did the outreach to the

workers who actually would be affected by the regulations and who would actually be affected by any incident that might happen.

Mr. STEPHAN. Yes.

Ms. SANCHEZ. I would also like to know what you are going to do in the future to keep these people in the process.

Mr. STEPHAN. I guess we will go back and use the same process that we—any type of possible change or amendment to the documents, the regulation itself or the Appendix A, will go back to the *Federal Register* piece. We will mobilize the same system we used to convene these two sessions with those types of organizations and continue to make this as inclusive as possible as we go forward.

Ms. SANCHEZ. I would suggest that instead of treating them as you would the normal public in just the *Federal Register* process, that because they are so heavily involved, because they are really the ones who might be involved in some type of attack, and because they are the ones who are the eyes and ears to what is happening, you might want to figure out some way in which you make sure that they are involved and helping in the process. I have always found that these groups have first-hand knowledge of things that might occur, just as I am sure one of the employers might—you know, when you are trying to figure out how to make a process better down on the plant floor you probably ask your employees because they are the ones who are doing the motions every single day. Am I not correct about that?

Mr. PULHAM. Absolutely.

Ms. SANCHEZ. So they might have some knowledge.

Mr. STEPHAN. We will follow the two-track approach, the *Federal Register* notice, and we will convene the listening sessions with those types of groups represented as we have done to get to this point.

Ms. SANCHEZ. Great. The Department's current process classifies chemical facilities into four different tiers based on risk. In this process, what is the most important factor in determining whether a facility is high-risk?

Mr. STEPHAN. I think at this point in time the most important factor is direct impact on human public health and safety, human lives and injuries that would be suffered in the event of a terrorist attack against that type of facility housing the chemical of interest above a certain threshold quantity. So public health and safety, human lives and injuries.

Ms. SANCHEZ. I also have a question, and I am glad that Long Beach Water is here today. Obviously, right in my own backyard. I want to always let you know we really value the fact that you come out here and that you testify before our committee; and, of course, I think Californians do it better than New Yorkers.

Mr. KING. I move to——

Ms. SANCHEZ. So we are only interested in the cutting ground with respect to what you are working on.

My big question is, the project that is your on-site chlorine gas generation demonstration project, you say that the system will reduce the amount of chlorine gas being shipped to our Nation's railways, which of course will reduce the risk, especially out the highway, if you will, and our people out there, how long will it take you to complete all the phases of this project? Your testimony said that

it costs between $2 million and $3 million to implement this new system. How are you going to recover that? How is it going to affect your costs? I am just trying to get a feel for how others upgrade to protect our citizenry and yet at the same time figure how we are going to afford it.

Mr. WATTIER. Well, $2 million to $3 million—to put that in context, our total annual budget—annual operating and capital budget at the Long Beach Water Department is about $100 million. So a $2 million to $3 million one-time expenditure, while significant, is something that is certainly achievable within our financial capabilities. In fact, a number of utilities around the country of our size, even before 9/11, chose on their own to make some of these conversions. So there are a number of them that have already made this conversion within their own financial capability.

There will also be additional increased, ongoing operations and maintenance costs associated with any conversion to any alternative technology, but those are also financial obligations that we think are well within our financial capability. So we will handle them within our local financial capability through our revenues that we get from our ratepayors.

Ms. SANCHEZ. Remind me if your particular agency has to go through a regulatory process in order to decide what it is that you are charging your customers.

Mr. WATTIER. Well, under California law, there are various processes we have to go to change our rates every year and have a formal public hearing process and all that. We think again this can be incorporated within that existing process.

Ms. SANCHEZ. What advice would you offer to other water treatment facilities that are considering implementing this type of process?

Mr. WATTIER. Well, again, I think there are several alternatives that should be considered. The one that we are pursuing is something that many people didn't view as a proven technology a few years ago, nor did we. But we have tested it out, and we are now comfortable that this technology is now reliable to the extent that we are ready to move ahead.

I would encourage my colleagues to talk to their other utilities who have made changes to review what has been done to see what has worked and what has not worked. The water associations have already done a lot of that good communication sharing among the utilities, and so I would just encourage people to look at what others have done and get some lessons learned and then find the thing that works for them.

It will be a case-by-case, very site-specific analysis. Because in some cases space constraints might direct you in one direction versus another. In some cases, electrical capability might move you in one direction. But there are several alternatives. I would encourage my colleagues to consider the full gamut and then pick the one that works best for them.

Ms. SANCHEZ [presiding]. Great. Thank you for your testimony today.

I will now recognize for 5 minutes Mr. Broun.

Mr. BROUN. Thank you, Madam Chairwoman.

I want to begin by saying that I am an original intent constitutionalist and I believe that the main function of the Federal Government should be the defense of our Nation, whether it is national defense or homeland security. I was very honored and pleased to be assigned to this committee, and I believe that the main purpose of this committee is to authorize the functions of DHS. I believe it to be relevant the committee must pass an authorization bill before the House considers a DHS appropriations bill later this spring, and so I encourage the Chairman and this committee to do exactly that.

Now, having said that, Secretary Stephan, I have had an opportunity to sit down with those in the industry that have significant concerns about the effect that this Committee Print has on the implementation of the current regulations. I think it is important to secure our Nation's high-risk chemical facilities. But, in doing so, it is important that new legislation does not disrupt the work that DHS is currently doing to secure these facilities.

Do you believe that the industry's concerns are valid and what impact would this Committee Print have on the implementation of the current regulations? If you would in your response I would like for you to address its impact on the Maritime Transportation Security Act regulated facilities.

Mr. STEPHAN. We would have a concern that any potential regulation—again, not having seen the latest draft out of the committee—would involve a complex and very complicated rule-making process that would involve a considerable amount of time. So from several dimensions I come at you with this plea for assistance. Please do no harm in developing a new proposed piece of legislation to the current CFATS implementation. It is very important to sustain the momentum, sustain the important partnership relationships and keep this moving. Because we absolutely need to do this, especially in light of the fact at the end of this year we will be undergoing a transition of administration one to another and we need to keep the continuity and the flow moving.

Also, people have begun to make very significant investments on the private sector side with respect to the current CFATS requirements; and if those change to a significant degree we now no longer offer continuity and consistency and stability in terms of our private sector partners that are absolutely trying to do the right thing. Again, taking this very seriously, there is no one I work with on a daily basis in the industry that is not taking this very seriously; and we want to do the right thing here.

This also throws curve balls to our State and local government counterparts that have to take a very complex role in a partnership in the planning process and the implementation process itself.

So, again, lots of people at stake here, lots of momentum, lots of continuity.

Sir, what specific aspect of the MTSA rule would you like me to address?

Mr. BROUN. Well, the industry leaders that came and visited with me about it were just concerned about the implementation; and their concern was that the current regulations are being complied with and they are just concerned about any new regulations

being put on top of the current ones, not only the cost but the implementation of such. So that is the reason I ask you.

Mr. STEPHAN. Yes, sir. I think the same logic that I just articulated would apply in the case of the MTSA-regulated facilities and also for the committee's awareness. We have a working group with the Coast Guard and actually TSA to make sure that we are harmonizing the various security-related authorities regarding hazardous materials, chemicals of interest, so on and so forth, between the three principal DHS components that have a dog in this fight—again, the Office of Infrastructure Protection, TSA and Coast Guard—to make sure that we are harmonizing and that there is not a seam or a gap between us that could be exploited by our adversaries.

Mr. BROUN. Do we have any data or even a guesstimate about what these unfunded mandates are going to cost the industry and government across the Nation that ultimately the consumer is going to have to pay?

Mr. STEPHAN. No, sir, I have not had time to conduct that analysis. In fact, I have diverted considerable resources from CFATS implementation to figuring out the new Ammonium Nitrate authority going down to the point-of-sale.

So, again, I have a limited resource pool now; and you ladies and gentlemen should be aware of this. This is a year of program build for CFATS. We are building up personnel, we are building up capability, and we are building up a boots-on-the-ground partnership effort here this year. Any significantly impactful new legislation with additional requirements has the potential of pulling more resources off implementation of the current regulation into something else, and some of the provisions that I have seen in previous aspects of the legislation have appeared to me to be a very significant cost behind them or associated with them.

Mr. BROUN. Thank you. I yield back.

Ms. SANCHEZ. Thank you, Mr. Broun.

I just want to also make a note. Staff tells me that this will not take place until October, 2009, is that correct?

Mr. STEPHAN. In my understanding, the goal or the intent of the legislation is to do something about the inevitable sunset of the current CFATS authority October 1, 2009.

Ms. SANCHEZ. Great. I just wanted to put that on the record.

My good friend from North Carolina, Mr. Etheridge, for 5 minutes.

Mr. ETHERIDGE. Thank you, Madam Chairwoman.

Let me thank each of you for being here this morning.

Dr. Pulham, I have heard from chemical facilities in North Carolina that there are some problems with the chemical terrorism vulnerability information that DHS is asking—that they are asking for under CFATS. My question to you, has DHS classification of CVI been a problem that keeps you and your colleagues from controlling your own information or knowing what you are able to do with it? Also, have you been precluded from sharing information with State and local authorities because the information has been classified CVI?

Mr. PULHAM. As I said in my opening comments, Siegfried is a little different from many pharmaceutical manufacturers in that

the lion's share of our product line is controlled substances. So, by nature, some of the information is not readily available just for security reasons. But we are very controlled by DEA, we are very controlled by FDA and also DEP. So all of our systems and all of our processes are very transparent to authorities. So in this way it has not been a problem for us at Siegfried.

Mr. ETHERIDGE. Okay. Thank you.

Assistant Secretary Stephan, let me follow that up with you. What is DHS doing to rationalize the classification regime of CVI so that companies can maintain control over their proprietary information, ensuring the proper running of their businesses, and appropriately communicate with local law enforcement about their security needs without risking the disclosure of classified information?

Mr. STEPHAN. Sir, thank you for your question.

First of all, CVI is a very important program. We are asking industry to give us information that is very comprehensive, very detailed. We have never had this granularity before in terms of vulnerability and security information, hence, the need to make sure 1,000 percent protection of this type of information.

But also we feel it very important—in fact, it is a requirement—to make sure that that information gets into the hands of those with a need to know, and those who have been properly certified and cleared to have access to that information, to include State and local officials, law enforcement, first responders, emergency managers—absolutely No. 1 goal of this program.

But we have to do it in a controlled way so that we don't in some way, shape or form inadvertently have this information end up in the hands of terrorist planners and operators. That is the No. 1 goal, as well, of this program.

We pushed the initial user guide, defining the CVI program guide, attempting to make it user-friendly. We have had some very overwhelming feedback in terms of certain aspects of that user's guide. Because of that feedback, we have had from the private sector, State and local folks—in fact, we have got a working group set up specifically with State and local government partners to help us sign these issues out.

Our Office of General Counsel is in the process of modifying that into a second user's guide that I believe will answer the concerns of both industry that has to work with this new regime as well as the State and local officials they would have to work the regime.

Mr. ETHERIDGE. All right. Let me follow that up with another one, because, as you know, there is a great deal of concern about the security—chemical security regulation as it relates to rural and small businesses, and really, rural and small water systems because there are a lot of them in this country. There are very few water systems the size of New York and San Diego and large systems; there are a lot of small ones.

Could you please explain any efforts the Department is trying to take to mitigate these concerns and whether any subsequent legislation should include some specific exemptions for small systems where we will have a tough time complying or may not be able to comply with the major changes that would not have resources?

Mr. STEPHAN. Yes, sir. Currently, there are no water systems or wastewater systems that have fallen inside the regulatory authority of the CFATS regimes. So those are completely off the table in terms of this program, for me, in terms of some of the things that represent concern to small businesses, household farmers across the country.

Through the appendix A process, we have attempted very clearly to articulate the fact that the intent of this authority is not to impact small businesses, small households, individual family farms across America that really don't represent a significant public health and safety risk. So we have upped the threshold screening quantities where people would have to enter in the first part——

Mr. ETHERIDGE. What is that threshold?

Mr. STEPHAN. Sir, it varies by chemical. For example, for ammonia nitrate, it is 2,000 pounds. But we have gone out because we have found that the 2,000-pound piece could, in fact, get us hypothetically down to the individual farmsteads across the country; so we have put a temporary hold on any regulatory compliance requirements to the top screen entry process for those folks until we go through this first wave of data that will take us down to the distributor level.

Then we are going to push out a second questionnaire, an automated questionnaire, to the distributors to really help us zero in on where in the farming operations community—principally, pesticides or fertilizers—do we have people that do hold in store for significant amounts of time the quantities of these kinds of substances that we are concerned about.

So I think we have done a lot, listening to the concerns, finding out more about the operational nature of the food and ag world and how CFATS is critically impacted. We have frozen those things where we need more time and more information, and we will deal with them during the summer time frame as we gather the analysis from this first round of data.

Mr. ETHERIDGE. Thank you. I yield back.

Ms. SANCHEZ. I thank the gentleman from North Carolina. Now we will have 5 minutes with Mr. Dent.

Mr. DENT. Thank you. I guess my question will be to Dr. Pulham.

This whole notion of inherently safer technologies, it seems to be a practice that was born out of industry; is that correct, sir?

Mr. PULHAM. Yes, sir.

Mr. DENT. I guess the question I have too is, I represent an area where we have a large company that actually designs and builds chemical plants and gas plants. One thing that I guess concerns me: It is always in my understanding that some of the most toxic and dangerous chemicals produced are often used in the manufacture of semiconductors. Is that an understanding that you have as well?

Mr. PULHAM. It is. But that is not my area; mine is pharmaceuticals.

Mr. DENT. It seems to me that this inherently safer technology is an engineering practice or a process. Is that a fair assessment?

Mr. PULHAM. Yes. It begins right from drug discovery and it goes all the way through development, scale-up, pilot and commercial manufacturing.

Mr. DENT. If we, as a Congress, were to mandate inherently safer technology under certain circumstances for those high-risk facilities or, I guess, most hazardous of chemicals, do you believe that we would in some circumstances maybe be incenting those facilities to manufacture those particular chemicals offshore as opposed to in the United States?

Mr. PULHAM. It certainly has happened in the pharmaceutical industry. When the regulations have become too strict or too onerous, companies have outsourced some of the supplies of—some of the, certainly, early raw materials to offshore manufacturers. So I wouldn't be at all surprised if that were true also in this case.

Mr. DENT. What is a typical wage you would pay to somebody working in a chemical plant or a gas plant?

Mr. PULHAM. Fifty dollars an hour.

Mr. DENT. Fifty dollars an hour. So I guess what you are suggesting is that we should be very careful in terms of how we proceed on this issue. I understand why.

Mr. PULHAM. If I could just add, having worked for FDA for 27 years, I have seen it many times where we take tough regulatory positions, try to impose a lot of GMP or other requirements on companies, and so the company will just provide that material from one of its other facilities in Europe or the Far East or the Mideast.

So the thinking is that we are very strict in controlling these companies, when, in fact, we are losing control because they are now manufactured offshore, we have less control, less oversight of the facility and the quality of the product.

Mr. DENT. Is inherently safer technology more of a—it seems to be more of a—is it more of a workplace safety process or procedure than it is a chemical plant security tool?

Mr. PULHAM. No, sir. It is more of a process safety and more—to deal with the process and the product than it is with security. So——

Mr. DENT. Yes. I guess that is the point, I guess, I am trying to make. How will this affect the overall security of a plant as opposed to the actual safety of the work site, which of course is important, but is that the role of the homeland security community?

Mr. PULHAM. Right. In my view, it has more to do with the safety of the product and the manufacturing process than it does with security of the site. So the way we optimize processes, the way we control the reactants and ingredients that go into the processes to obtain ultimate yield in a safe environment for the operators is of utmost concern with the IST aspect in my view, not necessarily in the security of the site.

Mr. DENT. Understood. I guess my next question will be then, I guess, to Mr. Wattier.

How will the implementation of this IST affect the operation of water treatment facilities? How will the burden of installing these technologies affect the water use rates of local taxpayers who ultimately, you know, have to pay for the implementation of these technologies?

Mr. WATTIER. Well, again, we estimated for our situation a $2 million to $3 million one-time cost which again—put that in the context of a $100 million budget, we would incorporate that into our long-term rate setting. Then the ongoing costs would certainly be less than 1 percent of our ongoing operations and maintenance costs, comparing—switching to an on-site generation technology as opposed to the current practice of buying chlorine.

So I don't see any significant ongoing impact on our rates in terms of the O&M costs.

Mr. DENT. Thank you.

Do you also feel the regulatory scheme for water purification facilities, currently in existence under the Safe Drinking Water Act and the Waste Water Treatment Act, is appropriate to ensure the physical security of our water treatment facilities? Are these facilities safe now?

Mr. WATTIER. I believe that they can be made safer by assistance from the Department of Homeland Security.

That was my testimony, sir.

Mr. DENT. Okay. I will yield back my time.

Ms. SANCHEZ. I thank the gentleman.

Next on the list would be Mr. Pascrell for 5 minutes.

Mr. PASCRELL. Thank you, Madam Chairwoman.

I just wanted to make clear in my own mind, we are talking about the control and protection of particularly lethal chemicals and their mixtures. We have already determined that modern technology could bring us to the point of recommending different mixtures to prevent or minimize the amount of damage that could be done in an accidental or an intentional attack.

Second, we are talking also about the security of the facility within which this process takes place, be it fencing, be it personnel, be it modern technology. I wanted to make that very clear because I am very disappointed when we talk about fear.

See, we don't want to establish fear in people. Yet, how about these questions, how much will it cost the consumer? You know, establish that fear in people so, oh, my God, it is going to cost that much.

You said, Secretary Stephan, in your explanation of your chemicals of interest list, we are talking about chemicals that are toxic, that are flammable, explosive chemicals that have the potential to create significant adverse consequences, in your own words.

Mr. STEPHAN. Yes, sir. Correct.

Mr. PASCRELL. You talked about theft and aversion of these chemicals, that if they are stolen, they have the potential to go into the hands of the wrong people.

Mr. STEPHAN. That is correct, sir.

Mr. PASCRELL. And risk for sabotage if they are mixed with readily available materials have the potential to create significant adverse consequences for human life.

Most of that is your own words, right, Mr. Secretary.

Mr. STEPHAN. Yes, sir.

Mr. PASCRELL. Now, Dr. Pulham, I am proud to say that the State of New Jersey is a standard-bearer nationally for chemical security and chemical security protections, and I believe the State should be applauded for that. In fact, New Jersey passed the Toxic

Catastrophic Prevention Act way back in 1986 when, I imagine, few people even believed chemical security was an issue.

In April of last year the Department of Environmental Protection proposed amendments to the act to require all companies subject to the program to evaluate the potential of incorporating inherently safer technologies at the facilities. I think it is worth noting that in New Jersey, the inherently safer technology requirement under the chemical sector best practice standards, something like that, represents a practicality issue, practicability test. It is not mandatory that a covered facility implement this process, only that they evaluate it.

So, Dr. Pulham, the Committee Print for the Chemical Facility Anti-Terrorism Act calls for the same kind of non-mandatory IST approach for the great majority of facilities like yours—like yours—which seem to be operating just jim-dandy. Yet in your testimony, you call for this committee to take a less rigorous approach to IST standards. You even referred to this as paperwork, this is basically paperwork.

Why can't it be implemented by the Federal Government if inherent safety is a concept that the chemical industry invented, as you said, and we consider it continuously as we design and modify our production processes? Can you tell this committee why you believe facilities like yours in New Jersey should not have to even evaluate ICT standards when they have not hindered your ability to operate profitably and efficiently in the State of New Jersey?

I can't wait to hear this answer.

Mr. PULHAM. What I said was that we went through the requirements, we did an IST evaluation, we did an SVA assessment, we did all of those——

Mr. PASCRELL. You followed the law?

Mr. PULHAM. We did all of those evaluations and found that there were no opportunities for improvement. They had no impact because the nature of our business required that we already had these implemented. That is what I meant.

Mr. PASCRELL. You are still working in a profit and you are still working efficiently in the State of New Jersey underneath this "paperwork," as you call it, standard?

Is that what you are trying to tell us?

Mr. PULHAM. I would say underneath the requirements for a pharmaceutical/chemical manufacturer which incorporates these, absent this requirement to go through the assessment.

Mr. PASCRELL. So many of the facilities in New Jersey are already operating under the American Chemistry Council's Responsible Care Program, as you well know.

Are any of your facilities already operating under a security program such as the Responsible Care Program? Because it is basically a private program. Are any of yours?

Mr. PULHAM. Yes. Yes.

Mr. PASCRELL. Will the new CFATS regulations which we are talking about require those facilities to make significant security upgrades?

Mr. PULHAM. Since the red line came out again last night, I don't know all of the requirements. So that is hard for me to assess.

Mr. PASCRELL. How do you feel about the Committee Print's provision enabling facilities to submit alternative security procedures that are produced for other regulatory purposes, in whole or in part, to meet the security assessment or the security plan improvement? How do you feel about that?

Mr. PULHAM. The DEA mandates certain security, physical security requirements on us, so—we can't deviate from those, so we have fences with razors, we have cameras all along the fence lines. We have card access not only to the facility, but to each building within the facility, restricted access. We have vaults that have certain construction requirements that we are mandated to have to store certain products in. So our physical security program is pretty well established by the requirements of the DEA.

Mr. PASCRELL. Well, we would—can I just finish my statement I just started?

Ms. SANCHEZ. Mr. Pascrell, you are 3 minutes over.

Mr. PASCRELL. I know. Can I ask—I am not going to ask a question, but make a statement.

Ms. SANCHEZ. Make a statement. Make it short.

Mr. PASCRELL. Thank you, Madam Chairwoman. This is very important. We have to understand the urgency of this particular situation.

Why was this committee a few years ago so concerned about, for instance, the 2-mile stretch on the Turnpike then? There was good reason. We just didn't invent it. We didn't wake up one morning and say, Oh, I wonder what is happening in the chemical industry over in New Jersey.

We are talking about the whole country, first of all. There was a vulnerability. So for you to talk about paperwork to me is very demeaning when the State—I know the work that this State put in on trying to put the process together, and I would ask you, because of the urgency, to take a second look at this before coming out, guns blazing, because I am ready myself.

Thank you, Madam Chairwoman.

Ms. SANCHEZ. Dr. Pulham, before we go on, I just have a quick question with respect to the offshoring issue. Do you have any knowledge of any facilities that are leaving New Jersey because of New Jersey's chemical security regulations regarding IST?

Mr. PULHAM. Not specifically the chemical security regulations.

Ms. SANCHEZ. Thank you, Doctor.

Next we will have Mr. Davis of Tennessee for 5 minutes.

Mr. Davis.

Mr. DAVIS of Tennessee. Thank you, Madam Chairwoman. I would like to thank the panel as well. Thank you for being here today. Thank you for what you do in our economy and in our country. I would like to start with Secretary Stephan, if I may.

The Committee Print includes the requirements that the Department in certain situations mandate inherently safer technologies that reduce the risk of terrorist attacks. Is there a good definition of what inherently safer technologies are?

Mr. STEPHAN. Sir, I think the concept of inherently safer technologies means many things to many people. In some cases it may refer to a process, in some cases it may refer to the reduction of a chemical, in some cases it may refer to the elimination of a chem-

ical on a particular facility's premises. So I am not sure that I understand clearly a single definition of that term.

Mr. DAVIS of Tennessee. It always concerns me when we are asking an organization or group or any entity to move forward when there is not a clear, concise definition. So I hope we can move forward on that.

Does the Department have a methodology developed to assess the differing levels of risk for certain processes versus other processes?

Mr. STEPHAN. Sir, our methodology is a security-based methodology. It deals with aspects of consequentiality in terms of public health and safety.

The next phase, we will take a look at the impacts on national/regional economy, national mission accomplishments, such as impacts on the national security establishment if certain things were to happen at a certain chemical facility. We do not have a methodology in place that would evaluate different processes or safety-related processes.

I would suggest that perhaps the EPA that regulates the safety process world of the chemical industry might be a better place to go for that answer.

Mr. DAVIS of Tennessee. Considering that the Department of Homeland Security issued the current regulations only 8 months ago, do you believe Congress should be acting now to codify and expand these regulations? Or should we wait and see if what we have already done is working well?

Mr. STEPHAN. Sir, in my opinion, as the implementer of the existing, very complex set of rules and regulations that we have to push out the door, I have to maintain 100 percent focus on getting what we currently have in terms of authority and in terms in writing a rule that is very complex and reaches across the United States. I have got to dedicate everything I have to getting that out the door. Significant new changes beyond simply allowing the current CFATS authority to continue beyond October 1, 2009, would not be my preferred way to do business.

I would also ask that the committee consider the concept of time in terms of lessons learned in the implementation of the existing program and how they might apply to future legislation for something that has only been around for a few months. We don't have the lessons learned captured in granular detail; they just haven't appeared, so that they would be useful to you in some future legislation effort that would involve a rulemaking.

So I would say, give us some time to get this in place. Don't allow the wind taken out of the sails and let us go full blown to getting this program up and running in transition to the incoming administration, as it should be.

Mr. DAVIS of Tennessee. Thank you, Mr. Secretary.

Dr. Pulham, you stated that being mandated to adopt IST could be dangerous. Could you explain that statement?

Mr. PULHAM. Pardon me?

Mr. DAVIS of Tennessee. You have stated that mandating IST could be dangerous. Can you explain that statement?

Mr. PULHAM. Yes. What I mean is, if someone mandated us to use an alternate chemical, for example, or an alternate process,

and we had to do that even though our own assessment was that it was not the safest, that could be dangerous. You know, the developers, the innovators of a process and a product are really the experts in that process and the ramifications of it. So I am concerned there is a potential that if someone from the outside then takes a look at this process and mandates changes in it without knowing all of the related issues with it—so we have worked with the process for 10 years maybe bringing it to market, and we know all of the aspects of it, and if we are mandated from the outside to consider an alternate process or an alternate free agent, for example, that in our view is not as safe, that could be, in my view, dangerous.

Mr. DAVIS of Tennessee. Do you have concerns that you would have people other than scientists making those mandates?

Mr. PULHAM. People that maybe are not as experienced with the process as are our scientists. So we have quite a staff of Ph.D.'s in various disciplines that develop a process based on the literature and their experience with it at a laboratory scale, and then it is scaled up to commercialization. So if someone that hasn't—doesn't have that in-depth knowledge tries to modify it or mandate a modification to it, I think there is a potential it could be more dangerous, rather than less.

Mr. DAVIS of Tennessee. Thank you. I yield back.

Ms. SANCHEZ. The gentlewoman from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Let me thank the witnesses for their presentation and express how important this issue is to all of us. I hope that with the Committee Print we can find a constructive road map and legislative document that is going to put in place security for Americans.

I want to go to the issue of the background checks, Mr. Stephan, and note my colleagues had mentioned that the background checks were not mandatory. Of course, in the Committee Print on page 8, we have a listing of the issues that should be addressed in doing background checks and suggesting that they should be done.

Is a background check being mandatory something that the administration would support?

Mr. STEPHAN. No. In terms of the current CFATS regulation, that is one of the criteria that would constitute part of the security plan in terms of the performance measure that we have against personnel surety, that a criminal background check using publicly available commercial databases is an important component of a security plan.

Ms. JACKSON LEE. Is it now mandatory or as one of the elements of the security plan?

Mr. STEPHAN. As you will recall, based on the authority we have, we don't have the authority to make any single element mandatory inside the CFATS framework. But that is one of the recommendations we have inside the——

Ms. JACKSON LEE. Or if the legislation made it mandatory, you would have the authority. So I am asking you, in terms of Committee Print, would that make for a more secure setting to require that background checks be done?

Mr. STEPHAN. We support a requirement for a background check, as stated in the interim final role for the CFATS final regulation.

Ms. JACKSON LEE. Would you go to the next level of making sure that there is an element in that? I am asking you, do you want to make that element mandatory?

Mr. STEPHAN. I don't want to make any statement in favor of or against a piece of proposed legislation I haven't had a chance to look at. But generally, I am supportive of the concept of a background check, a criminal background check, as part of the personal surety element of a——

Ms. JACKSON LEE. So you would be open to the structure that presently exists, where it is an element; or you might be open, as well, to where it might be mandatory?

Mr. STEPHAN. If the current CFATS authority allowed me to make that piece mandatory, I believe that would be a wise thing to do.

Ms. JACKSON LEE. Okay.

Let me also ask you that you have gotten a budget under the fiscal year 2008 budget, and it is my understanding that Congress has provided the CSCD a substantial boost from the President's budget.

My question is, do you now have enough funding for inspectors and for training?

Mr. STEPHAN. In terms of—this program is being implemented in phases, and in terms of the program work activities and objectives, milestones, deliverables for fiscal year 2008, the answer is "yes." We, of course, bleed over now into the 2009 request where the administration has requested $63 million; and I believe that is an adequate amount of money to realize our goals and objectives for the program in fiscal year 2009.

Ms. JACKSON LEE. You believe that or you really are committed and dedicated to the fact that you have enough money?

Mr. STEPHAN. There is not a 100 percent, certain thing anywhere in my life. Again, the budget assumes a regulated universe of 5,000 facilities. Based upon our preliminary tiering analysis, that we are doing now, if that universe of regulated facilities exceeds 5,000, then of course we would have to go back within the administration and talk about that, and then of course come over here following a process to have a dialog with you.

But if you assume 5,000 is the number of facilities that would fall in this framework, the budget numbers that you have seen from the administration are adequate to do the job.

Ms. JACKSON LEE. Well, let me thank you for supporting the administration. I frankly believe they are not.

Let me quickly raise this question, Dr. Pulham, to tell me—and I want to get it out to answer it before the bell goes off—to speak to the lack of difficulty in implementing the IST, which has been discussed before, which is contemplated in the Committee Print.

The second question is: The value of creating chemical security excellence centers so that you involve the academic community in devising new technology as it relates to security in that arena?

Mr. PULHAM. Yes, ma'am.

As I said earlier, our industry is heavily regulated by DEA and FDA. So for us to make a change in a process is not an easy thing

and would take from 2 to 2½ years to implement. Our customers have applications with FDA that have to be amended. We would have to change our process. They would have to reformulate the drug product, do studies, stability studies and efficacy studies; and all that would have to go through FDA approval.

In addition, the DEA controls a quota that we are allowed to produce against. So it is very difficult for us to make a change in a process without severely interrupting the supply to our customers, or we are certainly taking a long time to affect the supply.

From a security point of view, we have, as I mentioned earlier, many layers of security at our facility because of the nature of the compounds that we handle. So we have things from card access to cameras to guards at all the entrances and exits. So just because of the nature of our business, we are very heavily controlled by DEA and the types of security systems that we have to have in place.

Ms. JACKSON LEE. You wouldn't have any problem complying with the rules?

Mr. PULHAM. Implementing a change would be difficult, so if we said we had to change the process, that would be difficult for us to do in a timely manner.

Ms. JACKSON LEE. Madam Chairwoman—did you answer the question about the academic collaboration that institutions of higher learning on cutting-edge technology?

Mr. PULHAM. Yes, ma'am. We have academic advisors so we have advisors at the university level to consult on chemistry and medicinal chemistry aspects of our business. So that would not be difficult.

Ms. SANCHEZ. The gentlewoman's time has expired.

I will now call on Mr. McCaul for 5 minutes.

Mr. MCCAUL. Thank you, Madam Chairwoman.

Thank you to the witnesses for being here today. I had a couple of follow-ups from my colleague from Texas on some of the questioning—the background, background checks specifically; and I believe, Colonel Stephan, you said that would be a wise thing to do to make those mandatory. Is that correct?

Mr. STEPHAN. Yes, sir, in terms of the criminal background checks that we currently have as a consideration inside the existing CFATS rule, yes.

Mr. MCCAUL. I would have to agree with that opinion, as well. The current draft of the Committee Print will include provisions regarding these checks, and it requires the Secretary to provide an appeal and a waivers process to employees who undergo the background check.

Could you tell me how the Department can meet that requirement and who would bear the cost of that?

Mr. STEPHAN. Sir, again, not having seen the current Committee Print, I am not able to probably provide the level of detail that is required. But right now, inside the existing CFATS regulation, we have the industry consider using commercially or publicly available data bases through which to conduct a criminal background investigation.

We also have a consideration for a check of terrorist nexus, or terrorist ties, in terms of people to have unescorted access to cer-

tain preidentified critical areas of inside a facility where the most harm could be done if impacted by a terrorist attack.

In practical terms, the only way to get to that problem 100 percent is to go through the terrorism screening database. That is an inherently governmental function, and we would have to—and of course, under the CFATS rule, are now working with our TSA partners in the screening coordination office inside the DHS headquarters to figure out how we would make that available through a secure, automated portal setup with the facilities that would be presenting us a list of people that run through that check process.

Mr. MCCAUL. I think that would be—in implementing this, assuming this passes, I think that would be an excellent idea to have that nexus or the ability to check it with the terrorist list as well.

Currently, that is not being done, right?

Mr. STEPHAN. Currently, it is not. We are not at that phase of the regulation's implementation at that point. But that is a thing that is looming on the horizon for about two phases from now.

Mr. MCCAUL. Is the current background check that is implemented more along the lines of an NCIC, sort of FBI background check?

Mr. STEPHAN. It is a background check that the facility would initialize or get under way through commercially or publicly accessible databases. Some facilities are working with the FBI; some are working with local law enforcement. There are a variety of ways that the individual facilities are tackling this issue.

Mr. MCCAUL. Okay. Thank you.

With respect to the administration's budget request, $63 million, do I understand you correctly that that would be sufficient to carry out your duties? Or would you need additional resources?

Mr. STEPHAN. Sir, based upon the universe of things that are known to me at this point in time, principally I am assuming, until I get my analysis completed here within the coming weeks, that I am looking at about 5,000 facilities across the country. All of our manpower and budget justifications to this point have been against that baseline. So I am happy if the baseline stays at $5,000 that the resources request that you have seen, as Members of Congress, are sufficient to do the job. If we go beyond our regulated universe of 5,000 facilities, then I am going to have to go and do another costing analysis and run that up my chain of command.

Mr. MCCAUL. You will certainly let us know about that if that happens, right?

Mr. STEPHAN. Sir, you will be among the first to know.

Mr. MCCAUL. If a subcommittee amendment was added to the bill that addressed technical and academic requirements for the head of the Office of Chemical Security, how would this language compare with the Department's current plans for leadership of this office?

Mr. STEPHAN. Sir, I think in the previous versions of this proposed legislation that I have seen, it kind of puts lots of different technical, professional, managerial, leadership qualifications all into the—all into one person. I am not quite sure that that person exists, to be quite honest with you. It is an incredible amount of detail in terms of those specific technical, professional, leadership and managerial qualifications.

The concept the Department is pursuing is to achieve all of those various technical, professional, leadership and management qualifications through a leadership team of three individuals. One would be a senior-executive-level technical advisor; one would be a senior-executive-service-level deputy director; and one would be a senior-service-executive-level principal director for the office. So a three-person team at the senior-executive level, that between them they would have the mix of all of the things that I have seen in the way of personnel qualifications in, initially, the amendment of Ms. Jackson Lee and, finally, the most recent version of the——

Mr. MCCAUL. In your opinion, does that language give you enough flexibility to hire the right person for the job?

Mr. STEPHAN. No, sir, I don't believe that it does. In fact, I believe I will be on a possibly never-ending search for that particular individual, because there are so many embedded qualifications inside that one position. If that person does exist, they are probably making a lot more money somewhere in the public sector than I will ever be able to pay them.

Mr. MCCAUL. That is very good to know.

One last question, Madam Chairwoman. I would respectfully request this committee pass an authorization bill before the House considers the DHS appropriations bill. I think it is relevant to this committee. I think if we want to remain relevant, we need to do that.

So I will yield back.

Ms. SANCHEZ. I will remind Mr. McCaul that it has always been our intent every year to try to pass an authorizing committee, even though most of the time the Senate doesn't get that bill out of conference with us. So we will probably try once again. I can't speak for the Chairman himself, but I would imagine he would like to see that.

I would like to give now 5 minutes—recognize Mr. Markey of Massachusetts for 5 minutes.

Mr. MARKEY. Thank you, Madam Chairwoman, very much.

Mr. Stephan, as you know, the legislation requires the highest-risk facilities to implement methods to reduce the consequences of a terrorist attack, such as substituting smaller shipments of less toxic chemicals for the ones that are being used. These methods would only be required when they are technically feasible, when they would not make it impossible for the company to continue to do its business, and when they would not result in the creation of a new, high-risk facility somewhere else.

Does the Department support these provisions?

Mr. STEPHAN. Sir, again, not having seen those provisions in terms of the most recent draft of the Committee Print, I think I would like to make a point that I am a security guy, and I am very comfortable talking about things in my area of core competency, which is security.

When we start talking about process safety, reduction of chemicals, possible rippling effects across the national economy, I soon get out of my area of core expertise as well as out of the area of core expertise of the inspectors that we would have on the ground. I would feel very bad one day if I woke up, and because of a decision that we made, for example, to reduce a chemical, change a

process, eliminate a chemical and approve that as part of somebody's chemical facility security plan three States over, we have now somehow inadvertently stopped the flow of safe drinking water into a very large——

Mr. MARKEY. No.

I am saying, the legislation in the earlier drafts, as well, contains similar language. Would you support it if those concerns which you just mentioned were dealt with and were giving you the flexibility to deal with it?

Mr. STEPHAN. Sir, again, I would like to not make myself, by virtue of this proposed legislation, into a safety or a process expert. I want to maintain my security core competency and make——

Mr. MARKEY. That is what we are trying to do. We are trying our best to reduce the need to have you do your job by obviously substituting less dangerous chemicals, so you have less to work on.

As you know, there have been numerous attacks in Iraq using chlorine cylinders as weapons. According to press reports several weeks ago, undercover New York Police Department investigators secretly set up a fake water purification company last year to demonstrate how easily and anonymously terrorists could purchase toxic chlorine on the Internet for a deadly chemical strike against the city.

Evidently, last June, undercover officials successfully purchased three 100-pound cylinders of chlorine using the Internet and were never once asked for an ID. They concluded that at the present time, few, if any, barriers stand in the way. That is the New York Police Department.

Do you think the vendors of chlorine and other dangerous chemicals should be required to verify the identity and legitimacy of orders of these dangerous chemicals, since that sort of validation is already required for the sales of radioactive materials that could be used to make a dirty bomb?

Mr. STEPHAN. Sir, let me answer that question by just reading you very briefly from the current regulation that addresses your question, I think, fairly clearly.

Inside our performance-based standard No. 6 under the current CFATS regulation, Theft and Diversion, we have a know-your-customer provision. The facility has an active documented know-your-customer program that includes a policy refusing to sell chemicals of interest to those who do not meet pre-established customer qualification criteria such as a confirmation of identity, verification, and/or evaluation of on-site security, verification that shipping addresses are valid business locations, confirmation of financial status, establishment of normal business-to-business payment terms and methods, e.g., not allowing cash sales——

Mr. MARKEY. No. I can hear what the intent is. As a result of that existing regulation, are you coordinating now with the New York Police Department, given their investigation?

Mr. STEPHAN. Sir, we coordinate on a lot of issues on a day-to-day basis with New York City.

You have to understand where we are in terms of the phase of implementation of the CFATS reg. This will be a piece, part and parcel, of the security planning process——

Mr. MARKEY. Do you know what went wrong in New York City, why they were able to purchase this chlorine online?

Mr. STEPHAN. Sir, I am not sure what went wrong. What I can tell you is, when this regulation takes effect and we get to this phase of CFATS implementation, the chances for something like that happening diminish quite greatly.

Mr. MARKEY. You are saying that this language in our bill would be complementary rather than contradictory to what your policy is?

Mr. STEPHAN. I fully support the language that I just read to you, and if your language in any way, shape or form is close to this, we can take a look at it.

But you should also know that that facility in question actually just completed a top-screen process, as do the other five companies under that corporate label; and they are involved now in the first phase of our regulatory process.

Mr. MARKEY. One final question: Do you agree that DHS should be able to enforce security regulations at all dangerous chemical facilities, including water treatment facilities?

Mr. STEPHAN. Sir, I believe that we ought to be able to enforce security regulations according to the authority that is provided to us by the U.S. Congress. Right now, we do not have the authority——

Mr. MARKEY. Would you object to us giving you that authority?

Mr. STEPHAN. At this point in time, I am not able to give you a "yes" or "no" answer because the issue of regulating water and wastewater treatment facilities, for example, bears considerable dialog between Members of Congress and the Department. We would be happy to engage you in that dialog to make sure that the ramifications are fully including water and wastewater treatment facilities are fully understood by all parties involved.

Mr. MARKEY. I understand that. But if we gave you that authority, you would be able to implement it, I assume?

Mr. STEPHAN. Sir, if you give us the authority, I am going to implement whatever authority you give us that is signed off by the President of the United States, absolutely.

Mr. MARKEY. Thank you very much, Madam Chairwoman.

Ms. SANCHEZ. I thank the gentleman from Massachusetts.

I now recognize Mr. Green of Texas for 5 minutes.

Mr. GREEN. Thank you, Madam Chairwoman.

Let's start with the background checks. The appeal process is of some concern, and it is of some concern because we have had Members of Congress who have found themselves on watch lists and have had some difficulty extricating themselves.

Can you tell me a little bit more about how this process would work, such that a person who really shouldn't be in a position of possibly losing a job or of being put in a position where he is under suspicion, or she, can extricate himself or herself?

Mr. STEPHAN. Sir, are you referring to an appeals process associated with the new proposed legislation?

Mr. GREEN. Yes.

Mr. STEPHAN. Sir, I am not familiar with that new proposed legislation, so I am not able to really answer that question.

Mr. GREEN. Okay. You agree that there will be one based on the legislation?

Mr. STEPHAN. Sir, I believe that part and parcel of a background check requirement, an appeals process is in line with the principles of American democracy and government. We have a very—in terms of all the aspects of the current CFATS rule, we have a fairly extensive appeals process to find in the rule itself, the main body of the rule, for very technically complicated—many steps, a process that actually represents a very open, fair and honest petition process with multiple layers, or sequences, for someone to walk through if they feel that they have a grievance in terms of any aspect of CFATS.

Now, again, the new proposal, I am not familiar with you-all's provisions.

Mr. GREEN. I understand that. Let me strike what I said about the new proposal and talk about what you have currently, so that I can get some indication of what you currently have, as to how you will handle future circumstances.

With your current rules, have you had a circumstance where persons have been on your list of persons who are under suspicion, and they have had to hire lawyers to extricate themselves?

Mr. STEPHAN. Sir, the answer to your question is "no" because we have not yet gotten to that phase of implementation of our program. That will occur probably 6 to 8 months from now. We are in the security plan development process, so we just haven't come to that bridge yet in CFATS implementation.

Mr. GREEN. When you come to that bridge, is this system one that anticipates that persons will have legal counsel?

Mr. STEPHAN. I believe that the appeals process that is outlined in the regulation has that provision and other technically complex pieces.

I would ask, sir, that your staff and perhaps my staff can get together. We can give you a full briefing in terms of where we are currently with CFATS. I am just not able to do that with you in great detail.

Mr. GREEN. If it does anticipate legal counsel, does the person who is challenging a ruling have to hire the counsel himself or herself?

Mr. STEPHAN. Sir, I don't have that degree of familiarity with that piece of the process. So I would ask that we be able to come to you and give you a more technically detailed briefing or presentation on this.

Mr. GREEN. With reference to the chemical security regulations, is it your opinion that water plants should not be regulated?

Mr. STEPHAN. Sir, it is my opinion that the question of regulating water plants has a lot of nuances to it. They are currently, as you know, not inside our regulatory authority.

There are certain aspects of the Bioterrorism Act of 2002 that give the EPA a bit of regulatory authority relative to security in that space. We don't currently have it.

I think we need to have a dialog with you all to understand the ramifications and the consequences of including, one way or another, water, wastewater plants into a regulatory framework.

Mr. GREEN. Thank you, Madam Chair.

Ms. SANCHEZ. I thank the gentleman from Texas.

Seeing no other Members, I thank the witnesses for their valuable testimony and the Members for their questions. The Members of the committee may have additional questions for the witnesses. We will ask you to respond quickly to those in writing.

Ms. SANCHEZ. Hearing no further business, the committee stands adjourned.

[Whereupon, at 11:56 a.m., the committee was adjourned.]

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