



One Hundred Tenth Congress
U.S. House of Representatives
Committee on Homeland Security
Washington, DC 20515

June 12, 2008

The Honorable Michael Chertoff
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Chertoff:

I am perplexed by your letter dated June 10, 2008, which asserts that the Department of Homeland Security (DHS) “strongly opposes bill H.R. 5577, the ‘Chemical Facility Anti-Terrorism Act of 2008.’” This legislation was the product of over twelve months of hearings and meetings with DHS and key stakeholders and culminated in a Full Committee mark-up on March 6, 2008. At every stage of this process, I have sought active engagement with DHS and, for the most part, discussions have been productive. The Committee Report on H.R. 5577 was filed on March 14, 2008, over three months ago. Therefore, the timing of this letter is highly suspect, as it was sent just a day before the Department was to participate in a hearing on H.R. 5577 in another House Committee. In light of this action, I am doubtful that DHS is still interested in continuing our good faith efforts at collaboration on this critical homeland security initiative.

It is important to the security of our Nation and this Committee that we comprehensively extend the current chemical security regime that will expire in October 2009. With that said, I believe that the issues raised in the letter represent a misunderstanding of the legislation.

In the first paragraph of the letter you state the concern that “...H.R. 5577, as currently written, will have a negative impact upon current and future efforts to secure the Nation’s high-risk chemical facilities.” As you know, this Committee explored the potential impact at numerous hearings and meetings and developed a legislative record that supports the converse conclusion — the promulgation of successor regulations would bring needed predictability to the industry and comprehensively strengthen security over the chemical sector.

You also note that H.R. 5577 would require the Department to issue new security regulations by October 2009, and assert that “[i]f H.R. 5577 were to become law, Congress would be requiring DHS to divert resources and attention from current efforts. . . .” It is baffling that you would presuppose that resources would not be made available for this undertaking. It seems to me it would be far more productive for you to tell us what kind of additional resources you need to implement H.R. 5577 rather than oppose the bill on this unsupported supposition. As you know, H.R. 5577 authorizes \$900 million over a three year period to support your efforts and ensure capacity to regulate water facilities and other facilities that would be new to this regulation. Moreover, I have expressed my commitment to advocate for these resources.

The statement that promulgating the new rules would require you to “...restart the process of developing and implementing regulations” is contrary to what the legislation envisions. Given your record of promulgating the CFATS interim final rule in the six months, we are confident that you can leverage the current CFATS regulations to get the job done.

With respect to the criticism that the prospect of successor regulations would create a “perverse incentive” for chemical facilities, I would note that the legislation delicately staggered deadlines for already covered facilities so that they are seamlessly integrated under the updated regime in H.R. 5577; therefore, they clearly will not be starting over under the new law.

The criticism that H.R. 5577 would somehow “move the security program away from the performance-based approach promulgated in the existing regulations by mandating that high-risk* facilities identify and implement specific mitigation solutions...” is baseless. Under the current regulations, the Secretary can mandate that high-risk facilities identify and implement specific mitigation solutions and the program is still risk- and performance based. The formulation under H.R. 5577 is no different so the criticism that the new law “by mandating that high-risk facilities identify and implement specific mitigation solutions” strays from risk and performance-based approach is not supportable.

You also charge that the measure’s requirement for “professional qualifications for leadership of the Office of Chemical Facility Security” is “overly prescriptive.” This concern was voiced to me by DHS during the development of the legislation, and changes were made to the text at the Full Committee mark-up that you indicated allayed your concerns. Therefore, I am surprised to hear that you have changed your position, as I thought we had an agreement.

You also express concern about the requirement that DHS communicate potentially classified reasons to the owner or operator of a facility that is deemed “high-risk.” Unfortunately, this rationale values secrecy over a facility operator’s legitimate right to know the risks his facility faces. Certainly, DHS can formulate a way to impart

* Here we both seem to be using “high-risk” in the same manner, meaning tiers 1 or 2.

this vital information. I would note that this is the first time I am being made aware of this concern in our year-long discussions.

With respect to background checks, you state that the provisions under §2114 would “require DHS to promulgate new and complex rules requiring background checks and redress processes for employees of the high-risk chemical facilities.” DHS should be able to build upon the mature background-check systems in operation at DHS.

You also express concern that requirements for the rule to cover “redress of labor grievances” could “inject DHS into private labor law disputes.” It is very important to me, and I think it should be to you, to not allow employees to be fired under the guise of security. We must ensure that background checks are used legitimately for security purposes. As you may know, history does not support your concern. Similar requirements under the Transportation Worker Identification Card have not resulted in DHS being a respondent in labor disputes.

Regarding your preemption claim, H.R. 5577 uses nearly identical language as existing law. We did this purposefully so as not to “upset the carefully balanced approach to Federal preemption of State law achieved in the current regulatory approach.” If DHS is in compliance with the balanced approach in current law, then following H.R. 5577 will be seamless.

As I have stated repeatedly, the extension of CFATS is a critical homeland security initiative. I had hoped to partner with you to make it a reality but am resigned to the fact that you would rather political games. Please contact Dr. Chris Beck, Senior Advisor for Science and Technology or Rosaline Cohen, Chief Counsel on my staff at 202-226-2616 with any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Bennie G. Thompson". The signature is written in a cursive, flowing style.

Bennie G. Thompson
Chairman

cc: Honorable Peter T. King, Ranking Member, Committee on Homeland Security
Honorable Donald H. Kent Jr., Assistant Secretary, Office of Legislative Affairs,
U.S. Department of Homeland Security