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Office of Legislative Affairs

U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland  
Security**

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

Dear Mr. Chairman:

The Department of Homeland Security (DHS) strongly opposes bill H.R. 5577, the "Chemical Facility Anti-Terrorism Act of 2008." While DHS agrees with and is actively pursuing the goal of securing high-risk chemical facilities, DHS believes 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.

The Department of Homeland Security Appropriations Act of 2007 was signed by the President in October 2006 (P.L. 109-295). Under Section 550 of the Act, DHS was required to issue an interim final rule establishing chemical facility security standards within six months of enactment. As required, DHS issued those regulations in April 2007. The regulations require high-risk facilities to comply with risk-based performance standards and provide for severe penalties for non-compliance. DHS anticipates the submission of security vulnerability assessments and related site security plans for hundreds of the highest risk facilities by early 2009.

In its current form, H.R. 5577 requires new chemical security regulations by October 2009. However, efforts to secure this Nation's chemical facilities would be impeded by the requirement to commence a new regulatory effort. The current regulations issued by DHS are an effective means to secure this Nation's high-risk chemical facilities. If H.R. 5577 were to become law, Congress would be requiring DHS to divert resources and attention from current efforts and to restart the process of developing and implementing regulations. In addition, H.R. 5577 could create a perverse incentive: chemical facilities might be reluctant to expend resources and efforts to comply with the current security regulations in anticipation of the new regulations and potentially different security requirements. This would significantly delay current security implementation at chemical facilities throughout the Nation, which is contrary to the intent of the Committee and the ongoing work of DHS.

H.R. 5577 also contains many specific and detailed directives that would, if enacted, frustrate the implementation of the chemical security program. For example, §2110 of the bill would 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 (provided the Secretary determines that those solutions would significantly reduce risks and would not be technically or economically infeasible).

In addition, the provisions under § 2113, which stipulate the professional qualifications for leadership of the Office of Chemical Facility Security, are overly prescriptive. Section 2102(c)(5) would require DHS to provide the owner or operator of a covered chemical facility with the reason for that facility's assignment to a risk-based tier. For high-risk facilities, that reason may involve classified information, and the decision on how and to what extent to share facility-specific information should be left to the Executive Branch to determine consistent with national security interests. Section 2114, as revised by Representative Perlmutter's amendment, would require DHS to promulgate new and complex administrative rules requiring background checks and redress processes for employees of the high-risk chemical facilities. Furthermore, the provisions under section 2114 would require DHS to promulgate rules affecting employment decisions and redress of labor grievances. Inclusion of these provisions has the potential to inject DHS into private labor law disputes that would further divert efforts from the goal of chemical security and its core missions.

Also, DHS would oppose any legislation that would upset the carefully balanced approach to Federal preemption of State law achieved in the current regulatory approach.

Finally, DHS and the Environmental Protection Agency (EPA) believe that there is a gap in regulating the security of chemicals at water and wastewater facilities in the United States. The authority for regulating the chemical industry purposefully excludes from its coverage water and wastewater treatment facilities. Work with the Congress is needed to close this gap in the chemical security authorities in order to secure chemicals of interest at these facilities and protect the communities they serve. Water and wastewater treatment facilities that are determined to be high-risk due to the presence of chemicals of interest should be regulated for security in a manner that is consistent with the CFATS risk and performance-based framework while also recognizing the unique public health and environmental requirements and responsibilities of such facilities. DHS and EPA look forward to working with the committees to address this issue.

For the reasons stated above, DHS would appreciate the opportunity to continue working with the Committee to reach mutually acceptable legislation that extends its authority to regulate high-risk chemical facilities.

The Office of Management and Budget advises that there are no objections to the transmittal of this letter from the standpoint of the President's program.

If I may be of assistance, please contact the Office of Legislative Affairs at (202) 447-5890.

Sincerely,



Donald H. Kent, Jr.  
Assistant Secretary  
Office of Legislative Affairs