

International Chemical Workers Union Council/UFCW
United Steelworkers (USW) • Communications Workers of America (CWA)
United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)
American Federation of State, County and Municipal Employees (AFSCME)
Physicians for Social Responsibility • New Jersey Work Environment Council
U.S. Public Interest Research Group • Environmental Health Fund • Environment America
Environmental Health Strategy Center • Greenpeace • Friends of the Earth • OMB Watch
Natural Resources Council of Maine • Sciencecorps • National Refinery Reform Campaign
National Bucket Brigade Coalition • Center for Health, Environment and Justice (CHEJ)
Indigenous Environmental Network • Green Education and Legal Fund Inc.

November 25, 2008

To: Department of Homeland Security
From: Labor, Public Health, Environmental and Public Interest Groups
Re: Comments on Risk-Based Performance Standards Guidance (RBPS)
Docket # DHS-2006-0073

Please accept this as our collective comments on the Department of Homeland Security's (DHS) proposed Risk-Based Performance Standards Guidance (RBPS) document for the interim Chemical Facility Anti-Terrorism Standards (CFATS). Although we can understand that many facilities would appreciate guidance on DHS's CFATS, the usefulness of the proposed guidance document is very limited and may even be counter productive by failing to encourage facilities to use the most protective security measures available.

For example, the proposed guidance DHS describes the purpose of this document as follows:

To assist high-risk facilities in selecting a suite of security measures and activities that both meet the CFATS performance standards and are tailored to the unique considerations associated with a facility...

At least nineteen times, the RBPS takes pains to emphasize the non-prescriptive nature of risk-based performance standards:

DHS is not requiring that any specific measure or activity be used. In fact, the 2006 interim statute prohibits DHS from disapproving a Site Security Plan based on the presence or absence of a particular security measure. Accordingly, the measures and activities listed in each chapter of the proposed RBPS contain a prominent disclaimer warning that **this guidance “does not establish legally enforceable requirements...” and security measures listed are “neither mandatory nor necessarily the preferred solution.”** Nor are they the complete list of potential activities from which a high-risk facility may choose to meet each RBPS. Rather, they are merely examples of measures a facility may choose to implement as part of its overall strategy to address the RBPSs. Facility owners/operators may consider other solutions based on the facility, its security risks, and its security program, so long as the suite of measures implemented achieve the targeted level of performance.

Given that all the security measures described in the RBPS are neither mandatory nor enforceable, the fact that inherently safer technologies are not mentioned once any

where in this 178 page guidance is inexcusable. For example, the use of inherently safer technologies to reduce or eliminate the use and/or storage of chemicals of interest (COI) may be the best way to achieve the goals of this performance standard because they will reduce or eliminate the number of critical targets that need to be secured.

Instead the DHS guidance relies on conventional fence-line security measures even though it acknowledges that “completely adequate perimeter security is rarely achievable through the deployment of a single security barrier or monitoring system.” The DHS further recognized that “the human component is often the most vulnerable aspect of a system.” Therefore, instead of suggesting that facilities rely on conventional fence-line measures, DHS should have emphasized the dramatic risk reductions achievable through the use of inherently safer technologies.

Should facilities choose to follow this RBPS guidance, while a comprehensive law and regulations are developed in Congress over the next few months, this RBPS is likely to actually discourage facilities from voluntarily switching to safer technologies. That in turn will delay the resulting risk reduction that safer technologies would bring to high risk plants where millions of employees and communities remain at risk.

Because the current regulations expire October 4, 2009 and it is highly likely that a bill based on H.R. 5577 (which was adopted by the House Homeland Security Committee) will be enacted before then. We are therefore troubled that our tax dollars are being used to issue voluntary guidance for a temporary regulations based on a temporary law which are both unenforceable and fall so far short of needed security measures under consideration by Congress. A better use of DHS resources would be to wait a few months and issue guidance at that point.

We are further troubled that the Department chooses to ignore the following provisions that would strengthen our nation's infrastructure. Among the fatal flaws in the “interim” statute which will likely be addressed within the next 6 months:

--- It prohibits the DHS from requiring the most protective security measures. DHS cannot require any specific “security measure,” including the use of safer and more secure chemical processes that can eliminate catastrophic hazards posed by poison gas, even when cost-effective alternatives are readily available. It is therefore all the more troubling that a “guidance” document fails to address the most basic of measures that would address the consequences of a catastrophic release. This is NOT prohibited by the current temporary law and leaves the guidance document as a narrowly useful tool.

--- It explicitly exempts thousands of chemical facilities, including approximately 2,800 water treatment facilities, some of which put major cities at risk. The House was moving forward in addressing this question and this industry will need guidance on protecting their facilities.

--- It fails to involve plant employees in the development of vulnerability assessments and security plans or protect employees from excessive background checks. Draft legislation has included this invaluable national resource.

The price of failure could be staggering. According to a 2008 Congressional Research Service review of EPA data, 100 U.S. chemical plants each put 1 million or more people at risk. In 2004 the Homeland Security Council projected that an attack on a chemical

facility would kill 17,500 people, seriously injure 10,000 people and send an additional 100,000 people to the hospital.

On November 19, 2008, the Center for American Progress released a report on chemical plant security. This report puts to rest any doubts about the need for action by Congress early in 2009. The report proves that the horrifying chemical risks facing more than 100 million Americans are preventable. It cites examples of safer chemicals and processes now in use across industry sectors that are eliminating these risks. The full report is at: www.americanprogress.org/issues/2008/11/chemical_security.html

Since 2001 more than 220 chemical facilities have switched to safer and more secure chemicals or processes which have eliminated risks to millions of people. Safer technologies are used in a wide variety of facilities including, water treatment plants, power plants, oil refineries and other manufacturers. Many facilities, however, have yet to adopt safer technologies. More than seven years after the 9/11 attacks we need chemical security standards that put all high-risk facilities on an even playing field.

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. Choosing from a broad 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 without shifting them elsewhere as H.R. 5577 provides.

We are working on a chemical security bill that will at a minimum address the following points that an effective guidance document must address:

- 1) Reduce the consequence of an attack through the use of safer and more secure chemicals and processes
- 2) Include all categories of facilities such as water treatment plants
- 3) Involve plant employees in developing plant security programs and gives employees protection from excessive background checks (the current description of background checks in Appendix C is far too broad and should NOT be issued).
- 4) Ensure equal enforcement for chemical facilities and accountability for government
- 5) Allow states to set more protective security standards
- 6) Require collaboration between the DHS, EPA and other agencies to avoid regulatory redundancy, inconsistency or gaps in supply chain security.

In the face of potentially ruinous liability from a catastrophic chemical release some business leaders agree that safer technologies must be required. In February, the Association of American Railroads said, *"It's time for the big chemical companies to do their part to help protect America. They should stop manufacturing dangerous chemicals when safer substitutes are available. And if they won't do it, Congress should do it for them..."*

We look forward to working with you on protecting this vital national asset.

Sincerely,

John Morawetz
**International Chemical Workers Union
Council/UFCW**

Michael Wright
United Steelworkers (USW)

Charles Loveless
**American Federation of State, County
and Municipal Employees (AFSCME)**

Kristen Welker-Hood, ScD, MSN, RN
Physicians for Social Responsibility

Rick Hind
Greenpeace

Elizabeth Hitchcock
U.S. Public Interest Research Group

Fred Millar
Friends of the Earth

Rick Engler
New Jersey Work Environment Council

Roger Strother
OMB Watch

Judith Robinson
Environmental Health Fund

Tom B.K. Goldtooth
Indigenous Environmental Network

Dave LeGrande
**Communications Workers of America
(CWA)**

Alan Reuther
**United Automobile, Aerospace &
Agricultural Implement Workers of
America (UAW)**

Christy Leavitt
Environment America

Michael Belliveau
Environmental Health Strategy Center

Kathleen Burns, PhD
Sciencecorps

Matt Prindiville
Natural Resources Council of Maine

Denny Larson
**National Refinery Reform Campaign &
National Bucket Brigade Coalition**

Mike Schade
**The Center for Health, Environment and
Justice (CHEJ)**

Mark Dunlea
Green Education and Legal Fund Inc.

For more information contact: Rick Hind (202) 319-2445