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

Key Points on the Amendment in the Nature of a Substitute to H.R. 2868: Chemical Security Legislation

October 29, 2009

The Amendment in the Nature of a Substitute to H.R. 2868 would rename the "Chemical Facility Anti-Terrorism Act" the "Chemical and Water Security Act of 2009." This bill reauthorizes the Department of Homeland Security's (DHS) authority to implement and enforce the Chemical Facility Anti-Terrorism Standards (CFATS), which are currently set to expire in October 2010, and improves these standards in a number of ways (Title I). It also requires the Environmental Protection Agency (EPA) to establish parallel security programs for drinking water (Title II) and wastewater facilities (Title III).

Title I – Chemical Facility Anti-Terrorism Act Reauthorization

Title I codifies the risk-based performance-based approach to securing chemicals that DHS has administered since 2007 (pursuant to Section 550 of P.L. 109-295) and includes provisions to ensure seamless transition from the current DHS regulations.

Under this Title, facilities are regulated by DHS based upon several factors, including the threats posed to them; their vulnerabilities; and the consequences that would follow from an attack on them. In addition to harmonizing statutory authority with the current regulations, H.R. 2868 enhances the regulations by including language to address:

- *Methods to Reduce the Consequences of a Terrorist Attack; Inherently Safer Technologies (IST).* Under the current regime and the bill, chemical facilities possessing certain amounts of chemicals must disclose information to the DHS Secretary. Based on this information, certain facilities are categorized according to four risk-based tiers. Title I requires every tiered facility to assess feasible alternative processes or chemicals that could reduce the consequences of a terrorist attack (IST). IST is already recognized as a "best practice" within the chemical sector. Of the tiered facilities, only a facility in Tiers 1 and 2 (the most at-risk tiers) that has been placed there because the release of the large quantities of toxic substances at that facility could endanger many people may be required by the head of DHS' Office of Chemical Facility Security to implement IST. Before requiring a facility to implement IST, the head of DHS' Office of Chemical Facility Security is required to review the facility's IST assessment and determines, in writing, that implementation would significantly reduce the risk of death, injury, or serious adverse effects to human health and that implementation—
    - Is technically feasible;
    - Is cost effective, including a consideration of any personnel implications, the costs, and whether the facility could continue to operate in its current location; and
    - Lowers risk at the facility while not shifting it to other facilities or to elsewhere in the supply chain.

  DHS' written determination must set forth its basis for the determination that address the three factors listed above but also the cost, avoided costs, savings, and the positive or negative implications for the facility's workforce.

  In the event that DHS determines that implementation is required, Title I establishes an extensive process by which a facility may submit a written appeal of the determination to the DHS Secretary within 120 days of receiving the determination from the DHS Office of Chemical Facility Security. Once the formal appeal is submitted, the DHS Secretary has 120 days to respond and must consult with both the facility operator and a wide range of technical experts in environment, health, safety, security, chemistry, design, and engineering. If the Secretary determines that implementation is necessary, the Secretary is required to issue an order and a

schedule for implementation and include the views of the technical experts in the order. The bill also authorizes $225 million for FY2011 through 2013 so that DHS may provide assistance to facilities that are required to implement IST.

- *Small Businesses and Agricultural Facilities.* Title I requires the DHS Secretary to transmit two reports to Congress within 6 months of enactment of this Act. One would look at the potential effects of IST on tiered facilities that have 350 employees or less. The other would require an analysis of the potential effects of the IST assessment on the agricultural sector, including fertilizer and pesticide manufacturers, retailers, and commercial applicators. Title I also requires the Secretary to issue tools to simplify the process.

- *Citizen Enforcement.* Under Title I, a person may file suit against the DHS Secretary to compel it to carry out its non-discretionary duties to implement CFATS or against governmental facilities for any violation of an order issued under this Act. Title I does not authorize citizen suits against privately-owned chemical facilities, but it creates a new "citizen petitions" process for citizens to report potential security violations to DHS and receive an official response. This process ensures that all sensitive security information is protected from public disclosure while facilitating citizen enforcement.

- *Background Checks.* Title I requires the DHS Secretary to issue regulations to require tiered facilities to undertake background checks (including criminal history, immigration status, and terrorist watch list checks). The provision protects workers who, by virtue of the background check, are improperly subject to an adverse employment decision by requiring redress and a reconsideration process.

- *No State Preemption.* Title I makes it clear that CFATS is a floor – not a ceiling – for chemical security regulations. States and localities may enact more stringent chemical security standards if they determine that such measures are necessary.

- *Protection of Information.* Title I requires DHS to provide standards for the sharing of security information with those who have an official need to know it, such as state and local officials, first responders, and local homeland security officials, and to protect information when disclosure would be harmful to the security of a covered chemical facility. Title I sets criminal penalties for anyone who discloses protected information in knowing violation of the information protection regulations.

- *Port Facilities.* Port facilities are currently exempt from the CFATS regulations. The Committee on Homeland Security has received extensive testimony, including testimony from DHS (both the Bush and Obama Administrations), asserting that this is bad security policy given that these facilities possess the same chemicals as the facilities regulated by CFATS. Title I helps to close these vulnerabilities by directing the U.S. Coast Guard, which current regulates port facilities under the Maritime Transportation Security Act of 2002 to oversee the administration of CFATS for port facilities.

- *Whistleblower Protections.* Title I requires the DHS Secretary to establish a process to accept information from whistleblowers and prohibits retaliation against a worker who properly reports violations.

- *Funding.* Title I authorizes $325 million for FY 2011, including $100 million for grants for implementation of inherently safer technology including $3 million targeted to assist the agricultural wholesalers and merchants. Overall for FY 2011 through 2013, $900 million is authorized for the CFATS program.

Title II – Drinking Water Facility Security

The Drinking Water System Security Act of 2009 (Title II) replaces Section 1433 of the Safe Drinking Water Act (SDWA). This Title requires the EPA Administrator to establish risk-based performance standards for community water systems serving more than 3,300 people and other exceptional public water systems that the EPA Administrator determines, in her discretion, pose a security risk.

Key provisions of Title II include:

- *Risk-Based, Performance-Based Tiering and Standards.* EPA must promulgate regulations establishing risk-based, performance-based standards for covered drinking water systems. The Administrator must assign covered

water systems to one of four risk-based tiers, ranging from Tier 1, the highest-risk systems, to Tier 4, the lowest-risk of the covered water systems.

- *Consultation with States and DHS.* In developing and implementing the regulations, the EPA Administrator must consult with states exercising primary enforcement responsibility for public water systems (hereafter "states with primacy") and other persons, including the Secretary of DHS.

- *Security Vulnerability Assessments and Site Security Plans.* Covered water systems must identify vulnerabilities through a security vulnerability assessment and develop a site security plan that addresses those vulnerabilities. Each covered water system is allowed to select layered security measures to meet the risk-based performance standards, which vary by tier.

- *Methods to Reduce the Consequences of an Intentional Act (Inherently Safer Technology).* As part of their site security plans, all covered water systems with dangerous chemicals in amounts exceeding thresholds that will be set by EPA must assess whether they can switch to safer chemicals or processes without violating drinking water standards. EPA must provide guidance, computer software and other tools to covered water systems assigned to Tiers 3 and 4 in order to streamline the inherently safer technology assessment process for these systems.

  Title II also authorizes the states with primacy (and EPA in Wyoming and D.C.) to require a system in one of the two highest-risk tiers to switch to safer chemicals or processes. Before requiring a covered water system in one of the highest two risk-based tiers to implement methods to reduce, the state with primacy (or EPA in Wyoming and DC) must examine whether implementing these methods would significantly reduce the consequences of a release of a substance of concern; would not increase the interim storage of a substance of concern by the covered water system; would not put the water system out of compliance with SDWA or state and local drinking water standards; and is technologically and financially feasible for the water system.

  The state drinking water agencies (or EPA in Wyoming and DC) must provide a covered water system with an opportunity for appeal if the covered water system disagrees with a determination that it must implement an inherently safer technology.

- *Employee Participation.* Title II requires that covered water systems include their employees in the development of security vulnerability assessments and site security plans and ensure that these employees receive the training necessary to perform their duties under the plans.

- *Protection of Information.* Title II requires EPA to provide standards for the sharing of security information with those who have an official need to know it and to protect information when disclosure would be harmful to the security of a covered water system. This Title sets criminal penalties for anyone who discloses protected information in knowing violation of the information protection regulations.

- *No State Preemption:* States and localities may enact more stringent security standards for covered water systems.

- *Funding:* Title II authorizes $315 million, including $125 million for implementation of inherently safer technology.

Title III – Wastewater Facility Security

Title III amends the Federal Water Pollution Control Act, more commonly known as the Clean Water Act, to enhance the security of operations at wastewater treatment works (i.e., sewage treatment facilities) from intentional acts that may substantially disrupt the ability of the facility to safely and reliably operate, or have a substantial adverse impact on, critical infrastructure, public health or safety, or the environment. This Title preserves the historic regulatory oversight of sewage treatment facilities by the U.S. Environmental Protection Agency (EPA) and ensures that security regulations appropriately balance water quality and security goals. By charging EPA with security in the water sector, this Act ensures seamless security-related requirements for public utilities with both wastewater and drinking water responsibilities (regulated under Title II of this Act). Key provisions of Title III include--

- *Significant Federal Resources to Enhance the Security of Public Sewage Treatment Facilities.* Title III authorizes $1 billion over five years in federal grants for publicly-owned sewage treatment facilities to conduct security vulnerability assessments, to develop site security and emergency response plans, and to implement security enhancements, ranging from the construction of security fences to the implementation of safer treatment processes.

- *Vulnerability Assessments, Site Security Plans, and Emergency Response Plans for Treatment Works.* Title III requires each sewage treatment facility that treats at least 2.5 million gallons per day (estimated by EPA to be a facility that serves a population of 25,000 or greater), or in the discretion of the Administrator, presents a security risk, to: (1) conduct a vulnerability assessment; (2) develop and implement a site security plan; and (3) develop an emergency response plan for the facility. Vulnerability assessments and site security plans developed under this title are required to be submitted to the EPA Administrator for review and approval, and to be updated on a periodic basis.

- *Risk-Based Evaluation of Treatment Works.* Title III requires the EPA Administrator, in consultation with the Department of Homeland Security, to categorize the nation's sewage treatment facilities into one of 4 risk-based tiers, with tier 1 representing a facility with the highest degree of security risk. Owners and operators of sewage treatment facilities would be required to implement appropriate site security and emergency response plans based on the perceived degree of risk to critical infrastructure, public health or safety, or the environment from an intentional incident at the facility.

- *Methods to Reduce the Consequences of a Terrorist Attack; Inherently Safer Technologies (IST).* Title III of the bill requires all sewage treatment facilities that possess a substance of concern to undertake an assessment of methods to reduce the consequence of a chemical release from an intentional act, more commonly referred to as inherently safer technologies (IST). For high-risk sewage treatment facilities, Title III authorizes states with approved programs under the National Pollutant Discharge Elimination System (section 402 of the Clean Water Act) or EPA (in the case of States without an approved program) to require implementation of inherently safer technologies where implementation: (1) would significantly reduce the risk of death, injury, or serious adverse effects to human health; (2) would not increase the onsite storage of chemicals; (3) would ensure that the facility could continue to meet its existing Clean Water Act obligations to protect water quality; and (4) is feasible. Individual states, and the EPA Administrator, are provided discretion to take enforcement action against a facility to ensure compliance with the inherently safer technology provisions of this Title.

- *Security-Related Audits and Inspections, Whistleblower Protections, and Protection of Security-Related Information.* Title III requires the EPA Administrator to audit and inspect individual sewage treatment facilities to ensure compliance with the security-related provisions of this Title, and provides whistleblower protections for employees with information on the failure to implement required security measures. Title III also provides for appropriate access to security-related information among federal, state, and local governments, tribal representatives, and sewage treatment employees, as well as law enforcement and first responder personnel.

- *No State Preemption.* Title III explicitly authorizes states and localities to enact more stringent wastewater treatment security standards if they determine that such measures are necessary.