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IMPORTANCE OF STATE AND LOCAL AUTHORITIES IN ENSURING CHEMICAL PLANT SECURITY

HEARING

BEFORE THE

SUBCOMMITTEE ON TRANSPORTATION SAFETY, INFRUSTRUCTURE SECURITY, AND WATER QUALITY

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

MARCH 19, 2007—NEWARK, NJ

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IMPORTANCE OF STATE AND LOCAL AUTHORITIES IN ENSURING CHEMICAL PLANT SECURITY

MONDAY, MARCH 19, 2007

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON TRANSPORTATION SAFETY,
INFRUSTRUCTURE SECURITY, AND WATER QUALITY
Newark, New Jersey.

The committee met, pursuant to notice, at 10:30 a.m. in room 125, Rutgers School of Law, Baker Trial Courtroom, Center for Law and Justice, the Hon. Frank R. Lautenberg (chairman of the committee) presiding.

Present: Senator Lautenberg.

OPENING STATEMENT OF THE HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. At first, I think we have to say thank you to Rutgers for providing this facility. The only better place this Field Hearing might have been conducted was at the courthouse a few blocks down, but I think this is excellent. We are grateful to Rutgers for providing this facility to us. I think that this kind of a critical time to get going on protecting our citizens more. I want to be able to see my colleagues, so we wanted to talk about the problem that we see here at the same time that Governor Corzine and the New Jersey Legislature are working on improving the strength and the surveillance of the chemical industry in order to protect our citizens.

So I want to welcome our witnesses and guests to this hearing of the Subcommittee on Transportation Safety, Infrastructure Security and Water Quality of the United States Environment and Public Works Committee. This hearing is a unique opportunity to bring an official Senate Hearing to New Jersey and the timing, as I said, could not be better for a concerted effort between the State of New Jersey and the Federal Government. Now I'll begin with my statement, and then I'm going to invite my friends and colleagues from the Congress who are here, Representatives Payne and Pallone to testify.

On September 11th, the year 2001, our country was attacked. Terrorists used airplanes as weapons and killed more than 3,000 people, including 700 from the State of New Jersey. Later, we learned that, as a result of the work of the 9/11 Commission and others, that many warnings were ignored that might actually have

prevented the 9/11 tragedy. And yet we're now being warned of another deadly catastrophe that is waiting to happen. That threat is the possibility of a terrorist attack on a facility storing large quantities of deadly chemicals.

Intelligence and law enforcement agencies have identified the Nation's chemical facilities as the next target for terrorists. In December 2001, it was reported that chemical training publications had been discovered not used by Osama bin Laden. And just this month the U.S. Military reported finding a bomb-making facility in Bagdad used to develop chlorine bombs. Six such bombs have been detonated in Iraq since January, and three of them used just this week.

There is a reason for us to be especially vigilant here in New Jersey and the surrounding region. We know that the 2-mile stretch between Port Newark and Newark Liberty International Airport is known as the most dangerous 2 miles in America for terrorism. According to the FBI, there are 15,000 chemical facilities across the country. An attack on just one of them could break down critical infrastructures of a community, kill tens of thousands of people, and damage the city, local, State and regional economies.

Given these facts, both the State of New Jersey and the Bush administration should be doing everything in their power to secure our chemical facilities to protect the public. New Jersey is doing its part. Since 2003, our State has adopted a series of measures to protect New Jersey's community. One of the most critical steps the State is taking is the requirement that the highest risk chemical facilities in New Jersey consider using Inherently Safer Technologies. What this means is that companies should look to replace the most dangerous chemicals with safer ones, still accomplishing their need to produce product. We want to reduce the threat, the consequence of a terrorist attack. And we've got to look at replacing these chemicals if it's possible.

On Friday, Governor Corzine proposed strengthening New Jersey's chemical security laws and expanding the number of facilities that must consider adopting Inherently Safer Technologies. But the Governor is not alone in working to protect New Jersey's nearly 9 million residents. The chemical industry has worked with the State to develop a set of Best Practice standards that are mandatory at 150 facilities. And laborers, including the New Jersey AFL-CIO and Steelworkers Union, they're working with the industry to improve worker training on chemical security procedures.

These efforts, combined with strong State Law, create an environment that best protects the people of New Jersey. But it is the Federal Government, and particularly the Bush administration, that's failing us. The Bush administration has proposed a Federal Regulation that could wipe out New Jersey's Chemical Security protections.

In fact, the Administration knowing that the maneuver was so reckless, that they tried to burry their proposal on the Friday afternoon just before the Christmas break. So while most Americans were enjoying the holidays, the Administration was working to strike down New Jersey's Chemical Security Law and prevent the states from taking steps necessary to protect their residents.

So how did the United States Department of Homeland Security defend this proposal to preempt our State law? Their answer, in summary, was that New Jersey could respond to disasters but do nothing to prevent them. We can't let this happen. Our friends, neighbors and fellow residents in New Jersey are entitled to better protection than that. Chemical plant security has always been important, even before 9/11. In fact, I introduced the first Chemical Security Bill in Congress in 1999.

Now, I called this hearing today to shed light on how our State is increasing its level of chemical security and how damaging this Federal Department of Homeland Security proposal would be. And I want to say it loudly and clearly: I'm going to do everything in my power to reverse this Administration's underhanded maneuver. As a member of this Committee, and the Senate's Appropriations Committee, I'm going to work with my colleagues, those seated here now. We'll do whatever we can to maintain New Jersey's right to enact laws to protect the people of our State.

Now, we've got four panels of witnesses here today, and I am grateful for those who will be testifying. I'm particularly pleased to welcome two of my good friends and colleagues from the House of Representatives on this issue, Congressman Donald Payne and Frank Pallone. I want to thank them each for being here, for working with me in Washington, to protect New Jersey and to protect the rights of every state to defend their residents from harm. So we thank all of you for being here today. Senator Menendez is running a little bit late, and he will testify a little bit later.

So now, since we are in Congressman Payne's District, a District that houses not only the chemical facilities that we're talking about, but people who are living in close quarters with one another where an attack could be jeopardize lots and lots of lives of people, Congressman Payne.

STATEMENT OF HON. DONALD M. PAYNE,
U.S. CONGRESSMAN FROM THE STATE OF NEW JERSEY

Mr. PAYNE. Thank you very much, Senator Lautenberg, for calling this very important U.S. Senate Committee on Environment and Public Works' Transportation Safety, Infrastructure Security and Water Quality. And it's so important that you decided to hold this very vital Field Hearing on security of our chemical facilities right here in this District.

We appreciate all the work that you've done for so many years in the U.S. Senate, and are very pleased that you now will be chairing this very important subcommittee. And to also my colleague, Congressman Pallone, who has done so many great things on healthcare. And for us to be at this great law school. We worked so closely with the Newark Community and the entire State, and the opportunity also to have the students from this great law school here in addition to others.

Let me say that September 11, 2001 reminded us of the many security vulnerabilities our country faced and, unfortunately, still had. That tragedy also affected so many people in my District right here, but also statewide because, as you know, many of the workers of the Twin Towers lived in New Jersey. And many of the courageous first responders hailed from our State. And many of the first

responders from Newark and Jersey City went across the Hudson to work there at the World Trade Center.

So we were very close in touch because, as you know, 5 minutes from here you have the Path train, which took thousands of people, and still do, each day to the World Trade Center District. And so it's been a very personal and traumatic situation for us here in the 10th Congressional District.

The issue of chemical facility security is not a new one. Dating back even before 9/11, the Nation's 15,000 chemical facilities, including over 350 State industrial, petroleum, and chemical storage and transfer facilities, have actually been sitting ducks—defenseless if a terrorist attack ever happened again. As the face and tactics of terrorists continue to change, we must be mindful and vigilant about any and all vulnerabilities.

The New York Times, in February 2005, frankly stated that "Washington has caved to pressure from interest groups, like the chemical industry, that have fought increased security measures." So it must be asked, "Why would we leave the security of our State and our citizens to an Administration that so easily kowtows to our Nation's securities and keeps our Nation's security at risk?

In the silence of the Federal Government, New Jersey, taking its security into its own hands, created State regulations which are among the strongest in the Nation. Unfortunately, though, the Department of Homeland Security misguidedly wants to have their weaker Federal regulations trump our State's guidelines. This is wrong. The plan the Congress handed in late 2006 to DHS would undue the hard work of our State regulators. While congress did not explicitly give Homeland Security the right to preemption, they are unwisely proposing it and therefore are rightfully receiving much criticism.

We are currently holding this hearing here in my District, which is near what is considered by the FBI as the "most dangerous 2 miles in America." It is nonsensical to allow lax security guidelines to rule over an area with such a connotation, especially when stronger regulations exist that are on the books. It is also illogical to favor softer security provisions especially in New Jersey, the densest spaced population in the Nation, when a terrorist attack would be detrimental to so many people because of that density in population.

According to the New Jersey Work Environmental Council, over 20 facilities, some of which are in Hudson, Middlesex, Passaic and Union Counties, exist where in the event of a worst-case release of toxic chemicals, millions of people extending even beyond New Jersey's borders would be at risk.

In fact, Kuehne Chemical Company in South Kearny borders Newark. If an intentional or accidental chemical release happened to occur, an estimated 12 million people extending into New York City and its boroughs could be harmed. Toxic chemicals such as chlorine, hydrochloric acid, ammonia and other chemicals can just simply waft as highly hazardous toxic clouds in the air leaving entire neighborhoods, including schools, hospitals and other public areas victim to chemicals that can prove to be fatal. Being that New Jersey is a major transportation corridor for the Northeast and the Eastern seaboard, it does not take far leaps of one's imagi-

nation to find the possible damage a chemical facility attack could have.

There is a saying, "If you want something done right, then you have to do it yourself." In regard to chemical facility safety, that saying holds great value for our State of New Jersey. We know, after much analysis, what is at stake and therefore what our State needs. We are, especially because of our acute risk, one of the strongest states in the nation on the issue of chemical safety, as I've mentioned.

New Jersey has made great strides to protect our State's critical infrastructure. In fact, in the fall of 2005, the Department of Environmental Protection introduced, along with then Governor Richard Codey and the Domestic Security Preparedness Task Force, Best Practice Standards—the firs in the nation. In another maverick move, New Jersey has allowed, through an Administrative Order, workers and Union representatives to be vocal on the issue. They are, many times, our eyes and ears and therefore would be the best to inform us legislators of vulnerabilities in our security standards. It fares well for no one if the Federal Government weakens these types of regulations. While a great deal has been done, we must move beyond analysis into action. While provisions such as the Inherently Safe Technologies have been introduced, we must do more. Let us use what we have learned to galvanize new initiatives such as built-in in security provisions that will make millions of New Jerseyans as well as inhabitants of other states safer.

Once again, let me thank you, Senator Lautenberg, for calling this very important hearing and thank you for the opportunity for me to speak.

Senator LAUTENBERG. Thank you, Congressman Payne, for that statement. When it's that close to home, you feel the heat, and that's what we're feeling in this State of ours. Thank you very much. Congressman Pallone, you and I have worked on lots of things affecting the environment, but none of the issues that we've worked on compares to the risk that we are facing here now. And in your Congressional District, there's a lot of activity to make the air safer and make the water cleaner, etc. And a perfect addition to that is to make sure that we protect all of our residents, those of your constituency, as well as Congressman Payne. And we've worked together in the past, and I look forward to us working together in the future.

Now, please, Representative Pallone, thank you.

STATEMENT OF HON. DONALD M. PAYNE,
U.S. SENATOR FROM THE STATE OF NEW JERSEY

Let me thank Senator Lautenberg for arranging for the Senate Committee on Environment and Public Works' Transportation Safety, Infrastructure Security and Water Quality Subcommittee to come to New Jersey to hold this vital field hearing on the security of our chemical facilities. Residents of New Jersey have a great champion in Senator Lautenberg, and we are fortunate that he is serving on a Committee with such important jurisdiction over public health and safety.

September 11, 2001 reminded us of the many security vulnerabilities our country faced. Unfortunately, while we have taken measures to protect against another attack, many vulnerabilities remain. The massive tragedy of 9/11 forever changed the lives of thousands of people both in my Congressional district and statewide. As you know, many of the workers of the Twin Towers lived in New Jersey and many of the courageous first responders hailed from our State.

The issue of chemical facility security is not a new one. Dating back even before 9/11, the nation's 15,000 chemical facilities, including over 350 State industrial, petroleum, and chemical storage and transfer facilities, have been sitting ducks—defenseless if a terrorist attack ever happened again. As the face and tactics of terrorists continue to change, we must be mindful and vigilant about any and all vulnerabilities. The New York Times, in February 2005, frankly stated that "Washington has caved to pressure from interest groups, like the chemical industry, that have fought increased security measures." So it must be asked, "Why would we leave the security of our State and our citizens to an administration that so easily kowtows to industry when our Nation's security is at risk?" In the silence of the Federal Government, New Jersey, taking its security into its own hands, created State regulations which are among the strongest in the nation. Unfortunately, the Department of Homeland Security misguidedly wants to have their weaker Federal regulations trump our State's guidelines. While Congress did not explicitly give Homeland Security the right of preemption, they are unwisely proposing it and therefore are rightfully receiving much criticism. It is outrageous that the Department of Homeland Security is threatening to undo the hard work of our State regulators.

We are currently holding this hearing in my district which is near what is considered by the FBI as the "most dangerous two miles in America". It is nonsensical to allow lax security guidelines to rule over an area with such a designation, especially when stronger regulations exist and are on the books. It is also illogical to favor softer security provisions especially in New Jersey, the densest State in the nation, when another terrorist attack would be absolutely devastating and would impact countless lives.

According to the New Jersey Work Environment Council, over 20 facilities, some of which are in Hudson, Middlesex, Passaic and Union Counties, exist where in the event of a worst-case release of toxic chemicals, millions of people extending even beyond New Jersey's borders would be at risk.

In fact, Kuehne Chemical Company in South Kearny borders Newark. If an intentional or accidental chemical release happened to occur, an estimated 12 million people extending into New York City and its boroughs could be harmed. Toxic chemicals such as chlorine, hydrochloric acid and anhydrous ammonia can just simply waft as highly hazardous toxic clouds in the air leaving entire neighborhoods including schools, hospitals and other public areas victim to chemicals that can prove to be fatal. Being that New Jersey is a major transportation corridor for the Northeast and the Eastern seaboard, it does not take far leaps of one's imagination to see the possible damage a chemical facility attack could have.

There is a saying, "If you want something done right, then you have to do it yourself." In regards to chemical facility security, that saying holds great value for our State. We know, after much analysis, what is at stake and therefore what our State needs. We are, especially because of our acute risk, one of the strongest States in the nation on the issue of chemical facility security—and I am proud of the fact that Senator Lautenberg and I have two of the strongest pro-safety and pro-environmental records in the entire U.S. Congress. New Jersey has made great strides to protect our State's critical infrastructure. In fact, in the fall of 2005, the Department of Environmental Protection introduced, along with then Governor Richard Codey and the Domestic Security Preparedness Task Force, Best Practice Standards—the first in the nation. In another maverick move, New Jersey has allowed, through an Administrative Order, workers and union representatives to be vocal on this issue. They are, many times, our eyes and ears and therefore would be the best to inform legislators of vulnerabilities in our security standards. It fares well for no one if the Federal Government weakens these types of regulations.

While a great deal has been done, we must move beyond analysis into action. While provisions such as the consideration of Inherently Safer Technologies have been introduced, we must do more. Let us use what we have learned to galvanize new initiatives such as built-in security provisions that will make millions of New Jerseyans as well as inhabitants of other States safer. I look forward to working with Senator Lautenberg and our other colleagues to achieve this goal, and again, I thank the Senator for convening today's hearing.

STATEMENT OF HON. FRANK PALLONE, JR., U.S. CONGRESSMAN FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Senator Lautenberg. And thank you for what you said. You really have been the leader on this issue in the Senate.

First of all, I don't want to reference you as Chairman, because we're very happy with the fact that, not only are you in the majority, but the Chairman of this subcommittee, and so many others that deal with this issue, because it means that you can make a difference, as you always have, on this and so many environmental issues. So I want to thank you for having the hearing here and inviting myself and Don Payne to be here.

I should also mention, it's very nice to be at Rutgers Law School. I know about the fact that this institution, for many years, has been sort of the progressive voice, if you will, and has many clinical programs on environment. So I think it's particularly appropriate that you had this hearing here today at Rutgers Law School in Newark.

I just wanted a reference back initially to what you said earlier in your opening statement about New Jersey and the reason, I think you stated very clearly, why it is so important that the Federal Government not preempt New Jersey laws with regard to chemical security is because New Jersey——

and I suppose you can make this argument about any State——

but I think particularly our state, because of the history of having so many chemical facilities, we know best what to do.

And the notion of preempting Governor Corzine and the State DEP and the others who have made decisions with the legislature on how to proceed in what I consider a much stricter and more protective of the public safety way. And to have that preempted on the Federal level is a mistake.

You talk about how the Governor on Friday is expanding the number of facilities looking into safer technologies. I would argue that the Federal Government should have stricter standards, too. But in the absence of that, for the Federal Government to step in and say that New Jersey can't impact and have tougher standards, when the people in New Jersey are on the grounds and the Governor and other officials are on the ground and know what needs to be done here is a mistake.

The whole notion of the Federal preemption and the way it makes it more difficult for states with stricter standards to operate just goes against the grain because the State people know what's best. They're on the ground. They deal with these facilities. They know the dangers. They know that using safer technologies would be a better way to go. So I just wanted to point that out, because I know that you stressed it in your opening statement.

And I have to be honest, for years we've been working with not only the State Government, but also the constituent groups, the AFL-CIO. I don't know how many times Charlie Perkanick (phn) has mentioned this to me. This goes back to previous Administrations with Brad Campbell and Lisa Jackson, working with the AFL and labor groups, including the Work Environmental Group, to try to come up with these standards and training and the mechanism that we use. So it is such a shame, just from a good government point of view, to have that all wiped out because the Federal Government decides they want to do something different.

Now, the other thing I wanted to stress today is that what I consider incredible arrogance on the part of the U.S. Department of Homeland Security in willfully disregarding the intents of the U.S.

Congress by preempting state and local laws on chemical security, because I believe, and I was there listening to this, and I know the parties involved, it was not the intent when we passed this Appropriations bill last year, and that language was put in the last of the minute. It was not the intent to preempt the State laws.

There was a clear exchange on the floor of the House of Representatives between the Chairman of the Homeland Security Committee, a friend of mine, and the Ranking Member of the Homeland Security Appropriations Subcommittee, during which they agreed that the temporary chemical security provision included in an Appropriations Bill last year was not intended to preempt the rights of States like New Jersey. They essentially said that.

Unfortunately, what the Department of Homeland Security decided to do was to ignore those clear directions and, instead, they cite a quote from the Chairman, then Chairman, Republican Chairman of my Committee, the Energy and Commerce Committee Chairman Joe Barton of Texas, saying the opposite.

And you have to understand—and I know this is kind of bureaucratic, Senator, and maybe I shouldn't get into it—but I had tried many times to get that bill considered in my committee, the Energy and Commerce Committee. And Joe Barton then and continued to say that they were not going to exercise jurisdiction.

So for the Department of Homeland Security, rather than referencing the exchange on the floor, which was with the Committee in jurisdiction, the Homeland Security Committee, and their clear intent that said this was not supposed to preempt state law and, rather, go to the other committee, my committee, which decided not to exercise jurisdiction, and to say that this was intended to preempt the State law, is totally contrary to what actually happened.

And I know it sounds very bureaucratic, but I just have to stress that, because a lot of times I think that these exchanges and the intent needs to be brought out. So, in my opinion, the Department of Homeland Security is disregarding the will of Congress in saying that State Law has been preempted.

Now, you know that we're in the process now of putting together and introducing legislation again in both the Senate and the House that would make it clear that there is no Federal preemption of stronger standards. That would also make it so that, on a Federal level, there would be a mandate to use the safer technology.

There's other things in the legislation, as well, but I think that the most important development right now on the House side is that, in the Supplemental Appropriations Bill, the Supplemental Bill, which was reported out of the Appropriations Committee last Thursday but is expected to come for a vote in the House this Thursday, we do once again have language in it that makes it clear that the State Law is not preempted, and also makes it clear that there was no intention to prohibit the Federal Government from moving ahead with safer technologies, as well.

So if that legislation passes the House, and ultimately survives conference—and I know we're going to work together to make sure that it does—then once again we would send to the president legislation language that would make it clear that this preemption doesn't exist and States like New Jersey can move ahead and cover

more plants and have better Right-to-Know provisions and also move to safer technologies.

But in the absence of that, obviously, you and I will still try to move ahead with our legislation, which I think is a good thing in any case.

The one thing that I just wanted to stress again is that our State put together this Comprehensive Plan to improve security and provide for greater worker safety, working with the AFL, working with all the different departments. And the reason that they moved ahead with this before the Federal Government adopted any language was because they felt it was necessary because of what Congressman Payne said, that we have this situation here where we have so many chemical plants that we needed to take action.

And I think that it should be understood, at every level, either with the current law or through any legislation that we pass in the supplemental or through our efforts, that any State that takes, moves ahead with higher standards, should have the flexibility to accomplish that goal, and that nothing should be done to preclude States like New Jersey, who have this problem and who know what to do, from being able to move forward with their own program.

And with that I'll just end and thank you again for all you've done on this issue. I really think it's crucial. And it's not just because of the response to 9/11, but because of perceived threats, as you mentioned, that we may also have in the future. So thank you again.

Senator LAUTENBERG. Thanks very much, Congressman Pallone and Congressman Payne. I appreciate the fact that the both of you have found the time to be here with us and indicate how closely we're working to try and deal with this problem. And I appreciate the fact that you mentioned the fascinations that were going on in the Congress to try and burry what was not at all an acceptable inclusion, that we would give the Federal Government the right to override New Jersey law, a strong environmental protection law, one designed to keep our citizens secure in an area that far too frequently is a tempting target for terrorist activity.

And we're pleased now to have been joined by our good friend and colleague, Senator Menendez. Senator Menendez and I have worked together on environmental protection actions in his earlier days when he was a member of the House of Representatives. And, by the way, a very high-ranking member of the House of Representatives, and in a very short period of time has become a very senior member of the United States Senate. Well-respected. His opinions are secure and his work is notable.

So I'm pleased to see Mr. Menendez in this position. And just one quick last reminder, he's my junior. Senator, please feel free to say all the good things.

STATEMENT OF HON. FRANK PALLONE, JR.,
U.S. CONGRESSMAN FROM THE STATE OF NEW JERSEY

Chairman Lautenberg, thank you for holding this hearing and for inviting me to testify before you today. You and I have worked together numerous times on efforts to secure chemical facilities in New Jersey and around the country, and I salute your leadership and hard work on this issue.

I want to take this opportunity to express my extreme displeasure at the incredible arrogance of the U.S. Department of Homeland Security, which has chosen to willfully disregard the intent of the United States Congress by preempting State and local laws and regulations on chemical security.

There was a very clear exchange on the floor of the U.S. House of Representatives between the Chairman of the Homeland Security Committee and the Ranking Member of the Homeland Security Appropriations Subcommittee, during which they agreed that the temporary chemical security provision included in an appropriations bill last year was not intended to preempt the rights of States like New Jersey. Unfortunately, DHS chose to ignore those very clear directions and instead cite a quote from Energy and Commerce Committee Chairman Joe Barton, whose committee did not exercise jurisdiction over chemical security during the 109th Congress.

These may seem like bureaucratic legal details of congressional intent, but they are critical. The Bush administration has once again glibly disregarded the will of Congress, and they are apparently uninterested in providing for the safety and security of New Jerseyans. The Republican Congress gave this kind of behavior a free pass, but it's time for that to stop.

That's why Chairman Lautenberg and I are working to take away any ability of DHS to preempt State or local regulations that are stronger than Federal ones. I'm pleased that the House will take up a supplemental spending bill this week that includes chemical security language I supported. Our intent is to ensure that DHS can't undo New Jersey's chemical security regulations, which were intended to protect the State's citizens in the face of Federal inaction.

Chairman Lautenberg and I had hoped last year that we would be able to pass a bill to create a comprehensive security regime for chemical facilities across the country. But under pressure from industry, the Republican Congress refused to take action and the Bush administration dragged its feet for years, even after 9/11 exposed serious weaknesses in our national security. Expert after expert called for us to pay serious attention to the need to secure chemical facilities—including ones in New Jersey that could potentially threaten the lives of millions of people.

Finally, at the last minute, the Republican Congress last year passed weak, industry-friendly language providing temporary authorization for chemical security regulations. From there, DHS stepped much further in the direction of helping the industry by attempting to wipe away New Jersey's first-in-the-nation State chemical security rules.

The fact is that New Jersey had to step up when the Federal Government fell down on the job. Our State reached out to industry and plant workers to develop a comprehensive plan to improve security and provide for greater worker safety. That's too much for this Administration, apparently. They jumped at a chance to override New Jersey's regulations—even if they had to use imaginary authority to do so.

But as Governor Corzine can tell us, New Jersey has stepped up and worked in innovative ways to protect its citizens from threats that could come from facilities located within the staff. They've done so because they know the State, the facilities here, and our vulnerabilities much better than bureaucrats in Washington. And they've done so because the Federal Government did nothing.

Federal legislation and regulations concerning chemical security should allow States to set higher standards that the Federal Government. We have the unfortunate combination of both a large number of facilities and a high population density, so the consequences of insufficient security are too great in our State. New Jersey's rights must be preserved.

Again, Mr. Chairman, thank you for holding this hearing. I look forward to continuing to work with you.

STATEMENT OF HON. ROBERT MENENDEZ, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator MENENDEZ. Well, your Honor—I mean, Mr. Chairman—let me just say, at age 53, Mr. Chairman, it's good to be Junior all over again. So let me thank you for holding this hearing here in New Jersey, which I believe with your leadership—I appreciate the fact that your chairmanship of this subcommittee creates an opportunity to rivet attention on an issue that we care about deeply in New Jersey, but I think has national impact. And, once again, your long history in the Senate has been at the forefront of a whole host of issues that have national impact, Superfund, the whole question

of cleaning up the air in our airlines, as we have dealt with smoking issues. On so much you've been at the forefront of it. And once again today's hearing shows your leadership in a critical issue. And I'm pleased to be joined by my close colleagues from the House, who will have a tremendous opportunity to help us collectively have a strong response from our delegation to what the Department of Homeland Security wants to do, which I fundamentally believe——

Senator LAUTENBERG. Let's see if we can do anything to prevent the echo. (Pause in the proceedings)

Senator MENENDEZ. Let me just say, Senator Lautenberg, what you did today is incredibly important. We're not far away from the area that many of us in New Jersey know has been deemed the "most dangerous two miles" in America by the FBI. Here, at Rutgers Law School in Newark, we sit within 5 miles of the Kuehne chlorine plant in southern Kearny, in a range that would without question, if devastated by an attack, would have an enormous consequence to millions of people not just in New Jersey, but millions of people throughout the region.

And as we speak, as this hearing goes on, the Kearny Police Department has informed us that the Department of Homeland Security wants to take away the surveillance cameras and the electronic monitoring systems that have been put in place at that location because of issues of funding.

Now, this is a prime example of how we cannot delegate to the Department of Homeland Security the question of what standards that we set, that New Jersey chooses to set in the protection of its own citizens, which are greater than that which the Federal Government has chosen.

And this is a perfect example of how we cannot, at least at this stage in time, depend on the Department of Homeland Security to do the right thing. Now, I hope we'll turn that reality around, but it shouldn't even be a question. A chemical plant that has the potential to kill millions of people within the New York/New Jersey region should not be the subject of a lower standard or a greater risk, but the subject of a higher standard and a more secure set of circumstances.

Now, for those of us here, who have worked long to improve the security of critical infrastructure in our state, these are the scenarios we have worked furiously to avoid. For residents of New Jersey, many of whom have grown up in the shadows of chemical plants, down the road from port container shipyards, or in the backyards of railroad lines that transport hazardous materials, these are the types of threats we've had to grapple with on a daily basis.

In New Jersey, we are acutely aware of the risks we face. Not only did we experience the horror and the impact of September 11th, not only do we live across the river from a site that is a daily reminder, we have our own risks that are unique to New Jersey and to those states similarly situated that have other chemical industries located in their states. Nowhere else in the country are densely populated areas sandwiched between a multitude of wide-ranging threats, including a major international airport, the largest seaport on the east coast, proximity to the nation's largest metropo-

lis, and all within a tight cluster of chemical plants known as the chemical coastway. So, when it comes to our security, the bottom line is, no one knows what we need better than our State.

And that is the key distinction over which we are currently locked in a battle of the Department of Homeland Security. The Department's assumption that it can and should preempt chemical security measures at the State level should be, at a minimum, alarming to New Jerseyans. The Department's proposed regulations would not just jeopardize the progress we are making here in New Jersey to make sure our communities are safe - it would take us backwards. The proposed laws would fail to cover many dangerous chemical facilities unique to the State. They wouldn't push chemical makers to switch to less dangerous technology or materials that are available within the marketplace, that can still create a product that would be profitable to the industry, but at the same time create greater protection for all of our citizens, something New Jersey has already been doing.

The fact is, we are the only State that has acted to enact such strict provisions and provide enforceable standards. So, instead of working to come up with regulations that could supercede the progress we have made and preempt future attempts to tighten our regulations, I would hope they would use New Jersey as an example, and build off the steps we have taken.

More than 5 years after September 11th, the fact that the Federal Government has not led the way to secure our chemical plants is nothing short of a failure. Instead, our local police departments, our state legislatures, and communities, are leading the charge. If there is anything we learned from September 11th, Mr. Chairman, it was that we will not always be able to preconceive the nature of an attack or imagine what could be used as a weapon against us. What was once inconceivable—a simple letter laced with Anthrax becomes a deadly weapon, a commercial airplane used every day for commerce and tourism becomes deadly weapons of mass destruction. These and other realities changed our world forever. Yet, we refuse to come to terms with a stark reality: The terrorists are creative and they work every day to find a new vulnerability to exploit. At a minimum, we have to be at least as creative as they are, and certainly as it relates to the chemical industry and the nature of the industry. The creativity doesn't have to be so expansive. It's pretty obvious.

Meanwhile, we have yet to see any innovative approach from the Department of Homeland Security on chemical security. This latest development from the Department is concerning not just because it calls into question the future of New Jersey's chemical security, but because it signals the Department is on the wrong track. Instead of looking ahead to develop creative ways to secure our plants, the Department has put forward proposal that threatens to undermine our own protections.

Mr. Chairman, I know with your leadership and working with our colleagues we will not, and should not, be at the whim of an agency that has yet to prove it grasps the gravity and the urgency of securing our chemical plants. New Jersey needs the flexibility to enforce its own, tougher standards.

I'm sure that the Chairman recalls the days where our colleagues, when they had the majority, would say, "The states know best, the states know best." We should delegate to the States all of these block grants. We should delegate to the States all of this authority. And yet we do not hear one voice, in this most critical issue on security, say, the State knows best. On the contrary, the State does not know the best in terms of the Department of Homeland Security.

I think I speak for all of us on the panel that will work to ensure that New Jersey's right is upheld and that our security is not compromised. The stakes are simply too high. And I look forward to working with you, Senator Lautenberg, to make sure our rights are preserved in this regard and we are not preempted.

Senator LAUTENBERG. Well said, Senator. Is there an intimation in what you've said that there could be, perhaps, other voices trying to communicate with the Department of Homeland Security, which might have a greater influence in the stakes themselves?

Senator MENENDEZ. Well, obviously, clearly, the suggestion that the fundamental principle we heard from our colleagues, that the states know best, in this particular case, seems to be undermined. And so one would have to ask, Well, what makes the states less knowledgeable about its own securities and its own unique perspective as it relates to this industry, which the FBI has cited as part of the equation as "the most dangerous two miles in America."

You got to ask, Well, who is creating the pressure points to subvert the State standards to a lesser Federal standard?

Senator LAUTENBERG. Thanks very much, Senator Menendez, Councilman Pallone. For those of you within earshot, we are determined to change the course that has been laid out by the Department of Homeland Security. To put it in a term in the vernacular, "They just don't get it." And we're going to change that. Thank you.

Senator MENENDEZ. Thank you.

Senator LAUTENBERG. Now I'd like to call our second panel of witnesses to the table. The second panel consists of Mr. Larry Stanton from DHS, Susan Bodine from EPA. And Ms. Bodine will be joined at the witness table, I understand, by Deborah Dietrich. She's the Director of the Emergency Management at EPA. And we welcome all of you here.

At the outset, I must make say a couple of things here. I had hoped that the United States Department of Homeland Security Secretary Michael Chertoff, who is himself a native of Elizabeth, New Jersey, or other more senior-level—and we welcome you, Mr. Stanton, but we had extended an invitation to DHS to bring in the highest level of persons at the Department. However, they declined to attend.

And, again, it's troubling that the top officials at the Department of Homeland Security refuse to come here to defend their decision to preempt New Jersey's chemical Security Law. And I mean no disrespect to Mr. Stanton, the DHS witness who's here with us today, and I appreciate the fact that you've traveled this distance to New Jersey to discuss this important issue.

Our country depends on capable and hard-working Federal employees like those before us from the Department of Homeland Security and the Environmental Protection Agency. The Environ-

mental Protection Agency currently plays a secondary role to DHS in the area of chemical security, but it retains an enormous amount of the Federal Government's skills and expertise about the safe and secure operation of chemical facilities.

Now, EPA also has experience in working with state and local governments on safety and security related matters. And the witnesses with us today, Larry Stanton, Deputy Director of the Risk Management Division of the U.S. Department of Homeland Security; Susan Bodine, Assistant Administrator for the Environmental Protection Agency's Office of Solid Waste and Emergency Response, and Ms. Dietrich, who I mentioned earlier.

We're pleased to have all of you here, and we'll start by asking Mr. Stanton to begin. Now, what I've asked for is a 5-minute summary of your statement. The detailed statement that you've prepared will be considered, entered into the record, but I would ask you, please, to try to adhere to the time frame. I'll give you a general reminder if you go over a little bit. If you go over a lot, it won't be so gentle, but we thank you very much.

Mr. Stanton, please.

STATEMENT OF HON. ROBERT MENENDEZ,
U.S. SENATOR FROM THE STATE OF NEW JERSEY

Mr. Chairman, Thank you for the invitation to appear before you today on this critical issue. I am pleased that we have a strong commitment from our New Jersey congressional delegation to address serious concerns facing our state's ability to regulate chemical security, and that our senior senator has made this such a forefront issue. I have been proud to join you in your efforts on chemical security and I thank you for holding this hearing.

Today, we are not far from the area that many of us from New Jersey know has been deemed the "most two dangerous miles" in America by the FBI. Here, at Rutgers Law School in Newark, we sit within 5 miles of the Kuehne plant in South Kearny, in a range that would without question be devastated by an attack at that facility. This is not a new reality. For those of us here, who have long worked to improve the security of the critical infrastructure in our state, these are the scenarios we have worked furiously to avoid. For residents of New Jersey, many who have grown up in the shadows of chemical plants, down the road from port container shipyards, or in the backyards of railroad lines that transport hazardous materials, these are the type of threats have had to grapple with on a daily basis.

In New Jersey, we are acutely aware of the risks we face. Not only did we experience the horror and the impact of September 11th, not only do we live across the river from a site that is a constant reminder of what we are up against, but we have are own risks that are unique to New Jersey. Nowhere else in the country are densely populated areas sandwiched between a multitude of wide-ranging threats, including a major international airport, the largest seaport on the east coast, proximity to the nation's largest metropolis, and all within a tight cluster of chemical plants. So, when it comes to our security, the bottom line is, no one knows what we need better than our state.

And that is the key distinction over which we are currently locked in a battle with the Department of Homeland Security. The Department's assumption that it can and should pre-empt chemical security measures at the state level should be, at a minimum, alarming to New Jerseyans. The Department's proposed regulations would not just jeopardize the progress we are making here in New Jersey to ensure our plants are secure and our communities are safe—it would take us backwards. The proposed rules would fail to cover many dangerous chemical facilities unique to the state. They wouldn't push chemical makers to switch to less dangerous technology or materials, something New Jersey has already been doing. The fact is, we are the only state that has acted to enact such strict protections and provide enforceable standards. So, instead of working to come up with regulations that could supersede the progress we have made and pre-empt future attempts to tighten our regulations, I would hope they would use New Jersey as an example, and build off the steps we have taken.

More than 5 years after September 11th, the fact that the Federal Government has not led the way to secure our chemical plants is nothing short of a failure. Instead, our local police departments, our state legislatures, and communities, are leading the charge. If there was anything we learned from September 11th, it was that we will not always be able to pre-conceive the nature of an attack or imagine what could be used as a weapon against us. What was once inconceivable—that commercial planes we use every day could become deadly weapons of mass destruction—changed our world forever. Yet, we refuse to come to terms with a stark reality: the terrorists are creative and are working every day to find a new vulnerability to exploit. At a minimum, we have to be at least as creative as they are.

Meanwhile, we have yet to see any innovative approach from DHS on chemical security. This latest development from the Department is concerning not just because it calls into question the future of New Jersey's chemical security, but because it signals the Department is on the wrong track. Instead of looking ahead to develop creative ways to secure our plants, the Department has put forward a proposal that threatens to undermine our own protections.

We will not, and should not, be at the whim of an agency that has yet to prove it grasps the gravity and the urgency of securing our chemical plants. New Jersey needs the flexibility to enforce its own, tougher standards. I think I speak for all of us on this panel that we will not give up until we ensure that New Jersey's right is upheld and that our security will not be compromised. The stakes are simply too high.

STATEMENT OF LAWRENCE STANTON, DEPARTMENT OF HOMELAND SECURITY

Mr. STANTON. Thank you, Senator. Thank you for the opportunity to be here today, sir. The Department does recognize the importance of the partnership with state and local authorities in ensuring chemical plant security. We believe that an open partnership, an open dialogue, among the partners, the state and local authorities, private sector, owner/operators operators, and the Federal Government is critical to providing for a secure chemical facility infrastructure for the nation. We believe that success in this area involves effective dialogue between all of the various levels of government, and we are dedicated to that principle.

The DHS vision for security of the chemical infrastructure, sir, includes an infrastructure that is economically viable, is employing effective and appropriate risk analysis tools, has attained a sustainable security posture, and is addressing its vulnerabilities and consequences of attack.

We have noted, sir, that the number of bills that have been presented since 9/11 addressing chemical security have all been centered around the concept of risk reduction to the chemical sector. The recent enactment by Congress of legislation in this area has provided DHS with the opportunity to regulate the chemical sector, and we will be announcing an Interim Final Regulation on April 4th of this year.

The intent, sir, of the Department, when we released the Advance Notice of intent to regulate, the ANRM, was to solicit comments. And I think it is important to note at this hearing that, and especially here in New Jersey, that our intent with the ANRM was exactly as was purported, that our intent was to state a position, and to solicit comments on that position.

We received hundreds of comments on the ANRM. As you can well imagine, sir, some of those comments were from members of the Congress and the Governor of this great State. All of those comments were read by us, considered very carefully, and have been weighed very carefully, and are reflective and have been re-

flected in the Interim Final Regulation. That's not to say that, in every case, every comment was accepted, or that there have been sweeping changes to the Interim Final Regulation from the ANRM, but there are substantial changes in the Interim Final Regulation from the Advance Notice.

That Interim Final Regulation, which will be released in just 2 weeks, we believe, is the appropriate start to the Federal regulatory effort in securing the chemical sector. We would like very much to have the opportunity to implement that regulation and to show what that regulation does on the ground.

DHS has a number of voluntary programs with the chemical sector, and I've elaborated on these in my written statement, sir. I would just note very quickly that our hallmarks, the Office of Infrastructure Protection's hallmark, has been an effective engagement. The protection planning process depends heavily on effective partnering between our Federal officials and the local and state officials that are responsible for response to and protection of plants in their communities.

The Comprehensive Review Program we have launched throughout the Nation, specifically aimed at the chemical sector, relies entirely on effective partnership between local and State authorities, local and State responders, and the variety of Federal capabilities that can be brought to bear in both planning and response around the risk issues inherent in a chemical facility.

We have in the Office of Infrastructure Protection a long track record of success in partnering effectively with our State and local colleagues, especially here in New Jersey, which, as has been pointed out by the previous panel, certainly has one of the most robust chemical infrastructures in the nation. We are keenly aware of that and we look forward to a continued effective partnership with our local and state partners in New Jersey.

Thank you, sir.

Senator LAUTENBERG. Thank you very much.

Ms. Bodine.

STATEMENT OF LAWRENCE STANTON, DEPARTMENT OF HOMELAND SECURITY

Thank you Chairman Lautenberg, Ranking Member Vitter, and Members of the Committee. It is a pleasure to appear before you today to discuss "the Importance of State and Local Authorities in Ensuring Chemical Plant Security." Open dialogue between security partners is a key element in advancing the security of our nation, and I appreciate this opportunity to address you. Securing the Chemical Sector is a large job that will extend beyond the reaches of the Federal Government. It must be a national program that includes all levels of Government, industry and even the public. Integrated and effective partnerships among all partners, Federal, state, local, and private are essential to some of the most critical infrastructures in our country, chemical facilities.

DHS' vision for the chemical sector is to have an economically competitive industry that has achieved a sustainable security posture, by effectively reducing vulnerabilities and consequences of attack to acceptable levels, using risk-based assessments, industry best practices, and a comprehensive information sharing environment between industry and Government.

Before discussing some of the Departments work and achievements in the chemical sector, I pause to make a few notes concerning the legislation authorizing DHS to regulate facilities within the chemical sector. Since 9/11, there have been several congressional hearings and legislation introduced on chemical security, and then late last fall, the Department was pleased to have Congress enact legislation in this

area. Even before we have an opportunity to implement this law, however, there are already threats of having the program delayed yet again.

I am referring to a provision that is currently in the House Emergency Supplemental Appropriations bill. Among other problems, the provision imposes new requirements that would delay the implementation of this important regulatory program at a time when the Administration is scheduled to issue an interim final rule within weeks. The provision would also weaken the Department's ability to protect from disclosure information transmitted to the Department for regulatory purposes—information that would, if in our enemies' hands, provide information about how to attack chemical facilities and foil existing defenses. Furthermore, the provision removes the restriction that the Department has the sole ability to enforce the provision, potentially resulting in lawsuits that might even further delay this important program. Finally, the provision would force DHS to reject any site security plan that does not meet State and local standards, which could put the Department in the position of imposing Federal fines on a facility that does not meet State and local regulatory standards. We urge Congress to remove the problematic provisions from the House Emergency Supplemental Appropriations bill.

This hearing comes at an important moment for chemical security. This is not just because of the new federal regulations for chemical facility security which we will soon promulgate, but because voluntary cooperative efforts between the public and private sectors are beginning to bear fruit. Let me give you some examples of these voluntary efforts. One of the more important efforts we have been working on is the National Infrastructure Protection Plan (NIPP) which was issued in June 2006. The NIPP improves protection of Critical Infrastructure and Key Resources (CI/KR) by setting forth the risk management framework guiding national CI/KR protection activities across all sectors. Improving protection in the most cost effective manner requires cooperation between the owners and all levels of Government, and the NIPP clearly defines roles and responsibilities among all partners.

Under the NIPP, each sector has developed a Sector-Specific Plan, or SSP, which details how the NIPP will be implemented in that specific sector. The Chemical SSP is a great example of the public/private partnership we are trying to foster working together to improve security at chemical facilities. It establishes goals, objectives, and metrics that address the full spectrum of protection activities including awareness, prevention, protection, response, and recovery. As with the other SSPs, the plan is in final clearance. We look forward to the chemical sector continuing to set a strong example in implementing cooperative strategies that cost effectively use Government and industry resources to ensure all of our CI/KR continue to operate economically and safely.

The Chemical SSP describes many of the programs in which the chemical sector is voluntarily cooperating with DHS to protect and ensure the resiliency of its assets and manufacturing capabilities. In many cases, industry, through the Chemical Sector Coordinating Council (SCC), has actually partnered with DHS to develop these initiatives. Some examples of these voluntary efforts are:

Site Assistance Visits (SAVs) are designed to facilitate vulnerability identification and discussion between the Federal Government and owners/operators of CI/KR in the field. 41 SAVs have been conducted in the chemical sector.The Comprehensive Review (CR) program, a non-regulatory exploration of potential threats in the terrorist environment, brings together a Federal interagency team, facility owner/operators, industry representatives, and community emergency services organizations. The first Chemical Sector CR was conducted in Detroit in February 2006. By August 2007, CRs will be conducted in five additional regions including Chicago, Houston, Los Angeles, Northern New Jersey, and Lower Delaware River. CRs have identified many improvements—many of them low- or no-cost--that can be implemented by CI/KR owners/operators, as well as longer term strategies and potential improvements that can be implemented with a mix of Government and private sector resources.

The Buffer Zone Protection Program (BZPP) is a targeted grant program designed to assist local law enforcement in enhancing CI/KR protection across the country. In FY 2006, grant funding was increased from $50,000 per site to $189,000 per site for 185 sites in all sectors. For FY 2004/2005 248 BZPP reports for chemical facilities were submitted to DHS, which are eligible for a total of $12,600,000. For FY 2006, three chemical reports have been submitted out of a total of 46 eligible chemical facilities which are eligible for a total of $10,316,000. For FY 2007 a total of 100 chemical sites are eligible for BZPP funding of $19,865,000. To date, 394 chemical facilities have been eligible for a total of $42,781,000 under the BZP Program. Additionally in FY 06, there was a $25 million dollar Chemical BZPP to enhance state and local jurisdiction's ability to protect and secure identified Chemical Sector CI/KR regions. The Chemical BZPP program is a sector-specific effort designed to be a companion to the Chemical Sector CR initiative.

The Homeland Security Threat and Risk Analysis Center (HITRAC) is working hard to ensure the timeliness and content of the threat information provided to this sector. HITRAC works to provide valuable threat information themselves or via other invited members of the Intelligence Community through written products and periodic classified threat briefings to cleared industry representatives in the chemical sector. In addition, HITRAC provides scheduled unclassified teleconference briefings on threat information based on private-sector reporting, as well as law enforcement and other sources.

The Homeland Security Information Network (HSIN) is providing an increasing amount of timely information to users in a secure online format. Recent information that we have posted on HSIN includes information on the January 17th train derailment and fire involving chemicals in Kentucky, reports on recent incidents in Iraq involving chlorine, and Quarterly Suspicious Activity Analyses which provide information on incidents and threats of concern to the private sector. These Quarterly reports are based primarily on private-sector reports, and represent the value of public-private cooperation.

As I mentioned earlier, the Fiscal Year 2007 Homeland Security Appropriations Act directed DHS to develop and implement a regulatory framework for high risk chemical facilities. Section 550 of the Act gave DHS authority to require high-risk chemical facilities to complete vulnerability assessments, develop site security plans, and implement protective measures necessary to meet DHS-defined performance standards. The Act gives us six months from the date the President signed the Bill, or until April 4, 2007, to promulgate interim final regulations implementing this authority.

In December 2006, DHS released an Advanced Notice of Rulemaking (ANRM) on the Chemical Facility Anti-terrorism Standards, containing draft regulations and seeking public comment on those regulations and some of the central issues surrounding them. Comments were due to DHS by February 7, 2007.

Through the comment period, DHS received over 1300 pages of comments from over 106 separate submitters, which I am sure includes some of you. DHS is reviewing and considering these comments as the text of the interim final regulation is refined and finalized. A cursory review of these comments shows preemption, information protection, adjudications, and inherently safer technology as issues upon which numerous comments have been provided. We really appreciated all of the input and perspectives offered by Members of Congress, State and local jurisdictions, and industry. As the interim final rule is still being drafted, I can speak to some of the main principal and aspects of the program that we outlined in the Notice.

First, let me stress that this will be a security focused regulatory regime that takes into consideration other existing authorities, such as the Environmental Protection Agency's Risk Management Program, the Department of Transportation's Hazardous Materials Lists, the Chemical Weapons Convention, and others. Looking at these other authorities, DHS has identified five security issues to be addressed as part of its program. Those are:

Release—quantities of toxic, flammable or explosive chemicals or materials the DHS believes have the potential for significant adverse consequences for human life or health if released from a facility.

Theft or Diversion—chemicals or materials DHS believes have the potential, if stolen or diverted during shipment, to be used as weapons or easily converted into weapons using simple chemistry, equipment or techniques in order to create significant adverse consequences for human life or health.

Sabotage or Contamination—chemicals or materials which produce large amounts of toxic by inhalation gas when spilled in water and that DHS believes, if sabotaged or contaminated, have the potential to create significant adverse consequences for human life or health during transit or at a appoint of destination.

Government Mission Criticality—chemicals materials, or facilities, the loss of which DHS believes could create significant adverse consequences for national security or the ability of the Government to deliver essential services.

Economic Criticality—chemicals, materials or facilities the loss of which DHS believes could create significant adverse consequences for the national or a regional economy.

To implement the regulations, DHS must define the regulated community, or determine which facilities are "high risk". To facilitate this, DHS has developed a screening tool called the Chemical Security Assessment Tool (CSAT). The CSAT employs an easy-to-use, online consequence-based Top Screen tool. CSAT builds upon the foundational assessment tool developed with industry referred to as the Risk Analysis and Management for Critical Asset Protection, or RAMCAP. Under the DHS proposal, those facilities that are initially designated high-risk must complete

the online CSAT Security Vulnerability Assessment (SVA) which will factor into a final determination of a facility's risk level for purposes of the regulatory regime.

Using the results of the CSAT tools, all high risk facilities will be placed into risk-based tiers. While all high-risk facilities will be required to develop site security plans addressing their vulnerabilities, the security measures needed to meet the performance standards, as well as its inspection cycle and other regulatory requirements will be based upon each facility's tier level. The performance standards are intended to address the facility's relationships with local jurisdictions, the ability to delay an adversary until a response by local authorities, response capabilities in the community, and emergency planning with local authorities. Thus, the performance standards take into consideration, and are intended to validate, the essential role that local authorities play in facility and community security.

The higher a facility's risk tier, the more robust the security measures they will need to incorporate, and the more frequent and rigorous their inspections will be. Inspections will both validate the adequacy of a facility's site security plan, as well as verify the implementation of the measures identified therein.

Training of the inspectors is taking place this month in Louisville, Kentucky. A large component of this training is being conducted on site at chemical facilities that have volunteered to participate. DHS is also finalizing the IT tools, guidance documents, procedure manuals, and other materials necessary to be ready for the launch of the regulatory program on April 4, 2007. Presently, the CSAT Top Screen has been developed and is going through final preparation.. DHS will be using a phased approach in implementing the regulations, with implementation at the highest risk facilities beginning in an expedited manner, and implementation at lower-risk facilities occurring in a sequential fashion.

For our initial operating capability carrying through the end of this calendar year, we have identified a number of facilities that we believe will land clearly in the highest risk tier. Once the Interim Final Rule is published, we intend to begin working with those facilities in a partnership to perform the initial screening and vulnerability assessment, provide assistance in the drafting of the Site Security Plan, and conduct an initial inspection. We intend this to be a learning experience for us, our Inspectors in particular, and for industry, and what we learn will shape further implementation of the program, and help us ensure consistency in our approach across the Nation.

Finally, let me just note that Chemical regulatory authority is an issue that has been worked on for a long time, and was the subject of several hearings and bills introduced by the 109th Congress. The Department had reached the conclusion that the existing patchwork of authorities did not permit us to regulate the industry effectively and ensure the security of these facilities. Finally, late last fall, the Fiscal Year 2007 Homeland Security Appropriations Act gave the Department the authority to regulate the security of high risk chemical plants nationwide. As we have said all along, and have incorporated into the proposed interim final rule, the following core principles must guide and regulatory approach:

First, we recognize that not all facilities present the same level of risk, and that the most scrutiny should be focused on those that, if attacked, could endanger the greatest number of lives, have the greatest economic impact or present other very significant risks. There are certainly many chemical facilities in the country that pose relatively low risk.

Second, facility security should be based on reasonable, clear, and equitable performance standards. The Department is developing enforceable performance standards based on the types and severity of potential risks posed by terrorists and natural disasters, and facilities should have the flexibility to select among appropriate site-specific security measures that will effectively address those risks.

Third, we recognize the progress many responsible companies have made to date. Many companies have made significant capital investments in security since 9/11 and we should build on that progress. We will do that through implementation of the regulations, and by continuing all of the voluntary efforts.

Thank you for your attention and I would be happy to answer any questions you may have at this time.

STATEMENT OF SUSAN BODINE, ASSISTANT ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. BODINE. Thank you, Chairman Lautenberg. I'm pleased to be here to discuss EPA's authority to promote the safety of our nation's chemical facilities.

The Office of Solid Waste and Emergency Response manages EPA's response to environmental emergencies. EPA's national planning and preparedness functions, and development and implementation of Federal regulations to prevent hazardous chemical accidents and oil spills.

In carrying out our emergency response functions, we work closely with EPA's ten regional offices, our Federal agency partners, and state and local authorities to respond to major environmental emergencies and to conduct emergency removal actions at oil spill and hazardous waste sites.

Of the regulations administered by my office, two in particular form the basis of our Chemical Accident Prevention and Prepared Program. Specifically, these are regulations for hazardous chemical inventory reporting under the Emergency Planning and Community Right-To-Know Act (EPCRA), and regulations for accident prevention and mitigation under Section 112(r) of the Clean Air Act.

Now, EPCRA was enacted in 1986 as part of the Superfund amendments in response to the Bhopal, India chemical disaster of December 1984. And under EPCRA, states are directed to form State Emergency Response Commissions and local communities are to form Local Emergency Planning Committees.

Now, the primary function of the Local Emergency Planning Committee is to prepare community emergency response plans for chemical accidents. EPCRA also requires chemical facilities to provide the Local Emergency Planning Committees with information necessary for emergency planning, and chemical facilities also submit annual chemical inventory reports and information about the facility's hazardous chemicals. They submit those both to the state commissions, local committees, and to the local fire departments.

In 1990, as part of the 1990 amendments to the Clean Air Act, Congress added Section 112(r). In response to chemical accidents that occurred in the late 1980s. Section 112(r) of the Clean Air Act establishes general duties on all stationary facilities that handle extremely hazardous chemicals to prevent and mitigate accidental releases of those chemicals into the air. It also directs EPA to promulgate risk management requirements for facilities that have large quantities of the most dangerous chemicals, facilities that store quantities above a threshold. They have to conduct a hazardous assessment and, develop and implement an accident prevention and emergency response program. These facilities, also have to analyze the potential consequences of both a worst-case scenario release, as well as an alternative release scenario. And, again, they need to write a summary report. And all of that goes into a Risk Management Plan, which we call a RMP. There are approximately 14,000 facilities in the states that are subject to these RMP requirements.

In addition to providing the address and physical location of a facility, these RMPs, the Risk Management Plans, report the identity and quantity of the regulated chemicals on site and information about measures taken by the facility to prevent accidental releases, facility emergency planning information, the history of significant accidents at the facility over the last 5 years, as well as the facility's Offsite Consequence Analysis information.

Neither EPCRA nor the Clean Air Act contain any chemical plant security requirements, but they do contribute to facility safety and emergency preparedness by reducing the vulnerability of the facilities and communities to releases from whatever source and, therefore, to the consequence of those releases.

I do want to mention that in 1999 Congress did change some of the Section 112(r) Risk Management Plan requirements in the Chemical Safety Information Site Security and Fuels Regulatory Relief Act. That change was to ask EPA to conduct a study of the Offsite Consequence Analysis information, and determine whether public release could increase terrorist risks.

In 2000, EPA promulgated a change to the Offsite Consequence Analysis information as a result of its finding that making that information public did propose an increased risk.

In addition, in 2004, EPA amended its regulations again for the Risk Management Program to remove the requirement that there be any information on Offsite Consequence Analysis in the summaries of the RMPs, which are publicly available.

Now, after the creation of the Department of Homeland Security in 2002, the Homeland Security Presidential Directive 7 established DHS as the lead agency for coordinating the overall national effort to enhance the protection of critical infrastructure and key resources of the United States, including the chemical sector. EPA supports DHS by providing information and support and we work together with them when we provide them assistance as requested.

Senator LAUTENBERG. Thank you.

Ms. Bodine, I didn't see any reference to IST. You're familiar with what the acronym means?

Ms. IBODINE. Yes.

Senator LAUTENBERG. As I take it, your contribution to preventing, and I look at your testimony here, establishing the Chemical Accident Prevention Program, but you don't include IST in your commentary.

Is that not a factor in your evaluation?

Ms. IBODINE. What the chemical facilities are required to do is a safety review. They are required to identify hazards, look at their process controls, look at their mitigation systems, look at their monitoring and detection systems, look at training, compliance, and incident investigations.

And as part of the process, hazard analysis, the facilities need to look at what would happen if there was a failure in the process, what would happen if there was a leak.

Senator LAUTENBERG. So you're talking about what might happen in supplying information. You're not taking an active role in prescribing ways to prevent these things. What you're doing is providing information. I take it you're a data resource for DHS.

Ms. IBODINE. Well, no, the EPA's programs are, again, to deal with chemical safety and to require facilities to have both evaluation of the Offsite Consequence Analysis, which——

Senator LAUTENBERG. Consequence management. You mean a medical or therapeutic arrangement. We'd like to start earlier, as you can imagine.

Ms. IBODINE. Right. That's what the Risk Management Program looks at, both at the analysis of what the risks are associated with

the facility and the processes up front. And if an accident does occur, then you need to have, of course, in place the planning and procedures to respond.

Senator LAUTENBERG. So you don't look at IST as a means of helping to reduce the risk of a major accident happening.

Ms. IBODINE. Our program doesn't have a requirement.

Senator LAUTENBERG. Thank you.

I find it, I must tell you, shocking, to believe that EPA, with its responsibilities for making sure that the air is clean, the water is clean, the Superfund sites are cleaned up, doesn't think that, in their development of information for DHS to act upon, which is, as I take it, its principal role here, that it would not be suggested by your department that they look at alternative ways to do what they have to with easier materials than those that are used now. Easier, in the fact that they might not have the same disastrous consequence.

Ms. IBODINE. But it's not always clear what is Inherently Safer. There are always going to be risk trade-offs when looking at different materials. You have to remember, we started using MTBE in our gasoline in 1979 for octane purposes.

And then later in 1992 we started using it to meet the 1990 Clean Air Act amendments for oxygenated fuels. There could be unintended consequences.

Senator LAUTENBERG. The question is whether or not EPA has the responsibility to be more aggressive in terms of making recommendations that will help prevent the accidents. We look at EPA as an agency that would help prevent health dangers to children, to people in communities, that by having cleaner air, et cetera. That's what EPA's job is.

Yeah, they have a secondary phase, they do clean up afterwards. We don't want to clean up afterwards, Ms. Bodine. We would like to get on with this and make sure that the protections that we propose have a direct effect on the exposure to danger.

Thank you.

Mr. Stanton, is it the view of DHS that preempting the rights of states or local governments to adopt strong chemical security protection increases our homeland security?

Mr. STANTON. That's not my understanding of DHS's position, no, sir.

Senator LAUTENBERG. So then what is the value of preemption here? I don't quite understand. If you don't think that preempting would endanger people more, rather, States rights would protect people more rigidly, what

is the purpose of preemption as you see it?

Mr. STANTON. The purpose of preemption, sir, would be to enable DHS to address a situation where a state law or, perhaps, a local law or ordinance was interfering with DHS's ability to reduce risk, improve security, reduce consequentiality of or vulnerability of a chemical plant.

Senator LAUTENBERG. Now, you have to forgive me, I don't get it, because what you're saying is that stronger laws would prevent DHS from being more effective in terms of preventing a catastrophe.

Mr. STANTON. I'm sorry, sir, I didn't understand the question.

Senator LAUTENBERG. The suggestion is that it would inhibit your ability to help prevent accidents resulting from chemical exposure of an attack.

Mr. STANTON. No, sir.

Senator LAUTENBERG. Well, would preemption protect our citizens more strongly.

Mr. STANTON. I'm not sure if you're asking the question in general, sir, or in the context of the New Jersey chemical regulation.

Senator LAUTENBERG. Well, it applies to all states, Mr. Stanton.

Mr. STANTON. Yes, sir. I understand that the Department's position———

Senator LAUTENBERG. Let me be clear.

Would you say that preempting States' programs to prevent chemical accidents from occurring in any way would improve the safety of the people who reside there?

Does the preemption, being an earlier intervention, would help people be more safe as a result of that, of taking down themore rigid requirements that a state has?

Mr. STANTON. Sir, it is not my understanding that DHS intends to preempt State laws that do not frustrate our goal of reducing risk to the communities, to the nation, to the infrastructure itself.

Our intent is to make a case for preemption, as is our place to do, in a situation where a state law is frustrating or interfering with our ability to accomplish risk reduction and improve security, reduction of consequentiality, reduction of vulnerability.

Senator LAUTENBERG. So the State exercising its right to protect its citizens to the best of its ability, that might be more requiring than DHS's, might frustrate DHS's ability to conduct their programs on a weaker standard?

Mr. STANTON. No, sir. Sir, that's not our proposition at all.

Senator LAUTENBERG. Well, what does preemption do? I'm not getting it. I don't know when the people, who either see this or hear it, will understand why it's better to have, not to frustrate, your words, frustrate DHS from carrying on its mission, when it's mission is less.

Would they use a shorter ladder fighting a fire, I mean, in making people feel safer? It doesn't make sense, Mr. Stanton. And I don't mean to be picking on you, but I would tell you that there is nothing that I've heard from your statement, nor that I've seen from DHS, that suggests they are more concerned about taking care of the people who are exposed to these facilities by permitting states, who have tougher standards, to exercise those tougher standards.

Mr. STANTON. And I don't think that the language that we are intending to post on April 4th will necessarily——

Senator LAUTENBERG. Well, can I say that DHS would salute more rigid standards in the states, and let them do whatever they can that is more requiring than DHS to protect their residents?

Mr. STANTON. I think, sir, that the role of the Federal Government is to address national risk, to bring a national perspective to the table. When we look at the risks of a chemical facility, I think that what is risk reduction to one level of government may not always be risk reduction to every level of government.

And so I think that it is entirely possible that, on a case-by-case basis, there will be differences of opinion between the Federal Government and the state, not only in New Jersey, but in other places, as well. And I think the intent of DHS——

Senator LAUTENBERG. This isn't a court of law, but I think that the case that you're making on behalf of DHS doesn't really do the job, Mr. Stanton. And convey it to Mr. Chertoff, to the Secretary of the Department of Homeland Security, that Senator Lautenberg does not understand why preemptions of rigid state law would be a better way to protect people with a lesser standard; that chlorine trucks have been recently used, Mr. Stanton, as bombs to kill people in Iraq.

Does DHS view a terrorist attack on a chemical facility in the United States as a potential threat to the American public.

Mr. STANTON. Certainly, sir.

Senator LAUTENBERG. If so, why is the Administration proposing to preempt States from protecting their residents?

Mr. STANTON. I'm not sure that we are, sir. We're releasing an Interim Final Regulation in two weeks. The Interim Final Regulation will state DHS's position post-incorporation of comments. As I said in my opening statement, the Advance Notice that was released was exactly what it purported to be, it was a solicitation of comments on the subject. We received many comments on the subject of preemption, and those comments have figured heavily into our thinking of the language of the Final Regulation.

Senator LAUTENBERG. The situation that we have here with chlorine now being used as a weapon, as I noted, in Iraq, and it conforms to a statement made by Mr. Richard Falkenrath, the Homeland Security Policy Advisor, to President Bush from 2001 to 2003. He said something, "When you look at all of the different targets that could be attacked in the United States and ask yourself which presents the greatest possibility of mass casualties and are the least well secured at the present time, one target flies off the page, and it's chemicals, in particular toxic inhalation hazardous chemicals, not necessarily explosive chemicals, which, if inhaled, might be damaging to human health."

And if we can find Inherently Safer Technologies to deal with these things, I don't understand why we can't go ahead and do that without having the Department of Homeland Security saying, no, you're going to frustrate our means to work with these problems.

As you can tell, it's really hard to imagine how circumventing our more rigid structure is going to give our people any protection, any comfort.

The 2007 DHS Appropriations bill gave your Agency the task of writing Federal Rules on chemical security and was silent on the issue of preemption. What kinds of security analysis did DHS use in its decision to preempt the states?

Mr. STANTON. Sir, no decision has been made to preempt states.

Senator LAUTENBERG. No, you keep saying that, Mr. Stanton. Is there any objection to us reinserting in the law that was passed in the House, the Bill that was passed in the House of Representatives, why suddenly was there an effort to take out that right, the right of the states to write their own rules, that would send over

to the Senate a Bill that strikes out the inability of DHS to preempt States' rights.

Mr. STANTON. This is in reference to the amendments to the Iraq Funding bill, sir.

Senator LAUTENBERG. Right.

Mr. STANTON. The Department is concerned that those amendments will significantly delay the implementation of a security regulation, sir. We've been requesting authority to regulate the chemical industry for several years. The authorization to do so was finally granted on September 29th of last year. We were given six months to write a rule. We put out a request for comment on December 28th. We received those comments. We read those comments. We studied those comments. We've redrafted the Interim Final Rule in recognition of those comments.

Senator LAUTENBERG. Is there a proposal to preempt states from using their own standards?

Mr. STANTON. Sir, the Interim Final Rule is going to be released in two weeks. It will lay out very specifically what DHS's understanding of its preemption authorities prerogatives are.

Senator LAUTENBERG. Okay.

Mr. STANTON. Under existing Federal law.

Senator LAUTENBERG. I hear you. I'll close with this: In 2006, Government Accountability Office issued a report encouraging DHS to work more closely with EPA and consider Inherently Safer Technologies as part of the chemical security policy. DHS rejected that suggestion because of concern over how DHS's interaction with EPA might be perceived among DHS's private sector partners. Now, that's a quote, how DHS's interaction with EPA might be perceived among DHS's private sector partners.

Should DHS's relationship with the chemical industry be a factor in its decisions about Homeland Security Regulations?

Mr. STANTON. I'm sorry, sir, could you repeat the question.

Senator LAUTENBERG. I asked, should DHS's relationship with the chemical industry be a significant factor in its decisions about how they write Homeland Security regulations?

Mr. STANTON. DHS believes that, in order to effectively regulate, in order to effectively reduce risk, in order to effectively reduce vulnerabilities and consequences in the chemical sector, the most beneficial way to do that is in partnership with our local and state partners in Government, with our partners in the public sector, and with our partners in the private sector, its infrastructures, owners and operators. We think that a positive relationship with all of those stakeholders helps us to achieve our end more quickly, more efficiently, and more effectively.

Senator LAUTENBERG. Do the private partners, to your use your expression, do they recommend a preemption for the Department of Homeland Security?

Mr. STANTON. You're referring to the private sector.

Senator LAUTENBERG. No.

Mr. STANTON. The owners and operators, sir?

Senator LAUTENBERG. Yes.

Mr. STANTON. It is my understanding that preemption is a preferred outcome. However, the concept of preemption in the private sector would appear to be very broad, and it's my understanding

that that is not the Department's interpretation of our preemption capabilities.

Senator LAUTENBERG. I thank you very much. We're going to keep this record open. We'll submit questions in writing to give prompt attention in responding to us. Thank you very much, all of you, for appearing here.

I'm pleased to note the presence of our distinguished Governor, former Senator, someone always concerned about the protection of the people in the state of New Jersey, working very hard during his time as the United States Senator, working on chemical security.

And we will ask the indulgence of those who appear on the next panel; that would be Mayor Bollwage, Dr. Flynn and Rick Engler,to please indulge us while we hear from the Governor, whose schedule, as you can imagine, is one that demands his attention so immediately.

So, Governor, thanks. Welcome here. We look forward to hearing your testimony.

STATEMENT OF SUSAN BODINE, ASSISTANT ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Good morning, Chairman Lautenberg, and Members of the Subcommittee, I am Susan Parker Bodine, Assistant Administrator of the Office of Solid Waste and Emergency Response (OSWER), U.S. Environmental Protection Agency (EPA). I am pleased to be here to discuss EPA's authorities for promoting the safety of our nation's chemical facilities.

INTRODUCTION

EPA's OSWER manages EPA's response to environmental emergencies, EPA's national planning and preparedness functions, and development and implementation of Federal regulations to prevent hazardous chemical accidents and oil spills.

In carrying out our emergency response functions, we work closely with EPA's 10 regional offices, our Federal agency partners, and state and local authorities to respond to major environmental emergencies and to conduct emergency removal actions at oil spill and hazardous waste sites. In this capacity, we respond to several hundred major oil spills and hazardous chemical releases each year. The events EPA responds to cover a wide range of emergencies, from train derailments and fires at chemical plants to incidents of national significance such as the collapse of the World Trade Center and the Hurricane Katrina recovery effort. In all of our response activities, EPA maintains close working relationships with state and local authorities in order to carry out our responsibilities.

In the area of national planning, EPA has partnered with the Department of Homeland Security and other Federal agencies in development and implementation of the National Response Plan, the National Incident Management System, and the National Infrastructure Protection Plan (NIPP). Together, these plans form a cohesive structure that integrates the incident management, protection activities, and emergency response capabilities and resources of Federal, State, and local governments into a national framework for domestic incident management.

In addition to managing our field emergency response and national planning functions, OSWER is also responsible for the development and implementation of several important Federal regulations. These include regulations for hazardous chemical inventory reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA), emergency release reporting requirements contained in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), oil spill prevention and response planning requirements under the Clean Water Act and the Oil Pollution Act (OPA), and regulations for chemical accident prevention and mitigation under the Clean Air Act (CAA).

EPCRA AND THE CAA RISK MANAGEMENT PROGRAM

In response to the December 1984 toxic chemical disaster in Bhopal, India, and subsequent chemical accidents that occurred in the United States in the mid to late

1 980s, Congress passed both EPCRA and CAA section 112(r), establishing the chemical accident prevention program. EPCRA calls on states to create State Emergency Response Commissions (SERCs) and local communities to form Local Emergency Planning Committees (LEPCs) to prepare community emergency response plans for chemical accidents. EPCRA also requires chemical facilities to provide LEPCs with information necessary for emergency planning, and to submit annual chemical inventory reports and information about the facility's hazardous chemicals to SERCs, LEPCs and local fire departments.

As its name suggests, EPCRA promotes the sharing of hazard information and emergency planning. However, EPCRA does not require facilities to take actions to prevent chemical accidents from occurring. After major chemical accidents continued to occur in the U.S. throughout the late 1980s, Congress added section 112(r) to the Clean Air Act (CAA) in 1990 which imposes a "general duty" on all stationary facilities handling extremely hazardous chemicals to prevent and mitigate accidental releases of those chemicals into the air. It also directs EPA to promulgate risk management requirements for those facilities having large quantities of the most dangerous chemicals.

In accordance with Congress' direction in CAA 112 (r), EPA listed 140 chemicals and their threshold quantities based on potential harm to human health and the environment in the event of an air release. Facilities having a listed chemical present in more than a threshold quantity must conduct a hazard assessment, develop and implement an accident prevention and emergency response program, analyze the potential consequences of worst-case and alternative (less severe) release scenarios, and provide a summary report—called a Risk Management Plan, or RMP—to EPA. Approximately 14,000 chemical facilities are currently subject to theserequirements.

RMPs contain valuable information about a chemical facility and its hazards. In addition to providing the address and physical location of the facility, RMPs report the identity and quantity of each regulated chemical on site, information about the measures taken by the facility to prevent accidental releases, facility emergency planning information, the history of significant accidents at the facility over the last 5 years, and the facility's Offsite Consequence Analysis (OCA) information, which provides the facility's analytical estimate of the potential consequences of hypothetical worst-case and alternative release scenarios. EPA maintains a national electronic database of RMPs, known as RMP Info, which is currently the most comprehensive database of chemical facility hazard information in existence.

While neither EPCRA nor CAA section 112 (r) contain any chemical plant security requirements, both contribute to facility safety and emergency preparedness and as a result help reduce the vulnerability of certain facilities and their communities to terrorist attacks. EPCRA's reporting requirements ensure that communities are made aware of hazardous chemicals located in their area, and SERCs and LEPCs established under the law help prepare communities to respond to any catastrophic releases of those chemicals. The CAA requirement for facilities to assess and address their potential chemical hazards reduces the risk that any unanticipated release will seriously threaten public health and the environment. The CAA requirement that facilities have emergency response plans in place also helps lessen the potential consequences of any unanticipated release, however caused. In addition, the national RMP database created under the CAA has proven to be one of the Federal government's most important sources of information on the risks associated with U.S. hazardous chemical facilities.

COORDINATION WITH DHS

After the creation of the Department of Homeland Security (DHS) in 2002, Homeland Security Presidential Directive 7 established DHS as the lead agency for coordinating the overall national effort to enhance the protection of the critical infrastructure and key resources of the United States, including the chemical sector. While DHS is the lead Federal agency for chemical sector security, EPA serves in a supporting role by providing information and analytical support, and by maintaining involvement in the Department's ongoing chemical security initiatives as requested. For example, EPA participates in the Department's Chemical Comprehensive Review program, where DHS involves Federal, State, and local Government authorities, as well as private sector representatives, to evaluate the security vulnerabilities and emergency response capabilities of selected major metropolitan areas, and provides grants to assist states in obtaining resources necessary to address area security vulnerabilities.

The 2007 Homeland Security Appropriations Act now provides DHS with explicit interim authority to publish security regulations for high-risk chemical sites and

conduct regulatory enforcement activities. This authority reinforces DHS as the Federal lead for chemical site security and significantly improves the Department's ability to carry out that role.

As DHS continues its efforts to develop and implement the regulations and other programs related to chemical sector security, EPA stands ready to support them in those initiatives, as needed.

CONCLUSION

Thank you for the opportunity to testify. I would be pleased to answer any questions.

STATEMENT OF HON. JON S. CORZINE, GOVERNOR FROM THE STATE OF NEW JERSEY

Mr. CORZINE. Mr. Chairman, it's nice to use that language when I am addressing you.

Senator LAUTENBERG. I like it.

Mr. CORZINE. Brings back old days. It's good to be back in front of then Senate Environment and Public Works Committee, which I was fortunate enough to serve on in my first 2 years when I was in the Congress.

Senator LAUTENBERG. Could everybody hear the Governor okay.

Mr. CORZINE. And the good work that both that Committee and you, who preceded me there, have done with regard to chemical plant safety and security, the topic that is on the table today. And I'm very pleased to have a chance to testify to the view, that we should be able to, at a state and local level, to address the risks and vulnerabilities that we see, so that we can take on the responsibility that I think all of us in public life believe is our number one responsibility, which is to protect the citizens we serve.

I have a formal statement for the record, which if you are having trouble sleeping, I urge you to read tonight, but I want to be passionate about the subject of chemical plant security.

As you know in the State of New Jersey, we have had a number of instances before. We have had explosions, toxic chemical releases that have threatened our public. Most recently an explosion at the Napp Technologies facility in Lodi killed five workers in 1995. There are a number of other instances through time.

None of us have to conjure up too long a memory to recognize the catastrophe that occurred around Valero, and you can go through a litany of these examples.

By the way, last week alone, three people were injured in a small blaze in Colorado at a chemical plant. Workers were hospitalized in Florida from a chemical spill in an asphalt plant that caught fire in Pennsylvania. This is sort of the everyday elements of environment and public safety exposure that exist. And, as you noted, some of the experts that have reviewed the vulnerabilities that we have in the post-9/11 world report efforts to use our infrastructure as weapons against the public.

Nothing seems more central or close to the top of the list of those items than chemical plants. And we have taken very strong steps here in New Jersey, both from an environmental safety and public safety standpoint, but also with regard to security. There's a series of complex legislative and regulatory steps that we have taken that identify plants that are vulnerable, those that expose the public in large degree, and we have asked them to take specific steps, both

on a security basis, but also to look at what is called Inherently Safer Technology in that process.

And just last week we expanded the number of plants that would be required, not only for new activities at those plants, but for their broad elements, to examine Inherently Safer Technology. And we're trying to put it into regulatory format, not just in what is the equivalent of what is an Executive Order. We think these are strong steps, important steps, ones that have been engineered in conjunction with ongoing dialogue with the private sector, but recognizing the tremendous dangers that our public, in a dense, the most densly-populated State in the nation, would incur.

We're proud of our chemical industry. We're not trying to run the chemical and petroleum industry out of the state. In fact, we want to be welcome to it, but it needs to be done in the context of public safety and security. This is an issue that I've worked on in Congress. It's an issue that I believe we need to be ever attentive to here in the State of New Jersey.

The one thing that is very disturbing, from the discussion that I just heard of the previous panelists and in the initial proposal of rules that follow the September 29th regulations that were put forth in last year's Appropriations bill, is the fact there is the potential that much of the good work that we have put in place could be diminished, could be reduced.

Almost everybody agrees, we ought to have vulnerability assessments and risk-based analysis of where a plant stands, but substituting ammonia or chloride hydrolyte for chlorine is not something that would be mandated under those kinds of contexts. Looking for substitutions, looking for reduction of the storage of chemicals on site, changes in process, those are not generally required around the country.

We think they're important ingredients. And if we wrote chemical plant security regulations or law that I thought met those standards at the national level, we wouldn't need to take those steps at the state level, but that hasn't occurred. And we need to make sure that we're not preempted from doing those things that we think would protect the public.

This is a big deal for our communities. You know I get different counts, someplace between 109 and 111 plants that would impact a million people or more if there were a release of toxic chemicals. Some of the most dangerous plants in the country identified by EPA are here in New Jersey. And it's not because we want to close these plants, it's because we want to protect the public on a best probability basis that we can, that we have worked so hard here.

Federal preemption, the basis that one set of rules works everywhere, I think would be a big mistake. And the State of New Jersey will take those actions, aside from the kinds of testimony we give today, to try to protect our position to be able to protect the public of the State of New Jersey. So I think I'll stop there, Mr. Chairman.

Senator LAUTENBERG. Thank you very much, Governor. I have to tip my hat to you, because you haven't been waiting to see what could happen if there is less attention paid to these problems by expanding the number of sites that you think ought to be reviewed. And here again, I draw not only on your Senate experience, but

your business experience, and that is, I understand, that you've got people from industry working with you, and that's as it should be.

And we're not looking at incapacitating these companies. They provide valuable material for public use and they're important facilitators for better crops, for better protection against all kinds of things. And so we want to encourage them to do their business. And it's most surprising to me, having been in New Jersey all of my life, having come out of the corporate world, to see these companies stepping up and saying, okay, look, we don't want things to be tougher, but we do want them to be safer. And so it's an excellent relationship.

You've got labor behind you, Governor, by way of the New Jersey AFL-CIO making their announcement to be of help. And so I think what you've done is the thing I know you best for, and that is your leadership quality, Governor. And the old Frank and Jon alliance is still alive and well. So thanks very much.

Mr. CORZINE. Appreciate it. And I want to concur and underscore that this has been a collaborative effort, business, labor, and the public sector, which it should be. But that is not an excuse for our Federal partners to preempt what is the good work of a lot of people here, not just my Administration, but previous Administration.

Senator LAUTENBERG. If there is one lingering polity here is how DHS could make a case for not permitting states, that are willing to deal with it, having their industry deal with it, to go ahead and have a more requiring standard. But we heard that they don't, that it frustrates them. And the last thing we want to do is frustrate them. Thanks very much.

Mr. CORZINE. Thanks, Senator.

Senator LAUTENBERG. We'll take a 5-minute break, please, and I'll call the next witness to the table, Mayor Bollwage, Council on Foreign Relations; Dr. Flynn, Council on Foreign Relations; Rick Engler of New Jersey Work Environmental Council.

(Recess is taken at 11:45 a.m.)

Senator LAUTENBERG. Mayor Bollwage.

STATEMENT OF JON S. CORZINE, GOVERNOR FROM THE STATE OF NEW JERSEY

Chairman Lautenberg—I like the way that sounds. . . Chairman Lautenberg, Ranking Member Vitter, Senators Cardin, Klobuchar and Whitehouse, Senator Menendez, Congressman Pallone, Congressman Payne, fellow witnesses, I am pleased to appear before the Senate Environment and Public Works Subcommittee on Transportation Safety, Infrastructure Security and Water Quality. I am especially pleased to do so here in New Jersey and I welcome the Subcommittee to our Great State. I appreciate you accommodating my schedule today, so that I can be here to talk about an issue about which I care deeply—the importance of state and local authorities in ensuring chemical plant safety and security.

I have long fought to ensure the public safety by addressing the security of our nation's chemical facilities. As you know, as Senator, I championed Federal legislation on this issue, and I am pleased that the once and again Senior Senator from New Jersey has continued that effort.

We know how dangerous these places can be because of the terrible accidents that occur at them. In September 2001, an accident at a chemical plant in France caused 300 tons of nitrates to explode, killing 29, injuring thousands, and damaging 10,000 houses. And we have certainly had our share of these problems right here in New Jersey. In 1995, an explosion at the Napp Technologies facility in Lodi resulted in the death of five workers. In addition, al-queda affiliated insurgent groups in Iraq have targeted chemical facilities to enhance the lethality of their attacks. Today, a

plausible threat remains that a successful attack against chemical facilities has the potential to meet terrorist goals.

As you know, last October Federal legislation addressing this important issue was signed into law as part of the Homeland Security Appropriations Act. However, that legislation did not go as far as I would have liked, and I am particularly concerned about DHS' claim of preemption authority in the proposed regulations despite no clear grant of authority from Congress. We have, and will continue to, forcefully oppose any claim of preemption which impacts New Jersey's ability to protect its citizens.

Since becoming Governor, my Administration has been committed to ensuring that New Jersey's pioneering chemical security, public safety, and environmental protection laws are successfully implemented; and to identifying any gaps that the state must address.

September 11th shocked us into the realization that our assets can be turned against us by terrorists. New Jersey's critical infrastructure concentration and high population density may have no comparison in the United States. Our robust chemical industry also presents us with unique advantages and challenges.

According to EPA data, there are a number of plants here in New Jersey where a worst case release of toxic chemicals—accidental or otherwise—could threaten more than a million people. You'd better believe this is an issue we take seriously here.

Since January 1986, New Jersey has had in place the Toxic Catastrophe Prevention Act (TCPA), an environmental statute that requires facilities that handle extraordinarily hazardous substances (EHS) above certain thresholds to prepare and implement risk management plans to prevent potentially catastrophic releases. And in 2003, the TCPA rules were updated to specifically require that owners and operators evaluate inherently safer technology (IST) for newly designed and constructed covered processes.

Since 1990, New Jersey has also had the Discharge Prevention, Containment and Countermeasures (DPCC) program, which regulates facilities storing petroleum and/or hazardous substances to protect from accidental discharges to the environment.

In September 2003, New Jersey adopted Best Practices for the Chemical Sector. These represent a risk-based approach to security consisting of a site-specific vulnerability assessment that evaluates threats to a facility's operation, its particular vulnerabilities and likely consequences of a chemical release, and the physical and procedural security measures already in place and those which should be taken to remediate vulnerabilities.

And since November 2005, Best Practices Standards have been in place, clarifying that Best Security Practices are "mandatory" for TCPA/DPCC chemical sites. They:

- Require the development of "prevention, preparedness, and response plans"
- Require facilities management to afford employees a "reasonable opportunity" to identify issues that should be addressed in the security assessment and plans, including emergency response plans;
- Require covered TCPA facilities to produce a review report regarding the adoption of "Inherently Safer Technology (IST);"
- Define IST as: 1) reducing the amount of material that could be released; 2) substituting less hazardous materials; 3) using hazardous materials in the least dangerous process condition or form; 4) designing equipment and processes to minimize equipment or human error.

Just this Friday, we announced proposed changes to our TCPA rules to more than double the number of facilities affected by IST requirements—all 94 TCPA facilities will now have to review the possibility of making materials substitution or equipment or process changes for the sake of public safety.

To date, as a result of our TCPA requirements there are many New Jersey IST success stories:

- Over 20 wastewater treatment facilities have switched from using chlorine to sodium hypochlorite for disinfection of their treated wastewater.
- Four electric generation and cogeneration plants substituted anhydrous ammonia with aqueous ammonia for use in their air pollution control systems.
- One facility switched from chlorine to bromochlorohydantoin for use as an algicide in treating cooling water.
- One facility switched from bulk storage of liquid sulfur trioxide to on-site generation of gaseous sulfur trioxide for direct consumption into the process.
- One facility switched from bulk storage of chlorine to on-site generation of ozone for disinfection of potable water.
- Another facility is proposing to switch from bulk storage of chlorine to on-site generation of chlorine dioxide for bleaching paper.

As we implement these policies and work with facilities on site-by-site review of security vulnerabilities, we have seen positive compliance with the Best Practices Standards, which have now been in place over a year. Overall, 62 percent of the facilities demonstrated compliance with the Standards. Facilities were given 30 days to satisfactorily resolve any outstanding compliance issues. Our Department of Environmental Protection anticipates compliance with the all of the above requirements to exceed 98 percent.

We are proud of the work that we have done in New Jersey. I want to recognize that most of this work has been done cooperatively with the chemical industries. To date, the chemical industry in New Jersey has invested hundreds of millions of dollars to improve safety and security at their plants. We appreciate these efforts and will continue to work cooperatively whenever we can.

For example, New Jersey has invested in developing a worker-training curriculum based on extensive collaboration between industry leaders, workers and their advocates, academia, and homeland security and safety experts. AFL-CIO, Rutgers University, the Steelworkers, the Teamsters, the chemical industry and others played a key role in developing and promoting our "train the trainer" program to ensure workers and managers at chemical plants are prepared to make their workplaces the safest places possible. We recently reached out to the chemical industry to ensure timely implementation and look forward to making progress with them on this issue.

While New Jersey has taken major steps, this is far from a New Jersey-only issue. I have long argued that Federal standards are necessary to protect all of our citizens from the potential dangers of an attack on, or accident at, a chemical plant, and to ensure a level playing field for security throughout the nation This need must be balanced with the flexibility for states to take action beyond the Federal standards to address unique state circumstances.

I have been very vocal about my opposition to Federal preemption of state chemical security laws. As Senator, I proposed legislation that was deferential to state's efforts to go beyond Federal standards to protect their citizens. And last month, I sent a letter to Secretary Chertoff expressing my opposition, and asked New Jersey's Director of Homeland Security and Preparedness Richard Canas and Department of Environmental Protection Commissioner Lisa Jackson to submit detailed formal comments to the Department of Homeland Security expressing these sentiments as part of the public comment period.

Our citizens will be most secure when all levels of Government work closely together to ensure their safety. It would be a terrible mistake to undermine the great work that New Jersey has done, or the future flexibility to implement additional security measures. Thank you for your time today.

STATEMENT OF J. CHRISTIAN BOLLWAGE, MAYOR, ELIZABETH, NEW JERSEY

Mr. BOLLWAGE. As the fourth largest municipality in New Jersey and the Union County Seat, Elizabeth is centrally located to the entire tri-state area. In addition to its position within the region, located within the City of Elizabeth are Port Elizabeth/Newark, the CSX Facility, the North East Corridor, Goethals Bridge, Route 278, Routes 1&9 and the New Jersey Turnpike. In addition, the Chemical Coast Line, which transports chemicals by rail through the City of Elizabeth, poses potential high life hazards in the event of an emergency or potential terrorist attack. As a transportation hub and vital destination, Elizabeth's growing need for homeland and chemical security is evident.

Furthermore, Elizabeth borders municipalities such as Linden, Newark and State of New York City, which due to the location and the presence of petrochemical plants, pose potential fire hazards, as well as potential terrorist targets.

We continue to operate at an Elevated Alert Level, and High Threat Level for the Aviation Sector. Our efforts on September 11th, while vital in New York City and surrounding municipalities, we required unprecedented manpower, in addition to equipment utilization disbursements. Commuters stranded on major roadways

such as the Goethals Bridge, were provided shelters in our city. Police officers were assigned for security purposes. Our firefighters went to New York, as well as the surrounding Boroughs, to provide coverage at their local firehouses.

We're expanding with the growth of the Jersey Gardens Mall, IKEA, Union County College, and Trinitas Hospital. In recent years, the AMC Theater, in addition to five hotels. Furthermore, the city anticipates incorporation of a ferry service departing from the Elizabeth Seaport to New York City.

We've been identified within the most dangerous two miles in the country. Located in close proximity to the Infineum Corporation and Conocco Phillips Oil Refinery, the City of Elizabeth is at an even higher risk for potential terrorist activity. And with 15,000 chemical facilities throughout the nation, it's imperative that local chemical security procedures are enacted.

In November 2005, New Jersey implemented state-based chemical security protection procedures. And those requirements indicated that the State's highest risk chemical facilities would have to conduct an analysis to determine whether Inherently Safer Technologies, safer chemical or materials, could be used to reduce the risk of a hazardous material emergency or terrorist attack. Due to its location in the region, the City of Elizabeth is beginning to apply safe planning policies to reduce the risk of an emergency. In order to efficiently continue implementing these strategies, state and local municipalities need to have the ability to apply a plan that will most effectively enable prevention and targeted response in the event of an emergency.

In September, Congress gave the Department of Homeland Security the authority to adopt interim regulations for security at chemical facilities. However, that measure was silent on the issue of preemption. Within their proposed regulation, DHS asserted that based upon Congress' silence on this issue, it had the authority and would preempt state and local laws that went further than the Department's regulations. Under these regulations, the City of Elizabeth would be unable to create policies that could assist in reducing the risk of a catastrophic emergency.

The EPA is responsible for handling environmental impacts of all 15,000 chemical facilities in the nation. Federal chemical security measures, such as the proposed DHS regulations, will not be sufficient to ensure the safety of local municipalities such as ours.

Even before 9/11, the nation's chemical facilities were vulnerable to chemicals attacks involving hazardous materials.

In 1980, Senator, as you know, an explosion and fire at Chemical Control, a chemical storage facility in Elizabeth, burned for 15 hours and literally rocked neighborhoods for miles. Approximately 14,000 residents within one mile of the site and one residence located within 200 feet. Not to mention the dozens of densely populated neighborhoods located across the Elizabeth River. Over 400 firefighters, policy and emergency workers labored in thick smoke; less than half had air packs. Runoff stained the Elizabeth River red; smoke shrouded Staten Island. Within 18 months, many firefighters reported respiratory trouble and others developed health problems ranging from cancer to chronic skin rashes.

This tragic event spawned the birth of Hazardous Material Response Awareness. Since then Federal, State and local Governments have worked together to ensure the safety of our first responders. The interoperability among Government agencies continues to protect the men and women who without hesitation risk their lives to protect our residents. And now more than ever we must work together to develop guidelines that can be realistically applied to safeguard our residents.

Twenty-seven years later, we should not be waiting for another chemical disaster to figure out what the best plan of action should be to protect the lives of our citizens. A blanket Federal security measure will not adequately safeguard all chemical facilities throughout the nation and the residents in surrounding neighborhoods. In the event of a hazardous chemical emergency or terrorist attack, the City of Elizabeth needs to act, and will not be able to wait for the Federal Government to implement immediate emergency assistance.

It is imperative that State and local Government agencies be allowed, with the assistance of the Federal Government, to develop and implement strategies that will ultimately result in lowering the risk and consequences of a terrorist attack and make chemical facilities more secure.

If you ask New Jersey officials how to better secure our chemical facilities, we can respond. If you ask the New Jersey officials how to better secure a chemical facility in Baton Rouge, LS we could not respond adequately. Each facility is unique and, therefore, needs specific security measures. Having one standard model of security, which would preempt state and local law, for the 15,000 facilities nationwide is a recipe for disaster.

In order to protect the health, safety and well-being of the residents within the City of Elizabeth, it is imperative that state and local municipalities have the authority and resources to secure our hometowns.

Regardless of the outcome, the City of Elizabeth is equipping, training and preparing our first responders to deal with any emergency situation. The only question now is whether Federal, State and local Governments can come together and collectively ensure the safety of our residents.

Mr. Chairman, thank you for this opportunity.

Senator LAUTENBERG. Thanks very much, Mayor.

Dr. Flynn, we welcome you here. And I note that your contact with Foreign Affairs is kind of an interesting platform for your interests from your position in the Council on Foreign Relations, and we invite you to give your testimony.

STATEMENT OF J. CHRISTIAN BOLLWAGE, MAYOR, ELIZABETH, NEW JERSEY

As the fourth largest municipality in New Jersey and the Union County Seat, Elizabeth is centrally located to the entire tri-state area. In addition to its position within the region, located within the City of Elizabeth are Port Elizabeth/Newark, the CSX Facility, the North East Corridor, Goethals Bridge, Route 278, Routes 1&9 and the NJ Turnpike. In addition, the Chemical Coast Line, which transports chemicals by rail through the City of Elizabeth, poses potential high life hazards in the event of an emergency or potential terrorist attack. As a transportation hub and vital destination, Elizabeth's growing need for homeland and chemical security is evident.

Furthermore, Elizabeth borders municipalities such as Linden, Newark, as well as NYC, which due to location and the presence of petrochemical plants, pose potential fire hazards and potential terrorist targets.

In New Jersey, we continue to operate at an Elevated Alert Level, and a High Threat Level for the Aviation Sector. Elizabeth's efforts on September 11th, while vital in New York City and surrounding municipalities, required unprecedented manpower, in addition to equipment utilization and disbursement. Commuters stranded on major roadways such as the Goethals Bridge, were provided shelter at a local Recreation Center and other sites throughout the City. City police officers were also assigned for security purposes. Elizabeth's firefighters were sent to New York City, as well as the surrounding Boroughs, to provide coverage at the local firehouses.

The City of Elizabeth is expanding, with economic development and growth taking the forefront. Home to Jersey Gardens Mall, IKEA, Union County College, and Trinitas Hospital, in recent years Elizabeth has welcomed the AMC Theater and numerous restaurants and shops. With the addition of five hotels, including extended-stay facilities, there is an immense increase in high-life hazard locations. Furthermore, the City of Elizabeth anticipates the incorporation of a ferry service departing from the Elizabeth Seaport, thus increasing the number of visitors and commuters traveling to and from Elizabeth on a daily basis.

The City of Elizabeth has been identified within the most dangerous two miles in the country. Located in close proximity to the Infineum Corporation and the Conoco Phillips oil refinery, the City of Elizabeth is at an even higher risk for potential terrorist activity. With 15,000 chemical facilities throughout the nation, it is imperative that local chemical security procedures be enacted.

In November 2005, New Jersey implemented state-based chemical security protection procedures. These requirements indicated that the State's highest risk chemical facilities would have to conduct an analysis to determine whether Inherently Safer Technologies (IST), safer chemical or materials, can be used to reduce the risk of a hazardous material emergency or terrorist attack. Due to its location in the region, the City of Elizabeth is beginning to apply safe planning policies to reduce the risk of an emergency. In order to efficiently continue implementing these strategies, State and local municipalities need to have the ability to apply a plan that will most effectively enable prevention and targeted response in the event of an emergency.

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In 1980, an explosion and fire at Chemical Control, a chemical storage facility in Elizabeth, burned for 15 hours and literally rocked neighborhoods for miles. There were approximately 14,250 residents within 1 mile of the site and one residence located within 200 feet. Not to mention the dozens of densely populated neighborhoods located across the Elizabeth River. Over 400 firefighters, police and emergency workers labored in thick smoke; less than half had air packs. Runoff stained the Elizabeth River red; smoke shrouded Staten Island. Within 18 months, many firefighters had reported respiratory trouble. Others developed health problems ranging from cancer to chronic skin rashes.

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of Elizabeth needs to act, and will not be able to wait for the Federal Government to implement immediate emergency assistance.

It is imperative that State and local Government agencies be allowed, with the assistance of the Federal Government, to develop and implement strategies that will ultimately result in lowering the risk and consequences of a terrorist attack and make chemical facilities more secure.

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In order to protect the health, safety, and well being of the residents within the City of Elizabeth, it is imperative that State and local municipalities have the authority and resources to secure our hometowns.

Regardless of the outcome, the City of Elizabeth is equipping, training, and preparing our first responders to deal with any emergency situation. The only question now is whether Federal, State, and local Government can come together and collectively ensure the safety of all our residents.

STATEMENT OF STEPHEN E. FLYNN, COUNCIL ON FOREIGN RELATIONS, NEW YORK, NEW YORK

Mr. FLYNN. Thank you very much, Senator. It's an honor to appear before you today. And I'm also a retired Coast Guard officer and spent 24 years in that service and have been working in Homeland Security for a bit of time, and had the good fortune to appear and honor to appear before you on a number of these Committee Hearings before.

I wanted to appear before you today to address the vital issue of chemical facility security. At the outset, Mr. Chairman, I want to thank you for the exceptional leadership you have been providing in both raising the profile and advancing practical approaches to this complex challenge. You have been hard at work I know long before the attacks of September 11th.

Recognizing that communities may be jeopardized by accidents, such as the tragic one that took place in the pesticide plant in Bhopal, India, in December 1983, you have played an instrumental role in advancing prudent safety measures such as the Emergency Response and Community Right-to-Know Act, to reduce the potential peril chemical facilities can pose to citizens who neighbor them.

As I had previously testified before the Senate Homeland Security and Governmental Affairs Committee, what you said, almost two years ago, April 27, 2005, there are hundreds of chemical facilities within the United States that represent the military equivalent of a poorly-guarded arsenal of weapons of mass destruction.

At that panel, in fact, I said to the panels of Senators that are were there, I said, "Imagine you are receiving a briefing from the Director, from the presidential morning daily brief, Mr. President, we just made ourselves aware there are weapons of mass destruction positioned around the United States next to some of the most densly-populated areas, next to some of the most critical infrastructures. We rely on things like seaports and airports and refineries and, Mr. President, we have no idea what the stance of these weapons are, and we would like the authority to go in and check out the plants."

You would think, as a Nation that has expanded so much blood and treasure looking for weapons of mass destruction overseas, that their Commander and Chief that received that briefing would

be poised for action. That was almost 2 years ago. And Americans should be flummoxed of the fact that it has taken to September 2006 for the Federal Government to be given the authority to begin the process of looking at security of chemical facilities. This is a real problem in part because the threat is such.

I mean, one basic lesson we should surely have pulled away from the events of 9/11 was Al Qaeda did not import weapons of mass destruction; they converted four domestic airliners into them. Our own infrastructure could be used against us, and yet here we are this far down the pike and we're still carrying on fairly preliminary conversations about how to secure these facilities.

What also makes us such a starking lapse is that the skillset of taking on the chemical industry and the petroleum refinery infrastructure is being developed in Iraq and in Saudi Arabia. And this expertise of insurgents and those who are involved in this war that we are poised against, eventually these insurgents are going to go home with the experience back to them or some will realistically tap into chat rooms and pick up the keys of how one does this. And so we simply must be operating on a recognition that we're on borrowed time; that we have these facilities and we need to think about securing them.

Now, against this backup, of course, we have what would seem an insufficiency in 2006 when the Department of Homeland Security and the American Chemistry Council acknowledged that voluntarily measures are not working and they, therefore, authorized language in Fiscal 2007's Homeland Security spending law to provide a response.

But I would argue it's ineffective for five critical reasons: First, the Department of Homeland Security simply has too few resources to do this job. They are receiving this year a possible $15 million on top of $10 million. They had to carry out and build the capacity to police an industry that has 15,000 plus facilities around this country.

To put that number into context, the Nuclear Regulatory Commission receives over $50 million to provide oversight for the 140 facilities within its purview. Now, that is every year giving them $50 million to provide oversight for security of nuclear facilities, and yet the Department of Homeland Security if going to receive this year $25 million. By the way, the extra 15 million has to come out of hide of the existing infrastructure budget because the budget asked for no additional funding for the Environmental Protection Office to do this critical issue.

So you're asking the Department of Homeland Security now to take on this responsibility, overriding the State's ability to do this, and not providing the resources or the trained manpower to do it. That's a real limitation.

The second issue is simply the authority that DHS has, it just simply lacks any teeth. The legislation says, "That the Secretary may not disapprove a site security plan submitted under the section based on the presence or absence of a particular security measure, but the Secretary may disapprove a site security plan if the plan fails to satisfy the risk-based performance standards established by this section."

If that sounds like a bit of goodly guck to most people, I think it will be a legal nightmare for a Secretary to try to go in and say, I think these are limits and should be pushed back and there are other risk-based things you should take into account.

The bottom line is, if the Secretary tries to enforce this rule, I think this will be a real limitation. The limited resources and limited authorities is what DHS is bringing to the table and providing Federal oversight of this critical issue. Larry Stanton, who we heard from today, who have been working long and hard at these issues without any resources and without adequate authority.

The third issue is one I think you should be very sensitive to, Mr. Chairman, and this is the Right-to-Know Act, the need to know by communities. With other national disasters like tornados or hurricanes, we get warned and communities know what to do. People who are adjacent to these facilities don't know what's going on in them. And I worry the language is treated as if it were classified information, which puts you in a whole rubric of security claims process that's going to cut out state and local people from knowing what's being done in their own backyards.

I would add as a fourth issue here, so we have this problem of limited authority, limited resources, things being done on a code of silence. Then we basically ask the DHS to preempt the State's ability to carry out and move this all further, and this is simply outrageous.

The final ones I would highlight here is that the public law purposely exclude the situation of Inherently Safer Technology as an element of risk-based standards that DHS is called upon to assess.

So the very thing the State has moved forward on, that we have to look at, at safer ways of doing this, is something they have stepped back down in. I can tell you, at many of these facilities around, where I've been, I can't provide a physical security plan that will make the community safe. They're just where they are and what they do. We're talking about suicide truck bombs. This is what played out this past weekend with chlorine trucks. When that plays out here, the physical security measures in place are not going to be up to par.

Then we deal with release of chemicals that could kill potentially tens of thousands of people. You have to look at the way they do business and change the way they're doing business, if they're going to be located in the most congested state in the union.

Now, I ask people to consider particularly the issue of anhydrous hydrogen fluoride, which is used in the refinement of gasoline. During an industry-sponsored test conducted in a Nevada desert in 1986, a small accident was simulated by releasing one thousand gallons of the chemical into the atmosphere for 2 minutes. The plume is heavier than air, so it hugs the ground. The test found there were lethal concentrations of this gas five miles away and up to seven-and-a-half miles away. If you were exposed to it for 30 minutes, you would die, too.

Now, of course, evacuation, people caught in the traffic. They are going to be 7.5 miles away. They are going to go into their cars and they're going to perish. This is one of the most painful ways to die. It basically vaporizes at 68 degrees and then spreads out and a plume downstream.

The acid begins by burning the eyelids of the victims. Then they experience a dry, hacking cough. Breathing becomes increasing labored and painful as they gasp in more of the chemical. Their lungs become inflamed and congested, depriving them of oxygen and leading them to seizures. Ultimately, most people fall into a coma. And without medical attention, everybody caught in the toxic plume is dead within ten hours.

Refineries near major urban areas could use an alternatives to hydrofluoric acid. We need to consider IST. We need to recognize that the Department of Homeland Security, while well intends people in the Departments trying to move forward, has not been given the legislative authority to. Governor Corzine is on track where we should go.

And I'll finish by simply saying that one of the things that I most lament, in being involved with this issue well before 9/11 and being an essential part of the U.S. Commission on National Security and making the warning saying, we're going to have an attack on U.S. soil, and people not paying attention. I don't want to live with the angst again of this foreseeable threat we have not taken action here at home to address.

I applaud you, Mr. Chairman, for moving this conversation forward.

Senator LAUTENBERG. Thanks very much for your testimony, Dr. Flynn.

We'll hear now from Rick Engler of the New Jersey Work Environment Council, and invite you toproceed.

STATEMENT OF STEPHEN E. FLYNN, COUNCIL OF FOREIGN RELATIONS, NEW YORK, NEW YORK

Chairman Lautenberg, and distinguished members of the Subcommittee on Transportation Safety, Infrastructure Security and Water Quality. I am honored to appear before you this morning to discuss the vital issue of chemical facility security. At the outset, Mr. Chairman, I want to thank you for the exceptional leadership you have been providing in both raising the profile and advancing practical approaches to this complex challenge. You have been hard at work on this issue long before the attacks of September 11, 2001 exposed how vulnerable America is to catastrophic terrorist attacks on U.S. soil. Recognizing that communities may be jeopardized by accidents such as the tragic one that took place in a pesticide plant in Bhopal, India, in December 1984, you have played an instrumental role in advancing prudent safety measures such at the Emergency Response and Community Right to Know Act (EPCRA) to reduce the potential peril chemical facilities can pose to citizens who neighbor them.

As I have previously testified before the Senate Homeland Security and Governmental Affairs Committee on April 27, 2005, there are hundreds of chemical facilities within the United States that represent the military equivalent of a poorly guarded arsenal of weapons of mass destruction. Deadly chemicals including chlorine, anhydrous ammonia, hydrogen fluoride, boron triflouride, cyanide, and nitrates are often stored in large quantities in densely populated areas adjacent to important infrastructures, such as water treatment plants, bridges, energy facilities, and transportation hubs. It is perplexing that a nation that has expended so much blood and treasure searching for weapons of mass destruction in Iraq, would allow what could become their equivalent to sit largely overlooked on U.S. soil. It is prudent to recall, that on 9/11, Al Qaeda did not import weapons of mass destruction; they converted four domestic airliners into them.

Like many students of terrorism, I believe that Al Qaeda or one of its growing number of radical jihadist imitators will attempt to carry out a major terrorist attack on the United States within the next five years. At the top of the list of likely targets is the chemical industry. Al Qaeda has been acquiring experience in these kinds of attacks in Iraq and Saudi Arabia. Between January 2004 and March 2006,

insurgents carried out attacks on oil and gas facilities and pipelines that cost Iraq more than $16 billion in lost oil revenues. The details of their tactics are shared in Internet chat rooms. Further, many of the foreign insurgents have returned or will return to their native countries with the experience and practical skills of successfully targeting these kinds of facilities.

The effort to advance the security of chemical facilities in the United States is long overdue. Americans should be flummoxed that it took more than five years after September 11, 2001 for Congress to provide Federal officials with the authority to regulate security for many of the nation's highest risk chemical facilities. They should be even more baffled by the anemic legislative authority contained in the 2007 Department of Homeland Security Appropriations Act and the recently released interim rule-making language issued by the Department of Homeland Security in February 2007. I am deeply concerned that the recent actions of Congress and the Department of Homeland Security will actually serve as a barrier to progress on chemical security. I strongly urge that new legislation be drafted and enacted as soon as possible to address the critical shortcomings of these actions

The explanation for the lack of progress on this serious issue rests in part with the longstanding distrust by the chemical and petroleum industries of Government efforts to regulate them. This can be traced to the adversarial relationship that has long marked relations between the Environmental Protection Agency and chemical firms. The industry also has had a generally strong safety record which it believes should translate into a more hands-off approach by Government to how it does business. Additionally, some chemical producers are facing mounting global competition that has eroded their profit margins, making them understandably anxious about new requirements that raise their costs and place them at a competitive disadvantage.

On its face it would appear that 2006 was a watershed year for the chemical security agenda. Both the American Chemistry Council and the Department of Homeland Security publicly acknowledged that voluntary measures were not working. However, the authorizing language of the fiscal 2007 Homeland Security spending law (PL109-295) is proving to be an ineffective response for five critical reasons.

First, the Department of Homeland Security is provided with too few resources to become an effective partner in working with the chemical industry so as to provide reasonable oversight. The Department is receiving only $15 million in new funding in FY08. This will be added to the paltry $10 million budget it has had for the oversight for an industry that that has thousands of facilities producing extremely hazardous chemicals. To put that number into context, the Nuclear Regulatory Commission receives over $50 million to provide security for the nation's 140 nuclear power facilities. Another way to view that number is that the United States has been spending an average of $250 million each day on the war in Iraq since the spring of 2003. Thus the total expenditure for safeguarding some of the nation's most hazardous facilities amounts to what we spend every 150 minutes in Iraq. Further, President Bush's FY 2008 budget asked for no additional overall funding for DHS's Infrastructure Protection Office which has been assigned the lead of implementing this new DHS responsibility. In other words, the $15 million in new funding that is being applied towards building the Department's new capacity to oversee the chemical industry will come at the cost of other infrastructure protection programs managed by that office.

Second, the authority provided to the Secretary of Homeland Security to sanction a facility for failing to invest adequately in security is unworkable. Specifically, the legislation says:

That the Secretary may not disapprove a site security plan submitted under this section based on the presence or absence of a particular security measure, but the Secretary may disapprove a site security plan if the plan fails to satisfy the risk-based performance standards established by this section.

As a practical matter, even if DHS was receiving the resources to hire the personnel to conduct a comprehensive site assessment (and it is not) it would embark on a legal nightmare trying to disapprove a facility plan—which could potentially lead to the termination of operations at a facility—based on an assessment of "risk-based performance standards." This is because such an assessment would be open to competing interpretations that would inevitably get bogged down in the Federal court system. The end result is that the Secretary has been given a sanctioning authority in name only. DHS will not be able to execute that authority except when there are blatantly egregious circumtances.

Third, the new legislative language works against one of the most important imperatives in addressing chemical facility safety: the involvement of the community. The need for public disclosure of information that could affect the safety and well-being of a community rests at the heart of the "Emergency Response and Commu-

nity Right to Know Act (EPCRA)." While communities generally receive adequate warning and direction on what to do when it comes to natural events like hurricanes and tornados, historically, neighbors to dangerous chemical facilities have lived largely in the blind when it comes to the hazards they may be exposed to and are often unaware of the steps they should take to protect themselves in the event of a chemical release. While there is legitimate reason to treat some security information as sensitive, the act goes too far by requiring DHS to treat vulnerability or security information under this section, "as if the information were classified material" and stipulating that this information be provided only to "State and local Government officials possessing the necessary security clearances, including law enforcement officials and first responders." This onerous requirement effectively places the overwhelming majority of State and local officials and emergency responders out of the loop when it comes to the security of plants nestled within their own communities. Few officials hold these clearances and there is already an extensive backlog in providing them. As a consequence, the vast majority of emergency planners who are responsible for putting together the local response to disasters will have to make these plans without an understanding of the vulnerabilities and the existing security protocols that are in place at a facility. Further, local communities will have little to no ability to make informed zoning decisions in areas adjacent to these facilities.

The excessive new protections of vulnerability and security-related information reinforces one of the most serious shortcomings of the act which is its failure to allow State Governments to enact stronger security requirements than those adopted at the Federal level when those States determine such requirements are appropriate to safeguarding their populations. This has led DHS to interpret the act in its proposed interim final regulation in such as way that the Federal Government may actually preempt a State chemical security measure that it determines will interfere with its risk-based performance standards. The net result is that while DHS possesses little in the way of expertise and is not being provided adequate resources to provide effective oversight of the chemical industry and has been given an anemic—at best—sanction authority, it is taking the position that has the right of preemption over States who have stronger and more enforceable State standards such as those enacted in New Jersey. This is Federalism turned on its head. While States and locals are responsible for dealing with the aftermath of a disaster associated with a chemical plant about which it has historically possessed more intimate knowledge than the Federal Government, the Federal Government is now maintaining that it alone has the authority to set the rules governing the security of these facilities.

Finally, the gravest shortcoming of the chemical security authority provided to DHS under PL-109-295 is that it purposely excluded the consideration of inherently safer technology (IST) as an element of the risk-based standards that DHS is called upon to assess. The problem with this is that it fails to acknowledge that there will always be inherent limits to physical security measures for a facility that is proximate to a major population center, especially in the face of a terrorist attack involving a suicide bomber. Should there be an attack on a chemical facility on U.S. soil involving truck bombs like those that have been taking place with growing frequency in Iraq and such as the February 24, 2006 attack on the Abqaig Oil Processing Facility in Saudi Arabia, the likely result will be the release of deadly chemicals endangering the lives of tens of thousands of people downwind from that facility.

Consider the case of anhydrous hydrogen fluoride which is used in the refinement of gasoline. During an industry-sponsored test conducted in a Nevada desert in 1986, a small accident was simulated by releasing one thousand gallons of the chemical into the atmosphere for two minutes. The plume is heavier than air, so it hugs the ground. The test found lethal concentrations of hydrofluoric acid aerosol were present up to 5 miles away. At 7.5 miles there were still concentrations of the vapor at levels immediately dangerous to life and health for people who breath it in over a thirty-minute period.

There are few more painful ways to die then by exposure to hydrofluoric acid. The acid begins by burning the eyes and eyelids of its victims. Then they experience a dry, hacking cough. Breathing becomes increasingly labored and painful as they gasp in more of the chemical. Their lungs become inflamed and congested, depriving them of oxygen and leading to seizures. Ultimately, many people fall into a coma. Without immediate medical attention, everyone caught in the toxic plume will die within 10 hours.

Refineries near major urban areas could use an alternative to hydrofluoric acid that poses less of a danger to the surrounding community. In fact two-thirds of the refineries in the United States do just that. My colleague, Lawrence Wein, a pro-

fessor of management science at the Stanford University Business School, has determined that for a conversion cost of $20 million to $30 million per refinery, sulfuric acid could replace hydrofluoric acid in the alkylation process used to manufacture high-octane gasoline. Sulfuric acid can pose dangers as well, and the refinery would need to use larger quantities of it than anhydrous hydrogen fluoride. However sulfuric acid does not need to be stored under pressure, nor does it form a dense cloud when it is released. As a consequence, a terrorist attack on a refinery using sulfuric acid would create a nasty chemical spill that would have to be cleaned up within the facility, but the neighboring population would not be seriously endangered.

Quite simply, the consideration of IST must be a part of any reasonable effort to address the security risk associated with the chemical industry within the United States. I applaud Governor Jon Corzine and the State of New Jersey for embracing this approach. I am particularly gratified by Governor Corzine's announcement on Friday March 16th, to enact new rules that would require 94 industrial facilities including chemical plants, oil refineries, industrial food processors and water treatment plants to find safer ways to handle the lethal chemicals they use or use less dangerous chemicals altogether. New Jersey's citizens face the gravest risk from this threat and to the State's credit, it has chosen to lead the nation in developing a pragmatic strategy for confronting this risk. It would be travesty if the new and long-overdue Federal legislation, ostensively advanced to improve the security of chemical facilities around the nation, had the end result of actually eroding that security in a State where the public safety stakes are enormous and where the requisite political leadership to tackle the challenge has been most forthcoming.

While I was completing the preparation of my written testimony, CNN released a news report of an attack by suicide bombers who detonated three chlorine-filled trucks in Anbar province on Friday, March 16, 2007. Accordingly to U.S. military forces, the attacks killed two police officers and sickened about 350 Iraqis and six coalition force members. As someone who was monitoring the Al Qaeda threat in the 1990s and their attacks on U.S. barracks in Saudi Arabia, U.S. embassies in East Africa, and the USS Cole, one of my greatest frustrations prior to 9/11 was that Americans seemed to believe that what was happening beyond our shores would never happen here. I had the privilege of serving in support of the U.S. Commission of National Security (Hart-Rudman Commission) that warned in their final report released in January 2001 of the growing risk of a catastrophic terrorist attack on U.S. soil. I have since had to live with the angst of seeing that warning unheeded in advance of the attacks of 9/11. I do not want to live with that angst again when it comes to the terrorist risk posed to our chemical and petroleum facilities.

I strongly urge that Congress and the Bush Administration work together to redraft the legislative language on chemical security enacted into law last October to address the shortcomings I have outlined here today.

Thank you and I look forward to responding to your questions.

STATEMENT OF RICK ENGLER, DIRECTOR, NEW JERSEY WORK ENVIRONMENTAL COUNCIL

Mr. ENGLER. Thank you very much. The New Jersey Work Environment Council is an alliance of labor, community, and environmental organizations that advocates for safe, secure jobs and a healthy, sustainable environment. Our 70-member organization includes many unions, such as affiliates of the United Steelworkers and Teamsters, which directly represent workers employed by industries that use highly hazardous chemicals, the State's largest environmental groups, and community groups whose members live within the vulnerability zones of industrial facilities.

Ensuring chemical safety and hometown security for New Jersey's workers and communities has been a major priority for WEC over the last 5 years. We have developed and advocated for new policies and offered training and educational programs to workers and the public. We have a formal partnership with the United Steelworkers, our state's largest industrial union, which represents thousands of workers across this state to help provide training focusing on chemical safety and security.

Most of today's testimony has been focused on DHS. But lurking behind this agency is the chemical industry, who virtually directed the Bush-Chaney Administration to adopt these rules. It is our understanding that chemical industry representatives were invited to this hearing. Frankly, given the gravity of this issue, it is a moral outrage that they decided not to participate today to explain their position, to explain whether they would take steps to challenge New Jersey or other state action on this matter. And it's one of grave concern to us. They can run, but they cannot hide. We appreciate you holding this hearing, and we will follow up to ensure that their position on this issue is made as well-known as the DHS position has been made well-known by today's hearing. We again thank the subcommittee for holding this hearing.

Senator Lautenberg, you have been a leader on this issue and a consistent champion for the public's right to know and right to prevent toxic exposure. We share the concerns of many unions, environmental organizations, Governor Corzine, and our Congressional delegation, that the proposed Department of Homeland Security rules are fundamentally flawed. DHS, EPA and the Occupational Safety and Health Administration or OSHA should address this matter through an integrated approach that encourages State initiative and that does not give DHS power to derail state action.

Our testimony has five points, and I'll summarize them: New Jersey has taken precedent setting action to ensure the inseparable goals of chemical safety and security. The proposed DHS rules could conceivably harm, rather than protect, the people of New Jersey and other States.

The chemical industry lobby—and I want to emphasize this—or any one of its individual member companies—could use DHS preemption rules to challenge New Jersey policies. So, for example, if our State trade association says, well, we can work this out, we can figure this out, we hope there's a compromise. The fact is, they don't represent all of the chemical companies in this state. And anyone of them, even their member companies, could pose a challenge through the way the DHS rules are constructed at present.

OSHA, who is not represented here today, a subject for another day, have absolutely failed to enforce laws that could address chemical incident prevention and responses that are directly related to this challenge.

In summary of New Jersey efforts. We talked a little bit about the approach on Inherently Safer Technology. And we applaud Governor Corzine for his action in this area. I would like to emphasize worker participation and union involvement as being extremely important, perhaps equally important, as inherently safer technology. Who knows better than front-line workers, not me in this suit, but people who work day in and day out on the front-lines in our facilities across our states, what the hazards and vulnerabilities are. There's no one better.

And I'm pleased that New Jersey has taken action to authorize workers and local union representatives to accompany DEP inspectors to point out potential workplace environmental security dangers under the Toxic Catastrophe Prevention Act (TCPA). This right for workers and their unions to help protect public safety of

the environment and security applies at the 94 facilities covered by TCPA.

And just last Friday DEP issued a new Administrative Order that worker and Union representatives could participate in agency inspections at 330 facilities covered by the Spill Act regulations to help point out risks related to hazardous chemicals.

The third accomplishment of the State of New Jersey, is our training requirements. Our training requirements are that chemical plants train worker-trainers and their entire workforce about chemical safety and security. The required curriculum for this program was developed by the New Jersey State AFL-CIO and the United Steelworkers. The New Jersey Office of Homeland Security required training through a July 2006 mandate for 154 chemical plants employing more than 38,000 workers. This is a serious effort. It's not perfect. It needs additional fine-tuning, as might be expected to address a problem of this scale. But it is very important that the State be able to maintain these kinds of policies. WEC and our organization is pleased to help make all of these policies happen.

There is nothing in the proposed DHS rules that address the need for Inherently Safer Technology, nor is there any requirement for worker and union participation to help prevent hazards. In fact, the only reference to workers by the DHS proposal focuses on criminal background checks of long-term employees.

Our belief and view is that such background checks won't identify terrorists. After all, none of the 9/11 high-jackers had criminal records. And criminal background checks of long-term, dedicated employees will be used to retaliate against them and their union leaders, who speak out for safety, environmental, and security safeguards.

I did a computer kind of search through the DHS rule using words like "worker, employee, union," and what jumped out is that there was only a request to unions to comment on the employee background checks, but nothing about a positive role for employees who, again, are on the frontlines.

We believe that corporate executives and their lobbyists, along with their DHS allies, must not be allowed to place even higher profits ahead of worker and public safety and private security. We support the efforts of the subcommittee to block preemption.

We would also like to comment briefly on OSHA's role on this, which hasn't been———

Senator LAUTENBERG. Be brief.

Mr. ENGLER. We have an existing OSHA standard, the Process Safety Management Standard. It hasn't been adequately enforced. Earlier, there was testimony about Kuehne Chemical plant in South Kearny. That facility, which has the greatest potential offsite consequence of any facility in New Jersey, hasn't been inspected by OSHA since September 12, 1997.

Under the Process Safety Management Standards, we've urged OSHA to develop a plan to enforce that standard in New Jersey. They said they'll consider it and we're waiting to hear back.

Just to finally emphasize the question of worker participation. And since safety, including workers' safety and security are insepa-

rable, we think that there are continuing problems, despite the spin of the industry.

I'll give you a couple of quick examples of the exclusion of workers from safety and security policy. At a major chemical plant in South Jersey, in fact, the largest chemical plant in South Jersey, the railcars that store highly-hazardous substances were stored on the periphery of the plant.

Suddenly, those railcars are moved into the center of the plant. Not commenting on what's safer, what's not safer, but the workers there and the local union felt this was an outrage. They have a Safety Committee. They try to participate. The United Steelworkers tries to protect not only their members, but the community. And not to have any process of consultation about moving railcars into the very center of this huge chemical plant is something that was severely demoralizing to the workforce and not something that encouraged them to help play an active role in protecting themselves and their neighbors.

Senator LAUTENBERG. Mr. Engler, in fairness to the others and the press.

Mr. ENGLER. I'll conclude by saying, thank you.

Senator LAUTENBERG. And we invite you to submit any further testimony. We have copies of your written testimony, and each of you offered a particular insight into this problem.

And I'm reminded, Mayor Bollwage, that the Chemical Control facility, that we talked about, was kind of an inspiration supported by both to take a law that New Jersey had, to release inventory, and make it Federal Law, because it was more rigid than anything that the Federal Government had. And it passed. And it reduced substantially the toxic emissions that came out of companies in the area. And it was largely a voluntary program. The only penalty was exposure for the public to see which companies were putting more poisons in the air or unacceptable levels of toxic emissions. So it was very helpful.

And so I remember vividly the explosion and the fire at Chemical Control, as you described it. Many of the firefighters later suffered health effects. And we see that also in the aftermath of the 9/11 attack, that people were made ill, and it wasn't recognized until a substantially later period. And, by the way, we see injuries today coming from Iraq, that people are showing signs of deteriorating functionality.

And so we have to look at this in its broadest context. And why on earth they are insisting, as you heard, that what is going to help in some way to have this national standard, that's weaker than ours and weaker than many other states across the country, why it's going to be better for us. And so we this hearing today I think will have accomplished a lot.

Mayor Bollwage, we have to protect those who are called on at first to do their job, and we have to make sure that we at least give those first responders enough of a cautionary structure that says, look, you've got to be aware of what it is that you may face.

One of the things, I think, Mayor Bollwage, there was an incident, I don't know whether it was Chemical Control, but the uniforms that the firefighters wore actually deteriorated with the exposure to the chemical release that came about. And so shouldn't

we be protecting our first responders as national security priority at all levels of Government.

Mr. BOLLWAGE. Mr. Chairman, absolutely. And I was horrified to hear Dr. Flynn speak of these vaporized things. And Chemical Control, while it was not that severe, the 400 firefighters that fought it, 19, even to this day, 27 years later, we hear of firefighters who were there contracting certain diseases in direct relation or correlation to their exposure to chemicals at that Chemical Control fire in 1980. And some died in the late 1980S, as well, due to the chemical plume that basically twisted over Elizabeth and Staten Island.

At that point, Mr. Chairman, the plume and the wind direction was important to recognize, because it was blown in the direction of Staten Island over the Arctic Hull, where there was less inhabitables. But if that wind was blowing the other way, over the City of Elizabeth, with 125,000 people in the surrounding community, it would have affected a lot more people than it eventually did.

And we need the ability to regulate these facilities and do our own necessary security, as opposed to relying on a "one fits all" type of purpose for the entire nation.

Senator LAUTENBERG. I agree.

Dr. Flynn, your very articulate presentation of what constitutes weapons of mass destruction, is that in front of us. And we know that information was ignored before 9/11 that should have put us on a much more defensive position than we were, and the consequences are impossible to calculate. And so here we are now we're facing this.

One of the things that you mentioned, and it is a little oblique from here, is that I'm very active in trying to get Amtrack as an item more available, more efficient, because if there is an evacuation called for and we have to have all means available—I mean, heaven forbid that we should be trying to evacuate a facility fire and explosion and having to go exclusively to the main routes, to the Turnpikes, et cetera, to the airports. There is no way we can handle it. And so we have to be more aggressive in our preparation to deal with these things. And giving DHS the right to preempt I think is really a step that's way back.

For instance, do the chemical security rules proposed by the Administration, do they fill all the gaps that exist, or should we call on the states to do their best to establish their own levels of protection?

Mr. FLYNN. I think, clearly, it's a case, just as you outlined at the outset, Mr. Chairman, of taking a Best Practice at the State level and moving it to the Federal level. That's what we have potential for with what's happening here in New Jersey. Not surprising, the State that has the most at risk, the greatest stakes, but has a level of cooperation between local officials in the industry and the labor. This is a capability that doesn't exist in the proper Homeland Security.

It may well be they're not adequately resourced. We've been spending 250 million every day since the spring of 2003 on the war in Iraq. So we've been spending, on this issue, this year, we'll be spending 150 minutes of the war in Iraq.

Now, it just doesn't make any sense, given the scale of this threat and vulnerability of our own citizens. We should be making this environment—I'll just reinforce your intra with Amtrack. President Eisenhower was probably the last president who looked at our infrastructure as national security. But, of course, our highway system was built around the Interstate Highway and defensibility to basically immobile, but also to evaluate that the cold war got hot. Somehow, we're fighting this war on terrorism entirely disconnected from the reality that our infrastructure is essential to protecting our citizens. And, ultimately, we, the people, must be involved to a far greater extent.

It seems unbelievable to me, having spent 5 1/2 years of frustration trying to get Homeland Security issues dealt with in a real serious way, and getting pushed back, that really this is a state and local responsibility, private sector responsibility, because the job of the Federal Government is national defense under, beyond our borders.

And then, finally, the most critical infrastructure in terms of vulnerability that we get the insertion, where it's a federal government that knows best in the states and locals should be cut out of the loop.

Senator LAUTENBERG. You know what, Dr. Flynn, I think they're hearing voices, and they're not the voices that we want to most listen to. The voices are there. And once again, we know that the industry provides us with all kinds of wonderful resources and so forth, but they shouldn't be allowed to prescribe law that protects their interests ahead of the peoples' interests. And we find things like that going on throughout government now, whether it's the oil industry or the defense industry or what have you.

So we'll take all of your comments to heart and see if we can do something about ensuring the fact that we in New Jersey know best what's happening for us and what we have to do to protect our citizens. And we're going to work very hard at it. And we invite all three of you to continue to monitor the situation and let my office know if you see anything we ought to be doing.

Thank you all very much and thanks everybody for participating in this hearing. I have a statement that I'm going to put in the record from the Steelworkers. And I want to note, Mr. Engler, there is a bunch of comments submitted by the United Steelworks concerning the Department of Homeland Security's Proposed Rule establishing Chemical Facility Anti-Terrorism Standards.

And, Mr. Engler, one of the things that has to happen in all of these calculations is to make sure that those people who are working there, who are the first to be exposed, who are first to suffer the injury, are protected. And if we can protect them, then we have a surefire better chance of protecting our citizens who are a further distance away.

Thank you all for your good work. I appreciate it. This hearing is concluded.

STATEMENT OF RICK ENGLER, DIRECTOR, NEW JERSEY WORK ENVIRONMENT COUNCIL

Good morning and thank you for your invitation to the New Jersey Work Environment Council to present testimony today. My name is Rick Engler. I am Director of the New Jersey Work Environment Council or "WEC." WEC is an alliance of

labor, community, and environmental organizations that advocates for safe, secure jobs and a healthy, sustainable environment. Our 70 member organization includes many unions, such as affiliates of the United Steelworkers and Teamsters, which directly represent workers employed by industries that use highly hazardous chemicals, the State's largest environmental organizations, and community groups whose members live within the vulnerability zones of industrial facilities.

Ensuring chemical safety and hometown security for New Jersey's workers and the public is a WEC priority. For the last five years, WEC has worked to achieve this goal through developing and advocating for new State policies and by offering educational programs to workers and the public. We have a formal partnership with the United Steelworkers, our State's largest industrial union, which represents thousands of chemical and oil workers, to provide training about chemical safety and security through their Tony Mazzocchi Center for Health, Safety, and Environmental Education. Our President, John Pajak, a rank and file worker at the ConocoPhillips oil refinery in Linden and a member of Teamsters Local 877, was proud to stand with you and Senator Menendez last year when you, despite vociferous industry opposition, announced introduction of the Chemical Safety and Security Act of 2006.

WEC thanks you for holding this important hearing focusing on the value of State and local policies to ensure chemical safety and security. Senator, you have been a leader on this issue and a consistent champion for the public's right to know about and right to prevent exposure to toxic chemicals, dating back to your sponsorship of the Emergency Planning and Community Right to Know Act in 1986.

We share the concerns of many unions, environmental organizations, Governor Corzine and our Congressional representatives, that the proposed Department of Homeland Security (DHS) rules are severely flawed.

The major points of my testimony are:

1) The proposed rules on preemption far exceed Congressional intent. If DHS adopts them in their current form and they are upheld by the Courts, these rules will harm, not protect, the people of New Jersey and other States that act to address the new threats of a terrorist attack.

2) While DHS proposes to derail State protections, other Federal agencies fail to enforce existing laws that promote chemical safety and security.

3) There are three underlying principles for policy that can effectively address chemical safety and security—safe operation, maintenance and design of facilities, meaningful worker and union participation, and cooperation between Government agencies that address those issues.

4) There are at least thirteen key elements for a minimally effective State or national policy to ensure chemical safety and hometown security. These points are summarized in this testimony.

NEW JERSEY IS THE NATIONAL LEADER FOR CHEMICAL SAFETY AND SECURITY POLICY

New Jersey has taken some important actions to ensure both safety and security. Historically, these steps have included:

- Enactment of the 1984 Worker and Community Right to Know Act, which along with subsequent Federal laws, allows workers, plant neighbors, and emergency responders to learn about chemical hazards; and
- Enactment of the 1984 Toxic Catastrophe Prevention Act (TCPA), after Union Carbide's Bhopal, India disaster, which requires facilities that use extraordinarily hazardous chemicals to implement risk management plans. Because of this law, more than 300 water and sewage treatment plants no longer use large quantities of chlorine. The law served as a model for amendments to the Federal Clean Air Act (CAA).

Under the Administrations of Governors Codey and Corzine, New Jersey has adopted three significant and precedent-setting new policies:

1) In November 2005, New Jersey became the first State in the nation to require that approximately 42 chemical sector facilities evaluate whether they can adopt "built-in" safety measures, a strategy to promote use of "inherently safer technology" by issuing Best Practice Standards for the chemical industry. Just last Friday, at the direction of Governor Corzine, the Department of Environmental Protection (DEP) issued a rule proposal to expand this requirement to cover 94 facilities, including oil refineries, paper mills, and water and sewage treatment operations. Other provisions in the Best Practice Standards require management of 154 facilities using highly hazardous substances to conduct vulnerability assessments, forward the Occupational Safety and Health Administration's (OSHA) Process Safety

Management (PSM) Standard violations to DEP, and consider workers' and unions' input.[1]

2) In October 2005, New Jersey became the first State in the nation to allow and encourage workers and their union representatives to point out hazards while accompanying DEP staff on inspections at 94 of New Jersey's most hazardous facilities, those covered by the State's Toxic Catastrophe Prevention Act. These facilities include chemical plants, oil refineries, paper mills, food processing plants and water treatment and sewage operations.[2] Also, on March 14, 2007, the DEP issued a new Administrative Order ensuring that workers and union representatives can participate in inspections conducted under the Discharge, Prevention, Containment and Control (DPCC) program.

3) In July 2006, New Jersey became the first State in the nation to issue a requirement that 154 New Jersey chemical plants employing more than 38,000 workers train worker-trainers and their entire workforce about chemical safety and security. The required curriculum, developed by the United Steelworkers and the New Jersey AFL-CIO, covers mapping risks to workers and surrounding communities and underlying systems of safety.[3]

These three policies are significant accomplishments. WEC and our allies are pleased to have helped make them all happen. The chemical lobby claims that they will not challenge these policies "as currently implemented"[4] [our emphasis].

However, Governor Corzine has pledged further initiatives for chemical safety and security. The chemical lobby—or just one of its individual member companies—could use DHS preemption rules to challenge New Jersey's existing and/or new initiatives.

To put it simply, if the chemical industry wins by stopping New Jersey from taking strong action to meet the particular needs of our State, workers and the public lose. Corporate executives and their lobbyists, along with their friends at DHS, must not be allowed to put even higher profits ahead of worker and public safety and security. New Jersey and other States must be free to require industries that use hazardous chemicals to operate safely and securely.

In addition to the industry developed preemption language, the proposed DHS rules:

- Do not encourage facilities to adopt inherently safer and more secure approaches that minimize catastrophic risks and reduce the attractiveness of facilities as terrorist targets.
- Fail to engage workers and their unions when requiring plant management to assess risks or as part of ongoing consideration of safety and security concerns.
- Attempt to cover-up knowledge of toxic dangers through potentially gutting the worker and public "right to know provisions" of existing Federal and State laws, including the Occupational Safety and Health Act and the Emergency Planning and Community Right to Know Act.
- Undermine Government accountability through excessive secrecy. People will not be able to find out if DHS is requiring a facility to improve security or not.
- Include provisions for criminal background checks of long-term employees that won't identify terrorists but will likely be used to retaliate against workers and their union leaders who speak out for safety, environmental, and security safeguards.

WEC urges Congress to promptly pass comprehensive chemical safety and security legislation along the lines of your Chemical Safety and Security Act of 2006.

Such legislation should supersede the proposed DHS regulations and charge the Environmental Protection Agency (EPA) and OSHA, as well as DHS, with greater authority to prevent and respond to chemical incidents, whether they are caused by a terrorist attack or a "routine" accident.

An underlying principle of such legislation—in stark contrast to the current DHS proposal—would be that worker and public safety are inseparable from security. The industry's focus on perimeter hardening, in other words, more gates, barriers, lights, and guards, is not in itself a bad thing. No one wants unauthorized individuals, whether they are terrorists or vandals, entering potentially hazardous operations.

However, the approach that needs support from industry, instead of their misleading and misplaced opposition, is one that would emphasize making changes to

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[1]Best Practice Standards At TCPA/DPCC Chemical Sector Facilities, NJ DEP and NJ Domestic Security Preparedness Task Force, November 21, 2005

[2]NJ DEP Administrative Order No. 2005-05, October 1, 2005.

[3]Security Awareness and Preparedness Program for the NJ Chemical and Petroleum Sectors. A WEC fact sheet on this requirement can be found at www.njwec.org.

[4]"ACC does not believe that the New Jersey, New York, Maryland or Baltimore programs—as currently implemented—frustrate that flexibility." Source: American Chemistry Council (ACC) Comments on DHS—2006—0073, February 7, 2007, pages 4 and 24.

the underlying systems of safety and ensuring that inherently safer approaches are adopted.

WHILE DHS PROPOSES TO DERAIL STATE PROTECTIONS, OTHER FEDERAL AGENCIES DON'T ENFORCE EXISTING LAWS

Ironically, the Federal Government has had important regulatory tools to promote safety and security since well before September 11, 2001—but has chosen not to utilize them.

OSHA's Process Safety Management Standard is the agency's most important rule for preventing catastrophic events at facilities with highly hazardous chemicals. Issued in 1992, it requires covered employers to conduct a "Process Hazards Analysis" to review what could go wrong and what safeguards must be taken to prevent releases of highly hazardous chemicals. The standard mandates written operating procedures, employee training and participation, pre-startup safety reviews, evaluation of mechanical integrity of critical equipment, contractor requirements, and written procedures for managing change. It also requires a permit system for "hot" work, incident investigation, emergency action plans, and employer internal audits at least every 3 years.[5]

However, a WEC review of OSHA's enforcement record of private sector facilities in New Jersey has found that the agency has conducted few PSM inspections of PSM covered facilities since 9/11.[6] Of the 21 facilities in New Jersey that could each potentially harm up to 15,000 people or more—all of which are covered by the PSM standard:

- Only eight have received an OSHA inspection since September 11, 2001.
- Six have never even had one PSM OSHA inspection. These include facilities which could potentially endanger between 20,000 and 500,000 people.
- Seven were inspected before September 11, 2001, but have not been inspected since. These include facilities which could potentially endanger between 34,104 and 12 million people. For a notable example, OSHA has not inspected the Kuehne Chemical plant in South Kearny since September 12, 1997.

Please see the attached table listing facilities and OSHA inspection data.[7]

When OSHA has conducted PSM inspections, the agency has found violations of this standard. For example:

- On January 21, 2005, a violent explosion from the ignition of acetylene at the Acetylene Service Company in Perth Amboy, New Jersey killed three workers. OSHA subsequently found many serious and willful violations, including violations of the PSM standard, and penalized the company $ 176,790.
- On March 29 and April 19, 2005, a chemical explosion and leak, respectively, at the Siegfried, USA pharmaceutical plant in Pennsville, New Jersey injured a number of workers. OSHA subsequently found serious PSM and other violations and penalized the company $ 4,500.
- Since 9/11, OSHA inspections have also resulted in PSM citations and fines for Ashland Chemical in Totowa ($3,465), DuPont in Deepwater ($4,250), and ConocoPhillips in Linden ($23,060).

WEC has urged OSHA to promptly develop a comprehensive plan to enforce the PSM standard in New Jersey. They are currently considering our request. We ask that Congress direct OSHA to strengthen the PSM standard and to systematically inspect high risk facilities.

The U.S. EPA, like OSHA, has also chosen not to use their full authority to prevent chemical accidents. For example, Section 112(r) of the CAA, enacted in 1990, says that workers and union representatives have a right to participate in EPA inspections, which would include the right to accompany EPA inspectors during risk management plan (RMP) compliance inspections and accident investigations.[8] Governor Corzine has said, "Who knows more about a plant than the workers who work

[5]Related OSHA Standards, such as Hazard Communication, also help to prevent chemical accidents and exposures.

[6]Correspondence to Rick Engler, WEC Director, from Patricia K. Clark, Regional Administrator, OSHA, February 8, 2007 in response to a WEC Freedom of Information Act Request.

[7]The data in this table is from US EPA Risk Management Plans and the OSHA compliance database online at www.osha.gov. Last OSHA inspection dates were also confirmed by OSHA Area Office Directors.

[8]Title 42, Chapter 85, Subchapter 1, Part A, Section 7412. The relevant language (in the section on the duties of the Chemical Safety Board) reads "Whenever the Administrator [this refers to the EPA Administrator and State agencies which have assumed delegation] or the Board conducts an inspection of a facility pursuant to this subsection, employees and their representatives shall have the same rights to participate in such inspections as provided in the Occupational Safety and Health Act [29 U.S.C. 651 et seq.].

there?" Workers are on the front lines. Because of their experience and skills, they are intimately familiar with their work environment. Workers can point out hazards, risks, and vulnerabilities that may not be readily apparent to even a skilled inspector who is infrequently on-site.

Unfortunately, WEC does not believe that EPA has ever encouraged workers or their union representatives to participate during their agency's inspections. At the urging of WEC, the DEP, which has delegated EPA enforcement authority under CAA 112(r), adopted a TCPA Administrative Order in October 2005, allowing and encouraging workers and their union representatives to participate in DEP RMP inspections.[9] This program has proven successful, with a high percentage of inspections involving local union representatives. We ask Congress to ask EPA to issue a directive to its field staff and the other States with delegated enforcement instructing them to immediately engage workers and local union leaders during RMP inspections.

These two examples again demonstrate why safety and security are inseparable and why DHS, EPA, and OSHA should address this vital matter through an integrated approach, not rules that give DHS inappropriate power and responsibility.

PRINCIPLES FOR CHEMICAL SAFETY AND SECURITY POLICY

In WEC's view, there are three underlying principles for policy that can effectively address chemical safety and security.

First, facilities must be designed, operated, and maintained safely. No matter how many guards, gates, and surveillance cameras are in place, a determined terrorist who flies an airplane into a chemical processing unit or storage tank can kill workers and thousands of neighbors. The most practical way to address this threat is to prevent hazards in the first place—and to minimize the consequences of an incident if one does occur. For example, it is inexcusable that the Valero petroleum refinery in Gloucester County still uses a particular processing method involving hydrofluoric acid to make gasoline when their executives know that there are safer alternatives to this process. Oil companies are not poor. They should have to adopt safer methods, or at the very least, seriously consider their adoption. If they can't take real steps for safety, they should have to justify why they can't—and smaller profits is no excuse.

Second, there must be meaningful worker and union participation. For example, plants must have labor-management site safety and security committees. These committees would meet regularly to discuss potential safety and security risks and ways to prevent them. These committees would be able to regularly inspect the workplace to identify potential vulnerabilities that could be exploited by terrorists or that could lead to a toxic exposure, explosion, spill, or fire. Requiring these committees is just common sense. Many joint labor/management safety committees already exist and help prevent hazards to both workers and the community.

Third, as noted earlier, since safety and security are inseparable, Government agencies responsible for worker safety, environmental protection, and security must take an integrated and coordinated approach.

THIRTEEN KEY ELEMENTS FOR EFFECTIVE CHEMICAL SAFETY AND SECURITY POLICY

WEC believes there are at least thirteen key elements for a minimally effective State or national policy to ensure chemical safety and hometown security. We believe that these policy components should be incorporated in Federal legislation, with the right of States to adopt more effective protections to address local needs, such as population density or the presence of particular industries.

These elements include:

- First, regulating the appropriate scope of facilities. All facilities that are required to submit EPA Risk Management Plans because they use or process extremely hazardous chemicals should have comprehensive protections and States should be able to regulate additional facilities based on particular circumstances.
- Second, facilities must conduct a thorough vulnerability assessment to consider risks of both unintentional accidents and deliberate attacks on workers, surrounding communities, and the environment. Such assessments should include the potential toxic impact of multiple and cascading process failures.
- Third, facilities must assess perimeter protections such as lighting, barriers, and perimeter security.
- Fourth, facilities must, at a minimum, analyze options for their potential to adopt inherently safer approaches and overall systems of safety. Such approaches

[9]DEP Administrative Order 2005-05.

include input chemical substitution, process redesign, product reformulation, reducing hazardous pressures and/or temperatures, and improving chemical use efficiency and inventory control. Such analysis must include a review of available approaches within the facility, including where they operate in other countries, and within the industry overall. If a facility claims that they cannot financially afford to adopt measures for inherent safety, they should have to document the financial and other costs to workers, the public, and the environment of failing to take such approaches.

• Fifth, facility management must specify in writing the appropriate number of staff for safe operation, effective preventive maintenance, perimeter security, and emergency response. Many facilities, particularly in the chemical industry, have "downsized" and are running with fewer experienced staff even as their production output has stayed the same or increased. Needed maintenance, necessary for safety, is too often deferred. Management must specify safe staffing levels during all hours of operation.

• Sixth, facilities must establish joint employee/employer site Safety, Security and Environment Committees with real authority to help prevent, monitor, and respond to toxic releases. Safety Committees established by labor/management collective bargaining agreements already cover most manufacturing facilities. The function of such committees should be expanded to include security concerns. These committees should have the right to make recommendations to management, survey the workplace for risks, assist in accident and release investigations, and help develop safety and security assessments and plans. According to National Labor Relations Board decisions, in unionized facilities, the union must select its own representatives to committees dealing with safety and health, which would obviously include the prevention of catastrophic accidents.

• Seventh, all employees potentially exposed to hazardous chemicals should receive six hours of annual chemical safety and security training, in addition to training already required by OSHA standards. Such training should focus on understanding of inherently safer approaches and worker rights and responsibilities.

• Eighth, workers and union representatives must be able to participate in all aspects of Government enforcement of chemical safety and security rules. This includes the right to participate in all stages of DEP and DHS workplace inspections, including the accompaniment of Government inspectors to help point out potential hazards and vulnerabilities.

• Ninth, there must be strong whistle-blower protection that encourages employees in union and non-union facilities to confidently point out potential dangers without fear of reprisal. (The existing anti-discrimination provisions of OSHA are weak. New Jersey has relatively strong whistle-blower protections in its Conscientious Employees Protection Act).

• Tenth, there must be meaningful opportunities for community involvement. Facility management, upon request by an environmental agency, a Local Emergency Planning Committee, or 25 or more residents and/or employees, shall convene a community meeting to discuss its risk management program, including off-site consequence analysis, inherent safety options analysis, and emergency response plan. There must be adequate notice to the community about such a meeting and all parties, including employees and their union, shall be invited to participate in this dialogue.

• Eleventh, facilities must have stronger emergency response plans. Plans should include specific explanations of what actions neighbors should take in the event of a catastrophic release and should describe steps management has taken to inform neighbors.[10] Low income and people of color communities, where these facilities are often located, face language and transportation barriers. Plans must address these factors.

• Twelfth, there must be sufficient enforcement authority, financial penalties, inspection staffing and other resources for Government agencies to ensure compliance.

• Finally, we believe that there should be no rollback in either worker or public "right to know" protections. Weakening right to know laws would do little or nothing to stop terrorists but would endanger workers, emergency responders, and community members.

Thank you again for the opportunity to testify and we look forward to supporting your efforts to ensure chemical safety and security in the days ahead.

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[10]Most communities in New Jersey appear unprepared for a chemical disaster. A WEC neighborhood survey in 2004 in Linden revealed that few residents had any idea of steps to take if there was a toxic release from a nearby industrial facility. A WEC survey of emergency responders and health professionals in 2005 revealed that 63 % of them did not even know if there was a TCPA facility in their municipality.

[Whereupon, at 12:30 p.m., the committee was adjourned.]
[Additional statements submitted for the record follow:]

STATEMENT OF SENATOR JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator Lautenberg, thank you for holding this hearing today. During my Chairmanship of this Committee, we made a lot of progress on chemical security. I have made national security my top priority and consistently supported reasonable chemical security legislation that provides DHS with the authority it needs to protect chemical facilities from terrorists without extraneous environmental mandates. During my Chairmanship of the Senate Environment and Public Works Committee, the EPW Committee has twice passed chemical security legislation in Committee and I was pleased to be part of group that forged a compromise that was finally enacted into law last year. Chemical industries are crucial components of the national economy and the infrastructure of the United States. Congress has long been concerned about releases of hazardous chemicals from industrial facilities and has enacted several statutes to help prevent such releases and to improve preparedness and response capabilities. Programs to protect the health and safety of workers, the public, and the environment by reducing the potential for accidental releases of potentially dangerous chemicals, including the consequences of worst-case releases of those chemicals, are in place as required by numerous Federal and State laws. However the events of September 11, 2001, demonstrated the need to ensure that appropriate security measures are taken to address the threat of acts of terrorism against facilities that manufacture, use, or process potentially dangerous chemicals.

In the wake of September 11, 2001, there was a realization that chemical facilities could be targets for terrorism. Since then, the Bush administration has made a determined effort to protect our nation's critical infrastructure against terrorists who aim to harm us. Congress, too, has acted by enacting into law the Marine Transportation Security Act, the Bioterrorism Act, and a comprehensive nuclear security package that originated from the Environment and Public Works Committee. Congress has also created the Department of Homeland Security vesting it with power and authority to protect the nation's infrastructure. DHS has worked diligently and quickly to address the nation's security issues. In the chemical sector, DHS has deployed teams of counter terrorism specialists to each identified high-risk chemical facility to work with management, local first responders and law enforcement, States and other Federal agencies to assess and address the security needs. DHS has also created several tools to help all chemical facilities regardless of whether they represent high-risk locations. These efforts all mean that chemical facilities are more protected and that we are all indeed safer.

Late last year, the Congress passed the Department of Homeland Security Appropriations Act of 2007 (Public Law 109-295). Section 550 of the conference report contained provisions requiring the Secretary of Homeland Security to issue interim final regulations by April 6, 2007, establishing risk-based performance standards for security of chemical facilities and requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities that present high levels of security risk. I was pleased to support these chemical security provisions included in the DHS appropriations conference bill because I have always supported reasonable chemical security legislation that provides DHS with the authority it needs to protect chemical facilities from terrorists without including extraneous environmental provisions or provisions designed to place mandates on how companies manufacture their products requiring facilities to switch the chemicals they use or change their operating practices. During my tenure as Chairman of the Environment and Public Works Committee, we tried twice to move legislation to require certain chemical plants to upgrade their security against terrorist acts. Each time, we were sidetracked by the insistence of some that any such legislation must include allowing DHS to mandate inherently safer technologies. The environmental based concept of inherently safer technologies dates back more than a decade when the extremist environmental community were seeking bans on chlorine, the chemical that is used to purify our nation's water. It was only after the attacks of September 11, that these environmental organizations determined to repackage IST as a panacea to all of our security problems when in reality it is more about increased chemical regulation.

I was pleased to support the chemical facility security provision in the conference report because it did not include these extraneous environmental mandates but instead properly focused efforts on security. The language explicitly clarified that the new regulatory authorities given to the Department of Homeland Security do not

include any authorities to regulate the manufacture, distribution, use, sale, treatment or disposal of chemicals. These authorities have been properly provided to the US Environmental Protection Agency and other agencies and departments under numerous environmental and workplace safety laws, such as the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, the Occupational Safety and Health Act and a host of others.

During consideration of the Department of Homeland Security Appropriations Act of 2007, legislative debate centered not only on the necessary components of risk-based performance standards and vulnerability assessments but also focused on the preemptive effect to State law of the chemical security regulations required by Section 550 of the conference report. On September 28, 2006, a debate among a bipartisan group of Senators including Senators Voinovich, Pryor, Warner, and Domenici all agreed the intent of the language in the conference report was to impliedly preempt any State legislation on chemical plant security. The Senators recognized the importance of a single and integrated set of comprehensive standards as required by Section 550 being vital to the chemical industry and vital to national security.

One final note about the importance of Section 550 is its recognition that municipally owned and operated water and wastewater facilities are different than privately and investor owned chemical facilities. The Nation's drinking water and wastewater systems are arms of local Government, not for-profit industries. We in Congress recognized the fundamental difference between the for-profit private sector and local Government entities when we passed the Unfunded Mandates Act. To have included water utilities in this language would have imposed an enormous unfunded mandate on our local partners in violation of that Act.

Many here in Washington assume that local Governments need to be forced to protect their citizens. As a former mayor, I can tell you that is simply not true. Local water utilities have been making investments in security consistently since 9/11 and continue to do so. I have offered a bill on wastewater facility security that provides tools, incentives and rewards, not mandates, for local Governments to continue to upgrade security. My legislation passed the Environment and Public Works last Congress with a bipartisan vote and again this Congress by voice vote. However, each time the then-minority objected even to its consideration because they do not trust our colleagues at the local level to care as much about their constituents as we do ours.

Again, this is an important topic and I welcome the opportunity to hear from so many residents of the State of New Jersey on the importance of chemical security legislation to them.

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February 7, 2007

IP/CNPPD/Dennis Deziel,
Mail Stop 8610, Department of
Homeland Security, Washington DC
20528–8610.

Re: Dept. of Homeland Security, Chemical Facility Anti-Terrorism Standards-Proposed Rule; [DHS-2006-0073], RIN 1601-AA41

Dear Mr. Deziel:

On behalf of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO.CLC (USW) the following are our comments concerning the Department of Homeland Security's Proposed Rule on Chemical Facility Anti-Terrorism Standards. The USW represents approximately 50,000 workers in chemical plants, oil refineries and other workplaces that produce, use or store significant quantities of highly hazardous chemicals. We have a keen interest in effective standards protecting our members, their families, and the general public. Along with other organizations, we worked hard for effective legislation in the last Congress and we continue to work in the current Congress. The provisions attached to the DHS appropriations bill late last year did not meet all our objectives, but it did provide a useful starting point. Unfortunately, DHS has chosen to ignore both the letter and the spirit of that legislation in its current proposal. More important, the current proposal will do little to enhance the security of chemical facilities or the safety of workers and the public. We will summarize our comments below, and deal with each in more detail in a subsequent section

1) This proposal does not provide for involvement by workers or their labor representatives, in contrast with other similar regulations also aimed at public safety. We believe that such involvement is essential to chemical plant security.

2) "Chemical Facility" and "High Level of Risk" are not properly defined. Leaving those definitions to the discretion of anyone or any agency with no specified parameters leaves open the possibility of misinterpretation of the Department's intent, and could create difficulties and inconsistencies in applying of the rule.

3) The Department proposes to employ a risk assessment methodology with no apparent explanation of what that methodology consists of.

4) Risk Based Tiering should be kept simple. The three categories should be: High Risk, Low Risk, and No Risk. To do otherwise is to create confusion where it is not needed.

5) There is no requirement or suggestion to apply inherently safer technology and or changes to the process to lower the risk of a facility. This lack is perhaps the greatest defect in the proposal.

6) The proposal would provide far greater protection by including provisions requiring the employment of sufficient and qualified personnel in order to meet the DHS requirements; strengthening the recordkeeping and reporting requirements for process malfunctions or any attempted terrorist attack; defining the need for emergency response, safe shut down, evacuation and decontamination procedures in case of an attack or malfunction; and effective training requirements for workers in covered facilities.

7) Although there is some justification for background checks for new hires, background checks for current workers are unlikely to identify potential terrorists, and could create opportunities for discrimination.

8) The provisions regarding vulnerability information are overbroad. Workers and the public should have the right to know what risks they face.

9) The proposal contradicts the Act on the subject of preemption. The DHS does not have the authority to preempt laws that provide stronger protections to workers and the public.

Comment 1: Worker Involvement

The Chemical Facility Anti-Terrorism Standards-Proposed Rule lacks requirements for employee and union representative's involvement.

For example:

"The site visits are conducted by DHS protective security professionals, subject-matter experts, and local law enforcement, along with the facility's owners and operators." (p. 78278)

In other rules, such as OSHA's General Industries Standards (29 CFR 1910), the government encourages employee and employee representatives to be present during their site visits. To not involve some of the most informed employees and representatives is not to utilize one of the best assets to the adoption of a successful program. Workers are in a unique position to identify and prevent potential facility vulnerabilities. They understand just where an intruder might enter a plant; whether or not security guards are

doing their job; the location of volatile materials; whether the facility is sufficiently staffed with trained personnel; if backup control systems properly operate; as well as other potential risks. Because of their concerns about workplace safety and health, they routinely point out hazards to management. Workers also are often required to respond during emergencies, and in doing so, function as both the first and last line of defense against a disaster. Workers and their unions can be vital participants in plant safety and security. To be fully effective, worker participation must be supported by strong whistleblower protection.

Although the appropriations legislation authorizing the rule is silent on this subject, it certainly does not bar worker and union involvement. DHS could and should take guidance from the history of the legislation. The bills that emerged from the committees of jurisdiction in the House and Senate (H.R.5695 and S.2145) both contained worker participation and whistleblower protections. Other jurisdictions have also dealt with this issue. The State of New Jersey's Toxic Catastrophe Prevention Act, (N.J.S.A. 13:1K-19 et seq.) and New Jersey Department of Environmental Protection Administrative Order 2005-05 establish procedures for participation by employees and their representatives.

Comment 2: Definitions

The proposal states:

"A fundamental question posed by Section 550 is which facilities it covers. Section 550 specifies that the provision "shall apply to the chemical facilities that, in the discretion of the Secretary, present high levels of security risk."..."

The term "chemical facility" is vaguely defined in the proposal:

"...the Department proposes to define "Chemical facility" as "any facility that possesses or plans to possess, at any relevant point in time, a quantity of a chemical substance determined by the Secretary to be potentially dangerous or that meets other risk-related criterion identified by the Department."

The term "high levels of security risk" is not defined at all.

Both terms should have tighter definitions that clearly delineate which facilities are covered. The chemicals and amounts of those chemicals, such as in OSHA's Process Safety Management Standard, or the EPA's Risk Management Program would be a good place to start. We recognize that the rule should cover more facilities than those covered by the OSHA and EPA regulations, but not to define "chemical facility" more rigorously is to leave many facilities wondering if they would fall under the requirements.

The absence of a definition also leaves no room to discuss what the parameters for inclusion should be. It is all up to the Secretary. In addition, the proposal seems to invite the Secretary to determine coverage on a case-by-case basis, creating long delays in implementation.

One alternative proposed by DHS is the use of hazard classes:

"The Department also requests comments on whether, to the extent it looks to the nature of particular chemicals to classify facilities, classification should be based on a "hazard-class" approach rather than classifications based on particular chemicals." (p. 78282)

This approach has promise, but it must be based on a more detailed classification system than that provided by the DOT's Emergency Response Handbook. For example, the criteria for acutely toxic chemicals should include both toxicity and the possibility of dispersion in the event of a release.

Comment 3: Risk Assessment

The proposal states:

"As a practical matter, the Department must utilize an appropriate process to determine which facilities present sufficient risk to be regulated." (p. 78281)

But then:

"The Department may draw on many sources of available information..."

"The Department may also seek and analyze..." "The Department proposes to employ a risk assessment methodology system very similar to this RAMCAP Top-screen process..."

"The proposed regulation would permit the Department to implement this type of Top-screen risk analysis process to screen facilities."

What type? DHS "may", "may also", "very similar to," does not define what their method will be. The only description the Department offers is that **"the department has worked with the American Society of Mechanical Engineers (ASME) and others to design a RAMCAP "Top Screen" process..."** There is no comprehensive explanation of what the method will be. This is especially troubling given the fact that: **"As noted, the statute gives the Secretary unreviewable discretion to make this determination."**

No one, not even the Department, seems to know what method will be used. But, the Department claims to have unreviewable discretion in implementing the method. The Department should define what the method entails so that constructive comments can be made on whether or not the method should be refined. How can one comment on that which is not described? Who are the others who helped design what the Department may use? Were there workers, workers representatives, Union Health, Safety and Environmental Specialists, other Governmental Specialist, (ie OSHA, EPA etc.) consulted?

DHS should first define the method, then ask for comments. We cannot blindly comment on that which is not explained.

Comment 4: Risk-Based Performance Standards

The proposal states:

"The Department believes that the "risk-based performance standards" and the Section 550 Program should indeed incorporate risk-based tiering". (p. 78283)

The Department then seeks comment on how to differentiate requirements based on tiering. Later the document proposes that a high risk facility will have different requirements than a lower risk-base tiered facility.

In order not to complicate this issue further, DHS should simply identify the criteria for those facilities that will be regulated or not. If the DHS otherwise insists on having tiers, than the tiers should be limited to high or low risk. It may be futile or even counterproductive to try to determine which facility is more prone to an attack. In fact, a terrorist might choose a lower-tiered facility because it is classified as lower risk, with less stringent security requirements.

Comment 5: Safer Technology

The proposal never addresses the use of inherently safer technology. Such a provision was not required by the legislation, but neither is it barred. Safer processes may not be feasible in some circumstances, but they should at least be considered in any security plan. Many safety measures may be possible without expensive redesign or new equipment. Safer fuels or process solvents can be substituted for more dangerous ones. The storage of highly hazardous chemicals can be reduced. The lack of any requirement even to consider such measures is the greatest failing of the proposal.

Comment 6: Other Missing Provisions

The proposal lacks many other requirements that would greatly enhance security in chemical facilities, and mitigate releases of highly hazardous chemicals, either through a terrorist attack, or from industrial accidents. A partial list includes: requiring the employment of sufficient and qualified personnel in order to meet the DHS requirements; strengthening the recordkeeping and reporting requirements for process malfunctions or any attempted terrorist attack; defining the need for emergency response, safe shut down, evacuation and decontamination procedures in case of an attack or malfunction; and effective training requirements for workers in covered facilities.

Comment 7: Background Checks

The proposal states:

"A proposed standard on personnel surety would require covered facilities to "perform appropriate background checks on and ensure appropriate credentials for facility personnel, and as appropriate, for unescorted visitors with access to restricted areas of potentially critical targets" (p. 78286)

Conducting background checks on current, long-term employees of a high risk facility is unlikely to identify a potential terrorist. However, conducting background checks will open the Pandora's Box of ways that the gathered information can be misused. Millions of workers' right to privacy could be violated by such an order in an attempt to identify that which is extremely unlikely. Countless dollars will be spent for that which the DHS claims is necessary, but is not. Significant amounts of time will be spent prosecuting those who will misuse the information gathered in an illegal fashion. Time and money will be spent defending those who will be unjustly treated by information gathered by a background check. Some of this might be justified for new hires, who could potentially seek employment in order to commit a terrorist act. But it is very unlikely that long-term employees will turn out to be terrorists, or that they will be caught by any reasonable background check.

Some of the potential problems with background checks might be avoided by placing strict limits on access to, and the use of personal information required by the rule. That should certainly be done if background checks are required for new hires. However, ensuring that background checks are fair and accurate will require a significant allocation of resources by DHS, with very little return in the case of long-term employees.

In the proposal there is no provision protecting individuals who need occasional access to these facilities from being unjustly delayed by a background check. For example, labor unions have a duty to their members to investigate accidents in the workplace. Prompt access is absolutely essential in order to acquire vital information. Background checks could easily be misused to disallow prompt access. Investigators and or experts in their field do also require prompt access.

These entries are protected by other federal laws which 550 says this rule is not to abridge. The PL109-295 Homeland Security Appropriations Act of 2007 Section 550 (f) states: **"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."** The DHS should provide language that will guarantee prompt access to labor representatives and others. The language in the proposal could be interpreted to be in conflict of rights guaranteed by the National Labor Relations Act. Provisions should also be provided that describe how the DHS anticipates such inevitable conflicts will be adjudicated.

One solution would be to include requirements for escorting individuals that are called into a facility, such as contractors, to perform a variety of work that have not had background checks.

Later the proposal states:

"...the Department will consider appropriate grounds for denying access or employment to individuals when their background check reveals an anomaly. In a different context, the Department has developed a list of "disqualifying crimes," as part of a threat assessment process, that prevent individuals from gaining access to certain facilities or privileges. See 46 U.S.C.70105 (c); 71 FR 29396..." (p. 78284)

What type of anomaly is the DHS expecting to find from a background check of a worker that would deny them employment? The DHS doesn't even bother with a definition of "an anomaly". Accessing the document referenced, one can identify the listed "disqualifying crimes." Section (c) Determination of Terrorism Security Risk identifies several of the crimes that would disallow employment or access to covered facilities or critical processes. They are:

(A) If a person "has been convicted within the preceding 7-year period of a felony or found not guilty by reason of insanity of a felony-
- **(i) that the Secretary believes could cause the individual to be a terrorism security risk to the United States; or**
- **(ii) for causing a severe transportation security incident;**

(B) has been released from incarceration within the preceding 5-year period for committing a felony described in subparagraph (A);

(C) may be denied admission to the United States or removed from the United States under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.); or

(D) otherwise poses a terrorism security risk to the United States"...

The possibility of using this information to terminate workers is painfully obvious. For example, in Ohio it is a felony to not pay two of the twelve months of the year required child support payments. One would hope that the Secretary would not be inclined to think of this individual as a terrorist. However, if he or she did, the employee could lose their job with no recourse.

Nor has DHS explained what constitutes "causing a severe transportation security incident"? A legal strike or lockout, or a work refusal over a safety issue might be considered by the employer to constitute a "severe transportation security incident." The DHS needs to define these terms.

These very questions arose in the past with regard to other rules. In some cases they were addressed. The Maritime Transportation Security Act and the HAZMAT CDL allow provisions for workers, who have committed what is considered a disqualifying crime, to be able to demonstrate that they are nonetheless not a security risk. The DHS has offered no such provision in this proposed rule.

Comment 8: Access to Information

The proposal states:
"Section 550 (c) of the Homeland Security Appropriations Act of 2007 provides the Department with the authority to protect from inappropriate public disclosure any information developed pursuant to Section 550, "including vulnerability assessments, site security plans, and other security related information, records and documents." In considering this issue, the Department recognized that there are strong reasons to avoid the unnecessary proliferation of new categories of sensitive but unclassified information, consistent with the President's Memorandum for the Heads of Executive Departments and Agencies of December 16, 2005, entitled "Guidelines and Requirements 550 (c), however, Congress acknowledged the national security risks posed by releasing information relating to the security and/or vulnerability of high risk chemical facilities to the public generally. For all information generated under the chemical security program established under Section 550, Congress gave the Department broad discretion to employ its expertise in protecting sensitive security and vulnerability information. Accordingly, the Department proposes herein a category of information for certain chemical security information called Chemical-terrorism Security and Vulnerability Information (CVI)." (p. 78288)

If one analyzes this paragraph carefully, it states that DHS has authority to refuse disclosure of certain information. The information includes **"any information developed pursuant to Section 550, "including vulnerability assessments, site security plans, and other security related information, records and documents".** This also includes unclassified information. In summary, any information the Department places in its new category is Chemical-Terrorism Security and Vulnerability Information (CVI). The Department identifies the President's Memorandum and Congress as the source for the authority given to them to refuse the disclosure of CVI.

The next paragraph reiterates this authority by stating:

"Congress also recognized that, to further the national security interests addressed by Section 550, the Department must be able to vigorously enforce the requirements of Section 550, and that these efforts may include the initiation of proceedings in Federal district court. At the same time, it is essential that any such proceedings not be conducted in such a way as to compromise the Department's ability to safeguard CVI from public disclosure. For this reason, Congress provided that, in the context of litigation, the Department should protect CVI more like Classified National Security Information than like other sensitive Unclassified information. This aspect of Section 550 (c) has no analog in other sensitive unclassified information regimes."

In other words, DHS concludes they have the authority to treat CVI more like Classified National Security Information.

In the next section, "**Protection from Public Disclosure,**" the proposal states:

"In setting forth the minimum level of security the Department must provide to CVI, Section 550 (c) refers to 46 U.S.C. 70103, which was enacted by the Maritime Transportation Security Act of 2002: "Notwithstanding any other provision of law and subsection (b), information developed under this section * shall be given protections from public disclosure consistent with similar information developed by chemical facilities ..."**

Later the proposal includes a very broad list of what could be considered CVI:

"The following information should be reviewed by the VA team as appropriate for determination of applicability as critical assets: chemicals, such as the Clean Air Act 112(r) list of flammable and part 68 or the OSHA Process Safety Management (PSM) 29 CFR 1910.119 list of highly hazardous chemicals; inhalation poisons or other chemicals that may be of interest to adversaries..."

There is no question that some information should be protected from public disclosure. Which tanks contain which chemicals is an example. At the same time, a potential terrorist with knowledge of chemical engineering will almost always be able to determine what chemicals may be on the site taken as a whole. Hiding that information from the public serves no legitimate purpose.

There are good reasons for the public to have access to critical information about nearby chemical facilities. Community residents should have the right to know the risks they face, so they can work to reduce those risks. The information may also be necessary for effective emergency planning, and to protect vulnerable populations.

CVI material should be limited to information generated by the proposed legislation. Any information that has been or can be independently gathered should not be considered CVI. Information such as PSM, EPA's Risk Management, Emergency Planning and Community Right to Know Act including Sections 311, 312, and 313, related records or any other such material need to be clearly defined that they do not and will not fall into the CVI category.

Community, labor and environmental organizations fought for decades for the right to know about the hazardous chemicals that they were and are being exposed to in an effort to protect their very lives. It is estimated that more than 50,000 workers die each year from exposures to hazardous chemicals. To take away the right to know the names and hazards of the chemicals to which they are exposed would deny them the ability to protect themselves and ultimately result in increased illness and death.

Unfortunately, the proposal couples an unacceptably vague definition of CVI with unbridled discretion granted the Secretary. DHS should replace these provisions with language precisely defining the information to be protected, based on a careful weighing of the public's right and need to know against the need to deny sensitive information to a potential terrorist. Those provisions should be subjected to full public notice and comment. Finally, there must be a mechanism to challenge determinations by the Secretary.

Comment 9: Preemption

The proposal gives the Secretary broad authority to preempt state and local regulation. DHS attempts to justify preemption by stating:

"The application of implied preemption usually turns on the principle that no state or local authority can frustrate the purposes of a federal law or regulatory program." (p. 78293)

And:

"The proposed regulatory test in section 27.405(a) below recognizes this balance and provides that: "No law or regulation of a State or political subdivision thereof, nor any decision rendered by a court under state law, shall have any effect if such law, regulation, or decision conflicts with, hinders, poses an obstacle to or frustrates the purposes of these regulations or of any approval, disapproval or order issued thereunder..."

This is far too broad. There is no doubt that where a covered entity cannot simultaneously comply with a federal and a state or local rule, the federal rule prevails. However, a mere "conflict" with a state or local rule should not trigger preemption if the entity can fulfill the requirements of both. Where a state or municipality implements a more protective law or regulation, DHS should not and cannot claim the authority to overturn it. DHS should, in fact, commend the state or municipality and consider whether similar protection should be considered for federal regulation.

The legislation does not confer the broad authority to preempt claimed by the Secretary. In fact Congress explicitly rejected such authority. The Congressional Record of September 29, 2006 records Congressman Peter King of New York and the Chairman of the House Homeland Committee stating: **"Mr. Speaker it is our understanding, and we had the opinion of committee counsel on this, that it does not preempt States."** Congressman Martin Sabo responded: **"The intention is not to preempt the ability of the States."**

9. Conclusion

Some of the most fundamental protections that one would expect to be identified in this proposal are missing. The involvement of workers and their representatives in all aspects, the use of inherently safer technology, the ambiguity of terms, the unwarranted background checks, the pre-emption of existing laws that would strengthen a facility's ability to protect itself, the possible classification of information used to protect workers and the public, the lack of government accountability, are all issues that beg to be addressed.

In addition, many of these issues and concerns were addressed previously in the Maritime Transportation Security Act (MTSA) and the HAZMAT CDL rule which were written for other groups of workers. Substantial changes and provisions were adopted protecting workers. It would do well for the committee to review all of the Acts or regulations that have been adopted on security and on health and safety more generally.

We all want to protect our country and our citizens. But this proposal takes away important rights while ignoring measures that are simultaneously more protective and more compatible with American democracy. If we proceed in the fashion outlined by DHS, the terrorists will have accomplished part of their goal.

Respectfully submitted,

John P. Alexander
Safety and Health Specialist
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VIA FAX AND USPS

February 20, 2007

Patricia K. Clark
Regional Administrator
Occupational Safety and Health Administration
U.S. Department of Labor

201 Varick Street, Room 670
New York, New York 10014

Dear Administrator Clark:

Since September 11, 2001, it is understood that facilities using highly hazardous chemicals are vulnerable to terrorist attacks and unintentional accidents that could endanger both workers and surrounding communities.

The New Jersey Work Environment Council (WEC), an alliance of 70 labor, community, and environmental organizations, requests that the federal Occupational Safety and Health Administration (OSHA) promptly develop a plan to conduct inspections at New Jersey facilities that use extraordinarily hazardous chemicals in sufficient quantity to be covered by your agency's mandatory standard for *Process Safety Management (PSM).*

The PSM standard is OSHA's most important rule to achieve prevention of catastrophic events at chemical facilities. Issued in 1992, it requires covered employers to conduct a "Process Hazards Analysis" to review what could go wrong and what safeguards must be taken to prevent releases of highly hazardous chemicals. The standard also mandates written operating procedures, employee training and participation, pre-startup safety reviews, evaluation of mechanical integrity of critical equipment, contractor requirements, and written procedures for managing change. It also requires a permit system for "hot" work, incident investigation, emergency action plans, and employer internal audits at least every 3 years.[1]

[1] Related OSHA Standards, such as Hazard Communication, also help to prevent chemical accidents and exposures.

According to February 2007 data from the New Jersey Department of Environmental Protection (DEP), there are 95 state-regulated facilities in New Jersey that use large quantities of extraordinarily hazardous chemicals. These substances include chlorine, hydrochloric acid, ammonia, ethylene oxide, and other materials that can pose severe risks to workers, community residents and the environment. ***We request that OSHA immediately begin a program to inspect for PSM compliance facilities with major potential off-site consequences, beginning with those facilities potentially harming up to 15,000 or more New Jerseyans.***[2]

According to an OSHA Directive, "OSHA's investigation of workplace conditions which cause, or could cause, catastrophes resulting in multiple loss of life and significant property damage is the agency's highest enforcement priority."[3]

However, OSHA has conducted few PSM inspections of PSM covered facilities since 9/11.[4]

Of the 21 facilities in New Jersey that could each potentially harm up to 15,000 people or more – all of which are covered by OSHA's PSM standard – only eight have received an OSHA inspection since September 11, 2001.

- **Six have *never* even had one PSM OSHA inspection.** These include facilities which could potentially endanger between 20,000 and 500,000 people.

- **Seven were inspected before September 11, 2001, but have not been inspected since.** These include facilities which could potentially endanger between 34,104 and 12 million people. For a notable example, OSHA has not inspected the Kuehne Chemical plant in South Kearny since September 12, 1997.

Please see the enclosed table listing facilities and OSHA inspection data.[5]

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[2] This statistic is based on the latest Risk Management Plan off-site consequence data submitted by facility management to the US EPA and is current as of February 9, 2007. This data was examined by WEC at EPA's public reading room in Edison, New Jersey.

[3] CPL 02-00-094 - CPL 2.94 - OSHA Response to Significant Events of Potentially Catastrophic Consequences (from OSHA website at www.osha.gov)

[4] Correspondence to Rick Engler, WEC Director, from Patricia K. Clark, Regional Administrator, OSHA, February 8, 2007 in response to a WEC Freedom of Information Act Request.

[5] The data is this table is from USEPA Risk Management Plans and the OSHA compliance data base on-line at www.osha.gov. Last OSHA inspection dates were also confirmed by OSHA Area Office Directors.

As you are well aware, unexpected releases of highly hazardous chemicals continue to endanger New Jersey workers and the communities adjacent to these facilities. On February 7, the Valero oil refinery in Paulsboro released hydrogen sulfide gas (an extraordinarily hazardous chemical) which forced the nearby high school to close after students developed headaches and vomiting.

When OSHA has conducted PSM inspections, the agency has found violations of this standard. For example:

- On January 21, 2005, a violent explosion from the ignition of acetylene at the Acetylene Service Company in Perth Amboy, New Jersey killed three workers. OSHA subsequently found many serious and willful violations, including of the PSM standard, and penalized the company $ 176,790.

- On March 29 and April 19, 2005, a chemical explosion and leak, respectively, at the Siegfried USA pharmaceutical plant in Pennsville, New Jersey injured a number of workers. OSHA subsequently found serious PSM and other violations and penalized the company $ 4,500.

Since 9/11, OSHA inspections have also resulted in PSM citations and fines for Ashland Chemical in Totowa ($3,465), DuPont in Deepwater ($4,250), and ConocoPhillips in Linden ($23,060).

Some of these facilities are covered by OSHA's Voluntary Protection Program or participate in an OSHA voluntary educational "alliance" with the chemical industry. *However, these voluntary programs are not an effective substitute for PSM compliance monitoring and enforcement action by OSHA.*

Please note that the State of New Jersey is taking this issue very seriously. In response to a WEC request, the Public Employee Occupational Safety and Health Program (PEOSH) in the New Jersey Department of Health and Senior Services is now conducting inspections of five publicly-owned water treatment plants that use large quantities of chlorine gas. PEOSH has found violations and/or potential hazards at the facilities inspected to-date.[6]

In summary, WEC urges OSHA to promptly develop a comprehensive plan to enforce the Process Safety Management Standard in New Jersey. The potential danger to workers and communities – whether

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[6] We appreciate the assistance by federal OSHA compliance officers to help PEOSH to conduct these public sector inspections. We urge you to coordinate federal enforcement efforts at private sector facilities with the New Jersey DEP's Toxic Catastrophe Prevention Program.

from unintentional accidents or an intentional terrorist attack – requires your immediate action.

Sincerely,

/s/ /s/

John Pajak, President Rick Engler, Director

P.S. WEC would be pleased to cooperate with your agency on complementary efforts to educate workers and their union representatives, as well as management, about the PSM standard. However, development of an OSHA compliance and enforcement plan must come first.

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[1] Most communities in New Jersey appear unprepared for a chemical disaster. A WEC neighborhood survey in 2004 in Linden revealed that few residents had any idea of steps to take if there was a toxic release from a nearby industrial facility. A WEC survey of emergency responders and health professionals in 2005 revealed that 63% of them did not even know if there was a TCPA facility in their municipality.

OSHA Inspections at NJ Facilities with worst-case toxic or flammable release scenario affecting 15,000 people or more

	Facility	Location	County	Chemical of Concern	Danger Zone (miles)	Population in Danger Zone	Date of Last OSHA Inspection	PSM violation? (#PSM violations)
1	**Kuehne Chemical**	**South Kearny**	**Hudson**	**Chlorine**	**14.00**	**12,000,000**	**9/12/1997**	
2	**Infineum USA L.P.**	**Linden**	**Union**	**Chlorine**	**14.00**	**4,200,000**	**1/20/2000**	
3	**Solvay Solexis (formerly Ausimont USA)**	**Thorofare**	**Gloucester**	**Chlorine**	**25.00**	**4,165,831**	**9/23/1996**	
4	Valero Refining Co	Paulsboro	Gloucester	Hydrofluoric acid (Conc. 50% or greater)	19.00	3,170,000	4/8/2004	
5	DuPont Chambers Works	Deepwater	Salem	Chlorine	25.00	2,000,000	7/7/2004	Yes (1)
6	Schweitzer-Mauduit Int'l	Spotswood	Middlesex	Chlorine	14.00	1,100,000	1/27/2003	
7	**DuPont Performance Elastomers**	**Deepwater**	**Salem**	**Hydrochloric Acid**	**13.00**	**500,000**	**None**	
8	**New York Terminals**	**Elizabeth**	**Union**	**Ammonia (anhydrous)**	**5.00**	**485,000**	**None**	
9	**Hercules Incorporated**	**Parlin**	**Middlesex**	**Ethylene oxide**	**7.80**	**410,000**	**5/25/1999**	
10	**Basell USA, Inc (formerly Akzo Nobel Polymer Chem)**	**Edison**	**Middlesex**	**Titanium tetrachloride**	**6.20**	**404,046**	**1/4/1990**	
11	**Ferro**	**Bridgeport**	**Gloucester**	**Chlorine**	**7.50**	**240,000**	**None**	
12	**Bayonne Plant Holding**	**Bayonne**	**Hudson**	**Ammonia (anhydrous)**	**2.13**	**112,728**	**None**	
13	**Air Products Polymers, LP**	**Dayton**	**Middlesex**	**Vinyl acetate monomer**	**5.60**	**112,225**	**5/20/1985**	
14	Farmland Dairies	Wallington	Bergen	Ammonia (anhydrous)	1.20	54,000	5/28/2004	
15	Mallinckrodt Baker	Phillipsburg	Warren	Ammonia (anhydrous)	2.30	52,535	6/24/2004	
16	**AGC Chemicals**	**Bayonne**	**Hudson**	**Ammonia (anhydrous)**	**1.40**	**46,700**	**None**	
17	**State Metal Industries**	**Camden**	**Camden**	**Chlorine**	**1.30**	**34,104**	**4/24/1998**	**Yes (1)**
18	*Siegfried (USA), Inc	Pennsville	Salem	Thionyl chloride	3.60	31,663	3/31/2005	Yes (4)
19	**Tropicana Northeast Operations**	**Jersey City**	**Hudson**	**Ammonia (anhydrous)**	**0.97**	**20,000**	**None**	
20	Conoco-Phillips Bayway Refinery (formerly TOSCO)	Linden	Union	Flammable Mixture	1.40	18,000	8/13/2002	Yes (6)
21	Nestle USA - Beverage Division	Freehold	Monmouth	Ammonia (anhydrous)	1.50	17,000	1/20/2004	

Number of Facilities:	**21**
# Facilities w Inspections Since 9/11:	8
# Facilities Inspected Prior to 9/11	**7**
# Facilities NEVER been inspected	**6**

* Facility regulated under NJ *Toxic Catastrophe Prevention Act* but not federal *Clean Air Act*.

Source: Review of Risk Management Plans (RMPs) filed under Section 112 (r) of the federal *Clean Air Act* and under the NJ *Toxic Catastrophe Prevention Act* as of February 9, 2007.

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