

Statement for the Record

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Thank you, Chairman Markey, Ranking Member Upton, and distinguished Members of the Committee. It is a pleasure to appear before you today as the Committee considers H.R. 3258, the Drinking Water System Security Act of 2009. This Act is intended to close the security gap at drinking water facilities that possess substances of concern.

We have made significant progress since the implementation of the Chemical Facilities Anti-Terrorism Standards (CFATS). We have reviewed over 36,900 facilities' Top-Screen consequence assessment questionnaires, and in June 2008, we notified 7,010 preliminarily-tiered facilities of the Department's initial high-risk determinations and of the facilities' requirement to submit Security Vulnerability Assessments (SVAs). We received and are reviewing almost 6,300 SVAs. We have recently begun to notify facilities of their final high-risk determinations, tiering assignments, and the requirement to complete and submit Site Security Plans (SSPs) or Alternative Security Programs (ASPs). CFATS currently covers approximately 6,200 high-risk facilities nationwide. The current state of coverage reflects changes related to chemicals of interest that facilities have made since receiving preliminary tiering notifications in June 2008, including security measures implemented and the consolidation or closure of some facilities.

Chemical Security Regulations

Section 550 of the FY2007 Department of Homeland Security Appropriations Act directed the Department to develop and implement a regulatory framework to address the high level of security risk posed by certain chemical facilities. Specifically, Section 550(a) of the Act

authorized the Department to adopt rules requiring high-risk chemical facilities to complete SVAs, develop SSPs, and implement protective measures necessary to meet risk-based performance standards established by the Department. Consequently, the Department published an Interim Final Rule, known as CFATS, on April 9, 2007. Section 550, however, expressly exempts from those rules certain facilities that are regulated under other Federal statutes. For example, Section 550 exempts facilities regulated by the United States Coast Guard pursuant to the Maritime Transportation Security Act (MTSA). Drinking water and wastewater treatment facilities as defined by Section 1401 of the Safe Water Drinking Act and Section 212 of the Federal Water Pollution Control Act, respectively, are similarly exempted. In addition, Section 550 exempts facilities owned or operated by the Departments of Defense and Energy, as well as certain facilities subject to regulation by the Nuclear Regulatory Commission (NRC).

The following core principles guided the development of the CFATS regulatory structure:

- 1) Securing high-risk chemical facilities is a comprehensive undertaking that involves a national effort, including all levels of government and the private sector. Integrated and effective participation by all stakeholders—Federal, State, local, and the private sector—is essential to securing our national critical infrastructure, including high-risk chemical facilities. Implementing this program means tackling a sophisticated and complex set of issues related to identifying and mitigating vulnerabilities and setting security goals. This requires a broad spectrum of input, as the regulated facilities bridge multiple industries and critical infrastructure sectors. By working closely with experts, members of industry, academia, and Federal Government partners, we leveraged vital knowledge and insight to develop the regulation.
- 2) Risk-based tiering will ensure that resources are appropriately deployed. Not all facilities present the same level of risk. The greatest level of scrutiny should be focused on those facilities that, if attacked, present the most risk and could endanger the greatest number of lives.

- 3) Reasonable, clear, and equitable performance standards will lead to enhanced security.
The current CFATS rule includes enforceable risk-based performance standards. High-risk facilities have the flexibility to select among appropriate site-specific security measures that will effectively address risk. The Department will analyze each tiered facility's SSP to see if it meets CFATS performance standards. If necessary, DHS will work with the facility to revise and resubmit an acceptable plan.

- 4) Recognition of the progress many companies have already made in improving facility security leverages those advancements. Many responsible companies have made significant capital investments in security since 9/11. Building on that progress in implementing the CFATS program will raise the overall security baseline at high-risk chemical facilities.

Appendix A of CFATS lists 322 chemicals of interest, including common industrial chemicals such as chlorine, propane, and anhydrous ammonia, as well as specialty chemicals, such as arsine and phosphorus trichloride. The Department included chemicals based on the consequences associated with one or more of the following three security issues:

- 1) Release – toxic, flammable, or explosive chemicals that have the potential to create significant adverse consequences for human life or health if intentionally released or detonated;
- 2) Theft/Diversion – chemicals that have the potential, if stolen or diverted, to be used or converted into weapons that could cause significant adverse consequences for human life or health; and
- 3) Sabotage/Contamination – chemicals that, if mixed with other readily available materials, have the potential to create significant adverse consequences for human life or health.

The Department established a Screening Threshold Quantity for each chemical based on its potential to create significant adverse consequences for human life or health in one or more of these ways.

Implementation Status

Implementation and execution of the CFATS regulation require the Department to identify which facilities it considers high-risk. The Department developed the Chemical Security Assessment Tool (CSAT) to identify potentially high-risk facilities and to provide methodologies that facilities can use to conduct SVAs and to develop SSPs. CSAT is a suite of online applications designed to facilitate compliance with the program; it includes user registration, the initial consequence-based screening tool (Top-Screen), an SVA tool, and an SSP template. Through the Top-Screen process, the Department initially identifies and sorts facilities based on their associated risks.

If a facility is initially identified during the Top-Screen process as having a level of risk subject to regulation under CFATS, the Department assigns the facility to one of four preliminary risk-based tiers, with Tier 1 indicating the highest level of risk. Those facilities must then complete SVAs and submit them to the Department. Results from the SVA inform the Department's final determinations as to whether a facility is high-risk and, if so, of the facility's final tier assignment. To date, the Department has received over 6,300 SVAs. Each one is carefully reviewed for its physical, cyber, and chemical security content.

Only facilities that receive a final high-risk determination letter under CFATS will be required to complete and submit an SSP or an Alternative Security Program (ASP). DHS's final determinations as to which facilities are high-risk are based on each facility's individual consequentiality and vulnerability as determined by its Top-Screen and SVA.

After approval of their SVAs, the final high-risk facilities are required to develop SSPs or ASPs that address their identified vulnerabilities and security issues. The higher the risk-based tier, the more robust the security measures and the more frequent and rigorous the inspections will be. The purpose of inspections is to validate the adequacy of a facility's SSP and to verify that measures identified in the SSP are being implemented.

In May, the Department issued approximately 140 final tiering determination letters to the highest risk (Tier 1) facilities, confirming their high-risk status and initiating their 120-day time

frame for submitting an SSP. In June and July, we notified approximately 826 facilities of their status as final Tier 2 facilities and the associated due dates for their SSPs. Most recently, on August 31, 2009, we notified approximately 137 facilities of their status as either a final Tier 1, 2, or 3 facility and the associated due dates for their respective SSPs. Following preliminary authorization of the SSPs, the Department expects to begin performing inspections in the first quarter of FY 2010, starting with the Tier 1-designated facilities.

Along with issuing the final tiering determination notifications for Tier 1 facilities in May, the Department launched two additional measures to support CFATS. The first is the SSP tool, which was developed by DHS with input from an industry working group. A critical element of the Department's efforts to identify and secure the Nation's high-risk chemical facilities, the SSP enables final high-risk facilities to document their individual security strategies for meeting the Risk-Based Performance Standards (RBPS) established under CFATS.

Each final high-risk facility's security strategy will be unique, as it depends on its risk level, security issues, characteristics, and other factors. Therefore, the SSP tool collects information on each of the 18 RBPS for each facility. The RBPS cover the fundamentals of security, such as restricting the area perimeter, securing site assets, screening and controlling access, cybersecurity, training, and response. The SSP tool is designed to take into account the complicated nature of chemical facility security and allows facilities to describe both facility-wide and asset-specific security measures, as the Department understands that the private sector in general, and CFATS-affected industries in particular, are dynamic. The SSP tool also allows facilities to involve their subject-matter experts from across the facility, company and corporation, as appropriate, in completing the SSP and submitting a combination of existing and planned security measures to satisfy the RBPS. The Department expects that most approved SSPs will consist of a combination of existing and planned security measures. Through a review of the SSP, in conjunction with an on-site inspection, DHS will determine whether a facility has met the requisite level of performance given its risk profile and thus whether its SSP should be approved.

Also issued with the final Tier 1 notifications and the SSP tool was the *Risk-Based Performance Standards Guidance* document. The Department developed this guidance to assist high-risk chemical facilities subject to CFATS in determining appropriate protective measures and practices to satisfy the RBPS. It is designed to help facilities comply with CFATS by providing detailed descriptions of the 18 RBPS as well as examples of various security measures and practices that would enable facilities to achieve the appropriate level of performance for the RBPS at each tier level. The *Guidance* also reflects public and private sector dialogue on the RBPS and industrial security, including public comments on the draft guidance document. High-risk facilities are free to make use of whichever security programs or processes they choose, provided that they achieve the requisite level of performance under the CFATS RBPS. The *Guidance* will help high-risk facilities gain a sense of what types and combination of security measures may satisfy the RBPS.

To provide a concrete example: in the case of a Tier 1 facility with a release hazard security issue, the facility is required to appropriately restrict the area perimeter, which may include preventing breach by a wheeled vehicle. To meet this standard, the facility is able to consider numerous security measures, such as cable anchored in concrete block along with movable bollards at all active gates or perimeter landscaping (e.g., large boulders, steep berms, streams, or other obstacles) that would thwart vehicle entry. As long as the measures in the SSP are sufficient to address the performance standards, the Department does not mandate specific measures to approve the plan.

Outreach Efforts and Program Implementation

Since the release of CFATS in April 2007, the Department has taken significant steps to publicize the rule and ensure that our security partners are aware of its requirements. As part of this dedicated outreach program, the Department has regularly updated the Sector and Government Coordinating Councils of industries most impacted by CFATS, including the Chemical, Oil and Natural Gas and Food and Agriculture Sectors. We have also made it a point to solicit feedback from our public and private sector partners and, where appropriate, to reflect that feedback in our implementation activities, such as adjustments made to the SSP template.

We have presented at numerous security and chemical industry conferences; participated in a variety of other meetings of relevant security partners; established a Help Desk for CFATS questions; and developed and regularly updated a highly-regarded Chemical Security Web site. These efforts are having a positive impact: approximately 36,900 facilities have submitted Top-Screens to the Department via CSAT.

Additionally, the Department continues to focus on fostering solid working relationships with State and local officials as well as first responders in jurisdictions with high-risk facilities. To meet the risk-based performance standards under CFATS, facilities need to cultivate and maintain effective working relationships—including a clear understanding of roles and responsibilities—with local officials who would aid in preventing, mitigating and responding to potential attacks. To facilitate these relationships, our inspectors have been actively working with facilities and officials in their areas of operation, and they have participated in almost 100 Local Emergency Planning Committee meetings to provide a better understanding of CFATS' requirements.

We are also working with the private sector as well as all levels of government in order to identify facilities that may meet the threshold for CFATS regulation but that have not yet registered with CSAT or filed a Top-Screen. We have recently completed pilot efforts at the State level with New York and New Jersey to identify such facilities in those jurisdictions. We will use these pilots to design an approach that all States can use to identify facilities for our follow up. Further, we are in the process of commencing targeted outreach efforts to certain segments of industry where we believe compliance may need improvement.

Internally, we are continuing to build the Infrastructure Security Compliance Division that is responsible for implementing CFATS. We have hired, or are in the process of on-boarding, over 125 people, and we will continue to hire throughout this fiscal year to meet our goals. The FY 2010 budget request contains an increase to allow the hiring, training, equipping, and housing of additional inspectors to support the CFATS program as well as to continue deployment and maintenance of compliance tools for covered facilities.

New Legislation

We have enjoyed a constructive dialogue with Congress, including this Committee, as it works on new authorizing legislation. The Department recognizes the significant work that this Committee and others, particularly the House Committee on Homeland Security, have devoted to drafting legislation to reauthorize the CFATS program and to address chemical security at the Nation's water systems. We appreciate this effort and look forward to continuing the constructive engagement with Congress on these important matters. CFATS is enhancing security today by helping to ensure high-risk chemical facilities throughout the country have security postures commensurate with their levels of risk.

The Department supports a permanent authorization of the program. Given the complexity of chemical facility regulation, the Department is committed to fully exploring all issues before the program is made permanent. To that end, the President's FY 2010 budget includes a request for a one-year extension of the statutory authority for CFATS, which will allow the time needed to craft a robust permanent program while avoiding the sunset of the Department's regulatory authority on October 4, 2009. Further, as this one year extension is considered, we urge Congress to provide adequate time and resources to implement any new requirements under the prospective legislation and to ensure that new requirements would not necessitate the Department to extensively revisit aspects of the program that are either currently in place or will be implemented in the near future. Throughout our discussions with congressional committees, the Department has communicated a series of issues for consideration as part of any CFATS legislative proposal.

It is important to note that the Administration has developed a set of guiding principles for the reauthorization of CFATS and for addressing the security of our Nation's waste water and drinking water treatment facilities. These principles are:

- 1) The Administration supports permanent chemical facility security authorities and a detailed and deliberate process in so doing, hence our preference for that process to be completed in FY10.

- 2) Nonetheless, CFATS single year reauthorization in this session presents an opportunity to promote the consideration and adoption of inherently safer technologies (IST) among high-risk chemical facilities. We look forward to working with this Committee and others on this important matter.
- 3) CFATS reauthorization also presents an opportunity to close the existing security gap for waste water and drinking water treatment facilities by addressing the statutory exemption of these facilities from CFATS. The Administration supports closing this gap.

As DHS and EPA have stated before, we believe that there is a critical gap in the U.S. chemical security regulatory framework—namely, the exemption of drinking water and wastewater treatment facilities. We need to work with Congress to close this gap in order to secure substances of concern at these facilities and to protect the communities they serve; drinking water and wastewater treatment facilities that meet CFATS thresholds for chemicals of interest should be regulated. We do, however, recognize the unique public health and environmental requirements and responsibilities of such facilities. For example, we understand that a “cease operations” order that might be appropriate for another facility under CFATS would have significant public health and environmental consequences when applied to a water facility. The Administration has established the following policy principles in regards to regulating security at water sector facilities:

- The Administration believes that EPA should be the lead agency for chemical security for both drinking water and wastewater systems, with DHS supporting EPA’s efforts. Many of these systems are owned or operated by a single entity and face related issues regarding chemicals of concern. Establishing a single lead agency for both will promote consistent and efficient implementation of chemical facility security requirements across the water sector.
- To address chemical security in the water sector, EPA would utilize, with modifications as necessary to address the uniqueness of the sector, DHS’ existing risk assessment tools and performance standards for chemical facilities. To ensure consistency of tiering

determinations across high-risk chemical facilities, EPA would apply DHS' tiering methodology, with modifications as necessary to reflect any differences in statutory requirements. DHS would in turn run its Chemical Security Assessment Tool and provide both preliminary and proposed final tiering determinations for water sector facilities to EPA. EPA and DHS would strive for consensus in this tiering process with EPA in its final determination, attaching significant weight to DHS' expertise.

- EPA would be responsible for reviewing and approving vulnerability assessments and site security plans as well as enforcing high-risk chemical facility security requirements. Further, EPA would be responsible for inspecting water sector facilities and would be able to authorize states to conduct inspections and work with water systems to implement site security plans. It is important to note that any decisions on IST methods for the water sector would need to engage the states given their primary enforcement responsibility for drinking water and wastewater regulations.
- DHS would be responsible for ensuring consistency of high-risk chemical facility security across all 18 critical infrastructure sectors.

CFATS currently allows, but does not require, high-risk facilities to evaluate transferring to safer and more secure chemicals and processes. Many facilities have already made voluntary changes to, among other things, their chemical holdings and distribution practices (for example, completely eliminating use of certain chemicals of interest). The Administration supports, where possible, using safer technology, such as less toxic chemicals, to enhance the security of the nation's high-risk chemical facilities. However, we must recognize that risk management requires balancing threat, vulnerabilities, and consequences with the cost to mitigate risk. Similarly, the potential public health and environmental consequences of alternative chemicals must be considered with respect to the use of safer technology. In this context, the Administration has established the following policy principles in regards to IST at high-risk chemical facilities:

- The Administration supports consistency of IST approaches for facilities regardless of sector.

- The Administration believes that all high-risk chemical facilities, Tiers 1-4, should assess IST methods and report the assessment in the facilities' site security plans. Further, the appropriate regulatory entity should have the authority to require facilities posing the highest degree of risk (Tiers 1 and 2) to implement IST method(s) if such methods enhance overall security, are feasible, and, in the case of water sector facilities, consider public health and environmental requirements.
- For Tier 3 and 4 facilities, the appropriate regulatory entity should review the IST assessment contained in the site security plan. The entity should be authorized to provide recommendations on implementing IST, but it would not require facilities to implement the IST methods.
- The Administration believes that flexibility and staggered implementation would be required in implementing this new IST policy. DHS, in coordination with EPA, would develop an IST implementation plan for timing and phase-in at water facilities designated as high-risk chemical facilities. DHS would develop an IST implementation plan for high-risk chemical facilities in all other applicable sectors.

Because CFATS and MTSA both address chemical facility security, there certainly should be harmonization, where applicable, between these programs. We of course continue to work closely within the Department with the Coast Guard to review the processes and procedures of both programs. We also support further clarification in the statute concerning the type of NRC-regulated facilities exempt from CFATS.

In the area of enforcement, we have expressed in our testimony on HR 2868 the Department's support for eliminating the requirement that an Order Assessing Civil Penalty may only be issued following an Administrative Order for compliance. This change would greatly streamline the civil enforcement process, enhancing the Department's ability to promote compliance from facilities. We also support language that would authorize the Department to enforce compliance by initiating a civil penalty action in district court or commencing a civil action to obtain appropriate relief, including temporary or permanent injunction. We note, however, that the enforcement provisions this Committee has proposed in HR 3258 would subject drinking water facilities to a lower maximum penalty as compared to chemical facilities regulated under HR

2868 if enforcement is pursued through a civil penalty action in district court. This could result in inconsistent enforcement between facilities.

The Department notes that the Drinking Water System Security Act of 2009 would give the Administrator discretion in divulging information about the reasons for placing a facility in a given tier. This provision is preferable to the provision in Title I of HR 2868 which mandates that the Department disclose specific information to tiered facilities that could include classified information.

The Department also notes that HR 3258 and HR 2868 contain provisions that require covered facilities and government agencies to comply with all applicable state and Federal laws and exclude from protection “information that is required to be made publicly available under any law.” While the Department supports current requirements for facilities to report certain information to Federal and state agencies under other statutes, DHS is concerned that this language as written could increase the likelihood that sensitive information could be inappropriately disclosed to the general public. The Department would like to work with the Committee to explore what other Federal statutes and information might be affected by this language in order to ensure that there are no inconsistencies that could undermine the important goal of protecting sensitive information from unwarranted disclosure, while still protecting the public right-to-know about information that may affect public health and the environment, as embodied in these other statutes. We will also consult with our partner agencies that administer the affected Federal statutes.

Conclusion

The Department is collaborating extensively with the public, including members of the chemical sector and other interested groups, to work toward achieving our collective goals under the CFATS regulatory framework. In many cases, industry has voluntarily done a tremendous amount to ensure the security and resiliency of its facilities and systems. As we implement the chemical facility security regulations, we will continue to work with industry, our other Federal partners, States, and localities to get the job done.

The Administration recognizes that further technical work to clarify policy positions regarding IST and water treatment facility security is required. The policy positions discussed above represent starting points in renewed dialogue in these important areas. DHS and EPA staff are ready to engage in technical discussions with Committee staff, affected stakeholders, and others to work out the remaining technical details. We must focus our efforts on implementing a risk- and performance-based approach to regulation and, in parallel fashion, continue to pursue the voluntary programs that have already resulted in considerable success. We look forward to collaborating with the Committee to ensure that the chemical security regulatory effort achieves success in reducing risk in the chemical sector. In addition to our Federal Government partners, success is dependent upon continued cooperation with our industry and State and local government partners as we move toward a more secure future.

Thank you for holding this important hearing. I would be happy to respond to any questions you may have.