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3 HEARING ON H.R. 3258, THE DRINKING WATER SYSTEM SECURITY ACT
4 OF 2009, AND H.R. 2868, THE CHEMICAL FACILITY ANTI-TERRORISM
5 ACT OF 2009

6 THURSDAY, OCTOBER 1, 2009

7 House of Representatives,

8 Subcommittee on Energy and Environment

9 Committee on Energy and Commerce

10 Washington, D.C.

11 The Subcommittee met, pursuant to call, at 10:00 a.m.,
12 in Room 2123 of the Rayburn House Office Building, Hon.
13 Edward Markey [Chairman of the Subcommittee] presiding.

14 Members present: Representatives Markey, Butterfield,
15 Melancon, McNerney, Green, Capps, Gonzalez, Barrow, Waxman
16 (ex officio), Upton, Stearns, Shimkus, Pitts, Walden,
17 Sullivan, Burgess and Scalise.

18 Staff present: Greg Dotson, Chief Counsel, Energy and
19 Environment; Jackie Cohen, Counsel; Melissa Bez, Professional

20 Staff Member; Alison Cassady, Professional Staff Member;
21 Caitlin Haberman, Special Assistant; Peter Kethcham-Colwill,
22 Special Assistant; Dave Leviss, Chief Oversight Counsel;
23 Karen Lightfoot, Communications Director, Senior Policy
24 Advisor; Lindsay Vidal, Special Assistant; Earley Green,
25 Chief Clerk; Matt Eisenberg, Staff Assistant; Jerry Couri,
26 Minority Professional Staff; Mary Neumayr, Minority Counsel;
27 and Garrett Golding, Minority Legislative Analyst.

|
28 Mr. {Markey.} Good morning, ladies and gentlemen. We
29 welcome you to the Subcommittee on Energy and Environment and
30 this very important hearing which we are going to conduct
31 today.

32 My Congressional district is one that harbored Mohamed
33 Atta and the other nine who hijacked the two planes from
34 Boston on 9/11. They walked the streets. They scoped out
35 Logan Airport. They took whatever actions it took and for
36 however long it took in order to then successfully hijack
37 those two planes with 150 citizens on them. It was very
38 clear to me that they spent a lot of time trying to determine
39 what the line of least resistance is in their efforts to
40 attack our country, and at the end of those two plane trips
41 unfortunately they were thousands of others who perished as
42 well. We have spent much of the last 8 years in trying to
43 develop strategies in order to reduce opportunities for
44 terrorists to exploit our vulnerabilities. Since 9/11, we
45 have enacted legislation to secure the aviation, maritime,
46 rail, mail transit, nuclear energy and other sectors. But
47 what we have yet to do is to act on comprehensive legislation
48 to secure the facilities that make or store dangerous
49 chemicals. Instead, we have relied on the incomplete and
50 inadequate legislative language that was inserted into 2007

51 appropriations bill behind closed doors that amounted to
52 little more than a long, run-on sentence.

53 The chemical sector represents the best of American
54 technological might. Its products help to purify our water,
55 make the microchips used in our computers, cell phones and
56 military technologies, refine our oil and grow our food. But
57 these same chemicals could also be turned into a weapon of
58 mass destruction, something that we were reminded of last
59 week when we learned of a disrupted terrorist plot to use
60 hydrogen peroxide purchased in Colorado for use as a bomb in
61 New York. Yet the incomplete 2007 legislation that gave the
62 Department of Homeland Security interim authority to regulate
63 chemical facilities included several glaring security
64 loopholes. It exempted all drinking and wastewater
65 facilities. It exempted all maritime facilities. It
66 prevented the Department from requiring any specific security
67 measure at any facility. So if there was a hole in a fence,
68 DHS couldn't order it to be fixed, and if there was a cost-
69 effective alternative to a particular chemical or process
70 that greatly would reduce the risk the facility posed to the
71 surrounding community, DHS couldn't order that either, and it
72 prevented citizens living around these facilities from being
73 able to ensure that regulations were being met or enforced.

74 At the beginning of this Congress, Energy and Commerce

75 Committee Chairman Henry Waxman and Homeland Security
76 Committee Chairman Bennie Thompson agreed on the need to
77 quickly act to comprehensively and permanently ensure the
78 security of all facilities containing dangerous chemicals.
79 The chairman agreed to work together on two separate pieces
80 of legislation. First, we would craft comprehensive chemical
81 security legislation to require the Department of Homeland
82 Security to build on the good work it has already begun but
83 do so in a manner that closed the loopholes included in the
84 interim authority Congress provided several years ago. The
85 Chemical Facility Anti-Terrorism Security Act of 2009 was
86 introduced following 5 months of bipartisan Energy and
87 Commerce and Homeland Security staff negotiations and has the
88 support of a wide range of labor and environmental
89 organizations.

90 Second, we would craft legislation to provide EPA with
91 the enhanced authority to ensure the security of drinking
92 water facilities in recognition of the unique public health
93 role these facilities play in providing a safe supply of
94 drinking water. The Drinking Water System Security Act of
95 2009, which is exclusively within the jurisdiction of the
96 Energy and Commerce Committee, has the support of the
97 environmental and labor communities and also the Association
98 of Metropolitan Water Agencies whose member utilities provide

99 safe drinking water to more than 125 million Americans.

100 Though the two pieces of legislation provide authority
101 to two different agencies, their intent and purpose is very
102 similar. The bills require EPA and DHS to coordinate efforts
103 with one another to minimize duplication in order to ensure
104 that we make an assignment to one of four risk-based tiers
105 and implement the bills' requirements. We want to work
106 together with all of the members of the committee as we move
107 forward in this process so that we can act wisely and we do
108 so in a way that is consistent with the traditions of the
109 committee.

110 [The prepared statement of Mr. Markey follows:]

111 ***** COMMITTEE INSERT *****

|
112 [The information follows:]

113 ***** INSERTS 7, 8, 9, 10, 11 *****

|
114 Mr. {Markey.} Let me now turn and recognize the ranking
115 member of the Committee, the gentleman from Michigan, Mr.
116 Upton, for an opening statement.

117 Mr. {Upton.} Thank you, Mr. Chairman.

118 Like every member on this Committee and in the
119 communities, homeland security is a concern and certainly a
120 priority, and today we are examining two bills that deal with
121 the security implications of facilities that use various
122 chemicals. I do have a number of concerns with the bills
123 before us today. However, I will primarily focus my remarks
124 on H.R. 2868, the Chemical Facility Anti-Terrorism Security
125 Act.

126 There have been disagreements about how chemical
127 facilities should be regulated to address security issues but
128 Congress was able to enact provisions to authorize the DHS to
129 regulate security at designated chemical facilities. Rather
130 than enact new legislation, we should give DHS the
131 opportunity to fully enact the laws that we have already
132 passed. I believe that it is too soon for Congress to start
133 over with new regulations. I support a 3-year extension of
134 the existing law to give DHS the time to finalize
135 implementation of the security regs and allow Congress to
136 determine what works and what doesn't, and I prefer that to

137 what we are looking at perhaps today.

138 We must legislate from a body of experience and
139 accumulated evidence, not ideological notions of what sounds
140 like a good idea, especially when it means stranding billions
141 of dollars in investments at a time when we have frozen
142 domestic financing market with the struggling economy. I
143 have been made aware of a few real tangible examples on the
144 impacts of this legislation, and I recommend to the members
145 of this subcommittee that they talk to companies in their
146 districts and States about how the legislation would impact
147 them. This legislation is not just about chemical
148 facilities. It also covers facilities with chemicals too.
149 It isn't something that it just going to hit the big guys.
150 Small businesses will be swept in too, then perhaps even
151 swept overseas.

152 A recent study looked at the impact of inherently safer
153 technology, IST, mandate on oil refineries. IST may sound
154 good but it is in reality a government-mandated product
155 substitution. The study found that in certain terrorist
156 situations, sulfuric acid, the mandated IST, can be just as
157 dangerous as hydrofluoric acid, which is commonly used today.
158 But under the federally mandated IST, the refining process
159 would require roughly 250 times more sulfuric acid than
160 hydrofluoric. To put this into scale, we are talking about

161 the difference between one and two truckloads per month
162 versus three to four truckloads each day. The IST, which
163 doesn't make us safer, costs between \$45 million to \$150
164 million per refinery and an increase in operating costs of
165 between 200 to 400 percent. What do you think would happen
166 to gas prices with refineries moving abroad? Between this
167 and cap and trade, we will be stuck importing virtually every
168 single gallon of gasoline from overseas.

169 The problems with this legislation extend beyond the
170 economic realm. The citizen lawsuit provisions in the
171 chemical plant security bill are completely inappropriate for
172 national security legislation. Allowing these types of
173 lawsuits could harm security at these facilities, not make it
174 stronger. Citizen supervisions in the bill are an over-the-
175 top example of why we should not be rushing, especially
176 considering that terrorists hire lawyers and could use them.
177 Citizen suits are not used in a national defense context and
178 shouldn't be used here. Folks should not be able to compel
179 the release of roadmaps to destruction by simply using the
180 legal discovery process.

181 Additionally, the information protection language rolls
182 back traditional protections of information that Congress has
183 employed since 9/11. It eliminates penalties against those
184 who recklessly disclose sensitive information to the public.

185 Even though we have been blessed not to have been attacked
186 since 9/11, we should not relax our resolve to sanction
187 violators swiftly or aggressively.

188 In closing, H.R. 2868 would increase costs and send jobs
189 abroad without bolstering national security. In fact, an
190 argument can actually be made that it weakens our security.
191 Chemical manufacturers have already invested millions of
192 dollars in chemical security upgrades to ensure that the
193 communities where they operate are safe, secure and
194 efficient. The requirements in this bill will not improve
195 that security. It will only shift the security risks to
196 other sectors such as transportation or manufacturing while
197 hindering the economic profitability in the process.
198 Hundreds of thousands of jobs have been lost over the past
199 year, resulting in plant closures and other facilities
200 operating on the margins. Michigan's unemployment is still
201 about 15 percent. The chemical industry has been hit hard by
202 the economic recession and now is not the time to jeopardize
203 those jobs while weakening our national security. This isn't
204 the right prescription for making our country stronger. We
205 need a bill that secures the economy, not just re-engineers
206 and exports. I yield back my time.

207 [The prepared statement of Mr. Upton follows:]

208 ***** COMMITTEE INSERT *****

|
209 Mr. {Markey.} The gentleman's time has expired. The
210 chair recognizes the chairman of the full Committee, the
211 gentleman from California, Mr. Waxman.

212 The {Chairman.} Thank you very much, Mr. Chairman.

213 Since 2001, federal officials, the Government
214 Accountability Office, and outside experts have warned that
215 the Nation's drinking water utilities and chemical facilities
216 remain vulnerable to terrorist attack. The risk that
217 hazardous, but useful, chemicals can be wielded against us is
218 not theoretical or abstract. Just last week, we read news
219 accounts that the FBI arrested an individual suspected of
220 plotting to blow up a federal building using common chemicals
221 purchased at a beauty supply store. It doesn't take much
222 imagination to be concerned about what a motivated terrorist
223 group could do with access to a facility containing large
224 quantities of lethal substances.

225 The bills we will learn more about today are unfinished
226 business from 9/11. They are critical not only to homeland
227 security but to the safety of workers at these facilities and
228 overall public health.

229 First, I would like to note the process by which this
230 legislation was developed. At the beginning of this
231 Congress, I sat down with Homeland Security Committee Chair

232 Bennie Thompson. We agreed that our committees needed to
233 work together to address the vulnerability of chemical
234 facilities to terrorist attack and other intentional acts.

235 The Chemical Facility Anti-Terrorism Act, H.R. 2868, is
236 the product of these discussions. This legislation will
237 establish a chemical security program to address the threat
238 posed by the Nation's vulnerable chemical facilities.

239 Committee staffs on both sides of the aisle spent hundreds of
240 hours methodically working through these issues.

241 The second bill we are discussing today, H.R. 3258, the
242 Drinking Water System Security Act, creates a security
243 program for drinking water facilities similar to the chemical
244 security program. While this legislation is exclusively
245 within the jurisdiction of our committee, it also is the
246 product of dozens of discussions on both sides of the aisle
247 at the staff level. I cannot claim we have achieved
248 consensus on these bills but are well considered and respond
249 to each of the concerns raised. I would like to highlight
250 what each of these bills will do.

251 The Chemical Facility Anti-Terrorism Act begins with the
252 recognition that DHS has made tremendous progress in
253 developing a strong chemical security program and gives DHS
254 permanent authority to strengthen security at America's
255 chemical facilities. It then fills in some important gaps in

256 the existing program. The bill requires all covered chemical
257 facilities to assess whether they can adopt safer chemicals,
258 processes or technologies to reduce the consequences of a
259 terrorist attack. The bill gives the Secretary the
260 authority, under certain circumstances, to mandate that the
261 riskiest facilities adopt safer technology. This is a
262 commonsense policy that will help make facilities reduce the
263 likelihood that they will become an attractive terrorist
264 target.

265 We have also added an important citizen enforcement tool
266 to the chemical facility security program where citizens can
267 use the provisions to hold DHS accountable for failing to
268 perform their duties.

269 H.R. 3258, the Drinking Water System Security Act,
270 authorizes EPA to create a security program for drinking
271 water facilities similar to the chemical security program
272 under DHS. There are a couple of important aspects in that
273 bill that deserve to be highlighted.

274 First, the bill makes permanent EPA's authority under
275 the Drinking Water Act to regulate security at drinking water
276 facilities. Second, just like the chemical facility bill,
277 this bill requires all covered water systems that use a
278 certain amount of dangerous chemicals to assess whether they
279 can switch to safer chemicals or processes. Since States

280 play a unique role in implementing the Safe Drinking Water
281 Act and are most familiar with local drinking water concerns,
282 we give the States--not EPA--the authority, under certain
283 circumstances, to require the riskiest facilities to adopt
284 safer technology.

285 We worked closely with the water sector to balance the
286 needs of safe drinking water with homeland security concerns,
287 and I am pleased that the Association of Metropolitan Water
288 Agencies has endorsed H.R. 3258. AMWA is an organization
289 representing the largest publicly owned drinking water
290 systems in the United States, and we will hear from one of
291 its members on the second panel.

292 We still have some significant issues to work through on
293 these bills and I hope we can find common ground to close
294 these security gaps once and for all to make our country
295 safer. Thank you, Mr. Chairman.

296 [The prepared statement of Mr. Waxman follows:]

297 ***** COMMITTEE INSERT *****

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298 Mr. {Markey.} Great. The gentleman's time has expired.

299 The Chair recognizes the gentleman from Florida, Mr. Stearns.

300 Mr. {Stearns.} Thank you, Mr. Chairman.

301 I would say to you, Mr. Chairman, and to Mr. Waxman, in
302 2002 we passed the Drinking Water Security Act, part of Title
303 IV of the Bioterrorism Act. And then we also passed the
304 Chemical Plant Security Act in 2006, so I really think we
305 should just extend those bills and see if the industry can
306 comply. I think the industry is having difficulty complying
307 with what we have already passed so I agree with the ranking
308 member, Mr. Upton, when he said just have an extension for 3
309 years and not start all over, let industry comply with what
310 we passed, and as Mr. Upton said, see what works and what
311 doesn't work and just correct it. You know, frankly, we
312 haven't had a terrorist attack. We have had attempts but we
313 really have not had enough to drive these two bills to ask
314 urgent passage, you know, and this is particularly a concern
315 of mine when millions of Americans have already lost their
316 jobs due to economic slowdown and so you put these two bills
317 in place, I think they will have a negative effect on raising
318 prices for everyday products including food, water,
319 pharmaceutical drugs, fertilizers, energy at a time when
320 people can least afford the price increase.

321 The proposed legislation goes beyond increasing security
322 protections by imposing mandates on American manufacturers as
323 to which products and processes they will use without any
324 regard for practicality and availability or cost. Absent
325 federal preemption and a uniform national standard, this
326 legislation would create overlapping and conflicting security
327 requirements that would cause disruption of federal security
328 standards, increase government red tape and obvious create
329 more economic instability.

330 So I am here at this hearing, Mr. Chairman, but based
331 upon what we passed in 2002 and 2006, I think the simple
332 thing to do, as Mr. Upton pointed out, just extend the bill,
333 see what works, what doesn't work, because these folks are
334 having a hard time complying with what we already passed.

335 Thank you, Mr. Chairman.

336 [The prepared statement of Mr. Stearns follows:]

337 ***** COMMITTEE INSERT *****

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338 Mr. {Markey.} Great. The gentleman's time has expired.
339 The Chair recognizes the gentleman from Louisiana, Mr.
340 Melancon.

341 Mr. {Melancon.} Thank you, Mr. Chairman. I appreciate
342 the opportunity to do an opening statement.

343 I too would like to thank you, Mr. Markey, and Chairman
344 Waxman for your efforts to bring attention to this very
345 important issue.

346 My State is particularly affected by the proposals in
347 this legislation. Louisiana is home to 61 chemical
348 manufacturing companies that have 96 sites and at least 10
349 refineries throughout the State. These sites employ
350 thousands of hardworking men and women, oftentimes multiple
351 generations in the same plant. These jobs are not minimum-
352 wage employment. These jobs pay good salaries and offer a
353 strong set of balances. People are paying attention to this
354 bill in Louisiana, not only because of its potential impact
355 on jobs and employment but plant workers in the communities
356 surrounding the facilities are also concerned for their
357 safety. My son, Seth, works within the confines of one of
358 those chemical plants along the Mississippi River in my
359 district as a safety supervisor, and what I have come to
360 learn through the years and especially since he has become

361 active in the industry is that the key to every one of these
362 facilities is safety, safety, safety. That is the number one
363 priority to all of them, management and workers.

364 Despite existing rigorous safety protocols in these
365 plants, there are still national and community security
366 considerations addressed in this bill. Some of the chemicals
367 we use every day in this country such as chlorine are used to
368 make drinking water safe but can also represent a real
369 security hazard in the wrong circumstances. As we continue
370 to work toward a final bill, we must balance national
371 security with the means to ensure that we do not create
372 mandates that will threaten the jobs of tens of thousands of
373 workers who are the backbone of this vital industry. We must
374 make certain that our efforts do not shift rather than
375 eliminate risk. We must examine existing models and learn
376 from the success of State chemical security plants. Finally,
377 we must guarantee that critical security information is not
378 made available to those who might use it to harm us.

379 The chemical facility security bill being considered
380 today has considerable expansions on the original
381 authorization passed in 2006 and the motivation for this
382 broadened initiative is commendable. However, I encourage my
383 colleagues on this committee to keep an open dialog with all
384 parties affected by the statute, and remember that while our

385 responsibility to secure this Nation from terrorist attacks
386 is paramount, we must also have a duty to legislate
387 responsibly and consider all sides of the matter.

388 I would like to take the opportunity to applaud the
389 groups such as American Chemical Council and Crop Life
390 America for their contributions in recent months and
391 constructive viewpoints from the industry perspective, and I
392 would also like to recognize the Blue Green Alliance for
393 their diligence in making sure that there are strong
394 protections for both the facility employees and surrounding
395 communities. Lastly, I would like to thank the Committee
396 staff and the staff of Representative Markey for working so
397 hard to try and accommodate the interests of this wide
398 variety of affected parties. With that, I yield back my
399 time.

400 [The prepared statement of Mr. Melancon follows:]

401 ***** COMMITTEE INSERT *****

|
402 Mr. {Markey.} Great. We appreciate that. The Chair
403 recognizes the gentleman from Texas, Mr. Burgess.

404 Mr. {Burgess.} Thank you, Mr. Chairman, and thank you
405 for having a hearing on this important issue.

406 Securing our Nation's drinking water and chemical
407 facilities should be a priority for every Member of Congress,
408 indeed, every Congressional district. There is little doubt
409 that these are centers where great damage could be inflicted
410 on the communities and surrounding areas. It does seem that
411 there is disagreement how to go most effectively go about
412 ensuring the safety of these facilities while at the same
413 time protecting their economic viability. Imposing
414 regulations on facilities that are still in the process of
415 implementing Congress's last round of regulations does appear
416 to be ill advised at this time. Congress last addressed this
417 issue of chemical facility security in the homeland security
418 for fiscal year 2007 in the appropriations bill. The
419 regulations put in place following the enactment of this
420 legislation are in the process of being implemented and the
421 Department of Homeland Security has yet to make any onsite
422 assessments regarding the covered facilities' compliance with
423 the regulations. It seems to me a prudent course of action,
424 indeed, if any further regulations are necessary, would be to

425 wait until the Department of Homeland Security has had an
426 opportunity to report back to Congress, study their
427 recommendations and look at the success or failure of the
428 current regulations. Chemical manufacturing facilities are
429 some of the most highly regulated entities in the country,
430 and in many cases for good reason. Moving the ball every few
431 years by piling on additional regulations without assessing
432 how well the existing rules and recently created regulations
433 are working creates both confusion and uncertainty for these
434 entities. Having to redo and rewrite the security plan every
435 year or two Congress keeps changing course means businesses
436 cannot focus on their core mission and indeed on their bottom
437 line growing their operations and creating more jobs.

438 Congress should tread carefully when we consider
439 extending security regulations to drinking water facilities
440 including facilities that serve relatively small amounts of
441 people. I think it is important that we have the dialog that
442 we will have today but more investigation is needed as to how
443 to properly craft any legislation that would impose new
444 burdens on drinking water facilities which are already
445 struggling to meet the demands of growing population,
446 specifically in rural areas and specifically in rural areas
447 that I represent back in Texas.

448 My concerns on both pieces of legislation that we will

449 be discussing today center around the mandate of using
450 inherently safer technology but it is not always necessarily
451 a one-size-fits-all application for all facilities. Further,
452 the provisions allowing citizens to bring suits against
453 covered facilities pose potential for placing an additional
454 burden on our court system and tying up the facilities'
455 resources in court proceedings rather than simply making
456 their plants safer.

457 I hope the hearing today will be productive and we will
458 enter into a dialog of how we may best go about keeping the
459 American people safe and keeping chemical plants secure and
460 drinking water supplies safe. I look forward to listening to
461 the testimony of the panels today and working with others on
462 the dais on these matters. Thank you, Mr. Chairman. I will
463 yield back.

464 [The prepared statement of Mr. Burgess follows:]

465 ***** COMMITTEE INSERT *****

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466 Mr. {Markey.} Great. The gentleman's time has expired.
467 The gentleman from Texas, Mr. Green, is recognized.

468 Mr. {Green.} Thank you, Mr. Chairman, for holding the
469 hearing today on H.R. 2868 and H.R. 3258, the legislation
470 that seeks to protect chemical facilities and drinking water
471 systems across the country.

472 Chemical facility security is especially important to
473 the protection of public health and safety and particularly
474 in our Congressional district. The Houston Ship Channel area
475 is the heart of the largest petrochemical complex in our
476 country that stretches along the Texas Gulf Coast, producing
477 many essential products for modern life. People who live
478 near and work in these facilities deserve the best security
479 possible to prevent the risk of death or injury. Our
480 industry, federal, State and local law enforcement have been
481 working together since 2001 to do this. Chemical facilities
482 have already invested nearly \$8 billion in security
483 improvements since 2001 and are fully complying with DHS's
484 Chemical Facility Anti-Terrorism Standards, or CFATS, which
485 is not yet fully implemented.

486 Today, DHS continues to review thousands of security
487 vulnerability assessments to determine the Nation's highest
488 risk facilities that require appropriate risk-based security

489 measures. Our hearing should shed some light on the progress
490 of existing regulations for chemical and drinking water
491 facilities so we can learn what is working and what isn't
492 from these programs. We need to understand the impact of
493 these pieces of legislation on the various responsibilities
494 of EPA, DHS and the Coast Guard, which regulates many of the
495 chemical facilities in our district under the Maritime
496 Transportation Security Act, or MTSA. In 2006, the
497 appropriations rider that authorized CFATS exempted MTSA
498 facilities to avoid unnecessary duplication. We should
499 continue to avoid overlap of the existing security programs
500 including and regarding background checks for employees. We
501 have the same agency, Homeland Security and Coast Guard
502 looking at one plant that is on the waterside and a
503 neighboring plant that may not have a waterside. Those
504 security standards should be the same.

505 The hearing is also a good opportunity to learn more
506 about the risk government concept and inherently safer
507 technology, or IST, which is already in use in various
508 chemical facilities today. If available, IST can be the most
509 efficient step to improve security. The difficulties with
510 IST is whether or how to involve government agencies like DHS
511 that have few, if any process safety experts, chemical
512 engineers or other qualified staff. Hopefully we can promote

513 the adoption of inherently safer technology while avoiding
514 unqualified judgments and unintended consequences.

515 I also question whether broad, private right-to-sue
516 authorities similar to civil suit provisions found in
517 environmental statutes are appropriate for the security
518 legislation. It should at least limit the affected party
519 including the neighbors and employees that live near a
520 facility.

521 Mr. Chairman, I look forward to the testimony of today's
522 witnesses so we can learn how to protect our communities with
523 feasible and affected standards, and I yield back my time.

524 [The prepared statement of Mr. Green follows:]

525 ***** COMMITTEE INSERT *****

|
526 Mr. {Markey.} Great. The gentleman's time has expired.
527 The Chair recognizes the gentleman from Illinois, Mr.
528 Shimkus.

529 Mr. {Shimkus.} Thank you, Mr. Chairman.

530 More regulation, more costs, more uncertainty, less
531 jobs. It is curious that we would try to move more
532 legislation when we haven't fully enacted the previous
533 legislation nor do we have a full handle or facilities have
534 been inspected, and that is the frustrating thing in this
535 environment that we would move to do so. We are talking
536 about more than--based upon language, we are talking more
537 than just chemical plants. We are talking about farms,
538 hospitals, universities, deep underground wells. Based upon
539 this terminology of substance of concern, I call it
540 terminology of concern because it is undefined. Chemical
541 facility security efforts are not a branch of environmental
542 law. The use of inherently safer technology is not a
543 protection panacea against terrorism. Citizen suits are not
544 used in national defense context and should not be used here.

545 The last thing is the preemption regime in these bills
546 allows States and localities to enact more stringent laws.
547 That is obviously problematic. And with that, Mr. Chairman,
548 I think we have a long way to go. We shouldn't rush since

549 the budget has a year extension and there are folks who are
550 pushing for time to look and review the process that is going
551 on, and I yield back my time.

552 [The prepared statement of Mr. Shimkus follows:]

553 ***** COMMITTEE INSERT *****

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554 Mr. {Markey.} The gentleman's time has expired. The
555 Chair recognizes the gentlelady from California, Ms. Capps.

556 Mrs. {Capps.} Thank you, Mr. Chairman.

557 Today we will hear about the threat posed by toxic
558 chemicals and the need to ensure the security of those
559 chemicals. As has been stated, we will have testimony on two
560 bills that seek to provide essential protections to millions
561 of workers and communities now living in the shadow of
562 preventable chemical disasters.

563 Since 2001, we have had to reorder our priorities as a
564 number of issues have taken on new urgency. The security of
565 toxic chemicals and our drinking water remains very high on
566 this list. Security experts continue to list the Nation's
567 chemical and drinking water plants as vulnerable and a deadly
568 part of our Nation's infrastructure. The threat is very real
569 and it requires immediate action, and that is why Congress
570 must act quickly to pass protective and comprehensive
571 legislation.

572 H.R. 3258, the Drinking Water System Security Act, is an
573 excellent start. This legislation will help us protect and
574 secure our Nation from potential acts of terrorism against
575 our Nation's drinking water facilities. It advances the use
576 of safer, more secure chemicals and technologies where

577 feasible and, importantly, involves plant employees in
578 developing security programs. I am pleased this bill has the
579 support of the Nation's largest water utilities as well as
580 environmental and labor groups. This broad coalition shows
581 that this bill provides a commonsense approach to securing
582 American's drinking water.

583 Mr. Chairman, just let me say that I understand the
584 value of chemicals in our society. We are not here to
585 question whether or not we need chemicals, but as a public
586 health nurse, I am well aware of the fact that what we need
587 to do is protect those chemicals, especially the most
588 hazardous ones, and also protect the employees that handle
589 them every day from terrorist threats. Action is long
590 overdue to address these preventable chemical disasters. All
591 of us have a responsibility to make sure we do all we can to
592 keep this country safe. I hope we can enact this legislation
593 as soon as possible to eliminate that threat, and I yield
594 back.

595 [The prepared statement of Mrs. Capps follows:]

596 ***** COMMITTEE INSERT *****

|
597 Mr. {Markey.} Great. The gentlelady's time has
598 expired. The Chair recognizes the gentleman from Oklahoma,
599 Mr. Sullivan.

600 Mr. {Sullivan.} I would like to waive my opening
601 statement, and I will submit a statement for the record.

602 [The prepared statement of Mr. Sullivan follows:]

603 ***** COMMITTEE INSERT *****

|
604 Mr. {Markey.} The gentleman's time will be preserved.
605 The Chair recognizes the gentleman from Pennsylvania, Mr.
606 Pitts.

607 Mr. {Pitts.} Thank you, Mr. Chairman. I would like to
608 thank you for convening this hearing today on H.R. 2868, the
609 Chemical Facility Anti-Terrorism Act, and H.R. 3258, the
610 Drinking Water System Security Act.

611 I think we can all agree that there is a great need to
612 protect our chemical facilities from terrorist attacks. To
613 this end, 3 years ago Congress enacted section 550 of the
614 Department of Homeland Security Appropriations Act for 2007.
615 This section authorizes DHS to regulate security at
616 designated chemical facilities. Though the law sunsets in a
617 few days, there has not been enough time to fully implement
618 the program. Realizing this, the Obama Administration's
619 fiscal year 2010 budget recommended a straight 1-year
620 extension of section 550, which was included in the fiscal
621 year 2010 Department of Homeland Security Appropriations Act.
622 However, there are several new provisions in H.R. 2868 that
623 are very concerning.

624 First of all, the application of inherently safer
625 technology, IST, is not a protection panacea against
626 terrorism. The National Petrochemical and Refiners

627 Association says, ``IST is not a technique or procedure, it
628 is an engineering philosophy. There is no valid method for
629 objectively characterizing whether a process is as inherently
630 safe as it can be.'' I do not believe it is Congress's role
631 to mandate engineering philosophies or chemical substitutions
632 as a security cure-all.

633 In addition, regarding the citizen suits provisions,
634 there is a great concern that every person including
635 terrorists could use these types of suits to threaten
636 litigation. Citizen suits are not used in a national defense
637 context and should not be used here.

638 Finally, as I mentioned earlier, the existing program
639 under section 550 has not yet been fully implemented. We
640 need a full record of what works, what doesn't, what lessons
641 we have learned before we change the rules. Mr. Chairman,
642 there is no need to race legislation through this committee.
643 Let us allow the existing law to be fully implemented, then
644 take a careful, reasoned assessment of it.

645 I appreciate the witnesses' coming today, and I look
646 forward to hearing their testimony. I yield back.

647 [The prepared statement of Mr. Pitts follows:]

648 ***** COMMITTEE INSERT *****

|
649 Mr. {Markey.} Great. The gentleman's time has expired.
650 The Chair recognizes the gentleman from California, Mr.
651 McNerney.

652 Mr. {McNerney.} Thank you, Mr. Chairman. I believe I
653 will waive my opening statement.

654 [The prepared statement of Mr. McNerney follows:]

655 ***** COMMITTEE INSERT *****

|
656 Mr. {Markey.} The chair recognizes the gentleman from
657 North Carolina, Mr. Butterfield.

658 Mr. {Butterfield.} Thank you very much, Mr. Chairman,
659 for convening this important hearing. You told us at the
660 beginning of the session that we would have these hearings
661 and they would be forward thinking, and today is certainly an
662 example of that.

663 Mr. Chairman, one of the outcomes of that fateful day in
664 2001 was our expanded awareness of potential threats and
665 vulnerabilities. In the wake of that tragedy on September
666 11, we found renewed responsibility to secure chemical
667 facilities and water treatment plants from intentional harm.
668 We are exercising that responsibility in the consideration of
669 these two pieces of legislation. Though my support for
670 securing these facilities is unequivocal, I would be remiss
671 not to convey concerns that I have received from some of my
672 constituents with regard to the proposed legislation. The
673 authority that grants the Secretary of Homeland Security to
674 mandate inherently safer technologies troubles many of these
675 constituents that I represent. I am appreciative of the
676 language for highlighting the Secretary's need to factor
677 economic and cost concerns into the final determination on
678 the need for ISTs. I urge that the economic consideration

679 provision be as strong as possible, given existing incentives
680 and CFATS for covered facilities to improve their security.

681 Fertilizer producers and retailers in particular have
682 expressed concern that the IST provision could be detrimental
683 to their businesses. The 1st District in North Carolina is
684 in large part agrarian and with many people dependent upon
685 the farm economy. Yes, it is farm country for their
686 livelihood. Fertilizer is a major input for these farmers
687 and increasing the cost of fertilizer has enormous
688 consequences for the bottom line of the family farm. This is
689 just one example, Mr. Chairman, of economic concerns, and I
690 do hope that we keep these concerns and other concerns in
691 mind as we go forward.

692 I thank you for convening the hearing. I yield back.

693 [The prepared statement of Mr. Butterfield follows:]

694 ***** COMMITTEE INSERT *****

|

695 Mr. {Markey.} We thank the gentleman very much. All
696 time for opening statements has been completed. We will now
697 turn to our panel, our very distinguished first panel, and we
698 will hear first from Rand Beers, who serves as the under
699 secretary for National Protection and Programs Directorate at
700 the U.S. Department of Homeland Security. In this role, Mr.
701 Beers oversees the coordinated operational and policy
702 functions of the directorate's subcomponents which include
703 infrastructure protection, risk management and analysis,
704 cybersecurity and communications. Mr. Beers previously
705 served on the National Security Council staff under
706 Presidents Reagan, Bush, Clinton and George W. Bush. So we
707 welcome you, sir. Whenever you are ready, please begin.

|
708 ^STATEMENTS OF HON. RAND BEERS, UNDER SECRETARY, NATIONAL
709 PROTECTION AND PROGRAMS DIRECTORATE, DEPARTMENT OF HOMELAND
710 SECURITY; AND HON. PETER SILVA, ASSISTANT ADMINISTRATOR,
711 OFFICE OF WATER, ENVIRONMENTAL PROTECTION AGENCY

|
712 ^STATEMENT OF RAND BEERS

713 } Mr. {Beers.} Thank you, Chairman Markey, Ranking Member
714 Upton and distinguished members of this Committee. It is a
715 pleasure to appear before you today as the committee
716 considers H.R. 3258, the Drinking Water System Security Act
717 of 2009. This Act is intended to close the security gap at
718 drinking water facilities that possess substances of concern.

719 We have enjoyed a constructive dialog with Congress
720 including this Committee as it works on new authorizing
721 legislation. The Department recognizes the significant work
722 of this Committee and others, particularly the House
723 Committee on Homeland Security, that you all have devoted to
724 drafting this legislation to reauthorize the CFATS program
725 and to address chemical security at the Nation's water
726 systems. We appreciate this effort and look forward to
727 continuing the constructive engagement with Congress on these
728 important matters.

729 CFATS is enhancing security today by helping to ensure
730 high-risk chemical facilities throughout the country have
731 security postures commensurate with the levels of risk. We
732 have made significant progress since the implementation of
733 CFATS in 2007. CFATS currently covers approximately 6,200
734 high-risk facilities nationwide. The current state of
735 coverage reflects changes related to chemicals of interest
736 that facilities have made since receiving preliminary tiering
737 notifications in June of 2008 including security measures
738 implemented and the consolidation or closure of some
739 facilities.

740 The following core principles guided the development of
741 the CFATS regulatory structure: securing high-risk chemical
742 facilities in a comprehensive undertaking that involves a
743 national effort including all levels of government and the
744 private sector, risk-based tiering that ensures that
745 resources are appropriately deployed, reasonable, clear and
746 equitable performance standards that will lead to enhanced
747 security, and recognition of the progress many companies have
748 already made in improving facilities that leverages that
749 advantages.

750 It is important to note that the Administration has
751 developed a set of guiding principles for this
752 reauthorization of CFATS and for addressing the security of

753 our Nation's wastewater and drinking water treatment
754 facilities. These principles are that the Administration
755 supports a permanent chemical facility security authority and
756 a detailed and deliberate process in so doing. Hence, our
757 preference for a full-scale process that will be completed in
758 fiscal year 2010. Nonetheless, CFATS single-year
759 reauthorization in this session prevents an opportunity to
760 promote the consideration and adoption of inherently safer
761 technology among high-risk chemical facilities. We look
762 forward to working with this committee and others on this
763 important matter.

764 CFATS reauthorization also presents an opportunity to
765 close the existing security gap for wastewater and drinking
766 water facilities by addressing the statutory exemption of
767 these facilities from CFATS. The Administration supports
768 closing this gap. The Administration believes that EPA
769 should be the lead agency for chemical security for both
770 drinking water and wastewater systems with DHS supporting
771 EPA's efforts with its security expertise and the leveraging
772 of the CFATS process and structure to include the risk-based
773 performance standards, tiering methodology, compliance tools,
774 inspector training and other support. This will ensure that
775 the water facilities identified as high-risk chemical
776 facilities are addressed consistently nationwide with

777 modification where necessary to reflect the unique
778 characteristics of such facilities.

779 With regard to policies surrounding inherently safer
780 technology, the Administration had established the following
781 policy principles in regard to IST at high-risk chemical
782 facilities. The Administration supports consistency of IST
783 approaches for facilities regardless of sector, and DHS will
784 be responsible for ensuring such consistency. The
785 Administration believes that all high-risk chemical
786 facilities, that is tiers 1 through 4, should assess IST
787 methods and report the assessment in the facility security
788 plans. Furthermore, the appropriate regulatory entity should
789 have the authority to require facilities posing the highest
790 degrees of risk, that is, tiers 1 and 2, to implement IST
791 methods if such methods enhance overall security are
792 feasible, and in the case of water sector facilities
793 especially, though obviously not exclusively, that such
794 methods consider public health and environmental
795 requirements. With respect to tier 3 and 4 facilities, the
796 appropriate regulatory entity should review the IST
797 assessment contained in the site security plan and the entity
798 should be authorized to provide recommendations on
799 implementing ISTs but that entity would not require those
800 facilities to implement those IST methods. The

801 Administration believes that flexibility and staggered
802 implementation would be required in implementing this new IST
803 policy. Clearly, this process could not happen overnight and
804 care and the collection of good data will be necessary. DHS
805 in coordination with EPA would develop an IST implementation
806 plan for timing and phase-in at water facilities designated
807 as high-risk chemical facilities. DHS would develop an IST
808 implementation plan for other high-risk chemical facilities
809 in all other applicable sectors.

810 The Administration recognizes that further technical
811 work to clarify policy positions regarding IST and water
812 treatment security facility is required. The policy
813 positions discussed above represent starting points in
814 renewed dialog in these important areas. DHS and EPA staff
815 are ready to engage in technical discussions with the
816 committee staff, affected stakeholders and others to work out
817 remaining technical details. We must focus our efforts on
818 implementing a risk- and performance-based approach to
819 regulation and in parallel fashion continue to pursue the
820 voluntary programs that have already resulted in considerable
821 success.

822 Again, I thank you for the opportunity to discuss these
823 issues with the Subcommittee and look forward to answering
824 your questions on this important issue.

825 [The prepared statement of Mr. Beers follows:]

826 ***** INSERT 1 *****

|
827 Mr. {Markey.} Thank you, Mr. Beers, very much.

828 Our next witness is Peter Silva. He serves as the
829 assistant administrator for water at the Environmental
830 Protection Agency where he supervises water office programs,
831 implementing laws that include the Safe Drinking Water Act
832 and the Clean Water Act. Mr. Silva is a civil engineer with
833 32 years of experience in the field of water and wastewater
834 management. We welcome you, sir. Whenever you are ready,
835 please begin.

|
836 ^STATEMENT OF PETER SILVA

837 } Mr. {Silva.} Thank you. Good morning, Mr. Chairman,
838 Ranking Member Upton and member of the Subcommittee. I
839 welcome this opportunity to discuss EPA's efforts to promote
840 security and resiliency in the water sector with an emphasis
841 on our role in addressing chemical security at drinking water
842 facilities.

843 I will also reiterate with my colleague from DHS our
844 shared conclusion that a critical gap exists with respect to
845 the water sector and the framework for regulating the
846 security of chemicals in the United States. The subcommittee
847 has demonstrated both leadership and thoughtfulness in
848 drafting a bill, the Drinking Water System Security Act of
849 2009, with the intention of closing this gap for drinking
850 water systems. In my remarks, I will offer some comments on
851 this bill as well as the importance of EPA coordinating with
852 DHS in addressing chemical security at water and wastewater
853 facilities.

854 EPA has worked over the last several years to support
855 the water sector in improving security and resiliency, and I
856 am pleased to report that the sector has taken its role very
857 seriously. EPA has been entrusted with important

858 responsibilities for coordinating the protection of the water
859 sector through Congressional authorization under the
860 Bioterrorism Act of 2002 and through Presidential mandates
861 under Homeland Security Presidential Directives 7, 9 and 10.

862 Promoting the security and preparedness of the Nation's
863 water infrastructure is a priority of this Agency in a post-
864 9/11 and post-Hurricane Katrina world. A loss of water
865 service can seriously jeopardize the public health, economic
866 vitality and general viability of a community. In working
867 with the water sector, we have emphasized a multi-layered
868 approach to security consisting of prevention, detection,
869 response and recovery. We support the Drinking Water System
870 Security Act of 2009 because it will enable us to reduce the
871 risks associated with chemical security in the water sector
872 without compromising the public health and environmental
873 protection standards. We also support the structure of the
874 bill as to its tiering process, vulnerability and
875 assessments, site security plans, risk-based performance
876 standards and other provisions that are consistent with the
877 proposed CFATS reauthorization language of H.R. 2868.

878 With respect to the inherently safer technology issue,
879 the EPA and DHS support the bill's requirement for covered
880 systems that use substances of concern above threshold levels
881 to conduct assessment methods to reduce consequences, or

882 MRCs. This requirement should promote the sector's
883 consideration and adoption of safer methods.

884 Further, we concur with authorizing the regulatory
885 agency to require the highest-risk facilities to implement
886 MRCs under certain conditions. Although we find much to
887 support in the bill, EPA and DHS share a significant concern
888 that the bifurcation of the water sector under two separate
889 bills with wastewater facilities covered under H.R. 2868 and
890 drinking water facilities covered under H.R. 3258. We urge
891 the committee to authorize EPA in coordination with DHS to
892 regulate chemical security at both drinking water and
893 wastewater facilities.

894 The Committee's bill correctly recognizes the importance
895 of coordination between EPA and DHS in regulating chemical
896 security in the water sector. EPA and DHS have each acquired
897 valuable insight through their respective experience with
898 both the water and wastewater sectors. We recommend that EPA
899 utilize DHS's chemical security risk assessment tools and
900 performance standards and modify as necessary for the water
901 sector.

902 In implementing H.R. 3258, we envision that DHS would
903 conduct initial reviews of vulnerability assessments and
904 recommend risk tier assignments for water and wastewater
905 facilities to EPA. DHS also would support EPA's evaluation

906 of site security and train inspectors to ensure consistency
907 of inspections nationwide. EPA also supports authority for
908 the States to implement certain provisions including a
909 prominent role in MRC determinations in both auditing and
910 inspections.

911 In conclusion, we have made significant progress in
912 enhancing the security of our Nation's drinking water and
913 wastewater systems. With respect to chemical security, we
914 look forward to continuing to work with members of the
915 Committee on legislation that ensures the security of
916 substances of concern at water and wastewater facilities
917 while supporting the critical mission of these facilities for
918 public health protection.

919 Thank you again for the opportunity to testify about our
920 role in water security. I look forward to answering your
921 questions.

922 [The prepared statement of Mr. Silva follows:]

923 ***** INSERT 2 *****

|

924 Mr. {Markey.} Thank you very much, Mr. Silva, and
925 again, we thank the witnesses for all their hard work and
926 their work with our staff in moving towards today. And for
927 the purposes of the question-and-answer period, Mr. Beers
928 will be joined by Sue Armstrong from the DHS and Mr. Silva
929 will be joined by Cynthia Dougherty from the EPA staff if
930 they would like to come up to the table, and we welcome you
931 both.

932 The Chair will now recognize him and we will begin with
933 you, Mr. Beers. There has been, Mr. Beers, many inaccurate
934 statements made about the language in the bill that requires
935 facilities to assess whether there are safer practices or
936 technologies that they could use and for facilities in the
937 two highest risk tiers, the language that provides DHS with
938 the authority to require them to be used in some cases. Some
939 have said that the provision might shift the security risk
940 because a company could change the location of the dangerous
941 chemical or store it outside the facility's fence. H.R. 2868
942 says that before DHS can require a facility to adopt a safer
943 process or technology that it needs to find that there
944 wouldn't be this kind of risk shifting. Do you think it
945 makes sense to ensure that risk is not shifted?

946 Mr. {Beers.} Mr. Chairman, we certainly are of the view

947 at DHS that as we look at any issue with respect to security,
948 be it under the mandate that this committee is seeking with
949 respect to inherently safer technology or the screening and
950 assessment process that DHS already undertakes, that measures
951 to reduce risk are not shifting of risk to other areas. That
952 is a basic bedrock position that DHS has held up to this
953 point and would like to see continued as we consider any
954 kinds of security measures.

955 Mr. {Markey.} Okay. Thank you.

956 Mr. {Beers.} It does not help us otherwise.

957 Mr. {Markey.} Thank you. And H.R. 2868 says that
958 before DHS can require a facility to adopt a safer process or
959 technology that it needs to find that the facility would be
960 able to stay in business at its current position. Do you
961 think that it makes sense for the Department to consider the
962 cost before requiring a facility to adopt a safer chemical or
963 process?

964 Mr. {Beers.} Sir, as we look at any kind of legislative
965 impact, be it the existing CFATS legislation or what this
966 committee has under consideration, we believe quite strongly
967 that we have to take into account a number of factors
968 including economic considerations in any move to seek
969 facilities to change their practices. So in moving forward
970 in an area of concern with inherently safer technology, we

971 would certainly want to be able to take that into account.

972 Mr. {Markey.} Thank you. Now, there have been some
973 proposals to exempt small businesses from some of the
974 requirements to assess and implement safer chemicals or
975 processes. Do you believe that the risk to the surrounding
976 community is smaller just because the business is smaller if
977 al-Qaeda could launch a successful attack on a chemical
978 facility that was unprotected?

979 Mr. {Beers.} Sir, the risk process that we undertake in
980 reviewing facilities looks at the risk as the risk exists.
981 It is not an issue of whether a business is large or small,
982 and the risk to a community is not determined by the size of
983 the business, it is determined by the size of the risk. So
984 as we look at these issues, we would be looking at the size
985 of the risk. As I said in answer to my previous question, we
986 would also take into account economic considerations, but
987 risk is risk, and that is no difference between the size of
988 the business.

989 Mr. {Markey.} In your opinion, is it reasonable to
990 assume that Mullah Omar and Osama bin Laden in Pakistan right
991 now have plans if they could implement them to strike at the
992 United States once again?

993 Mr. {Beers.} Sir, it is the view of our intelligence
994 community that al-Qaeda and its affiliate organizations still

995 represent a risk to the homeland of the United States. We
996 have not deviated from that view across a change of
997 Administration and the recent events in New York clearly
998 suggest that that risk is alive.

999 Mr. {Markey.} And could chemical facilities be a high
1000 priority target for al-Qaeda within the United States if
1001 security was inadequate?

1002 Mr. {Beers.} We certainly believe that chemical
1003 facilities represent a potential target. That was the
1004 purpose behind the original CFATS legislation and we continue
1005 to believe that that is the case.

1006 Mr. {Markey.} Thank you, Mr. Beers, very much.

1007 Let me turn and recognize the gentleman from Michigan
1008 for his questions.

1009 Mr. {Upton.} Thank you, Mr. Chairman.

1010 Mr. Beers, you know, the Congress passed in 2006 and
1011 funded the chemical facility anti-terrorism bill and the 2007
1012 appropriations bill. How many facilities are actually
1013 impacted by the legislation in the United States, about? I
1014 don't know if you know the exact number or not.

1015 Mr. {Beers.} I am going to turn to my colleague here,
1016 Sue Armstrong, to answer that detailed question.

1017 Ms. {Armstrong.} Good morning, I will apologize in
1018 advance for my voice today.

1019 Mr. {Upton.} Sounds fine to me.

1020 Ms. {Armstrong.} There are currently 6,156 covered
1021 facilities in the four CFATS tiers.

1022 Mr. {Upton.} And if those 6,156 facilities, how many of
1023 them have been inspected since the bills passed?

1024 Ms. {Armstrong.} Well, the first regulatory deadline
1025 under CFATS was January 22, 2008, to file top screen, which
1026 is the initial consequence screening that a facility
1027 possessing appendix A chemicals of interest must file with
1028 the Department, and at that point in time we had 29,453 top
1029 screens in. In June of last year, June 23, 2008, we notified
1030 7,010 facilities nationwide that they were preliminarily
1031 tiered under CFATS and needed to do a security vulnerability
1032 assessment, again under the program, and--

1033 Mr. {Upton.} And then you dropped it down to 6,156?

1034 Ms. {Armstrong.} Yes.

1035 Mr. {Upton.} And of those 6,156, how many of them have
1036 you actually gone to visit?

1037 Ms. {Armstrong.} Well, we have done a number of
1038 compliance assistance visits over the past year or so to,
1039 number one, make sure we understand what we are seeing in a
1040 security vulnerability assessment or if a facility requests a
1041 visit we will pay them one.

1042 Mr. {Upton.} So has that happened? Have you actually

1043 visited any of these sites?

1044 Ms. {Armstrong.} Yes, sir. Compliance assistance
1045 visits have been occurring regularly. Facilities are also
1046 able to visit us in Washington for a technical consultation
1047 regarding their tiering if they want to. We have not begun
1048 inspections formally yet. We expect to do so in December.
1049 The first site security plans for a group of tier 1
1050 facilities that were notified of their final tiering status
1051 this May were due September 15.

1052 Mr. {Upton.} Okay. The reason I ask that is that I
1053 know that in the budget request, the President's budget
1054 request that was made, he sought a 1-year extension of the
1055 bill, which as I understand it, the Homeland Security
1056 appropriation bill is going to comply with that. I think
1057 there is a 1-year extension in both the House and the Senate
1058 bill. And as a former OMB official, I know that this is
1059 about the time of year that the agencies submit their
1060 requests for the next budget to be presented early next year.
1061 Can you tell us where the Department of Homeland Security is
1062 as they look at the 2011 budget? Are they going to pursue a
1063 1-year extension again?

1064 Mr. {Beers.} No, that is not our intention. That was a
1065 good-faith effort to indicate that it was our preference that
1066 we work with the Houses of Congress on a permanent

1067 reauthorization during fiscal year 2010.

1068 Mr. {Upton.} Are you aware from receiving the
1069 information from these 6,000-some facilities that there are
1070 any shortcomings in their compliance?

1071 Ms. {Armstrong.} We have not taken any enforcement
1072 actions under the program at this point in time. We did
1073 receive approximately 6,300 total security vulnerability
1074 assessments and we have been in the process of reviewing
1075 those since they were due at the beginning of--or late last
1076 year and the beginning of this year. We have tier 1, 2 and 3
1077 reviewed pending new submissions of top screen and we are
1078 reviewing the tier 4 vulnerability assessments at this time
1079 and continuing to make final tiering determination
1080 notification.

1081 Mr. {Upton.} Mr. Beers, you said in response to Mr.
1082 Markey's question, you wanted to take into account economic
1083 considerations of the changes that they are making. Do you
1084 have any estimate of what these facilities have done
1085 financially to comply with the regulations that are on the
1086 books now? Do you have any total costs?

1087 Ms. {Armstrong.} While I don't have a total cost, I do
1088 know, and you can see from the numbers, 7,010 initial
1089 preliminary tiering notifications and a covered population of
1090 6,156 at this point in time. To me, that says that

1091 facilities are taking a look at their chemical holdings.
1092 They are taking a look at their internal corporate supply
1093 chain and security posture and making change. The rule
1094 specifically provides that when a facility makes a material
1095 modification, it needs to refile its top screen with us. So
1096 we have had thousands of top screen resubmissions. We have
1097 received 36,960 top screens as of this date. So facilities
1098 are looking at their holdings, looking at their practices
1099 and--

1100 Mr. {Upton.} I know my time is expired but do you have
1101 any idea what the cost has been on these facilities to
1102 comply?

1103 Ms. {Armstrong.} I do not at this point.

1104 Mr. {Upton.} Thank you.

1105 Mr. {Markey.} The gentleman's time has expired. The
1106 Chair recognizes the gentleman from Louisiana, Mr. Melancon.

1107 Mr. {Melancon.} I will waive questions for right now.
1108 Thank you.

1109 Mr. {Markey.} The Chair recognizes the gentleman from
1110 Texas, Mr. Green.

1111 Mr. {Green.} Thank you, Mr. Chairman.

1112 Mr. Beers, as you know, H.R. 2868 requires DHS to review
1113 facilities of IST assessment. In your testimony, you
1114 mentioned that the infrastructure security compliance is

1115 responsible for implementing the CFATS, has hired in the
1116 process over 125 people. Can you tell me how many of those
1117 125 people who are either on board or in the process are
1118 experts in the field of chemical engineering, chemical
1119 process, safety, design and engineering or occupational
1120 health, which are only a few fields that would be required
1121 under IST? Do you have that information for us?

1122 Ms. {Armstrong.} We have approximately at this point in
1123 time 130 people either on board or in the selection process.
1124 Of those, we have a number, five or six, who are either civil
1125 or physical engineers or chemical engineers. We have a
1126 chemist on site--on staff, sorry--and we have several
1127 inspectors who joined us from industry.

1128 Mr. {Green.} I have to admit, with the state of the
1129 industry right now, it is probably not a bad time to be out
1130 seeking someone with a chemical engineering degree, at least
1131 in my area. What type of expertise do you feel is necessary,
1132 DHS, to make the IST determinations?

1133 Ms. {Armstrong.} Well, I think as with everything we
1134 have done with the CFATS program, it needs to be an inclusive
1135 process. It needs to include industry. It needs to include
1136 DHS security expertise, which we have on staff. It needs to
1137 include academia. It needs to include the covered facilities
1138 themselves so we envision as we move forward if this

1139 legislation is enacted working with the covered community as
1140 closely as we have in standing up the CFATS program.

1141 Mr. {Green.} And that gives me some comfort. And I
1142 know you are not here representing the Coast Guard, and I
1143 have some questions regarding the Coast Guard's current
1144 security regimen under the Maritime Transportation which has
1145 been cooperative between the industry in my area and the
1146 Coast Guard. MTSA's requirement is to prevent maritime
1147 transportation security incidents defined as any incident
1148 that results in a significant loss of life, environmental
1149 damage, transportation system disruption or economic
1150 disruption in a particular area. Do you see this vision
1151 significantly different from what H.R. 2868 seeks to prevent
1152 in chemical facilities that may not be waterside or under
1153 MTSA?

1154 Mr. {Beers.} The Secretary of Homeland Security as she
1155 was becoming familiar with the activities of the Department
1156 of Homeland Security was informed early on in her tenure of
1157 the potential for differing enforcement with respect to the
1158 Coast Guard's responsibilities under MTSA and the NPPD
1159 responsibilities under CFATS and asked the commandant of the
1160 Coast Guard and myself to ensure that we work together over
1161 the course of this year to seek full harmony in terms of the
1162 implementation between our two regulatory regimes. As a

1163 result of that, Sue, on behalf of NPPD and a senior flag
1164 officer of the Coast Guard have a committee that has met and
1165 is in the process of trying to ensure that those two
1166 regulatory regimes are in full harmony.

1167 Mr. {Green.} Great. Let me--I only have 5 minutes. Do
1168 you believe this legislation is absolutely clear that MTSA
1169 facilities only have to deal with one federal agency or one
1170 subagency of DHS as the Coast Guard, and to follow up, right
1171 now, and I think a number of members have bought our TWIC
1172 card, because I spend a lot of times on plant sites in our
1173 district, it kind of concerns me that a chemical worker at,
1174 say, ABC Chemical Company at waterside uses a TWIC card, and
1175 yet if they go to their plant facility at another location it
1176 may not have waterside but have to have a different set of
1177 regimens. Is there any way through this legislation or
1178 through DHS we can harmonize that so it will just make it
1179 much more efficient, you know, using the TWIC card as a
1180 basis?

1181 Mr. {Beers.} I understand your concern, Congressman,
1182 and that is one if the areas obviously that we want to look
1183 very carefully at to ensure that we have if not a single
1184 regulatory regime at least a fully harmonized regulatory
1185 regime. That card issue is an issue that is much broader
1186 than just these two regimes as well.

1187 Mr. {Green.} I know, you know, it covers not only
1188 workers. I have five refineries and I would say a boatload
1189 of chemical facilities in my area and I appreciate DHS
1190 partnering with our community over the years, both the local
1191 law enforcement and federal law enforcement, to make sure we
1192 safeguard.

1193 Thank you, Mr. Chairman.

1194 Mr. {Markey.} Great. We thank the gentleman very much.
1195 There are three roll calls that we will have to attend to as
1196 members out on the House Floor and so we will take a brief
1197 recess after we recognize the gentleman from Illinois, Mr.
1198 Shimkus, for his 5 minutes of questioning.

1199 Mr. {Shimkus.} Thank you, Mr. Chairman, and this kind
1200 of follows up to my opening statement. I appreciate you all
1201 being here. One of the comments I made was that we are
1202 talking about farms, hospitals, universities, deep
1203 underground wells, basically anyone anywhere who possesses a,
1204 quote, unquote, substance of concern as defined by the
1205 legislation. At a June 29, 2009, meeting to update the
1206 chemical sector security summit, a leading official at the
1207 Department of Homeland Security stated that the Department is
1208 doing targeted outreach to colleges, universities and medical
1209 and public health facilities. Does this mean that you
1210 consider--and this is for Mr. Beers--that you consider

1211 colleges and universities to be in the high-risk tiers?

1212 Ms. {Armstrong.} I was actually the official who made
1213 that statement, so I will elaborate. What I was announcing
1214 is that we are beginning some targeted outreach for awareness
1215 purposes in certain segments of industry, colleges and
1216 universities and public health and health care facilities
1217 among them. There are currently colleges and universities
1218 and other health care facilities that are tiered under CFATS.
1219 We want to make sure that those communities understand the
1220 CFATS programs and their potential requirements under it and
1221 our willingness to work with them to incorporate into their
1222 security plans their unique circumstances.

1223 Mr. {Shimkus.} So the answer is yes?

1224 Ms. {Armstrong.} The answer is yes, they are.

1225 Mr. {Shimkus.} Okay. So if yes, they are tiered--

1226 Ms. {Armstrong.} Some of them.

1227 Mr. {Shimkus.} --we are talking about colleges and
1228 universities, are they in tier 1 or tier 2?

1229 Ms. {Armstrong.} They are in actually at this point in
1230 time lower tiers, primarily 3 and 4.

1231 Mr. {Shimkus.} Does that mean that DHS considers
1232 hospitals and other public health clinics or facilities, you
1233 are saying that they are falling into the lower risk tiers,
1234 not in 1 and 2?

1235 Ms. {Armstrong.} Correct.

1236 Ms. {Shimkus.} According to this presentation, DHS
1237 considers certain federal facilities to be outliers. Section
1238 550 exempted many federal facilities. Since DHS is having
1239 trouble implementing section 550 before it expires, what is
1240 the Department doing chasing entities that it considers
1241 outliers when you don't have the legal authority to do
1242 anything about it?

1243 Ms. {Armstrong.} Well, we do have the authority to
1244 identify facilities as high risk based on other
1245 considerations and their submission of top screen. That is
1246 in our rule. What the reference to outliers was getting at
1247 was, we have worked with two States in particular, New York
1248 and New Jersey, to have them based on their knowledge help us
1249 identify facilities in their jurisdictions who may have not
1250 have filed top screen and need to do so.

1251 Mr. {Shimkus.} Going back to the opening statement, so
1252 we have addressed hospitals and universities. What about the
1253 issue of the terminology, substance of concern, for farms and
1254 deep underground wells?

1255 Mr. {Beers.} The current policy is that there is an
1256 extension of those entities having to file. That is ongoing.

1257 Mr. {Shimkus.} And when will you make a determination?

1258 Mr. {Beers.} We have begun a data gathering effort. We

1259 expect to be issuing some data calls to supplier firms in the
1260 not-too-distant future. That will be the beginning of the
1261 process of collecting information in order to make a
1262 determination. This will be all done publicly and
1263 transparently so that affected or potentially affected
1264 entities will be fully aware of what is happening.

1265 Mr. {Shimkus.} Okay, Mr. Chairman. That is all I have.
1266 Thank you very much.

1267 Mr. {Markey.} The gentleman's time is expired. What we
1268 are going to do right now is to take a brief recess and we
1269 should be back here in about 15 minutes to reassemble and to
1270 continue the questioning. So the committee stands in recess.

1271 [Recess.]

1272 Mr. {Markey.} Welcome back, everybody, and we thank you
1273 for your patience. There was an extended period of time for
1274 the roll call. Let me turn and recognize the gentlelady from
1275 California, Ms. Capps.

1276 Mrs. {Capps.} I am still out of breath, Mr. Chairman.

1277 Mr. {Markey.} No, good, you made the right decision,
1278 though. Getting back here first is a big payoff.

1279 Mrs. {Capps.} Thank you very much.

1280 As has already been referenced, and this is for Under
1281 Secretary Beers again, recent events have demonstrated that
1282 we live in a world where terrorists can go to a beauty supply

1283 store in Colorado to secure chemicals for a bomb they intend
1284 to use for an attack in New York City. Incidents like this
1285 illustrate how security vulnerabilities in one place can
1286 result in injuries or deaths all the way across the country.
1287 My questions are going to be in the area of citizen suit
1288 provisions. The Administration has not taken a position on
1289 this. Am I right?

1290 Mr. {Beers.} That is correct.

1291 Mrs. {Capps.} Well, I would like to frame this in a
1292 broader context then. Do you agree that broad enforcement of
1293 CFATS requirements is central to our security?

1294 Mr. {Beers.} We certainly believe that the ability to
1295 work with industry to increase the security and safety for
1296 the country is absolutely critical. If that requires some
1297 kind of leverage, then we are prepared to consider it.
1298 Obviously we prefer not to have to use it--

1299 Mrs. {Capps.} Well, let me just sort of work up to
1300 that. Is it fair to say that the Department perhaps lacks
1301 the personnel and resources to observe for all violations at
1302 all regulated facilities at all times?

1303 Mr. {Beers.} I am sorry?

1304 Mrs. {Capps.} Would it be fair to say that the
1305 Department lacks personnel and resources to observe for
1306 violations at all regulated facilities at all times?

1307 Mr. {Beers.} Oh, that goes without question. I mean,
1308 our intent is to be able to visit each of the tier 1 sites in
1309 this fiscal year and 50 percent of the tier 2 sites based on
1310 the current resources that we have.

1311 Ms. {Capps.} Well, that isn't everywhere at every time.
1312 I mean, that is kind of omniscient if you were able to do
1313 that. So that leads me to say, is it possible that neighbors
1314 who live around a chemical facility and observe it in their
1315 neighborhood every day may be in a position to spot evidence
1316 of security violations that the Department of Homeland
1317 Security may not be aware of on any particular day?

1318 Mr. {Beers.} That is possible, yes.

1319 Mrs. {Capps.} Well, that is what I am leading to in the
1320 area of concerns that many neighborhoods have raised about
1321 their opportunities to recommend and have their concerns
1322 addressed in this way. Can I ask you what you feel should be
1323 done about this?

1324 Mr. {Beers.} Well, we have a system now in which
1325 citizens can report their issues or concerns to the
1326 Department of Homeland Security and it appears at this
1327 particular point in time to be working. Sue, do you want to
1328 add anything?

1329 Mrs. {Capps.} Yes, and I would like to add, what are
1330 the steps that are taken and what kind of guarantee would

1331 neighbors have that there would be the kind of follow-up that
1332 they would know about too?

1333 Ms. {Armstrong.} Well, what we have done in CFATS
1334 implementation is to, number one, have a very publicly
1335 accessible website where people can get information about the
1336 program. It is a subset of the DHS main website. And we
1337 have also established a tip line where an individual can
1338 either call anonymously or call and identify themselves if
1339 they would like to be contacted in follow-up to report any
1340 kind of security concerns.

1341 Mrs. {Capps.} Would they have any assurance or is there
1342 any feedback, is there a procedure that they know this is
1343 being addressed?

1344 Ms. {Armstrong.} Well, if they identify themselves and
1345 request follow-up, one of our staff will get back to them.

1346 Mrs. {Capps.} And is there record of this having
1347 happened?

1348 Ms. {Armstrong.} Yes.

1349 Mrs. {Capps.} So that it is possible that there is a
1350 record of citizens--well, how about if they are not satisfied
1351 with the answer. Is there a possibility for legal action?

1352 Mr. {Beers.} At this particular point in time, they can
1353 certainly go to you as their Congressperson or to someone
1354 like that, but we are dealing with information here in some

1355 cases where the information that is relevant to the decision
1356 that we might take for inaction or different action from what
1357 they were suggesting or requesting. We are not in a position
1358 to reveal to them the basis for which we would undertake to
1359 act differently than they thought we ought to act.

1360 Mrs. {Capps.} So if they feel that their reporting has
1361 not been followed up upon to their satisfaction, they have no
1362 further recourse at this time?

1363 Mr. {Beers.} They can come to you.

1364 Mrs. {Capps.} They can come to their Member of
1365 Congress? Well, I am not going to pursue it any further, but
1366 this committee has a long history with citizen enforcement
1367 and citizen suit provisions. For close to 40 years this
1368 Committee has included citizen enforcement provisions in each
1369 of our environmental laws from the Clean Air Act to the Safe
1370 Drinking Water Act, and we have now ascertained that this is
1371 a valuable tool in enforcing our laws. I appreciate your
1372 thoughts on this matter.

1373 Thank you very much, Mr. Chairman.

1374 Mr. {McNerney.} [Presiding] Thank you. The
1375 gentlelady's time has expired. The Chair recognizes himself
1376 for 7 minutes.

1377 Mr. Silva, I just want to say, my father is a civil
1378 engineer and I appreciate the work civil engineers do to make

1379 our country work, and this is certainly an important part of
1380 it. In your testimony, you mentioned that there was a
1381 security gap or that a security gap exists. I am going to
1382 ask you sort of an open-ended question here. What is not
1383 part of the security gap? In other words, what do you feel
1384 good about in terms of the security of our Nation's water
1385 supplies?

1386 Mr. {Silva.} Well, right now I think that the gap is
1387 just in terms of the fact that we don't have coverage in both
1388 the water and wastewater sectors, and so with this bill and
1389 hopefully with further action by the committee, as was
1390 mentioned, EPA would take the lead in ensuring that those two
1391 sectors would be covered for security purposes.

1392 Mr. {McNerney.} Okay, but is there anything you feel
1393 good about in terms of what part of our water infrastructure
1394 do you feel is secure and we don't need to worry too much
1395 about in terms of terrorist attack or so on?

1396 Mr. {Silva.} Well, again, right now we do have existing
1397 site security plans and assessments that we do as part of the
1398 Safe Drinking Water Act, but again, we feel that there could
1399 be a gap and so, you know, we would feel more comfortable
1400 working with DHS to ensure that all facilities are covered
1401 and that there are more of the tier 1 and tier 2-type
1402 facilities out there that they could be covered under this.

1403 Mr. {McNerney.} All right. What are some of the more
1404 significant challenges that the EPA might face in meeting the
1405 obligations under this legislation and do you think that they
1406 are adequately addressed in H.R. 3258?

1407 Mr. {Silva.} Well, I think some of the more principal
1408 ones probably would be funding for communities to perform the
1409 inspections, to do the plans and also to carry out any kind
1410 of changes that would come out of any IST type of review, and
1411 so we comfortable if we get the legislation through and that
1412 we have the funding that is available in the legislation that
1413 we could work with States and communities to fund those types
1414 of requirements.

1415 Mr. {McNerney.} So you don't have any particular
1416 recommendations then on improving the legislation?

1417 Mr. {Silva.} Well, no, again, the recommendation would
1418 be again to be able to cover both water and wastewater and
1419 somehow get those two under the same umbrella through EPA,
1420 again, working with DHS.

1421 Mr. {McNerney.} Okay, you did mention that in your
1422 testimony. I appreciate that.

1423 Mr. Beers, I am going to follow up on a question that
1424 Mr. Markey asked or a similar question regarding exemptions
1425 for small businesses, and I understand the need for small
1426 businesses to be able to move forward and work without too

1427 much hindrance but I see a potential for a significant risk
1428 with regard to small business in terms of risk to the
1429 population. How can you address that?

1430 Mr. {Beers.} As I tried to convey, we have a process
1431 that currently exists in which we are prepared to work with
1432 each of the facilities that are covered for them to present
1433 their assessments to work with them with respect to their
1434 development of responses and plans in order that we can do
1435 this in a way that both protects public safety and security
1436 and at the same time doesn't undermine the economic viability
1437 of the small-business concern. My point earlier, though,
1438 was, this is not an issue of defining whether the risk is
1439 less important because the size of the firm is small. The
1440 risk doesn't change with respect to the size of the firm.

1441 Mr. {McNerney.} Well, earlier I think the testimony was
1442 that there are 6,156 facilities. I think that was the number
1443 that was given. That is a large number. Do you feel that
1444 this legislation will increase the risk of layoffs or some of
1445 these facilities closing because of regulatory burdens that
1446 are being placed on them by this legislation?

1447 Mr. {Beers.} It is certainly not our intention to
1448 enforce any legislation that Congress should pass that would
1449 automatically have that effect. We will try to work with all
1450 of the concerned facilities not to have that kind of an

1451 economic impact. That is certainly where we start from.

1452 Mr. {McNerney.} And Mr. Silva and Mr. Beers, you see
1453 opportunity for cooperation between your two agencies. There
1454 is not too much reason why there wouldn't be any hurdles or
1455 personalities that will cause problems in enforcing this new
1456 legislation?

1457 Mr. {Beers.} One of the, I think, benefits of the
1458 process with respect to working with this committee is the
1459 agreement that our two agencies have come to, to think
1460 through how we would work together and cooperate. Obviously
1461 the devil is in the details and we will have some other
1462 issues that we will want to have to work through but I think
1463 we have got a really solid start here, an ability to work
1464 together with EPA in the lead.

1465 Mr. {Silva.} I would definitely concur with that.

1466 Mr. {McNerney.} Well, thank you. That is all the
1467 questions I have.

1468 Mr. Upton, do you have any additional questions?

1469 Mr. {Upton.} I just want to say, I know Dr. Burgess had
1470 some questions, and they have a weekly Texas meeting, Texas
1471 delegation lunch, and I might just ask that we keep the
1472 record open for questions for members that did not come back
1473 so we might be able to forward those questions to both of you
1474 for a response and allow that to be placed into the record if

1475 I might.

1476 Mr. {McNerney.} Without objection.

1477 Mr. {Upton.} No one is here to object.

1478 Mr. {McNerney.} That concludes our first panel. Thank
1479 you for coming out here to testify today.

1480 We now welcome the second panel starting with Brian
1481 Ramaley. Mr. Ramaley serves as president of the Association
1482 of Metropolitan Water Agencies, the AMWA, which is an
1483 organization representing the largest publicly owned drinking
1484 water providers in the United States. Mr. Ramaley is also a
1485 director of the Newport News Waterworks in Newport News,
1486 Virginia, which provides drinking water to more than 400,000
1487 customers. He previously served as chairman of EPA's
1488 National Drinking Water Advisory Council from 2004 to 2007.
1489 Thank you, Mr. Ramaley. Martin Durbin, who is vice president
1490 of federal affairs for the American Chemistry Council, where
1491 he is responsible for directing federal legislative advocacy.
1492 In his previous tenure leading the ACC's security program,
1493 Mr. Durbin was responsible for public policy, advocacy,
1494 communications and operational activities of the association
1495 as related to site, cyber and value chain security for the
1496 business of chemistry. Welcome aboard. Thank you for
1497 coming. Darius Sivin, Dr. Darius D. Sivin. Dr. Darius Sivin
1498 served as the legislative representative for the

1499 international union UAW since November 2007. His work with
1500 the UAW includes 5 years in the UAW health and safety
1501 department where he conducted numerous workplace entries to
1502 investigate health and safety issues at a wide variety of
1503 facilities. Prior to joining the UAW, he was employed by the
1504 Occupational Safety and Health Administration and by the
1505 Washington State OSHA program. Dr. Sivin received his Ph.D.
1506 in environmental and occupational health from the Johns
1507 Hopkins School of Public Health and his master's in
1508 environmental studies from Evergreen State College. Thank
1509 you for participating. Stephen Poorman. Mr. Poorman
1510 presently serves as the manager of environmental health,
1511 safety and security for the Fujifilm Imaging Colorants. He
1512 also chairs the Society of Chemical Manufacturing Affiliates'
1513 safety and security committee and has been actively involved
1514 in chemical security issues while serving in this capacity.
1515 Mr. Poorman's previous experience includes serve as a program
1516 supervisor at the Ohio Environmental Protection Agency and
1517 EHS manager with responsibility for chemical security at
1518 chemical manufacturing sites and corporate headquarters.
1519 Thank you for participating.

1520 I will begin our panel's testimony with Mr. Ramaley.
1521 You have approximately 5 minutes. Begin when you are ready.

|
1522 ^STATEMENTS OF BRIAN RAMALEY, DIRECTOR, NEWPORT NEWS
1523 WATERWORKS, AND PRESIDENT, BOARD OF DIRECTORS, ASSOCIATION OF
1524 METROPOLITAN WATER AGENCIES; MARTY DURBIN, VICE PRESIDENT,
1525 FEDERAL AFFAIRS, AMERICAN CHEMISTRY COUNCIL; DARIUS SIVIN,
1526 LEGISLATIVE REPRESENTATIVE, CWA-UAW LEGISLATIVE ALLIANCE; AND
1527 STEPHEN POORMAN, INTERNATIONAL EHS MANAGER, FUJIFILM IMAGING
1528 COLORANTS, AND CHAIR, SAFETY AND SECURITY COMMITTEE, SOCIETY
1529 OF CHEMICAL MANUFACTURERS AND AFFILIATES

|
1530 ^STATEMENT OF BRIAN RAMALEY

1531 } Mr. {Ramaley.} Good afternoon, Mr. Chairman and members
1532 of this Committee. My name is Brian Ramaley and I am the
1533 director of Newport News Waterworks which, as you indicated,
1534 provides drinking water to more than 400,000 people each day
1535 in southeastern Virginia. I am also the president of the
1536 Association of Metropolitan Water Agencies, or AMWA, an
1537 organization that represents the largest publicly owned
1538 drinking water providers in the United States.

1539 In my testimony today, I am going to focus on H.R. 3258,
1540 the Drinking Water System Security Act. AMWA understands
1541 that H.R. 2868, the Chemical Facility Anti-Terrorism Act, is
1542 not intended to apply to drinking water systems. However, we

1543 opposed similar legislation last year, H.R. 5577, that would
1544 have subjected drinking water systems to federally mandated
1545 inherently safer technologies through the DHS CFATS program
1546 and we would do so again this year if such a bill were
1547 proposed.

1548 Turning to the Drinking Water System Security Act of
1549 2009, while H.R. 3258 is not perfect, there are several
1550 components of the bill that enable AMWA to offer it support
1551 for that legislation. First, it continues EPA's regulation
1552 of drinking water system security, thus avoiding duplicative
1553 requirements with DHS. Second, the bill maintains the
1554 important concept of local choice in water disinfectant and
1555 does not allow EPA or any other federal entity to broadly
1556 force drinking water systems across the country to change
1557 their disinfection methods or chemicals. Instead, the bill
1558 requires drinking water systems that employ certain chemicals
1559 to evaluate the feasibility of potential IST operations and
1560 decide on their own whether the utility will begin using
1561 those alternates in the future. Only a State drinking water
1562 enforcement agency, not EPA, is given a direct opportunity to
1563 review a utility's analysis and mandate the change in
1564 disinfectants after considering factors such as feasibility,
1565 cost and possible water quality implications. I must point
1566 out that AMWA's acceptance of this State-level review is

1567 based on our expectation and experience that State drinking
1568 water enforcement agencies, which have an awareness of local
1569 water utility operations, will act responsibly when reviewing
1570 a utility's disinfectant choice. AMWA could not support this
1571 approach if EPA or another federal agency had the direct
1572 ability to dictate a State or local water disinfection
1573 decision.

1574 Additionally, the bill reflects AMWA's request that the
1575 current civil penalty, criminal penalties, I should say, of
1576 up to 1 year in prison and substantial fines be maintained
1577 for individuals found to have unlawfully distributed
1578 protected utility information. Any weakening of the
1579 penalties for the unlawful disclosure of protected
1580 information would increase the chances of an unauthorized
1581 leak of sensitive utility security documents and such a leak
1582 could provide terrorists and criminals with a detailed
1583 account of where and precisely how a utility's security could
1584 best be compromised.

1585 The legislation does direct EPA to formulate standards
1586 to facilitate the appropriate sharing of protected
1587 information with entities such as local first responders,
1588 certain water utility employees and their union
1589 representatives. AMWA looks forward to participating in
1590 EPA's development of standards that will set the ground rules

1591 for how this information may be accessed.

1592 Some suggested improvements: AMWA hopes to continue
1593 working with the committee and other members of Congress to
1594 further strengthen H.R. 3258. For example, the legislation
1595 should include an appeals process that a utility may initiate
1596 if they disagree with their primacy State agency's order to
1597 adopt an alternate water disinfection method. Because the
1598 decision on water disinfectants is so critical to public
1599 health and public health protection, I believe the
1600 opportunity to be heard in an appeal process is a reasonable
1601 request.

1602 AMWA also remains concerned that the legislation would
1603 apply only to the Nation's drinking water systems while H.R.
1604 2868 as approved by the House Homeland Security Committee
1605 would regulate the security of wastewater utilities under DHS
1606 CFATS program. I think we have heard today that there is
1607 some agreement that that should fall under EPA as well. This
1608 approach would be especially problematic for municipalities
1609 that operate both water and wastewater systems as do many
1610 AMWA members as it would force the employees of such systems
1611 to comply with two varying sets of security rules issued by
1612 two different federal entities. To resolve this issue, AMWA
1613 recommends and supports that the security of wastewater
1614 utilities be regulated under the same EPA program that this

1615 legislation would apply to drinking water systems and that
1616 both drinking water and wastewater utilities remain
1617 explicitly exempt from CFATS.

1618 In closing, I want to thank the Committee for working
1619 with AMWA on H.R. 3258. Because of the improvements made to
1620 the bill, AMWA is pleased to offer its support and hopes to
1621 continue to work with the Committee to further strengthen the
1622 bill in the weeks and months ahead.

1623 That concludes my testimony, and I will defer answering
1624 questions until the rest of the panel speaks, if that is your
1625 choice.

1626 [The prepared statement of Mr. Ramaley follows:]

1627 ***** INSERT 3 *****

|

1628 Mr. {McNerney.} Thank you, Mr. Ramaley.

1629 Mr. Durbin, you may begin.

|
1630 ^STATEMENT OF MARTY DURBIN

1631 } Mr. {Durbin.} Mr. Chairman, Mr. Upton, thank you very
1632 much for the opportunity to again speak with you on this very
1633 important subject on behalf of the members of the American
1634 Chemistry Council.

1635 Having worked on this issue for 8 years and testified
1636 before Congress on numerous occasions, I know that this issue
1637 is always accompanied by heated rhetoric and emotion.
1638 Regardless of what I consider to be significant actions taken
1639 by all those involved, enormous progress has been made. So
1640 while there are clearly differences on how best to achieve
1641 the objectives of securing our Nation's chemical facilities,
1642 I think it is useful to reflect on what has been
1643 accomplished.

1644 First, after September 11, ACC and many others in the
1645 chemical industry stepped up and implemented serious,
1646 stringent security programs at their facilities before there
1647 was any specific government direction. Second, Congress
1648 stepped in and enacted national legislation to ensure that
1649 these assets, their workers and the communities where they
1650 operate are protected. And third, DHS has acted swiftly to
1651 develop and implement comprehensive security regulations.

1652 CFATS is by far the most robust, comprehensive and demanding
1653 chemical security program to date and DHS should be
1654 commended. ACC believes CFATS provides a solid foundation
1655 and that Congress should provide DHS the necessary staff and
1656 resources to ensure continued success.

1657 As Congress now analyzes CFATS and identifies areas for
1658 improvement, ACC is committed to being a constructive
1659 partner. While our views are not always in alignment, I want
1660 to acknowledge the willingness of the Energy and Commerce
1661 Committee and its staff to seek our input and consider our
1662 viewpoint. We have had constructive discussions and we hope
1663 to continue working together to make a smart regulatory
1664 program even better. I believe our common goal is greater
1665 than our differences.

1666 ACC's record of accomplishment and cooperation with
1667 Congress, DHS and other agencies is well established. Since
1668 2001, our members have invested nearly \$8 billion in security
1669 enhancements under our own Responsible Care Security Code and
1670 we continue to support strong federal chemical security
1671 regulations. Our security code not only provided a model for
1672 chemical security programs in New Jersey, New York and
1673 Maryland but it was also recognized as an alternative
1674 security plan under the U.S. Coast Guard's Maritime
1675 Transportation Security Program.

1676 Turning to the DHS program, at each step of the
1677 regulatory development process, our members volunteered to
1678 pilot core program elements and assist DHS in rapidly and
1679 successfully developing the tools needed to implement the
1680 program and swiftly meet their deadlines. CFATS is a tough
1681 yet flexible program that allows facilities to utilize a full
1682 range of potential security enhancements including inherently
1683 safer approaches to address potential security
1684 vulnerabilities. This is exactly what a strong, smart
1685 regulatory approach must do: set a high bar through
1686 performance-based standards and then hold facilities
1687 accountable.

1688 The legislation being considered today by this committee
1689 represents an important step toward making CFATS permanent.
1690 We are pleased to see H.R. 2868 reflects many of the security
1691 measures that will be implemented under CFATS and we
1692 appreciate the efforts made to minimize duplication of effort
1693 by facilities that have already acted or will take further
1694 action under the program. However, I would like to highlight
1695 just a few provisions we have discussed with the committee
1696 where our members continue to have questions and concerns.
1697 For example, we believe the provision that would give DHS
1698 authority to mandate process changes is unnecessary. Through
1699 its use of risk-based performance standards, CFATS drives

1700 each facility to consider all possible risk reduction options
1701 including inherently safer approaches while developing a site
1702 security plan. While you can't mandate innovation, CFATS
1703 does allow DHS to unleash the ingenuity, expertise and
1704 resources of the chemical sector.

1705 In addition, we feel the provision that provides for
1706 private right of action is counterproductive to the ultimate
1707 success of CFATS. Unlike environmental statutes, CFATS is
1708 not a series of prescriptive statutory measures like
1709 emissions standards or discharge limitations. It will
1710 therefore be difficult for a citizen or a judge to ascertain
1711 if a standard is being met or to decide what needs to be done
1712 to address an alleged deficiency. However, let me clear that
1713 we fully support strong enforcement so we would again urge
1714 Congress to provide DHS with the necessary tools and
1715 resources to ensure compliance.

1716 Also, since employees are the first line of defense when
1717 it comes to chemical security, we appreciate provisions that
1718 address employee involvement. One of the core components of
1719 ACC's Responsible Care Security Code stresses employee
1720 involvement including training, drills and guidance, so we
1721 would like to continue to work with the committee to ensure
1722 that the right people with the right knowledge are involved
1723 in our efforts to secure chemical facilities.

1724 The crucial partnership between our industry and the
1725 federal government requires each of us to do our part. ACC
1726 and its member companies are committed to safeguarding
1727 America's chemical facilities and we will continue to work
1728 with Congress and DHS in that spirit. Thank you.

1729 [The prepared statement of Mr. Durbin follows:]

1730 ***** INSERT 4 *****

|
1731 Mr. {McNerney.} Thank you, Mr. Durbin.

1732 Mr. Sivin, would you please begin your testimony? Now,
1733 we just got called so we have about 10 or 15 minutes before
1734 we need to leave, so there is plenty of time.

|
1735 ^STATEMENT OF DARIUS SIVIN

1736 } Mr. {Sivin.} Mr. Chairman, Ranking Member Upton,
1737 members of the Subcommittee, thank you for the opportunity to
1738 testify today. I am Dr. Darius Sivin representing the CWA-
1739 UAW Legislative Alliance. We represent more than 2 million
1740 active and retired workers who are members of the
1741 Communications Workers of America and of the international
1742 union UAW. Both unions represent members who work at
1743 facilities potentially covered by the legislation before us
1744 today. The CWA and the UAW strongly support H.R. 2868, the
1745 Chemical Facility Anti-Terrorism Act of 2009, and H.R. 3258,
1746 the Drinking Water System Security Act of 2009. We urge the
1747 subcommittee and the entire House to grant prompt and
1748 favorable consideration to these two bills. We would not
1749 like to see delay beyond the 1-year reauthorization already
1750 in process. We have heard how enhancing the regulation now
1751 might strand some costs. Additional delay will offer the
1752 opportunity for further costs which will ultimately be sunk
1753 and stranded.

1754 Chemical security is an issue of great importance to
1755 organized labor because our members get hurt first and worst
1756 in case of any attack. CWA and UAW believe that government

1757 should have the authority to require the higher-risk tiers to
1758 implement their own plans to reduce the consequences of an
1759 attack. We have heard examples supposedly of how this would
1760 result in bad solutions being imposed on industries that
1761 would increase risk. We disagree because the language of the
1762 bill clearly says that a solution cannot be imposed unless it
1763 would reduce risk. The only thing that would have to happen
1764 is a facility would have to submit an analysis showing that a
1765 solution would not reduce risk and then they would not have
1766 to implement it.

1767 We are very pleased that members on both sides of the
1768 aisle are concerned about protecting our jobs. Nothing is
1769 more important to the men and the women of the labor movement
1770 than the protection of jobs. We want to make it clear that
1771 we do not believe that anything in the MRC provisions of this
1772 legislation, H.R. 2868, as introduced is a threat to jobs.
1773 There does not need to be any additional requirement for
1774 analysis or administrative law review to protect jobs. We
1775 think that the addition of additional requirements to the
1776 bill as introduced would only make it harder to implement
1777 necessary security measures and would not add any protection
1778 of jobs.

1779 Further, we would like to strongly support Under
1780 Secretary Beers' statement that the size of the risk is not

1781 related to the size of the business. We would like the
1782 subcommittee to move very, very carefully if it seeks to
1783 protect small businesses. For example, using the Small
1784 Business Administration's definition of a small business
1785 could exempt very high-risk facilities including one that
1786 puts 12 million people at risk. We think it is very
1787 important that government be able to give weight to the
1788 degree of the security risk as well as the size of the
1789 security.

1790 We are quite concerned about some of the background
1791 checks because we think they could provide an opportunity for
1792 rare but very real unscrupulous employers to go on fishing
1793 expeditions, and if a fishing expedition is undertaken in the
1794 name of security, it would be very difficult to question it.

1795 We would like to see the following improvements made to
1796 H.R. 2868. First, adverse employment decisions should be
1797 made only pursuant to a determination by DHS that an
1798 individual's offenses could cause the individual to be a
1799 terrorism security risk. Second, employees subject to
1800 adverse employment decisions should be informed of the basis
1801 of the decision and that they have a right to appeal and/or
1802 file for a waiver as provided by H.R. 2868. Third, an
1803 employee subject to an adverse employment decision should
1804 have the option to exercise any rights they have under a

1805 collective bargaining agreement without losing the right to
1806 appeal. We are pleased with the language that supports
1807 participation of employee representatives in both bills. We
1808 would like to see in the water bill the additional thing
1809 whereby employee representatives would have a right to a copy
1810 of the MRC provisions after they are jointly developed, and
1811 we do not believe there should be any additional stipulations
1812 as to how employee representatives should be chosen and we do
1813 not believe employee representatives should be subject to
1814 criminal penalties for disclosing vulnerability information
1815 to those who have a legitimate role in fixing problems.

1816 We think that H.R. 2868 should be amended to give
1817 employees and their representatives the right to accompany an
1818 inspection similar to that which they have under OSHA. We
1819 also believe that to develop public confidence, there needs
1820 to be additional information made available to the public to
1821 allow for government accountability for enforcement.

1822 Finally, I want to reiterate that we support favorable
1823 action on both these bills and we look forward to continuing
1824 to work with the Committee to improve them. Thank you on
1825 behalf of the Communications Workers of America and the
1826 international union UAW.

1827 [The prepared statement of Mr. Sivin follows:]

1828 ***** INSERT 5 *****

|
1829 Mr. {Markey.} Well, thank you so much, and we have time
1830 to get in the final opening statement of our witnesses, Mr.
1831 Poorman, and then we are going to recess again to attend to
1832 the roll calls on the House Floor and we will then return to
1833 complete the session.

1834 So whenever you are ready, please begin.

|
1835 ^STATEMENT OF STEPHEN POORMAN

1836 } Mr. {Poorman.} Good afternoon, Chairman Markey, Ranking
1837 Member Upton, members of the Subcommittee, I am pleased to
1838 testify before you regarding H.R. 2868, the Chemical Facility
1839 Anti-Terrorism Act of 2009.

1840 I speak today on behalf of the Society of Chemical
1841 Manufacturers and Affiliates. SOCMA represents the batch and
1842 custom chemical manufacturing industry. Over 70 percent of
1843 SOCMA's members are small businesses that employ more than
1844 100,000 workers nationwide. From pharmaceuticals to
1845 cosmetics, soaps to plastics and all manner of industrial and
1846 construction products, SOCMA members make materials that save
1847 lives, make our food supply safe and abundant and enable the
1848 manufacture of literally thousands of other products. For
1849 over 88 years SOCMA has partnered with the federal, State and
1850 local governments to protect America's critical
1851 infrastructure.

1852 SOCMA encourages Congress to make the current risk-based
1853 CFATS program permanent, or at least to reauthorize it for
1854 another year. The CFATS program protects our Nation from
1855 terrorist attacks by requiring thousands of chemical
1856 facilities nationwide to deploy hardened security measures.

1857 Our members have spent billions of dollars before and now
1858 under CFATS to secure their facilities and operations.

1859 We support those aspects of H.R. 2868 that would codify
1860 the current CFATS program but we have serious concerns about
1861 two aspects of the bill: the requirement for mandatory
1862 implementation of inherently safer technology and the citizen
1863 suit provision. These provisions are inherently unwise and
1864 potentially counterproductive to our shared goal of
1865 preventing terrorist incidents. They would slow and possibly
1866 undo the progress that industry and DHS have made thus far.

1867 First, inherently safety is not a simple technology or
1868 fix despite what you may hear today. Inherent safety is a
1869 philosophy by which engineers, operations and management work
1870 together to reduce the level of risk that may be associated
1871 with a chemical process lifecycle. Inherent safety analysis
1872 must be conducted very thoughtfully by people who understand
1873 the process. Empowering even well-intentioned regulators to
1874 second-guess the judgments of the engineers who know their
1875 processes best could result in actually increasing or
1876 transferring overall risks. It could also wreak economic
1877 havoc on regulated facilities, especially small businesses.
1878 Makers of active pharmaceutical ingredients and other
1879 federally regulated substances would be most at risk. For
1880 example, one SOGMA member is a small business regulated under

1881 both CFATS and the rules of the Food and Drug Administration.
1882 This company produces an active pharmaceutical ingredient
1883 used in the treatment of life-threatening bacterial
1884 infections. If a mandated safer manufacturing process was
1885 outside the terms of the FDA's approval, the company would
1886 likely be forced to discontinue production, lay off workers
1887 and increase our Nation's vulnerability to grave health
1888 threats. Production of that crucial ingredient would likely
1889 shift to foreign countries where FDA is less able to monitor
1890 quality standards. The world's experts in chemical
1891 engineering have told Congress that there is no consensus
1892 methodology to measure whether one process is inherently
1893 safer than another. For this reason and others, they have
1894 consistently recommended against regulating inherent safety
1895 for security purposes.

1896 Today, the Administration now supports mandating IST for
1897 tier 1 and tier 2 facilities when unspecified key criteria
1898 are met. We acknowledge that DHS officials are sincerely
1899 trying to do their very best under ever-mounting political
1900 pressure but it is imperative for Congress to listen to
1901 chemical engineers and not political scientists. Consistent
1902 with the experts' recommendations, Congress should direct DHS
1903 to submit to a report that explains in detail how DHS intends
1904 to compare various IST alternatives. Such a report should be

1905 developed with broad participation by the expert community
1906 and stakeholders. DHS should be allowed to focus all its
1907 other resources on completing the current CFATS program.

1908 Secondly, we strongly oppose applying environmental laws
1909 citizen suit provisions to security laws. We are concerned
1910 that no matter what protections courts impose, sensitive
1911 security information inevitably will be disclosed and could
1912 be used by terrorists to target a facility and its
1913 surrounding communities. A citizen suit provision will also
1914 divert needed resources from DHS's efforts to finish
1915 implementing and enforcing CFATS. If people believe they see
1916 security weaknesses, they have effective options now such as
1917 calling the CFATS tip line at 1-877-FYI-4DHS.

1918 Again, SOCMA supports permanent risk-based chemical site
1919 security standards and we urge Congress to authorize the
1920 existing CFATS program. I look forward to your questions.

1921 [The prepared statement of Mr. Poorman follows:]

1922 ***** INSERT 6 *****

|

1923 Mr. {Markey.} Great. Thank you so much, Mr. Poorman.

1924 Again, we apologize. We will have to take a recess for-

1925 -why don't we schedule about 15 minutes from now and then we

1926 will come back. I think it will be 15 minutes this time.

1927 The Committee stands in recess.

1928 [Recess.]

1929 Mr. {Markey.} Welcome back, everyone, and we apologize

1930 for having the United States House of Representatives meet

1931 simultaneously with this hearing. It is an unavoidable

1932 conflict that unfortunately is characteristic of my life in

1933 33 years in the institution. It would be so much better if

1934 they would plan their lives around ours rather than the other

1935 way around but like so many other things in life, as William

1936 Shakespeare said, the will is infinite but the execution is

1937 confined. And so we are confined by these roll calls on the

1938 House Floor and we return here to complete the hearing with

1939 our gratitude to the witnesses and to everyone else, the

1940 remaindermen of history who are still sitting out in our

1941 audience and whatever C-SPAN audience we still have left for

1942 this vitally important issue. There is kind of a ``get a

1943 life'' quality to this hearing at this point for anyone who

1944 is still watching and we appreciate the attention which is

1945 being paid for whoever is out there in a non-somnolent state.

1946 So let us turn, let me recognize the ranking member, Mr.
1947 Upton, if he would like to ask his questions at this time.

1948 Mr. {Upton.} Well, thank you, Mr. Chairman. I do have
1949 a number of questions.

1950 First I would like to put a couple of letters into the
1951 record and ask unanimous consent that that happen.

1952 [The information follows:]

1953 ***** COMMITTEE INSERT *****

1954 Mr. {Markey.} Without objection.

1955 Mr. {Upton.} I have a number of questions, and I talked
1956 to a number of members on the Homeland Security Committee
1957 during this last series of votes and I know that they have
1958 marked up their bill earlier this year, and I don't know if
1959 we have a date of when you are thinking about what the next
1960 step is, but the questions that I have do relate to the
1961 economic consideration of these facilities and I accept the
1962 statement that was made on the last panel. Mr. Durbin, in
1963 your read of this bill, what does this do to your membership?
1964 Do we see as some have suggested that a number of companies
1965 will pull up stakes and go someplace else? What is the
1966 economic impact as it relates to jobs? And certainly I want
1967 these jobs to stay here but what is your sense as you have
1968 talked to your members?

1969 Mr. {Durbin.} Well, Mr. Upton, let me take a step back
1970 first and let you know what our member companies have done to
1971 date, you know, because they really looked at the issue of
1972 security at their facilities as their responsibility and a
1973 cost of doing business and to date have already before having
1974 to implement under CFATS have invested \$8 billion to--

1975 Mr. {Upton.} Billion?

1976 Mr. {Durbin.} Billion, to enhance security at their

1977 facilities, and we represent roughly 2,000 facilities around
1978 the country. So these are obviously investments that have
1979 already been made. We do expect that the CFATS program will
1980 require some additional investment. It is kind of hard to
1981 put a number on exactly what that will be. You know, DHS in
1982 some of their earlier testimony have estimated, you know, an
1983 additional \$8 billion across the industry, across all of the
1984 regulated facilities to implement CFATS. But as far as what
1985 additional costs will come about through CFATS or through
1986 this bill, again, many of those investment decisions have
1987 been made, are being made and have been part of the plan.
1988 The extent to which additional requirements might add to
1989 that, I can't say that they won't. I think it certainly is
1990 going to--there will be more resources that will have to be
1991 put into further analysis and potentially further
1992 investments. But again, at this point there is no way of
1993 quantifying, here is what the cost will be or here is how
1994 many facilities will or will not, you know, end up having to
1995 make significant changes or consider not operating anymore.

1996 Mr. {Upton.} Now, Mr. Poorman, you ended your testimony
1997 talking about the citizen lawsuits and the potential for what
1998 is pretty secure information relating to the security of
1999 these facilities to be in fact opened up. Is that right?

2000 Mr. {Poorman.} Yes. The concern that we have is that

2001 the information that is put into DHS through their secure
2002 information systems would be leaked out and could get into
2003 the wrong hands and create situations that obviously would
2004 not be desirable.

2005 Mr. {Upton.} Is any of that information now available
2006 to folks, I mean in terms of security relating to any of
2007 these thousands of facilities that are out there? Is it
2008 pretty difficult to be able to obtain at this point?

2009 Mr. {Poorman.} Yes, it is, and it has been that way
2010 even since when we did other pieces of legislation and
2011 regulatory programs such as RMP. The Justice Department made
2012 sure that that information was protected as well because it
2013 does have a security aspect.

2014 Mr. {Upton.} Dr. Sivin, is the UAW or the Communication
2015 Workers taking a position as it relates to the release of
2016 information as to the secure aspects of those facilities? Do
2017 they have a position on that part of this bill?

2018 Mr. {Sivin.} If you mean facility-specific information
2019 such as that contained in security vulnerability assessments
2020 and site security plans, the only people we favor having
2021 access to that information are those employees and their
2022 representatives who participate in developing those plans.
2023 If you mean other types of government accountability
2024 information such as is a particular facility covered by the

2025 statute and the regulations, in a general sense is it in
2026 compliance, we believe that the public at large needs to have
2027 that kind of information in order to know that all
2028 responsible parties are doing their jobs.

2029 Mr. {Upton.} I know my time is expiring rapidly here
2030 but is it your sense that if this bill were to move forward
2031 ultimately to the President's desk, what impact would it have
2032 on your membership in terms of being able to continue to
2033 operate as they are doing now? Do you think that this in
2034 fact would provide as an incentive for companies to move
2035 someplace else outside of the United States borders?

2036 Mr. {Sivin.} Reading from the language of the bill,
2037 sir, it says that the Secretary of Homeland Security must
2038 show that implementation of methods to reduce the
2039 consequences of a terrorist attack would not significantly
2040 and demonstrably impair the ability of the owner or operator
2041 of the covered chemical facility to continue the business of
2042 the facility at its location. That is to say if a facility
2043 could show that it would have to move from Adrian, Michigan,
2044 to Toledo, Ohio, the Secretary of Homeland Security has no
2045 authority to require implementation and certainly if a
2046 facility could show that it would have to close its doors.
2047 Therefore, I expect zero impact on employment.

2048 Mr. {Upton.} Dr. Durbin, do you accept that?

2049 Mr. {Durbin.} Well, thank you for promoting me to
2050 doctor.

2051 Mr. {Upton.} Oh, I am sorry.

2052 Mr. {Durbin.} That is quite all right. I would just
2053 say that, you know, again, there are provisions in that bill
2054 that we continue to have concerns with that we think would be
2055 more difficult to operate and as I mentioned in my testimony
2056 about the civil lawsuits and the IST provisions. However, we
2057 are eager and anxious to continue working with the committee
2058 to make changes to the bill as it moves forward.

2059 Mr. {Upton.} Thank you. I yield back.

2060 Mr. {Markey.} Great. You didn't just call him Mr.
2061 Chairman by accident, did you? Because the fact that he can
2062 make you a phony doctor can't make him--

2063 Mr. {Upton.} Once the chairman, always the chairman.
2064 Isn't that what it is?

2065 Mr. {Markey.} Let me turn and recognize the gentleman
2066 from Texas, Mr. Green.

2067 Mr. {Green.} Thank you, Mr. Chairman, and I always
2068 heard when I was a State legislator, once a State senator,
2069 always a State senator, but I don't get called that in D.C.
2070 very much, only in Austin.

2071 Mr. Durbin, H.R. 2868, you mentioned in your testimony
2072 has civil suits for an uninjured party, and in my open

2073 statement you may have heard that I have some concern about
2074 that. Would you feel more comfortable if we actually limit
2075 it someone who could show harm, whether it be an employee or
2076 a neighbor, similar or what current law is, you know, someone
2077 who had actually been harmed?

2078 Mr. {Durbin.} Well, I think that is certainly true
2079 that--I think one of the complications you have is being able
2080 to show harm under a security statute as opposed to
2081 environmental statute as we have discussed before, but
2082 certainly finding ways of limiting the applicability is going
2083 to improve that.

2084 Mr. {Green.} Well, and maybe you can comment because I
2085 am familiar with our public's right to know statutes that all
2086 my plants have their committees that they meet with and I
2087 don't have any problem with plants and people who live near
2088 the plants or work there knowing what is going on. I do have
2089 some problem with someone across the world or somewhere else
2090 who really shouldn't be interested in what is going on in a
2091 chemical plant or refinery in my district but the folks who
2092 live there because the security issue. That is why I know
2093 the security issue is something--and we had to deal with that
2094 after 9/11 that we wanted, in fact we crafted legislation to
2095 show that someone living near there had that right but
2096 someone in a cave in Afghanistan looking on the Internet

2097 shouldn't have that capability, and so that is why hopefully
2098 we will be able to deal with that in this bill.

2099 I know sometimes IST is confused as a new concept but
2100 inherently safer technology has been around for many years
2101 and I know most businesses in production or manufacturing use
2102 that. Is the chemical industry opposed to legislation that
2103 requires companies to assess IST?

2104 Mr. {Durbin.} Well, again, I will only speak for ACC.
2105 I think because ACC members are already required to assess
2106 inherent safety in their own operations under the security
2107 code, under the Process Safety Code that existed prior to
2108 9/11, and I would hasten to add that in the State of New
2109 Jersey they require consideration of IST. Our companies
2110 operate there as well. That program frankly has been very
2111 effective that ACC members would be comfortable with a
2112 requirement to consider because again, I would also say we
2113 think that the regulations as they are today, when you are
2114 trying to meet performance-based standards, you are going to
2115 have to consider all the options on the table.

2116 Mr. {Green.} Well, and I know New Jersey, the State
2117 does mandate--the State of New Jersey doesn't have where they
2118 can mandate the IST, they just can mandate the consideration.

2119 Mr. {Durbin.} Correct.

2120 Mr. {Green.} Dr. Sivin, in your testimony, several

2121 recommendations you believe on the importance to approve the
2122 legislation, particularly in the background checks. Can you
2123 elaborate on your suggestion the bill should codify statutory
2124 language that protects individuals who have fully equivalent
2125 federal background checks? And you heard my comments
2126 earlier. If I have a plant that, you know, is under Maritime
2127 and they have the TWIC card, transport worker identification
2128 card, and yet they have a plant that is not covered by that,
2129 would you feel comfortable with the TWIC card or that
2130 background check that the TWIC card should also stand in the
2131 place of what is now CFATS or this legislation?

2132 Mr. {Sivin.} Sir, that is precisely the kind of thing
2133 we were thinking. If someone has already undergone a
2134 background check and has a TWIC card and let us say they are
2135 transferred from the plant with the waterfront to the other
2136 plant, we think since they have already undergone a
2137 background check they shouldn't have to undergo another one
2138 under CFATS. That is exactly the kind of thing we were
2139 thinking of.

2140 Mr. {Green.} I would hope this legislation would give
2141 that guidance to Homeland Security because they are actually
2142 the same agency. I mean, Coast Guard obviously works with
2143 Homeland Security, and like I said, in our district in
2144 Houston after 9/11 if we didn't have Homeland Security

2145 partnering with us with the Port of Houston and our local law
2146 enforcement, federal enforcement and our refinery and
2147 chemical industry, we wouldn't be near as safe as we are
2148 today because there has been great cooperation in East Harris
2149 County on what we try to do, I mean obviously for the folks
2150 who live and work there.

2151 Mr. Ramaley, I have heard concerns from drinking water
2152 systems about unfunded mandates that arise from this bill.
2153 If the State regulatory agency directs a drinking water
2154 system to implement IST, do you feel the legislation provides
2155 enough assistance to water systems to defray the cost of any
2156 of the inherently safer technology requirements?

2157 Mr. {Ramaley.} I think you are asking me if I would
2158 consider the imposition of IST on water and wastewater
2159 utilities an unfunded mandate, and at this stage I am not
2160 aware of programs that would provide money to water utilities
2161 for making technology switches to accommodate chemical
2162 changes and things like that. So yes, it will have some
2163 impact, and I don't believe that there is adequate funding.
2164 I know there is not adequate funding to cover those costs at
2165 some of the Nation's largest drinking water utilities where
2166 those costs would be significant.

2167 Mr. {Green.} And I have shared this concern with a lot
2168 of other folks. You know, I have part of the city of

2169 Houston, which is a huge water supplier, but I also have very
2170 small water suppliers, some of my smaller communities, and
2171 the city of Houston may be able to do some of the things but
2172 some of my smaller suppliers can't do it because their tax
2173 base is not near as large as the city of Houston.

2174 In your testimony you mentioned the EPA should be the
2175 lead agency for chemical security on both drinking water and
2176 wastewater, and you know the two pieces before us today place
2177 drinking water systems under EPA and wastewater systems under
2178 DHS. How many facilities nationwide have joint drinking and
2179 wastewater systems and what kind of regulatory burden would
2180 arise if these facilities were shifted to two different
2181 security regimens?

2182 Mr. {Ramaley.} I can't give you a precise number but I
2183 can tell you that many municipalities around America operate
2184 both a water and the wastewater facilities. My guess would
2185 be tens of thousands.

2186 Mr. {Green.} And I know in my area everyone who has--
2187 you know, we may have a freshwater district that may not have
2188 wastewater but the municipalities all do it themselves.

2189 Mr. {Ramaley.} Many of the very large and countless
2190 small cities and towns have both water and wastewater
2191 operations. What was the second part of your question?

2192 Mr. {Green.} Well, what regulatory burden would arise

2193 with these facilities being subject to two different security
2194 regimens, you know, what EPA may require as compared to the
2195 Department of Homeland Security?

2196 Mr. {Ramaley.} In those situations where you have
2197 utilities, municipal utilities in particular, that are both
2198 responsible for both facilities, you would have to have staff
2199 trained in both sets of procedures. There are other
2200 complicating factors as well. For example, the Information
2201 Sharing and Analysis Center that both water and wastewater
2202 facilities depend on for security information would have to
2203 be up to speed in both the DHS and EPA requirements to
2204 provide that information because that is shared and accessed
2205 by both water and wastewater systems. So there is a number
2206 of complicating factors--personnel training, investments,
2207 different procedures. There is quite a few complications.

2208 Mr. {Green.} Mr. Chairman, I know you have been
2209 patient, and thank you.

2210 Mr. {Markey.} I thank the gentleman very much, and the
2211 Chair will recognize himself for some questions.

2212 And I will just begin by pointing out that on page 40 of
2213 the bill in dealing with the handling of sensitive
2214 information in judicial proceedings that on page 40 it says
2215 ``in a proceeding under this title, protected information
2216 described in subsection G or related vulnerability or

2217 security information shall be treated in any judicial or
2218 administrative action in a manner consistent with the
2219 treatment of sensitive security information under section 525
2220 of the Department of Homeland Security Appropriations Act of
2221 2007,' in other words, those protections that in 2006 were
2222 put in by the Republican Congress and signed by George Bush.
2223 So the provision actually states that that should be the
2224 standard and I think that was a good standard that we agreed
2225 upon in a bipartisan fashion back then, and I just wanted to
2226 make sure that everyone understood that those safeguards will
2227 still be in place because there is a little bit of confusion
2228 on that.

2229 I would also add that we just talked about funds for
2230 implementing IST, and on page 36 of the legislation we
2231 authorized \$125 million for the EPA to be able to ensure that
2232 there are grants to water systems to assist them with cost as
2233 well as more funds for other costs of compliance, so I just
2234 want to make sure that everyone understands that is also in
2235 the legislation.

2236 Mr. Ramaley?

2237 Mr. {Ramaley.} Yes, I would just comment, \$125 million
2238 spread over the Nation's largest water and wastewater utility
2239 systems in my opinion would not go very far, but I appreciate
2240 that information.

2241 Mr. {Markey.} Well, you know, we have looked at the
2242 question. We think that can do the job. And so that is our
2243 perspective on it. But we can continue to talk about this in
2244 terms of what the proper funding is.

2245 As you know, I have been a longstanding advocate for the
2246 use of inherently safer technologies. I have spent the last
2247 5 years attempting to ensure that comprehensive chemical
2248 security legislation includes language that reduces the
2249 consequences of terrorist attacks by requiring facilities to
2250 switch to safer chemicals or processes when it is
2251 economically and technologically possible for them to do so,
2252 and I met many of you during my 6 years on the Homeland
2253 Security Committee making the amendments on IST and making
2254 the amendments on water safety and all of down the line so we
2255 have a long relationship at this point since 9/11 with my
2256 membership on the Homeland Security Committee. So I would
2257 like to thank all of you for being here and for your
2258 colleague, Judah Prero, for all of your work and efforts on
2259 trying to narrow differences and to come up with potential
2260 solutions, and I want to continue to work with you towards
2261 that goal.

2262 First of all, isn't it true that all ACC companies are
2263 required to assess already whether they could utilize safer
2264 chemicals or processes under your Responsible Care Code and

2265 that the American Chemical Council therefore is supportive of
2266 including that requirement in the legislation?

2267 Mr. {Durbin.} Mr. Chairman, first of all, let me also
2268 acknowledge what a great discussion we have had with your
2269 staff as well and I think we have been able to make some real
2270 progress trying to find some common ground but as I was
2271 saying to Mr. Green as well, yes, within the ACC security
2272 code, member companies do have to analyze inherent safety as
2273 they are doing vulnerability assessments and putting their
2274 plans together, and also in the State of New Jersey are
2275 operating under where they are required to consider IST and
2276 that program is considered to be working very effectively and
2277 the State of New Jersey I think will tell you the same. So
2278 yes, our membership at this point is comfortable with the
2279 idea of mandatory consideration of IST as we are already
2280 doing.

2281 Mr. {Markey.} Thank you. The Department of Homeland
2282 Security puts facilities into different risk-based tiers
2283 based on the type of risk the chemicals at the facilities
2284 pose. If the chemicals are highly toxic and the facility is
2285 located in a densely populated area, the facility would be
2286 tiered because an attack to cause the release of those
2287 chemicals might be the greatest risk. If the chemicals are
2288 highly toxic but the facility isn't located near any

2289 residential community, the facility would be tiered because a
2290 terrorist would be more likely to steal those chemicals and
2291 blow them up somewhere else. Do you think that we should be
2292 looking at the type of risk that facilities pose as we
2293 consider which facilities should be subject to authority to
2294 mandate the use of safer chemicals or processes, Mr. Durbin?

2295 Mr. {Durbin.} Yes, in general, ACC members would
2296 clearly say that risk should always be used to help determine
2297 the priority levels of which facilities should be taking
2298 which actions.

2299 Mr. {Markey.} Do you agree with that, Mr. Poorman?

2300 Mr. {Poorman.} Yes, we do agree with that.

2301 Mr. {Markey.} Dr. Sivin?

2302 Mr. {Sivin.} Yes.

2303 Mr. {Markey.} And Mr. Ramaley?

2304 Mr. {Ramaley.} Yes.

2305 Mr. {Markey.} Great. Thank you. So I think it makes a
2306 lot of sense to look at risk obviously, and that will help us
2307 then to obviously put different facilities in the correct
2308 tiers. Do you think that limiting the authority to mandate
2309 the use of safer chemicals or processes to the tier 1 and 2
2310 facilities that have been deemed by DHS to pose a risk of a
2311 chemical release might be a more targeted way for Congress to
2312 proceed, Mr. Durbin?

2313 Mr. {Durbin.} Well, again, as the Administration has
2314 now made very clear that they are going to--you know, they
2315 have taken a position in favor of having some limited IST
2316 mandate on implementation, we certainly want to continue to
2317 be part of the discussion on how best to do that so yes, by
2318 limiting it in that way that would certainly be a more
2319 focused way of getting to that solution.

2320 Mr. {Markey.} And we want to work with you and all the
2321 other parties here to make sure that we accomplish that goal.

2322 During the Homeland Security Committee markup, an
2323 amendment was offered that would allow a facility to appeal
2324 to an administrative law judge if it felt that the Department
2325 of Homeland Security's initial IST determination was
2326 inaccurate. It seems to me that given the highly technical
2327 nature of the safer processes and chemicals involved that a
2328 more suitable appeal might be more scientific in nature.
2329 Would you like to talk about that, Mr. Durbin?

2330 Mr. {Durbin.} Certainly, and I think again, as our
2331 members look at this issue, as I said, we are very
2332 comfortable with the idea of mandatory consideration. Going
2333 further than that, one of the concerns that we have expressed
2334 with regard to the provisions in the bill was the lack of a
2335 robust appeals process if there were a determination. So by
2336 adding one, I think that is helpful and I would certainly

2337 agree that having folks who are technically proficient in the
2338 technologies available here and the chemical engineering and
2339 the process safety and health and what have you is going to
2340 be a more appropriate way of handling that.

2341 Mr. {Markey.} Thank you. I appreciate that. You know,
2342 I remember in my first year of college there were 200 of us
2343 in pre-law and then you had the 200 over there in theology
2344 and philosophy and then you had the 200 kids who were going
2345 to be doctors, so it was 200, 200, 200. And then they had
2346 organic chemistry freshman year for those future doctors and
2347 then sophomore year we had 300 people in pre-law, and then
2348 when the additional chemistry and other courses were given
2349 they kept building the number of lawyers, and while I am one
2350 of those people who became history and political science
2351 majors, our technical capacities are more limited, let us
2352 say, than those people who stayed the course. So I think it
2353 would be helpful for us to find a way to have scientific
2354 determinations be made even on appeal that reflect scientists
2355 making these evaluations so that we don't wind up having some
2356 court process where, with all due respect to myself and any
2357 others in this room that might be offended by my comments,
2358 making the determinations. So we thank you for that.

2359 I tell you what I am going to do. Let us give each 1
2360 minute to summarize to us what you would like the committee

2361 to remember as we are moving forward on the creation of this
2362 legislation just so that we have got your kind of summary
2363 statements in our brain. So we will begin with you, Mr.
2364 Poorman.

2365 Mr. {Poorman.} Thank you once again for allowing us to
2366 be here today. Really, the summary would be that we really
2367 would like to see the CFATS program extended. A lot of good
2368 work has been done. We want to continue that good work. In
2369 regards to the IST issue, we want to just be cognizant of the
2370 myriad of programs that we are subject to. Our membership in
2371 particular, we have a lot of different chemical processes
2372 represented there, and when we make our material, we are
2373 making it under registration of different agencies, and if we
2374 are asked by DHS to discontinue the use of a chemical
2375 compound, it could have ripple effects that could reach out
2376 into even consumer safety where certain active ingredients
2377 for drugs won't be available. So we want you to keep that in
2378 mind, and also make sure that as you said, we agree that
2379 there needs to be really a technical review and we feel our
2380 people, our engineers, our chemists are best qualified to
2381 determine that per process.

2382 Mr. {Sivin.} In my summary I would like to point out
2383 again that the only thing that the bill authorizes the
2384 Department of Homeland Security to require implementation of

2385 is a facility's own plan. I cannot imagine that some of the
2386 examples we have heard today, a plan that would violate the
2387 FDA or a plan that would actually make the facility more
2388 dangerous would ever be in a facility's plan. I would like
2389 to reemphasize that we do not believe that the ability to
2390 mandate this because of the language that already exists in
2391 the bill is a threat to jobs. I also would like to emphasize
2392 that we are concerned about the background-check language in
2393 the bill and we do believe it needs to be improved to provide
2394 adequate protection against unfair adverse employment
2395 decisions. And finally, I want to emphasize that I think
2396 that certain parts of the employee participation need to be
2397 enhanced.

2398 Mr. {Markey.} Thank you, Doctor, very much.

2399 Mr. Durbin.

2400 Mr. {Durbin.} Thank you, Mr. Chairman. At its core I
2401 think ACC members firmly believe that the CFATS program that
2402 is in place now is a very solid foundation, a good program,
2403 and we want to make sure we can continue the success of that
2404 program and are our committed to working constructively with
2405 you on finding areas that may need improvement. Again, with
2406 regard to the IST provisions in here, our members continue to
2407 have concerns about that but we are willing and eager to
2408 continue working with you and the Committee on those issues,

2409 and as I mentioned in my testimony, we as well continue to
2410 have concerns on the civil lawsuit provisions, but again, I
2411 think there is much more common ground here than there are
2412 differences to help us get to the objective of protecting
2413 these facilities.

2414 Mr. {Markey.} Thank you very much.

2415 And you have the final word, Mr. Ramaley.

2416 Mr. {Ramaley.} Yes. First of all, I appreciate the
2417 working relationship between AMWA and the Committee staff in
2418 developing the legislation. As you know AMWA supports 3258.
2419 A few points. We believe EPA should continue its oversight
2420 of the drinking water sector and our exemption from DHS's
2421 CFATS and IST programs must continue. We also believe that
2422 wastewater should be included under EPA as we testified. We
2423 think that security information resulting from vulnerability
2424 assessments and gathered information must be protected and
2425 must be strongly protected against public disclosure. We
2426 believe the bill now does that. And maintaining the current
2427 criminal penalties is important and we do look forward to
2428 working with EPA to formulate the appropriate standards for
2429 the sharing of that information as needed. Thank you.

2430 Mr. {Markey.} Thank you, Mr. Ramaley, and we thank each
2431 of you for working with the committee thus far and again we
2432 would like to keep a close working relationship with you and

2433 work with the minority as well on these issues. It has been
2434 8 years since al-Qaeda attacked and obviously I am very
2435 sensitive to it because Mohamed Atta and the other nine were
2436 right there in Boston in my district preparing for that
2437 attack. And in 2000, I will be honest with you, Abdul Ghani
2438 Misqini, who was one of the millennium bombing plotters for
2439 the LAX, he came in from Algeria off of an LNG tank and just
2440 jumped off in Everett, Massachusetts, as did other al-Qaeda
2441 into the United States into my district, and that was an LNG
2442 facility that was unprotected. Now, they had a different
2443 plan and it involved the L.A. airport and thank God that they
2444 were apprehended before that happened but I am very sensitive
2445 to that huge LNG facility, to the port, to Boston, to what
2446 happened and to my constituents who were on those planes and
2447 who actually were working in New York City at the time. So
2448 it is something that I focused on very closely and why I
2449 asked the Speaker to put me on the Homeland Security
2450 Committee so I could make sure that we did in protections
2451 that nuclear weapons could not be put on ships that could
2452 then be detonated in the harbor of Boston but any harbor in
2453 the United States, that we screen for cargo on planes that we
2454 weren't screening. We were screening the shoes that people
2455 wore and the computers that they were putting through but not
2456 the cargo that went under their feet of passengers who

2457 weren't even on the plane, and chemical security into this as
2458 does water security. We know they are out there. We know
2459 they want to hit. We know that they would in fact implement
2460 their plan if somehow or other they could get through our
2461 outer security perimeters overseas and here, and so we must
2462 balance because the impact, for example, just on Boston alone
2463 of that successful attack was, we had a 27 percent reduction
2464 in air travel out of Boston for 3 or 4 years. That kills
2465 jobs. That kills the economy. That alters people's lives so
2466 they cannot be successful. So we have to find a formula here
2467 that works. And by the way, airports across the country
2468 might have gone down an average of 10 percent just as a
2469 derivative of what happened in Boston and in New York City
2470 and down here in Washington on September 11. But all of it
2471 was profound in terms of its economic impact.

2472 So we have to make sure that they are not allowed to
2473 successfully implement a terrorist attack because that is
2474 what terror does. It scares people. They don't fly, they
2475 don't move, they don't buy things, and everyone suffers as a
2476 result. And we know that chemical facilities are on their
2477 list. We just have enough security information to be well
2478 aware that they are very near the very top of the al-Qaeda
2479 terrorist target list. And so our responsibilities are
2480 great, and we must make sure that especially in urban areas

2481 where these chemical facilities, where these water facilities
2482 might be located, you know, if we could all do it again we
2483 would not put them right there in the middle of downtown
2484 Boston right on the harbor and other cities across the United
2485 States. We would make those beaches or waterfront parks if
2486 we could do it all over again, but we didn't do it that way.
2487 They are there. They are in densely populated areas. We
2488 have to deal with it realistically, try to put together a
2489 formula that works, doesn't hurt industry and comes up with
2490 something that does protect the American people. That is our
2491 goal.

2492 We very much enjoyed working with all of you so far and
2493 we look forward to the relationship. With that, this hearing
2494 is adjourned. Thank you.

2495 [Whereupon, at 2:00 p.m., the Subcommittee was
2496 adjourned.]