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ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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August 10, 2007

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The Honorable Paul A. Schneider
Under Secretary for Management
U.S. Department of Homeland Security
Washington, D.C. 20528

Dear Under Secretary Schneider:

The Committee on Energy and Commerce has had a multi-year investigation of the Department of Homeland Security's (DHS) ability prevent the smuggling of nuclear materials or weapons of mass destruction into the United States. This effort has included numerous hearings by the Subcommittee on Oversight and Investigations, field visits to both domestic and foreign ports, and numerous discussions with key officials from DHS, the Department of Energy (DOE), the Defense Threat Reduction Agency (DTRA), and a number of DOE National Labs.

As part of DHS's efforts to combat the threat of radiological or nuclear attack, its Domestic Nuclear Detection Office (DNDO) contracted for development of the next generation of radiation portal monitors. Earlier this year, DNDO conducted tests that compared the effectiveness of the existing Polyvinyl Toluene (PVT) radiation portal monitors with Advanced Spectroscopic Portals (ASPs). Such tests were critical since it is claimed by some experts that ASPs are better than PVTs in speeding the flow of cargo through ports by distinguishing between materials containing naturally occurring radioactive material, such as kitty litter, from dangerous materials such as highly enriched uranium.

On January 19, 2007, we requested a Government Accountability Office (GAO) evaluation of DNDO tests to determine whether ASPs are as effective as PVTs for detecting radioactive materials that may be hidden in commerce. This follow-on review was prompted by GAO's October 17, 2006, report, "Combating Nuclear Smuggling: DHS's Cost-Benefit Analysis to Support the Purchase of New Radiation Detection Portal Monitors Was Not Based on Available Performance Data and Did Not Fully Evaluate All of the Monitors' Costs and Benefits," which found that DNDO's cost-benefit analysis to purchase and deploy ASPs was not based on a sound analytical basis, and that DNDO's conclusions were based more on aspirational goals than actual performance.

We were therefore surprised to learn that just as GAO's current review was nearing completion, DHS announced that it is obtaining a separate and apparently redundant review by DTRA of these tests. On August 2, 2007, DHS issued a "terms of reference" memorandum for this review, which states:

"The purpose of this review is to provide the Secretary of Homeland Security an independent assessment of the demonstrated performance of the ASP as one additional input to the decision making process that will ultimately lead to the required congressional certification and procure production decision."

It is important to note that due to Congress's continued concerns about DHS's management of this critical program, before any funds can be obligated by DNDO for the full-scale development of ASPs, the fiscal year 2007 Homeland Security Appropriations Act (P.L. 109-295) requires DNDO to submit a certification that "a significant increase in operational effectiveness will be achieved." In that regard, the "terms of reference" memorandum requires DTRA to deliver its assessment on September 17, 2007, which is three days prior to the date that DHS has indicated that it will be transmitting a certification to the House and Senate Committees on Appropriations.

By its own terms, the outcome of this new DTRA review would appear to be steered towards a certification to Congress and a subsequent procurement estimated at up to \$1.2 billion. DHS's review does not appear to be an audit, or a peer review. The time allowed for it appears to be woefully inadequate to assess such complicated testing. In addition, although this review is advertised as "independent," this conclusion may be premature. The review team has not been selected, and their potential conflicts of interest have not been assessed or disclosed. Moreover, the "terms of reference" memorandum states "The Under Secretary will provide supplemental subject matter expertise as requested by the Team Leader."¹ If the DHS Under Secretary is providing some of the subject matter expertise, how can independence be fully assured?

In light of this action by DHS in creating the DTRA review panel, the Committee on Energy and Commerce feels obligated to conduct a full and complete review of the methods, protocols, and validity of DTRA's review including requesting GAO to immediately embark upon another analysis of DNDO's actions in this matter. We strongly encourage DNDO staff and the DTRA review team to provide GAO with full transparency and cooperation.

At an August 2, 2007, meeting with the Committee on Energy and Commerce staff, you stated that you had recommended an "independent review" after you received a leaked draft of a letter from the House and Senate Homeland Security Committees that asked for DNDO to withhold submitting its certification to Congress until GAO had completed its evaluation. At that meeting, you refused to tell our staff how you obtained that draft letter and refused to deny it was purloined.

¹ The Team Leader will be DTRA's Deputy Director for Research, George P. Nanos.

At that meeting, you also asserted that in your “professional judgment,” GAO lacks the qualifications to carry out an evaluation. When questioned, you provided no specifics to justify why you feel GAO is unqualified to carry out this review. This is troubling.

GAO expects to provide its draft product to DHS for comment within approximately two weeks. This last minute effort to seek a separate agency-sponsored review appears to be an effort by DHS to insulate itself from GAO’s potentially critical findings regarding the adequacy of ASP testing. On its face, it would appear such efforts are nothing other than an attempt to lessen the impact of potentially bad news from the GAO report by doing an “end run” with a hastily planned and initiated “independent review” by DTRA, another Federal agency, which apparently has strong professional and financial links to DNDO and DHS.

Unlike the new DTRA/DHS review, GAO has not pre-judged the outcome of its assessment before it started. In addition, due to its lack of organizational or individual conflicts of interest, we feel that GAO, a trusted advisor to Congress for nearly a century, will be able to give an independent, unbiased, and objective opinion, removed from personal or financial ties to DHS.

In addition, we must note that the Committee was disappointed that you chose to prematurely end the August 2, 2007, meeting with our staff after a mere 20 minutes, despite the numerous questions that were left unanswered about the DHS-commissioned review. Your abrupt departure necessitates this current request for additional information, as well as written responses to the following questions within a week of receipt of this letter.

Accordingly, under Rules X and XI of the Rules of the House of Representatives, the Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations request the following documents:

- 1) Please provide a copy of the protocols being used by DTRA to conduct this review.
- 2) Does DHS intend to conduct further testing of ASP performance with various threat and masking materials prior to certification? Does it intend to conduct further testing after the certification?
- 3) Is it DNDO’s recommendation that ASPs be used in primary screening or as a secondary screening device?
- 4) Please provide a list of the DTRA review team members, their organizational affiliations, their qualifications, and copies of their completed conflict of interest (COI) and financial disclosure forms. What are the specific criteria to be used in assessing COI? Who is developing these criteria? Please provide their names and titles. Who is conducting the COI reviews?
- 5) How is the DTRA review team’s work being funded? Is this funded by DTRA, or will DHS be reimbursing DTRA? Please provide the interagency agreement between

DTRA and DHS that covers the costs of this review. What is the estimated cost of this review?

- 6) The “terms of reference” memorandum indicates that two vendors’ ASPs have been deployed so far. Please identify which vendor’s ASPs have been deployed. Which vendor’s ASPs have not been deployed?
- 7) The “terms of reference” memorandum indicates there is a “Developed Cost Benefit Analysis,” which evaluates the probability of successfully detecting and identifying radiation and nuclear threats, and a comparison between ASP and PVT detection systems. Please provide a copy of the Cost Benefit Analysis.
- 8) Please provide a copy of all records between DNDO and DTRA regarding the review of ASPs as of the date of this letter.
- 9) Please provide copies of all drafts of the “terms of reference” memorandum.
- 10) Please provide the basis for concluding that GAO is not qualified to review the performance of ASPs or DNDO’s tests. Please provide all internal communications regarding DNDO or DHS’s concerns about the GAO review.
- 11) Please provide the name of the individual who provided DHS with a copy of the draft letter prepared by the Homeland Security Committee and the date you received it.
- 12) In explaining your credentials, you indicated that you had worked as a defense and aerospace consultant. This included work on the Coast Guard’s Deepwater program. Please provide a copy of your consulting agreement, all reports and deliverables related to your contract with the Coast Guard/DHS, and records of any and all payments received by you pursuant to that contract.

If you have any questions, please contact us, or have your staff contact John F. Sopko, Chief Counsel for Oversight and Investigations, at (202) 226-2424.

Sincerely,



John D. Dingell
Chairman



Bart Stupak
Chairman
Subcommittee on Oversight and Investigations

The Honorable Paul A. Schneider
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cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Ed Whitfield, Ranking Member
Subcommittee on Oversight and Investigations

Vayl Oxford, Director
Domestic Nuclear Detection Office

George P. Nanos, Associate Director, Research and Development Enterprise
Defense Threat Reduction Agency

The Honorable Bennie G. Thompson, Chairman
Committee on Homeland Security

The Honorable Peter T. King, Ranking Member
Committee on Homeland Security

The Honorable David E. Price, Chairman
Subcommittee on Homeland Security
Committee on Appropriations

The Honorable Harold Rogers, Ranking Member
Subcommittee on Homeland Security
Committee on Appropriations

The Honorable Joseph I. Lieberman, Chairman
Senate Committee on Homeland Security and Governmental Affairs

The Honorable Susan Collins, Ranking Member
Senate Committee on Homeland Security and Governmental Affairs

Congress of the United States
House of Representatives
Washington, D.C. 20515

January 19, 2007

Mr. Vayl Oxford
Director
Domestic Nuclear Detection Office
U.S. Department of Homeland Security
245 Murray Lane, SW
Washington, D.C. 20528-0300

Dear Mr. Oxford:

The Committee on Energy and Commerce has had an ongoing investigation regarding the efforts of the Department of Homeland Security (DHS) to target and inspect sea cargo containers bound for the United States from foreign ports in order to prevent possible smuggling of weapons of mass destruction. This effort has included numerous hearings by the Subcommittee on Oversight and Investigations, field visits to both domestic and foreign ports, and numerous discussions with key officials from DHS, the Department of Energy (DOE), the Defense Threat Reduction Agency, and a number of DOE national laboratories. We are writing to obtain from you information regarding the efforts of the Domestic Nuclear Detection Office (DNDO) to test and deploy nuclear detection technologies.

Since the attacks of September 11, 2001, efforts have been undertaken worldwide to secure the Nation from the threat of nuclear or radiological attack. These multifaceted efforts involve a number of key agencies and programs. On April 15, 2005, President Bush established DNDO under the Department of Homeland Security. DNDO shares responsibility for testing, selecting, and deploying nuclear detection technologies, working in conjunction with the Departments of Energy, State, and Defense, agencies that have been implementing their own programs to combat nuclear smuggling. As part of the mission at DNDO, the agency sponsors research and testing of an array of capabilities for both current generation (deployed) as well as future generation radiation portal technology. Much of this testing was conducted at the Nevada Test Site over the past 18 months.

On October 17, 2006, the Government Accountability Office (GAO) issued a report entitled "Combating Nuclear Smuggling: DHS's Cost-Benefit Analysis to Support the Purchase of New Radiation Detection Portal Monitors Was Not Based on Available Performance Data and Did Not Fully Evaluate All the Monitors' Costs and Benefits." In summary, GAO's report found that DNDO's cost-benefit analysis did not provide a sound analytical basis for DNDO's decision to purchase and deploy new radiation portal technology. Moreover, the report noted that DNDO did not use the results of its own performance tests, conducted at the Nevada Test Site, in its

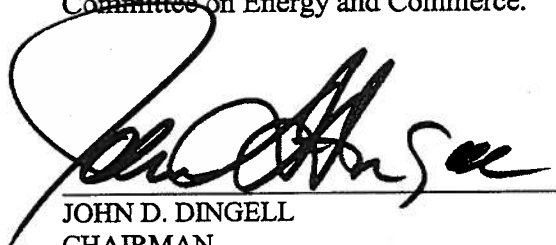
Mr. Vayl Oxford

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costs-benefit analysis and instead relied on assumptions of the new portals expected performance capability. Finally, GAO found that DNDO did not perform certain tests that were key to selecting portals that could mitigate against an array of potential dangerous radiological or nuclear materials. Given that Committee staff has had numerous discussions with key DHS staff regarding the scope of testing at the Nevada Test site, it is somewhat surprising that certain key tests were ultimately not pursued.


As this Committee continues to examine the issues relating to securing and detecting nuclear materials throughout the world, and given the ongoing legislative activities related to this matter, we ask that you respond to the attached list of questions by no later than close of business on Friday, February 16, 2007. Furthermore, we are forwarding this letter to the GAO Comptroller General as a formal request to continue its audit of both the testing, deployment, and the selection of equipment by DNDO for this effort. We intend to separately discuss with GAO additional language to define both the scope and direction of this future work, and we ask that your staff work with the staff from GAO as they conduct this review.

If you have any additional questions, please have your staff contact Christopher Knauer of the Majority staff (202/225-2927) or Dwight Cates of the Minority staff (202/225-3641) of the Committee on Energy and Commerce.




JOHN D. DINGELL
CHAIRMAN
COMMITTEE ON ENERGY AND COMMERCE


Sincerely,



JOE BARTON
RANKING MEMBER
COMMITTEE ON ENERGY AND COMMERCE



BART STUPAK
CHAIRMAN
SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS



ED WHITFIELD
RANKING MEMBER
SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS

Attachment

cc: The Honorable David M. Walker
Comptroller General
U.S. Government Accountability Office

Attachment to letter of January 19, 2007

Questions for Mr. Vayl Oxford, Director, Domestic Nuclear Detection Office
U.S. Department of Homeland Security
from Reps. Dingell, Barton, Stupak, and Whitfield

1. It is our understanding that additional tests involving portal technology are scheduled to occur at the Nevada Test Site. If so, please indicate what types of equipment will be tested and what these additional tests are designed to accomplish with respect to the selection and purchasing of nuclear portal technology.
2. A primary reason for the Nevada Test site tests was to determine the validity of "Energy Windowing," that could be applied to certain technology. Please indicate why the previous tests at the Nevada Test Site did not formally assess this technology and whether any new testing is designed to do so.
3. Please indicate whether DNDO has definitive data which can determine whether existing "plastic scintillators (PVTs)" are more or less capable of detecting radiological or nuclear materials than the proposed "advanced spectroscopic portal monitors (ASPs)." If DNDO does have such data, please include this data in your response.
4. The audit by the Government Accountability Office (GAO) revealed that although DNDO tested the performance of PVTs, along with the ASPs, it did not use the results of these tests in its cost-benefit analysis used to select the new generation of portals. Please explain why DNDO did not use the results of these tests in its selection process for choosing new technology.
5. It is our understanding that ASPs will be placed in "secondary" inspection locations at certain U.S. seaports including ports designated under the Department of Energy's "Megaports Initiative." If so, please provide the full methodology both DHS and DOE will use to not only gather data, but also assess the capability of such equipment while deployed in such settings. Please indicate how certain ports will be selected to receive any new ASP technology for testing.