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Testimony of
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Subcommittee on Transportation Security and Infrastructure Protection
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Chemical Security – A Rising Concern for America: Examination of the Department's Chemical Security Regulations and its Effect on the Public and Private Sector

Honorable Bennie Thompson and Members of the Committee, the United Steelworkers (USW) appreciates the opportunity to appear before the U.S. House Committee on Homeland Security and the Subcommittee on Transportation Security and Infrastructure Protection. My name is John Alexander; I am a health and safety specialist for the USW's Health, Safety and Environment Department at our international headquarters in Pittsburgh, PA.

The testimony I present today is to examine the Department of Homeland Security's (DHS) chemical security regulations and its effect on the public and private sector.

The full name of our union is the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO.CLC, but we have a short name more common in use, which is the USW. As the largest industrial union in North America, we represent a total of 850,000 active workers employed all across North America. The USW represents approximately 50,000 workers in chemical plants, oil refineries and other workplaces that produce, use or store significant quantities of highly hazardous chemicals. However, using the DHS definition that specifically applies to chemical facilities, the USW represented workers exceeds the 50,000 figure by tens of thousands.

We have a keen interest in effective standards protecting our members, their families, and the general public. Along with other organizations, we worked hard for effective legislation in the last Congress and we continue that work. The provisions attached to the DHS appropriations bill late last year did not meet all our objectives, but it did provide a useful starting point. Unfortunately, the USW continues to have grave concerns on how some of the issues are being addressed. Some of the current proposals will do little to enhance the security of chemical facilities or the safety of workers and the public. We will summarize our comments below, and deal with each in more detail in a subsequent section.

Comment 1: Worker Involvement

Summary -- *The current proposals do not provide for involvement by workers or their labor representatives, in contrast with other similar regulations also aimed at public safety. We believe that such involvement is essential to chemical plant security.*

The recent Chemical Facility Anti-Terrorism Standards-Proposed Rule lacked requirements for employee and union representative's involvement as does 6 CFR part 27.

For example:

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

In other rules, such as OSHA's General Industries Standards (29 CFR 1910), the government encourages employee and employee representatives to be present during their site visits. To not involve some of the most informed employees and representatives is not to utilize one of the best assets to the adoption of a successful program. Workers are in a unique position to identify and prevent potential facility vulnerabilities. They understand just where an intruder might enter a plant; whether or not security guards are doing their job; the location of volatile materials; whether the facility is sufficiently staffed with trained personnel; if backup control systems properly operate; as well as other potential risks. Because of their concerns about workplace safety and health, they routinely point out hazards to management. Workers also are often required to respond during emergencies, and in doing so, function as both the first and last line of defense against a disaster. Workers and their unions can be vital participants in plant safety and security. To be fully effective, worker participation must be supported by strong whistleblower protection.

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

Comment 2: Top Screen Process

Summary *-- Top Screen Process required by facilities containing certain amounts of chemicals is out of line. High level of Risk is not properly defined. Leaving the definition to the discretion of anyone or any agency with no specified parameters leaves open the possibility of misinterpretation of the Department's intent, and could create difficulties and inconsistencies in application of the rule.*

The Top Screen process is a process that will provide information to the DHS in order to make the determination at what level of security risk the facility will be designated.

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

In 6 CFR part 27 Appendix A, a list determining the amounts of chemicals located at a facility will determine whether the facility will be required to perform a Top Screen.

More than a hundred of those chemicals are listed at any amount of possession. We believe many of these chemicals are listed at unreasonably low amounts. Having many of these chemicals on site at such low amounts would in no way place a site at a high risk level. By requiring all of such facilities to perform a Top Screen would present two major problems. First, it is inappropriate to require a facility to perform a Top Screen just because it has any amount of some of the chemicals listed. This will place an unjust burden on facilities that would never be considered a target. Secondly, the inordinate number of facilities that would be sending their Top Screen to the DHS would over-burden the department requiring them to address and reply to those facilities informing them that they are at the no risk tier of the tiering system. The DHS could well better spend their time ensuring that High Risk Level facilities are addressing their security issues.

The problem presented with the determination of High Risk Level is that it is up to the DHS to make that decision. Better parameters or a specific definition would better serve the DHS.

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

Comment 3: Risk Assessment and Risk Based Tiering

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

The proposal states:

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

But then**:**

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

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

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

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

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

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

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

6 CFR Sec 27.105

The Department shall place covered facilities in one of four risk-based tiers, ranging from highest risk facilities in Tier 1 to lowest risk facilities in Tier 4.

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

6 CFR Sec. 27.230 now identifies the steps a High Risk facility will be required to perform. None of those listed are items that a Low Risk facility shouldn't perform.

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

An attempt to delineate what items should be performed for four categories is an exercise in futility. That is not to mention a quagmire for the DHS for enforcement and an undue burden on the facilities.

Comment 4: Safer Technology

Summary -- *Safer Technology, there is no requirement or suggestion to apply inherently safer technology and or changes to the process to lower the risk of a facility. This lack is perhaps the greatest defect in the regulation.*

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

Safer Technologies include but are not limited to changes in the process that would reduce the possibility or likelihood of an attack turning into a major catastrophe. Yet, nowhere in the standard is this even addressed. If in fact, we are attempting to reduce the likelihood of an attack of a chemical facility or the effects thereof, then it is unconscionable that inherently safer technology goes unaddressed in this legislation.

Comment 5: Other Missing Provisions

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

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

Comment 6: Background Checks

Summary -- *Background checks, although there is some justification for background checks for new hires, background checks for current workers are unlikely to identify potential terrorists, and could create opportunities for discrimination.*

The DHS proposes:

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

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

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

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

On 4-24-07, I was assigned to investigate a fatality of one of our members that took place at a Power Plant. The company refused entry based on the "New DHS regulations". After hours of discussion, I was able to persuade the company to allow entry. We already are being denied access that is protected by the National Labor Relations Act simply because the DHS refused to address that the DHS regulation would not interfere with rights guaranteed by previous legislation.

These entries are protected by other federal laws which 550 says this rule is not to abridge. The PL109-295 Homeland Security Appropriations Act of 2007 Section 550 (f) states: **"Nothing in this section shall be construed to supersede, amend, alter, or affect any Federal law that regulates the manufacture, distribution in commerce, use, sale other treatment, or disposal of chemical substances or mixtures."** The DHS should provide language that will guarantee prompt access to labor representatives and others. The language in the proposal could be interpreted to be in conflict of rights guaranteed by the National Labor Relations Act. Provisions should also be provided that describe how the DHS anticipates such inevitable conflicts will be adjudicated.

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

Later the proposal states:

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

What type of anomaly is the DHS expecting to find from a background check of a worker that would deny them employment? The DHS doesn't even bother with a definition

of "an anomaly". Accessing the document referenced, one can identify the listed "disqualifying crimes." Section (c) Determination of Terrorism Security Risk identifies several of the crimes that would disallow employment or access to covered facilities or critical processes. They are:

(A) If a person "has been convicted within the preceding 7-year period of a felony or found not guilty by reason of insanity of a felony-
  (i) that the Secretary believes could cause the individual to be a terrorism security risk to the United States; or
  (ii) for causing a severe transportation security incident;
(B) has been released from incarceration within the preceding 5-year period for committing a felony described in subparagraph (A);
(C) may be denied admission to the United States or removed from the United States under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.); or
(D) otherwise poses a terrorism security risk to the United States"…

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

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

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

Comment 7: Access to Information

Summary -- *Access to information, the provisions regarding vulnerability information is overbroad. Workers and the public should have the right to know what risks they face. Guarantees should be included that provide the right to information to workers including site plans that have already been guaranteed by previous legislation.*

The DHS states:

"Section 550 (c) of the Homeland Security Appropriations Act of 2007 provides the Department with the authority to protect from inappropriate public disclosure any

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

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

The next paragraph reiterates this authority by stating:

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

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

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

"In setting forth the minimum level of security the Department must provide to CVI, Section 550 (c) refers to 46 U.S.C. 70103, which was enacted by the Maritime

Transportation Security Act of 2002: "Notwithstanding any other provision of law and subsection (b), information developed under this section * shall be given protections from public disclosure consistent with similar information developed by chemical facilities …"**

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

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

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

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

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

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

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

6 CFR Sec 27 has not adequately addressed the above concerns. A provision should be added that ensures information designated CVI that has otherwise guaranteed access, shall not over-rule those preceding regulations. In addition, where 6 CFR Sec 27 identifies the inspection process by the DHS Inspector, a requirement should be added to include a designated union representative, designated by the local President, be present with the company representative during such inspection where a union is present in the company.

Conclusion

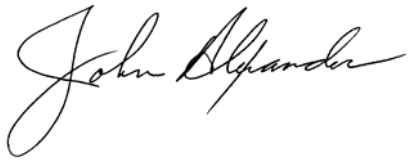
Some of the most fundamental protections that one would expect to be identified in the DHS regulation are missing. The involvement of workers and their representatives in all aspects, the use of inherently safer technology, the ambiguity of terms, the unwarranted background checks, and the possible classification of information used to protect workers and the public, the lack of government accountability, are all issues that beg to be addressed.

In addition, many of these issues and concerns were addressed previously in the Maritime Transportation Security Act (MTSA) and the HAZMAT CDL rule which were

written for other groups of workers. Substantial changes and provisions were adopted protecting workers. It would do well for the committee to review all of the Acts or regulations that have been adopted on security and on health and safety more generally.

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

Respectfully submitted,



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