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SECURITY IN THE RESPONSE TO BAYER'S
CHEMICAL PLANT EXPLOSION
TUESDAY, APRIL 21, 2009
House of Representatives,
Subcommittee on Oversight
and Investigations,
Committee on Energy and Commerce,
Washington, D.C.

The subcommittee met, pursuant to call, at 12 p.m., in Room 2322, Rayburn House Office Building, Hon. Bart Stupak [chairman of the subcommittee] presiding.

Present: Representatives Stupak, Braley, Markey, Christensen, Sutton, Waxman [ex officio], Walden, and Burgess.

Also Present: Representative Capito.

Staff Present: Karen Lightfoot, Communications Director, Senior Policy Advisor; David Rapallo, General Counsel; Theodore

Chuang, Chief Oversight Counsel; Mike Gordon, Deputy Chief Investigative Counsel; Dave Leviss, Deputy Chief Investigative Counsel; Scott Schloegel, Investigator, Oversight and Investigations; Stacia Cardille, Counsel; Daniel Davis, Professional Staff Member; Jennifer Owens, Special Assistant; Jennifer Berenholz, Deputy Clerk; Caren Auchman, Communications Associate; Lindsay Vidal, Special Assistant; Julia Elam, Fellow, Kenneth Marty, Detailee ICE; Allison Cassady, Professional Staff Member; Andrew Su, Professional Staff Member; Byron Gwinn, Staff Assistant; Alan Slobodin, Minority Chief Counsel; Karen Christian, Minority Counsel; Peter Kielty, Minority Senior Legislative Analyst; Peter Spencer, Minority Professional Staff Member; and Jerry Couri, Minority Professional Staff Member.

Mr. Stupak. This meeting will come to order. Today we have a hearing titled "Secrecy in the Response to Bayer's Fatal Chemical Plant Explosion."

Before we begin with opening statements, I ask unanimous consent that the contents of our document binder be entered into the record, provided that the committee staff may redact any information that is business proprietary, relates to privacy concerns or is law enforcement sensitive. Without objection, the documents will be entered into the record.

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Mr. Stupak. I ask unanimous consent that the supplemental memo prepared by the majority staff be entered into the record. Without objection, the documents will be entered into the record.

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Mr. Stupak. Now the Chairman, Ranking Member and Chairman Emeritus will be recognized for 5 minutes for opening statements. Other members of the subcommittee will be recognized for 3 minutes for their opening statements. I will begin.

On August 28, 2008 a tank exploded at the Bayer CropsScience Chemical Plant in Institute, West Virginia. The explosion sent a fireball hundreds of feet into the air and was felt 10 miles away.

I have here photographs of the accident and its aftermath. The explosion captured from a distance, the destruction at the plant -- do you want to flip that over one -- and then a pair of safety goggles encased in chemical residue.

Before I go any further I would like to express on behalf of the entire subcommittee our condolences to the families of the two employees, Barry Withrow and Bill Oxley, who were killed as a result of the explosion. We acknowledge the tremendous personal sacrifices and pain these people and their families have been put through as a result of this tragic incident.

We also thank the emergency first responders who protected the public that night, especially the six volunteer firefighters who suffer from nausea, intestinal and respiratory disturbances as a result of the exposure that night. We are tremendously grateful for their service and the service of all our public safety personnel.

Today the committee is examining not only what actually

happened but what could have happened. About 80 feet from the blast site was a day tank that can store nearly 40,000 pounds of methyl isocyanate or MIC. MIC is the chemical that killed thousands of people and sickened tens of thousands in 1984 after release of the toxic chemical at the Bhopal, India.

The explosion at the Bayer plant in West Virginia caused a 2-1/2-ton steel vessel containing methomyl to rupture and to be violently propelled in a northeasterly direction, leaving a path of destruction. Had the projectile headed south and struck the MIC tank, the subcommittee today might be examining a catastrophe rivaling the Bhopal disaster. As it happened, the explosion caused shrapnel to damage the protective blast blanket around the MIC day tank.

Immediately after the explosion, local emergency responders tried to obtain crucial information from Bayer representatives, information that was essential to determine how best to protect the public and their own personnel from possible chemical contamination.

For example, the emergency responders were trying to determine whether to order the community to shelter-in-place, which is to stay in their homes with doors and windows closed. A shelter-in-place order must be announced soon after a chemical release in order to be effective.

The fire department in Nitro, West Virginia reported, "We have a cloud of some type that is dark, it is moving towards

Nitro. Can you please try to get some information so you can tell us what it is?" Bayer rebuffed the emergency responder's effort to obtain information about the explosion. When the 911 dispatcher asked the company to confirm whether the explosion took place in the Larvin Unit, which contains toxic chemicals, Bayer responded, "No, that's all. I'm only allowed to tell you that we have an emergency in the plant."

At least six State and local emergency responders were denied entry to the plant to investigate the explosion. As Kent Carper, the president of Kanawha County Commission wrote to Bayer a week after the explosion. METRO911 repeatedly asked for information and was refused. This was a complete abdication of Bayer's responsibility to your neighbors and to our first responders who were sent, uninformed, to an explosion because no one was allowed to inform us. We will hear testimony today from Mr. Carper as well as from other officials and representatives of the local community.

The United States Chemical Safety and Hazard Board, CSB, an independent Federal agency, is conducting an investigation with the goal of reporting to the public on the cause of the accident and recommending changes to prevent future accidents like this one. We will hear today from the chairman of the CSB on the board's preliminary findings.

For the first time during a CSB investigation, a company sought to limit CSB's use of documents and information by labeling

it sensitive security information, SSI, under the Maritime Transportation Security Act. Although the law is supposed to prevent the public release of information that might compromise national security, Bayer has now admitted that it began using this SSI label in part to prevent negative publicity and stymie public debate about the safety of its processes.

William Buckner, the president and CEO of Bayer CropScience, says in his written testimony for today's hearing that Bayer invoked SSI out of, "a desire to limit negative publicity, generally, about the company or the Institute facility to avoid public pressure to reduce the volume of MIC that is produced and stored at the Institute by changing to alternative technologies."

One document Bayer produced to the subcommittee, company counsel instructed that the assertion of sensitive security information should be liberal and should strike any releases to any piece of equipment, piping or document involving MIC or chlorine, a process that resulted in the marking of thousands of pages of documents.

Finally, the committee's investigation has uncovered several troubling facts that further raise concerns about an orchestrated effort by Bayer to shroud the explosion in secrecy. Bayer removed and destroyed the blast blanket that surrounded the MIC tank, pictured here with the visible damage. There's the photo up in the top part. The whereabouts of this important piece of evidence is unknown.

Air monitoring devices designed to determine whether MIC has been released into the air were not operational on the night of the explosion. Video cameras positioned to capture the site of explosion did not record the time period of explosion because they had been disconnected from the recording unit.

Bayer's pattern of secrecy raises questions, not just about Bayer, but also about whether the law adequately protects the public's right to have information about potential dangers in their communities and what their communities face and how those dangers might be minimized.

Today we will ask whether the security sensitive information designation system is susceptible to abuse, given the committee's investigation has revealed that a private chemical company -- which has the most to lose -- invoked SSI in part out of business motive of limiting public discussion of the fact that it continues to be the only company in America that still stores large quantities of methyl isocyanate, or MIC, on site. We will also explore ways for companies to employ safer technology to protect their communities so tragedies like this do not happen again.

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Mr. Stupak. Next, I turn to Mr. Walden from Oregon for his opening statement, please.

Mr. Walden. Thank you very much, Mr. Chairman. Before I start, I want to recognize our colleague Shelley Moore Capito who has joined us today. While I appreciate your allowing her to join us on the dais even though she is not a member of this committee and therefore is not allowed to participate in the process, we do appreciate her involvement in this issue, since it is in her district, and I think maybe even in her hometown. And she has been very helpful in providing background information to me and probably others on the committee.

I join you, Mr. Chairman, also in expressing our condolences to those who lost their lives, and our praise for public safety officials who rose to the challenge on a very difficult night in that part of West Virginia. The subject of this hearing revolves around communications and information provided by Bayer CropScience during and after the fatal explosion and fire in its Riverside Chemical Plant outside of Charleston.

Our bipartisan investigation leading up to this hearing focused on the concerns this single troubling incident has raised among first responders, the surrounding community and Federal safety investigators.

For more than 21 years my wife and I were small business owners out in Oregon. We are in the radio business, and therefore

have been very closely involved with emergency communication, alerting the communities, trying to get information in a timely manner. And so as I've read some of the background here, obviously there are some enormous lessons to be learned about what didn't work right on that evening. And I will tell you, if I were in that community I would share the frustration that's been shared already by many in that community for the lack of knowledge.

The hearing today will examine these concerns closely, I'm sure, and hopefully shed some light on a broader tension between the public safety information and sensitive security obligations of chemical and other industrial facilities following this accident.

Given the Energy and Commerce Committee's primary jurisdiction over public health and safety, it is incumbent upon us to confront this tension so that we can identify whether additional congressional action or guidance is necessary.

To the people and first responders along the Kanawha River, the explosion on the night of August 28th didn't really involve Federal rules and regulation about safety and security. They were immediately concerned about what was engulfed in that fireball and escaping in a cloud of smoke and mist blowing in the wind down river from the facility. That's what worried them.

The police and firemen along the river -- from Nitro, St. Albans, Dunbar, South Charleston, Jefferson, Kanawha County -- knew that many very dangerous chemicals were used at the Bayer

plant. In fact, some of them were employees of the plant, others had relatives who worked there. They had been on site, they had friends or family who worked there, they knew about phosgene and chlorine, and they knew about methyl isocyanate, or MIC, the toxic chemical notorious for killing and sickening thousands of people in India.

What they did not know, and what Bayer would not confirm with any specific information for nearly 3 hours, was what chemicals were associated with that fire and whether anything toxic risked being released into the community. They could not even get confirmation where the fire was for nearly an hour and a half. Bayer wouldn't let them into the facility. The county sheriff had to get fire information through a deputy's family contact in the plant. Frankly, folks, that's unacceptable.

What Bayer would say in its main communications to the county METRO911 and emergency operations center was, "Our response team is responding to our emergency." And sometimes would add, "Alert the public." This went on all night. Alert the public about what? Having been -- not in a chemical situation -- but having been, again, in the radio business, when things break loose the public wants more information and the media can actually be helpful in calming the fears or helping people do the right things.

We will learn today that Bayer CropScience has a very capable fire brigade. It managed to control the fire largely on its own,

but this does not absolve the company of its obligations to the community.

As County Commission president Kent Carper, a witness today, noted a few days later, Kanawha County emergency officials were given no information during this critical time to make proper decisions to ensure the safety of its citizens. Fortunately, the fire did not result in a major toxic release, but emergency responders, lacking information, had to notify some 40,000 residents to take shelter in their homes. Imagine the concerns that generated.

We'll take testimony on what Bayer and first responders have done to resolve communications issues which reportedly have been addressed. Yet as we moved from the communications during the incident to the ensuing Federal safety investigation, we find continuing problems. Chief among these is the ability of the Federal Chemical Safety Board, the CSB, to investigate, examine and report, unhindered, full and necessary information about the causes of the explosion.

Similar to the Federal investigations following airplane crashes, the CSB reports result and makes recommendation that can improve safety throughout the industry. This is a critical function for enhancing public safety. Security sensitive information about chemical plants does need to be protected against terrorists. But Bayer CropScience admits using the Federal law and such information to frankly restrict legitimate

public discussion by CSB about critical safety processes for certain chemicals at the site and prevent public debate.

At least initially the U.S. Coast Guard, the arbiter of security designations, and CSB both had to take company assertions at face value, in part due to a lack of familiarity with and clarity in the regulations as they applied to chemical facilities. This is a policy matter beyond the Bayer case that may require congressional attention. Allowing inappropriate use of sensitive security information designations to hide inconvenient facts is simply not acceptable and undermines public safety.

Moving forward, we have to ensure the rules are clear and that CSB and the U.S. Coast Guard can work out bureaucratic differences so the public safety can be addressed effectively and with our security needs.

I welcome the witness and I think you, Mr. Chairman, for this hearing.

Mr. Stupak. Thank you Mr. Walden.

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Mr. Stupak. The Chairman of the full committee, Mr. Waxman, for an opening statement, please.

The Chairman. Thank you very much, Mr. Chairman. Today's hearing is important not only for the residents of West Virginia, but for people across the country who live near chemical plants and may be concerned about their safety.

This morning I would like to do two things. First, I would like to provide some historical context for today's hearing. And secondly, I would like to describe some of the specific findings of the committee's investigation into the Bayer explosion.

I've been working on the issues relating to chemical security for several decades. On December 14, 1984, when I was chair of the committee's health subcommittee, we held a field hearing in West Virginia to examine the safety record of the very same plant we are discussing today. Back then, the plant was owned by Union Carbide. We called that hearing because earlier that month the company's sister plant in Bhopal, India released 25 to 45 tons of an extremely toxic chemical called methyl isocyanate, killing approximately 4,000 people and injuring tens of thousands of others. We wanted to make sure that we never had a similar incident here.

As a result of the committee's work on this issue, we passed legislation in 1990 to create the Chemical Safety and Hazard Investigation Board. Congress gave the Board broad investigative

powers, authorized it to identify measures to reduce the likelihood of the consequences of an accidental release, and charged it with recommending ways to make chemical production, processing, handling and storage as safe and free from risk of injury as is possible.

The Board is investigating the recent Bayer explosion, and we are pleased to have Chairman John Bresland with us today to present his preliminary findings.

In my opinion, the most significant problem we face today is that we are examining the same chemical plant in West Virginia, although it is now owned by Bayer, and the same toxic chemical, MIC. Although other chemical companies like Dupont have invested in safer technologies to eliminate their MIC stockpiles, Bayer's facility in West Virginia is the only site in the United States that continues to produce and store large amounts of methyl isocyanate.

Twenty-five years after the catastrophe in India, I think it is finally time to ask whether it makes sense to allow Bayer to continue producing and storing such massive amounts of this highly toxic chemical. I know the Chemical Safety Board is considering how to address this issue. So I want to make absolutely clear that Congress will look to the Board for specific and concrete recommendations on how Bayer can reduce its MIC stockpile and change its procedures to inherently safer technologies. This is not an easy task, but it is essential and time has occurred for us

to get on with this job already.

Now let me turned to the findings of our investigation. We have a detailed memo that was compiled by our committee staff and it sets forth the result of our investigation. The committee reviewed more than 200,000 pages of documents, as well as audio and video recordings obtained from Bayer, the Coast Guard, Environmental Protection Agency and the Chemical Safety Board.

Committee staff also inspected the Bayer's plant in West Virginia and interviewed more than 20 Bayer employees, first responders, elected officials and concerned residents. Based on this evidence, our overall conclusion is that Bayer engaged in a campaign of secrecy by withholding critical information from local county and State emergency responders by restricting the use of information provided to Federal investigators, by attempting to marginalize news outlets and citizen groups concerned about the dangers posed by Bayer's activities and by providing inaccurate and misleading information to the public.

We have three specific findings:

First, on the night of the explosion, Bayer failed to provide emergency responders with critical information about the scope of the explosion, the potential chemical hazards involved, or the action needed to safeguard the surrounding communities.

Second, there are serious questions about the vulnerabilities of Bayer's inventory of MIC and about MIC monitoring systems that were out of service at the time of the explosion.

And third, Bayer is now attempting to conceal information about the explosion by invoking, and in some cases misusing, a statute governing maritime transportation security to designate unprecedented amounts of material as "sensitive security information."

The memo goes into greater detail about the evidence that forms the basis of these findings. Mr. Chairman, I ask unanimous consent that the memo and the documents it refers to be made part of the official hearing record.

Mr. Stupak. Without objection, I think it has previous been entered.

The Chairman. Thank you.

Finally, I would like to extend special thanks to the local, county and State emergency responders and other officials from West Virginia who worked with our staff on this investigation and traveled here today to answer the committee's questions.

Mr. Chairman, I want to thank you very much for holding this hearing and doing this investigation.

Mr. Stupak. Thank you, Mr. Chairman.

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Mr. Stupak. Next, Ms. Sutton from Ohio for an opening statement.

Ms. Sutton. Thank you, Chairman Stupak, and thank you for holding today's important hearing on the secrecy in the response to Bayer's fatal chemical plant explosion. And to the families of those who lost their lives as a result of this explosion, I am deeply sorry. There is nothing quite like the fear of the unknown. Musicians have written songs and Hollywood has made countless movies about this fear.

On August 28, 2008, families and rescue workers throughout the community of Institute, West Virginia lived through this fear. They knew some information. They knew that an explosion shot a fireball more than 100 feet into the sky. They knew that a fire was raging inside Bayer's facility, the only facility in the United States that continues to store MIC. This is the same highly toxic chemical that killed thousands of people in an industrial disaster in India in 1984.

According to Dale Petry, the director of the Office of Emergency Services for Kanawha County in West Virginia -- and I quote -- "We didn't know what to do. We want to protect the community and we need more information to do that." That is not an acceptable place to leave our first responders.

He said, we didn't know what to do. Without the proper information, actions cannot be taken in a timely fashion to inform

and protect the public. And without the proper information, those charged with protecting the public are left to plan for the absolute worst case instead of an actual situation, which can waste a lot of time and resources.

For the sake of our safety, our firefighters and other first responders face dangers every day throughout my district and communities across the country. And increasingly they are called to do so under cash-strapped conditions and understaffing. They can't afford to waste resources and they certainly cannot afford to operate in a crisis, without knowledge, all the knowledge that we can give them to safely do their jobs and protect their communities. And our constituents deserve a system that works, a system that keeps them safe.

I take my responsibility to ensure the safety of Americans very seriously. Congress, through this committee's hard work, created the Chemical Safety and Hazard Investigation Board in 1990 as an independent agency to investigate chemical accidents and provide public recommendations in findings to help prevent future accidents. After 9/11, additional laws, such as the Maritime Transportation Security Act, were passed, aimed at protecting the public from potential terrorist attacks. But we now find ourselves in a situation where two laws, both aimed at protecting the public, failed to get the job done. And I think that the laws had some help.

The accident and the actions taken and not taken in the

aftermath of the accident caused grave harm. We owe it to the families of those who lost their lives, we owe it to the first responders who were on the scene, we owe it to the community in West Virginia, and we owe it to communities throughout this country to get to the bottom of what has happened and take the actions that are necessary to make sure if it ever should happen again, which we hope to prevent, that things will be handled differently and more effectively. And I yield back.

Mr. Stupak. Thank you.

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Mr. Stupak. Mr. Braley for an opening statement, 3 minutes.

Mr. Braley. Thank you, Mr. Chairman and Ranking Member Walden, for holding this hearing. You know, we talk a lot about accountability on this committee and we talk a lot about transparency. But what I thought about as I was reviewing the materials for this hearing is a public relations course that I took when I was a college student at Iowa State University, where Bayer has a huge presence. And the number one thing that you are taught in a public relations course in response to a disaster of this magnitude, the first thing you do is own up to your responsibility, accept responsibility for it, and communicate to the public your plan to make sure that it never happens again.

If Bayer had been graded on their project based upon the response they made to this disaster, they would have gotten an F. That's the bottom line of why we are here today. Our job is to get to the bottom of what went wrong, to get answers to the people in this community who are entitled to answers, and to get a commitment from this corporation about what they are going to do to change their corporate behavior and start to put a better image forward of corporate responsibility.

This is not an isolated incident that happens in one community in West Virginia. It is the type of risk that U.S. citizens are exposed to every day. In light of what's going on on Wall Street and other parts of the economic sector, it is time for

American companies to realize that the best way for them to generate profits for their shareholders is by being frank and forthright when they do something wrong; to accept responsibility for it, and to look into the eyes of the people they have harmed and say, we will make this better, we will make sure this doesn't happen again.

And that's what I hope happens as a result of this hearing and I yield back.

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Mr. Stupak. Mrs. Christensen for an opening statement.

Mrs. Christensen. Thank you, Mr. Chairman, and thank you, Chairman Stupak, for holding this hearing on chemical plant security, both for this Energy and Commerce Committee and my previous committee.

Mr. Stupak. Is your mike on?

Mrs. Christensen. -- Homeland Security. If we can fix what went wrong during the incident of August of 2008, it would not only ensure the safety and reassure people living in the areas adjacent to Bayer CropScience, but it will do so and be reassuring for people all over our country who live near chemical, nuclear and other plants that house and store hazardous material.

As a former emergency services coordinator, I have been responsible for health during two of the worst hurricanes that hit any part of the United States at that time. I find the lack of information-sharing and failure of coordination of response at the time of the incident shocking and totally unacceptable.

I am very concerned about the withholding of vital information the community needed to have, but also about the lack of a clear incident command process that would have linked the plan to those responsible for the safety of the community.

And I am especially concerned, since I have an oil refinery and several other smaller chemical plants on a small 82-square-mile island that has less people than live in the area

surrounding Bayer CropScience. And all of the plants are on the water and come under the Coast Guard and the MTSA. The entire island of St. Croix, 60,000 people, including my daughter and grandchildren, would be in grave danger if there was an accident and the response was not quick and appropriate.

I also have a long and excellent relationship with the Coast Guard and admire and applaud their history of service and readiness to serve and protect lives under every circumstance, and it pains me to see them drawn into this situation, especially on an issue of possibly withholding information the public is entitled to have. And I trust that this will be cleared up during the hearing. I am sure we will examine this and other areas of concern, and so I look forward to the testimonies, and thank everyone for coming here to share information with us this afternoon. I yield back.

Mr. Stupak. Thank you.

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Mr. Stupak. That concludes the opening statement by all members of the committee -- almost concludes. Mr. Markey, recognized for an opening statement.

Mr. Markey. Thank you, Mr. Chairman, very much, I appreciate your recognizing me.

On December 3rd, 1984, an accident at a Union Carbide pesticide plant in Bhopal, India released 42 tons of toxic methyl isocyanate -- or MIC -- gas, killing thousands of people and injuring many more. Reports regarding the accident's cause indicated that in addition to questions surrounding the maintenance of the plant, other factors also contributed to the catastrophe. Union Carbide was using toxic MIC, even though a safer substitute that could have reduced the consequences of the accident was available. Union Carbide was storing the toxic MIC in large tanks instead of smaller ones, the use of which could have reduced the consequences of the accident.

Last summer when a chemical tank exploded at a Bayer facility in West Virginia, sending a fireball into the sky and killing two employees, that facility was, just like the facility in Bhopal, storing large quantities of the same chemical and, just like the facility in Bhopal, the Bayer facility could have chosen to use safer processes that eliminated or greatly reduced the need for the toxic chemicals in the first place.

. But unlike the Bhopal catastrophe, the people of West

Virginia were relatively lucky because, quite by chance, the explosion that caused the two tragic deaths did not result in the release of large quantities of MIC gas that could have killed thousands more. That is because when the 8-by-10-foot steel vessel became a violent projectile missile as a result of the explosion, it happened to travel in the opposite direction, away from the MIC tank.

Although the accident ultimately caused two fatalities and the demolition of the area within the facility, the most catastrophic consequence, the release of almost 7 tons of MIC gas, did not occur. The explosion at the Bayer plant highlights the need for all facilities storing large quantities of dangerous chemicals to assess if there are safer ways to do business and to use these technologies when possible.

Today's hearing is about an accident. Another chilling scenario: that would-be terrorists who target these facilities could cause a catastrophic accident. I am committed to ensure that the use of safer technologies and processes be part of the legislation which we ultimately pass.

I thank my colleagues for all of their hard work on this legislation and I thank you, Mr. Chairman, for recognizing me.

Mr. Stupak. Thank you, Mr. Markey.

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Mr. Stupak. That now concludes the statement of members of the subcommittee.

I want to recognize our colleague, as the Ranking Member said, Ms. Capito, Shelly Moore Capito, who represents and lives near Institute, West Virginia. Ms. Capito, you are welcome to sit through this hearing and observe. And I understand you have an opening statement or written statement for the record.

I ask unanimous consent that Ms. Capito's statement be entered into the record. Without objection, so be it.

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Mr. Stupak. Also Senator Rockefeller from West Virginia has also submitted an opening statement that will be made a part of the record. Hearing no objection, it will also be made a part of the record.

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Mr. Stupak. I now call our first panel of witness.

On our first panel we have Mr. John Bresland, who is chairman of the U.S. Chemical Safety and Hazard Investigation Board, CSB; Mr. Joseph Crawford, who is chief of police for the City of St. Albans, West Virginia; Mr. Michael Dorsey, who is the chief of Homeland Security and Emergency Response for the West Virginia Department of Environmental Protection; Mr. Kent Carper, who is the president of the Kanawha County Commission in Kanawha County, West Virginia; and Ms. Pamela Nixon, who is an environmental advocate with the West Virginia Department of Environmental Protection. Welcome to all of our witnesses.

It is the policy of this subcommittee to take all testimony under oath. Please be advised that you have the right under the rules of the House to be advised by counsel during your testimony. Do you wish to be represented by counsel?

Voice. No.

Mr. Stupak. They are shaking their heads "no." So then I will ask you to please rise and raise your right and to take the oath.

[Witnesses sworn.]

Mr. Stupak. Let the record reflect that witnesses have reapplied in the affirmative. You are now under oath and that includes your opening statement.

We will now hear an opening statement from each of you. If

you have a longer statement we will submit it for the record, but please try to keep your comments to 5 minutes.

TESTIMONY OF JOHN BRESLAND, CHAIRMAN, U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD; MICHAEL DORSEY, CHIEF OF HOMELAND SECURITY AND EMERGENCY RESPONSE, WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL SECURITY; KENT CARPER, PRESIDENT, KANAWHA COUNTY COMMISSION; AND JOSEPH CRAWFORD, CHIEF OF POLICE, CITY OF ST. ALBANS, WEST VIRGINIA

Mr. Stupak. We will start with you Mr. Bresland, if you don't mind, for an opening statement. You might have to press that button on that mike there. There you go. I can hear you.

TESTIMONY OF JOHN BRESLAND

Mr. Bresland. I have pressed it. I thank Chairman Stupak, Ranking Member Walden, and also Chairman Waxman for attending today. I'd also like to thank Congresswoman Capito for attending. I am one of her constituents living in West Virginia, but not in the area where the accident took place.

Also I thank all the other distinguished members of the panel or of the committee who are here today.

I am speaking today on my own behalf as CSB Chairman, not necessarily for the other board members. The Chemical Safety

Board is an independent Federal agency that investigates major chemical accidents at fixed facilities. Our public reports, recommendations and safety videos are used worldwide to help save lives, protect the environment and promote safer industrial operations.

Mr. Chairman, the explosion at Bayer CropScience was a very serious and tragic event and it had potential for additional grave consequences. The explosion occurred during the restarting of the plant's methomyl production unit while highly toxic and reactive methomyl waste was overloaded into a residue treater vessel. A violent runaway reaction ruptured the 5,000-pound vessel and sent it careening through the production unit, breaking pipes and equipment, leaving a 50-long-foot swath -- if I'm pronouncing that word correctly -- of destruction.

The explosion and resulting chemical release and fire fatally injured two employees, six volunteer firefighters, and two others showed likely symptoms of chemical exposure. The blast waste damaged businesses thousands of feet away.

Mr. Chairman, our investigation has revealed that significant lapses in process safety management set the stage for this accident. Plant operators had received inadequate training on a new computer control system which was being used for the first time. Written operating procedures were outdated and could not be followed during start-ups due to longstanding equipment problems. The heater for the residue treater was known to be undersized.

This regularly forced operators to defeat three critically important safety interlocks during start-ups, increasing the chance of dangerously overloading the treater with methomyl. This longstanding practice was known to Bayer management prior to the explosion.

I am also troubled by Bayer's delays in providing county 911 officials and the National Response Center with accurate information about the nature of the ongoing emergency and the hazardous chemicals involved.

In addition, there is the question that many of the public are concerned about: What else could have happened? The Bayer plant manufactures and stores very large quantities of some of the deadliest substances used in industry including phosgene gas, and methyl isocyanate, or MIC.

Following Bhopal, other companies moved to inherently safer technologies that largely eliminate MIC storage. Bayer is the last company that still stores large quantities of MIC.

Approximately 80 feet to the southwest of the methomyl residue treater there is a 30,000-pound vessel capacity MIC storage tank which contained almost seven tons of MIC on the night of the accident.

During the explosion, metal projectiles weighing up to 100 pounds flew in all directions. Some landed near the MIC tank. If the MIC tank had been damaged by a powerful projectile or the residue treater itself, which had a great deal of energy, there

might have been a catastrophic impact on workers, responders and the public.

Finally I am concerned about Bayer's recent secrecy claims which surfaced in February, right after we told the company we were planning a public hearing on our preliminary findings. Bayer now contends that around 2,000 pages of previously submitted investigative documents should be treated as sensitive security information, or SSI, under the Maritime Transportation Security Act.

Simply understanding which of these SSI markings are proper or not is a daunting task for all of the agencies involved, including the Chemical Safety Board and the Coast Guard. In close consultation with the Coast Guard and with DHS, we decided to proceed with the CSB public meeting, which will now occur this Thursday in Institute, West Virginia. I still have significant concerns about how these information protection rules may negatively impact this and future CSB investigations.

I am asking Congress to consider the following:

Companies should not be able to claim OSHA and EPA safety compliance documents or routine business records as secret. The information protection rules for chemical plants should be harmonized across the different branches of DHS. Finally, the CSB and other public safety agencies should not be subject to potential sanctions when conducting their congressionally mandated job of reporting to the public on the causes of accidents. We

should not be threatened with losing our job or being fined as a result of doing our job properly here in Washington.

I call for a reaffirmation of the public's right to know so we at the CSB can continue to fulfill our mission of saving lives of workers and the public from chemical accidents.

I thank you for this opportunity to testify today.

Mr. Stupak. Thank you, Mr. Bresland.

[The prepared statement of Mr. Bresland follows:]

***** INSERT 1-2 *****

Mr. Stupak. Mr. Dorsey, your statement please.

TESTIMONY OF MICHAEL DORSEY

Mr. Dorsey. Thank you Mr. Chairman. Chairman Stupak, Ranking Member Walden, Congresswoman Capito, and ladies and gentlemen. Thank you for the opportunity to be here today. My name is Mike Dorsey.

The explosion at the Institute, West Virginia, Bayer facility which shook the entire area and eventually claimed the lives of two workers was a tragic accident, the effects of which, were compounded by a lack of communication about the conditions inside the plant by the onsite command team and a nearly complete failure of the instant command system as a result of that failure.

Perhaps of greater consequence, Bayer's attempts to stifle the report of the Chemical Safety Board by citing the Marine Transportation Security Act's provisions regarding port security plans, which in and of itself is a greater communication failure.

The Maritime Transportation Security Act of 2002, or MTSA, is legislation which seeks to improve security in America's ports through a number of measures, but the requirement pertinent to this investigation is that which mandates the preparation of maritime transportation security plans. This requirement has become an issue in this instance because in all States,

"Information developed under this chapter is not required to be disclosed to the public."

It is under this language that Bayer sought to block the findings of the Chemical Safety Board. Bayer is able to make this assertion because the broad definition of "facility" in the act, which includes -- and I'm quoting again -- "any facility of any kind" on waters subject to the jurisdiction of that law.

The relevant definition does not present a problem when normal port facilities which deal only with the loading and unloading of various cargos are considered. When facilities such as chemical plants or other manufacturing facilities, whose major emphasis is the manufacturing of goods rather than the shipping of goods are included wholesale under this definition, vast areas under which the Coast Guard has no expertise or experience are suddenly covered by a protective veil which other concerned agencies as well as the public are prohibited from lifting.

Manufacturing processes, chemical storage transfer methods and many other physical and administration functions which have nothing at all to do with the shipping or the port portion of the facility are now potentially under the purview of an agency which, through no fault of its own, is now expected to make decisions far outside of its mission.

Bayer CropScience uses many dangerous chemicals such as chlorine, phosgene, methyl isocyanate and others in its processes. In fact, most large manufacturing facilities use dangerous

materials and equipment.

Nearly all major Institute industries in West Virginia are on navigable waterways that are under the jurisdiction of the MTSA. Conceivably, all such chemicals and processes can be concealed using MTSA.

I do believe that the Coast Guard made a wise decision in the case at hand, allowing all information except the times when the MIC tank is to be filled to be disclosed. But I would argue that in spite of their skills, they are not the proper agency to make decisions regarding chemical processes or other activities far removed from the port setting.

As a member of the State Emergency Response Commission with the responsibility for implementing the Emergency Planning and Community Right To Know Act, or EPCRA, I believe that allowing the MTSA to be read as Bayer proposes will cripple provisions of this act. EPCRA mandates that local emergency planning committees write plans to address all potential emergency situations at chemical plants and that critical information be provided by the facility to the emergency response committee.

This information would not be available if Bayer's reading of the Maritime Transportation Security Act is validated; nor information required by other acts, such as the Resource Conservation Action, Clean Water Act, and others would be available.

A final, but critical note on the MTSA is language that Bayer

used to attempt to prevent the CSB's finds from being revealed to the public is not prohibitive at all; it was permissive. The act states that facility plans -- and I am quoting again, "are not required to be disclosed." It does not prohibit such disclosure.

In other words, even if the definition of the facility is broadly interpreted and the entire plan is covered, Bayer can still release the information developed under MTSA if it wanted to in this instance. The choice of whether or not to be a good corporate citizen in this case is Bayer's.

Ladies and gentlemen, I have other testimony written testimony. I will now cease my comments.

Mr. Stupak. Thank you Mr. Dorsey.

[The prepared statement of Mr. Dorsey follows:]

***** INSERT 1-3 *****

Mr. Stupak. Mr. Carper, your opening statement, please, sir.

TESTIMONY OF KENT CARPER

Mr. Carper. First time someone had to push a microphone in my face.

Chairman Stupak, Ranking Member Walden, and members of the O&I Subcommittee, and particularly my Congresswoman Capito, I want to thank you for your interest and I also want to thank you for what I know is your absolute sincere concern about our two lost family members in the State of West Virginia. I want to thank you.

And I do have some written comments, I want to skip through part of it. But when I heard about your interest in passing communications and knowing we run a 911 center for about 600,000 calls a year -- small enough for a peninsula, but pretty big for us -- but I am familiar, Chairman, with your record on interoperable communications and how you fought for that, like our Congresswoman Capito.

And I've heard the comments about the lack of the command system. You can't dispatch someone if nobody will tell you where to send them to, what's going on and the nature of the emergency. And with all due respect, it is not a question of whether it happened or not, we supplied you -- your staff has done an

excellent job by the way, I want to commend them as well -- we supplied them with our tapes.

One thing about our 911 center, when we do something right, we know it; and when we do something wrong, we know it and it is all documented. And I'm not saying the dispatch was perfect, but it was pretty darn good considering what we had, number one.

And our first responders were heroic. And it was practically a miracle that one of the other vessels didn't rupture. And that was our problem as we continuously sought to find out what was going on so we could tell police officers, firefighters and paramedics in the community what they needed to know. And they needed to know, and they didn't know.

I'm the former police chief of the city of Charleston. I have not the law enforcement background like the Chairman has, but a little bit. And this gentleman next to me has an extensive law enforcement background, and our elected sheriff and chief deputy on the scene, they did all they could do, but they knew so little.

As you look through this, we had an event that occurred in December the previous year. We were assured that this wouldn't happen again.

With me today is our executive director of our 911 center, our former fire chief of the city of Charleston. These folks have extensive experience in managing an emergency. But they were simply there, waiting to make decisions, waiting to work. The word "waiting" is what happened. And as my testimony -- Mr.

Chairman, you have it -- we have the time line. This went on not for minutes, it went on for hours. And eventually the 911 people, in conjunction with our decision makers made a decision in the blind, in the dark, to go ahead and issue a shelter-in-place decision. I helped participate in that to some extent. I am proud of them for doing that. That was exactly what they needed to do.

As you know, the State of West Virginia, our Governor, Governor Manchin, has issued legislation now -- which is in my written testimony -- where we've changed the rules. The legislature simply won't allow this to happen. Our 911 center also changed the rules.

I think at the end of the day, there are two things that concern me. And frankly I agree 100 percent with CSB's recommendation. I hope Congress will take a look at that. You actually have two issues before you as O&I -- whether or not you're going to issue stringent requirements on how they are going to handle that. But the more troubling aspect is the veil of secrecy as you all have described it. It is a veil of secrecy. And with all due respect to Bayer, I will go on record saying they have changed things since then. They are doing certain things. I am sure they will testify to that. I looked at it, and I believe they had good faith in those efforts.

However, we will have a public meeting in Institute, West Virginia, this Thursday at 6:30 I believe. What kind of a meeting

is that going to be when certain information is still being withheld from the public? And even if they have complied in part after they drug the Coast Guard into this -- I mean, Mr. Chairman, this is West Virginia, this isn't Upper Peninsula; we don't have 1,600 miles of coastline. It is a small State. And the idea that the Coast Guard is going to stop the people in Institute, which by the way is a heavy minority community, we have over 500 college students at West Virginia State University, right in the footprint of this chemical plant. Right now, even if everything seems to go good at this hearing, the people there will believe that critical information is being withheld from them simply because of this insertion of Homeland Security.

It is above my pay grade. I don't claim to be an expert on Homeland Security, the Patriot Act, or anything else. But I cannot imagine this Congress had that intent when they passed the law not to let the people know, who are sitting as a next-door neighbor to one of the most dangerous chemicals -- I can't pronounce it either, I just call it M-I-C -- but I know enough about it to know that it is a very dangerous chemical. And the more you store, the more dangerous it is. And if you're going to store a lot of it, you ought to tell your neighbors what you are doing.

And with that, I do again, Chairman, want to thank you for your sincere reflection on our loss and your interest in a very, very serious matter. Thank you very much.

Mr. Stupak. Thank you Mr. Carper.

[The prepared statement of Mr. Carper follows:]

***** INSERT 1-4 *****

Mr. Stupak. Mr. Crawford, your testimony, please, sir.

TESTIMONY OF JOSEPH CRAWFORD

Chief Crawford. Thank you, Mr. Chairman. First of all I would like to thank you very much and brag on your staff. I thought my dealings with them was probably the best I've experienced in my life, in my career in law enforcement. Hats off to your staff, they did an excellent job.

First I want to take this opportunity to thank you, Mr. Chairman, and distinguished members of this committee for allowing me to speak today. My motivation is to provide this committee with the perspective of a responder responsible for the safety of our community, as well as the safety of my officers.

It is my hope and intention that this hearing today will help you understand what happened on the night of August 28th, 2008. I want to give members of the committee the most accurate information, from a responder's perspective, that will help this committee draft legislation and implement changes to make the necessary changes to ensure that the citizens of Kanawha County and the first responders' safety are not compromised. I believe this can be done -- this can be accomplished by all of us working together.

The city of St. Albans is southwest and within line of sight

of Bayer CropScience Plant. The city of St. Albans is near the western border of Kanawha County. Kanawha River separates the plant and the town. The population of the city of St. Albans is approximately 11- to 12,000 people. U.S. Route 60 is the main highway through town and has a high volume of traffic.

I had three officers on scene, of an unrelated call on the east end of the city, when they heard and observed the fire and explosion. My supervisor radioed to METRO911 Kanawha County Dispatch Center and advised them of the explosion at 10:33 p.m. The officers had direct line of sight to the plant, being almost directly across the river from the explosion.

I was at my residence. It was approximately 2 miles direct line of sight from the plant. The percussion shook my house and rattled pictures on the walls. I contacted my on-duty shift commander by phone and he confirmed that he and two other officers witnessed the explosion and fire at the plant.

Within minutes, I was receiving phone calls from local news media. I and Chief Steve Parsons, the St. Albans Fire Department Chief, responded to the east end of the city and met with my shift commander within 10 minutes of the explosion. It was obvious that there was a large fire in the direction of the plant. We started assessing the situation and wind conditions. We noticed a large plume moving west towards the city of St. Albans and Nitro City, just across from us. Chief Parsons and I were in constant contact with METRO911, trying to learn the gravity of the situation, but

were informed that METRO911 was unable to get any information from the plant. Chief Parsons and I had a discussion about ordering a shelter-in-place for the St Albans-based, and based on our assessment and direction of the plume.

We were waiting on more up-to-date information from the incident commander, which came an hour later. The incident commander advised he did not think a shelter-in-place should be ordered for the surrounding areas from his position. Hindsight, if the same situation happened again, we would have ordered a shelter-in-place immediately.

I was also in contact with my colleagues from other law enforcement agencies, because no one knew the substance that was being released from the plant. Area law enforcement officials were making decisions to close highways in the area of the plant to protect the public. I ordered to call all our off-duty officers to assist.

A traffic diversion plan from our emergency response plan was used. Chief Parsons and I activated our Forward Operation Center there in the city at approximately 11:15 p.m., which is about 45 minutes after the initial call.

We still weren't able to obtain information from the Bayer CropScience Plant as to the chemicals that were involved. Forty-five minutes into the event we still did not have any information from the plant. However, we received information that the incident commander on scene was advising that a

shelter-in-place order was not needed. The only information about what was involved came from outside sources, that it may be the Larvin Unit. At this time, there were low-lying, hazy clouds over the city.

At 11:18 p.m. we heard a secondary explosion. At 11:21 we received unofficial information that an explosion had occurred in the Larvin and Pesticide Unit. I had a growing concern about our officers being out in that environment and directing traffic for an extended period of time. My colleagues also had the same concern for their officers as well.

At 11:42 p.m., Kanawha County Emergency Management Director Dale Petry issued a shelter-in-place due to lack of information coming from the plant. It is common knowledge that MIC is stored and used at the plant on a daily basis. It is very frustrating not having any information about what was being released and trying to make decisions to protect our officers and citizens.

I was advised at 11:20 p.m. representatives from the County were staged at the main gate of the plant waiting to gain access. I also was advised later that representatives from the Kanawha County Sheriff's Department, County OES, and West Virginia Fire Marshals Office had made numerous attempts to gain access to the BayerCrop Plant. This was being done to help coordinate efforts outside the plant.

Finally, after 30 to 40 minutes, BayerCrop allowed those representatives inside the plant and escorted them to the EOC.

They were placed and sequestered, in a separate room connected to the plant EOC, but still had problems getting information to relay back to the County EOC. At 035 hours, 12:35 a.m., Chief 24, the incident commander, radioed METRO911 advising that he still does not know what chemicals are involved.

At approximately 1:15 a.m., there were discussions about evacuation. We were advised that the fire was still burning and it could be out of control, it could not be contained. At 2:09 a.m., we were advised that the shelter-in-place had been lifted, the roadways were reopened. At 2:30 a.m., the St. Albans Police and Fire Department units were released and the Forward Operations Center was closed.

In closing, Mr. Chairman, I would like to make a comment to some key problems we faced that night and steps taken to correct them.

RPTS DOTZLER

DCMN HERZFELD

[1:00 p.m.]

Chief Crawford. First, the most important issue was the lack of communication and cooperation from the Bayer CropScience plant. The record will reflect on numerous occasions that the security guard at the gate was directed not to give out any information to the 911 center. Then once inside the plant, the officials were not given much information so that they could be relayed back to the county EOC. State legislation has been passed to address the notification process, where a chemical facility must notify the 911 center within 15 minutes.

Bayer has purchased radios to be placed with the security supervisor in their emergency vehicles and operations center. Bayer will have the capability to use the county OES channel and communicate information directly to the 911 center.

The second issue is there was a breakdown in communication between the incident commander and the county EOC. Information was relayed to the incident commander about the impact that the plume had on the surrounding areas, such as St. Albans, Nitro, Institute and Jefferson, and it was ignored. This was an issue about sheltering in place for us.

The incident commander was not able to see the impact outside of the plant. As a city official and responsible for the safety

and welfare of our citizens and my responding officers, it made it very difficult to make operational decisions. Records will support that the incident commander, Chief 24, was made aware of the conditions in the surrounding areas. This issue will be resolved in the future by ordering a shelter in place if we have not received information from the Bayer CropScience plant within 15 minutes.

The third issue discussed in the critique and after-action reviews were conversations about placing monitors outside of the plant and surrounding areas. Bayer has monitors along the fence line property on the river side of the plant. The discussions also included the capability of the monitors being able to send information back to the county EOC, mobile commander center, and other locations. This would allow command personnel to make better operational decisions to the units out in the field. Bayer officials indicated that would be a good idea, and indicated that Bayer may be able to assist with some funding for that project.

And the last issue is the security of the plant. From a law enforcement perspective, I believe that Bayer needs to make their facility more secure. The reason for this concern is that Bayer could be a potential target for terrorism. When you have an event such as this, the first thing that crossed my mind: Is this an accident or an attack? Due to the nature of the hazards stored and manufactured at the site, one cannot overlook that as a possibility.

Just my observations from outside of the plant, there are no barricades at the main entrance of the plant. What would prevent a vehicle from running the gate at the guard shack? Another concern is access from the river to the plant. There is a fence, but bolt cutters or a saw could give access, and it would go virtually undetected.

Thank you, Mr. Chairman.

Mr. Stupak. Thank you, Mr. Crawford.

[The prepared statement of Chief Crawford follows:]

***** INSERT 2-1 *****

Mr. Stupak. Ms. Nixon, your opening statement, please.

TESTIMONY OF PAMELA NIXON

Ms. Nixon. Thank you, Mr. Chairman.

I am Pam Nixon. I am the environmental advocate with the West Virginia Department of Environmental Protection. My role with the community is to be their ombudsman. I am not a lawyer, and I do not work in that capacity.

On the night of August 28, 2008, while visiting friends in the east end of Charleston, over 10 miles away from the Institute facility, around 10:30 we felt and heard a loud rumble. A statement was made, "At least it didn't break the windows."

When I arrived home around 11 p.m., it was being reported there had been a major explosion and fire at the Institute plant; but there was no additional information on actions for the public to take for their safety. It had been 30 minutes. No shelter in place had been called.

I had lived in West Dunbar, less than 1 mile from the plant, between the years of 1979 and 1990. The Institute area includes three small communities and a university; the communities of Institute, Pinewood Park and West Dunbar, and there is the campus of West Virginia State University, an Historically Black University with an enrollment of 5,000 students. Bayer

CropScience is located to the west end of Institute near the university, and sits on the north bank of the Kanawha River. Directly across on the south side of the river is the unincorporated town of Jefferson, and to the west of Jefferson are the towns of St. Albans and Nitro.

Due to their close proximity to the plant, all of the communities are no strangers to chemical emergencies. Depending on the velocity and direction of the wind, it would take less than 15 minutes for a plume from the plant to blow across them. Longtime residents know to stay off the phone and listen to the news for safety instructions during chemical emergencies.

But as the minutes began to tick away, my phone began to ring. Before this, I was a grass-roots activist in the Institute area. I could hear the anxiety in their voices, and also the frustration and anger that this was happening again. Some of the callers said they were going to Charleston to stay at a hotel until it was safe to return. Others just wanted additional information since there was no valid information about public safety being reported on the news.

I knew what they were feeling. It is like a wave that engulfs you when you hear an explosion, when you feel your home shake, when you see the smoke and the glow of the fire go up into the sky, not knowing what will happen next and fearing for the safety of your family. When you live that close to a chemical plant, you learn that every minute counts.

As I said earlier, the plant sits along the river floor. There are two roadways also that follow the valley floor, MacCorkle Avenue, which is Route 60, on the south side, and Route 25 on the north side of the river. Also on the north side of the river and on the hill above the plant is I-64, a major interstate highway. In the Kanawha Valley, due to the terrain, you have to plan your path of egress in case of an emergency, whether it is from a chemical emergency or an accident blocking your way.

For decades, the people of Institute were asking valid health and safety questions, even before the 1984 Bhopal tragedy. The very same questions that were asked back then were questions asked by different individuals during the public forums that were held after last year's fire and explosion. Those questions were: Is it safe for our families to live here? What were the chemicals involved in the plume? What are the potential health risks? When will the plant stop producing and storing dangerous chemicals in our neighborhoods? And is it safe to eat the vegetables from our gardens? This is West Virginia, and people have gardens in their backyards.

Back in 1984, there were no community right-to-know laws. The community and the faculty members from the university, at that time it was a college, organized to form the group People Concerned About MIC. With everybody working together, the group was empowered. They hosted meetings for company officials to explain chemical releases when they occurred. They participated

in the national discussions to develop the community right-to-know laws. They worked with universities, medical doctors, and Ph.D.s to conduct health surveys, and they worked with technical advisers on toxic use reduction to present to the plant in 1984 a design for the company to use to reduce the risk to the community.

After the right-to-know laws, they utilized this information for crucial information on the chemicals.

Information was finally getting out, but over the past few years, community members have murmured that they were beginning to lose ground in the quality of information that they were receiving when there was an incident. They had been proactive.

When chemical releases occur, residents say information is not in a timely manner. At times it takes weeks, even months, before the company will list the chemical names and provide the health risks to the community. In the past 2 years, there were two notable chemical releases, one on December 28 of 2007, and the other last year on August 28, 2008. During both events, even the emergency responders complained that they were not given enough information from Bayer CropScience to make informed decisions.

After the December 2007 incident, Bayer CropScience vowed at that time to provide emergency services with detailed information during a release. It wasn't until 2 months later, on February 27, 2008, that Bayer officials described the December incident to the Sub-area Community Improvement Council. They were told the chemical was thiodicarb, also known as Larvin, a hazardous

material used in insecticides.

After much criticism about the August 28 incident, Bayer apologized and again vowed to provide detailed information on releases. However, on October 26, 2008, the news media informed Kanawha emergency services personnel of an MIC event that had occurred at Bayer around the end of September of 2008. This became such an issue that West Virginia's Governor proposed legislation, which was passed during this year's 2009 legislative session. This law now requires businesses to report industrial incidents to 911 emergency assistance centers within 15 minutes or be fined up to \$100,000.

So as you can see, it is no wonder that residents of western Kanawha County, particularly Institute residents, have lost confidence in Bayer CropScience providing early notification on chemical releases that happen at their plant.

Thank you for allowing me to present this information. I am available for questions.

Mr. Stupak. Thank you for your testimony.

[The prepared statement of Ms. Nixon follows:]

***** INSERT 2-2 *****

Mr. Stupak. Mr. Bresland, your preliminary report, if I may summarize quickly, you indicated that where they are using this new vessel, this residue treater, that there is inadequate training on the computer system, there was a heater undersized, and is that where they bypassed the system? So they sort of bypassed the safety system on the heater, and that day we had a temperature rise, and they were getting different readings off the gauges, and that is when they sent the two employees down to check the gauges?

Mr. Bresland. Correct.

Mr. Stupak. And that is when the vessel blew up, if you will?

Mr. Bresland. That is correct.

Mr. Stupak. And at the time the vessel blew up, the video cameras were not working in that area, nor were the air monitors?

Mr. Bresland. That is correct.

Mr. Stupak. In your preliminary report, is it fair to say that methomyl is the release that had come from this explosion?

Mr. Bresland. Methomyl was the cause of the explosion. What happened was a concentrated solution of methomyl was fed into the residue treater. Normally it is diluted in the residue treating with a solvent; but in this case it wasn't diluted with a solvent, and eventually it started to overheat, and it became an uncontrollable reaction, and the vessel exploded.

What exactly happened after that we are not sure yet. We are still doing some work on that, because when the vessel explodes, the methomyl has already reacted, and then there was a major fire as well. That is a continuing part of our investigation, to find out just exactly what the outcome was.

But if you look at a material safety data sheet for methomyl, it lists a series of chemicals that can be formed when it decomposes.

Mr. Stupak. So methomyl was released because the pipes exploded?

Mr. Bresland. Yes.

Mr. Stupak. Any other chemical? We talked about MIC. Any other chemicals that may have been released that night?

Mr. Bresland. Well, the chemicals that would have been released would have been the decomposition products from the decomposition of methomyl. I can give you a list of those chemicals.

Mr. Stupak. In your preliminary report, you have the exposure symptoms from methomyl, correct?

Mr. Bresland. That is correct.

Mr. Stupak. You have on here nervous system disruption, blurred vision, pinpoint pupils, tremors, muscles twitching, nausea, abdominal pain, respiratory arrest, coma, death, liver damage, anemia; is that correct?

Mr. Bresland. That is correct.

Mr. Stupak. So in this fire, some of this methomyl would be burned in the fire, and some would be washed away when fighting the fire into the river, and some might be carried off into the air, correct?

Mr. Bresland. That is the issue that we need to address, just how much was carried off into the air because there was a major fire after the explosion.

Mr. Stupak. And we have no idea of knowing how much?

Mr. Bresland. Not at the present time, no.

Mr. Stupak. There is the methomyl residue. You can see the pipes where it would be released because of the broken pipe and equipment.

Those goggles that I showed in my opening statement, do you have any idea what the chemicals are that are on the goggle?

Mr. Bresland. That is the first time I have seen that photograph, so I am not able to answer that question.

Mr. Stupak. Let me ask, first responders, Chief Crawford, there seems to be a major disconnect between the story you tell about Bayer's failure to provide information to emergency responders and the story that Bayer tells. They say that they shared everything.

You lead the police department of St. Albans, the city directly across the river from the plant. Your officers saw the massive fireball from the explosion and notified Metro 911. As you began coordinating the emergency response for your community,

a large, possibly toxic, cloud started drifting towards you, your officers and your citizens. I would like to show you the transcript of the radio calls between St. Albans Fire Department and Metro 911. It is right there in that document book. You can find it in tab number 2, if you want to follow along.

"ST. ALBANS FIRE: We have a cloud of some type that is dark. It is moving toward Nitro. Can you please try to get some information so you can tell us what it is?"

"METRO: Copy. Cloud is moving toward Nitro. I will try and figure out something. The command on seat hadn't said anything about the cloud, but we are still trying to get some information on it.

"ST. ALBANS FIRE: You can see the cloud with the fire right above it for 3 to 4 miles.

"METRO: Still trying to figure out something out on it.

"ST. ALBANS FIRE: If we don't hear something within 5 to 6 minutes, we are going to do a shelter in place in the St. Albans area."

Chief Crawford, did you ever receive any information from Bayer about what this cloud was?

Chief Crawford. No.

Mr. Stupak. So Metro 911 was forced to go ahead and issue an order to shelter in place without knowledge of what was in that cloud?

Chief Crawford. That is correct. We did not receive any

information.

Mr. Stupak. Did you ever receive any information what they believe was the composition of that cloud?

Chief Crawford. No.

Mr. Stupak. A week after the explosion, Bayer officials issued a stated that said, "We shared all information available with Metro 911 as that information became available." Do you believe that to be an accurate statement?

Chief Crawford. What is a timely fashion? Some believe an hour and a half. An hour is entirely too long.

Mr. Stupak. Commissioner Carper, you wrote a letter on September 4 to Bayer. It is tab 6 in that book Mr. Crawford has. You said, "Metro repeatedly asked for information and was refused. In fact, no notification from Bayer, including the mention of the Larvin Unit, until the all clear the next morning. This is a complete abdication of Bayer's responsibility." Is that correct?

Mr. Carper. That is correct.

Mr. Stupak. In your testimony today that you provided in advance, Bayer's president and CEO said the company sent an official to Metro 911 center to provide that information, and let me show you what the Bayer president says. Again, it is in the book there.

"We were initially surprised when we received criticism from our Metro 911 counterparts and others in our community regarding our communications relating to the incident. CropScience sent a

representative from the Institute facility to Metro 911 site who was in direct communication with our EOC."

Commissioner Carper, did the official Bayer sent to Metro center provide you with all of the information you needed?

Mr. Carper. No, sir, because he didn't know anything. With all due respect to the response from Bayer, the record reflects that the only reason they sent a representative was because I insisted on it due to their previous failure to give us information. I believe it was in December of the previous year. I believe December 28. That's why they were there.

I believe it was Mr. Curry, and I had a number of conversations with Mr. Curry, a nice person, but he didn't know anything. Just like their security guard Steve at the gate, he didn't know anything. As your Ranking Member says, alert the public about what?

Now, the record is clear, we have them on tape. We don't have to guess what they told us and what they didn't tell us. They didn't tell us anything.

Mr. Stupak. As commissioner, have you learned what chemicals your community may have been exposed to that night?

Mr. Carper. No, sir. I have learned more here today. I had to come to Washington, D.C., to find this out.

Mr. Stupak. Mr. Dorsey, let me turn to you. You were at the Bayer site that night; is that correct?

Mr. Dorsey. Correct.

Mr. Stupak. It is a PowerPoint presentation Bayer officials created 3 days after the incident. You can find it at tab number 5, page 11. The title of the slide is "Positive Points." The first item on the list reads as follows: "Emergency response went very well. No significant complaints from the community and neighbors."

But in your testimony, you said you weren't allowed into the plant until after 3 a.m., and you said you were only allowed in after a confrontation at the front gate, and even then you weren't allowed to go to the scene of the explosion until nearly 5 a.m. in the morning.

Mr. Dorsey, do you agree with Bayer's claim that the emergency response went very well, and there were no significant complaints from the communities or neighbors?

Mr. Dorsey. Absolutely not. You have heard the testimony and have it written before you.

In my personal circumstance, I was at the front gate with the State emergency response director, Jimmy Gianato, and we were attempting to get into the facility. I was talking to my boss, the secretary of the Department of Environmental Protection, and he was speaking with the Governor. The questions were: Exactly how bad is it? Exactly what was released? All of the questions you have heard.

I went to the front gate and said, look, I need to get in here. And the fellow at the front gate said, I will tell let you

talk to somebody on the phone. I said, I am not leaving until I get into this plant. Mr. Gianato came immediately after that and said, if we don't get in here, there are going to be some State troopers who will show up, and they will start arresting people. So at that point we were allowed into the plant, and as the other people were earlier, we were ushered into a side room away from the main communication center, and Mr. Crosby came in and Mr. Way, and eventually we made our way to the incident site.

Mr. Stupak. So it was only after threat of arrest that you actually got in?

Mr. Dorsey. Yes, sir.

Mr. Stupak. Let me ask you this: In the testimony of Bayer's president and CEO, he states that the only real problem with the emergency response that night was you didn't receive immediate reassurances that you were safe. Do you agree that you needed reassurance that night, or did you need actual information about what was going on?

Mr. Dorsey. We needed real information. As someone stated earlier, the plant's fire department did a good job. That was a major incident, and they did well in there. But it is a dangerous plant. There are miles of piping, and there are thousands of tanks. We needed to know what was happening. The Governor himself was on the way. The 28th was the night of the Democratic National Convention. He flew in. At about 5:00 he got there himself. So that was the level of concern that was there that

night on the State level, and we weren't getting what we needed.

Mr. Stupak. Thank you.

Mr. Walden, questions, please.

Mr. Walden. Thank you, Mr. Chairman.

Mr. Crawford, I want to get at the issue of who was controlling the flow of the information inside the plant to outside of the plant, and I believe you said the security guard who you talked to or others talked to said, this is all I can say. I can only tell you there is an emergency. That is all am allowed to say, language such as that.

Who was controlling what the security guard was allowed to say; do we know?

Chief Crawford. I don't know, sir.

Mr. Walden. Mr. Carper?

Mr. Carper. I know now because I have talked to them. They have changed their procedures. They didn't have an on-site manager present. Remember, now, to some extent, to put this in perspective, they have had one heck of a bad explosion. They have had at least one death, and it turns out two deaths, and they are trying to sort through that and assess it. But frankly, Mr. Walden, had I known then what I know right now, I would have ordered an evacuation. I would not have let those people stay in that footprint if I had known a 100-pound piece of shrapnel was flying through the air, and I specifically asked about the MIC tank.

Mr. Walden. What were you told?

Mr. Carper. Listen, we get more information on a car wreck than we got that night. This was the most unreported. We were led to believe everything was okay. Obviously if we had known that, I think any first responder, a trooper, anybody knowing what that plant has, knowing the damage to that vessel, would have ordered -- at least prepared an evacuation at the very least. We didn't do that.

Mr. Walden. So who was telling all of these people to keep quiet, in effect, and just say, we have an emergency and we are dealing with our emergency?

Mr. Carper. As I understand it, they had basically two command structures in the plant. You would have to ask them. That is their responsibility. And remember, it is a fixed-asset industrial plant, so we generally rely upon them to tell us what they have and what we are supposed to do. It is not like a train accident or a commercial incident.

Mr. Walden. I guess that is what I am getting to. I assume that they have an emergency plan, and I assume they have protocols, and I assume you have worked those out together so when there is an incident, boom, this is what we do. It sounds like there was one in 2007. It sounds like they pledged that any communication problems then had been fixed. And now you get to the big one or near big one, and there isn't the communication that is essential in a situation like this.

Mr. Carper. I can explain what we did right and what we did wrong. I can explain what we have changed. But, frankly, I think they will have to explain their lack of giving us information.

If their position is they gave our 911 center adequate information to make an intelligent decision, I disagree with that.

Mr. Walden. There is breakdown, clearly.

Mr. Bresland, I have been working through your West Virginia accent, and I have been trying to figure out what part of West Virginia that originates from.

I appreciate the work you are doing to try and bring about safer plant operations. I want to touch on a couple of things. First of all, I believe you said there were three safety interlocks that were disabled?

Mr. Bresland. That is correct.

Mr. Walden. What were those?

Mr. Bresland. Those were safety interlocks that controlled the flow of the methomyl solution into the residue treater, and they had been bypassed to allow the temperature to get up to what they considered to be the appropriate temperature for the decomposition of the methomyl to take place under normal circumstances.

However, in this particular case they were pumping very concentrated methomyl into the reactor. Again, the safety interlocks were bypassed, and you filled the tank with a concentrated solution, which resulted in the explosion.

Mr. Walden. How long had these interlocks been disabled?

Mr. Bresland. It is my understanding that on a routine basis when they were starting up the residue treater, the interlocks would be bypassed until they got the temperature up.

Mr. Walden. Is that a standard operating procedure then?

Mr. Bresland. No. Safety interlocks are there for a reason.

Mr. Walden. I always believed that when I was dealing with transmitter repair.

Mr. Bresland. There is no logical reason to bypass the safety interlock. You are putting the facility in danger when you do that.

Mr. Walden. Let me ask you this question, because there is a lot of concern among us and, I assume, most people observing this. If you have these projectiles flying around, and you have the MIC tank nearby, and there is this safety screen of some sort that was there, did it take a hit? Did any of those projectiles hit that safety screen?

Mr. Bresland. There was a photograph shown early on of the safety screen, and it did show some indentation.

Mr. Walden. I didn't know if that was the design or if that was something that happened during the explosion. Do you know the answer to that?

Mr. Bresland. What my lead investigator says, that was caused by a sagging of the material.

Mr. Walden. Because of heat?

Mr. Bresland. Probably just because of its age. It had been there for some time.

Mr. Walden. Do you know in your evaluation of that safety screen, would it have withstood the force of those projectiles had it taken a direct hit?

Mr. Bresland. Well, we are going to look at a couple of issues. Number one, what were the design criteria for that safety screen? Was it designed to take, or did somebody make an assumption that there could have been a series of explosions and it could be hit by projectiles? What strength was it built to?

Mr. Walden. But we don't have an answer to that?

Mr. Bresland. We don't. That is part of our continuing investigation.

Mr. Walden. I represent a district that has one of the chemical facilities from the Cold War era, and we are in the process of destroying the mustard gas and the nerve agents, and I know there is an array of air sensors all around that facility. Do you believe in your investigation that there are adequate air sensors either at the plant or outside the plant or around the perimeter or further out, wherever a plume might go?

Mr. Bresland. Well, with a chemical like methyl isocyanate, I think it is very important that you have air sensors that would specifically measure the concentration of methyl isocyanate and allow both the facility and the emergency responders and the community to know.

Mr. Walden. And are there adequate sensors today, from your perspective?

Mr. Bresland. I will have to wait and hear what the Bayer people have said about what they have done since the investigation.

We were not able to get any information on the adequacy of the sensors.

Mr. Walden. Why?

Mr. Bresland. My understanding is that they were not working at the time.

Mr. Walden. The air sensors were not working?

Mr. Bresland. That is my understanding.

Mr. Walden. One final question. Mr. Crawford, in terms of the shelter-in-place system and how that works, is there an audible alarm that goes off in the communities that they need to shelter in place? This was obviously very late at night.

Chief Crawford. According to our plan, you have a ring-down system.

Mr. Walden. Ring down, meaning it calls people in their homes?

Chief Crawford. Yes.

Mr. Walden. Did that come off correctly?

Chief Crawford. No.

Mr. Carper. It was a miserable failure.

Mr. Walden. Why?

Mr. Carper. Well, the vendor that sold it to us hadn't scrubbed the system. We did too large of an area. We tried to do it in one time. It just couldn't handle it. We have since changed the vendor.

Mr. Walden. Have you run a test of the system since you changed the vendor?

Mr. Carper. Yes.

Mr. Walden. Does it work now?

Mr. Carper. It is better. It is still not perfect. It is just part of the tools in the toolbox. We have EBS, the media, ring down, outdoor warning sirens. We have got a good system, but you have to know. To hit the button, you have got to be told.

Mr. Walden. I understand. I would encourage you to do the test. We ran into the same problems when they were ramping up the same sort of alert systems out in my district for the decommissioning of the chemical plant. They had false alarms that put the signs up on the freeway to flee. It was a little problematic.

Mr. Carper. We now have what is called a handshake system on our system. Thanks to Congress and Homeland Security money, we actually know when a siren goes off. We do routine tests of all of these things.

But again, we have cable interrupt; but you have to have the television set on.

Mr. Walden. That is why the ring down and the audible alarm

systems are critical in the middle of the night.

Mr. Carper. And somewhat limited, but very effective in the Institute area.

Chief Crawford. And under the cable intercept, that was one of the things that was identified in the after-action review and critique.

Mr. Walden. Cable intercept, as in the emergency alert system?

Chief Crawford. With the cable company.

Mr. Walden. And did the emergency alert system work, both radio, TV and cable?

Chief Crawford. There was a glitch in that, I believe.

Mr. Walden. How so? What was the breakdown there?

Mr. Carper. Well, we have different cable companies. We have some problem with that. We have our EBS, our emergency broadcast, now working pretty well. But remember, they are just part of the way to warn people.

Mr. Walden. I understand.

Mr. Carper. We want them all to work. They should work every time.

Mr. Walden. Thank you. My time has expired.

Mr. Stupak. Ms. Sutton for questions, please.

Ms. Sutton. Thank you very much, Mr. Chairman, and thank you for your very informative testimony.

On the next panel, we will hear from Bayer CropScience

president and CEO William Buckner, but I want to share with you a portion of his prepared testimony and get your reactions to it.

After the August 2008 explosion, the Chemical Safety Board received thousands of pages of documents from Bayer about its plant's operations. In February, more than 4 months after the accident, Bayer informed CSB that many of these documents contain sensitive security information, or SSI, as we have heard here today. And under law, SSI cannot be disclosed to the public.

So let's look at why Bayer took this position, according to the testimony of Mr. Buckner. He admits that his company initially hoped to use SSI to avoid responding to the Chemical Safety Board's request for information about the plant's large stockpile of MIC. When that failed, Bayer tried to invoke SSI to block discussion of the MIC with the general public.

So, Mr. Bresland, in your experience at the CSB, has any other company ever tried to withhold documents from the Board under the guise of homeland security?

Mr. Bresland. We have been in operation since around 2001, 2002, and we have completed approximately 55 major investigations. This is the first time that we have been exposed to this issue where someone came in and said, all of the documents that we have submitted to you, you're eligible to receive them and look at them, but you can't tell anybody else about them.

For example, when we look at the list of some of the documents that they told us we couldn't tell, an incident, near

miss on environmental release reports, these are basically public documents. Operator training records, I just could not understand how these would be considered security related. To me -- and I worked in the chemical industry for 35 years. I ran chemical plants, and I know how they work. I know the difference between security and process safety, and the documents that they were asking to be considered as SSI were not security documents, they were process safety documents, the sort of documents that we on a routine basis get from all of the companies that we investigate. And we routinely get them cooperatively from the companies. Then we use those documents in our reports.

We are having a public meeting in West Virginia on Thursday evening, and we have a PowerPoint presentation that will give a lot of information about what happened at this accident, much more than we have time to present today. There will be no SSI in that. We worked with the Coast Guard, and they took out one item from our PowerPoint presentation. Everything else is what we would normally present.

However, if we have to go and look at 2,000 documents, or in the case of our BP Texas City accident where we got 6 million documents, if we have to look through 20 percent, a million documents, we might as well pack up and go home because there is no way we can do these investigations under these circumstances.

Ms. Sutton. Mr. Bresland, thank you.

Mr. Buckner in his testimony says, "We frankly admit" that

one of his company's goals was to "avoid making the controversial chemical MIC part of the public debate during the incident."

He further acknowledged that there were, of course, some business reasons that also motivated our desire for confidentiality. These included a desire to limit negative publicity generally about the company or the Institute facility to avoid public pressure to reduce the volume of MIC that is produced and stored at Institute by changing to alternative technologies, or even calls by some in our community to eliminate MIC production entirely.

So, Mr. Dorsey, I would shift to you. We have examined the statute and regulations at issue here, and nowhere can we locate a provision allowing a company to conceal information in order to limit negative publicity. That is not a proper basis to label something as SSI, is it?

Mr. Dorsey. Not in my opinion, no. As I touched on briefly in my testimony, there are a number of laws, Federal and State, that require the submission of information on processes, waste streams, et cetera, which could at least potentially be covered under these types of claims. And I think that is not what was intended by the coverage under that type of statute.

Ms. Sutton. And yet Mr. Buckner acknowledges that public discussions and CSB recommendations about alternative technologies and inventory amounts would be a sensitive matter for the company. And he concludes, "We concede that our pursuit of SSI coverage was

motivated in part by a desire to prevent the public debate from occurring in the first place."

If I can shift very quickly, and I know I am running out of time, Ms. Nixon, I know you have been involved with the safety of chemical plants in West Virginia for two decades; is that correct?

Ms. Nixon. Yes, it is.

Ms. Sutton. Have you ever heard anything like this, the president of Bayer basically admitting in his testimony that his company was abusing this process in order to prevent the public debate about MIC? What do you think about that?

Ms. Nixon. I have never heard anything like that. I do know that 1 month after the incident occurred last year, the community group People Concerned About MIC held a forum in Institute. At that time the company refused to attend their meeting. They waited another month to hold a meeting of their own. Even with that, we still haven't been given the information as to what was in the plume or the health risks that the community may have been exposed to.

Ms. Sutton. Do you have an opinion about what should happen to a company for doing this?

Ms. Nixon. Many in the community, I can tell you, would like for the company to stop producing the chemical. Some would like the company to close.

I would like the company to be a safe company, to eliminate the production of MIC so close to a university and to communities

that are surrounding it. As I said, it takes less than 15 minutes for a plume to engulf the communities of Institute, and across the river to Jefferson and St. Albans.

Ms. Sutton. Thank you.

Mr. Stupak. Thank you, Ms. Sutton.

Mr. Burgess, questions.

Mr. Burgess. Thank you, Mr. Chairman.

Just continuing on that thought, Mr. Carper, you may not be the correct person to ask this, but historically how has this evolved that there is such close proximity with neighborhoods and institutions of higher learning?

Mr. Carper. Kanawha County and Charleston, West Virginia, at one time was the chemical center of the world. We had over 50,000 to 70,000 chemical jobs from one end of the county to the other. West Virginia is blessed with natural resources. We have got good water. Union Carbide started there, and chemical plants flourished. West Virginia State University at one time was an Historically Black College. It was built there. We didn't think about things in those days. People just kind of got along, and they melded into each other.

Mr. Burgess. Now, the storage of the methyl isocyanate, is that recent?

Mr. Carper. No. They have produced that, and you would have to ask them since when, but that has been a multiple-decade activity at that plant. I think it is the only one now existing

in the U.S.

Mr. Burgess. Part of this goes back to what Mr. Walden was asking. Presumably recognizing today that we have got, in juxtaposition to an institution of higher learning and neighborhoods, a chemical that has been shown to be very, very toxic if it is released all of a sudden, what sort of plans -- do you and the chemical plant work on disaster drills? Do you have an ongoing dialogue?

Mr. Carper. They might get an F for this response, but I will give them an A-plus for that. They are very good about that. They are working with us. We have worked quite well with the first responders as far as emergency planning and preparedness. They will tell you, I suspect, that they are in the process of doing a drill in the next couple of months. They are very cooperative on that. That is not a problem.

Mr. Burgess. Just one last question. This is just for background information, and I don't mean to imply anything by it. How many jobs are at this plant? What is the economic impact to the community?

Mr. Carper. It is significant. I think in the Larvin Unit, it is 140 or some. It is better for that to come from them.

Listen, these are West Virginia workers. They are good, safe workers with a long history in Kanawha County and West Virginia of producing necessary chemicals safely.

Mr. Burgess. I appreciate that point. Certainly in our

Texas City area where we have a long history of refining, it is a similar environment.

Now, Mr. Bresland, you said you could provide us with a list of the products of decomposition from the fire of the methomyl that was released, and you will do that?

Mr. Bresland. Yes, sir. I don't know if we gave you the most up-to-date PowerPoint presentation, but in our presentation on Thursday night, we do list those chemicals. It is in the PowerPoint presentation that I have here.

Mr. Burgess. That is part of our record? I don't know that I have that. It is not urgent that I have it right now, but I would like to see what the compounds are that we are talking about.

Mr. Braley. [Presiding.] It is slide 37.

[The information follows:]

***** COMMITTEE INSERT *****

Mr. Burgess. What is next from your perspective? You have a hearing or meeting Thursday night?

Mr. Bresland. We have a meeting on Thursday night that is being held at West Virginia State University, and there will be a presentation by our investigators to the community. And we have invited the whole community to attend the meeting, and there will also be a panel discussion when we have some of the emergency responders, some of the people who are here.

Mr. Burgess. So your intended audience is the community?

Mr. Bresland. Yes. The purpose of the meeting is twofold. One is to tell the community here is what we have discovered so far; and also hear from the community what are their concerns or issues with this incident and/or our investigation.

Mr. Burgess. Looking at this list, I can almost imagine what their concerns would be. These are the by-products of burning methomyl that I am looking at on page 37? Methomyl thermal decomposition, hydrogen cyanide, methyl isocyanate?

Mr. Bresland. Yes, I have them here.

Mr. Burgess. Again, I can imagine what their concerns are going to be.

At this point I don't know that we have established whether the sensitive security information argument is correct or not, but are there going to be issues surrounding sensitive security information that are going to be discussed at your meeting?

Mr. Bresland. At our meeting we plan to tell the public here is what happened in the incident. We don't plan on getting into too much of a discussion of SSI, because at least in terms of our PowerPoint presentation, we have reached agreement with the Coast Guard on what is SSI.

Mr. Burgess. So you have?

Mr. Bresland. We sent it to them, and they said there is one issue that we would not like you to disclose, and that was the time of day at which the methyl isocyanate was transferred within the facility.

Mr. Burgess. Okay. Just in general, with having dealt with this problem and the issues about sensitive security information, I'm assuming it has hindered your work so far. Is that an accurate assumption on my part? Do you see it as continuing to hinder your ability to do this investigation going forward?

Mr. Bresland. Don't take this the wrong way. It is a less than accurate assumption. It has just about killed us. We have spent a lot of our time dealing in a very cooperative manner with the Coast Guard; but internally within our agency, and we only have 37 people, we are a small agency, the team that has been doing the investigation has been tied up with this. The same team is investigating a major explosion at a sugar refinery in Georgia that killed a number of people. That investigation has basically been put on hold until we resolve this issue. It has really taken up a lot of our time.

I keep getting calls from the news media about this and doing interviews. I don't want to underestimate this at all. It has taken up a lot of our time.

Mr. Burgess. Going forward is this something that is going to quickly be resolved after today?

Mr. Bresland. My fervent hope is after today we will move ahead. What I worry about is when we publish our final report, which is typically 100 to 150 pages long, and it is a technical report with lots of information, we will send that to the Coast Guard, and they will review it also. We will be going back and forth with this issue when we do our final report. I do worry about that.

Mr. Burgess. As part of your investigation, do you involve yourself at all as to whether or not there is adequate security surrounding the plant? If there is sensitive security information that it is better not get out into the public domain, is there robust enough security around the plant to protect it from the type of damage that we might want to prevent someone from knowing about?

Mr. Bresland. As someone who worked in the chemical industry for many years, we are obviously concerned about security, but we don't get involved in evaluating the security at the facility. We don't feel that we are qualified to do that. We leave that to the experts, either Homeland Security or the Coast Guard in this case.

Mr. Burgess. Thank you.

Mr. Braley. The Chair recognizes himself for 5 minutes.

One of the reasons why this is such an important conversation is because it is easy to understand why the citizens of Kanawha County are angry and frustrated. The Washington Post reported on Sunday: "West Virginia chemical plant shut down, fined \$2 million over emissions. State and Federal authorities announced Monday that Dupont and Lucite International have agreed to pay \$2 million to settle air pollution violations at a West Virginia plant. The violations stem from sulfur dioxide releases from a sulfuric acid unit owned by Lucite, but operated by Dupont at its plant in Kanawha County." This announcement said Lucite voluntarily agreed to close the unit by next April.

Mr. Carper, this gets back to the point you were raising earlier, Ms. Nixon, and that is this takes away jobs. And I assume that this county in West Virginia has a high unemployment rate, like many other counties in this country, and when you are not a responsible corporate citizen, and these plants get shut down, it affects people's livelihoods. That is why I want to follow up on your earlier conversation, Ms. Nixon, about frustration and anger that this was happening again. I want to talk about the history of prior accidents.

The committee's investigation has determined that the August 28 accident was not an isolated incident. The Institute plant has a long history of chemical accidents and failures to provide timely and actionable information to the public and first

responders, both during the explosion and after.

On December 28, 2007, just 8 months before, a chemical reaction caused a release at the Larvin Unit. Bayer's own internal documents characterize the event as a "decomposition incident." In plain English, dangerous chemicals escaped.

On August 13, 2001, shortly before Bayer took over, 10 workers received medical treatment from a chloroform leak at the Aventis portion of the Institute plant. In all, there have been as many as 11 chemical accidents at the plant dating back to 1985.

Ms. Nixon, since you have lived through a number of these chemical incidents, have you ever been personally harmed by a chemical incident at the plant?

Ms. Nixon. Yes. On August 11, 1985, there was a release of aldicarb oxime and methylene chloride. There were 135 of us that ended up in emergency rooms. When I say "of us," I was one of them. We ended up in emergency rooms.

Mr. Braley. What does this pattern of incidents that I just recited tell us about how confident we should be about Bayer's commitment to being able to prevent another major chemical event at this plant?

Ms. Nixon. There seems to be some sort of inherent process defect in the way that the process goes on, that it continually occurs in this facility, at least in the insecticide part of the plant.

Mr. Braley. One of the things that concerns the committee is

that the investigation has shown that there is not just a pattern of chemical accidents, there is also a pattern of accidents in which the community has demanded information from the company that was not forthcoming. For example, in a letter from Bayer to the EPA after the December 2007 incident, and this is at tab 27, the company admitted the following: Bayer CropScience is aware that area officials were frustrated with their inability to answer all questions that were being asked. We agree that Institute and Metro 911 can and should communicate more efficiently and quickly. Bayer acknowledged that they could do better, but the August episode has shown they have not lived up to their own promise.

Ms. Nixon, you concluded your testimony by saying that the Institute residents have lost confidence in Bayer CropScience. What role has Bayer's continuing failure to provide adequate information to the community played in that loss of confidence?

Ms. Nixon. As I said, the company is in such close proximity to the community, that whenever there is a release, it is only minutes before it gets into the community. The lack of communication has caused a lot of concern among the community residents on what they have been exposed to from the chemicals that were released.

Mr. Braley. Mr. Carper, you used a phrase that is very common to a lot of us, and that is the question of good faith. One of your colleagues, Mr. Dale Petri, who is the director of the Office of Emergency Services for the Kanawha County Commission,

told members of the committee staff that it is a matter of building trust every time the plant has changed hands. So I ask you: How is Bayer going to regain your trust and the trust of your emergency personnel who selflessly serve in your community?

Mr. Carper. Mr. Braley, I don't know if I can give you a clear answer on that. I know they are trying. I have met with Mr. Crosby, the plant manager, a number of times. They will tell you they are making changes. They are bringing in a full-time safety person. They are going to do a drill. They are going to do outreach to the community.

But, you know, I think part of their biggest problem now is this SSI thing. They are giving that acronym a bad name. If I was the Social Security Administration, I would make them quit using it. It really sends the wrong message. The fact that they are the very first company to ever do this; the fact that Congress, who wrote the law, says it doesn't apply, maybe they ought to find something to do with their time and invest in rebuilding community trust.

They have to have a transparent process. The community has to believe that they actually know the risk. That takes a long time. Mr. Petri is here with me. He has 25-plus years in the fire service. He is our emergency manager. He nailed that correctly. The plant has changed a lot, but they have to rebuild trust. That is not going to be an easy thing to do.

Mr. Braley. Mr. Crawford, have you ever heard the phrase

"action speaks louder than words"?

Chief Crawford. Yes, I have.

Mr. Braley. You have seen a lot of policies down on paper, I assume?

Chief Crawford. That is correct.

Mr. Braley. It is one thing to have those policies on paper, and it is another to act like you believe in them; would you agree with that?

Chief Crawford. Yes, I do.

Mr. Braley. Is that the type of commitment you are looking for from Bayer is a demonstrated proof that they really have an action to commit to carrying these policies forward to protect the citizens of your community?

Chief Crawford. Yes, and we want to do what is right. From a first responder's point of view of making a decision, to a plant manager making those decisions, we need to do what is right and be responsible.

I mean, we are all held responsible. That is the bottom line.

Mr. Braley. Thank you.

The Chair now recognizes the gentlewoman from the Virgin Islands for 5 minutes.

Mrs. Christensen. Thank you, Mr. Chairman.

Before I ask my question, there is an extensive body of evidence that toxic plants are more likely to be located near

minority communities, so I asked for the demographics of Kanawha County and was told 91 percent white, 8 percent black, 1 percent other. But I see if you look at the closer-in picture, and we have heard from Mr. Carper, that it is largely a minority community.

I consider students at a university to be a particularly vulnerable population. Ms. Nixon, do you know if there was any specific information given? We know that the general community and the public safety officials didn't get much, but was there any kind of communication specifically to West Virginia State?

Ms. Nixon. As you will note, the incident occurred August 28, 2008. This was the beginning of the year for the students at West Virginia State University. They had gone through orientation. They had heard this information. They had heard about shelter in place and chemical plant being there, along with all of the other information that they received as new students on campus. This was on a hot evening in August. The students were outdoors, and that is when the explosion occurred, and they are close to the plant.

Mrs. Christensen. I see that.

Ms. Nixon. They did receive information during orientation, but it takes drills and things before it is learned.

Mrs. Christensen. But no specific information that evening?

Ms. Nixon. I believe some of the dormitory captains did advise their residents to go inside and shelter in place. But

some students were outdoors.

Mrs. Christensen. That was on their own?

Ms. Nixon. On their own, yes.

Mrs. Christensen. Although we don't know specifically what chemicals might have been in the air, have you seen any public health activity in the area surveying individuals? We have heard some of the kinds of symptomatology from some of the possible chemicals. Has there been any public health surveying of the population?

Ms. Nixon. I do know that the Kanawha County Poison Control Center was very frustrated with the lack of information that they had received also. That was brought out at one of the critique meetings that was held in the Kanawha Valley.

The question that people had about their gardens and whether they should eat from their gardens, there was no direct information coming from the plant. When the plant manager was asked that, all he said was, you usually wash your garden plants before you eat them. And there had been reports about residue being on the plants after the incident.

Mrs. Christensen. We have heard, and you have mentioned the bill that was passed this year, and it requires that businesses report industrial incidents. The incident was reported; there was just no specific information on which to make a determination to inform and protect the public. From what you know of the bill, do you think it goes far enough? It requires notification? I have

not seen the bill. Does it satisfy you? You said that you can't rely on the company. Does this bill reassure you in talking to the public? Is the public feeling more protected?

Ms. Nixon. I haven't had a chance to review the whole bill because it was just passed this spring, and it is April, and I am here, and so I haven't had a chance to review the full content of the bill.

Mrs. Christensen. Mr. Bresland, Bayer is the only company in the United States that makes and stores large amounts of MIC, as we understand it, and I would like to show a photograph of the section of the Bayer plant where the explosion occurred. It should come up on the screen, CSB 22. I think that Mr. Walden's line of questioning and your responses have already determined that the residue tank could have gone just as easily in the other direction into the MIC tank. If that 2-ton residue tank had blasted into the MIC tank, it is possible that MIC could have been released into the surrounding communities, correct?

Mr. Bresland. That is correct. In this photograph, the accident takes place in the middle right of the photograph, and the MIC tank is the tank that is marked on the left-hand side.

Mrs. Christensen. This wasn't the first explosion in this facility, as we have heard. We regret the loss of life, and we extend our sympathies to the families as well, but in 1993 there was another explosion.

My question is why in the world is Bayer putting the

community at risk by storing large amounts of this deadly chemical in a tank that is vulnerable to these kinds of accidents? MIC doesn't need to be stored in that way. There are safer alternatives that exist. We had a near miss in August. We might not be as lucky next time. As part of the report, will CSB make a recommendation as to whether Bayer should adopt alternative technologies that do not require storage of large amounts of MIC?

Mr. Bresland. After the Bhopal incident in 1984, there were at least two major manufacturers of MIC. One was Dupont, and one at that time was Union Carbide. Dupont, within a very short period of time, switched their process to a type of process that ultimately gives the same product, which is a similar product to the one that is being made at Institute, but they switched the process to one in which MIC was formed, but immediately used, so there wasn't any -- and that operation or facility is still there. So they are manufacturing MIC, but there is only a very minute amount that is -- that is stored.

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Mrs. Christensen. So are you going to make a recommendation in your report?

Mr. Bresland. We're certainly going to make a recommendation that Bayer explain to us what would the issue be that would prevent you from doing this.

Obviously, there is a technical capability. I don't know if that capability belongs to Dupont. I don't know if that's available to other manufacturers and then there would be an economic evaluation that they would have to do as well. But certainly keeping in mind the community interest in this, I'm sure that Bayer will be actively moving in this direction to look at this and come up with an evaluation, and that would certainly be a recommendation that we would make.

Mrs. Christensen. Thank you.

My time is up, and I have to go to the floor, but I will try to return.

Mr. Stupak. [Presiding.] Thank you.

Let me follow up with that, if I may.

Are you familiar with a report reducing the storage of methyl isocyanate at the Institute in West Virginia? It is a 1994 report, November 12, 1994, by -- community groups put it together. Are you familiar with that report at all?

Mr. Bresland. I know the report has been written. I haven't read it.

Mr. Stupak. Again, this report is 15 years ago and is after Bhopal. In the report it says, the plant may be a disaster waiting to happen. They talk about a 1993 incident in which there were numerous points of neglect by the company management, including a company-wide yield enhancement program that accelerated production outputs at the plant without ensuring adequate safety reviews.

Looks like we have the same thing here. We have a new residue treater being there. We have it jerry-rigged, a bypass system put on it. So the safety valves -- the interlocking safety valves -- you don't have any monitors, air monitors, no video cameras. It seems like we have the same thing. Because it says here that a worst-case MIC release at the plant could cause deaths for a 9-mile radius and injuries for up to 28 miles from the plant.

I went on and read this report; and it said the plant here at Institute, Virginia, stores 3 times more than actually was released in Bhopal.

And as to your point, it went on to say that Dupont, through a no-storage continuous feed system, whatever they need that day they produce it, they use it. So you're not storing this MIC chemical. And the Israeli firm had found different ways of making the same product with different materials, avoiding the use of MIC

entirely.

Again, this is 15 years ago. I'm sure science has progressed in 15 years. What is the purpose of using MIC then? If that might be one of your recommendations, why would you need to use this dangerous chemical stored in such large volumes?

Mr. Bresland. The issue I think is more the amount stored at the facility. Is there a way to make it and use it immediately?

I used to run a large chemical plant in Philadelphia. We had a major explosion. As a result of that, we did away with the chemical that caused that explosion. I was a little skeptical about it when it happened, but that plant has been running very successfully ever since it was rebuilt without the storage of this dangerous material.

Mr. Stupak. You could use a day's supply --

Mr. Bresland. We didn't store any at all. We zapped it on through. It went from one process unit to another.

Mr. Stupak. Let me just ask one question, and if Mr. Walden has any follow up we'll go to the next panel.

This blast blanket -- appears to be some controversy whether or not it has gone as we said in our opening statement, but we just received an e-mail saying that part of it's still at the plant. After an accident like this occurs, you are in charge, right?

Mr. Bresland. Yes.

Mr. Stupak. The Chemical Safety Board? So if they were to

move the blast curtain or blanket, they would have to ask you to remove it.

Mr. Bresland. That would be my assumption, that they would ask us, if you were moving a particular piece of equipment that is involved or at least peripherally involved in the incident.

Mr. Stupak. So if part of it is still in the plant, you would be interested in your investigation of seeing this blast mat or blast blanket around the MIC?

Mr. Bresland. Oh, sure, absolutely. We would be.

Mr. Stupak. You haven't seen it since then? Since this investigation commenced?

Mr. Bresland. Let me ask our -- we have had an opportunity to take a look at it since --

Mr. Stupak. I have no other questions. Mr. Walden?

Mr. Walden. I yield to the last panel.

Mr. Stupak. Ms. Sutton and Mr. Burgess. I'm afraid to ask Mr. Burgess, because I know --

Mr. Burgess. Yeah, Mr. Bresland, I just have one last question on the heater, I guess, that you described in the bypassing of the safety mechanism. Do you have an idea as to how long that heater had been defective?

Mr. Bresland. Well, it wasn't that the heater was defective. It was during the start-up operation to get the temperature -- to allow the temperature to rise to the appropriate temperature for the reaction to take place inside the tank. They had to bypass

the 3 safety controls that were there -- that were there with the purpose of preventing inappropriate reaction.

Mr. Burgess. Well, that, to me, though, suggests that the heater was inadequate to do the job that it was intended to do --

Mr. Bresland. That's correct.

Mr. Burgess. -- and so we had to rely on the heat of the chemical reaction to get us up to the ignition or the start-up temperature or whatever would be appropriate there.

Mr. Bresland. Yes.

Mr. Burgess. How long had that -- it just seems like -- if you look for a root cause, we have an inadequate heater where we're having to bypass and use a chemical reaction to make things work. It just defies logic on something as critical as that that you would have a nonfunctioning apparatus there. Buy a bigger heater, for Christ sakes.

Mr. Bresland. I think Mr. Carper brought up an interesting point here. This facility was Union Carbide, and in our presentation later this week we'll show the number of different owners that the facility has had. Every time you change corporate ownership, you probably bring in new management, new cultures, new safety cultures and ways of operating things. And this can be confusing for, well, for the employees, it can be confusing for the community.

While one set of management might have an approach that we are really going to work closely with the community, another set

of management might say, well, we don't really need to deal with them too much. That's in issue that may not be exactly involved in this instance. But when I see a facility in which ownership is changing, it -- it raises some questions in my mind that -- that that could be an issue.

Mr. Burgess. So in a brief answer to the question, the inadequate heating element likely predated the ownership of --

Mr. Bresland. Of Bayer?

Mr. Burgess. Of Bayer.

Mr. Bresland. It probably was back there when this particular facility was built, when this particular operation was built.

Mr. Burgess. Okay.

Mr. Bresland. So it may have been there for years and years.

Mr. Burgess. Thank you, Mr. Chairman.

Mr. Stupak. Thank you. And let me thank this panel for your testimony today and your interest, and we will continue to work with you and hopefully get some legislative changes made. Thank you very much for your testimony.

Mr. Bresland, you will stay with us for the second panel I take it?

Mr. Bresland. Yes.

Mr. Stupak. So I won't reintroduce you again as the Chairman of the U.S. Chemical Safety and Hazard Investigation Board, but you can stay.

Mr. Bresland. Do you want me to do my presentation again as well?

Mr. Stupak. Only if you wish.

Mr. Bresland. No, that's okay.

Mr. Stupak. We will call up our second panel of witnesses: Rear Admiral James Watson, who is the Director of Prevention Policy for Marine Safety, Security and Stewardship of the U.S. Coast Guard; Mr. William Buckner, who is the President and CEO of Bayer CropScience, LP; Mr. Nick Crosby, who is Vice President, Institute Site Operations for Bayer CropScience; and Mr. John Bresland, of course, is going to stay with us.

It is the policy of this subcommittee to take all testimony under oath. Please be advised that you have the right under the rules of the House to be advised by counsel during your testimony. Do any of you wish to be represented by counsel during your testimony?

Mr. Buckner. My counsel is present.

Mr. Stupak. Mr. Buckner, you have counsel? Would you, just for the record, want to identify them? You would have to answer questions, but any time during questioning if you want to stop and consult with your counsel you are allowed to.

Mr. Barnett. Bob Barnett principally with Williams & Connolly.

Mr. Stupak. Okay, Mr. Barnett, very good.

Please rise, raise your right hand and take the oath.

Mr. Bresland, you don't have to. You are still under oath from the last one.

[Witnesses sworn.]

Mr. Stupak. Let the record reflect the witnesses have replied in the affirmative. They are now under oath.

STATEMENTS OF REAR ADMIRAL JAMES WATSON, DIRECTOR OF PREVENTION POLICY FOR MARINE SAFETY, SECURITY AND STEWARDSHIP, U.S. COAST GUARD; WILLIAM BUCKNER, PRESIDENT AND CEO, BAYER CROPSCIENCE LP; NICK CROSBY, VICE PRESIDENT, INSTITUTE SITE OPERATIONS, BAYER CROPSCIENCE; AND THE HONORABLE JOHN BRESLAND, CHAIRMAN, U.S. CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Mr. Stupak. We will begin with a 5-minute opening statement. Admiral would you like to go first? If you want to pull that, press that button, get that green light on, we'll be ready to go.

STATEMENT OF REAR ADMIRAL JAMES WATSON

Admiral Watson. Yes, sir, thank you very much.

Good afternoon, Mr. Chairman and distinguished members of the committee. Thank you for the opportunity to provide this testimony on the Coast Guard's role and response related to the incident at the Bayer CropScience facility in Institute, West Virginia. I'm Rear Admiral James Watson, Director of Prevention Policy.

At the outset, I would like to express my sincere condolences to the families, friends, and community of the 2 plant workers who lost their lives as a result of the explosion and fire. I would also like to underscore the Coast Guard's commitment to cooperate with those responsible for investigating this accident in order to assist partner agencies to help ensure these tragedies are prevented in the future.

As a maritime first responder, I know the importance of having accurate information about hazardous chemicals that might be present at waterside facilities and fully support accurate disclosure of this information as required by law, including the

disclosure to appropriate emergency preparedness officials under the Emergency Planning and Community Right to Know Act, EPCRA.

As we also understand the importance of ensuring that safety investigators have access to critical information, that's why we have ensured the U.S. Chemical Safety and Hazardous Investigation Board, CSB, has access to all the information regarding the Bayer CropScience chemical plant in Institute, West Virginia, including information that claimed to be security sensitive information, or SSI. I firmly believe that SSI requirements and EPCRA requirements can coexist for the benefit of the public in the current regulatory framework.

As mandated by the Marine Transportation Security Act of 2002, MTSA, and in fulfillment of the Coast Guard's regulatory responsibilities under the Port and Waterways Safety Act of 1972, the United States Coast Guard conducts annual safety and security inspections on over 3,200 regulated waterfront facilities. As the agency with primary responsibility for coordinating maritime security on America's waterways, we also know that public disclosure of certain security related information can make facilities such as chemical plants more vulnerable to terrorists or nefarious acts or general security breaches. That's why some information is designated SSI.

The relationship between the Coast Guard and the CSB in this instance is actually an excellent example of two agencies working together to achieve the appropriate balance between public

disclosure of safety details and protection of SSI. It successfully demonstrates that a balance of safety and security can exist without compromising the mission of either agency.

Mr. Chairman and distinguished members of the committee, the August, 2008, incident at Bayer CropScience is an unfortunate and tragic event that highlights the importance of ensuring that all agencies responsible for oversight and post-accident investigation of chemical facilities work together in partnership with industry to prevent future accidents and be prepared to respond to incidents that may occur. We will continue to carry out our regulatory responsibilities as we support the Chemical Safety and Hazard Investigation Board's investigation of the incident at process.

Thank for the opportunity to provide this testimony on the Coast Guard's role and response. I'm happy to answer questions.

Mr. Stupak. Thank you, Admiral.

[The prepared statement of Admiral Watson follows:]

***** INSERT 3-1 *****

Mr. Stupak. Mr. Buckner, your opening statement, please, sir. Pull that light forward and turn on the green light there.

STATEMENT OF WILLIAM BUCKNER

Mr. Buckner. Thank you very much, Mr. Chairman; and good afternoon to everybody. My name is Bill Buckner, and I am the President and CEO of Bayer CropScience LP. With me today is Mr. Nick Crosby, who is the site manager at our Institute site.

On August 28th, 2008, we had a tragic accident at the Institute that claimed the lives of 2 of our colleagues at our facility. We are all saddened by this loss. We also regret that the community did not promptly receive assurance that it was not in danger.

Over the last 7 months, we have been working with several agencies to examine this incident to learn from it and to improve our performance both to prevent another such accident and to improve our emergency communications.

Our initial communications with Metro 911, while well intentioned, inadvertently created confusion and concern. Under our emergency response plan, further information about the explosion should have been provided to Metro 911 in a timely manner.

Throughout the incident, our emergency responders did an

excellent job under very difficult circumstances. Within a few minutes, the Institute's community fire chief was at our facility and in direct contact with our incident commander's team and Metro 911. Our emergency operation center opened several additional lines of communication to Metro 911. When our incident commander determined that the circumstances warranted a shelter in place for the 2 nearby communities, we immediately communicated that recommendation to Metro 911.

Again, however, we recognize that the initial communications contributed to confusion. That was never our intention, and we will do better. We have established new procedures, we have established dedicated radio and telephone lines to Metro 911, we have hired a new emergency services leader and provided new real-time chemical monitoring technology to Metro 911.

We have received questions about whether the chemical, MIC, was released into the community during the incident. Let me assure you we monitor for this, and there was no indication that MIC was released the night of August 28th. Our control room operators continually monitor the MIC day storage tank in the affected unit. Our incident commander monitored the tank and noted that it was not compromised nor in danger of being compromised. Our emergency operations center and incident commander employed air monitoring technology and detected no potentially harmful chemical emissions that might threaten the community. Most important, the multiple layers of protection in

place to protect the MIC day tank storage functioned as intended and it worked.

There had been reports about the CSB's investigation to the effect that our company used the law protecting sensitive security information, or SSI, to restrict the scope of the investigation. This was the first time that CropScience had ever considered the issue of SSI in the context of a Federal or State investigation. It is our understanding that it was also the first time that the CSB and the Coast Guard had confronted these issues in this context. As our experience demonstrates, there is need for further education and guidance regarding the interplay between the SSI regulations and CSB investigations.

As explained in my written statement, we had various reasons for wanting to limit public discussion of these issues. For about 1 week in January, 2009, there were some in our company who thought that the Maritime Transportation Security Act could be used to withhold certain information to the CSB regarding aspects of our MIC operations that were not involved in the accident. One week later after getting further advice we understood the company could not deny the CSB access to this information, only that the law might prevent the CSB from disclosing certain of this information publicly.

The company sought guidance from U.S. Coast Guard officials to determine whether our understanding of the law was correct. We were told it was.

CropScience did not withhold information from CSB on the grounds that it was SSI. SSI information was provided to the CSB. We complied with the law, and we cooperated with the CSB and the Coast Guard.

In closing, we welcome the opportunity to participate in this hearing. We are proud of our company, our employees, and our community.

Mr. Chairman, we stand ready to answer your questions. Thank you.

Mr. Stupak. Thank you.

[The prepared statement of Mr. Buckner follows:]

***** INSERT 3-2 *****

Mr. Stupak. Mr. Crosby your opening statement.

Mr. Crosby. I have no opening statement. I will stay with the statement of Mr. Buckner.

Mr. Stupak. Okay. Thank you.

We will go right to questions.

Mr. Buckner, Exhibit 26 there in the book right there -- that's our document there. In there is some of the documents that Bayer was going to make under SSI, and 2 of them sort of caught my eye because I'm trying to figure out something here, the responsibility you had to let people know what chemical may have possibly been in that toxic cloud.

So on page 13 -- it is BCD 10 004. It's right on the top there. It is a copy of the BCS incident report for the exposure involving the MIC equipment for the accident that occurred late September, 2008, including this response associated with procedures or protocols for working involving process equipment, process line equipment, opening particular equipment.

Is there anything in there in your policies that tell you that you have to tell the emergency response people what kind of fire they may be fighting?

On the next page, if you will -- that's page 13. On page 14, the only document in there indicates any MIC equipment installed on or near the Larvin Unit information shall include but not be limited to maximum inventories, emergency dump tanks, deluge

systems, spill containment refrigeration system, back-up power, area detection alarms, include a copy of the most PHA and all the emergency procedures. So do you have any procedures at all in the company that you are supposed to communicate with emergency personnel if a fire or something occurs?

Mr. Buckner. Yes, sir, we do have these procedures; and I would like to refer this question, if I could, please, to Mr. Crosby, who has got the background on this.

Mr. Stupak. Sure. Were these procedures in place on August 28th, 2008?

Mr. Crosby. We have a number of procedures that we use for communicating with our outside responders.

Mr. Stupak. So why didn't you tell the emergency response or Metro 911 what was in that cloud or what you suspected to be in the cloud that night?

Mr. Crosby. We have a very experienced and 24/7 incident commander on our site. That commander is on site 24 hours a day, 7 days a week, 365 days a year.

Mr. Stupak. With all of that experience he would be able to make a decision and be able to tell you what might possibly be in that cloud, could he not?

Mr. Crosby. He did.

Mr. Stupak. Why didn't you tell the communities and emergency responders?

Mr. Crosby. He was highly trained. He went to the scene --

Mr. Stupak. Right. But my question is, why didn't you tell him? I'm sure he's highly trained, and I'm sure he's an expert and had an idea what was in the cloud, the 3 to 4 miles that was drifting over Nitro and the rest of the area. And with the university right up to your fence line, why wouldn't you let people know what they were facing?

Mr. Crosby. He made the decision based upon his observation of the incident that there were no toxic chemicals being released from --

Mr. Stupak. How did he make that determination with his expertise and his knowledge? Because your monitors weren't working.

Mr. Crosby. We have -- we have fence line monitors which were working.

Mr. Stupak. But on the west side you had no monitors. They were not working.

Mr. Crosby. The incident commander summed up, he used his experience, as any firefighter would in that particular situation, sir, and he drew the conclusion -- we believe the conclusion was right, that there were no --

Mr. Stupak. Let us assume for a moment that he was right. Then why wouldn't you tell -- if it wasn't a problem, why wouldn't you tell the emergency firefighters what it was?

Mr. Crosby. Our objective is to communicate to the firefighters and our emergency response center. There were 2

parts to --

Mr. Stupak. Right. You are supposed to communicate with them. Aren't you supposed to communicate on what the chemicals are?

Mr. Crosby. Yes, we are.

Mr. Stupak. Why didn't you do it that night?

Mr. Crosby. Basically, the security guard who was accountable for relaying that message, he became overwhelmed by the incident, and he failed to relate information correctly to 911 in a timely manner.

Mr. Stupak. So you're saying you told the security guy and he failed do it?

Mr. Crosby. No, I -- I'm the site leader and accountable for what goes on in the Institute site.

Mr. Stupak. So why didn't you tell them what chemicals might possibly be in the cloud?

Mr. Crosby. Because we didn't believe there were chemicals in that cloud.

Mr. Stupak. Why did you issue then in your plant shelter in place for all your employees? So if it is not dangerous to the outside community, why was it dangerous to your employees where you would put a shelter in place right after the thing exploded?

Mr. Crosby. The initial assessment of the incident indicated that there were no toxic chemicals being released.

Mr. Stupak. Then why do a shelter in place?

Mr. Crosby. That was validated by one of the volunteer fire department chiefs who arrived at the fence line on their side.

Mr. Stupak. No danger, then why do a shelter in place for your employees? It seems to be a contradiction.

Mr. Crosby. As the incident progressed, what happened, sir, was our incident commander became concerned because he felt nearby storage bins were potentially being compromised by the fire. They were starting to heat up. And so he ordered a precautionary shelter in place for part of the area.

Mr. Stupak. Why didn't you tell the community that then?

Mr. Crosby. Excuse me?

Mr. Stupak. Why didn't you tell the community that?

Mr. Crosby. We passed the information through to Metro 911. We make the recommendations in place, and then Metro 911 informed the community.

Mr. Stupak. But, with all due respect, if you read the Metro 911, they constantly say, this was all I'm allowed to tell you. Basically, I know, but I can't tell you.

That was -- Mr. Reck was it? Or who is the gentleman --

Mr. Crosby. This was the security guard who initially on the gate who made the calls to Metro 911.

Mr. Stupak. Right, every time Metro 911 asked or called, it was like, I can't tell you; this is all I can tell you; I'm not allowed. They wouldn't even tell them if the Larvin Unit was damaged or if the chemicals were coming from there. All he was

told is this is all I can tell. You we have an emergency.

Mr. Buckner. If I could, please.

Mr. Stupak. Sure.

Mr. Buckner. We acknowledged fully that we had a breakdown in these communications. It is my responsibility to make sure that these don't happen again. I think we have the process in place again to ensure that it doesn't happen again.

Mr. Stupak. Sure. But you even said, Mr. Buckner, in your opening statement that the lack of communication was inadvertent and there was confusion.

Here is what your Bayer CropScience -- Steve, at the main gate, who was communicating from Mr. Crosby. Mr. Crosby is dealing with Steve, and Steve would say, well, I can't give out any information. Like I say, we'll contact you with -- with the proper information.

Now this was at 22:39 hours.

22:42 hours, 3 minutes later, well, I can't give out any information until I get my information.

Here he is at 23:15: What it is, we have an emergency at Bayer CropScience plant; and the only information I can give you is that you will need -- you might want to alert the community -- my supervisor informed me to tell you, alert the community there is an emergency in the plant right now.

Here it goes on at 23:34: My instructions are to tell you to keep the community alerted, and we're responding to the emergency.

Even at 5:55 in the morning, the only thing they told 911 was we have an emergency. God, we all knew that. It blew up. We heard it. We saw the fire. We knew it was an emergency. Why didn't you tell them something more?

Mr. Buckner. It is my understanding, Chairman Stupak, that communications had been established through the emergency on-site control center with the Metro 911.

Mr. Stupak. You are talking, but you're not saying anything to the community that needs to know. How about these kids right there, right on your fence line? Don't they have a right to know?

Mr. Buckner. Sure, and I have acknowledged the fact that we had a breakdown in these communications; and now we have policies in place to correct this situation.

Mr. Stupak. Have you ever told the community yet what chemicals you believe went up in smoke that night in that cloud? Do we know?

Mr. Crosby. As far as our analysis is concerned, the chemicals that were released were consumed in the fire. We are not aware of any toxic chemicals that left the site that evening.

Mr. Stupak. How do you reconcile that with the Chemical Safety Board which basically says, well, if it is methomyl, some of it was burned, some of it was washed away in the fire, some of it evaporated up in the air. That's their preliminary investigation. You are familiar with that, are you not?

Mr. Crosby. I'm not familiar with the absolute details, but

we will attending the hearing with the CSB on Thursday, and I expect to get more information.

Mr. Stupak. Let me help you.

Methomyl solution sprayed from residue theater. Broken pipes and equipment. Some burned in fire. Some remain on ground and nearby equipment. Some might have been carried in the air.

And the physical reaction to the exposure: Again, nervous system disruption, blurred vision, pinpoint pupils, tremors, muscle twitching, nausea, abdominal pain, respiratory arrest, coma, death, liver damage, anemia. I think we had 6 firefighters had respiratory problems and nausea, which sounds like there was exposure.

Mr. Crosby. Our analysis shows that there wasn't. When methomyl --

Mr. Stupak. How do you account for the 6 officers, firefighters being sickened?

Mr. Crosby. We are aware of 2 firefighters who visited a medical center that evening. They were both suffering from heat exhaustion, and they were treated and released.

Mr. Stupak. You say all your air monitors didn't show anything, but you admit that some of your air monitors were not working.

Mr. Crosby. Our fence line air monitors were working that evening.

Mr. Stupak. They were not working, right?

Mr. Crosby. Our fence line air monitors were working that evening.

Mr. Stupak. But not the air MIC monitors, were they?

Mr. Crosby. I'm not aware of that fact.

Mr. Stupak. Wait a minute. You're the incident command officer. You are telling me under oath you have no idea that part of your --

Mr. Crosby. I was not the incident site leader.

Mr. Stupak. Okay. Now, under oath, you're telling me you didn't know that part of your monitors, air monitors by the MIC unit, was not --

Mr. Crosby. At that time, no, I didn't, sir.

Mr. Stupak. Okay. But, today, under oath, you know that part of them were not working, right?

Mr. Crosby. Yes, I'm aware now.

Mr. Stupak. You're aware your cameras weren't working, right?

Mr. Crosby. I was aware there was a video camera that wasn't working that evening, yes.

Mr. Stupak. Okay. And you're aware you bypassed the interlock safety valves on this retreat vessel, right?

Mr. Crosby. I'm aware of the full findings of the internal investigation.

Mr. Stupak. And you are aware that the computer training wasn't adequate.

Mr. Crosby. We respectfully disagree with that comment.

Mr. Stupak. Okay. So you learned all this stuff today. The night, you didn't know that the monitors weren't working and the videos weren't working and had jerry-rigged this thing?

Mr. Crosby. As I said at the time of the incident, I was not aware the MIC monitors were not working. I was certainly aware that the monitors were working around the site, and we certainly completed our full investigation, and we understand now fully --

Mr. Stupak. Well, when you and your expert decided there was no problem in the air, you must have looked at the monitors. When you looked at the air monitors, you must have realized some of them weren't working. So when you made that decision that night you didn't have all the information necessary to fully inform the public, did you? Because part of your monitors -- you had to realize that night because you had to look at the screens, right?

Mr. Crosby. We used the full expertise that we got on that night, sir, that was available to us. I believe that those guys made a proper assessment of the situation. I believe that they drew the right conclusions. I believe that we made the right decisions.

Mr. Stupak. Mr. Walden for questions, please.

Mr. Walden. Thank you, Mr. Chairman.

Mr. Crosby, were you actually at the plant that night when this first happened?

Mr. Crosby. At the point of which the incident occurred I

was actually about 3 hours away. I was attending a West Virginia business summit meeting.

Mr. Walden. So you weren't on site at the time of the event. At what point did you take command -- or is that the right term?

Mr. Crosby. I arrived on site approximately about 2:30 on the Thursday morning.

Mr. Walden. So 2:30 on Thurs -- on the morning. This is overnight, right? So you are like 3 hours after the explosion.

Mr. Crosby. Three or 4 hours after the event, yes, sir.

Mr. Walden. So were you in charge of the incident as you made your way there? If not, who was?

Mr. Crosby. What happens is that, in the event of an incident, we call our emergency operations center.

Mr. Walden. All right.

Mr. Crosby. And the key role in that operation center was -- actually, that seat was occupied by the production leader, who was in charge and accountable for that methomyl unit.

Mr. Walden. Who is the production leader? Who was the person in charge since you weren't?

Mr. Crosby. That production leader came in and took charge of the incident.

Mr. Walden. Right. Who is that?

Mr. Crosby. His name is Rick Clay; and I believe he has been interviewed by your staff, sir.

Mr. Walden. And so he would have been the one overseeing all

these decisions at that time, because you weren't on site.

Mr. Crosby. I wasn't on site, but he has a team of people who form around him. Typically, when we have -- if we have an incident like this, we form a team of -- an emergency response coordination team. There were 15 to 20 people or more in that room that night all advising him.

Mr. Walden. I would hope you could appreciate our frustration in terms of the breakdown in communication.

Mr. Crosby. Absolutely.

Mr. Walden. You've alluded to that, Mr. Buckner. I got to tell you, when I hear you use words like "well intentioned but inadvertently caused confusion", I really think that's lawyer speak and really misses the point. Because if -- as you heard, I've been in the broadcast business, and it may have been well intentioned, but it sure doesn't read that way in the transcript. It really reads more like either lack of knowledge or stonewalling, one of the two. And my interpretation is more stonewalling when you have the fellow at the gate saying, I'm not allowed to tell you any more, and we have an emergency.

And I concur with the Chair. I mean, everybody knew that.

Mr. Buckner, have you taken an opportunity to meet with community leaders and first responders leaders to make sure everybody is on the same page going forward?

Mr. Buckner. No, sir, I haven't.

Mr. Walden. Is that something you would be willing to do?

Mr. Buckner. Absolutely.

Mr. Walden. Because as I watched you testify and watched their reactions I still think you have a communication problem here. I'm not -- that's for you all to figure out, but I just sense that there is a lot of mistrust right now, and I think if you were in their shoes you might feel that way.

Mr. Crosby. Could I just say a huge part of my own personal efforts now is maintaining or establishing and maintaining that outreach with our -- what I would call our local stakeholders. I maintain personal communications with Commissioner Carper, with the folks of Metro 911, with our Congresswoman Capito. I work with the governor. I work with the community councils. It is my accountability, primary accountability to do that; and I am throwing myself 100 percent into that.

Mr. Walden. I think that's an important move, no doubt about it.

I'm troubled, too, by the information Mr. Bresland seeks, has, wants. You've heard his testimony. Correct me if I am wrong, Mr. Bresland, but I sense from your testimony that you feel there is still an issue here about getting all the information you want or that you felt that there was a withholding of information that otherwise did not pose a security risk to share, correct? Am I summarizing that correctly?

Mr. Bresland. We are still concerned about the issue of sensitive security information, and we still have 2,000 documents

that have been stamped SSI by Bayer. So we're --

Mr. Walden. Mr. Buckner, are you familiar with 2,000 documents stamped as SSI by Bayer?

Mr. Buckner. I was familiar with them, yes.

Mr. Walden. And do you still believe they should be stamped SSI?

Mr. Buckner. We sent this information out to outside legal counsel for their review. We didn't believe we are qualified enough to interpret exactly what constitutes SSI in this situation. So we sent all these documents. And it was my understanding that 12 percent of the documents that we sent over to the outside legal counsel actually were classified as SSI by these individuals.

Mr. Walden. Twelve percent.

Mr. Buckner. Twelve percent, that's correct. Or 90 percent -- roughly 88 percent of them actually were not SSI.

Mr. Walden. So of those 88 percent that your outside counsel say are not SSI are you freeing those up for CSB to have access to?

Mr. Buckner. Absolutely.

Mr. Walden. Has that happened?

Mr. Bresland. The problem is not allowing CSB to have access, but the problem is our use of the documents. We are an agency that prides ourselves on being very public. We have public meetings. We have press conferences. We prepare videos. Our

issue is what do we do with these documents that we want to use in our outreach -- maybe not the exact document but certainly information in the document. What do we do with that in the future? I'm thoroughly confused by this.

Mr. Walden. Let's take that 88 percent of those documents that they say they don't believe have SSI problems. Is there something else that poses a problem to you for your use of those documents?

Mr. Bresland. No, no.

Mr. Walden. So everybody is okay on that question. So it is the remaining 12 percent that's at issue here. Am I tracking this correctly?

Mr. Buckner. If I could, sir, we don't have issue with the 12 percent. They have been classified as SSI.

Mr. Walden. Who classified them as SSI? Your outside counsel?

Mr. Buckner. Outside counsel.

Mr. Walden. And did the Coast Guard make that call, whether they are SSI or not?

Mr. Buckner. It is my understanding that's correct.

Mr. Walden. Have you reviewed these 2,000 documents, Admiral?

Admiral Watson. No, sir. The Coast Guard has not reviewed any of those documents.

Mr. Walden. Have you sought to review them and not gotten

them? Or how does the process work?

Admiral Watson. We review documents that are submitted to the Coast Guard. And SSI is a classification that can be applied by any covered person, which is a person by the law and regulation is authorized to handle SSI information and sometimes create SSI information, as in the case of Bayer. The system is up to them --

Mr. Walden. It's up to them to decide whether it's classified or not, is that what you're saying?

Rear Admiral Watson. I'm sorry?

Mr. Walden. It is up to Bayer to decide what is SSI?

Admiral Watson. Yes, sir. There is 16 categories that require labeling a document as SSI. These are categories which would cause the information to be transportation security sensitive.

Mr. Walden. And does anybody external of a company review that decision making? And, if so, who is that?

Admiral Watson. Well --

Mr. Walden. Couldn't somebody just say, I don't want all this stuff released, so I think will call it SSI and I get to decide, right?

Mr. Bresland. Well, here is a perfect example. This is a list of all of the -- generally, a list of all of the documents that have been supplied to us; and every page on this list is marked SSI.

Mr. Walden. Every page?

Mr. Bresland. Every page.

Mr. Walden. If you go to tab 23 and maybe 26 as well, Admiral, in e-mail traffic a Bayer CropScience outside lawyer is instructing OSHA about its obligations to protect sensitive information, and then he instructs OSHA how to do this. Review of SSI is the language of the citations should be liberal and OSHA should strike any reference to any piece of equipment, piping or document involving these two chemicals, chlorine and MIC. Tab 23.

Admiral Watson. Tab 23.

Mr. Walden. Third page in, on tab 23.

Admiral Watson. What paragraph, sir?

Mr. Walden. Second paragraph -- third paragraph, I'm sorry.

So I guess from your outside counsel, is that right,

Mr. Buckner?

Mr. Buckner. I haven't seen the document.

Admiral Watson. That's the first I have seen that document.

Mr. Stupak. Eric Kahn.

Mr. Buckner. Yes, he is with our outside counsel.

Mr. Walden. And so you haven't seen this document?

Mr. Buckner. No, sir, I have not.

Mr. Stupak. It's dated February 23rd. The third paragraph: Accordingly, your review for SSI and the language of the citation should be liberal; and OSHA should strike references to any piece of equipment, piping or document involving those two chemicals. You should be particularly cautious about PHA and PNID references

to those chemicals or their interconnectivity on the parts to the unit.

Does this make sense, the company dictating what and how to label SSI to a Federal agency, Admiral?

Admiral Watson. Sir, I'm looking at it against the different categories upon which you label something SSI; and it really don't fall into any of those categories, in my opinion.

Mr. Walden. Do the instructions even make sense? I mean, where is the transportation security nexus concerning a piece of equipment or document? Is that what you're saying, that there is no nexus from your quick evaluation?

Admiral Watson. My quick evaluation, there is no nexus.

Mr. Walden. So I think this is the public policy question. Whether it is Bayer or somebody else, if you can have your attorney you didn't know had done this tell an agency what to do and what not to do -- and here, Admiral, you're the one saying, I don't even see where this fits the 16 criteria. And poor Mr. Bresland over here is being shut down in his ability to use these data points.

Mr. Bresland. Earlier in the testimony or earlier in your statement you mentioned Mr. Buckner's written testimony in which I understood that he said the reason that they applied the SSI categorization was to slow us down in our investigation and avoid -- hopefully avoid us having a public meeting. Am I correct in saying that?

Mr. Walden. I don't believe that was --

Mr. Stupak. Business concern, negative response. It was more -- not necessarily slow you down. And avoid discussion --

Mr. Walden. I believe it is in the submitted testimony but not what he read this morning.

Mr. Bresland. Correct.

Mr. Walden. Which is different.

Mr. Bresland. I just don't understand.

Mr. Walden. Well, there is a motive issue here that strikes some of us as disconcerting, to say the least.

Mr. Bresland. Yes.

Mr. Walden. Am I correctly capturing that your submitted testimony is different from what you read today?

Do we have the submitted here with the language? Where is it? Can we get that?

Page 80 of your submitted -- where you say, there were several reasons why the company sought confidentiality and SSI protection, including legitimate security concerns, the proper scope of CSB's investigation and, we frankly admit, the desire to avoid making the controversial chemical MIC part of the public debate regarding the incident.

Now, I wouldn't think in any of those 16 criteria that avoiding public debate is on that list.

Mr. Buckner. No, sir, it's not.

Mr. Walden. So do you appreciate what Mr. Bresland is

getting at here?

Mr. Buckner. I appreciate the dilemma that we have in understanding SSI in its context.

As I stated in this particular statement that you reference, Congressman, we have two issues that we are dealing with. One is the obligation for us to acknowledge that we can't supply confidential information that may in fact be contrary to Homeland Security -- the Homeland Security Act. The other is this information that I was made aware of of an internal discussion we had relative to our efforts to keep this from becoming a public issue. That's outside -- in my way of thinking, that's outside the scope of the SSI issue.

Mr. Walden. Right. And I think ours, too, which is using SSI to avoid some other discussion by taking a liberal approach in how things get labeled.

Mr. Buckner. Again, sir, we supplied that information to our outside counsel. We let them determine what that is. There was a period of time, if I could, please, of a span of 1 week, roughly -- I mentioned this earlier -- to where this internal discussion took place. Once we received the information from our outside counsel, we readily supplied all this information that the CSB had requested.

Mr. Walden. So this memo we have from February 23rd of this year, was that within that 1-week period?

Mr. Buckner. No, sir, the 1 week took place previous to

that. It was from January 15th up through the latter part of January itself.

Mr. Walden. So how do you explain this memo then from Eric Kahn that is somewhere toward the end of February that appears to say use SSI liberally to OSHA?

Mr. Buckner. I can't explain that.

Mr. Walden. Is Mr. Kahn one of your counsel?

Mr. Buckner. Yes, he is.

Mr. Walden. That reviews all of these things?

Mr. Buckner. That's correct.

Mr. Walden. So I guess in your testimony you said there were some in company management who initially thought that the Maritime Transportation Security Act of 2002 could be used to provide information to CSB.

Mr. Buckner. This was in that period of time in January, yes.

Mr. Walden. Would you characterize Mr. Kahn's memo as still of that opinion, that SSI can be used?

Mr. Buckner. I would have to take a moment to review the memo and discuss it with counsel. I can't make -- this is the first time I have seen this document, and I can't make a judgment on that. I'm sorry.

Mr. Walden. I know my time has expired.

I would encourage you to take a look at this. I didn't realize that it would surprise you today to not know of that memo.

Mr. Stupak. Let me try to clear it up, if I may.

Isn't it true there is a January 13th, 2009, document -- the Bayer personnel responsible for examining whether or not to seek confidentiality for the MIC documents identified only 1 specific reason do so and that was a concern that information contained in them would be used by CSB to recommend reduction or elimination of MIC storage at the plant by using inherently safer technologies.

Mr. Buckner. That's true. I have seen that document.

Mr. Stupak. So there is no evidence prior to January 13th of '09 that the company was discussing national security concerns over the release of documents?

Mr. Buckner. Well, again, I would say, in the context of the requested information from the CSB, we felt like it was going beyond the scope of the accident itself and moving off into a direction of looking at all the other information surrounding MIC; and this individual made a speculation and a PowerPoint presentation.

Mr. Stupak. Right, it was a PowerPoint presentation, and there was no real concern prior to that time about national security.

Mr. Buckner. Not before that time, because we didn't really understand it.

Mr. Stupak. Mr. Burgess for questions?

Mr. Burgess. I don't know that I have much more to add. But just for my own clarification, the night of the incident there

would have been no reason for the plant operator who made the 9/11 call to have assumed that there was sensitive security information that he must be careful of what he disclosed or didn't disclose to the responders; is that correct?

Mr. Buckner. That's correct.

Mr. Burgess. So I guess we are better left to assume that the disconnects there are more because of a crisis and people have made mistakes in the process of doing their job?

Mr. Buckner. That's correct.

Mr. Burgess. You are going to fix that because the plant is important to the community. We have heard that testimony in the previous panel; and, obviously, we are putting people at risk in the plant, people who come in to help when you have a problem and the people next door at the college. So we're going to reassure the community at large that that is happening and an ongoing part of your internal safety protocol.

Mr. Buckner. You are absolutely correct.

Mr. Burgess. That that really has nothing to do with national security.

Mr. Buckner. No, sir.

Mr. Crosby. If I could add to that, we have already changed our procedures and protocols; and we are in a position now where we're going to carry out a drill, an emergency drill to really test those again to make sure we have done the right things.

Mr. Burgess. I'm just like Mr. Walden. I would suspect that

there is some significant bridge building that needs to occur between the community and first responders, because that was a serious, serious --

Mr. Crosby. A lot --

Mr. Burgess. A lot of people at risk. And I think they justifiably feel they weren't getting accurate, timely information that they needed to do their jobs and do it safely.

And, Admiral Watson, if I could ask you -- let's just assume that there was significant sensitive security information; and had Bayer CropScience not followed the protocol, what penalty would they be facing today? What if they had released sensitive security information, opened the books? Mr. Bresland comes in and says, let me see what you've got. They open the books. Sensitive security information is sitting right out there on page 1, and they disclose it. What happens?

Admiral Watson. That would have been perfectly fine, sir.

Mr. Burgess. No whistles, no bells, no lights?

Admiral Watson. No, the CSB, like this committee, is a covered person. So if you have a need to know, you're authorized by law to have access to SSI.

Mr. Burgess. Okay. Well, let's take it even one step further. What if it was the Daily Herald that came in and they opened the books up and there is SSI on the front page and it gets printed in the newspaper?

Admiral Watson. Then Bayer has an obligation to keep that

information secure.

Mr. Burgess. What's the worst-case scenario for them?

Admiral Watson. Well, the worst case would be a civil penalty.

Mr. Burgess. I --

Mr. Bresland. Can I make 1 point?

Mr. Burgess. Yes, please.

Mr. Bresland. The issue for the Chemical Safety Board was not the receipt of the information. We were allowed to receive it. Our issue was could we have a public meeting and explain what happened on that night of August 28th without disclosing what was alleged to be sensitive security information. Had we done that and had that been shown to be sensitive security information, I could have lost my job. There could have been penalties against me. Our investigators could have lost their jobs. That is the penalty that's laid down in the regulations. That's why we were concerned about this.

Mr. Burgess. Sure, I understand that. That would have been the case whether or not Bayer CropScience said it was sensitive security information or not, would it not? Had you disclosed information that put national security at risk -- does Bayer's interpretation of the information at this point, does that then -- is that what's guiding you on releasing the information or not releasing the information?

Mr. Bresland. It appears that Bayer is the decisionmaker on

what is SSI. They say it is SSI --

Mr. Burgess. Admiral, is that the intent of this, protection for national security?

Admiral Watson. Yes.

Mr. Burgess. That Bayer would make that determination?

Admiral Watson. Bayer is supposed to know their duties and responsibilities under the regulation for SSI, which is pretty clear. There are 16 categories. They evaluate each piece of information against those categories of SSI. They label it SSI. And then it is perfectly normal for the CSB to assume if it is marked SSI that it is SSI.

There is a process by which they can sort of appeal that classification, and that's the case where it would go to the Coast Guard or Transportation Security Administration.

Mr. Burgess. All right. Is there any penalty for Bayer inappropriately labeling something SSI when it is not? Since they're the arbiter, it is determinate as to whether or not -- it is their obligation to --

Admiral Watson. There is definitely a penalty for not labeling something SSI that should be SSI. I don't know the answer to your question about mislabeling.

Mr. Burgess. Well, I'm just wondering if there is a scenario where Bayer might be prone to over interpret to stay out of trouble, stay out of congressional committees and writs and subpoenas and the sort of things that we do.

I'm just asking the question because I honestly don't know. It seems there is some definitional difficulties that we have that are leading to certainly making Mr. Bresland's life miserable on what he can and can't do and created a congressional committee to work well into the afternoon on this. But that is just purely conjecture on my part. It seems like this is something that could be tightened up considerably, but I'll leave that up to the Coast Guard.

Mr. Bresland. We are an independent agency, and we have the authority to go out and investigate chemical accidents. As much we love the Coast Guard, we don't to be going to them every time we write a report and say please check this for SSI. Especially if the information is what I'd consider to be frivolous when it comes to a definition of SSI.

We have no interest in guards, guns, fences. There are experts at DHS and the Coast Guard who deal with that issue. We have absolutely nothing to do with that, and we have no interest in ever dealing with that.

Mr. Burgess. I guess that's what I'm having difficulty in understanding, is how we came to such an impasse on this. Was it the inappropriate labeling of documents that say SSI by Bayer? Was Bayer doing that in an abundance of caution because they did not want to invoke civil penalties? I guess that's where I'm having the disconnect.

Mr. Bresland. Well, I think Mr. Walden made an interesting

point in asking what was the motive here. I can't read people's minds. I don't know what their motive was.

Mr. Burgess. You have obviously said it to counsel and you got solicited advice that you paid for and you took them for their word when they said you better not disclose this; is that correct?

Mr. Buckner. That's correct.

Mr. Burgess. I yield back the balance of my time.

Mr. Stupak. Thank you, Mr. Burgess.

There is no civil penalty if you produce too much information. There is only a civil penalty under the Maritime Act if you don't take sensitive information and label it.

So you can bury a company with SSI information. For instance, 2,000 documents they declared are SSI here that we feel have no national security inference. So that's 2,000 documents. How many pages in each document? You're probably talking thousands and thousands of pages the Coast Guard would have to go through to make a determination if there is national security interest. Maybe there should be a penalty for companies that use the Maritime Act to overwhelm us with paperwork that has nothing to do with national security.

Mr. Burgess. Well, exactly the point. I think perhaps -- I don't know whether it is our jurisdiction, but perhaps there could be some clarity for the company and all concerned. Because it doesn't sound like there was an abundance of clarity in that situation.

But, again, I yield back.

Mr. Stupak. Well, if we had a literal approach as opposed to a liberal approach as we saw in the memo maybe we wouldn't have been on that issue so long.

Let me ask you, Mr. Crosby, the committee staff has heard from several people, including Bayer employees, that the startup and shutdown is the most dangerous part of any chemical process; is that correct?

Mr. Crosby. Yes, it is.

Mr. Stupak. And I understand that this explosion occurred as we were restarting the methomyl unit, right?

Mr. Crosby. We had been in the process of restarting that unit over a number of days, yes.

Mr. Stupak. Well, if it is a particularly dangerous time, then isn't that precisely when you'd want to make sure your MIC air monitors were working and the video cameras were recording?

Mr. Crosby. As I explained to you, at the time I wasn't aware that the MIC monitors were not working at the time of the incident. I subsequently found that out. Those monitors are there to --

Mr. Stupak. Some Bayer employee must know that, right? If it is the most dangerous part and you are restarting this unit and your safety devices, the air monitors and video cameras, if the process is not working, someone had to decide to restart the thing even though the safety --

Mr. Crosby. We also have a lot of -- a number of operators actually working that area as well. We have eyes and ears and levels of instrumentation --

Mr. Stupak. Sounds like your eyes and ears weren't on that day.

Mr. Crosby. Our eyes and ears -- we have highly trained chemical operators who were starting that process. They were supported by a number of technical folks that were there. We have round-the-clock technical cover, and they were working on the restart process.

Mr. Stupak. Unfortunately, the real eyes and ears went to check, because the monitors were indicating an increased temperature, and those folks were killed, right?

Mr. Buckner. We did an internal investigation, a very thorough one; and out of that we identified several multiple factors that contributed to the accident itself. We've gone back and we dedicated the site, further trained the individuals to look at our standard operating procedures to ensure that this accident never happens again.

Mr. Stupak. Well --

Mr. Buckner. Including everything that you just acknowledged.

Mr. Stupak. You have had it since 2002. So you have had it about 7 years. And we have got about 3 or 4 incidents -- in fact, the one in September of -- 8 months before this one, September of

'07. And we seem to have repeat complaints about lack of communication and things like this. And you bypassed the internal safety systems on this heater unit to get it to work.

Mr. Buckner. I wasn't aware of that, and I can assure you that it will not happen again.

Mr. Stupak. If we're really concerned safety then -- and I know you didn't want MIC to be part of the public debate. That's why you had the SSI invoked, to try to stop that public debate. But in light of what we have learned today of the recent accident of last August will you, on behalf of Bayer CropScience, commit today to implementing a safer technology that eliminates the MIC stockpiles at your plant?

Mr. Buckner. I won't commit to eliminating, endorsing or bringing in inherent safer technologies. I think what we have to do is we have to continue to assess new technologies as they become available.

Mr. Stupak. Why wouldn't you eliminate it in light of the accident and near worst-case scenario we almost had? Is it a monetary thing, the cost of reduplication? I mean, the Dupont plant did it; and as I read from the earlier report from '94, the Israelis used different chemicals to get the same results from their pesticides. Why are we the only company left that still has the storage and this MIC unit? Why don't you just produce what you need that day and that's all for that day? Why don't you do that?

Mr. Buckner. I'll let Mr. Crosby answer that question.

Mr. Crosby. We believe the process that we use to produce and store MIC at Institute is the safest process available for the products that we make.

We have 4 different manufacturing plants. Some of those operate continuously, and some operate on a patch-wise process. If we were to introduce inherently safer technology, then we would essentially have to implement 4 independent small units, each operating in conjunction with each of those manufacturing plants.

Mr. Stupak. That would be today's use.

Mr. Crosby. Yes.

Mr. Stupak. Wouldn't that be safer than what you are doing now?

Mr. Crosby. We don't believe so, the reason being those 4 plants would go through multiple startups and shutdowns and that itself imposes an inherent risk. We prefer and believe the safest way of making MIC and using that in our production is to make it a 1 point of use, is to store a quantity of a maximum of 2 to 3 days of inventory. That's all that we store -- processes.

Mr. Stupak. You or Mr. Buckner can answer, if you don't want to stop storing it like I think you should, then how about this? Will Bayer agree then to have a third party come in and conduct an independent analysis of your safety use of MIC? Will you commit to have someone else look at it other than just you?

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Mr. Buckner. I would have to take that back and have a discussion with our plant operators to ensure, one, what we have done in the past was thorough enough and, two, really challenge the fact whether there are inherent safer technologies out there before I commit 100 percent.

Mr. Stupak. Mr. Bresland, if they won't stop storing it and they won't have a third party look at it, I hope one of your recommendations is that Bayer should eliminate the storage of large quantities of MIC at this plant. And if they have to do 4 different systems, let them do 4 different systems. I hope that is one of your recommendations. I know that Mrs. Christensen and some of the others brought that up, and I would suggest that.

Mr. Buckner. Chairman Stupak, we look forward to the opportunity to work with the CSB to understand what ideas that they might have for us as well as part of the process.

Mr. Stupak. That's good. But I hope, since you are reluctant even to have a third-party independent review your safety procedures on how you are handling this MIC, especially when you put a bypass system in, the monitors aren't working, the air quality and the cameras -- it seems like all of the things that should have been in place, you bypassed them or turned them off during the most dangerous time, which is loading and unloading

and starting up the process.

Maybe we shouldn't use it. Why should we just allow one company in this country to stockpile this much? I guess I find that ironic. We dodged a bullet here today. The next one we might not.

Even the notification for the emergency response people, having been there and having done that myself -- we alluded to traffic accidents. Even traffic accidents, when you have an 18-wheeler roll over, right on the truck it says what it is so we know when the firefighters approach it. Or a train. But in your case we never got past the front door, so we did not know what it was. The people on the first panel said they didn't know what was coming out -- methomyl or whatever it was.

We look forward to your investigation and your report on Thursday and look forward to continuing to work with you and get this matter resolved.

I have no further questions.

Mrs. Capito, I thank you again for staying with us all today.

Mr. Burgess. Mr. Chairman, we have two questions from counsel that are so involved and intricate that I am going to submit them in writing because I don't understand them.

Mr. Stupak. Thank you.

[The information follows:]

***** COMMITTEE INSERT *****

[The prepared statement of Ms. Nixon follows:]

***** INSERT 3-3 *****

Mr. Stupak. That concludes our questioning. I want to thank all of the witnesses for coming today and for your testimony.

The committee rules provide that members may have 5 days to submit additional questions for the record.

That concludes our hearing. The meeting of the subcommittee is adjourned.

[Whereupon, at 3:05 p.m., the subcommittee was adjourned.]