

RSC Outlook: Possible Consideration of the Chemical Facility Anti-Terrorism Act

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Section 550 of the Homeland Security Appropriations Act of 2007 authorized the Department of Homeland Security (DHS) to require “high risk” chemical facilities to conduct security vulnerability assessments (SVA) and implement site security plans (SSP). In June, DHS issued the Chemical Facility Anti-Terrorism Standards (CFATS) that required owners and operators of facilities possessing certain specified quantities of chemicals to complete a preliminary risk screening assessment to determine whether that facility needed to be further regulated by CFATS rules.

Pursuant to the final CFATS rule, DHS established and began placing each facility into four-category tiers based on risk and performance. Those facilities deemed “high risk” will be required to prepare an SVA and ultimately implement an SSP, in addition to the most stringent security requirements. On October 4th, 2009, the CFATS expired without being fully implemented by DHS. In order to prevent this sunset, earlier this year, legislation (H.R. 2477) was introduced to extend authorization for the current program through Oct. 1, 2012, in order to provide ample time to adequately establish a mature regulatory regime under an eight-step process. The DHS and Obama Administration support extending this Act. However, Democrats have introduced H.R. 2868 to revise and expand upon the recently expired requirements that now makes U.S. production and storage of chemicals more expensive, burdensome, and subject to a patchwork of different and conflicting regulations with no benefit to public safety or national security.

While there are a number of conservative concerns with the bill, there are three major issues that make H.R. 2868 extremely problematic for many conservatives:

Preemption:

One concerning provision is located in Section 2109, which would allow state or local governments to preempt federal law in order to adopt or enforce regulatory and safety standards different than federal law. H.R. 2868 would essentially allow any state to enact standards that are “more stringent” than outlined in the legislation in the name of national security. While it may seem to some that setting a federal “floor” may encourage plants to adopt additional security measures, in actuality it will greatly burden industry without providing consequential benefits to the public.

Prescriptive state rules will result in a confusing patchwork of different and potentially contradictory regulations and divert scarce resources to comply with requirements that do not necessarily advance national security interests. A state-by-state regulatory structure will lead to

uneven security efforts and result in confusion for the multitude of companies that operate in more than one state. Additionally, it contradicts the idea of having a *national* security plan developed through the Department of Homeland Security.

Additionally, the nuclear industry, hazardous materials transportation industry, aviation, port securities industry and other industries with national security implications operate solely under federal security regulations. The chemical industry should not be forced to operate in a different fashion under regulations that conflict, hinder, and pose obstacles to innovation that will ultimately cost jobs.

Citizen Suits:

Under Section 2116 of the legislation, *any citizen* will have the ability to bring suit against a regulated facility *or the DHS* to enforce compliance with the Act. Since anyone can take legal action, the bill allows individuals that *did not suffer any harm* to sue for a potential violation of the act. Also known as a private right of action, “citizen suits” are based on the logic that citizens will possess knowledge about an actual or potential environmental harm and address the issue if government fails to act. While common in environmental lawsuits, CFATS established performance-based standards to provide facilities some flexibility to adopt appropriate security measures. Allowing any individual with absolutely no expertise in security to challenge a facility’s security plan is not appropriate in a national security context. Citizen suits are not allowed to challenge decisions involving with national defense decisions; the same rationale should apply to homeland security decisions involving dangerous chemicals.

Furthermore, citizens should not be allowed to access sensitive security information that would be needed to bring any sort of suit against a facility. Allowing sensitive information to be made available to the public during a court proceeding could encourage would-be terrorists to sue first to compel the production of documents related to security measures. Potential terrorists should not have the opportunity to use the legal process to compel the release of documents that could compromise the safety of the plant and public. Citizen suits on chemical facilities divert resources from achieving actual security.

Inherently Safer Technology:

Lastly, Section 2111 of the bill requires larger chemical facilities to implement “inherently safer technologies” if mandated by the DHS. While improving the safety of the workplace is a primary goal for all chemical facilities, mandating certain technologies provides DHS excessive authority to implement changes in the private-sector manufacturing process. Under the performance-based CFATS guidelines, chemical facilities were already provided with incentives to implement enhanced safety measures and use safer chemicals in the manufacturing process. A government mandate to use certain equipment and process would gut the current framework without providing any new incentives to reduce risk.

Mandating a company to substitute products and processes with government-selected technologies goes beyond security protections and would lead to confusion, loss of products, additional legal liabilities, and business failures. Additionally, there is no consensus way to measure what process is inherently safer than another, which is why many experts in chemical engineering have consistently [recommended](#) against regulating inherent safety for security purposes.

The RSC will provide updates on this issue and legislation as warranted.

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