

Congress of the United States
Washington, DC 20510

COMMENTS OF

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REPRESENTATIVE FRANK PALLONE (D-NJ)
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ON

DEPARTMENT OF HOMELAND SECURITY
CHEMICAL ANTI-TERRORISM STANDARDS

Docket No. DHS-2006-0073, 71 Federal Register 78275 – 78332,
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We are writing to comment on the interim chemical security regulations proposed by the Department of Homeland Security (DHS) and published in the Federal Register on December 28, 2006. These interim regulations were mandated under Section 550 of the Department of Homeland Security Appropriations Act of 2007 (P.L. 109-295).

In particular, we are writing to offer our comments on section 27.405 of the proposed regulations, "Review and Preemption of State Laws and Regulations." We oppose this proposed section.

As proposed, section 27.405 states in part:

"(a) No law, regulation, or administrative action of a State or political subdivision thereof, nor any decision or order rendered by a court under state law, shall have any effect if such law, regulation, or decision conflicts with, hinders, poses an obstacle to or frustrates the purposes of these regulations or of any approval, disapproval or order issued thereunder.

(b) State law, regulation or administrative action defined. – For purposes of this section, the phrase 'State law, regulation or administrative action' means any enacted law, promulgated regulation, ordinance, administrative action, order or decision, or common law standard of a State or any of its political subdivisions."

The proposed regulations then establish a petition process, through which any chemical facility covered by the regulations or any State may petition DHS for "review." Based upon such review, the regulations propose that DHS will "opine" whether

"(A) complying with the State law or regulation and a requirement of this Part is not possible; or

(B) the application or enforcement of the State law or regulation would present an obstacle to or frustrate the purpose of this Part.”

In short, DHS is proposing through these interim regulations to preempt the right of New Jersey -- and every other state or local government in the United States -- to adopt chemical security protections such state or local government might deem necessary to protect its citizens from a terrorist or criminal attack.

We do not believe that a majority of the 109th Congress, in the Senate or House, thought they were giving DHS such sweeping authority when they voted for the Department of Homeland Security Appropriations Act of 2007, including Section 550. Nor do we believe that a majority of the 110th Congress would support DHS finalizing this proposed interim regulation.

Moreover, in our view, it is clear that the legislative history regarding development of chemical security legislation in the 109th Congress prior to the adoption of Section 550 contradicts the Department’s claim that Congress intended to sweepingly preempt state and local authority in this area.¹ A brief summary of that history follows.

Chemical security legislation was extensively considered and ultimately adopted by the authorizing committees in both the Senate and the House.

In the Senate, the Homeland Security and Government Affairs Committee passed the Chemical Facility Anti-Terrorism Act of 2006 (S. 2145) in June 2006. Section 10(a) of that bill explicitly reserved the right of state and local governments to adopt stronger chemical security protections, except in those instances when such protections posed an “actual conflict” with the federal law intended to be enacted.

At the mark-up of S. 2145, the Committee rejected an amendment that would have struck the state and local law provision in Section 10 and replaced it with a provision establishing Federal preemption of state and local laws in the regulation of chemical security. The Committee ultimately voted unanimously to report the bill to the full Senate. The bill did not receive further consideration in the Senate.

In the House, the Homeland Security Committee passed H.R. 5695, the Chemical Facility Anti-Terrorism Act of 2006, by voice vote on July 28, 2006. While the original text of H.R. 5695 was silent on preemption, the Committee decided, by voice vote, to

¹ We also note that none of the major chemical security bills introduced in the Senate or the House during the 106th, 107th, 108th, or 109th Congresses contained provisions preempting state or local authorities. See: Chemical Security Act of 1999, S. 1470 (Lautenberg, 106th), Chemical Security Act of 2002, S. 1602 (Corzine, 107th), Chemical Security Act of 2003, S.157 (Corzine, 108th), Chemical Facilities Security Act of 2004, S. 994 (Inhofe 108th), Chemical Security and Safety Act of 2006, S.2486 (Lautenberg, Obama); see also Chemical Security Act of 1999, H.R. 2257 (Green, 106th), Chemical Security and Right-to-Know Act of 2000, H.R. 5623 (Holt, 106th), Chemical Security Act of 2002, H.R. 5300 (Pallone, 107th), Chemical Security Act of 2003, H.R. 1861 (Pallone, 108th), and Chemical Facility Security Act of 2003, H.R. 2901 (Fossella, 108th).

include language preserving the rights of state and local governments to adopt more stringent regulations unless they "frustrate" the purposes of the Act. The Committee was explicit in the accompanying report (H.Rept. 109-707):

"[Section 1807] provides that nothing in this title shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance respecting chemical facility security that is more stringent than a regulation, requirement, or standard of performance in effect under this title, unless such regulation, requirement, or standard of performance would frustrate the purposes of this title...

The Committee does not believe that a State law would frustrate the purposes of this title solely if such State law requires a chemical facility to use or consider using a modification, process, substitution, or reduction of substance of concern for the purposes of reducing the consequences of a terrorist incident."

Neither of the chemical security bills that were voted out of the authorizing committees were given further consideration. As a result, Congress and the American public were facing the prospect of no federal chemical security legislation five years after 9/11.

In order to ensure that DHS had at least the minimal authority it needed to pursue some federal regulation of chemical facilities until Congress could pass more comprehensive legislation, Senator Byrd and others offered an amendment to the Department of Homeland Security Appropriations Act of 2007 authorizing the Department to establish interim final regulations "that establish homeland security requirements, including minimum standards and required submission of facility security plans to the Secretary, for chemical facilities that the Secretary determines present the greatest security risk and that are not currently regulated under Federal law for homeland security purposes." Those interim regulations were to apply "to a chemical facility until the effective date of final regulations issued under other laws by the Secretary, that establish requirements and standards referred to in subsection (a) that apply with respect to that facility." The Byrd amendment was adopted in the Senate by unanimous consent on a voice vote.

Unfortunately, when the bill went to Conference, it was changed and weakened considerably. These changes were made in a process that was neither public nor bipartisan. Concern over the process and substance of these revisions to the Byrd amendment generated significant opposition in both the House and Senate.²

In addition, the National Governors Association wrote to the leaders of the House and Senate on September 19, 2006. The NGA urged the leaders "to ensure that any

² See September 20, 2006 letter from Senators Obama, Lautenberg and 22 colleagues to Senators Gregg and Byrd; and September 21, 2006 letter from Representatives Dingell, Pallone and 12 colleagues to Reps. Hastert, Pelosi, Lewis, Obey, Rogers and Sabo.

chemical security provisions that Congress considers clearly affirm states' ability to enact and maintain stronger protections...it is critical that states retain their authority to supplement the federal chemical security program with additional security protections deemed necessary by the state as long as such requirements do not directly conflict with the federal law."

Faced with this opposition to efforts to preempt state and local authority to adopt chemical security protections to supplement federal protections, it became apparent that the only way an amended version of the Byrd amendment could pass the House and Senate without a major fight over the changes was to remain silent on the question of preemption, and to include a provision to "sunset" after three years the authority provided by the Byrd amendment.

The sunset provision was included, in part, to ensure that Congress would continue to address the need for comprehensive chemical security legislation – including the issue of preemption of state and local authorities – through the regular authorization process. In its interpretation of Section 550, DHS never acknowledges the existence, or intent, of the sunset clause. The most likely reason DHS seeks to ignore the sunset clause is that it seriously undermines the Department's argument for preemption.

Congress intended the Byrd amendment, even in its final form, to be a temporary "fix" to the lack of existing federal authority to regulate chemical plants. As noted above, that fix was only meant to last three years, to allow the authorizing committees to work on more complete security legislation. It is simply implausible to suggest that Congress intended to sweepingly -- and silently -- preempt state and local authority as part of a temporary measure that was known to be a stop-gap.

In the preamble to its proposed interim rules, DHS ignored a statement of Congressional intent, in the form of a colloquy, between Rep. Peter King, then-Chair of the authorizing committee, and Martin Sabo, then-Ranking Member of the House Appropriations Committee's Subcommittee on Homeland Security:

Mr. SABO. Mr. Speaker, I yield myself 1 minute. Mr. Speaker, I have read the chemical bill language, and I do not understand whether that language preempts the ability of a State to adopt more stringent requirements than the Federal standards.

Mr. KING of New York. Mr. Speaker, will the gentleman yield?

Mr. SABO. I yield to the gentleman from New York.

Mr. KING of New York. Mr. Speaker, it is our understanding, and we had the opinion of committee counsel on this, that it does not preempt States.

Mr. SABO. The intention is not to preempt the ability of the States.

Mr. KING of New York. That is not the intention.

In support of its assertion of complete executive authority over chemical security, the Department makes the point that the threat of terrorist attacks is a "national threat." This fact does not make terrorism any less of a state threat. It simply means that the federal government has a legitimate -- but not exclusive -- interest in the issue. By analogy, no one would argue that there is not a national interest in controlling air pollution, or water pollution, but the federal government under our environmental laws sets the *minimum* level of protections for the states to meet the national interest, and states are allowed to do more than the federal minimum if they deem it to be necessary. Nevertheless, in its preamble, DHS seeks to downgrade the role of state and local governments from actively protecting their citizens from harm to "first responders and in other response capacities."

DHS and the industry have argued that there is a danger of a "patchwork" of chemical security regulations being adopted across the states if all states are not preempted from going beyond the national standards. This argument does not work any better in the realm of chemical security than it does with respect to the environment. The facilities in question are fixed, meaning that if New Jersey decides to adopt a requirement, it does not apply to a facility in Indiana and is not a nationwide problem for the owner of those facilities. Similarly, if New Jersey were to adopt a more stringent discharge limit on a toxic chemical into a river than federal law, or West Virginia state law required, there is no reason it should be prevented from doing so.

DHS seeks to reserve for itself the "lead and coordinating role" in addressing chemical security by preempting the right of state and local governments to go beyond whatever DHS actually requires. The effort by DHS to eliminate the authority of state and local governments to adopt chemical security requirements is particularly alarming in light of the Administration's nearly six years of failure to support strong federal chemical security protections, whether by law or regulation. As a result, many chemical facilities across the country remain vulnerable to a terrorist attack.

By way of example, over the past five years, a reporter for the Pittsburgh-Herald Tribune has documented the poor state of security at chemical plants around the country. He repeatedly entered into facilities and even climbed to the tops of large storage tanks containing dangerous chemicals without ever being questioned by plant security or personnel. The forays by the reporter are of course embarrassing for the companies involved, but they should also concern DHS, which has done too little to secure our chemical sites, and continues to insist that its partnership with industry -- rather than a partnership with states -- will be sufficient to protect the American public.

As representatives of the citizens of New Jersey, we simply cannot accept a proposed regulatory scheme that requires our constituents to rely upon the best efforts of private companies and this Administration to ensure their safety from terrorist attacks on chemical facilities in their communities.

Some 700 people from New Jersey were killed on 9/11. New Jersey is one of the states most vulnerable to a terrorist attack: It is home to what counter-terrorism experts at the Federal Bureau of Investigation have called “the most dangerous two miles in America,” the stretch between Newark Airport and Port Elizabeth, in great part due to the presence of chemical facilities. Elsewhere in the State, twelve million people could be endangered if the Kuehne chemical plant in Kearny were to be attacked.

New Jersey has a long and proud history of adopting strong legislation to protect the health and safety of its citizens, and the environment, without waiting for the Federal Government to act. In the wake of the catastrophic chemical leak in Bhopal, India, in 1984, which killed thousands of innocent people, the New Jersey legislature passed the Toxic Catastrophe Prevention Act (TCPA). This law requires facilities that handle extraordinarily hazardous substances above certain inventory thresholds to prepare and implement risk management plans. The plans must include detailed procedures for safety reviews of design and operation, operating procedures, maintenance procedures, training activities, emergency response, process hazard analysis with risk assessment, and self-auditing procedures. The TCPA became the model for Section 112(r) of the Clean Air Act, which established a similar requirement to develop risk management plans for the highest risk chemical facilities in the country, of which there are approximately 15,000.

Since 9/11, New Jersey has taken several steps to strengthen the TCPA, and to adopt additional measures to enhance the security of New Jersey citizens from terrorist or other criminal attacks on chemical plants. For example, based upon the work of New Jersey’s Domestic Security Task Force, Chemical Sector Best Practices Standards (Standards) were put in place on November 21, 2005. The Standards require chemical sector facilities to, among other things:

- comply with the Chemical Sector Security Best Practices;
- conduct a terrorism-based security vulnerability assessment; and
- develop a prevention, preparedness, and response plan to minimize the risk of a terrorist attack.

In addition, chemical sector facilities subject to TCPA are required to conduct a review of practicability and potential for adopting inherently safer technology. Facilities required to conduct an inherently safer technology review must evaluate:

- reducing the amount of extraordinarily hazardous substances materials that potentially may be released;
- substituting less hazardous materials;
- using extraordinarily hazardous substances in the least hazardous process conditions or form; and
- designing equipment and processes to minimize the potential for equipment failure and human error.

The inherently safer technology requirement under the Standards represents a practicability test; it is not mandatory that a covered facility implement IST, only that

they evaluate. The results of the evaluations are held at the facility site, and are made available to DEP inspectors during an on-site visit.

We have many concerns about the types of activities that DHS could deem to be preempted under the guise of “frustrating” or “hindering” its regulations. Several of these are outlined below. We note that these same concerns might be shared by any or all of the states.

- The DHS interim final regulations will establish requirements for certain chemical facilities to develop vulnerability assessments and site security plans. Those regulations may not require facilities to include a role for workers in developing the vulnerability assessments or site security plans. We are concerned that if New Jersey (or another state) wanted to require worker participation in development of those plans, DHS could attempt to assert its authority to preempt that requirement.
- Section 550 requires DHS to establish standards for the development of vulnerability assessments and site security plans, but not emergency response plans. We are concerned that if New Jersey adopted a requirement for chemical facilities in the state to develop emergency response plans, DHS could attempt to assert its authority to preempt that requirement.
- Section 550 requires DHS to establish its standards for those chemical facilities that “present high levels of security risk.” Depending on how that term is defined, the number of chemical facilities that pose such a risk nationwide could be anywhere from 100 to 15,000. If DHS defines that universe narrowly, and doesn’t include one or more facilities in New Jersey, then the state might want to adopt and apply its own chemical security requirements to facilities not covered by DHS. We are concerned that DHS could attempt to assert its authority to preempt those state requirements.
- The proposed DHS regulations have a process which DHS would follow if it were to order a facility to cease operations for non-compliance. That process is arguably a long one. We are concerned that if New Jersey adopted provisions allowing it to order a facility to cease operations (based upon its own estimation of a security threat posed by a facility), DHS could attempt to assert its authority to preempt those state provisions.
- The proposed DHS regulations require that the Department give 24-hour notice to facilities prior to an inspection. If New Jersey were to adopt its own inspection requirements for chemical facilities, establishing more frequent inspections, or with little or no advance notice to facilities, we are concerned that DHS could attempt to assert its authority to preempt those state provisions.

These are only a few examples of the types of security protections New Jersey and other states might seek to adopt to improve oversight of chemical facilities and ensure

greater protection from terrorist attacks for their citizens. Given the sweeping authority DHS seeks to grant itself, some or all of these could be at risk of preemption.

We are deeply disturbed that more than five years after 9/11, after virtually no meaningful action by Congress, the Administration, or the chemical industry to adopt comprehensive chemical security legislation, there is now an effort by the Administration to prevent states and local communities from taking the necessary steps to protect their communities. The safety of the people of New Jersey or any other state or local community which wishes to protect itself must be preserved, and state or local governments should not be forced to settle for whatever compromises are ultimately reached at the federal level if, in their view, greater protections are needed in their community.

New Jersey took steps to improve its security after 9/11, and it may need to take additional steps in the future. We strongly oppose any efforts by DHS and the rest of this Administration to prevent it from doing so.

Thank your for taking these comments into consideration.

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