



VERBAL COMMENTS

Before the

Chemical Facility Safety and Security Working Group

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Good morning. I am Judah Prero, assistant general counsel for the American Chemistry Council.

Clearly, issues brought to light by the tragic incident in West, Texas, were the impetus for Executive Order 13650. The Executive Order notes that measures can be taken by executive departments and agencies utilizing existing regulatory authority to further improve chemical facility safety and security in coordination with owners and operators. We at ACC agree that there are opportunities to enhance safety and security throughout industry.

We have offered numerous recommendations to this Working Group over the past few weeks to see how this can be achieved, to address the fundamental issues, and to successfully meet the objectives of the Executive Order.

Unfortunately, we are very concerned that the Working Group has chosen instead to focus on proposals that address one small piece of the Executive Order. We believe the misplaced attention to proposals related to “safer alternatives” will ultimately distract from work on many other pieces of the Executive Order that have yet to be addressed, but need to be, and lead to unnecessary and duplicative regulatory obligations that do not enhance safety or security.

To start, there are numerous existing regulatory programs that focus the attention of owners and operators to operate a safe and secure facility, such as the Occupational Safety and Health Administration’s (OSHA) Process Safety Management of Highly Hazardous Chemicals (PSM) standard, the U.S. Environmental Protection Agency’s (EPA) Risk Management Plan (RMP) Rule, the U.S. Department of Transportation’s (DOT) Haz Mat regulations under the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the U.S. Department of Homeland Security’s (DHS) Chemical Facility Anti-Terrorism Standards (CFATS). All of these programs, as they exist today, require operators to take a hard look at the operations and to do what it takes to make them safe and secure. Explicit “safer alternatives” mandates are not needed; the goal of arriving at safety is implicit and site-specific, for example, in a process hazard analysis or development of a risk management plan. EPA acknowledged as much when it promulgated the regulations for the RMP program.

Furthermore, operators need to take a holistic approach when addressing risk at the facility; these various programs and requirements need to be addressed in concert, so the overall safety and security profile – for employees, environment, and community – can be maintained at the highest level possible while allowing the facility to function. No one agency has the legal authority to perform this task nor is one even capable of performing this task.

There are numerous challenges and pitfalls to a regulatory mandate to evaluate “safer” alternatives. For one, what does “safer” mean? What factors go into the decision process for determining “safety?” If EPA did want to require an analysis for “safer” alternatives under RMP, the focus would need to be on safety relative to accidental emissions into the ambient air, as that is the extent of EPA’s authority under the Clean Air Act. In that context, how would “safer” be addressed for employees, for processes that don’t involve releases but pose other hazards, or for chemicals that could be stolen or diverted for illicit purposes? Mandating the evaluation of “safer” alternatives is complicated, near impossible, to quickly import into a regulatory context, and it is not simply low-hanging fruit for enhanced safety and security that some would have you believe. This fruit has already been harvested through industry initiatives and existing regulatory programs.

The New Jersey experience highlights the complexities of such a program. Under New Jersey’s Toxic Catastrophe Prevention Act (TCPA), regulated facilities are required to perform an “Inherently Safer Technology Review.” New Jersey uses a non-traditional definition of inherently safer technology (IST) that focuses on strategies that are already considered via best management practices, OSHA’s PSM standard, and EPA’s RMP rule. As such, many companies claim to identify and/or implement “IST” controls that really are not bona fide IST measures but measures already identified or implemented under other programs.

Furthermore, the TCPA program goals did not specifically require reporting of the risks before and after the implementation of IST. There is no specific accounting for risk shifted upstream, off-site, or anywhere along the supply chain. There is no specific way to quantify “risk” and what a “lesser” risk is. There is no way to

qualitatively determine if the program truly has resulted in any real risk reduction across the board. In light of existing federal and industry programs, it is difficult to envision the benefit of adopting this program on the federal level or how doing so would meet the objectives of this Executive Order or even Executive Order 13563 concerning Improving Regulation and Regulatory Review.

Government clearly has a role in addressing security and safety. But, as the Executive Order states, the role needs to be coordinated with industry, who has the primary responsibility to ensure the safety and security of its employees and neighbors. It is possible to reach these safety goals through companies' continual devotion to the management and control of hazards via adherence to existing regulations, industry best management practices, and safety systems such as the ACC Responsible Care® Process Safety Code. Adopting a "safer" process does not represent the only way to attain the desired level of safety.

We encourage the Working Group to focus on improving communication and coordination among all regulators and first responders at all levels of government. We encourage the Working Group to focus on facilities that may have previously been "off the radar" that truly need help with security and safety measures. That is the goal of the Executive Order – not developing new regulatory programs that will create additional complexity and do not provide any quantifiable benefit. As we have demonstrated, we are ready to work with you to tackle the issues that the Executive Order was intended to address. Thank you.