

**United States Senate**  
WASHINGTON, DC 20510

July 16, 2012

The Honorable Lisa Jackson  
Administrator  
Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Dear Administrator Jackson:

We understand that National Environmental Justice Advisory Council has urged EPA to promulgate new rules or guidance to expand the general duty clause of Section 112(r) of the Clean Air Act (CAA 112[r]), which addresses accidental release prevention, to regulate chemical facility security against terrorist attacks. As members of the Senate Committee on Environment and Public Works (EPW), which has jurisdiction over the Clean Air Act (CAA), and the Senate Committee on Homeland Security and Governmental Affairs (HSGAC), which has jurisdiction over the Chemical Facility Anti-Terrorism Standards program (CFATS)<sup>1</sup>, we strongly oppose the use of these provisions to address site security for chemical and other facilities from terrorist attacks.

The requests you have received ask that EPA “use its authority under the 1990 Clean Air Act, Section 112(r), to reduce or eliminate these catastrophic risks, where feasible, by issuing new rules and guidance to fully implement the General Duty Clause.” The requests cite a 2002 EPA proposal, drafted following the terrorist attacks of September 11, 2001, considering the use of the general duty clause to make chemical facilities “inherently safer by reducing quantities of hazardous chemicals handled or stored, substituting less hazardous chemical for extremely hazardous ones, or otherwise modifying the design of processes to reduce or eliminate chemical hazards.” Given that laws have since been enacted to address site security, we do not believe this is a necessary or prudent action by your Agency.

As you know, in 2002, no federal program existed to regulate security of facilities with chemicals present onsite. At that time, EPA asserted that the CAA *could* be interpreted to provide authority to address site security but did not try to use the provisions because EPA was “concerned that such an interpretation would pose significant litigation risk and has concluded that chemical facility security would be more effectively addressed by passage of specific legislation.”<sup>2</sup> In a 2003 report, the Government Accountability Office (GAO) agreed that such an interpretation of EPA’s authority under CAA could be open to legal challenges.<sup>3</sup>

This GAO report went on to list several limitations on using the CAA 112(r) general duty clause authority for chemical facilities, including that “the General Duty Clause provides that chemical facility owners and operators have a ‘general duty in the same manner and to the same extent’ as OSHA’s general duty clause. However, the Department of Labor informed us that it does not believe OSHA’s general duty clause provides it with authority to address the threat of terrorism. . . . Justice expressed concerns that the Clean Air Act does not provide sufficient protection against dissemination of sensitive information that could be used by terrorists,”<sup>4</sup> a position similarly articulated by the Clinton Administration’s Justice Department on April 18, 2000.<sup>5</sup> GAO also agreed with EPA’s conclusion that specific legislation was needed to address chemical facility security, stating: “Our work demonstrates the need to move to a

comprehensive national strategy that does more to assure the Congress and the public that chemical facilities have taken appropriate security measures. By swiftly implementing a comprehensive approach to reduce the risk of a terrorist-caused release, policy makers can better protect American communities.”<sup>6</sup>

In that same report, GAO made eight recommendations on actions to better ensure chemical facility safety. All of their recommendations have been implemented.<sup>7</sup> The final recommendation was completed in 2006 when Congress granted the Department of Homeland Security (DHS) authority to require high risk chemical facilities to complete vulnerability assessments, develop site security plans, and implement protective measures necessary to meet DHS-defined performance standards. DHS released the CFATS interim final rule in 2007. Under the CFATS program, thousands of chemical facilities have made changes to their business operations and chemical holdings to reduce risk. Out of more than 7,000 high risk chemical facilities identified initially by DHS, approximately 1,600 facilities have completely removed their chemicals of interest, and more than 700 other facilities have reduced their holdings of chemicals of interest to levels resulting in the facilities no longer being considered high-risk. Facilities continue to make progress in this area. These actions were the result of choices made by facilities after the establishment of the CFATS regulation.

Additionally, Congress enacted the Public Health Security and Bioterrorism Preparedness and Response Act of 2002<sup>8</sup> which, under Title IV, requires community water systems serving more than 3,300 people to conduct vulnerability assessments to terrorist attacks, prepare emergency response plans that incorporate the results of the vulnerability assessments, certify to EPA that the vulnerability assessments and emergency response plans have been completed, and provide a copy of the assessment to EPA. To improve security in our nation’s ports, the Maritime Transportation Security Act of 2002<sup>9</sup> directed the Secretary of DHS to identify vessels and port facilities that pose a high risk of being involved in a transportation security incident to conduct a vulnerability assessment of these facilities and vessels and develop security plans.

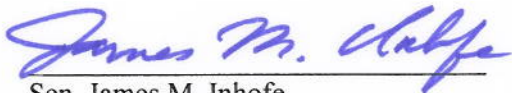
Despite the current security regulatory programs for facilities with chemicals that are being implemented by the Federal government, you have received recommendations to further regulate these same facilities under the CAA. These requests for new EPA action argue for using the CAA 112(r) general duty clause authority to mandate the use of “inherently safer technologies” or IST. Both HSGAC and EPW have heard from multiple security and chemical experts that IST should *not* be federally mandated, including at a June 21, 2006, EPW hearing focused entirely on the effectiveness of IST. At a March 2010 hearing on Chemical Security, HSGAC received testimony summarizing the major issue with mandating IST to reduce terrorism hazards. Not only is IST, from a legal standpoint, not well-defined – requiring subjective enforcement by EPA – but also “[IST] is a chemical safety process exercise premised on the belief that, if a particular chemical process hazard can be reduced, the overall risk associated with that process will also be reduced . . . it is an elegant concept, but the reality is almost never that simple. A reduction in hazard will reduce overall risk if, and only if, that hazard is not displaced to another time or location, or result in the creation of some new hazard.”<sup>10</sup>

EPA understood this complicated reality, and the 2002 proposal was not the first time EPA rejected the use of CAA 112(r) risk management plans for mandating IST. In 1996, the Clinton Administration’s EPA considered mandating IST under the these provisions, but ultimately decided it was unnecessary saying: “PHA [process hazard analysis] teams regularly suggest viable, effective (and inherently safer) alternatives for risk reduction, which may include features such as inventory reduction, material substitution, and process control changes. These changes are made as opportunities arise, without regulation or adoption of completely new and unproven process technologies. . . . EPA does not believe that a requirement that owners or operators conduct searches or analyses of alternative process technologies for new or existing processes will produce significant additional benefits.”<sup>11</sup>

The concept of mandating IST is not as simple as replacing one chemical with another. As the Congressional Research Service reported earlier this year: "A fundamental challenge for inherently safer technologies is how to compare one technology with its potential replacement. It is challenging to unequivocally state that one technology is inherently safer than the other without adequate metrics. Risk factors may exist outside of the comparison framework. Some experts have asserted that the metrics for comparing industrial processes are not yet fully established and need additional research and study."<sup>12</sup> For these reasons among others, mandating IST remains impractical.

The existing regulations under CFATS, Safe Drinking Water Act, and Maritime Transportation Security Act are designed to evaluate vulnerabilities, and provide meaningful opportunity for hazard reductions, without mandating unproven solutions that could introduce additional risk. Promulgation of new EPA regulations or guidance under the general duty clause of CAA 112(r) would be duplicative, confusing, and potentially conflict with these current regulatory systems. The Clean Air Act was not designed to address terrorist activities, and we therefore request that you decline any proposals for new regulations under this authority.

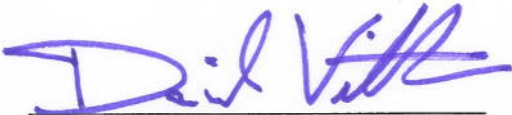
Sincerely,



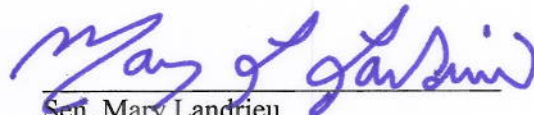
Sen. James M. Inhofe  
Ranking Member  
Senate Committee on Environment and  
Public Works



Sen. Susan M. Collins  
Ranking Member  
Senate Committee on Homeland Security and  
Governmental Affairs



Sen. David Vitter  
Ranking Member  
Subcommittee on Transportation and  
Infrastructure



Sen. Mary Landrieu  
Chairman  
Subcommittee on Homeland Security

Cc: Nancy Sutley, Chair, White House Council on Environmental Quality

<sup>1</sup> The Chemical Facility Anti-Terrorism Standards program was established under P.L. 109-295, Section 550.

<sup>2</sup> GAO-03-439, March 2003, p. 16, available at: <http://gao.gov/products/GAO-03-439>.

<sup>3</sup> Id., p. 16

<sup>4</sup> Id., p. 18.

<sup>5</sup> U.S. Department of Justice, "Assessment of the Increased Risk of Terrorism or other Criminal Activity Associated with Posting Off-Site Consequence Analysis Information on the Internet," April, 18, 2000.

<sup>6</sup> Id., p. 30.

<sup>7</sup> <http://gao.gov/products/gao-03-439>

<sup>8</sup> P.L. 107-188.

<sup>9</sup> P.L. 107-295.

<sup>10</sup> Testimony of Stephen Poorman, International EHS Manager, FUJIFILM Imaging Colorants Ltd., on behalf of the Society of Chemical Manufacturers and Affiliates before the Senate Committee on Homeland Security and Governmental Affairs on Chemical Security: Assessing Progress and Charting a Path Forward. March 3, 2010.

<sup>11</sup> 61 Fed. Reg. 31699 (June 20, 1996).

<sup>12</sup> R41642 *Chemical Facility Security: Issues and Options for the 112th Congress*, Dana A. Shea, Specialist in Science and Technology Policy, January 13, 2012.