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Greening a Homeland Bureaucracy Chemical Plant Security Issue Hijacked by Green Activists

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Nearly five years after the terrorist attacks on New York City and Washington D.C., Congress is still debating how to shore up security at the nation's chemical plants. Legislation has languished because special interests have attempted to use the issue to pursue an unrelated agenda. In particular, environmental activists and their allies in Congress seek to use security needs as an excuse to reduce or phase out the use of so-called toxic chemicals—many of which provide important public health benefits. So it's no surprise that it has taken five years to shift the debate in a more productive direction.

Sen. Diane Collins (R-ME), Chairwoman of the Senate Homeland Security and Governmental Affairs Committee, recently offered a bill, the Chemical Facility Anti-Terrorism Act (S. 2145), that attempts to manage risks rather than remove chemical products from the marketplace. The Collins bill represents important progress in setting a proper focus for the issue, but challenges remain. First, green activists and their allies in Congress are working to shift the focus back to their agenda. Second, the Collins bill poses a new set of problems associated with an overly bureaucratic approach and excessive enforcement provisions.

The Changing Agenda. Despite claims that the issue is somehow new, the proposals debated actually date back to the 1980s. At the time, the political catchphrase was “toxics use reduction.” The agenda was clear: reduction and elimination rather than management of chemicals. Congress rightly rejected the toxics-use-reduction concept as unreasonable.

But the green activists' anti-chemical agenda has advanced masqueraded under other headings. By 1990, anti-chemical activists advocated and their allies in Congress passed

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into law an “accidental release” provision in an amendment to the Clean Air Act.¹ This provision mandated “risk management planning,” which requires chemical plants, public utilities, and government installations to develop “worst-case scenario” estimates about potential accidental releases. These scenarios involve highly improbable horror stories about the potential for catastrophic, accidental chemical releases. The law then directed the Environmental Protection Agency (EPA) to make these stories public. The program’s ostensive goal was to educate the public about risks, but it has been used by green activists, politicians, and the media to generate unwarranted fears about chemicals, which have led to calls for regulation to restrict them.²

Moreover, the program created a new problem. In 1999, the International Association of Fire Chiefs, the FBI, and the CIA pointed out that an EPA proposal to post the worst-case scenario information online posed a national security risk. While the data didn’t reveal anything about actual risk probabilities, it could still aid terrorists in selecting the biggest and most vulnerable targets and formulating plans to attack the nation’s chemical plants and basic infrastructure.

Congress punted. Rather than demanding that EPA keep all the sensitive information classified, it allowed the agency to decide how much of the data it would post online. EPA then proceeded to post most—though not all—online, including detailed executive summaries containing some of the most sensitive worst-case-scenario data. After September 11, 2001, EPA pulled the data off the Internet. Yet green activists had already downloaded the summaries, which they host online today. The information also is available in government libraries across the nation.

Stoking Unwarranted Fears. Since 9/11, anti-chemical activist groups have capitalized on public fears about terrorism, dressing the issue of toxics use reduction in the guise of a chemical plant security bill. The first proposal in this area was offered by Sen. Jon Corzine (D-N.J.) in 2001. His bill (S. 1602) proposed to reduce and phase out “dangerous” chemicals and replace them with “inherently safer technology.” The end goal was the same as the long-rejected “toxics use reduction” scheme: grant regulators authority to essentially ban or reduce politically unpopular chemicals. Yet many products are valuable because they are “toxic” or “inherently dangerous.” Indeed, the toxic properties of pesticides and disinfectants are what make these products valuable in the war against deadly pathogens. Banning or reducing their use would only undermine public health and safety, yet activists continue their efforts.

To advance their cause under the new banner of chemical security, green activists, reporters, and their allies in the federal regulatory bureaucracy use the worst-case data to sell horror scenarios in the hope of prompting Congress into passing regulations to phase out chemicals in the name of security. In particular, activists and politicians cite an EPA study that asserts that there are 123 industrial plants in the United States that, if attacked, could each release enough chemicals to harm 1 million or more people.³ Yet this study is based on implausible worst-case scenarios: It ignores *any* safety measures currently in place and assumes that *every* possible chemical container would be breached, releasing the *maximum* amount of chemicals, under the *worst possible* wind conditions. It also

assumes that *all* safety and mitigation measures at the plant would fail, and that *no one* would evacuate from the surrounding community. The Department of Homeland Security (DHS) has joined this chorus, using these scenarios to hype up fears to push along legislation. DHS claims to have found 300 plants that could each produce more than 50,000 casualties if they suffered from a catastrophic release of hazardous materials.⁴

Using this data to justify more federal controls makes no sense because such theoretical scenarios say nothing about actual risks. Applied to the airline industry, worst-case planning would demand that we need even more regulation on airplanes—and that we could never have enough regulation—because airlines’ *mere existence* places millions of people at risk based on the “worst case scenario” airplane crash. A similar line of reasoning would assume that terrorists could—unhindered by anyone—crash the world’s largest jets, filled to capacity, into the largest and most populated buildings at the most vulnerable spots and that no one could evacuate the buildings or the surrounding areas.

Refocusing the Issue. Fortunately, the Bush Administration and allies in Congress—including Environment and Public Works Committee Chairman Sen. James Inhofe (R-Okla.)—have worked to bring the issue into proper perspective. They succeeded in shifting jurisdiction from EPA to the Department of Homeland Security, and relevant legislation now falls under the homeland security committees on the Hill. Recently, the administration underscored this new focus by publicly rejecting recommendations in a Government Accountability Office (GAO) report to study policies to promote “inherently safer technology.”⁵ In response to the GAO report, DHS commented that switching to allegedly “safer technologies would not generally result in more secure chemical facilities...The use of inherently safer technologies tends to shift risks rather than eliminate risks, often with unintended consequences.”⁶

Fortunately, Sen. Collins’s bill does not emphasize the need for firms to pursue so-called “inherently safer technology” as a security measure. Rather, it focuses on ways to ensure that facilities assess and manage risks associated with chemicals, rather than press firms to eliminate valuable products or change manufacturing processes. However, one provision could be misconstrued to advance the anti-chemical activists’ agenda. In the section defining what would constitute a security measure at a chemical plant, the bill lists several items, including “the modification, processing, *substitution, or reduction of substances of concern.*” [Emphasis added]⁷ While firms may decide to take such measures, legislation need not list specific items, lest regulators use this provision to push firms “substitute” chemicals—a move that, as Department of Homeland Security officials pointed out, may simply substitute one risk for another.

The issue of inherently safer technology will likely continue as the center of debate, as Sen. Joseph Lieberman (D-Conn.) is expected to offer an amendment to include such language in the bill during its committee markup. In addition, Sen. Barack Obama (D-Ill.) recently began circulating a draft bill sponsored by him and other Senate Democrats—including John Kerry (D-Mass.) and Joe Biden (D-Del.)—that would include language to mandate the switch to “inherently safer technology.”⁸

Other provisions in the Collins bill have also been controversial. Her first draft attempted to preempt states from passing additional chemical security bills. As a national security issue, this approach enables the federal government to take the lead. It also would have eliminated laws—such as one recently enacted in New Jersey—that focus on the anti-chemical agenda rather than security. Political compromises led Sen. Collins to add to the bill a provision indicating that it won't preempt states from enacting more stringent regulations. This could be changed during committee markup as an amendment on the Senate floor. Homeland Security Secretary Michael Chertoff has expressed public support for the addition of a federal preemption provision.⁹

Another positive aspect of the Collins bill is the fact that chemical plant plans are to remain confidential and will not be subject to Freedom of Information Act requests. This provision will help avoid problems associated with public release of similar data by EPA as part of its risk management plan program.

Serious Points of Concern. While the Collins bill has the proper focus, some serious problems remain. The bill requires facilities to develop vulnerability plans that assess their risks of attack and include plans to prevent them. These plans would be reviewed and approved by the Department of Homeland Security, and would replace more flexible ongoing voluntary efforts, but it is not clear that they would be any better or worse than the current system.

The new program also appears to needlessly increase bureaucratic federal mandates since it overlaps considerably with EPA's risk management program. One solution would be to shift EPA's existing program to Homeland Security, add a security aspect to those plans, and limit public access to them. This approach would eliminate the need for firms to file separate reports and comply with different agencies, each with different guidance policies. After all, both the EPA and DHS programs address chemical releases—the only difference is that one focuses on accidental releases and the other on intentional releases. Both are more appropriately addressed by emergency planning experts than by environmental bureaucrats.

In addition, the Collins bill would create a new emergency planning structure for chemical plants rather than rely on the system already set up under the Emergency Planning and Community Right to Know Act (EPCRA).¹⁰ EPCRA created various levels of government emergency planning committees at the state and local levels. The Federal Emergency Management Agency already participates in these efforts, and these state and local bodies serve as vehicles for communications under the EPA risk management program. Instead of working through these existing institutions, the Collins bill would create a duplicative structure that includes creation of "Infrastructure Protection Regional Security Offices" around the nation as well as "area coordinators" and other federal personnel.¹¹ It is unclear as to why the federal government would need to create so much additional bureaucracy rather than simply set policies to sharpen the focus on this issue within existing institutions.

If poor performance under the EPCRA system is the reason for setting up a new system, then it would be wiser to examine and repair EPCRA rather than create a parallel structure. After all, if we learned anything from Hurricane Katrina, it is that we need to streamline and improve existing emergency planning institutions, and that we don't need new levels of bureaucracy to navigate through national crises.

Finally, enforcement provisions in the Collins bill should also raise red flags for anybody who cares about private enterprise. These provisions are so broad that they give the Department of Homeland Security unqualified power to shut down chemical plants, levy fines of up to \$1 million a year, and place owners or operators in jail for up to one year if a plant doesn't gain the agency's approval of a vulnerability assessment.¹² These penalties are extreme. Under current law—as outlined in EPA's National Contingency Plan,¹³ EPA cannot even begin an emergency response to “abate, prevent, minimize, stabilize or eliminate” a release unless the release presents an “imminent and substantial danger to public health and welfare or the environment.”¹⁴ If that standard is good enough for EPA, then why should DHS have the power to shut down a plant because it does not comply with paperwork mandates?

Of course, if a plant's security is found to be so lax that it places public health and safety in *imminent and substantial danger*, then allowing a federal shutdown would be appropriate. There is no reason to allow the Department of Homeland Security to shut down a plant simply because it deems a vulnerability assessment as “deficient.” It should have to show that the facility represents an *imminent and substantial danger to public health and safety*. DHS should not have such wide authority to shut down American businesses as currently exists in the Collins bill.

Conclusion. If Congress is to pass a chemical plant security bill, public health would be best served if it focuses on ensuring that existing systems work well and are placed under the authority of the proper security and emergency planning agencies. It is clear that the Department of Homeland Security is better situated than the Environmental Protection Agency to address such concerns. The current debate appears to be moving in that direction, but pending proposals take the least efficient approach, and they include enforcement mechanisms that pose a serious threat to our free enterprise system. Consolidating such planning in the Department of Homeland Security, eliminating duplicative processes, and sharpening the focus of existing planning mechanisms—rather than creating new ones—would make more sense.

Notes

¹ Section 112 (r) of the Clean Air Act, codified at 42 U.S.C. 7412.

² For example, see Greenpeace, USA, “Bhopal in the Bayou: Are Chemical Accidents a Trade Secret? Environmental Groups Release Unpublished Accidental Scenario Reports,” March 22, 2001, www.greenpeaceusa.org/media.

³ Recently cited in Charlie Savage, Chertoff Touts Chemical Plant Plan, But Critics Contend Security Proposal Caters to Industry,” *Boston Globe*, March 22, 2006; and “Chemical Site Security: America's Achilles' Heel? Federal Report Ranks States for Chemical Terrorist Threat” (Washington, D.C.: National Environment Trust, 2006), <http://www.net.org/health/security.vtml>.

⁴ U.S. Department of Homeland Security, “Fact Sheet: Protecting America’s Critical Infrastructure – Chemical Security,” Press Release, December 15, 2004, <http://www.dhs.gov/dhspublic/display?content=4343>.

⁵ *DHS is Taking Steps to Enhance Security at Chemical Facilities, But Additional Authority is Needed* (Washington, D.C.: U.S. Government Accountability Office, January 2006), GAO-06-150.

⁶ Ben Geman, “DHS Rejects Call to Study ‘Inherently Safer’ Technologies,” *Greenwire*, February 28, 2006.

⁷ H.R. 2145, Section 2 (10(B)(vii)).

⁸ Ben Geman, “Democratic Chemical Facility Bill Mandates ‘Inherently Safer’ Technologies,” *Environment and Energy Daily*, March 31, 2006

⁹ “Bush Proposal may Complicate N.J. Security Rules,” *Greenwire*, March 23, 2006.

¹⁰ 42 USC § 11001 et seq.

¹¹ S. 2145, Section 6.

¹² S. 2145 Section 4(c)(3)(iv).

¹³ The National Contingency plan was created to address accidental releases of oil, gas, and hazardous substances in 1968. Federal authorities under the NCP has been codified and expanded in public laws, including the Clean Water Act in 1972 and the Federal Superfund Law in 1980.

¹⁴ 40 CFR §300.130; and 40 CFR §300.415.