

1. The CFATS program was intentionally designed to promote inherent safety. The basic structure of having multiple tiers of facilities, based on risk, with increasingly demanding performance standards for each tier, was consciously developed to create incentives for facilities to reduce the risks that facilities pose, and thus move down to less-demanding tiers of regulation – or even to exit the system altogether.<sup>1</sup> And this design has paid off – the majority of plants that were ever tiered for CFATs purposes have managed to modify their inventories or manufacturing processes in ways that enabled them to tier out of the system. Thus, the CFATS program has been an active driver of inherent safety. Moreover, it has done so following a market-based approach – one in which individual facilities have been the ones to decide whether they want to make process changes to reduce risk, and if so, which changes to implement. The system has thus succeeded greatly while avoiding the need for DHS personnel to make decisions about inherent safety.

Congress should not move toward a system that would impose those kinds of decision responsibilities upon government personnel, for two reasons.

First, IST is inherently subjective and arbitrary. For example, if a proposed technology would reduce explosion hazards but pose water pollution risks, would it be inherently safer?<sup>2</sup> DHS's July 2010 report entitled "Definition for Inherently Safer Technology in Production, Transportation, Storage, and Use,"<sup>3</sup> which is the Federal government's most definitive statement on the topic of IST, explains that that what is "inherently safer" for some hazards might simultaneously be inherently less safe for others. Similarly, the 2012 National Academy of Sciences (NAS) report on "The Use and Storage of Methyl Isocyanate (MIC) at Bayer CropScience" observed that, "[a]lthough one process alternative may be inherently safer with respect to one hazard...the process may present other hazards."<sup>4</sup> As a result, consistent enforcement of IST is impossible because different companies and different inspectors will inevitably have differing views on specific technologies that cannot be objectively resolved.

Second, the DHS report also notes that "there is currently no consensus on either a quantification method for IST or a scientific assessment method for evaluation of IST options."<sup>5</sup> The NAS concurred that there is no "set of practice protocols for identifying safer processes."<sup>6</sup>

Currently, DHS inspectors work closely with facilities to reduce risks and enhance security measures. DHS will be most successful in promoting security at regulated facilities through these partnerships, as opposed to a regulatory construct that would be difficult for both

---

<sup>1</sup> See, e.g., Testimony of Richard A. Falkenrath before the Senate Homeland Security & Governmental Affairs Committee (April 27, 2005), at 16-17, available at <https://www.hsgac.senate.gov/imo/media/doc/SHSGACTestimonyonHazmat042705.pdf>.

<sup>2</sup> See National Academy of Sciences, "The Use and Storage of Methyl Isocyanate (MIC) at Bayer CropScience" (NAS Report) at 107; available at [http://dels.nas.edu/Report/Storage-Methyl/13385?\\_ga=2.133359881.606789487.1533571699-861784906.1476455634](http://dels.nas.edu/Report/Storage-Methyl/13385?_ga=2.133359881.606789487.1533571699-861784906.1476455634).

<sup>3</sup> Available at [https://www.aiche.org/sites/default/files/docs/embedded-pdf/ist\\_final\\_definition\\_report.pdf](https://www.aiche.org/sites/default/files/docs/embedded-pdf/ist_final_definition_report.pdf).

<sup>4</sup> See NAS Report at 4.

<sup>5</sup> 79 Fed. Reg. 44620.

<sup>6</sup> NAS Report at 6.

facilities and regulators to understand and comply with. Mandating IST would erode the partnership that exists between DHS and regulated facilities and harm the excellent relationships that have been established in recent years between DHS and the chemical industry.

2. SOCMA believes an assessment of the PSP program is necessary before expanding the program to include Tier 3 and 4 facilities. PSP information is just beginning to process through the Terrorist Screen database (TSDB) for most Tier 1 and 2 facilities. Effectively, PSP is still in its very early stages, similar to those of the pilot stage of a program. DHS should not expand the program until it can evaluate the costs and benefits of the program at Tier 1 and 2 facilities – including whether any of the individuals run through PSP actually have terrorist ties. Tier 1 and 2 facilities represent less than 10% of all CFATS facilities, and so the burden of compliance for Tier 3 and 4 facilities would, in the aggregate, be much greater than what Tier 1 and 2 facilities currently experience – while the risks posed by Tier 3 and 4 facilities are by definition lower.

The best way to conduct this evaluation would be for DHS to collaborate with the Department of Justice (DOJ) and its Federal Bureau of Investigation (FBI) on a formal assessment of the benefits and positive outcomes of running PSP-gained information through TSDB. There is precedent for just this sort of multi-agency partnership in the evaluation of a regulatory program that implicates the interests of multiple agencies. In the late 1990s, EPA was proposing to post on its Web site the “off-site consequence analyses” (i.e., worst-case release scenarios) submitted to it by facilities regulated under the Risk Management Program rule. Even before 9/11, industry and the FBI recognized that this sort of disclosure could pose security risks. Congress responded by passing the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act (CSISFRRRA), which required the President to study the benefits and risks of such disclosure.<sup>7</sup> The President in turn instructed EPA to assess the benefits of this disclosure and DOJ to study the risks. Based on that analysis, EPA and DOJ jointly published a regulation that provides limited public access to specific worst-case scenario data but keeps that information off the Internet.<sup>8</sup>

A similar DHS/DOJ review of PSP and its application to lower-risk tier facilities would deliver a better idea of the effectiveness of PSP and may uncover new and better ways for PSP to operate. Additionally, the greater number of facilities and people that can be considered in the review the better. Hence, it may be premature even at this point to complete this analysis.

3. CSAT 2.0 has vastly improved the CFATS tiering process, especially the Top-Screen process. The process is still not completely transparent, but SOCMA members now have a much clearer picture of why they are tiered the way they are. Collaboration with DHS is again the key. SOCMA members have been able to work closely with inspectors and the DHS staff completing the tiering and retiering assessments, which has given our members greater insight into the CFATS tiering process generally and into their specific cases. DHS has also been much more willing to evaluate alternative operating scenarios and to advise facilities about how those would affect the facility’s tier assignment.

---

<sup>7</sup> 42 U.S.C. § 7412(r)(7)(H).

<sup>8</sup> See 40 C.F.R. Part 1400.

While the system and program are not perfect, and greater clarity is always appreciated, CSAT 2.0 has greatly improved the CFATS tiering process.