

**Legislative Bulletin.....November 5, 2009**

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**H.R. 2868—Chemical Facility Anti-Terrorism Act**

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**H.R. 2868—Chemical Facility Anti-Terrorism Act  
(Rep. Thompson, D-MS)**

**Key Conservative Concerns**

*Take Away Points*

- ***Job Killer with No Impact on Homeland Security:*** H.R. 2868 is not a bill about enhancing the security at chemical facilities; it is a bill to regulate and cripple facilities that contain chemicals under the guise of “homeland security.” The U.S. Bureau of Labor Statistics cites a 16 percent decrease in chemical manufacturing jobs and wages
- ***Potentially Makes Facilities Less Safe:*** The bill allows some of the documents and information on the security requirements of a chemical facility to be accessible to the public through litigation, effectively creating blue-prints for anyone that wishes to attack a facility.
- ***Many Mandates:*** The legislation forces a number of mandates on facility operators - some of which are so onerous and unclear that CBO cannot estimate the cost of a number of the mandates in the bill.
- ***State Preemption of Federal Law:*** Prescriptive state rules will result in a confusing patchwork of different and potentially contradictory regulations and divert scarce resources to comply with requirements that do not necessarily advance national security interests.
- ***Mandating “Inherently Safer Technologies”:*** Forcing a company to substitute products and processes with government-selected technologies goes beyond security protections and would lead to confusion, loss of products, additional legal liabilities, and business failures.

*For more details and additional conservative concerns, see below*

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**Order of Business:** The bill is scheduled to be considered on Thursday, November 5, 2009, under a structured rule (H.Res.885) providing for 90 minutes of general debate and making in order 10 amendments. The rule waives all points of order against consideration of the bill, except the earmark rule and “pay-go” violations. The rule allows one motion to recommit with or without instructions. Additionally, the *rule allows the majority to consider legislation on “suspension of the rules” through Saturday.* Typically, suspension bills are only allowed to be considered under House rules Monday through Wednesday. The RSC will summarize each amendment made in order in a separate document.

**Summary:** H.R. 2868 is three bills rolled into one “minibus” aimed to increase security within the chemical industry, drinking water suppliers, and wastewater treatment facilities. The *total authorizations of the three bills combine to at least \$2.215 billion over five years.* All three of these bills contain a similar number of provisions that concern conservatives including mandating of inherently safer technologies, state preemption, information protection, and permitting citizen lawsuits.

The first section of the legislation would require the Department of Homeland Security (DHS) to conduct audits, inspections, and set security standards to address potential terrorist threats on chemical facilities. A 2006 law temporarily authorized the department to issue regulations for high-risk chemical plants and to shut down plants for non-compliance that expired on October 31, 2009. The section authorizes \$900 million in fiscal years 2011 through 2013 and creates civil and administrative penalties against owners and operators of chemical facilities that fail to comply with requirements set forth in the bill.

Additionally, the bill contains the Drinking Water System Security Act of 2009 (H.R. 3258) that requires the Environmental Protection Agency (EPA), in consultation with DHS, to establish performance standards for community water systems determined to be “high priority” and serving more than 3,300 individuals by assessing four different levels of risk. It would require certain drinking water systems to switch to safer technologies and processes to meet the risk-based security standards established by the EPA. The EPA will issue grants to states or nonprofit organizations to support training, prepare vulnerability assessments, security plans, and implement security enhancements. This section of the legislation authorize \$315 million for FY 2011 and “such sums” from 2012-2014.

The final portion of the bill contains the Wastewater Treatment Works Security Act (H.R. 2883) to provide the EPA (in consultation with DHS) with authority to issues grants for certain security enhancements and requires security assessments of wastewater treatment plants that include a site security plan. This section of the legislation would authorize \$200 million for FY 2010 through 2014 for each fiscal year and “such sums” shall remain available until expended.

Some of the more notable provisions of the bill are as follows:

### ***Title I - Chemical Facility Security***

***Chemical Facility:*** The legislation defines a qualified chemical facility as an owner or operator that posses chemicals and meets certain “risk based” standards established by the Secretary to enhance the security of a chemical facility against a chemical facility terrorist incident.

***Risk Based Standards:*** H.R. 2868 allows the Secretary to define *any* chemical substance as a substance of concern and establish the threshold quantity for each such substance of concern.

DHS shall also establish and maintain a list of “covered” chemical facilities that are deemed to be of sufficient risk for an attack. Those facilities will be broken into four levels of risk based on factors of threat, vulnerability, and potential loss of human life.

***Vulnerability Assessments:*** The bill requires the Secretary to develop regulations to establish risk-based, performance-based standards, protocols, and procedures for mandatory security vulnerability assessments (SVAs), and site security plans (SSPs). The legislation also requires the Secretary to establish risk-based security performance standards for SSPs. Additionally, the bill allows the DHS to conduct unannounced inspections at “reasonable times” and to access a facility's records in order to review such facility's SVA or SSP or their implementation.

***Enforcement Provisions:*** If a facilities security plan does not comply with the standards, protocols, or procedures set forth by the Secretary, they must explain the deficiencies and require the owner or operator to revise the SVA or SSP within 14 days. If the Secretary determines a facility has failed to address the deficiencies, he or she may close a facility or impose fines of up to \$25,000 per day. The legislation also provides for “whistleblower” protections to establish a process for any person to report to the Secretary any deficiencies or vulnerabilities at a covered chemical facility to prevent employee retaliation.

***Federal Preemption:*** The bill allows any state or local government to issue a regulation, requirement, or standard of performance for chemical facility security that is more stringent than the federal statute.

***Possible Conservative Concern:*** Prescriptive state rules will result in a confusing patchwork of different and potentially contradictory regulations and divert scarce resources to comply with requirements that do not necessarily advance national security interests.

***Protection of Information & Methods to Reduce Attack:*** The legislation requires an evaluation on “Methods to Reduce the Consequence of a Terrorist Attack” and forces facilities to justify to DHS why they should not have to replace certain equipment for inherently safer technologies (IST). While that term IST was removed in committee mark-up of H.R. 2868, the legislation still allows enforcement of the government mandate that requires a company to substitute products and processes.

***Possible Conservative Concern:*** Some conservatives have expressed concern over this far reaching new mandate that could potentially have adverse effects across the industrial, manufacturing, and agricultural sectors. Additionally, some conservatives believe that mandating a company to substitute products and processes with government-selected technologies goes beyond security protections and would lead to confusion, loss of products, additional legal liabilities, and business failures.

***Office of Chemical Facility Security & Background Checks:*** The legislation establishes a new office under DHS to administer the new rules and mandates under H.R. 2868. Additionally, the bill requires the Secretary to establish guidelines for background checks of relevant employees.

***Citizen Enforcement:*** The legislation allows *any person* to proceed with a civil action against any governmental entity alleged to be in violation of an order or against the Secretary for failure to perform non-discretionary duties. In place of being able to bring a simple “citizen suit”, the bill establishes a petition process to receive, investigate, and respond to allegations of violations at covered facilities.

**Possible Conservative Concern:** While H.R. 2868 excludes private rights of action against chemical facilities, the legislation still does not exclude State action against the federal government. Additionally, some conservatives have expressed concern that allowing suits against the federal government to be brought by “any person” will lead to excessive and frivolous litigation.

**Discretionary Authorizations:** This section of H.R. 2868 authorizes \$900 million in fiscal years 2011 through 2013.

## **Title II - Drinking Water Security**

**Covered Water Systems & Risk Based Assessments & Vulnerability:** This section of H.R. 2868 requires the Administrator of the Environmental Protection Agency (EPA) to develop and update vulnerability assessments, site security plans, and emergency response plans and provide training to employees of covered water systems every five years. Covered water systems are community water systems serving more than 3,300 people or other public water systems that the Administrator determines constitutes a security risk. The Administrator is required to develop four levels of risk-based performance standards based on each covered water system's vulnerability taking into consideration factors that causes death or injury, overall infrastructure, other adverse effects.

**Methods to reduce the consequences of a chemical release:** Requires highest risk facilities, among others, to justify to the EPA or their state drinking water regulator, reasons to justify why they should not be forced to make storage changes to their drinking water system.

**Possible Conservative Concern:** Much like the “inherently safer technologies” under the chemical side of the bill, some conservatives have expressed concern over this new mandate that could also potentially have adverse effects across the industrial, manufacturing, and agricultural sectors. Additionally, some conservatives believe that mandating a company to substitute products and processes with government-selected technologies goes beyond security protections and would lead to confusion, loss of products, additional legal liabilities, and business failures.

**Audits and Maintenance of Records & Enforcement:** The bill allows the EPA to conduct unannounced inspections, and to access, a facility's records in order to review such facility's vulnerability assessment and inspect covered water systems determine compliance with the Act. Operators found in violation of the Act, can be punished up to \$25,000 per day by the Administrator.

**Protection of Information:** The bill establishes penalties for the sharing of information that is listed as “protected” under the Act. The protected information includes vulnerability assessments and site security plans and portions of other security-related documents and the bill requires the Administrator to promulgate by regulation standards for sharing protected information between appropriate parties.

**Possible Conservative Concern:** Some conservatives have expressed concern that H.R. 2868 creates a public ‘right-to-know’ that only protects documents and information specifically identified in the law to be protected effectively leaving unprotected materials that may have security implications accessible to the public. Additionally, this section of

the bill does not address the issue to bring citizen suits, which would allow any person to sue a drinking water facility of the Safe Drinking Water Act and compel sensitive information on these facilities through the discovery process in court.

**Preemption:** States and political subdivisions thereof can enact security standards for drinking water systems that are more stringent than provided in this section.

**Possible Conservative Concern:** As observed with the preemption under chemical facilities, this remains a provision that will divert scarce resources to comply with requirements that do not necessarily advance national security interests.

**Grant Program & Appropriations:** The legislation requires the Administrator to enter into cooperative grant programs with states to award grants to non-profit organization of covered water systems to prepare and implement assessment plans to reduce the risk of acts of terrorism. H.R. 2868 authorizes \$315 million for FY2011 and “such sums” as may be necessary for FY2012 through FY2015 to carry out this grant program.

### **Title III - Wastewater Treatment Works Security**

**Risk Assessment:** This section of the bill requires a wastewater facility with a treatment capacity of greater than 2,500,000 gallons a day, or deemed by the Administrator of the EPA to have a security risk, to submit a vulnerability assessment, site security, and emergency response plan for each facility. The vulnerability assessment will take into account factors such as infrastructure and ability to maintain continuity in operation. The plan must identify specific security enhancements, including procedures, countermeasures, or equipment, that, when implemented or utilized, will reduce vulnerabilities towards a facility.

**Risk Based Performance Standards:** The Administrator shall establish risk-based performance standards and vulnerability factors to develop emergency response plans which should be reviewed at least every five years. The facilities shall be identified in four tiers of security risk taking into account facilities size, proximity to population area, critical infrastructure, and other factors.

**Methods to reduce the consequences of a chemical release:** Requires highest risk facilities, among others, justify the EPA, or their state drinking water regulator, why they should not be forced to make storage changes to their drinking water system.

**Possible Conservative Concern:** Much like in the other areas of the bill, some conservatives believe that mandating a company to substitute products and processes with government-selected technologies goes beyond security protections and would lead to confusion, loss of products, additional legal liabilities, and business failures.

**Audits and Maintenance of Records & Enforcement:** The bill allows the EPA to conduct unannounced inspections and access to a facility's records in order to review such facility's vulnerability assessment and inspect covered water systems determine compliance with the Act. If the Administrator determines that the owner or operator of a treatment works fails to implement a method to reduce the consequences of a chemical release, the Administrator shall notify the State and may commence an enforcement action against the owner or operator of the treatment works, including by seeking or imposing civil penalties.

**Preemption:** States and political subdivisions thereof can enact security standards for drinking water systems that are more stringent than provided in this section.

**Possible Conservative Concern:** As observed with the preemption under chemical facilities, this remains a provision that will divert scarce resources to comply with requirements that do not necessarily advance national security interests.

**Grant Program & Authorizations:** The legislation requires the Administer to enter into cooperative grant programs with states to award grants to non-profit organization of covered wastewater facilities to “purchase and install equipment for access control, intrusion prevention and delay, and detection of intruders and hazardous or dangerous sub stances.” This section of the legislation would authorize \$200 million for FY 2010 through 2014 for each fiscal year and “such sums” as shall remain available until expended.

**Additional Background:** Section 550 of the Homeland Security Appropriations Act of 2007 authorized the Department of Homeland Security (DHS) to require “high risk” chemical facilities to conduct security vulnerability assessments (SVA) and implement site security plans (SSP). In June, DHS issued the Chemical Facility Anti-Terrorism Standards (CFATS) that required owners and operators of facilities possessing certain specified quantities of chemicals to complete a preliminary risk screening assessment to determine whether that facility needed to be further regulated by CFATS rules.

Pursuant to the final CFATS rule, DHS established and began placing each facility into four-category tiers based on risk and performance. Those facilities deemed “high risk” will be required to prepare an SVA and ultimately implement an SSP, in addition to the most stringent security requirements. On October 4<sup>th</sup>, 2009, the CFATS expired without being fully implemented by DHS. In order to prevent this sunset, earlier this year, legislation (H.R. 2477) was introduced to extend authorization for the current program through Oct. 1, 2012, in order to provide ample time to adequately establish a mature regulatory regime under an eight-step process. The DHS and Obama Administration support extending this Act. However, Democrats have introduced H.R. 2868 to revise and expand upon the recently expired requirements that now makes U.S. production and storage of chemicals more expensive, burdensome, and subject to a patchwork of different and conflicting regulations with no benefit to public safety or national security. Additionally, since the original CFATS regulations drinking water and wastewater facilities from the program - resulting in what DHS and EPA have called a “critical security gap” Democrats have attached two additional pieces of legislation to H.R. 2868 to regulate drinking water and wastewater facilities in a similar fashion to chemical facilities. For additional insight on separating risk from excessive regulation, see [this Heritage Foundation Web Memo](#).

### **Possible Conservative Concerns to H.R. 2868:**

**Job Killer with No Impact on Homeland Security:** H.R. 2868 is not a bill about chemical facility security; it is a bill to regulate and cripple facilities that contain chemicals under the guise of “homeland security.” The U.S. Bureau of Labor Statistics sites a 16 percent decrease in chemical manufacturing jobs and wages.

**Preemption:** The legislation would allow state or local governments to preempt federal law in order to adopt or enforce regulatory and safety standards different than federal law. Prescriptive state rules will result in a confusing patchwork of different and potentially contradictory regulations and divert scarce resources to comply with requirements that do not necessarily

advance national security interests. A state-by-state regulatory structure will lead to uneven security efforts and result in confusion for the multitude of companies that operate in more than one state. Additionally, it contradicts the idea of having a *national* security plan developed through the Department of Homeland Security.

Additionally, the nuclear industry, hazardous materials transportation industry, aviation, port securities industry and other industries with national security implications operate solely under federal security regulations. The chemical industry should not be forced to operate in a different fashion under regulations that conflict, hinder, and pose obstacles to innovation that will ultimately cost jobs.

***Boondoggle of Litigation:*** The citizen enforcement provision would allow *any* civilian to file civil lawsuits against the Department of Homeland Security for improperly enforcing the security standards and could lead to the disclosure of sensitive information in these proceedings. Citizen suits are not allowed to challenge decisions involving national defense decisions. The same rationale should apply to homeland security decisions involving dangerous chemicals.

***Mandate “Inherently Safer Technologies”:*** While the bill no longer requires larger chemical facilities to implement “inherently safer technologies”, the legislation essentially allows the Secretary of Homeland Security to mandate the use of “best” technology. Forcing a company to substitute products and processes with government-selected technologies goes beyond security protections and would lead to confusion, loss of products, additional legal liabilities, and business failures. Additionally, there is no consensus way to measure what process is inherently safer than another, which is why many experts in chemical engineering have consistently *recommended* against regulating inherent safety for security purposes. Finally, according to the U.S. Chamber of Commerce, businesses have spent approximately \$4 billion to enhance the security of their own chemical facilities and systems since 2006. Some of these forced changes are estimated to cost hundreds of millions of dollars per facility and would impose significant financial hardship on facilities struggling during the current economic recession.

***Right to Know Provision:*** The bill allows some of the documents and information on the security requirements of a chemical facility to be accessible to the public through litigation, effectively creating blue-prints for anyone that wishes to attack a facility.

***Overreaching:*** H.R. 2868 requires owners and operators of public and private high-risk facilities to implement specific methods to improve safety *as determined by the Secretary of DHS*, to reduce the consequences of a terrorist attack. This wide determination could allow the DHS to impose mandates on any industry that only uses chemicals.

***Many Mandates:*** The legislation forces a number of mandates on facility operators - some of which are so onerous and unclear that CBO cannot estimate the cost of a number of the mandates in the bill.

***Potentially Duplicative:*** The Occupational Safety and Health Administration’s Process Safety Management Program and the EPA’s Risk Management Program already regulate safe practices for the use and storage of chemicals.

***Bloated Bureaucratic Mess:*** H.R. 2868 is a combination of three bills, with jurisdictional oversight on chemical facilities, community water systems, and wastewater facilities overlapping between the DHS and EPA.

### **Groups Opposed to H.R. 2868:**

American Retailers Association	National Association of Chemical Distributors
American Farm Bureau Federation	National Association of Manufacturers
American Forest & Paper Association	National Grange of the Order of Patrons of Husbandry
American Petroleum Institute	National Mining Association
American Trucking Associations	National Oilseed Processors Association
Chemical Producers and Distributors Association	National Pest Management Association
Consumer Specialty Products Association	National Petrochemical and Refiners Association
The Fertilizer Institute	National Propane Gas Association
Institute of Makers of Explosives	North American Millers' Association
International Association of Refrigerated Warehouses	Petroleum Equipment Suppliers Association
International Liquid Terminals Association	USA Rice Federation
International Warehouse Logistics Association	U.S. Chamber of Commerce
National Agricultural Aviation Association	

**Committee Action:** On June 15, 2009, the bill was introduced and referred to the Committee on Homeland Security and the Committee on Energy and Commerce. On July 13, 2009, the Committee on Homeland Security held a mark-up and ordered the bill reported as amended. On October 14, 2009, the subcommittee on Energy and Environment held a mark-up and reported the bill to full committee (as amended) by a vote of 18 - 10. On October 23, 2009, the Energy and Commerce Committee reported the bill as amended.

**Administration Position:** While a Statement of Administration Policy is unavailable at press time, the administration has expressed their support for some provisions of the legislation in the media.

**Cost to Taxpayers:** According to CBO, the cost of enacting the first section of H.R. 2868 would “*cost about \$1.1 billion over* the 2011-2014 period, assuming appropriation of the necessary amounts. In addition, enacting the bill could affect direct spending and revenues.”

According to CBO, the cost of implementing the second section of the bill would authorize the appropriation of \$315 million for fiscal year 2011. For fiscal years 2012 through 2015, this section would authorize the appropriation of such sums as necessary. For each year after 2011, CBO estimates that EPA would require the same level of funding as in 2011, with annual adjustments for anticipated inflation, to support the requirements under the bill and the grants. In total, CBO estimates that enacting this (provision) would *cost about \$1 billion* over the 2011-2014 period.

A CBO cost estimate for the third provision of the bill is unavailable, but the section authorizes \$200 million for FY 2010 through 2014 for each fiscal year and “such sums” as shall remain available until expended.

**Does the Bill Expand the Size and Scope of the Federal Government?** Yes, the legislation requires DHS to conduct vulnerability assessments and set security standards to address potential terrorist threats on chemical plants, community water system, and wastewater facilities.

**Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?** Yes, according to CBO, the bill imposes “new mandates on employers and on owners and operators of public and private facilities where certain chemicals are present. The bill also would preempt state and local laws. Because the cost of some of the mandates would depend on future regulatory actions, CBO cannot determine whether the aggregate costs of complying with the mandates would exceed the annual thresholds established in UMRA for intergovernmental or private-sector mandates (\$69 million and \$139 million, respectively, in 2009, adjusted annually for inflation).”

Additionally, the CBO states that provisions in the bill “would impose new security requirements on owners and operators of drinking water systems. Because the costs of the mandates on state, local, and tribal governments would depend on future regulations, CBO cannot determine whether the aggregate costs of the mandates would exceed the annual threshold established in UMRA for intergovernmental entities (\$69 million in 2009, adjusted annually for inflation).” CBO goes on to state:

“Depending on future regulations governing performance standards, chemical thresholds, the number of covered water systems designated as high risk, and the implementation schedule for vulnerability assessments and site security plans, the costs to covered water systems could be significant. Those costs could result from new procedural requirements or, in some cases, capital improvements. At the same time, many water systems may already have security systems and procedures in place that would meet the new requirements. Because of uncertainty about the scope and implementation timeline of the bill’s requirements, CBO has no basis for determining annual costs of the mandates on publicly owned systems. However, because the number of privately owned systems that would be affected is small, CBO estimates that the cost of the mandates to private-sector entities would fall below the annual threshold established in UMRA”

**Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** According to House Report 111-205, “pursuant to clause 9 of rule XXI, H.R. 3854 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.”

**Constitutional Authority:** The Small Business Committee, in House Report 111-205, cites constitutional authority for this legislation in Article I, Section 8, Clauses 1, 3, and 18. House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific powers* granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” *[emphasis added]*

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