



# ICWUC CENTER FOR WORKER HEALTH AND SAFETY EDUCATION

Training programs for Emergency Response,  
Hazardous Waste and Nuclear Workers

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Department of Homeland Security  
Washington, DC 20528

Matthew Bettridge  
National Protection and Programs Directorate, Office of Infrastructure Protection  
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Department of Homeland Security

Re: Docket No. DHS-2012-0061 Chemical Facility Anti-Terrorism Standards Personnel Surety Program  
Information Collection Request

Dear Sirs:

Although beyond the open comment time period, I hope you will accept these comments on behalf of the International Chemical Workers Union Council/UFCW related to the DHS "Submission for Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program (PSP) Information Collection" Request. As we have mentioned in our letter of May 13, 2010, we have serious disagreements to the approach of DHS to expand the personal surety provisions of CFATS to prevent intentional releases.

We continue to have a significant interest in how these rules will impact facilities where we represent the workforce as well as non union facilities. We appreciate the Departments efforts to secure our nation's infrastructure and want to be sure that these efforts are directed at that goal. Other measures may or may not be necessary but if they are not a part of an effort to provide personal surety from a terrorist threat, they fall outside the scope of these regulations and should not be a part of it. We have been discussing these regulations with a number of other unions (United Automobile Workers, United Steelworkers, International Brotherhood of Teamsters and others) and we all share the similar concerns.

We are pleased that the Department is recognizing the utility of the Transportation Worker Identification Credential (TWIC). Although some updating of this information may be necessary, this should be limited in the burden it might place on facilities. We believe the Department should go further than stating that TWIC credential fulfills the CFATS terrorist requirements: It should make a clear statement that if a facility implements a requirement of TWIC credentials, there is no other requirement under personal surety requirement CFATS. If a company requires additional steps, DHS should clearly state that this is not covered under any CFATS mandate, even if they have the legal power to do so. Without such a clear statement, facilities and other authorities may well believe the CFATS gives them the legal authority to take additional actions.

## Members of the Consortium

International Chemical Workers  
Union Council/UFCW  
International Association of  
Machinists and Aerospace Workers

United Food and Commercial Workers Union  
American Federation of Teachers  
American Federation of Government  
Employees

Coalition of Black Trade Unionists  
American Nurses Association  
University of Cincinnati  
Department of Environmental Health



We believe the focus is on “measures designed to identify people with terrorist ties”. As such, we believe that the watch list questions cannot be separated from all personal surety requirements. Specifically the much expanded list in Appendix C of the Department’s RBPS document issued in May 2009 goes significantly beyond the preamble comments of the Department in finalizing CFATS regulations on April 9, 2007 and is of grave concern to us. Although there is a disclaimer on each of the RBPS page that this “does not establish legally enforceable requirements”, the example on page 183 clearly states these topics are “an example of a typical background check under RBPS-12.

We believe DHS at its word that these are not requirements but part of a performance standard where each item may not be required but they are the list of areas that DHS will examine to see if a facility’s plan is in compliance and a significant expansion from the April 7, 2007 rationale and rules.

The central issue we continue to have is DHS continuing to stand by measures that are not associated with the four elements as stated in the DHS rules in 27.230(a)(12):

- (i) Measures designed to verify and validate identity
- (ii) Measures designed to check criminal history
- (iii) Measures designed to verify and validate legal authorization to work
- (iv) Measures designed to identify people with terrorist ties

Simply put, does the DHS have authority to measure a facility’s personal surety plan by methods that go beyond these four elements? Our position is that is this time DHS does not and has straying well beyond their original intent stated in the Federal Register on April 9, 2007. If the DHS wants to expand the measures they want to use evaluate a company’s personal surety plan, they can publish in a new Federal Register notice proposing a change in 27.230(a)(12). Until that is done, we do not believe DHS has the authority to encourage or evaluate a personal surety plan that does not have the additional elements in the RBPS document.

We are troubled by the apparent position of DHS not to comment on the elements listed on RBPS pages 181-183. It is further troubling that the recent fact sheet refers to RPBS 12 without comment on these pages and even states that “the outstanding aspect of personnel surety is RBPS-12(iv), the vetting of individuals for terrorist ties”. We agree that this is likely the most important element but why the silence on the significant intrusion into people’s personal lives in Appendix C. Now the RPBS includes misdemeanors, civil court records, real estate disputes, pleas of no contest, unresolved indictments or charges. Where are ANY of these elements linked to the 4 requirements of (a)(12). Further, this directly contradicts previous statements by the Department that “It should also be noted that nothing in this regulation prohibits a person that has been convicted of a misdemeanor offense from being employed at a high risk facility”.

In summary, RBPS-12 and Appendix C pages 181-185 should be rescinded, reevaluated and significantly rewritten. We have seen nothing in the 3 years since our earlier comments that changes our position and would like to reiterate these briefly.

**1. Are these areas appropriate for employers to determine if workers are a terrorist threat?**

We believe that the best method, even with its weaknesses, is the TSDB with other sources of personal information being very difficult for private industry to identify “terrorist threats”. The listing on RBPS pages 181-183 may be appropriate for law enforcement but certainly not all workers covered by CFATS nor should this authority be placed in the hands of companies. The RBPS guidelines will likely be of little added benefit for employers in determining individuals who are a likely terrorist threat but pose a serious personal threat to workers.

**2. What is the appeal or waiver provision if the employer takes an adverse employment decision based on DHS guidelines?**

There is no appeal or waiver process for management decisions in the current rules by any outside independent agency. Rather on RBPS pages 184 and 185, DHS is recommending (but not requiring) an adjudication process run by the company that makes the employment decisions. This is inadequate and unacceptable. These sections appear to discuss solely the rights of individuals to appeal a decision by DHS based on the TSDB, not to an employment decision on the other personal surety elements (i), (ii) or (iii) let alone the laundry list on pages 181-185.

Is DHS proposing they have no responsibility if a covered facility fires an individual with no terrorist ties due to these elements recommended by CFATS? We do not believe most companies would take such action but we have numerous examples of union members being fired for protected activities. The Department should not set these wheels in motion and then callously walk away.

This logic is further troubling if it is extended to someone being fired due to information found through implementing RBPS guidelines such as their reported dates of high school, litigation on real estate disputes or that their employment history is “embellished” (all in Appendix C). Does DHS believe they have a responsibility to have an appeals or waiver procedure or is this area “not regulated by CFATS”?

**3. What are the controls to prevent an individual or the facility from using this personal information for other purposes?**

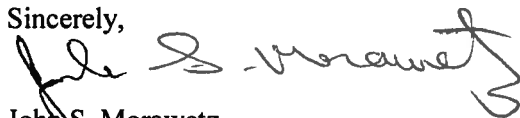
Although DHS states that this information is “subject to a set of laws and regulations”, restrictions must be issued by the Department that this information may not be made available to the public and cannot be accessed by employees of the facility except for employees who are directly involved with collecting the information or conducting or evaluating security background checks. It must also be maintained confidentially by the facility and the Secretary and can only be used for making CFATS determinations. The RBPS requirements will result in thousands of personal surety data bases housed at each facility with no controls over how this very personal information will be maintained a risky undertaking that may have numerous unintended consequences. DHS must address this weakness.

**4. What is the justification for putting this significant financial burden on companies?**

The type of examination that the Department is asking covered facilities to undertake will require a significant amount of staff and resources, an economic burden that is legitimately a role for law enforcement agencies, especially the broad sweeping areas of investigation recommended by DHS. Fulfilling these CFATS performance standards will inappropriately place the burden on private industry to track over a million workers with the overwhelming majority having no terrorist ties.

Thank you for your time in reviewing our comments and concerns.

Sincerely,



John S. Morawetz

cc: Frank Cyphers  
Darrell Hornback  
Anna Fendley, USW  
Darius Sivin, UAW  
Azita Mashayekhi, IBT