

**WEST FERTILIZER, OFF THE GRID: THE PROBLEM  
OF UNIDENTIFIED CHEMICAL FACILITIES**

---

---

**HEARING**

BEFORE THE

SUBCOMMITTEE ON CYBERSECURITY,  
INFRASTRUCTURE PROTECTION,  
AND SECURITY TECHNOLOGIES

OF THE

COMMITTEE ON HOMELAND SECURITY  
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

AUGUST 1, 2013

**Serial No. 113-30**

Printed for the use of the Committee on Homeland Security



Available via the World Wide Web: <http://www.gpo.gov/fdsys/>

U.S. GOVERNMENT PRINTING OFFICE

86-244 PDF

WASHINGTON : 2014

---

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Internet: [bookstore.gpo.gov](http://bookstore.gpo.gov) Phone: toll free (866) 512-1800; DC area (202) 512-1800  
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

## COMMITTEE ON HOMELAND SECURITY

MICHAEL T. MCCAUL, Texas, *Chairman*

LAMAR SMITH, Texas	BENNIE G. THOMPSON, Mississippi
PETER T. KING, New York	LORETTA SANCHEZ, California
MIKE ROGERS, Alabama	SHEILA JACKSON LEE, Texas
PAUL C. BROUN, Georgia	YVETTE D. CLARKE, New York
CANDICE S. MILLER, Michigan, <i>Vice Chair</i>	BRIAN HIGGINS, New York
PATRICK MEEHAN, Pennsylvania	CEDRIC L. RICHMOND, Louisiana
JEFF DUNCAN, South Carolina	WILLIAM R. KEATING, Massachusetts
TOM MARINO, Pennsylvania	RON BARBER, Arizona
JASON CHAFFETZ, Utah	DONALD M. PAYNE, JR., New Jersey
STEVEN M. PALAZZO, Mississippi	BETO O'ROURKE, Texas
LOU BARLETTA, Pennsylvania	TULSI GABBARD, Hawaii
CHRIS STEWART, Utah	FILEMON VELA, Texas
RICHARD HUDSON, North Carolina	STEVEN A. HORSFORD, Nevada
STEVE DAINES, Montana	ERIC SWALWELL, California
SUSAN W. BROOKS, Indiana	
SCOTT PERRY, Pennsylvania	
MARK SANFORD, South Carolina	

GREG HILL, *Chief of Staff*

MICHAEL GEFFROY, *Deputy Chief of Staff/Chief Counsel*

MICHAEL S. TWINCHEK, *Chief Clerk*

I. LANIER AVANT, *Minority Staff Director*

---

## SUBCOMMITTEE ON CYBERSECURITY, INFRASTRUCTURE PROTECTION, AND SECURITY TECHNOLOGIES

PATRICK MEEHAN, Pennsylvania, *Chairman*

MIKE ROGERS, Alabama	YVETTE D. CLARKE, New York
TOM MARINO, Pennsylvania	WILLIAM R. KEATING, Massachusetts
JASON CHAFFETZ, Utah	FILEMON VELA, Texas
STEVE DAINES, Montana	STEVEN A. HORSFORD, Nevada
SCOTT PERRY, Pennsylvania, <i>Vice Chair</i>	BENNIE G. THOMPSON, Mississippi ( <i>ex officio</i> )
MICHAEL T. MCCAUL, Texas ( <i>ex officio</i> )	

ALEX MANNING, *Subcommittee Staff Director*

DENNIS TERRY, *Subcommittee Clerk*

# CONTENTS

	Page
STATEMENTS	
The Honorable Patrick Meehan, a Representative in Congress From the State of Pennsylvania, and Chairman, Subcommittee on Emergency Preparedness, Response, and Communications:	
Oral Statement .....	1
Prepared Statement .....	3
The Honorable Michael T. McCaul, a Representative in Congress From the State of Texas, and Chairman, Committee on Homeland Security:	
Oral Statement .....	6
Letters .....	7
The Honorable Bennie G. Thompson, a Representative in Congress From the State of Mississippi, and Ranking Member, Committee on Homeland Security:	
Oral Statement .....	3
Prepared Statement .....	5
The Honorable Yvette D. Clarke, a Representative in Congress From the State of New York, and Ranking Member, Subcommittee on Emergency Preparedness, Response, and Communications:	
Oral Statement .....	32
Prepared Statement .....	65
WITNESSES	
PANEL I	
Mr. David Wulf, ISCD Director, National Protection and Programs Directorate, U.S. Department of Homeland Security:	
Oral Statement .....	14
Prepared Statement .....	17
Mr. Stephen L. Caldwell, Director, Homeland Security and Justice, U.S. Government Accountability Office:	
Oral Statement .....	22
Prepared Statement .....	23
PANEL II	
Mr. Donnie Dippel, President, Texas Ag Industries Association:	
Oral Statement .....	87
Prepared Statement .....	90
Mr. Paul Derig, Environmental Health and Safety Manager III, J.R. Simplot Company:	
Oral Statement .....	91
Prepared Statement .....	93
Mr. Timothy J. Scott, Chief Security Officer, Corporate Director, Emergency Services and Security, Dow Chemical:	
Oral Statement .....	99
Prepared Statement .....	100
Mr. Sean Moulton, Director, Open Government Policy, Center for Effective Government:	
Oral Statement .....	104
Prepared Statement .....	106

IV

FOR THE RECORD

Page

The Honorable Yvette D. Clarke, a Representative in Congress From the State of New York, and Ranking Member, Subcommittee on Emergency Preparedness, Response, and Communications:	
Statement of Dr. M. Sam Mannan and Mr. John S. Bresland, Mary Kay O'Connor Process Safety Center, Artie McFerrin Department of Chemical Engineering, Texas A&M University System .....	34
Statement of Rick Hind, Legislative Director, Greenpeace .....	52
Article .....	58
Statement of Paul Orum, Consultant, Coalition to Prevent Chemical Disasters .....	60
Statement of the U.S. Environmental Protection Agency .....	63
Letter .....	83
The Honorable Susan W. Brooks, a Representative in Congress From the State of Indiana:	
Letter From Timothy D. White .....	75

# **WEST FERTILIZER, OFF THE GRID: THE PROBLEM OF UNIDENTIFIED CHEMICAL FA- CILITIES**

---

**Thursday, August 1, 2013**

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON HOMELAND SECURITY,  
SUBCOMMITTEE ON CYBERSECURITY, INFRASTRUCTURE  
PROTECTION, AND SECURITY TECHNOLOGIES,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:04 a.m., in Room 311, Cannon House Office Building, Hon. Patrick Meehan [Chairman of the subcommittee] presiding.

Present: Representatives Meehan, McCaul, Clarke, Vela, and Thompson.

Also present: Representatives Flores and Brooks.

Mr. MEEHAN. The Committee on Homeland Security Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies will come to order. The subcommittee is meeting today to examine the West, Texas fertilizer plant explosion and the problem with unidentified chemical facilities.

I recognize myself for an opening statement. I want to welcome everyone to today's hearing, titled "West Fertilizer: Off the Grid, the Problem of Unidentified Chemical Facilities." The April 17, 2013 explosion at the West Fertilizer plant in West, Texas was most likely not the result of terrorist activity or foul play. Therefore, the Chemical Facility's Antiterrorism Standards or, as we call it, CFATS, the program was not directly implicated. But the tragic incident did reveal a disturbing fact, a fact about the CFATS program itself. There are literally thousands of facilities across the country that store or handle threshold quantities of high-risk chemicals that have gone under the radar at the Department of Homeland Security.

I am grateful that Mr. Caldwell is here today. I know that the GAO has looked at this particular issue, among others. In the words of his report, the preliminary findings of the investigation at West, Texas by the U.S. Chemical Safety Board showed that the explosion killed at least 14 people and injured more than 200 others, severely damaged or destroyed nearly 200 homes, three nearby schools, a nursing home, and an apartment complex. According to the Chemical Safety Board, the fire at the facility detonated about 30 tons of an ammonium nitrate. As of July 2013, the cause of the fire had not been determined.

I think what that report states so clearly is the real-life ramifications of the inability to be able to identify where the dangerous chemicals are stored and of the conditions. The hearing will focus on these outlier facilities and we should take—but before we do so, I want to take a moment to remember the victims of this terrible tragedy, including the brave first responders who sacrificed their lives to save others, the men and women who walked into the fire, not aware of what was there: Morris Bridges, Perry Calvin, Jerry Chapman, Cody Dragoo, Kenneth Harris, Jimmy Matus, Judith Monroe, Joseph Pustejovsky, Cyrus Reed, Mariano Saldivar, Kevin Sanders, Douglas Snokhous, Robert Snokhous, and Buck Uptmore.

The truth is, these are brave fire fighters. But they are real Americans, whose lives and a community and families whose lives have been affected by the inability for all of us to be able to understand the nature of the threat before it presented itself. While we do know that this was not likely an act of terrorism, imagine if it had been, what kind of questioning would be going on today about the failure to connect the dots or the failure to perform. West, Texas is the backdrop for today's hearing. The overarching mission is to identify the reasons for the Department's lack of awareness at these outlying facilities.

West Fertilizer stored large amounts of anhydrous ammonia and ammonium nitrate. Both chemicals have been identified as high-risk under the Department of Homeland Security and the Environmental Protection Agency and the Occupational Safety and Health Administration. It was very discouraging to learn that although DHS is supposed to be securing the facilities that store these chemicals, not only was the plant not registered with the Department's CFATS program, they didn't even know of the plant's existence. We must understand what the Department is doing to correct this serious shortcoming.

I was encouraged to see that, just this morning, the White House announced that they are taking this issue seriously, as I know that they do, and that the administration will be encouraging agencies to share information and provide greater transparency. I know Mr. Wulf will be prepared to speak to those issues. I am looking forward to further reviewing the Executive Order, and look to our witnesses today to understand the current and potential information-sharing environment among Federal agencies overseeing chemical facilities and the State agencies that implement CFATS.

The deficiencies brought to light by the West explosion have the potential to seriously limit CFATS' mission of securing America's chemical infrastructure. Shortly after the explosion, Chairman McCaul and I sent a letter to Secretary Napolitano asking for an explanation to the problem of identifying outliers, and specifically pointed to the lack of interagency cooperation. I am pleased that the Department took these concerns to heart when they crafted the Executive Order, and I hope that today we will be able to receive a more in-depth understanding of not only the shortcomings, but the efforts to ameliorate them.

The disaster at West illustrates the level of harm that our communities can suffer when something at even a small facility holding hazardous chemicals goes wrong. Whether the harm is intentional or the result is an accident, the effects are devastating. That

is why it is so important that these outliers are accounted for. I appreciate the Members of the subcommittee and our two witness panels who recognize the solemnity of this tragic situation which killed 14 people. With those victims in mind, I look forward to hearing your testimony for the work of this committee to address, as best we can, the shortcomings that have been recognized.

[The statement of Chairman Meehan follows:]

STATEMENT OF CHAIRMAN PATRICK MEEHAN

AUGUST 1, 2013

Welcome everyone to today's hearing titled, "West Fertilizer, Off the Grid: The Problem of Unidentified Chemical Facilities." The April 17, 2013 explosion at the West Fertilizer Plant in West, TX was most likely not the result of terrorist activity or foul play. Therefore, the Chemical Facility Anti-Terrorism Standards, or CFATS program was not directly implicated. But the tragic incident did reveal a disturbing fact about the CFATS program: There are literally thousands of facilities across the country that store or handle threshold quantities of high-risk chemicals that have gone under the radar at the Department of Homeland Security.

While today's hearing will focus on these "outlier" facilities, we should take a moment to remember the victims of this terrible tragedy, including the brave first responders who sacrificed their lives to save others: Morris Bridges, Perry Calvin, Jerry Chapman, Cody Dragoo, Kenneth Harris, Jimmy Matus, Judith Monroe, Joseph Pusteivosky, Cyrus Reed, Mariano Saldivar, Kevin Sanders, Douglas Snokhous, Robert Snokhous, and Buck Uptmor.

I thank the witnesses for joining us today and offering their testimonies.

While West, Texas is the backdrop for today's hearing, the overarching mission is to identify the reasons for the Department's lack of awareness of these outlying facilities.

West Fertilizer stored large amounts of anhydrous ammonia and ammonium nitrate. Both chemicals have been identified as "high-risk" under the Department of Homeland Security, the Environmental Protection Agency, and the Occupational Safety and Health Administration.

It was very discouraging to learn that although DHS is supposed to be securing facilities that store these chemicals, not only was the plant not registered with the Department's CFATS program, but they didn't even know of the plant's existence.

We must understand what the Department is doing to correct this serious shortcoming. I was encouraged to see that just this morning, the White House announced that they are taking this issue seriously and that the administration will be encouraging agencies to share information and provide greater transparency. I am looking forward to further reviewing the Executive Order, and look to our witnesses today to understand the current and potential information-sharing environment among Federal agencies overseeing chemical facilities, and the State agencies that implement CFATS.

The deficiencies brought to light by the West explosion have the potential to seriously limit CFATS' mission of securing America's chemical infrastructure.

Shortly after the explosion, Chairman McCaul and I sent a letter to Secretary Napolitano asking for an explanation of the problem of identifying outliers, and specifically pointed to the lack of interagency cooperation. I am pleased that the Department took these concerns to heart when they crafted the Executive Order, and I hope today we will be able to receive a more in-depth understanding of these shortcomings.

The disaster at West illustrates the level of harm that our communities can suffer when something at even a small facility holding hazardous chemicals goes wrong. Whether the harm is intentional or the result of an accident, the effects are devastating. That's why it is so important that these outliers are accounted for.

I appreciate the Members of the subcommittee and our two witness panels recognizing the solemnity of this tragic situation, which killed 14 people. With the victims in mind, I look forward to hearing your testimonies.

Mr. THOMPSON. The Chairman now recognizes the Ranking Member of the full committee, the gentleman from Mississippi, Mr. Thompson, for any statement he may have.

Thank you very much, Mr. Chairman. I thank our witnesses for their expected testimony. In the 4 months since the explosions at

a fertilizer facility shook the small town of West, Texas to its core, shock waves have been felt across the country, here in Washington and even at 1600 Pennsylvania Avenue. As the scale of death and destruction has come into focus, Americans have been forced to ask themselves some very tough questions. Could a West-type event happen here in my community? Do facilities with explosives or lethal chemicals pose a risk to my family, my home, or my community?

For most people, the likely response is “Maybe,” followed by, “Well, I don’t know, but surely my local fire chief does. Surely the Federal Government does. And they will keep my family safe.” Unfortunately, the West facility explosion undermines that sense of confidence. The West fire fighters heroically went in to do as they had been trained—fight a fire. But this was a chemical fire, fueled by ammonium nitrate. In the end, 12 of these heroes lost their lives. Until these explosions, the Department of Homeland Security, the Federal lead for chemical security, did not know that the West plant even existed.

DHS administers the risk-based, performance-based CFATS program that requires facilities with threshold quantities of certain chemicals to submit information through the Top Screen process. DHS then performs a risk analysis to determine whether the plant should be regulated. Facilities that DHS determined to be high-risk are required to do vulnerability assessments and site security plans. When I drafted the originating legislation, I envisioned a high level of collaboration between high-risk tiered facilities and DHS inspectors to ensure that security practices would be tailored to actual vulnerabilities.

I also envisioned that site security plan information would be shared with local first responders. Had that information sharing occurred in West, Texas, some of the death and property damage could have been mitigated. Today, for CFATS to work, facilities have to pay attention to the *Federal Register*. For large operations that have regulatory affairs departments that is probably not too difficult. Facilities that maintain membership in National associations like the ones we will hear from later today also have access to this information. It is unaffiliated, usually small so-called “outliers” that dot our Nation’s landscape that are of concern.

Many of these facilities operate in areas where the only responders are volunteers who do not have the access to the kind of specialized training and resources that are necessary to respond to West-type explosions. As the Congressman for a rural area and a former volunteer fire fighter, I am troubled by the prospect that thousands, maybe tens of thousands, of these facilities operate under the radar screen. There needs to be a sense of urgency on this issue at all levels. Interagency coordination is essential between EPA, ATF, OSHA, DHS, Coast Guard, and State regulators. There should be enough information available to identify those facilities that pose a risk.

That information needs to be shared. The next challenge is probably far more difficult: Ensuring that DHS properly analyze the risk at facilities that provide information. GAO has told us that when it comes to assessing risk and assigning risk tiers, arguably the most essential aspect of the CFATS program, VHS analysis, is

neither reliable or consistent. To that point, the Blue Rhino propane facility in Florida that, just this week, exploded—sending 200-foot fireballs into the night sky—was not determined by DHS to be high-risk. But I believe that with a lot of work and a lot of smart people in the CFATS program, we can do better.

That is why I join my colleague on the Energy and Commerce Committee, Mr. Waxman, in calling on the President to bring together experts to tackle the fundamental issues. In response, I was pleased to see the President establish an interagency working group to collaborate on improving information sharing and chemical safety and security. Hopefully, this renewed focus will yield meaningful results.

Thank you, Mr. Chairman, and I yield back the balance of my time.

[The statement of Ranking Member Thompson follows:]

STATEMENT OF RANKING MEMBER BENNIE G. THOMPSON

AUGUST 1, 2013

In the 4 months since explosions at a fertilizer facility shook the small town of “West, Texas” to its core, shockwaves have been felt across the country, here in Washington, and even at 1600 Pennsylvania Avenue.

As the scale of death and destruction has come into focus, Americans have been forced to ask themselves some very tough questions—

Could a “West-type” event happen here, in my community? Do facilities with explosives or lethal chemicals that pose a risk to my family, my home, my community?

For most people, the likely response is “maybe”—followed by “well, I don’t know but surely my local fire chief does. Surely, the Federal Government does, and they will keep my family safe.” Unfortunately, the West facility explosion undermines that sense of comfort.

The West fire fighters heroically went in to do as they had been trained, fight a fire. But this was a chemical fire—fueled by ammonium nitrate. In the end, 12 of these heroes lost their lives. And, until these explosions, the Department of Homeland Security—the Federal lead for chemical security did not know that the West plant even existed.

DHS administers the risk-based, performance-based CFATS program which requires facilities with threshold quantities of certain chemicals to submit information through the “Top Screen” process. DHS then performs a risk analysis to determine whether the plant should be regulated. Facilities that DHS determines to be “high-risk” are required to do vulnerability assessments and site security plans.

When I drafted the originating legislation, I envisioned a high level of collaboration between risk-tiered facilities and DHS inspectors to ensure that security practices would be tailored to actual vulnerabilities.

I also envisioned that site security plan information would be shared with local first responders. Had that information sharing occurred in West, Texas, some of the death and property damage could have been mitigated.

Today, for CFATS to work, facilities have to pay attention to the *Federal Register*. For large operations that have regulatory affairs departments, that is probably not too difficult. Facilities that maintain membership in National associations, like the ones we will hear from later today, also have access to this information.

It is the unaffiliated, usually small, so-called “outliers” that dot our Nation’s landscape that are of concern.

Many of these facilities operate in areas where the only responders are volunteers, who do not have access to the kind of specialized training and resources that are necessary to respond West-type explosions.

As the Congressman for a rural area and a former volunteer fire fighter, I am troubled by the prospect that thousands, maybe tens of thousands, of these facilities operate under the regulatory radar.

There needs to be a sense of urgency on this issue, at all levels of government.

Interagency coordination is essential. Between the EPA, ATF, OSHA, DHS, Coast Guard, and State Regulators, there should be enough information available to identify those facilities that pose a risk. That information needs to be shared.

The next challenge is probably far more difficult—ensuring that DHS properly analyzes the risks at facilities that provide information.

GAO has told us that when it comes to assessing risk and assigning risk tiers—arguably the most essential aspect of the CFATS program—DHS’ analysis is neither reliable nor consistent.

To that point, the Blue Rhino propane facility in Florida that, just this week, exploded, sending 200-foot fireballs into the night sky, was not determined by DHS to be “high-risk”.

But, I believe that with a lot of work and a lot of smart people, in the CFATS program can be better. That is why I joined my colleague on the Energy and Commerce Committee, Mr. Waxman, in calling on the President to bring together experts to tackle these fundamental issues.

In response, I was pleased to see the President establish an interagency working group to collaborate on improving information sharing and chemical safety and security. Hopefully, this renewed focus will yield meaningful results.

Mr. MEEHAN. I want to thank the Ranking Member of the full committee for his opening statement and for being here at this hearing. I think it demonstrates the significance and importance of this issue. I think that is further underscored by the presence today of the full committee Chairman, the gentleman from Texas, Mr. McCaul. So at this point in time I would like to recognize the full committee Chairman, Mr. McCaul, for any statement he would like to make.

Mr. McCAUL. I thank the Chairman for holding this important hearing on a tragedy that occurred in my home State of Texas. Of the importance of our Nation’s chemical infrastructure, security cannot be overstated. It is not just a concern on the National level, it is a local concern. As the explosion in West demonstrates, the harm to individual communities resulting from a chemical incident, the destruction suffered at the local level can be devastating. As I said, as a Texan, this tragedy feels especially personal. Fourteen people lost their lives, hundreds more were injured, schools were leveled, nursing homes were destroyed, dozens of homes were lost, entire neighborhoods were annihilated, and more than 120 people are filing for unemployment.

The cost of the physical damage alone is estimated to be nearly \$100 million. Whether an industrial accident, as this appears to be, or the result of foul play a chemical disaster wreaks havoc at the local level. Chemical facilities that are not run with the utmost care are a liability to everyone. Over the years, West Fertilizer had been broken into and vandalized repeatedly. The local residents complained about the strong smell of ammonia, a smell so potent it burned their eyes. The facility was routinely left open after-hours, and police reports indicate 11 burglaries occurred over the last 10 years. West Fertilizer was literally a disaster waiting to happen.

Yet as vulnerable as this facility was known to be, DHS had no idea it even existed. The plant’s owner failed to knock on the Department’s door and introduce himself. So West remained unidentified and unknown. What is even more disturbing is that West Fertilizer was just one of literally thousands of similar-situated facilities across the country that DHS has no knowledge of. On May 2, Chairman Meehan and I sent a letter to Secretary Napolitano asking her to explain how it was that West had managed to stay off the radar and what the Department was doing to improve their outreach.

The Department's response was wholly insufficient, and the reply letter simply reiterated the Department's current efforts, saying nothing about what DHS had learned from these new steps. I was encouraged to receive a call from the White House last night, talking about the President's Executive Order on chemical safety. I think this is a step in the right direction, and I look forward to the results of this Executive Order. But while these improvements indicate potential progress, if they indeed materialize, they alone will not be sufficient to get CFATS where it needs to be.

In July, I again wrote to Secretary Napolitano, joined by Energy and Commerce Chairman, Fred Upton, and together we expressed our dissatisfaction with the Department's failure to implement even the most fundamental components of the CFATS program, including the identification of potentially covered facilities. We state in our letter that we believe in the program's mission, and we ultimately want CFATS to succeed. But in order for CFATS to be viable, DHS needs to properly manage this program's basics.

The first step in securing America's chemical infrastructure is identifying those facilities that need to be secure. So I look forward to hearing from Director Wulf as to how he intends to work smarter, and not just harder, to right this ship. It is imperative not only to our National security, but also to our community's, that this problem be solved.

With that, Mr. Chairman, I yield back.  
[The information follows:]

LETTER SUBMITTED FOR THE RECORD

MAY 2, 2013.

Honorable JANET NAPOLITANO,  
*Secretary, U.S. Department of Homeland Security, Washington, DC 20528.*

Honorable SUZANNE SPAULDING,  
*Acting Under Secretary, National Protection and Programs, U.S. Department of Homeland Security, Washington, DC 20528.*

DEAR SECRETARY NAPOLITANO AND ACTING UNDER SECRETARY SPAULDING: On April 17, 2013 the West Fertilizer plant in West, Texas exploded, killing 15 people and injuring hundreds more. Numerous media outlets have reported that the plant was storing large quantities of both anhydrous ammonia and ammonium nitrate at the time of the incident. These particular chemicals are considered "high-risk" under Department of Homeland Security (DHS), Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA) standards, and Federal law requires these agencies to regulate the facilities that handle them.

DHS's role is to secure facilities that produce, store, or use hazardous chemicals that could be used by terrorists to inflict mass casualties in the United States. The program designed to accomplish this, the Chemical Facilities Anti-Terrorism Standards (CFATS), is not necessarily implicated in the West Fertilizer disaster, since initial reports indicate that the fire and subsequent explosion were the result of an industrial accident, and not of any terrorist activity or malicious intent.

However, the West Fertilizer explosion has brought to light some serious concerns about the efficacy of the CFATS program. To date, we have learned that although West Fertilizer stored high-risk quantities of CFATS-regulated chemicals, the plant was not registered with the CFATS program. What's even more troubling is the fact that DHS did not even know of the plant's existence.

The Government Accountability Office (GAO),<sup>1</sup> the DHS Office of Inspector General (IG),<sup>2</sup> and the DHS Office of Infrastructure Protection (IP) itself<sup>3</sup> have recognized that over the past 5 years, ineffectual management and implementation of the CFATS program have frustrated the Department's critical mission to secure America's chemical infrastructure. To its credit, the Department has brought in new leadership for CFATS, and is working in earnest to correct the program's deficiencies. But this latest incident reveals yet another serious problem that must be addressed.

Although the CFATS Authorizing Statute (Pub. L. 109-295 § 550) does not compel the DHS Secretary to affirmatively seek out and identify chemical facilities presenting high levels of security risk, this certainly does not suggest that DHS's approach should be purely passive. Yet the IP Office of Legislative Affairs estimates there are thousands of chemical facilities in the United States that have failed to report under CFATS facilities of which DHS has no knowledge.

The explosion of the West Fertilizer plant is a terrible tragedy, no matter what the cause. But had the event been the result of terrorist infiltration, how could DHS possibly justify the investment of resources the Department has made over the past 5 years to implement CFATS when it didn't even know of this plant's existence? The identification of facilities at risk of terrorist infiltration is the foundation of the CFATS program. It is the first step. The fact that CFATS relies on facilities to self-report cannot operate as an excuse for DHS's failure to adequately carry out its vital responsibilities.

If the CFATS reporting program is ineffectual, the Department has a responsibility to fix it. DHS must reevaluate its outreach campaign to ensure that it is robust and comprehensive. Facilities which are either inadvertently or willfully off the grid—facilities like West Fertilizer—must be both aware of their requirement to report, and held to account for failing to do so.

In order to completely understand the Department's failure to know about the West Fertilizer plant, and other "outlier" facilities, we would appreciate answers to the following questions by Monday, June 3.

- (1) Please describe the CFATS process for identifying chemical facilities of interest. Does DHS have any mechanism by which it can identify facilities which have not self-reported? How many "outliers" do you estimate exist?
- (2) To what do you attribute DHS's failure to identify all facilities of interest, and what is DHS currently doing to correct this critical deficiency?
- (3) Does DHS share information with EPA, OSHA, and the other Federal agencies responsible for chemical facilities oversight? If so, to what extent? If not, why not?
- (4) What is the relationship between DHS and State and local authorities with regard to identifying and regulating chemical facilities? Does DHS exchange information with local emergency planning authorities? Does DHS play any role in educating first responders as to handling chemical incidents?
- (5) Under CFATS, DHS is authorized to issue penalties for noncompliance. DHS can even go so far as to order a noncompliant facility to cease operations. To date, how many facilities has DHS penalized for noncompliance? Has DHS penalized any outliers for failure to submit a "Top Screen?" If not, how would you describe DHS's effectiveness in enforcing compliance?
- (6) The Ammonium Nitrate Security Program (ANSP) is a proposed regulation developed by DHS in response to direction from Congress to "regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility . . . to prevent the misappropriation or use of ammonium nitrate in an act of terrorism." Implementation of this program has been long delayed. Can you please update us on the status of the ANSP?
- (7) Although CFATS is intended to regulate the security of chemical facilities—as opposed to industrial safety—could CFATS compliance have helped to mitigate the disaster at West Fertilizer in any way?

<sup>1</sup>GOA-12-515T "Critical Infrastructure Protection: DHS is Taking Action to Better Manage its Chemical Security Program, but it is Too Early to Assess Results." July 26, 2012.

<sup>2</sup>OIG-13-55 "Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program." March, 2013.

<sup>3</sup>Memorandum from Penny Anderson, Director, Infrastructure Security Compliance Division, Office of Infrastructure Protection and David Wulf, Deputy Director to NPPD Under Secretary, Rand Beers: "Challenges Facing ISCD, and the Path Forward." November 10, 2011.

Thank you for your attention to this matter. We look forward to continuing to work with you to ensure that America's chemical facilities are adequately protected against terrorist attack.

Sincerely,

MICHAEL T. MCCAUL,  
*Chairman, Committee on Homeland Security.*

PATRICK L. MEEHAN,  
*Chairman, Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, Committee on Homeland Security.*

ATTACHMENT.—DHS RESPONSES TO REP. MCCAUL AND REP. MEEHAN'S MAY 2, 2013 LETTER REGARDING THE CHEMICAL FACILITY ANTI-TERRORISM STANDARDS (CFATS) PROGRAM

*Question 1.* Please describe the CFATS process for identifying chemical facilities of interest. Does DHS have any mechanism by which it can identify facilities which have not self-reported? How many "outliers" do you estimate exist?

Answer. Like many regulatory regimes, the first step in identifying potentially regulated facilities is through self-reporting by members of the affected population. In the case of CFATS, any facility that possesses a threshold level of one or more chemicals of interest (COI) established by the Department is required to submit a Top-Screen to the Department.

DHS continues to undertake significant outreach at the National, State, and local level to inform potentially regulated entities of their requirements under CFATS and to ensure affected facilities submit Top-Screens. This outreach includes thousands of engagements ranging from presentations at large conferences, to briefings for pertinent industry associations as well as individual meetings with facility owners and operators. The Department has co-hosted an annual Chemical Security Summit for the past 6 years with industry stakeholders, has given joint presentations and conducted joint site visits with Federal partners such as the U.S. Coast Guard, and has participated in engagements with various State Homeland Security Advisors (HSA) and other State and local security partners. The Department also has participated in numerous meetings with Local Emergency Planning Committees, Area Maritime Security Committees, Sector Coordinating Councils, and Fusion Centers. These outreach efforts have contributed to the ever-growing body of public information on CFATS, including articles and blog postings that have been written since the CFATS final rule was published in 2007.

As a result of these and other efforts, DHS has received over 44,000 Top-Screen submissions to date, roughly 4,300 of which have resulted in the identification of facilities determined by the Department to be high-risk. As the total number of chemical facilities in the United States is both unknown and dynamic, the Department cannot speculate on how many facilities should have submitted CFATS Top-Screens but have intentionally or unknowingly failed to do so.

The Department has been working to address the issues of identifying non-compliant actors since 2008. These efforts have included:

- A pilot program with the State HSAs from the States of New Jersey and New York to identify potentially non-compliant facilities within their respective States;
- The creation of the CFATS Share tool, through which State HSAs, appropriate DHS components, and other stakeholders have access to data on the CFATS-regulated facilities within their jurisdictions;
- A pilot program to exchange data with the Environmental Protection Agency (EPA) to identify facilities that, based on their EPA Risk Management Plan (RMP) filings, likely should have submitted a Top-Screen but failed to do so;
- Analysis of the CFATS-regulated population to identify communities from which the Department would have expected a higher number of Top-Screen submissions, followed by targeted outreach to the identified communities;
- The development of a toll-free CFATS Tip Line through which individuals can anonymously submit information on potential security issues, to include potentially non-compliant facilities; and,
- A regional pilot program through which Chemical Security Inspectors in a CFATS region review data maintained in EPA's Computer Aided Management of Emergency Operations system and other sources to identify facilities with threshold levels of COI who had not submitted Top-Screens, followed by attempts to contact each of the identified facilities.

These efforts resulted in the identification of a small number of high-risk chemical facilities who previously had not self-reported to CFATS. Several of these efforts were resource-intensive and were not continued beyond the initial pilot efforts as

the resources were determined to be of greater use on other CFATS-related implementation actions. Others, such as the CFATS Share tool and the CFATS Tip Line, are still in use.

*Question 2.* To what do you attribute DHS's failure to identify all facilities of interest, and what is DHS currently doing to correct this critical deficiency?

Answer. The CFATS-regulated community is expansive and dynamic and DHS is committed to pursuing all reasonable measures to identify potentially noncompliant facilities and urge them toward compliance. In order to further reduce the likelihood that potential high-risk chemical facilities intentionally or unintentionally avoid identification under the CFATS program, the Department is engaging in a variety of efforts. The Department is reinvigorating coordination with EPA and review of EPA RMP data to identify facilities that, based on their EPA RMP filings, may possess threshold levels of CFATS COI but have failed to submit a Top-Screen. This is being carried out in conjunction with a larger effort being coordinated by the White House to review chemical safety and security regulations across departments and agencies for potential gaps in coverage and explore ways to mitigate those gaps through existing authorities. DHS is also expanding outreach efforts to target segments of the chemical sector with higher likelihoods of potential non-compliance. In addition, the Department is examining ways to more efficiently coordinate with other Federal, State, and local entities to identify potentially non-compliant facilities within their jurisdictions. These efforts would be in addition to providing State HSAs and their designees with access to information on CFATS-regulated facilities in their jurisdictions via CFATS Share. Finally, the Department is continuing to operate its CFATS Tip Line and follow up on any reports of potentially non-compliant facilities submitted through the Tip Line.

*Question 3.* Does DHS share information with EPA, OSHA, and the other Federal agencies responsible for chemical facilities oversight? If so, to what extent? If not, why not?

Answer. The Infrastructure Security Compliance Division within the Department, which administers the CFATS program, has shared CFATS-regulated facility information with a variety of Federal partners including EPA, the Federal Bureau of Investigation, the U.S. Coast Guard, and the National Infrastructure Coordinating Center. The information has ranged from comprehensive lists of all regulated facilities to specific information on individual facilities, depending on the circumstances surrounding the exchange of information. The Department in coordination with the White House is exploring options, for sharing appropriate CFATS-regulated facility information with the Occupational Safety and Health Administration consistent with any applicable information-handling protocols such as Chemical-terrorism Vulnerability Information handling requirements.

*Question 4.* What is the relationship between DHS and State and local authorities with regard to identifying and regulating chemical facilities? Does DHS exchange information with local emergency planning authorities? Does DHS play any role in educating first responders as to handling chemical incidents?

Answer. Most States have one or more State or local authority regulating various aspects of operations at chemical facilities, ranging from workplace safety to emergency planning and security. Given the myriad different regimes and approaches that States employ in regulating chemical facilities, the Department primarily works through the State HSAs; the State, Local, Territorial, and Tribal Government Coordinating Council (SLTTGCC); and regional Fusion Centers to coordinate CFATS-related activities with States. As noted above, this has included a pilot program with representatives of the State HSAs for New York and New Jersey to identify potentially non-compliant facilities, as well as the dissemination of CFATS Share access to multiple Fusion Centers and all State HSAs and their designees.

The Department also has engaged numerous local planning authorities and routinely interacts with first responders across the country, with the majority of those engagements focused on providing introductions to and overviews or updates on the CFATS program. Starting in July 2012, the Department began sharing lists of CFATS facilities with local emergency responders upon request. Educating first responders on how to handle chemical incidents, however, is outside of the scope of the Department's CFATS authorities. Nevertheless, the CFATS program does encourage facilities to have an active outreach program with their community, local law enforcement, and emergency responders, to include participation in Local Emergency Planning Committees and similar local emergency responder-based organizations, and even looks for the inclusion of such activities in a facility's SSP as one potential way for the facility to comply in part with Risk-Based Performance Standards (RBPS) 9—Response.

*Question 5.* Under CFATS, DHS is authorized to issue penalties for noncompliance. DHS can even go so far as to order a noncompliant facility to cease operations.

To date, how many facilities has DHS penalized for noncompliance? Has DHS penalized any outliers for failure to submit a “Top Screen?” If not, how would you describe DHS’s effectiveness in enforcing compliance?

Answer. By statute and under the CFATS regulation, the Department cannot issue a fine against a facility or direct it to cease operations simply for failing to comply with the statute or regulations. Prior to DHS issuing a penalty (monetary or cease operations), the Department must issue an Administrative Order that identifies the specific steps the facility must take to come into compliance and provide the facility with a reasonable opportunity to correct its non-compliance. The Department may only issue a civil penalty and/or direct a facility to cease operations for violating a previously issued Administrative Order.

To date, the Department has issued 66 Administrative Orders against facilities that failed to submit a Site Security Plan in a timely manner. The Department did not need to follow up with issuing a penalty order in any of these instances because the facilities receiving the Administrative Orders subsequently came into compliance in a timely fashion or explained to the Department’s satisfaction why the action specified in the Administrative Order was not required for the facility to be in compliance with CFATS. None of these Administrative Orders were the result of a failure to submit a Top-Screen.

*Question 6.* The Ammonium Nitrate Security Program (ANSP) is a proposed regulation developed by DHS in response to direction from Congress to regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility . . . to prevent the misappropriation or use of ammonium nitrate in an act of terrorism.” Implementation of this program has been long delayed. Can you please update us on the status of the ANSP?

Answer. The Department is continuing to adjudicate comments received on the Ammonium Nitrate Security Program Notice of Proposed Rulemaking issued in August 2011.

*Question 7.* Although CFATS is intended to regulate the security of chemical facilities—as opposed to industrial safety—could CFATS compliance have helped to mitigate the disaster at West Fertilizer in any way?

Answer. The authority provided to the Department to develop regulations is specifically focused on security at high-risk chemical facilities and was not intended to help prevent or mitigate industrial accidents arising from failure to meet applicable safety standards. At this time, there is no indication that the West Fertilizer explosion was a security incident. It should also be noted there is no certainty whether West Fertilizer would be regulated under CFATS if the facility had submitted a Top-Screen. Until more information is known, the Department cannot speculate as to whether compliance with applicable CFATS requirements would have helped to mitigate the disaster.

Generally, compliance with CFATS might help mitigate the consequences of an incident like the West Fertilizer explosion. For example, to comply with CFATS RBPS 9—Response, many CFATS-regulated facilities will develop emergency response plans, establish emergency notification systems, and/or implement safeguards that allow units containing and/or using hazardous materials to safely shut-down in an emergency. Similarly, in support of RBPS 11—Training, many facilities conduct drills and exercises, including with local law enforcement or first responders. While a CFATS-regulated facility is not required to perform any of these activities and may propose other ways to comply with the applicable RBPS, the activities covered under the applicable RBPS may overlap with requirements administered under other Federal and State regulatory regimes focused on safety and environmental protection.

---

LETTER SUBMITTED FOR THE RECORD

JULY 21, 2013.

The Honorable JANET NAPOLITANO,  
Secretary, U.S. Department of Homeland Security, Washington, DC 20528.

DEAR SECRETARY NAPOLITANO: In 2006, Congress authorized the creation of the Chemical Facilities Anti-Terrorism Standards (CFATS) program, to secure facilities with chemicals that “present high levels of security risk.” The program’s enacting statute directs the Secretary of Homeland Security to issue “regulations establishing risk-based performance standards for security of chemical facilities and requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities.” (Pub. L. 109–295 § 550).

While the interim final regulations issued in 2007 were faithful to the legislation, implementation since then has fallen far short of what the legislation and the regulations promised.

The Government Accountability Office (GAO),<sup>1</sup> the Department of Homeland Security (DHS) Office of Inspector General,<sup>2</sup> and the DHS Office of Infrastructure Protection itself<sup>3</sup> have all recognized that, over the past 5 years, DHS's ineffectual management and implementation of the CFATS program has frustrated the Department's critical mission to secure America's facilities containing chemicals of interest. As the authorizers and appropriators of this program, we write to you to express serious reservations about continuing to extend CFATS funding without evidence of substantial programmatic improvement. The basic programmatic building blocks of CFATS are missing, and we are running short on both patience and confidence with regard to the Department's ability to correct its deficiencies.

Specifically, the risk evaluation system used to tier regulated facilities is not consistent with the Department's basic standard, nor with what Congress expected based upon the 2006 CFATS legislation and the 2007 regulations. The Department's standard for risk requires that threat, vulnerability, and consequence each be weighed. Yet, with regard to CFATS-covered facilities, consequence is only partially considered, while threat and vulnerability are not factored in at all. Because CFATS, by law, is a risk-based program, this failure to develop an accurate and effective risk evaluation system could not be more problematic.

Despite this flawed risk methodology, thousands of facilities across the country have attempted to comply with CFATS requirements by submitting their initial risk assessment information (the "Top Screen"), and have been assigned a final tier. These facilities have invested time and resources into the development of their site security plans. Yet, GAO estimates it could take up to 9 years for the Department to review these plans and certify each facility's security. Within that time, technology changes, plans become outdated, and facilities remain vulnerable to attack. The scope and pace of this backlog is simply unacceptable.

Perhaps the most basic step toward achieving the security of facilities with chemicals of concern is identifying those facilities that are at risk. Yet, even here, the Department has failed to implement an effective process. As the tragic explosion of the West Fertilizer plant in April brought to light, DHS is unaware of the existence of thousands of small facilities across the country that are potentially covered under the statute. The identification of facilities at risk of terrorist infiltration is the very foundation of the CFATS program.

Additionally, we are concerned that it has been 5 years since Congress passed section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act (Pub. L. 110-161), which requires DHS to regulate the sale and transfer of ammonium nitrate to prevent the misappropriation or use of ammonium nitrate in an act of terrorism. Although DHS published the Ammonium Nitrate Security Program Notice of Proposed Rulemaking (NPRM) in the *Federal Register* in 2011, DHS has yet to issue any guidance on the Ammonium Nitrate Security Program.

Unfortunately, problems with the Department's efforts to implement these programs are not limited to those discussed here. As the Chairmen, responsible for authorizing and funding CFATS, we are convinced the program should not continue in its present condition. While the need to secure American facilities with chemicals of concern is a critical one, the CFATS program is simply not getting the job done.

The Committees on Energy and Commerce and on Homeland Security, as authorizes, did not object to the appropriation of funds to CFATS in the Fiscal Year 2014 Homeland Security Bill because the House Committee on Appropriations, in both its bill, and its accompanying Report, requires the Department to formally justify its expenditures, create a plan to reduce its backlog, and report to Congress on its progress to correct some of its most serious shortcomings.

But these requirements will not be enough to justify the program in the long term.

As discussed, we believe in the vital importance of securing America's facilities with chemicals of concern. Moreover, hundreds of millions of American tax dollars have been spent on developing the CFATS program, and private industry has spent

<sup>1</sup> GOA-12-515T "Critical Infrastructure Protection: DHS is Taking Action to Better Manage its Chemical Security Program, but it is Too Early to Assess Results." July 26, 2012.

<sup>2</sup> OIG-13-55 "Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program." March 2013.

<sup>3</sup> Memorandum from Penny Anderson, Director, Infrastructure Security Compliance Division, Office of Infrastructure Protection and David Wulf, Deputy Director to NPPD Under Secretary, Rand Beers: "Challenges Facing ISCD, and the Path Forward." November 10, 2011.

billions of dollars complying with it. Therefore, we would like to see the program continue. However, what's most important is that the security mission is fulfilled.

Over the course of this fiscal year, the Energy and Commerce Committee and the Homeland Security Committee will continue the rigorous oversight and strict guidance needed to get CFATS on track. We intend to identify specific milestones the program must achieve in order to establish its viability. Ultimately, we would like to consider a multi-year reauthorization of CFATS—but only if it is the right program for the job.

To begin with, we would like to see the National Protections and Programs Directorate (NPPD) meet the requirements articulated in the Appropriations Committee Report Language Accompanying H.R. 2217 (H. Rept. 113–91). Among those requirements are the following:

(1) A report explaining how ISCD will further accelerate the review process for facilities which have already been assigned a final tier, reduce the current backlog of approximately 3,120 facilities, and detail the actions DHS is taking to better manage its chemical security program, including its progress in addressing the recommendations in the GAO report (GAO–13–353) and in implementing the associated action plan. Please submit this report not later than September 30, 2013.

(2) A report to focus on program implementation, and collaboration and communication within the Infrastructure Security Compliance Division (ISCD) and between ISCD and the regulated community. Specifically, the review should address the following sets of questions: 1. How will ISCD improve its facilities identification methodology to include the full universe of covered facilities in the United States? Is the ISCD sharing information with State authorities overseeing CFATS-regulated facilities, such as State Emergency Management Directors? 2. Is the ISCD organized to efficiently and effectively carry out the requirements detailed in Section 563 of Public Law 110–161 (ammonium nitrate security)? If not, what are the organizational gaps? How should it be structured and staffed to ensure effective execution of Section 563 of Public Law 110–161? Does the program include the appropriate level of outreach to address valid stakeholder concerns? What mechanisms are in place to ensure consistent outreach? Additionally, the review should include a comprehensive update on the status of the corrective measures being taken to ensure that facilities with chemicals of interest are notified by ISCD when they fall within the purview of the CFATS program; an estimate of the potential number of outlier facilities unaware of the CFATS requirement; and a detailed performance evaluation of the Chemical Security Inspectors within ISCD. This report should be submitted not later than September 30, 2013.

We look forward to receiving these reports, and to working with you to help secure our Nation against the risk of terrorism.

Sincerely,

MICHAEL T. MCCAUL,  
*Chairman, Committee on Homeland Security.*

FRED UPTON,  
*Chairman, Committee on Energy and Commerce.*

JOHN CARTER,  
*Chairman, Homeland Security Appropriations Subcommittee.*

Mr. MEEHAN. Well, I thank you, Mr. Chairman. Again, for your direct concern and presence in this. I know that you and I have had numerous conversations. We have awaited the GAO report and some further activity and a response from our original letter. But I know as one who represents Texas, the numerous times you have spoken to me about your own very genuine and sincere personal interest in this issue, and I am pleased to have been able to have this hearing and to have you participate to the extent you may.

I am also very pleased and privileged to be able to share the responsibility of this committee with the Ranking Minority Member, the gentlelady from New York, Ms. Clarke, who did inform me that she would likely be detained with some other responsibilities prior to this. So what I will elect to do is perhaps—well, here is Ms. Clarke, as she sits. But if she chooses, she can jump in. Or what I would do is be happy to introduce our witnesses, ask for your

opening statements. At the conclusion of the opening statements, I will recognize the Ranking Member, enable her to make her opening statements, and then we will move into the questions.

So I would identify for the other Members, committee Members, reminding the opening statements may be submitted for the record. Now, we are pleased to have two distinguished panels of witnesses before us today on this important topic. I am going to introduce the first panel, and then recognize each of you for your testimony.

Our first witness is Mr. David Wulf, the director of the Infrastructure Security Compliance Division within the National Protection and Programs Directorate at the Department of Homeland Security. In essence, Mr. Wulf is the principle person at DHS who oversees this program, and we are grateful for your presence here today. As the director, Mr. Wulf helps the ISCD lead National efforts to implement the collaborative security planning and assess high-risk chemical facilities as well as assisting DHS in creating regulations for detonable ammonium nitrate products.

Mr. Stephen Caldwell is the director of the Government Accountability's Office Homeland Security and Justice team. Thank you, nice to see you again, Mr. Caldwell. It has been a busy week. We had the chance to share some time together yesterday with some very good work Mr. Caldwell has done on one of the other issues we were dealing with the Coast Guard. Mr. Caldwell's focus has been related to protecting critical infrastructure and promoting resiliency. He recently raised concerns about the risk assessment process used by the ISCD in assessing terrorist risk to the 3,500 chemical facilities under the CFATS program.

So I thank you both for being here. Your full written statements will appear in the record, but I recognize you now for 5 minutes to testify. So Mr. Wulf, thank you for being here and I turn to you first.

**STATEMENT OF DAVID WULF, ISCD DIRECTOR, NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, U.S. DEPARTMENT OF HOMELAND SECURITY**

Mr. WULF. Thank you, Chairman Meehan.

Mr. MEEHAN. Mr. Wulf, we need you to push the button.

Mr. WULF. Thank you so much. Thank you, Chairman Meehan, Chairman McCaul, Ranking Member Thompson, Ranking Member Clarke, and distinguished Members of the subcommittee for the opportunity to appear before you today.

My team and I, and our colleagues across the Department, are absolutely committed to preventing incidents like the tragic explosion at West, Texas. Our hearts go out to the families of the heroic first responders and the people of the West community as they recover.

Although it doesn't appear that this incident was the result of a terrorist act, we have been working with our interagency partners and our industry stakeholders to find solutions that will prevent these types of disasters in the future. Today, I want to highlight the progress the CFATS program has made and how we have moved forward on several fronts since the explosion at the West, Texas fertilizer in April of this year. While the CFATS program

has had its challenges, we have made significant strides over the past year.

We have developed improved policies and training to ensure that inspections are conducted in a consistent and thorough fashion. We have implemented an effective, streamlined site security plan review process which has greatly enhanced our ability to authorize and, as appropriate, grant approval for security plans. We have authorized 589 site security plans and granted final approval for 182 of those; most of those in the highest-risk categories, Tiers 1 and 2. Reviews and authorizations of Tier 3 site security plans are now underway, as well, and I am very proud of the pace at which our staff is operating.

I do recognize, however, that we must continue to find ways to become more efficient and effective in our inspection NSSP review processes. We are looking closely at options to streamline the review and approval cycle for facilities in Tiers 3 and 4, and are soliciting stakeholder input on how to do so.

I do anticipate that alternative security program templates will be an important tool to enhance the efficiency of our reviews. The American Chemistry Council recently worked with us to develop an ASP template, and we continue to work with industry associations such as SOCMA, AFPM, and NACD, who have been considering the adoption of ASP templates for their member companies.

I expect you will hear from our industry stakeholders that they have seen progress and improvements in the program, as well. We remain committed to working with stakeholders and with Congress on a path forward so that the CFATS program continues to improve. Engagement with industry is absolutely critical to the success of CFATS. Since the program's inception, we have conducted extensive outreach with industry, resulting in the submission of more than 44,000 Top Screens. Chemical security is a shared responsibility, and we feel very strongly that our private-sector stakeholders are key to our efforts to implement the program.

Enhancing security across the chemical sector is not something a single company, industry, or even Government can do by itself. I am very grateful to our stakeholders for the hard work they have put into fostering security at America's highest-risk chemical facilities. In our engagements with industry stakeholders since the West, Texas explosion we have all agreed that we must work together to prevent future incidents. Industry has offered to further spread our message and to do its part to promote safety and security at chemical facilities.

Recently, associations such as the Fertilizer Institute and Agricultural Retailers Association have played a critical role in our outreach efforts facilitating our outreach to State-level agricultural association executives. First responders are also a critical part of chemical safety and security Nation-wide. It is absolutely essential that we continue to engage with them through the CFATS program. Our past efforts include sharing lists of CFATS facilities with local responders, as well as disseminating outreach material targeted at members of the emergency response community.

The CFATS program will continue to encourage facilities to conduct their own outreach to responders. I would also like to recognize the perspectives that GAO has offered us on the CFATS risk-

tiering methodology and on stakeholder outreach activities. As part of our commitment to continue moving the CFATS program forward, we are reviewing our risk assessment process, including through the conduct of an external peer review. We expect the peer review to provide input on how we can enhance the CFATS tiering model as appropriate in a fashion that comports with the practical realities of implementing the program.

We are also committed to meeting the challenge of identifying facilities that have not reported threshold quantities of chemicals of interest. From the early days of the CFATS program, DHS recognized that it would be a challenge to identify and find every failure with chemicals of interest. Over the years, we have undertaken and continue to support extensive outreach and industry engagement to ensure that non-exempt facilities that possess threshold levels of chemicals of interest comply with their Top Screen submission requirements. Since the West explosion, we have committed to doubling down on these efforts, and working with partners at Federal and State agencies, and with industry, to identify non-compliant facilities.

It is also important to note that improving chemical facility safety and security is a priority for this administration. That is why the President today signed an Executive Order to improve the safety and security of chemical facilities and to reduce the risks of hazardous chemicals to workers and communities. The Executive Order directs Federal agencies to improve coordination with State, local, and Tribal partners, including first responders; to collaborate on innovative approaches to inspections, enforcement, incident investigation and identification of high-risk facilities, as well as enhancing the collection and sharing of chemical facility information; and also to modernize policies, regulations, and standards to improve chemical safety and security, including by examining new options to address the safe and secure storage, handling, and sale of ammonium nitrate.

So these coordinated efforts will compliment many of the individual efforts being taken within the Department and across other Federal departments and agencies following the tragic events in West, Texas. This issue is a priority for the administration, and will continue to be in the future as we focus on building on steps already underway to mitigate chemical risks. In closing, I would like to note that the Department supports a permanent authorization for the CFATS program. We firmly believe that permanent authorization will provide industry with the necessary stability to move forward in effectively implementing CFATS.

It will send a clear message to facilities that may be seeking to avoid their obligation to report dangerous chemicals that the CFATS program is here to stay. We are gratified to hear our industry stakeholders say the same. The Department has turned a corner on the CFATS program. As we implement CFATS, we will continue to work with stakeholders to get the job done of preventing terrorists from exploiting chemicals or chemical facilities. We do firmly believe that CFATS is making the Nation more secure by reducing the risks associated with our Nation's chemical infrastructure. Along with our stakeholders, we are committed to its success.

Thank you for the opportunity to be here today. I look forward to answering any questions you may have.  
[The prepared statement of Mr. Wulf follows:]

PREPARED STATEMENT OF DAVID WULF

AUGUST 1, 2013

Thank you, Chairman Meehan, Ranking Member Clarke, and distinguished Members of the subcommittee. I appreciate the opportunity to appear before you today to discuss the Department of Homeland Security's (DHS) regulation of high-risk chemical facilities under the Chemical Facility Anti-Terrorism Standards (CFATS). Over the past year, the CFATS program has made significant progress, advancing programmatically while simultaneously addressing internal operational concerns. The Department remains committed to working with stakeholders and with Congress on a path forward so that the CFATS program continues to improve. Today I will focus on the progress made over the last year-and-a-half, as well as activities undertaken since the explosion at the West Fertilizer Company in April 2013.

The CFATS program has made our Nation more secure by identifying and regulating high-risk chemical facilities to ensure they have security measures in place to reduce the risks associated with their possession of chemicals of interest. CFATS has also played a role in reducing the number of high-risk chemicals, as more than 3,000 facilities have eliminated, reduced, or modified their holdings of certain chemicals of interest. The significant reduction in the number of chemical facilities that represent the highest risk is an important success of the CFATS program and is attributable both to the design of the program as enacted by Congress and to the work of CFATS personnel and industry at thousands of chemical facilities. I welcome the opportunity to work with stakeholders to further improve this vital National security program.

The National Protection and Programs Directorate (NPPD) Infrastructure Security Compliance Division (ISCD) continually evaluates the program to identify areas for improvement to ensure proper implementation. Through ISCD's comprehensive Action Plan, we have identified and acted decisively to address areas in which improvements to the CFATS program and associated supporting activities were warranted. As of July 15, 2013, 90 of the 95 action items contained in the current Action Plan have been completed. In fact, this spring, the DHS Office of the Inspector General (OIG) issued a report on ISCD progress, which examined many of the program's historic challenges. The OIG report confirmed what we had made efforts to correct through the Action Plan—23 of the 24 Recommendations were deemed resolved. Now that the Department has concluded this period of internal improvements, programmatic processes and structures are in place so we can focus our efforts on implementing the program.

As you are aware, the Department's current statutory authority to implement CFATS—Section 550 of the Fiscal Year 2007 Department of Homeland Security Appropriations Act, as amended—currently extends through October 4, 2013. DHS recognizes the significant work that the subcommittee and others have undertaken to reauthorize the CFATS program. The Department supports a permanent authorization for the CFATS program and is committed to working with Congress and other security partners to establish a permanent authority for the CFATS program in Federal law. We firmly believe permanent authorization will provide industry with the necessary stability to move forward in effectively implementing CFATS and will send a clear message to facilities that may be seeking to avoid their obligation to report dangerous chemicals that the CFATS program is here to stay.

CFATS IMPLEMENTATION PROGRESS

The cornerstone of the CFATS program in regulating the security of high-risk chemical facilities is the development, submission, and implementation of Site Security Plans (SSPs), or Alternative Security Programs (ASPs) in lieu of SSPs, which document the security measures that high-risk chemical facilities utilize to satisfy the applicable Risk-Based Performance Standards (RBPS) under CFATS. It is important to note that these plans are not "one size fits all," but in-depth, highly customized, and dependent on each facility's unique circumstances.

## STATUS OF CFATS-REGULATED FACILITIES

Tier*	Total No. of Facilities	Received Final Tier	Authorized SSPs and ASPs	Authorization Inspection Conducted	Approved SSPs and ASPs
1 .....	125	113	103	85	63
2 .....	457	367	202	176	91
3 .....	1,228	1,017	230	97	6
4 .....	2,426	1,865	1	0	0
Total .....	4,298	3,362	536	358	160

\* As of July 15, 2013.

In order to determine whether a facility is regulated under CFATS, the facility uses the web-based Chemical Security Assessment Tool (CSAT), to submit a Top-Screen to ISCD. Since we began collecting this information in 2007, ISCD has data from more than 44,000 Top-Screens submitted by chemical facilities, providing important information about their chemical holdings. Based on the information received in the Top-Screens, ISCD identified more than 8,500 facilities that were initially designated as high-risk facilities potentially regulated by CFATS. These facilities then compiled and submitted Security Vulnerability Assessments, which are used by ISCD to identify which facilities present a terrorism risk that is sufficiently high to warrant the assignment of a final high-risk tier under CFATS.

As of July 15, 2013, CFATS covers 4,298 high-risk facilities Nation-wide; of these, 3,362 have received final high-risk tier determinations and are required to develop SSPs (or ASPs) for ISCD review. The remaining facilities are awaiting final tier determinations based on their Security Vulnerability Assessment submissions. The tiered population is dynamic and subject to change, depending on the conditions at facilities.

As a part of our commitment to continue moving the CFATS program forward, NPPD is conducting a thorough review of the risk assessment process. In support of this, NPPD has implemented a phased approach, which is captured in the ISCD Action Plan and includes: Documenting all processes and procedures relating to the risk assessment methodology; conducting an internal NPPD review of the risk assessment process; and initiating an external peer review of the risk assessment methodology. We expect the peer review to provide input on how DHS can enhance the CFATS tiering models as appropriate. ISCD continues to issue final tier notifications to facilities across all four risk tiers. Facilities that receive a final high-risk determination are notified of the requirement to complete and submit an SSP or an ASP. Tiering determinations are dynamic and can change based on actions a facility takes. For example, a tiering determination can change when a facility voluntarily alters its operations in a material way that reduces its risk profile.

*Inspections.*—ISCD is currently carrying out authorization inspections for Tier 1, 2, and 3 facilities. Authorization inspections are scheduled after ISCD's review of an SSP (or ASP) results in a preliminary determination that the SSP satisfies applicable RBPS and issues a Letter of Authorization. From Fall 2011 to Spring 2012, ISCD updated and revised its internal inspections policy and guidance materials for conducting inspections. After releasing the updated guidance materials, inspector training sessions were conducted, which focused on the updated policy, procedures, and related materials to better prepare Chemical Security Inspectors to resume authorization inspections. Since resuming authorization inspections in July 2012, ISCD has conducted more than 350 authorization inspections. The authorization inspection results, as well as any further revisions that the facility may make to the SSP (or ASP), are reviewed to make a final determination as to whether the facility's SSP satisfies the applicable RBPS and whether to issue a Letter of Approval. ISCD anticipates that we will complete the approvable Tier 1 security plans by first quarter fiscal year 2014 and approvable Tier 2 security plans by third quarter fiscal year 2014. Once issued a Letter of Approval, the facility must implement the security measures detailed in the SSP (or ASP). ISCD has made great strides in improving our inspection process over the past year, and we continue to identify efficiencies to keep moving forward. In September 2013, ISCD plans to begin conducting compliance inspections for facilities with approved SSPs. These inspections will generally be conducted approximately 1 year after their SSPs were approved.

## A SHARED RESPONSIBILITY

We feel strongly that our private-sector partners are key to our efforts to enhance data sharing, increase cross-training, and identify areas for possible regulatory changes as well as identifying possible gaps in existing statutory authorities. Enhancing security and building resilience across the chemical sector is not something a single company, industry, or even Government can do by itself. This has to be a collaborative effort. It also has to be a comprehensive effort, because of the sheer complexity of the sector, its linkages to other sectors, and the potential cascading effects and consequences of a significant attack or disruption.

Since the West, Texas tragedy, we have engaged with numerous members of industry and all have agreed that we must work together to prevent future incidents. Industry has offered to spread our message and do their part to promote safety and security at chemical facilities. The Department appreciates this support and looks forward to working with industry and our Government partners to carry out these activities. We've made a lot of progress in advancing chemical security in this country, though we still have a lot of work to do. We must remain steadfast in our commitment to continue to collectively identify and develop programs that improve our security posture.

## OUTREACH TO STAKEHOLDERS

*Industry Engagement and Information Sharing.*—Since the establishment of the CFATS program in April 2007, NPPD has conducted significant outreach to the regulated community and other interested or affected entities so that they are aware of the program's requirements. NPPD and ISCD management and staff have presented at hundreds of security and chemical industry gatherings and participated in a variety of other meetings. As part of this outreach initiative, NPPD and ISCD leadership have regularly updated affected sectors through their Sector Coordinating Councils and the Government Coordinating Councils—including the Chemical, Oil and Natural Gas, and Food and Agriculture Sectors. To promote information sharing, ISCD has developed several communication tools for stakeholder use, including: The Chemical Security website ([www.DHS.gov/chemicalsecurity](http://www.DHS.gov/chemicalsecurity)); a help desk for CFATS-related questions; a CFATS tip-line for anonymous chemical security reporting; and CFATS-Share, a web-based information-sharing portal that provides certain Federal, State, and local agencies access to key details on CFATS facility information as needed.

*Compliance Assistance and Facility Outreach.*—Chemical Security Inspectors provide assistance and outreach directly to facilities. At any point in the CFATS process, a facility can request a Compliance Assistance Visit to provide support in preparing the necessary security-related documentation required under CFATS. During these visits, chemical inspectors offer compliance and technical assistance in the completion of the CSAT registration, Top Screen, Security Vulnerability Assessment, or Site Security Plan. As of July 15, 2013, ISCD has conducted more than 1,260 Compliance Assistance Visits. In addition to conducting inspections and supporting Compliance Assistance Visits at regulated facilities, NPPD's chemical inspectors actively work with facilities, local stakeholders, and governmental agencies across the country. Collectively, they have participated in more than 5,260 meetings with Federal, State, and local officials; held more than 4,680 introductory meetings with owners and operators of CFATS-regulated or potentially regulated facilities.

*Engaging First Responders.*—The Department also has engaged numerous local emergency planning committees and routinely interacts with first responders across the country. Additionally, starting in July 2012, the Department began, upon request, sharing lists of CFATS facilities with local emergency responders. The Department has also developed and disseminated outreach material targeted at members of the emergency response community, and encourages facilities to conduct their own outreach to their community, local law enforcement, and emergency responders, to include participation in Local Emergency Planning Committees and similar local emergency responder-based organizations. To satisfy CFATS RBPS-9 (Response), a high-risk facility generally will be expected to maintain and exercise an emergency plan to respond to security incidents internally and with the assistance of local law enforcement and first responders. Finally, DHS, the Environmental Protection Agency (EPA), and the State of New Jersey recently convened a meeting with representatives from approximately 25 fire stations within New Jersey to discuss their level of preparedness to respond to an incident at a chemical facility within their jurisdiction and identify both potential ways to increase their preparedness and lessons learned that can be shared with other fire departments.

## EARLY EFFORTS TO IDENTIFY NON-COMPLIANT FACILITIES

The first step in identifying potentially regulated facilities is through self-reporting by members of the affected population. Under the CFATS, any facility that possesses a threshold level of one or more chemicals of interest established by the Department is required to submit a Top-Screen to DHS. Throughout the existence of CFATS, DHS has undertaken and continues to support extensive outreach and industry engagement to ensure that non-exempt facilities that possess threshold levels of chemicals of interest comply with their Top-Screen submission requirements. These activities have, in concert with the efforts of our industry stakeholders, accounted for the significant number of Top-Screens industry members have submitted to date. The CFATS-regulated community, however, is expansive and dynamic, and, like many other regulators, the Department must be able to count on facilities that possess threshold levels of chemicals of interest to meet their reporting obligations under CFATS. DHS is committed to pursuing all reasonable measures to identify potentially non-compliant facilities, encouraging and assisting them in coming into compliance, and, where appropriate, using the enforcement mechanisms available to DHS to bring any non-compliant facilities into compliance.

Since the inception of CFATS, DHS has undertaken efforts to identify facilities that should have submitted a Top-Screen but have failed to do so. Beginning in the summer of 2008, ISCD identified multiple approaches to identifying and contacting facilities that were potentially non-compliant for failure to submit a Top-Screen, including:

- A pilot program with the State Homeland Security Advisors (HSAs) from New York and New Jersey to identify potentially non-compliant facilities within their respective States;
- Exchanges of data with the EPA in an attempt to identify facilities that, based on filings submitted pursuant to EPA regulations, likely should have submitted a Top-Screen but failed to do so;
- An analysis—by industry segment/sector and chemical of interest—of the CFATS-regulated population to identify communities from which the Department would have expected a higher number of Top-Screen submissions, followed by targeted outreach to the identified communities;
- The creation of the CFATS–Share tool, through which State HSAs, appropriate DHS components, and other stakeholders have access to data on the CFATS-regulated facilities within their jurisdictions;
- The development of a toll-free CFATS Tip Line through which individuals can anonymously submit information on potential security issues, to include facilities that may have failed to submit a required Top-Screen;
- A regional pilot program through which Chemical Security Inspectors in one CFATS region reviewed data maintained in EPA’s Computer Aided Management of Emergency Operations system and other sources to identify facilities with threshold levels of chemicals of interest who had not submitted Top-Screens.

These efforts resulted in the identification of a small number of chemical facilities that failed to submit a Top-Screen as required under CFATS. Several of these efforts were resource-intensive, however, and were not continued beyond the initial pilot efforts as the Division’s resources were determined to be of greater use on other CFATS-related implementation actions. Others, such as the CFATS–Share tool and the CFATS Tip Line, are still in use.

## RE-FOCUSED EFFORTS TO IDENTIFY NON-COMPLIANT FACILITIES

Following the explosion at West, Texas, the Department, in coordination with other Federal agencies, has reinvigorated some of the efforts mentioned above and is exploring other potentially cost-effective means for identifying facilities that should have submitted a Top-Screen.

*Interagency Data Sharing.*—One effort involves the review of EPA data under the Risk Management Plan (RMP) program to identify facilities that, based on their EPA RMP submissions, appear likely to possess a threshold amount of one or more CFATS chemicals of interest but have not submitted a Top-Screen to DHS. To facilitate this effort, EPA and DHS both have provided updated lists of facilities (in EPA’s case, the list of RMP facilities; in DHS’ case, the list of facilities that have completed a CFATS Top-Screen) to Oak Ridge National Laboratory (ORNL), which developed a set of heuristics to rate possible matches based on several categories including facility name, address, latitude/longitude, EPA Identification Number, and facility owner/operator. The initial matching process was completed in June, and ORNL has provided DHS with lists of facilities that, based on their filings with one of the two entities, potentially should have submitted a filing to the other entity but

appear to have failed to do so. ISCD reviewed the lists to attempt to identify and remove exempted facilities and thereafter contacted through written correspondence the non-exempt facilities identified through this effort to inform them about their potential obligation to submit a Top-Screen.

Even though ISCD previously had limited access to EPA data in late 2008 through a database with information from EPA regulations, differences between the DHS and EPA datasets and taxonomy made it difficult to cross-walk the data in an efficient manner. As a result of the Action Plan implementation, ISCD has realigned its organizational structure and created a branch dedicated to information technology operations. The Division is now in a much better position to utilize the information provided by EPA to successfully compare large quantities of data to identify potential matches and inconsistencies. Depending on the results of the ongoing crosswalk of EPA RMP data and CFATS data and available resources, a determination will be made on how often to repeat this effort. DHS is also looking at similar efforts involving the Department of Labor's Occupational Safety and Health Administration (OSHA) and data regarding Federal explosives licensees and permittees that has been shared by the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and facility data that has been shared by the State of Texas.

*Outreach to State and Local Officials and Chemical Industry.*—Most States have at least one State or local authority regulating various aspects of operations at chemical facilities, ranging from workplace safety to emergency planning to security. Given the myriad regimes and approaches that States employ in regulating chemical facilities, the Department primarily works through the State HSAs; the State, Local, Territorial, and Tribal Government Coordinating Council; and State and major urban area fusion centers to coordinate CFATS-related activities with States. Following the incident at West, Texas, we have also initiated steps aimed at increasing information-sharing efforts with various State and local partners, as well as increased outreach to the chemical industry and State and local first responders. ISCD has expanded efforts to reach State and local officials, including in-person meetings with State HSAs.

#### CHEMICAL FACILITY SAFETY AND SECURITY IMPROVEMENT

Following the explosion in West, Texas, the administration has taken a number of steps to try to reduce the likelihood that incidents like this occur in the future. Federal agencies are exploring potential areas for improvement in existing chemical facility safety and security oversight and working to identify and implement steps to ensure that facilities such as West Fertilizer are identified and complying with their chemical safety and security regulatory responsibilities. We have already identified a number of potential activities, including:

- Improving operational coordination with State and local partners;
- Enhancing Federal coordination;
- Enhancing information collection and sharing;
- Policy, regulation, and standards modernization;
- Identification of best practices.

These coordinated efforts will help ensure that the Federal Government most effectively uses the collective resources available to us for managing chemical risk. These activities complement many of the individual efforts being taken within the Department, and other Federal departments and agencies, following the tragic events in West, Texas. Should the effort result in proposals for legislative action, we will look forward to working with you to achieve those recommendations. This issue area is a priority for the administration, and will continue to be in the future as we focus on building on steps already underway to mitigate risks.

#### AMMONIUM NITRATE SECURITY PROGRAM

In addition to carrying out the CFATS program, ISCD also is working to implement the Ammonium Nitrate Security Program. The Department is continuing to adjudicate comments received on the Ammonium Nitrate Security Program Notice of Proposed Rulemaking issued in August 2011 and is developing a final rule. The authorizing statute provides the Department with the authority to require individuals engaging in the purchase, sale, or transfer of ammonium nitrate to register with the Department and submit to vetting against the Terrorist Screening Database, and requires facilities transferring or selling ammonium nitrate to maintain records on such sales and transfers and report any identified thefts or losses of ammonium nitrate to appropriate authorities.

## FUNDING REDUCTIONS

The Department is reevaluating the methods and resources dedicated towards encouraging facility self-reporting and identifying facilities that, intentionally or unintentionally, fail to comply with their Top-Screen reporting requirements. However, the expanded efforts noted above must be conducted using current resources while ISCD continues its progress towards security plan inspections and approvals. The House Appropriations Committee has proposed a reduction in funding to ISCD for fiscal year 2014. With this proposed reduction, the Division's capability to implement and enforce the CFATS regulations, which include activities to identify non-compliant facilities, would be adversely impacted. The Department asks for the subcommittee's continuing support in providing adequate resources to successfully carry out this essential mission.

## CONCLUSION

The Department has turned a corner on the CFATS program. We are moving forward strategically to address the challenges before us. As we implement CFATS, we will continue to work with stakeholders to get the job done of preventing terrorists from exploiting chemicals or chemical facilities. I firmly believe that CFATS is making the Nation more secure by reducing the risks associated with our Nation's chemical infrastructure and we are—along with our stakeholders—committed to its success.

Mr. MEEHAN. Thank you, Mr. Wulf.

The Chairman now recognizes Mr. Caldwell for his testimony.

**STATEMENT OF STEPHEN L. CALDWELL, DIRECTOR, HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE**

Mr. CALDWELL. Chairman Meehan, thank you. It is good to see you again today. Ms. Clarke, and also to Mr. Thompson and Mr. McCaul, who were here earlier, thank you for inviting GAO here today to talk about chemical security and, particularly, the issue of the outliers such as in West, Texas. I would like to also express my sympathies to the community in West, Texas for the disaster. My written testimony summarizes some of the earlier work we had done on CFATS. I now also try to focus on some of the issues that came out related to the issue specifically related to outliers.

Since we issued our 2013 report on April 5, just one week before the explosion in West, Texas, we have continued to monitor the situation, including some discussions with DHS about some of the steps they are taking, some of which Mr. Wulf has already outlined. But let me briefly summarize our April report, and then describe some of those key points related to the outliers. Regarding risk assessments by both DHS and GAO—have well-established criteria for risk assessments. Some aspects of those were not followed closely in developing the CFATS program.

This has already been mentioned. Maybe one of the key examples there is that vulnerability aspect of risk assessment is not applied until later in the process. In terms of the security plan reviews, we found that DHS had a cumbersome process and a backlog of unapproved plans. As mentioned, they have now streamlined that process to do this. But I think it will still take several years to finish those inspections on the facilities that have been tiered so far.

Regarding outreach to industry, we found that the CFATS program had increased its efforts for such outreach. Much of that outreach was focused on the major National trade associations, which will generally represent the larger chemical facilities. Nevertheless, the CFATS program could be more systematic in monitoring the ef-

fectiveness of some of that outreach. Now I would like to make three points based on the experience we had reviewing CFATS that may be contributed to the existence of the outlier issue that we are discussing here today.

I think my first point is that the CFATS regulatory regime in general is based on self-reporting. Facilities start that process by reporting their chemical holdings, reporting these to DHS for the risk assessment, and that is how it starts with the Top Screen assessment. For facilities such as one of these outliers does not report, basically nothing happens. Also related to the self-reporting, it is not until well along in the process—which could be months or even years—before DHS would actually inspect the facility to verify the information that has been reported to it.

To the extent that DHS prioritizes inspections for the highest-risk sites, these are not likely to be the kind of facilities such as those in West, Texas. The second point I would like to make is that the reliance on self-reporting that I just mentioned makes the outreach process even more important. So the explosion in West, Texas indicates a need for outreach to maybe the smaller associations to get to those smaller facilities and maybe even some direct outreach to such facilities. The explosion may also indicate a need for more coordination between DHS and other Federal agencies, as has been discussed here, to maybe help those other agencies; particularly some of the State or local agencies that may have information on some of these outlier facilities that are off the grid, at least in terms of CFATS' visibility.

My third point is that the initial risk assessment done by DHS to categorize the facilities into risk tiers is based very heavily on consequences, and very specifically on the number of casualties, which would tend to favor the more urban population-dense areas. So it is quite feasible that even if a facility, the facility in West, Texas did report its chemical holdings, and that if those quantities exceeded CFATS' reporting thresholds, that DHS would not necessarily have categorized it as a high-risk facility. Thus it would not have had to go through the process to develop a vulnerability assessment and security plan.

So in closing, certainly late-breaking news such as Mr. Wulf's update on today's new Executive Order, certainly provide positive steps toward improved Federal coordination and maybe expanded identification of outlier facilities. But I will be happy to respond to any questions now.

Thank you.

[The prepared statement of Mr. Caldwell follows:]

PREPARED STATEMENT OF STEPHEN L. CALDWELL

AUGUST 1, 2013

GAO HIGHLIGHTS

Highlights of GAO-13-801T, a testimony before the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, Committee on Homeland Security, House of Representatives.

*Why GAO Did This Study*

Facilities that produce, store, or use hazardous chemicals could be of interest to terrorists intent on using toxic chemicals to inflict mass casualties in the United States. As required by statute, DHS issued regulations that establish standards for

the security of high-risk chemical facilities. DHS established the CFATS program to assess the risk posed by these facilities and inspect them to ensure compliance with DHS standards. ISCD, which manages the program, places high-risk facilities in risk-based tiers and is to conduct inspections after it approves facility security plans. This statement summarizes the results of GAO's April 2013 report on the extent to which DHS: (1) Assigned chemical facilities to tiers and assessed its approach for doing so, (2) revised its process to review facility security plans, and (3) communicated and worked with owners and operators to improve security. GAO reviewed DHS reports and plans on risk assessments, security plan reviews, and facility outreach and interviewed DHS officials. GAO also received input from 11 trade associations representing chemical facilities, about ISCD outreach. The results of this input are not generalizable but provide insights.

*What GAO Recommends*

In its April 2013 report, GAO recommended that DHS enhance its risk assessment approach to incorporate all elements of risk, conduct a peer review after doing so, and explore opportunities to gather systematic feedback on facility outreach. DHS concurred with the recommendations and has actions underway to address them.

CRITICAL INFRASTRUCTURE PROTECTION.—DHS NEEDS TO IMPROVE ITS RISK ASSESSMENTS AND OUTREACH FOR CHEMICAL FACILITIES

*What GAO Found*

In April 2013, GAO reported that, since 2007, the Department of Homeland Security's (DHS) Infrastructure Security Compliance Division (ISCD) assigned about 3,500 high-risk chemical facilities to risk-based tiers under its Chemical Facility Anti-Terrorism Standards (CFATS) program, but it has not fully assessed its approach for doing so. The approach ISCD used to assess risk and make decisions to place facilities in final tiers does not consider all of the elements of consequence, threat, and vulnerability associated with a terrorist attack involving certain chemicals. For example, the risk assessment approach is based primarily on consequences arising from human casualties, but does not consider economic consequences, as called for by the National Infrastructure Protection Plan (NIPP) and the CFATS regulation, nor does it consider vulnerability, consistent with the NIPP. ISCD had taken some actions to examine how its risk assessment approach could be enhanced, including commissioning a panel of experts to assess the current approach and recommend improvements. In April 2013, GAO reported that ISCD needed to incorporate the results of these efforts to help ensure that the revised assessment approach includes all elements of risk. After ISCD has incorporated all elements of risk into its approach, an independent peer review would provide better assurance that ISCD can appropriately identify and tier chemical facilities, better inform CFATS planning and resource decisions, and provide the greatest return on investment consistent with the NIPP.

GAO also reported that DHS's ISCD has revised its process for reviewing facilities' site security plans—which are to be approved before ISCD performs compliance inspections. The past process was considered by ISCD to be difficult to implement and caused bottlenecks in approving plans. ISCD viewed its revised process to be an improvement because, among other things, teams of experts reviewed parts of the plans simultaneously rather than sequentially, as occurred in the past. ISCD intends to measure the time it takes to complete reviews, but will not be able to do so until the process matures. GAO estimated that it could take another 7 to 9 years before ISCD is able to complete reviews on the approximately 3,120 plans in its queue at the time of GAO's review. Thus, the CFATS regulatory regime, including compliance inspections, would likely be implemented in 8 to 10 years. ISCD officials said that they are exploring ways to expedite the process such as streamlining inspection requirements.

Furthermore, GAO reported that DHS's ISCD has also taken various actions to work with owners and operators, including increasing the number of visits to facilities to discuss enhancing security plans, but trade associations that responded to GAO's query had mixed views on the effectiveness of ISCD's outreach. ISCD solicits informal feedback from facility owners and operators on its efforts to communicate and work with them, but it does not have an approach for obtaining systematic feedback on its outreach activities. GAO found that ISCD's on-going efforts to develop a strategic communication plan may provide opportunities to explore how ISCD can obtain systematic feedback on these activities. A systematic approach for gathering feedback and measuring the results of its outreach efforts could help ISCD focus greater attention on targeting potential problems and areas needing improvement.

Chairman Meehan, Ranking Member Clarke, and Members of the subcommittee: I am pleased to be here today to discuss the findings from our April 2013 report on the Department of Homeland Security's (DHS) efforts to address the various challenges in implementing and managing the Chemical Facility Anti-Terrorism Standards (CFATS) program.<sup>1</sup> Chemicals held at facilities that use or store hazardous chemicals could be used to cause harm to surrounding populations during terrorist attacks, and could be stolen and used as chemical weapons, such as improvised explosive devices, or as the ingredients for making chemical weapons. Earlier this year, ammonium nitrate—one of the chemicals covered by the CFATS program—detonated during a fire at a fertilizer storage and distribution facility in West, Texas. The preliminary findings of an investigation by the U.S. Chemical Safety Board (CSB) showed that the explosion killed at least 14 people and injured more than 200 others, severely damaged or destroyed nearly 200 homes, 3 nearby schools, a nursing home, and an apartment complex.<sup>2</sup> According to CSB, the fire at the facility detonated about 30 tons of ammonium nitrate. As of July 2013, the cause of the fire had not been determined. This event serves as a tragic reminder of the extent to which chemicals covered by the CFATS program can pose a risk to surrounding populations.

The DHS appropriations act for fiscal year 2007<sup>3</sup> required DHS to issue regulations to establish risk-based performance standards for securing high-risk chemical facilities, among other things.<sup>4</sup> In 2007, DHS established the CFATS program to assess the risk posed by chemical facilities; place high-risk facilities in one of four risk-based tiers; require high-risk facilities to develop security plans; review these plans; and inspect the facilities to ensure compliance with regulatory requirements. DHS's National Protection and Programs Directorate (NPPD) is responsible for the CFATS program. Within NPPD, the Infrastructure Security Compliance Division (ISCD), a division of the Office of Infrastructure Protection (IP), manages the program.

In 2011, a leaked internal memorandum prompted some Members of Congress and chemical facility owners and operators to become concerned about ISCD's ability to implement and manage a regulatory regime under the CFATS program. This memorandum, prepared by the then-ISCD Director, raised concerns about the management of the program. The memorandum cited an array of challenges that ISCD had experienced implementing the CFATS program, including an inability to hire staff with the needed skills, an overly complicated security plan review process, and a compliance inspection process that had yet to be developed.

My testimony today summarizes the results of our April 2013 work on ISCD's efforts to address key mission issues that could affect the success of the program. Specifically, my testimony will address the extent to which DHS: (1) Assigned chemical facilities to risk-based tiers and assessed its approach for doing so, (2) revised the process used to review security plans, and (3) communicated and worked with facilities to help improve security. To conduct our work, we reviewed ISCD documents and data on tiered facilities and the approach used to determine a facility's risk; assessed ISCD's process for reviewing security plans and data on the number of plans reviewed, authorized, and approved from program inception through December 2012; and reviewed information on ISCD outreach activities. We also obtained the views of officials representing 11 trade associations with members regulated by CFATS on DHS efforts to work with facility owners and operators.<sup>5</sup> The information

<sup>1</sup>GAO, *Critical Infrastructure Protection: DHS Efforts to Assess Chemical Security Risk and Gather Feedback on Facility Outreach Can Be Strengthened*, GAO-13-353 (Washington, DC: April 5, 2013).

<sup>2</sup>Rafael Moure-Eraso, Chairperson, U.S. Chemical Safety Board, testimony before the Senate Committee on Environment and Public Works, 113th Congress 1st Sess., June 27, 2013. The CSB is an independent Federal agency charged with investigating industrial chemical accidents. The CSB board members are appointed by the President and confirmed by the Senate. According to the CSB website, CSB does not issue fines or citations, but makes recommendations to plants, regulatory agencies, industry organizations, and labor groups.

<sup>3</sup>Pub. L. No. 109-295, § 550, 120 Stat. 1355, 1388 (2006).

<sup>4</sup>According to DHS, a high-risk chemical facility is one that, in the discretion of the Secretary of Homeland Security, presents a high risk of significant adverse consequences for human life or health, National security, or critical economic assets if subjected to a terrorist attack, compromise, infiltration, or exploitation. 6 C.F.R. § 27.105.

<sup>5</sup>The 11 trade associations were among 15 that we contacted during our review and represent those that provided responses to our query about ISCD outreach activities. We selected the 15 trade associations because they are listed in the National Infrastructure Protection Plan (NIPP) as those with which DHS works on a regular basis on chemical security matters. According to the NIPP, working with these trade associations presents a more manageable number of contact

we obtained from association officials is not generalizable to the universe of chemical facilities covered by CFATS; however, it provides insights into DHS efforts to perform outreach and seek feedback on the implementation of the CFATS rule. We conducted this performance audit from October 2012 through April 2013 in accordance with generally accepted Government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. More detailed information on the scope and methodology of our published report can be found therein.

#### BACKGROUND

Section 550 of the DHS Appropriations Act for fiscal year 2007<sup>6</sup> requires DHS to issue regulations establishing risk-based performance standards for the security of facilities that the Secretary determines to present high levels of security risk, among other things.<sup>7</sup> The CFATS rule was published in April 2007,<sup>8</sup> and appendix A to the rule, published in November 2007, listed 322 chemicals of interest and the screening threshold quantities for each.<sup>9</sup> ISCD has direct responsibility for implementing DHS's CFATS rule, including assessing potential risks and identifying high-risk chemical facilities, promoting effective security planning, and ensuring that high-risk facilities meet applicable standards through site security plans approved by DHS. From fiscal years 2007 through 2012, DHS dedicated about \$442 million to the CFATS program. Appendix I describe the process for administering the CFATS program, as outlined in the rule.

ISCD uses a risk assessment approach to develop risk scores to assign chemical facilities to one of four final tiers. Facilities placed in one of these tiers (Tier 1, 2, 3, or 4) are considered to be high-risk, with Tier 1 facilities considered to be the highest risk. According to an ISCD document that describes how ISCD develops its CFATS risk score, the risk score is intended to be derived from estimates of consequence (the adverse effects of a successful attack), threat (the likelihood of an attack), and vulnerability (the likelihood of a successful attack, given an attempt). ISCD's risk assessment approach is composed of three models, each based on a particular security issue: (1) Release, (2) theft or diversion, and (3) sabotage, depending on the type of risk associated with the 322 chemicals.<sup>10</sup> Once ISCD estimates a risk score based on these models, it assigns the facility to a final tier.

ISCD HAS ASSIGNED THOUSANDS OF FACILITIES TO TIERS, BUT ISCD'S APPROACH TO RISK ASSESSMENT DID NOT REFLECT ALL ELEMENTS OF RISK

#### *ISCD Has Tiered Thousands of High-Risk Facilities*

In July 2007, ISCD began reviewing information submitted by the owners and operators of approximately 40,000 facilities. By January 2013, ISCD had designated about 4,400 of the 40,000 facilities as high-risk and thereby covered by the CFATS rule.<sup>11</sup> ISCD had assigned about 3,500 of those facilities to a final tier, of which

points through which DHS can coordinate activities with a large number of the asset owners and operators in the chemical sector.

<sup>6</sup>Pub. L. No. 109-295, § 550, 120 Stat. 1355, 1388 (2006).

<sup>7</sup>The CFATS rule establishes 18 risk-based performance standards that identify the areas for which a facility's security posture are to be examined, such as perimeter security, access control, and cybersecurity. To meet these standards, facilities are free to choose whatever security programs or processes they deem appropriate so long as DHS determines that the facilities achieve the requisite level of performance in each applicable standard.

<sup>8</sup>72 Fed. Reg. 17,688 (Apr. 9, 2007) (codified at 6 C.F.R. pt. 27).

<sup>9</sup>72 Fed. Reg. 65,396 (Nov. 20, 2007). According to DHS, CFATS not only covers facilities that manufacture chemicals but also covers facilities that store or use certain chemicals as part of their daily operations. This can include food-manufacturing facilities that use chemicals of interest in the manufacturing process, universities that use chemicals to do experiments, or warehouses that store ammonium nitrate, among others.

<sup>10</sup>For release, the model assumes that a terrorist will release the chemical of interest at the facility and then estimates the risk to the surrounding population. For theft or diversion, the model assumes that a terrorist will steal or have the chemical of interest diverted to him or herself and then estimates the risk of a terrorist attack using the chemical of interest in a way that causes the most harm at an unspecified off-site location. For sabotage, the model assumes that a terrorist will remove the chemical of interest from the facility and mix it with water, creating a toxic release at an unspecified off-site location, and then estimates the risk to a medium-sized U.S. city.

<sup>11</sup>According to ISCD officials, approximately 35,600 facilities were not considered high-risk because after preliminary evaluation, DHS concluded that they were considered not to be high-enough risk to be covered by the program; thus they were no longer covered by the rule.

about 90 percent were tiered because of the risk of theft or diversion. The remaining 10 percent were tiered because of the risk of release or the risk of sabotage.<sup>12</sup>

*ISCD's Risk Assessment Approach Did Not Consider All Elements of Risk*

In April, 2013, we reported that the tiering approach ISCD uses to assess risk and assign facilities to final tiers did not consider all of the elements of risk associated with a terrorist attack involving certain chemicals. According to the National Infrastructure Protection Plan (NIPP), which, among other things, establishes the framework for managing risk among the Nation's critical infrastructure, risk is a function of three components—consequence, threat, and vulnerability—and a risk assessment approach must assess each component for every defined risk scenario. Furthermore, the CFATS rule calls for ISCD to review consequence, threat, and vulnerability information in determining a facility's final tier. However, ISCD's risk assessment approach did not fully consider all of the core criteria or components of a risk assessment, as specified by the NIPP, nor did it comport with parts of the CFATS rule.

- *Consequence.*—The NIPP states that at a minimum, consequences should focus on the two most fundamental components—human consequences and the most relevant direct economic consequences. The CFATS rule states that chemical facilities covered by the rule are those that present a high risk of significant adverse consequences for human life or health, or critical economic assets, among other things, if subjected to terrorist attack, compromise, infiltration, or exploitation.<sup>13</sup> Our report showed that ISCD's risk assessment approach was limited to focusing on one component of consequences—human casualties associated with a terrorist attack involving a chemical of interest—and did not consider consequences associated with economic criticality. ISCD officials said that the economic consequences part of their risk-tiering approach will require additional work before it is ready to be introduced. In September 2012, ISCD officials said they engaged Sandia National Laboratories to examine how ISCD could gather needed information and determine the risk associated with economic impact, but this effort is in its early stages.
- *Threat.*—ISCD's risk assessment approach was not consistent with the NIPP because it did not consider threat for the majority of regulated facilities. According to the NIPP, risk assessments should estimate threat as the likelihood that the adversary would attempt a given attack method against the target. The CFATS rule requires that, as part of assessing site vulnerability, facilities conduct a threat assessment, which is to include a description of the internal, external, and internally-assisted threats facing the facility and that ISCD review the site vulnerability assessment as part of the final determination of a facility's tier.<sup>14</sup> Our report showed that: (1) ISCD was inconsistent in how it assessed threat using the different models because while it considers threat for the 10 percent of facilities tiered because of the risk of release or sabotage, it did not consider threat for the approximately 90 percent of facilities tiered because of the risk of theft or diversion, and (2) ISCD did not use current threat data for the 10 percent of facilities tiered because of the risk of release or sabotage. ISCD officials said that they were considering reexamining their approach and exploring how they could use more current threat data for the 10 percent of facilities tiered because of the risk of release or sabotage.
- *Vulnerability.*—ISCD's approach was also not consistent with the NIPP because it did not consider vulnerability when developing risk scores. According to the NIPP, risk assessments should identify vulnerabilities, describe all protective measures, and estimate the likelihood of an adversary's success for each attack scenario. Similar to the NIPP, the CFATS rule calls for ISCD to review facilities' security vulnerability assessments as part of its tiering process.<sup>15</sup> This assessment is to include the identification of potential security vulnerabilities and the identification of existing countermeasures and their level of effectiveness in both reducing identified vulnerabilities and meeting the aforementioned risk-based performance standards. We reported that the security vulnerability assessment contains numerous questions aimed at assessing vulnerability and security measures in place but the information was not used to assign facilities to risk-based tiers. ISCD officials said they do not use the information because it is "self-reported" by facilities and they have observed that it tends to over-

<sup>12</sup> According to ISCD officials, depending on the chemicals on-site, a facility can be final-tiered for more than one security issue.

<sup>13</sup> 6 C.F.R. §§ 27.105, .205.

<sup>14</sup> 6 C.F.R. §§ 27.215, .220.

<sup>15</sup> 6 C.F.R. § 27.220.

state or understate vulnerability. Thus, ISCD's risk assessment approach treats every facility as equally vulnerable to a terrorist attack regardless of location and on-site security. ISCD officials told us that they consider facility vulnerability during the latter stages of the CFATS regulatory process, particularly with regard to the development and approval of the facility site security plan.

*ISCD Had Begun to Take Actions to Examine How Its Approach Can Be Enhanced*

In April 2013, we reported that ISCD had begun to take some actions to examine how its risk assessment approach can be enhanced. For example, ISCD had commissioned a panel of subject matter experts to examine the strengths and weaknesses of its risk assessment approach. We stated that ISCD appeared to be moving in the right direction, but would need to incorporate the various results of these efforts to help it ensure that the revised risk assessment approach includes all of the elements of risk. We further stated that once ISCD develops a more complete approach for assessing risk, it would then be better-positioned to commission an independent peer review. In other past work, we have found that peer reviews are a best practice in risk management<sup>16</sup> and that independent expert review panels can provide objective reviews of complex issues.<sup>17</sup> As we previously stated in these reports, independent peer reviews cannot ensure the success of a risk assessment approach, but they can increase the probability of success by improving the technical quality of projects and the credibility of the decision-making process.<sup>18</sup> In our April 2013 report, we recommended that DHS enhance its risk assessment approach to incorporate all elements of risk, and conduct a peer review after doing so. DHS concurred with our recommendations and stated that it had efforts under way to address them.

ISCD HAD REVISED ITS SECURITY PLAN REVIEW PROCESS, BUT PLAN APPROVALS COULD TAKE YEARS

*ISCD Revised Its Security Plan Review Process Because of ISCD Managers' Concerns, and Plans to Measure Related Improvements Moving Forward*

In April 2013 we reported that ISCD had made various revisions to its security plan review process to address concerns expressed by ISCD managers about slow review times. Under the CFATS rule, once a facility is assigned a final tier, it is to submit a site security plan to describe security measures to be taken and how it plans to address applicable risk-based performance standards.<sup>19</sup> In November 2011, ISCD acknowledged that the security plan review process it was using was overly complicated and created bottlenecks and officials stated that revising the process was a top program priority.<sup>20</sup> Shortly thereafter, ISCD developed an interim review process. ISCD officials subsequently told us that the interim process was unsustainable, labor-intensive, and time-consuming because individual reviewers were sequentially looking at pieces of thousands of plans that funneled to one quality reviewer.<sup>21</sup> In July 2012, ISCD began using a newly-revised process, which en-

<sup>16</sup> See GAO, *Coast Guard: Security Risk Model Meets DHS Criteria, but More Training Could Enhance Its Use for Managing Programs and Operations*, GAO-12-14 (Washington, DC: Nov. 17, 2011). Peer reviews can identify areas for improvement and can facilitate sharing best practices.

<sup>17</sup> See GAO, *Aviation Security: Efforts to Validate TSA's Passenger Screening Behavior Detection Program Underway, but Opportunities Exist to Strengthen Validation and Address Operational Challenges*, GAO-10-763 (Washington, DC: May 20, 2011).

<sup>18</sup> See GAO, *Coast Guard: Security Risk Model Meets DHS Criteria, but More Training Could Enhance Its Use for Managing Programs and Operations*, GAO-12-14 (Washington, DC: November 17, 2011) and GAO, *Homeland Security: Summary of Challenges Faced in Targeting Ocean-going Cargo Containers for Inspection*, GAO-04-557T (Washington, DC: Mar. 31, 2004).

<sup>19</sup> 6 C.F.R. § 27.210(a)(3), .225.

<sup>20</sup> The specific security measures and practices discussed in DHS's guidelines state that they are neither mandatory nor necessarily the "preferred solution" for complying with the risk-based performance standards. Rather, according to DHS, they are examples of measures and practices that a facility may choose to consider as part of its overall strategy to address the standards. High-risk facility owners and operators have the ability to choose and implement other measures to meet the risk-based performance standards based on circumstances, security issues and risks, and other factors, so long as DHS determines that the suite of measures implemented achieves the levels of performance established by the standards.

<sup>21</sup> Using the interim review process, ISCD officials estimated that they authorized about 60 security plans and notified the facilities that inspectors would schedule visits to determine if the security measures described in the plan were in place.

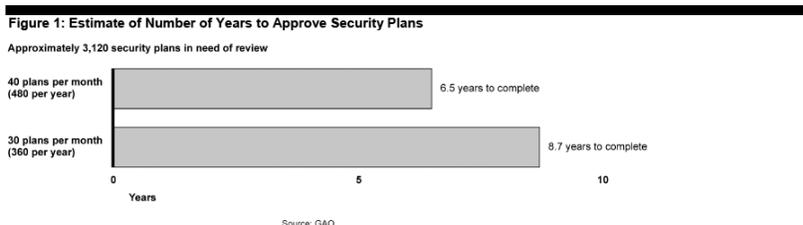
tailed using contractors, teams of ISCD employees (e.g., physical, cyber, and chemical specialists), and ISCD field inspectors to review plans simultaneously.<sup>22</sup>

ISCD officials said that they believed the revised process was a “quantum leap” forward, but they did not capture data that would enable them to measure how, if at all, the revised process is more efficient (i.e., less time-consuming) than the former processes. Moving forward, ISCD officials said they intended to measure the time it takes to complete parts of the revised site security plan review process and had recently implemented a plan to measure various aspects of the process. We reported that collecting data to measure performance about various aspects of this process is a step in the right direction, but it may take time before the process has matured to the point where ISCD is able to establish baselines and assess progress.

*Security Plan Reviews Could Take Years to Complete, but ISCD Is Examining How It Can Accelerate the Review Process*

We also reported in April 2013 that even with the most recent revisions to the review process, it could take years to review the plans of thousands of facilities that had already been assigned a final tier. ISCD hoped to address this by examining how it could further accelerate the review process. According to ISCD officials, between July 2012 and December 2012, ISCD had approved 18 security plans, with conditions.<sup>23</sup> ISCD officials told us that they anticipate that the revised security plan review process could enable ISCD to approve security plans at a rate of about 30 to 40 a month.

Using ISCD’s estimated approval rate of 30 to 40 plans a month, our April 2013 report showed that it could take anywhere from 7 to 9 years to complete reviews and approvals for the approximately 3,120 plans<sup>24</sup> submitted by facilities that had been final-tiered that ISCD had not yet begun to review.<sup>25</sup> Figure 1 shows our April 2013 estimate of the number of years it could take to approve all of the security plans for the approximately 3,120 facilities that, as of January 2013, had been final-tiered, assuming an approval rate of 30 to 40 plans a month.



It is important to note that our 7- to 9-year estimate did not include other activities central to the CFATS mission, either related to or aside from the security plan review process. In addition, our estimate did not include developing and implementing the compliance inspection process, which occurs after security plans are approved and is intended to ensure that facilities covered by the CFATS rule are compliant with the rule, within the context of the 18 performance standards. ISCD officials estimated that the first compliance inspections would commence in 2013, which means that the CFATS regulatory regime would likely be fully implemented for currently tiered facilities (to include compliance inspections) in 8 to 10 years. ISCD officials stated that they were actively exploring ways to expedite the speed with which the backlog of security plans could be cleared, such as reprioritizing resources and streamlining inspection and review requirements.

<sup>22</sup> According to ISCD officials, this newly-revised process, like its predecessor, entailed a “holistic” review whereby individual reviewers were to consider how layers of security measures met the intent of each of the CFATS performance standards.

<sup>23</sup> All authorization letters include a condition noting that ISCD has not fully approved the personnel surety risk-based performance standard of plans because ISCD has not yet determined what the facilities are to do to meet all aspects of personnel surety. The personal surety risk-based performance standard requires that regulated chemical facilities implement measures designed to identify people with terrorist ties, among other things.

<sup>24</sup> ISCD data showed that 380 security plans had started the review process and were at different phases of review.

<sup>25</sup> ISCD officials stated that the approval rate could reach 50 plans a month in the third quarter of fiscal year 2013, as the review process becomes more efficient. We did not calculate the time to complete reviews of the approximately 3,120 plans that had been final-tiered using ISCD’s estimate of 50 per month because of uncertainty over when and if ISCD would reach this goal during the third quarter of fiscal year 2013.

ISCD HAS INCREASED ITS EFFORTS TO COMMUNICATE AND WORK WITH FACILITIES AND MAY HAVE AN OPPORTUNITY TO SYSTEMATICALLY GATHER FEEDBACK ON ITS OUTREACH EFFORTS

*ISCD's External Communication Efforts With Facilities Have Increased Since 2007, but Selected Trade Associations Had Mixed Views About ISCD Efforts*

Our April 2013 report stated that ISCD's efforts to communicate and work with owners and operators to help them enhance security had increased since the CFATS program's inception in 2007. ISCD had taken various actions to communicate with facility owners and operators and various stakeholders—including officials representing State and local governments, private industry, and trade associations—to increase awareness about CFATS. For example, among other things, ISCD has increased the number of visits to facilities to discuss enhancing security plans.<sup>26</sup> However, trade associations' responses to questions we sent them about the program showed mixed views about ISCD's efforts to communicate with owners and operators through ISCD's outreach efforts. For example, 3 of the 11 trade associations that responded to our questions indicated that ISCD's outreach program was effective in general, 3 reported that the effectiveness of ISCD's outreach was mixed, 4 reported that ISCD's outreach was not effective, and 1 respondent reported that he did not know.<sup>27</sup>

*ISCD Sought Informal Feedback, but Did Not Solicit Systematic Feedback on the Effectiveness of Its Outreach Efforts*

Our report showed that ISCD sought informal feedback on its outreach efforts but did not systematically solicit feedback to assess the effectiveness of outreach activities,<sup>28</sup> and it did not have a mechanism to measure the effectiveness of these activities. Trade association officials reported that in general ISCD seeks informal feedback on its outreach efforts and that members provide feedback to ISCD. According to ISCD officials, feedback had been solicited from the regulated community generally on an informal basis, but inspectors and other staff involved in ISCD's outreach activities were not required to solicit feedback during meetings, presentations, and assistance visits on the effectiveness of the outreach. ISCD, as part of its annual operating plan, has established a priority for fiscal year 2013 to develop a strategic communications plan intended to address external communication needs including industry outreach, which may provide an opportunity to explore how ISCD can obtain systematic feedback on these activities. We concluded that a systematic approach for gathering feedback and measuring the results of its outreach efforts could help ISCD focus greater attention on targeting potential problems and areas needing improvement. We recommended that DHS explore opportunities to gather systematic feedback on facility outreach. DHS agreed and stated that it agreed with our recommendation and identified actions under way to address it.

Chairman Meehan, Ranking Member Clarke, and Members of the subcommittee, this completes my prepared statement. I would be happy to respond to any questions you may have at this time.

APPENDIX I: DEPARTMENT OF HOMELAND SECURITY'S (DHS) PROCESS FOR ADMINISTERING THE CHEMICAL FACILITY ANTI-TERRORISM STANDARDS (CFATS) PROGRAM

This appendix discusses DHS's process for administering the CFATS program. DHS's CFATS rule outlines a specific process for administering the program. Any chemical facility that possesses any of the 322 chemicals in the quantities that meet or exceed the threshold quantity outlined in Appendix A of the rule is required to use DHS's Chemical Security Assessment Tool (CSAT)—a web-based application through which owners and operators of chemical facilities provide information about the facility.<sup>29</sup> Once a facility is registered in CSAT, owners and operators are to complete the CSAT Top Screen—which is the initial screening tool or document

<sup>26</sup> Among other outreach activities, ISCD manages the Chemical Security website, which includes a searchable database to answer questions about the CFATS program. ISCD also manages a Help Desk (call service center), which is operated on a contract basis by the Oak Ridge National Laboratory.

<sup>27</sup> We originally sent questions to 15 trade associations representing various members of the chemical industry and received responses from 11 of the 15. The trade associations that responded provided responses that represent, to their knowledge, the general view of their members. In some instances, the associations provided responses directly from member companies.

<sup>28</sup> ISCD solicits voluntary feedback via a survey provided to Help Desk users on their experience with call center representatives. The survey asks: Did the service meet expectations, were questions answered in a timely manner, and was the call service representative friendly and knowledgeable?

<sup>29</sup> 6 C.F.R. § 27.200(b).

whereby the facility is to provide DHS various data, including the name and location of the facility and the chemicals and their quantities at the site.<sup>30</sup> DHS is to analyze this information using its risk assessment approach, which is discussed in more detail below, to initially determine whether the facility is high-risk.<sup>31</sup> If so, DHS is to notify the facility of its preliminary placement in one of four risk-based tiers—Tier 1, 2, 3, or 4.<sup>32</sup> Facilities preliminarily placed in any one of these tiers are considered to be high-risk, with Tier 1 facilities considered to be the highest risk. Facilities that DHS initially determines to be high-risk are required to then complete the CSAT security vulnerability assessment, which includes the identification of potential critical assets at the facility and a related vulnerability analysis.<sup>33</sup> DHS is to review the security vulnerability assessment and notify the facility of DHS's final determination as to whether or not the facility is considered high-risk, and if the facility is determined to be a high-risk facility, about its final placement in one of the four tiers.<sup>34</sup>

Once assigned a final tier, the facility is required to use CSAT to submit a site security plan or participate in an alternative security program in lieu of a site security plan.<sup>35</sup> The security plan is to describe the security measures to be taken to address the vulnerabilities identified in the vulnerability assessment, and identify and describe how security measures selected by the facility are to address the applicable risk-based performance standards.<sup>36</sup> DHS then is to conduct a preliminary review of the security plan to determine whether it meets the regulatory requirements. If these requirements appear to be satisfied, DHS is to issue a letter of authorization for the facility's plan. DHS then is to conduct an authorization inspection of the facility and subsequently determine whether to approve the security plan. If DHS determines that the plan does not satisfy CFATS requirements, DHS then notifies the facility of any deficiencies and the facility must submit a revised plan correcting them.<sup>37</sup> If the facility fails to correct the deficiencies, DHS may disapprove the plan.<sup>38</sup> Following approval, DHS may conduct further inspections to determine if the facility is in compliance with its approved security plan.<sup>39</sup> As of April 2013, DHS had not conducted any compliance inspections. Figure 2 illustrates the CFATS regulatory process.

---

<sup>30</sup> For example, under the CFATS rule, a facility that possesses butane at a quantity equal to or exceeding 10,000 pounds must submit information to DHS because the substance is considered flammable if subject to release. A facility possessing another chemical, oxygen difluoride, would have to submit information to DHS if it possessed a quantity equal to or exceeding 15 pounds of the substance, which, according to the rule, is considered vulnerable to theft for use as a weapon of mass effect.

<sup>31</sup> 6 C.F.R. § 27.205(a).

<sup>32</sup> 6 C.F.R. § 27.220(a), (c).

<sup>33</sup> 6 C.F.R. § 27.215. Preliminary Tier 4 facilities also have the option of submitting an alternate security program in lieu of a security vulnerability assessment. 6 C.F.R. § 27.235(a)(1).

<sup>34</sup> 6 C.F.R. § 27.220(b), (c).

<sup>35</sup> An Alternative Security Program (ASP) is a third-party, facility, or industry organization's security program that has been determined to meet the requirements of, and provides for an equivalent level of security to that established by the CFATS regulation. CFATS allows regulated chemical facilities to submit an ASP in lieu of a Site Security Plan. 6 C.F.R. § 27.235.

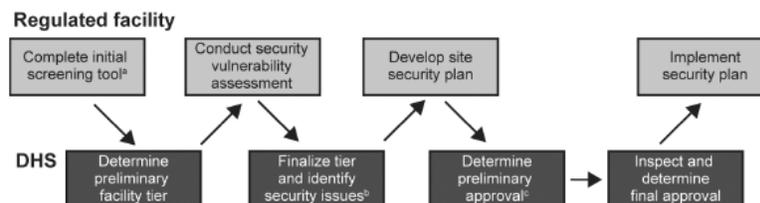
<sup>36</sup> 6 C.F.R. § 27.225.

<sup>37</sup> According to Infrastructure Security Compliance Division (ISCD) officials, site security plans can also be sent back to facilities to be revised for any number of reasons. For example, during the preliminary review, if ISCD finds that a plan does not contain all the requisite data needed to meet regulatory requirements, ISCD can return the plan to the facility for more information.

<sup>38</sup> 6 C.F.R. § 27.245.

<sup>39</sup> 6 C.F.R. § 27.250.

**Figure 2: Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) Process**



Source: GAO analysis of DHS CFATS regulatory process.

<sup>a</sup>Facilities are to submit an initial screening tool that provides basic information about the facilities and the chemicals they possess.

<sup>b</sup>This step includes determining if a facility is high risk, and if so, DHS assigns a tier and identifies security issues

<sup>c</sup>At this stage, if requirements are satisfied, DHS issues a letter of authorization for the facility's plan.

Mr. MEEHAN. I want to thank you, Mr. Caldwell. Before we take a moment to engage with our panelists, I want to recognize the Ranking Member for her opening statement.

Ms. CLARKE. Let me thank you for your indulgence this morning, Mr. Chairman, and thank you for convening this very important hearing. There are many central questions to be answered today, and I want to thank the Ranking Member, Mr. Thompson, as well as Chairman McCaul for being here earlier this morning and for their interest today.

I have heard it described that 2 hours after a fertilizer distribution center exploded in the small community of West, Texas around sunset on Wednesday, April 17 much of the town, 18 miles north of Waco, resembled a war zone. Some people were missing, hundreds more were rushed off to area hospitals, homes burnt, others threatened to collapse. The Texas Department of Public Safety, spokesman D.L. Wilson, offered this grim but accurate assessment of the devastation many saw via TV. "Massive, just like Iraq, just like the Murrah Building in Oklahoma City."

The explosion destroyed an apartment complex and a nursing home that sat within a few hundred yards. A nearby unoccupied elementary school was severely damaged. Walls and roofs of homes and businesses within a half-mile of the plant cracked, and windows even further. There were no Federal setback guidelines or requirements to separate extremely hazardous substances from surrounding populations, such as schools, houses, nursing homes, apartments, and businesses based on a worst-case scenario. I have been told that at least 800,000 people across the United States live near hundreds of sites that store large amounts of potentially explosive ammonium nitrate.

Hundreds of schools, hospitals, and churches, as well as hundreds of thousands of households also sit near these sites. Nationally, at least 12 ammonium nitrate facilities have 10,000 or more people living within a mile, according to a Reuters analysis of hazardous chemical storage data maintained by 29 States. Complaints about the DHS CFATS program have recently focused on the fact

that facilities that should be reporting to CFATS are not being contacted about their required reporting duty under the program. The program has also come under scrutiny about the slow pace of inspecting and approving site security plans, or SSPs.

A faster pace in the CFATS inspection and review process could have produced more tangible results in reducing vulnerabilities and consequences of a successful terrorist attack on its facilities. It could have also helped—excuse me, it could have also been a help for community emergency preparation for all hazardous material—excuse me, events, such as the apparent industrial accident we are examining today. It seems to me they are all intertwined.

However, the current rush to approve SSPs in today's CFATS program may not build confidence among the public. When airline passengers face a flight delay they are frustrated and they complain. But they also don't want the flight rushed onto the runway at the expense of safety. The tragic events in West, Texas may bring into sharper focus the issue of how we as a country protect our citizens from not only the threat of terrorist attack on facilities that store explosive chemicals, but how we identify and classify these types of facilities to begin with.

Will these methods be enough to protect hundreds of thousands of people living within chemical facility vulnerability zones? Will it help local emergency planning committees prepare for events like the one in West, Texas. As one of our witnesses has testified today—and it is just common sense that an engaged and informed public is a vigilant public. Citizens, first responders, medical professionals, plant workers, and local officials will need to be better informed about local chemical safety and safety information in order to be prepared for all types of emergencies.

We do know that West Fertilizer did report the possession and storage of ammonium nitrate to the State Emergency Response Commission, or SERC. This was done under the Emergency Planning and Community Right-to-Know Act, or EPCRA. The SERC in Texas apparently maintains Tier 2 reports in electronic format, which is important to remember. It is critical that we continue to examine whether the Department of Homeland Security has established a norm, or a protocol if you will, that compares their list of CFATS Top Screen facilities to the Emergency Planning and Community Right-to-Know reports held electronically by each State, a relatively simple procedure that might have helped identify facilities that failed, like West, to conduct a Top Screen under CFATS.

It would seem to me that DHS should have a memorandum of understanding with each State for routine electronic access to EPCRA data in that State. But I look forward for answers, I am looking for answers and someone on the panels who will be able to tell us that today. These questions, at the core of today's hearing, naturally produce other questions like what technological or business practice changes have enabled operating facilities that have submitted Top Screens to tier out of CFATS.

I have been told that there are apparently some 3,000 formerly-tiered facilities which are now considered less-attractive terrorist targets and no longer of interest to DHS. Is there a specific development, technological or procedural, that encourages facilities to tier out? I would like to learn more about that. Another feature

that I have learned about is that West Fertilizer seemingly lacked adequate liability insurance. While not a requirement in the CFATS program, companies that hold extremely hazardous substances and maintain liability insurance commensurate with a worst-case scenario would provide an incentive for companies to use methods that reduce potential consequences.

This is just standard business practice, nothing earth-shattering. Another critical infrastructure piece involved in this tragic event is rail transportation. West Fertilizer apparently received shipments of ammonium nitrate by rail. Under common carrier obligations, do shippers of extremely hazardous substances, or rail carriers, routinely carry enough insurance to cover liability associated with a worst-case release or explosion? I would be interested to find out. Federal, State, and local interagency planning and cooperation may be the key to finding solutions to prevent events like West, Texas from happening, whatever the cost.

DHS must step up to the plate on security and find ways to identify outliers and retool efforts to assess risk-based vulnerabilities. Other agencies like EPA already have authorities under the Clean Air Act to incorporate methods to reduce consequences into their risk management plans. I understand the White House Chemical Security Interagency group is working on this issue. It will be helpful to find out what the President's Executive Order released this morning will actually do.

So I thank you, Mr. Chairman, for holding this very critical hearing, and I look forward to the rest of this morning's testimony. I would like to just mention that, speaking on behalf of the Members on this side of the aisle, we are extremely pleased to see that the President's Executive Order on chemical facility security has been issued. It is especially timely for this hearing. Mr. Thompson wrote the President soon after the tragedy at West, Texas, calling for him to look at improving chemical security.

If such an effort is established, it should include members with background in Government information policy on hazardous chemicals. This is always overlooked. Also, it should include members from labor, environmental, community, and environmental justice communities. So we look forward to learning these details. Mr. Chairman, I also have a submission for the record, and I would like to ask unanimous consent to have several of these pieces submitted for the record.

Mr. MEEHAN. I have been given a copy of the materials that are asked to be submitted for the record, have reviewed them, and so ordered. Unanimous consent.

[The information follows:]

STATEMENT OF DR. M. SAM MANNAN AND MR. JOHN S. BRESLAND, MARY KAY O'CONNOR PROCESS SAFETY CENTER, ARTIE MCFERRIN DEPARTMENT OF CHEMICAL ENGINEERING, TEXAS A&M UNIVERSITY SYSTEM

AUGUST 1, 2013

INTRODUCTION

Dr. M. Sam Mannan holds a BS, MS, and PhD in chemical engineering. He is a registered professional engineer in the States of Louisiana and Texas and a certified safety professional. He is a fellow of the American Institute of Chemical Engineers and a member of the American Society of Safety Engineers, the International

Institute of Ammonia Refrigeration, and the National Fire Protection Association. He is director of the Mary Kay O'Connor Process Safety Center, holder of the T. Michael O'Connor Chair I in Chemical Engineering, and Regents Professor of Chemical Engineering at Texas A&M University. The Center seeks to develop safer processes, equipment, procedures, and management strategies that will minimize losses in the process industry. His area of expertise within the chemical engineering discipline is process safety. He teaches process safety engineering both at the undergraduate and graduate level. He also teaches continuing education courses on process safety and other specialty process safety courses in the United States and overseas. His research and practice is primarily in the area of process safety and related subjects. Mr. John S. Bresland graduated in chemistry from Londonderry Technical College, Northern Ireland and Salford University, England and has extensive experience in the Federal Government and the chemical industry, working for the United States Chemical Safety Board (as chairman/CEO and board member), Honeywell International Inc. and as a staff consultant for the Center for Chemical Process Safety. He is currently a research fellow at the Mary Kay O'Connor Process Safety Center. His technical and management expertise includes chemicals manufacturing, safety and environmental programs, re-engineering and facility design and construction. He has strong managerial track record of facilitating cross-functional teamwork and fostering positive community relationships. He also has an acknowledged reputation for opening doors of communication among diverse stakeholders. The opinions presented in this document represent the personal positions of Dr. Mannan and Mr. Bresland on these issues.

#### BACKGROUND

Chemicals play a key role in today's high-tech world. The chemical industry is linked to every technologically-advanced industry. Only a handful of the goods and services we enjoy on a daily basis would exist without essential chemical products. Chemicals are also a big part of the economy in Texas and many other States. For example, the Texas chemical industry alone provides more than 100,000 jobs, and the State's chemical products are shipped world-wide at a value of more than \$20 billion dollars annually.

But the use of chemicals is a two-edged sword. Safe use creates a healthier economy and a higher standard of living. Unsafe use threatens our lives, our businesses, and our environment. As the industry's sophistication increases, so does the need to work and live safely with chemicals. In order to accomplish this, many stakeholders must work together diligently and with persistent determination. A common theme that also must be present is competence at all levels with regard to knowledge and execution of responsibilities.

Today's hearings, "West Fertilizer, Off the Grid: The Problem of Unidentified Chemical Facilities," are an appropriate Congressional response to the recent events in West, Texas. This event in West, Texas is tragic and our heart goes out to the affected people, neighborhoods and cities, and the local authorities. We must as a Nation and individuals explore and investigate such incidents and do our best to prevent the recurrence of such incidents. At the Center we had one Ph.D. researcher working on ammonium nitrate before the West, Texas incident happened, and since the West, Texas incident, we have had a team of five Ph.D. researchers researching this whole issue and associated topics. Mr. Bresland also led this team of five Ph.D. researchers on a visit to the incident site in West, Texas. This testimony and opinions are derived from looking at the aftermath of the West incident. It must also be stated that much is still unknown about the incident and as the root causes are identified and more definitive information becomes available, some of these conclusions and opinions may have to be revisited.

#### *Description of the West, Texas, Incident*

On Wednesday, April 18, 2013, an initial fire exacerbated into an explosion at West Fertilizer in West, Texas, causing the death of 15 people and injuring more than 200. The blast wave completely destroyed the facility and also caused varying levels of damage to many buildings, businesses, and homes at significantly long distances from the plant. More than 50 homes, a 50-unit apartment building, a nursing home, and four schools were in the impact zone. Of the 15 people who died, 12 were emergency responders, who were responding to the initial fire and trying to control and extinguish the fire when the catastrophic explosion occurred.

#### ALTERNATIVES FOR IDENTIFYING THE REGULATED COMMUNITY

Following the West, Texas, incident, it has come to light that the facility was covered by the Department of Homeland Security's Chemical Facility Anti-Terrorism

Standards (CFATS). However, the facility did not file any compliance documents with DHS, neither was the facility inspected by DHS. Thus the premise of this hearing, i.e., how can Federal agencies identify all the facilities covered by a specific regulation. While we pose a broad general question, we have primarily based our findings on how the West facility may have been identified for Federal oversight prior to the incident.

The West Fertilizer facility had a capacity to store 110,000 lbs of ammonia and 540,000 lbs of ammonium nitrate (Tier II reporting data from 2012). All Federal agencies with responsibility to regulate safety/risk and associated issues should be required to conduct a primary screening to determine their regulatory landscape. We believe that a screening process can be conducted where information from different databases and sources can be mined to develop a comprehensive list of regulated facilities. We outline below a step-by-step approach that would have identified the West facility.

#### *1. North American Industry Classification System (NAICS)*

The North American Industry Classification System (NAICS) is a system of grouping establishments into industries based on their production processes. The U.S. Census Bureau assigns each establishment one NAICS code based on its primary activity (the activity that generates the most revenue for the establishment). Information about the type of activity of the establishment is typically requested when a company applies for an Internal Revenue Service Employer Identification Number (EIN). A review of the NAICS databases would immediately flag the West facility as NAICS code 424510 (Grain and Field Bean Merchant Wholesalers). This determination alone would not be enough to determine coverage by CFATS but would at least indicate a need for further probing. Details about the NAICS system are given in Appendix A.

#### *2. Tier II reports*

Any facility covered by Emergency Planning and Community Right-to-Know Act (EPCRA) requirements must submit an Emergency and Hazardous Chemical Inventory Form to the Local Emergency Planning Committee (LEPC), the State Emergency Response Commission (SERC), and the local fire department. Any facility required under OSHA regulations to maintain material safety data sheets (MSDS) for hazardous chemicals stored or used in the work place with chemicals in quantities that equal or exceed a certain thresholds must submit annually an emergency and hazardous chemical inventory form to the Local Emergency Planning Committee (LEPC), the State Emergency Response Commission (SERC) and the local fire department. Facilities provide either a Tier I or Tier II form. Most States, such as Texas, require the Tier II form. Tier II forms require basic facility identification information, such as name, address, Dun & Bradstreet number, NAICS code, employee contact information (for emergencies and non-emergencies) and information about chemicals stored or used at the facility. The chemical information includes chemical name and maximum amount stored. It should be noted that the West, Texas, facility was exempted from filing the Tier II reports. However, a search of the Texas Tier II data indicates that the facility did file a Tier II report in which they indicated the storage of ammonium nitrate at quantities of 270 tons. Thus, given the information from NAICS data (described in item 1 above), a query of Texas Tier II reports would have immediately identified the West facility as covered by the CFATS regulation. This would be enough for DHS to communicate with the facility and request compliance submissions.

Detailed information about the Tier II reporting is given in Appendix B.

#### *3. Office of the Texas State Chemist (OTSC)—Texas Feed and Fertilizer Control Service*

According to the Fertilizer Control Act—Texas Agriculture Code (1981), Chapter 63, “a person may not manufacture or distribute a commercial fertilizer in this state without a valid current permit issued by the Service and a person may not manufacture or distribute a commercial fertilizer in this state, other than customer-formula fertilizer, unless the person first registers the fertilizer with the Service.” According to this regulation, an application for a registration by any person that owns an ammonium nitrate facility must be submitted on a form, which includes information about the amount of ammonium nitrate. Again, a query of Records from the OTSC could be used to identify facilities potentially storing Ammonium Nitrate.

Detailed information about the OTSC regulation and program requirements is given in Appendix C.

#### 4. Other Sources of Information

The Agricultural Retailers Association (ARA) is a non-profit trade association representing the interests of retailers on legislative and regulatory issues Nation-wide. The Fertilizer Institute (TFI) is the leading voice for the Nation's fertilizer industry, including producers, importers, wholesalers, and retailers. Fertilizer companies can become members of ARA and/or TFI through a registration process. Once a company becomes a member of ARA, it can get benefits such as technical assistance, ARA Retailer Fact\$ Newsletter, member alerts, unlimited access to valuable website features and annual conference and exposition. It is not known if the West facility was a member of either association. While the list of members is not available on-line, it is conceivable that the DHS could develop outreach programs in conjunction with ARA and TFI to inform the potentially-regulated community about CFATS regulation and associated compliance requirements.

Most municipalities require a Certificate of Occupancy (CO) for any building and/or facility. The CO is a document issued by Building Inspection, which permits land, and/or buildings to be used for the purpose(s) listed on the CO. COs are required prior to occupancy of a building or land. Again, it is conceivable that the DHS could develop outreach programs in conjunction with cities and local government to inform the potentially-regulated community about CFATS regulation and associated compliance requirements. Appendix D provides more details about occupancy permit requirements.

#### CONCLUSIONS AND RECOMMENDATIONS

The incident at West, Texas, is a tragedy that could and should have been avoided. However, this requires continued and committed efforts by all stakeholders. A major part of getting this accomplished is identifying the regulated community. We have presented above a case study of how the West facility could have been identified for coverage by the CFATS regulation. We believe a similar case can be made for any chemical and any regulation, i.e., a systematic approach requiring minimal effort can be used to identify covered facilities, develop communication, and provide outreach. Our conclusions and recommendations are primarily focused on that aspect.

- (1) Based on the case study presented here, we strongly urge the U.S. Congress to mandate a study to determine the best possible way for mining currently-available sources of information to develop a methodology for identifying the regulated community for any given regulation.
- (2) Notwithstanding the study recommended in: (1) Above, all Federal agencies with responsibility to regulate safety/risk and associated issues should be required to conduct a primary screening to determine their regulatory landscape.
- (3) Once the regulatory landscape is determined in item: (2) Above, each Federal agency should be charged with developing a plan and schedule for ensuring compliance through regular inspections.
- (4) The U.S. Congress should require all Federal agencies participating in the National Response Team (NRT) to conduct inter-agency training and briefings with regard to what each agency is covering and how they are enforced. Federal agencies should be encouraged to develop protocols for referrals from one agency to another.
- (5) Inspections can only yield positive results when an adequate number of qualified, trained, and competent inspectors is available. Clearly, in these days of budget restrictions, hiring and training hundreds or thousands more inspectors is going to be a challenge at least and at worst impossible. A cost-effective and viable alternative is third-party certified audits and inspections mentioned in item (6) below.
- (6) Congress should consider directing Federal agencies to create verifiable and certified third-party auditing and inspection systems. This approach has worked for ISO-9000 certifications and other programs. There are market-based approaches through which this regime can be implemented without causing a major burden on the regulatory authority or the regulated community. For example, refer to the studies done by the University of Pennsylvania's Risk Management and Decision Processes Center regarding third-party audits and inspections for EPA's Risk Management Program<sup>1</sup> and Environmental Programs.<sup>2</sup>
- (7) EPCRA Sections 301-303 provide a systematic framework for coordination of hazard information, prevention programs, and emergency planning and response involving the Federal Government, State emergency response commis-

<sup>1</sup> [http://opim.wharton.upenn.edu/risk/library/2001\\_JCB\\_3rdPartyAudits.pdf](http://opim.wharton.upenn.edu/risk/library/2001_JCB_3rdPartyAudits.pdf).

<sup>2</sup> <http://opim.wharton.upenn.edu/risk/downloads/archive/arch272.pdf>.

sions (SERC), and the local emergency planning committees (LEPC). However, because of a lack of systematic funding and operational capability, most LEPCs are dysfunctional or exist in name only. Some further examination into better communication between the Federal and State partners is needed. We urge the U.S. Congress to look into ways to solve this problem and utilize the LEPC framework in an effective manner.

(8) The fact that a nursing home, schools, residential neighborhoods, and other public facilities were so near the blast zone in the West Fertilizer incident raises questions about zoning and land-use planning. We urge the U.S. Congress to look into ways to encourage States and local governments to improve and enforce risk-based zoning and land-use planning.

#### SUMMARY

We applaud the U.S. Congress for providing leadership in developing appropriate programs for preventing and addressing chemical threats. We have made a lot of progress in moving forward to overcome the challenges we face in using chemicals to improve our lives without hurting the industry employees, the public, and the environment. We all can agree that chemicals do improve our lives but we also can agree that they can hurt us as well, and if we do not do the right things, they can make us extinct as well. This is a serious matter and we are pleased that people at the highest level of Government are involved at looking at this matter.

#### APPENDIX A.—NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM (NAICS)

The North American Industry Classification System (NAICS) is a system of grouping establishments into industries based on their production processes. NAICS classifies industries using 2-, 3-, 4-, 5-, and 6-digit levels of detail. This classification replaces the previously used Standard Industrial Classification (SIC) codes.

There is no central Government agency with the role of assigning, monitoring, or approving NAICS codes for establishments. The U.S. Census Bureau assigns each establishment one NAICS code based on its primary activity (the activity that generates the most revenue for the establishment).<sup>3</sup> Information about the type of activity at the establishment is typically requested when a company applies for an Employer Identification Number (EIN) in order to assign the appropriate NAICS code.<sup>4</sup>

The NAICS Association, LLC can provide lists of establishments classified according to their NAICS code. Lists provided by the NAICS Association can be customized by multiple criteria in order to obtain a more targeted list. Several types of records are available, which include different levels of information for each establishment (See Table 1). The price of each type of report is shown in Table 2.

<sup>3</sup>What is NAICS and how is it used? <http://www.census.gov/eos/www/naics/faqs/faqs.html#q1>.

<sup>4</sup><http://www.naics.com/faq.htm>.



TABLE 2.—PRICING FOR CUSTOMIZED BUSINESS LISTS \*

Record Types	Domestic List Pricing
Mailing Record .....	\$100/thousand.
Telemarketing Record .....	\$140/thousand.
Enhanced Telemarketing Record .....	\$200/thousand.
Prospective Records .....	\$300/thousand.
Prospective Records with linkage .....	\$900/thousand.

\* Adapted from: <http://www.naics.com/Service-CustomLists.html>.

Since NAICS codes represent the primary activity of an establishment in the U.S. Census Bureau database, other activities may not be apparent if only the primary code is checked. For example, the West fertilizer used the NAICS code 42451 on its Risk Management Plan (submitted in 2011).<sup>5</sup> This code only stands for grain and field bean merchant wholesalers; the activity as a fertilizer distributor is not apparent. But each establishment can have more than one NAICS code because various other Government agencies, trade associations, and regulation boards adopted the NAICS classification system to assign codes to establishments for their own programmatic needs. For example, the West fertilizer company employed the NAICS code 325314 on its Tier II form,<sup>6</sup> which stands for fertilizer (mixing only) manufacturing.

Hence, in order to identify every establishment involved in a certain activity, more than one NAICS code needs to be checked. For example, in order to determine the number of businesses that deal with ammonium nitrate, at least four codes need to be checked. Detailed results on the number of facilities with potential to store ammonium nitrate obtained from the NAICS Association website are provided in the Table 3.

TABLE 3.—INDUSTRIES WITH A HIGH PROBABILITY OF HAVING AMMONIUM NITRATE \*

Code	Industry Title	Number of Business in United States
325311 .....	Nitrogenous Fertilizer Manufacturing .....	543
325314 .....	Fertilizer (Mixing Only) Manufacturing .....	618
424910 .....	Farm Supplies Merchant Wholesalers .....	19,474
424510 .....	Grain and Field Bean Merchant Wholesalers .....	8,201

\* NAICS search <http://www.naics.com/search.htm>.

## ADDITIONAL INFORMATION ON NAICS CODES

TABLE A1.—NEW HIERARCHICAL STRUCTURE OF NAICS CODES\*

The New Hierarchical Structure	
XX .....	Industry Sector (20 broad sectors up from 10 SIC).
XXX .....	Industry Sub sector.
XXXX .....	Industry Group.
XXXXX .....	Industry.
XXXXXX .....	U.S., Canadian or Mexican National specific.

\* <http://www.naics.com/info.htm>.

<sup>5</sup> Risk Management Plan of the West fertilizer [http://www.rtknet.org/db/rmp/rmp.php?facility\\_id=100000135597&database=rmp&detail=3&datatype=T](http://www.rtknet.org/db/rmp/rmp.php?facility_id=100000135597&database=rmp&detail=3&datatype=T).

<sup>6</sup> Tier II form of the West fertilizer.

TABLE A2.—NAICS SECTORS\*

Code	NAICS Sectors	Count
11 .....	Agriculture, Forestry, Fishing and Hunting .....	553,708
21 .....	Mining .....	37,975
22 .....	Utilities .....	37,237
23 .....	Construction .....	1,837,084
31–33 ..	Manufacturing .....	762,527
42 .....	Wholesale Trade .....	929,149
44–45 ..	Retail Trade .....	2,206,681
48–49 ..	Transportation and Warehousing .....	564,026
51 .....	Information .....	410,057
52 .....	Finance and Insurance .....	817,617
53 .....	Real Estate Rental and Leasing .....	929,217
54 .....	Professional, Scientific, and Technical Services .....	2,648,062
55 .....	Management of Companies and Enterprises .....	53,806
56 .....	Administrative and Support and Waste Management and Remediation Services.	3,372,309
61 .....	Educational Services .....	402,000
62 .....	Health Care and Social Assistance .....	1,611,468
71 .....	Arts, Entertainment, and Recreation .....	359,010
72 .....	Accommodation and Food Services .....	869,846
81 .....	Other Services (except Public Administration) .....	2,174,657
92 .....	Public Administration .....	299,778

\* *Ibid.*

Under NAICS code system, sectors 31 to 33 stand for manufacturing. The first three digits 325 stand for chemical manufacturing. The first four digits 3253 stand for pesticide, fertilizer, and other agricultural chemical manufacturing. It includes sub codes 325311, 325312, 325314, and 325320.<sup>7</sup> Details of these codes are given in Table A3.

TABLE A3.—DETAILED TYPES OF INDUSTRY UNDER NAICS CODE STARTING WITH 3253

Codes	Title	Number of U.S. Business
325311 ..	Nitrogenous Fertilizer Manufacturing .....	543
325312 ..	Phosphatic Fertilizer Manufacturing .....	149
325314 ..	Fertilizer (Mixing Only) Manufacturing .....	618
325320 ..	Pesticide and Other Agricultural Chemical Manufacturing ....	982

If we look deeper into these codes, we will get much more information from them. For example, code 325311 comprises establishments primarily engaged in one or more of the following:

- (1) manufacturing nitrogenous fertilizer materials and mixing ingredients into fertilizers;
- (2) manufacturing fertilizers from sewage or animal waste; and
- (3) manufacturing nitrogenous materials and mixing them into fertilizers.

The corresponding index entries are listed in Table A4.<sup>8</sup> Clearly, anhydrous ammonia and ammonium nitrate are involved in the establishment with this code.

TABLE A4.—CORRESPONDING INDEX ENTRIES UNDER CODE 325311

2012 NAICS	Corresponding Index Entries
325311 .....	Ammonia, anhydrous and aqueous, manufacturing.
325311 .....	Ammonium nitrate manufacturing.
325311 .....	Ammonium sulfate manufacturing.
325311 .....	Anhydrous ammonia manufacturing.

<sup>7</sup> 2012 NAICS Definition <http://www.census.gov/eos/www/naics/>.

<sup>8</sup> 325311 Nitrogenous Fertilizer Manufacturing <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

TABLE A4.—CORRESPONDING INDEX ENTRIES UNDER CODE 325311—  
Continued

2012 NAICS	Corresponding Index Entries
325311 .....	Fertilizers, mixed, made in plants producing nitrogenous fertilizer materials.
325311 .....	Fertilizers, natural organic (except compost), manufacturing.
325311 .....	Fertilizers, of animal waste origin, manufacturing.
325311 .....	Fertilizers, of sewage origin, manufacturing.
325311 .....	Nitric acid manufacturing.
325311 .....	Nitrogenous fertilizer materials manufacturing.
325311 .....	Plant foods, mixed, made in plants producing nitrogenous fertilizer materials.
325311 .....	Urea manufacturing.

The Census Bureau can provide statistics of chemical production quarterly with regard to fertilizer products.<sup>9</sup> A detailed spreadsheet can be found by searching 3253. Part of this spreadsheet is captured as Figure A1.<sup>10</sup> We can get detailed fertilizer-related chemicals from this sheet. Anhydrous ammonia and ammonium nitrate are inside.

<sup>9</sup>NAICS 3253 <http://www.census.gov/econ/industry/current/c3253.htm>.

<sup>10</sup>MQ325B—Fertilizer and Related Chemicals [http://www.census.gov/manufacturing/cir/historical\\_data/mq325b/](http://www.census.gov/manufacturing/cir/historical_data/mq325b/).

Figure A1. Sample of Fertilizer and Related Chemicals Statistics Spreadsheet

Product code	Product description	Year and quarter	Total Production
325311120	Ammonia, synthetic anhydrous (100 percent)	2011	
		Second quarter c/	2,658
		First quarter c/	2,826
		2010 1/	
		Fourth quarter c/	2,848
		Third quarter c/	2,732
		Second quarter a/	2,692
		First quarter a/	2,843
		2009	
		Fourth quarter a/	2,735
Third quarter a/	2,712		
Second quarter a/	2,679		
First quarter a/	2,205		
3253111201	Ammonium nitrate, original melt liquor	2011	
		Second quarter c/	1,954
		First quarter c/	1,887
		2010 1/	
		Fourth quarter c/	1,930
		Third quarter c/	1,797
		Second quarter a/	1,830
		First quarter a/	1,937
		2009	
		Fourth quarter b/	1,902
Third quarter a/	1,818		
Second quarter a/	1,762		
First quarter b/	1,461		
3253111240	Ammonium sulfate (100 percent)	2011	
		Second quarter a/	724
		First quarter a/	711

## APPENDIX B

## TIER II REPORTS

Any facility covered by Emergency Planning and Community Right-to-Know Act (EPCRA) requirements must submit an Emergency and Hazardous Chemical Inventory Form to the Local Emergency Planning Committee (LEPC), the State Emergency Response Commission (SERC), and the local fire department. Facilities required under OSHA regulations to maintain material safety data sheets (MSDS) for hazardous chemicals stored or used in the work place with chemicals in quantities that equal or exceed a certain thresholds must submit an emergency and hazardous chemical inventory form to the LEPC, the SERC, and the local fire department annually. Facilities provide either a Tier I or Tier II form. Most States, such as Texas, require the more comprehensive Tier II form.<sup>11</sup> In Texas, the reports are collected by the Department of State Health Services.

Tier II forms require basic facility identification information, such as name, address, Dun & Bradstreet number, NAICS code, employee contact information (for

<sup>11</sup>What facilities are covered? [http://www.epa.gov/osweroe1/content/epcra/epcra\\_storage.htm](http://www.epa.gov/osweroe1/content/epcra/epcra_storage.htm).

emergencies and non-emergencies) and information about chemicals stored or used at the facility. The latter includes the following:<sup>12</sup>

- The chemical name or the common name as indicated on the MSDS;
- An estimate of the maximum amount of the chemical present at any time during the preceding calendar year and the average daily amount;
- A brief description of the manner of storage of the chemical;
- The location of the chemical at the facility;
- An indication of whether the owner of the facility elects to withhold location information from disclosure to the public.

Tier II information for a specific chemical at a facility may be obtained by sending a written request to the State emergency response commission or the local emergency planning committee. If they do not have the requested Tier II information, they must obtain it from the facility. For chemicals present below 10,000 pounds, the response is discretionary by either the State Emergency Response Commission or the Local Emergency Planning Committee and depends on the justification of need by the requestor. The facility must make the information available to the SERC or LEPC if they request it on behalf of an individual.<sup>13</sup>

In general, Tier II forms have comprehensive information and could be useful to track a certain chemical such as ammonium nitrate. However, some facilities may be exempted from submitting Tier II.<sup>14</sup>

#### APPENDIX C

##### OFFICE OF THE TEXAS STATE CHEMIST (OTSC)—TEXAS FEED AND FERTILIZER CONTROL SERVICE

OTSC includes two units: The Texas Feed and Fertilizer Control Service and the Agricultural Analytical Service. The Texas Feed and Fertilizer Control Service (FFCS) is the State government agency responsible for administering the Texas Commercial Fertilizer Control Act of the Texas Agriculture Code Chapter 63, and the Texas Administrative Code Title 4 Chapter 65 Commercial Fertilizer Rules.<sup>15</sup>

OTSC's mission is to "protect consumers and enhance agribusiness through its feed and fertilizer regulatory compliance program, surveillance and monitoring of animal-human health and environmental hazards, and preparedness planning."<sup>16</sup>

According to the Fertilizer Control Act—Texas Agriculture Code Chapter 63, "a person may not manufacture or distribute a commercial fertilizer in this state [Texas] without a valid current permit issued by the Service [OTSC] and a person may not manufacture or distribute a commercial fertilizer in this state, other than customer-formula fertilizer, unless the person first registers the fertilizer with the Service".<sup>17</sup>

The application form for the permit to distribute commercial fertilizer requires the following information: Tax number (Federal I.D.); name of firm; telephone and fax number; mailing address; email and website address; and the class of permit applied for.

The fertilizer application registration requires the following information: Name; address; and telephone number of the fertilizer facility; name of authorized representative; a list of the brands or product names of all fertilizers distributed in Texas; the "Net Weight" of each package in which the product will be distributed (or bulk); and identification of the product by type: Pesticide; Specialty; On-Farm-Use; Liquid or Dry.<sup>18</sup>

In addition, the Texas Agriculture Code Chapter 63 has a subchapter on ammonium nitrate, which specifically requires the following: "A person may not produce, store, transfer, offer for sale or sell ammonium nitrate or ammonium nitrate material unless the person holds a certificate of registration issued by the service under this subchapter."<sup>19</sup> Accordingly, OTSC has records of those facilities or individuals

<sup>12</sup>How do I submit a Tier I or Tier II inventory report? [http://www.epa.gov/osweroe1/content/epcra/epcra\\_storage.htm](http://www.epa.gov/osweroe1/content/epcra/epcra_storage.htm).

<sup>13</sup>How will citizens have access to Tier I or Tier II inventory forms? <http://emergencymanagement.supportportal.com/link/portal/23002/23016/Article/17885/How-will-citizens-have-access-to-Tier-I-or-Tier-II-inventory-forms>.

<sup>14</sup>Exemptions/Applicability Section 311 & 312 [http://www.epa.gov/osweroe1/content/epcra/epcra-qa\\_exempt\\_311.htm](http://www.epa.gov/osweroe1/content/epcra/epcra-qa_exempt_311.htm).

<sup>15</sup><http://otscweb.tamu.edu/Reports/pdf/nwl/2013/May-2013-NL.pdf>.

<sup>16</sup><http://otscweb.tamu.edu/About/Mission.aspx>.

<sup>17</sup><http://otscweb.tamu.edu/Laws/PDF/FertilizerControlAct.pdf>.

<sup>18</sup>Office of the Texas State Chemist; Texas Feed And Fertilizer Control Service. Fertilizer Registration Application Form. <http://otscweb.tamu.edu/Forms-Fees/Forms/FertilizerRegistrationApplication-2-19-2008.pdf>.

<sup>19</sup><http://otscweb.tamu.edu/Laws/PDF/FertilizerControlAct.pdf>.

handling ammonium nitrate. The information required in the permit to distribute ammonium nitrate or ammonium nitrate material includes the following: Permit number, tax number, name, telephone number, mailing address, and email address or website of the company.

The Texas Agriculture Code Chapter 63 Subchapter E (Fees) establishes an inspection fee for a commercial fertilizer distributed in Texas as 36 cents per ton of fertilizer. A facility must report the tonnage and pay the inspection fee “(1) quarterly if the total amount of inspection fees in a year is \$100 or more; or (2) annually if the total amount of inspection fees in a year is less than \$100.”<sup>20</sup> Therefore, OTSC also has records of the total quantity of fertilizer handled by each facility. However, the quantity of each type of fertilizer (e.g. ammonium nitrate or other) is not specified in the tonnage report.

#### EQUIVALENT AGENCIES IN OTHER STATES

State agencies equivalent to OTSC—Texas Feed and Fertilizer Control Service also exist in other States.

---

<sup>20</sup>Fertilizer Control Act. § 63.072. Tonnage Report and Inspection Fee Payment.

**OFFICE OF THE TEXAS STATE CHEMIST**

APPLICATION TO TEXAS FEED & FERTILIZER CONTROL SERVICE, COLLEGE STATION, TEXAS FOR A PERMIT TO DISTRIBUTE COMMERCIAL FERTILIZER AS PRESCRIBED BY SECTION 63.031 OF THE TEXAS AGRICULTURE CODE.

NOTE: The information given on this form, particularly the firm name and address, must agree exactly with the registration and labeling of the commercial fertilizer manufactured and/or distributed by the firm.

Tax # (Federal I.D.) \_\_\_\_\_

Name of Firm	Telephone Number	Fax Number	
Street Address	City	State	Zip
Mailing Address	City	State	Zip
Email Address	Website Address		

Class of permit applied for (place X in the appropriate Box)

- Class 1, the sale or distribution of commercial fertilizer packaged only in containers weighing five pounds or less.
- Class 2, the sale or distribution of all classes of commercial fertilizer whose total amount of tonnage inspection fees will equal or exceed the \$100.00 minimum annual tonnage fee.
  - Bulk and/or packaged       Customer Formula ONLY
- Class 3, the sale or distribution of all classes of commercial fertilizer whose total amount of tonnage inspection fees will not exceed the \$100.00 minimum annual tonnage fee.
  - Bulk and/or packaged       Customer Formula ONLY

The signer of this application affirms that:  
 (1) he/she is affiliated with the firm for whom the application is made;  
 (2) he/she is authorized and empowered to act for this firm in making this application;  
 (3) the information shown herein is correct; and  
 (4) he/she further obligates said firm to provide the inspection fees.

Print or Type Name \_\_\_\_\_  
 Signature \_\_\_\_\_  
 Title \_\_\_\_\_  
 Date \_\_\_\_\_

**IMPORTANT:** Applications for Class 2 and Class 3 permits should be accompanied by the \$100 annual fee. Applications for Class 1 permits should be accompanied by \$50.00 per product annual fee.

Return Form to: Office of the Texas State Chemist, P.O. Box 3160, College Station, TX 77841-3160

Figure C1. Application form to request a permit to distribute commercial fertilizer

OFFICE OF THE TEXAS STATE CHEMIST  
 TEXAS FEED AND FERTILIZER CONTROL SERVICE  
<http://otsc.tamu.edu>  
 FERTILIZER REGISTRATION APPLICATION

Reply To: \_\_\_\_\_ Firm Name \_\_\_\_\_  
(Type or Print)

Office of the Texas State Chemist  
 P.O. Box 3160  
 College Station, Texas 77841-3160  
 979/845-1121

Fertilizer Permit No. \_\_\_\_\_

Name of Authorized Representative (Print) \_\_\_\_\_

No.	List the Brand or Product Name of All Fertilizer Distributed in Texas	Net Weight	Pesticide	Specialty Fertilizer (Non-Farm)	On-Farm-Use Fertilizer	L*	D*	New	Revised
1.									

**IMPORTANT: \$50 SHOULD ACCOMPANY REGISTRATION OF EACH PRODUCT PACKAGED IN CONTAINERS OF 5 LBS. OR LESS ONLY.**

**INSTRUCTIONS**

1. Complete and submit Application to the Control Service for approval.
2. List the brand or product name of each fertilizer to be distributed in Texas.
3. List the "Net Weight" of each package in which the product will be distributed. If distributed in "Bulk," state "Bulk".
4. Identify each product by type by placing check mark in appropriate box (Pesticide; Specialty; On-Farm-Use; Liquid or Dry). (L\*=Liquid; D\*=Dry)
5. All applications for registration of pesticide/fertilizer mixtures must be accompanied by appropriate certification from the Texas Department of Agriculture that the pesticide is approved for use.
6. Actual or facsimile labels must accompany the application of each product identified as "Pesticide" and "Specialty Fertilizer" (Non-Farm Use). For "On-Farm-Use Fertilizers", only the brand name requires registration and a completed sample label.

**NOTE: THE PERMITTED FIRM NAME AND ADDRESS OF THE REGISTRANT MUST BE THE SAME AS SHOWN ON THE LABEL.**

Form R-67 Revised 2-19-08

**Figure C2.** Fertilizer registration application form


**OFFICE OF THE TEXAS STATE CHEMIST**

P.O. Box 3160  
 College Station, TX 77841-3160  
 Tel: (979) 845-1121  
 Fax: (979) 845-1389  
<http://otsc.tamu.edu>

APPLICATION TO TEXAS FEED & FERTILIZER CONTROL SERVICE, COLLEGE STATION, TEXAS FOR A PERMIT TO DISTRIBUTE AMMONIUM NITRATE OR AMMONIUM NITRATE MATERIAL AS PRESCRIBED BY SECTION 63.151 AND 63.152 OF THE TEXAS AGRICULTURE CODE.

Permit # \_\_\_\_\_ Tax # (Federal I.D.) \_\_\_\_\_

Name of Firm \_\_\_\_\_ Telephone Number \_\_\_\_\_ Fax Number \_\_\_\_\_

Street Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Mailing Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Email Address \_\_\_\_\_ Website Address \_\_\_\_\_

Print or Type Name \_\_\_\_\_

Signature \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

**IMPORTANT:** Applications for Ammonium Nitrate Permits should be accompanied by the \$75.00 annual fee.

Return Form to: Office of the Texas State Chemist, P.O. Box 3160, College Station, TX 77841-3160

**Figure C3.** Application form to request a permit to distribute ammonium nitrate or ammonium nitrate material

#### AGENCIES REGULATING FERTILIZERS IN DIFFERENT STATES

The following is a brief list of agencies regulating fertilizers in several States. This is not a comprehensive list and it was included to emphasize that there are agencies in each State which likely maintain records on fertilizer facilities that can be used as source of information for DHS or other Federal agency.

*California—California Department of Food and Agriculture*

*Fertilizing Materials Registration Application*<sup>21</sup>

In California, fertilizers and amending materials are regulated by the California Department of Food and Agriculture (CDFA) under the Feed, Fertilizer and Live-stock Drugs Regulatory Services Branch (FFLDERS).

<sup>21</sup> [http://www.tsgusa.com/capabilities/state\\_fertilizers/california.htm](http://www.tsgusa.com/capabilities/state_fertilizers/california.htm).

*Fertilizing Materials inspection program*<sup>22</sup>

The Fertilizing Materials Inspection Program is an industry-funded program that ensures consumers receive fertilizing materials that are safe and effective and meet the quality and quantity guaranteed by the manufacturer. Inspectors and investigators located throughout the State conduct routine sampling and inspections; respond to consumer complaints; and enforce the laws and regulations that govern the manufacturing and distribution of fertilizing materials. Registration Specialists carefully review product labels for misleading claims and compliance with existing labeling requirements. (Fertilizing Materials Licensing, Registration & Labeling Guide)

*Washington—Washington State Department of Agriculture*

All fertilizer products distributed in Washington must first be registered with Washington State Department of Agriculture (WSDA). An additional registration requirement for waste-derived fertilizers was added to the fertilizer law in 1998. Waste-derived and micronutrient fertilizers must go through a Department of Ecology (Ecology) review before being registered by WSDA. All registration applications must first be submitted to WSDA. WSDA will forward information to Ecology for further review on an as-needed basis.<sup>23</sup>

*Florida—Florida Department of Agriculture and Consumer Services*<sup>24</sup>

The Fertilizer Section is responsible for enforcing the requirements of Florida's Commercial Fertilizer Law, Chapter 576, Florida Statutes and Chapter 5E-1, Florida Administrative Code. Applicant(s) requesting to distribute fertilizer in the State of Florida with their name appearing on the fertilizer label as guarantor are required to complete the following registration requirements using the Fertilizer Regulatory Website on-line located at: <http://lims.flas.org>. All registered licensees report monthly tonnage using the Fertilizer Regulatory Website and pay an inspection fee of \$1.00 per ton for mixed fertilizer and fertilizer materials, including an additional \$.50 per ton if the fertilizer contains nitrogen or phosphate. The inspection fee for liming materials and untreated phosphatic materials is \$.30 per ton.

*Minnesota—Minnesota Department of Agriculture*<sup>25 26</sup>

The objective of the Fertilizer Licensing Program is to promote fair trade practices among businesses that offer fertilizer products for sale and provide consumer awareness/protection by providing accurate, meaningful, and uniform labeling and licensing standards.

*Michigan—Michigan Department of Agriculture and Rural Development*

The Michigan Department of Agriculture and Rural Development<sup>27</sup> (MDARD) administers licenses, registrations, inspects and tests fertilizer, soil conditioner, and liming materials distributed or manufactured in Michigan.<sup>28</sup>

*New Mexico—New Mexico Department of Agriculture*<sup>29</sup>

In New Mexico, products are registered by the individual product label. Registration fees are \$5.00 per product in any size quantities. There is a \$10.00 annual inspection fee per product if distributed in quantities of 5 pounds or less in lieu of the quarterly inspection fees. There is no exemption for sample size containers. A registration application packet consists of a complete fertilizer/soil conditioner registration application, complete, legible label for each product being registered and fees.

*North Dakota—North Dakota Department of Agriculture*<sup>30</sup>

The North Dakota Department of Agriculture regulates fertilizer and soil amendment products through the authority provided by Chapter 19-20.1 of the North Dakota Century Code (N.D.C.C.). The fertilizer law is primarily a consumer protection law, ensuring that labeling for fertilizer products accurately reflects product composition and the concentration of key ingredients. N.D.C.C. 19-20.1 is also a licensing law, requiring certain businesses to be licensed to distribute and sell fertilizer

<sup>22</sup> <http://www.cdffa.ca.gov/is/ffldrs/fertilizer.html>.

<sup>23</sup> <http://agr.wa.gov/pestfert/fertilizers/productregistration.aspx>.

<sup>24</sup> <http://www.freshfromflorida.com/onestop/aes/fertilizer.html>.

<sup>25</sup> <http://www.mda.state.mn.us/licensing/licensetypes/specialty.aspx>.

<sup>26</sup> <http://www.mda.state.mn.us/licensing/licensetypes/fertilizer.aspx>.

<sup>27</sup> <http://www.michigan.gov/mdard>.

<sup>28</sup> [https://www.michigan.gov/statelicenseesearch/0,4671,7-180-24786\\_24812-81089--,00.html](https://www.michigan.gov/statelicenseesearch/0,4671,7-180-24786_24812-81089--,00.html).

<sup>29</sup> <http://www.nmda.nmsu.edu/fsf/fertilizer-and-soil-conditioners/fertilizersoil-conditioner-registration-and-tonnage/>.

<sup>30</sup> <http://www.nd.gov/ndda/general-resource/north-dakota-state-government/ndda-fertilizer-registration-and-licensing-guidelines>.

products, thereby providing a level playing field for businesses and uniform regulatory oversight. Therefore, the Department uses its statutory authority to regulate the registration, distribution, sale, and labeling of fertilizer products.

*Oklahoma—Oklahoma Department of Agriculture, Food and Forestry, Consumer Protection Services*<sup>31 32</sup>

This department deals with Fertilizer License Application, which indicates the products stored in bulk and/or distributed, including Anhydrous Ammonia, Liquid Fertilizer, Ammonium Nitrate, Dry Bulk Fertilizer and Bagged Fertilizer.

*Oregon—Oregon Department of Agriculture*<sup>33 34 35</sup>

ODA fertilizer program governs fertilizer, agricultural mineral, agricultural amendment and lime products. It provides registration procedure, guides, and forms.

APPENDIX D

BUILDING OCCUPANCY PERMITS

A Certificate of Occupancy (CO) is a document issued by Building Inspection, which permits land and/or buildings to be used for the purpose(s) listed on the CO.<sup>36</sup> COs are required prior to occupancy of a building or land.

*Classification.*—According to uniform fire code, Ammonium Nitrate (AN) would ordinarily be classified as an oxidizer class 1, which is an oxidizer that “can undergo an explosive reaction due to contamination or exposure to thermal or physical shock.”<sup>37</sup> Table D1 shows the classification of oxidizers.

TABLE D1.—OXIDIZER CLASSIFICATION \*

Oxidizer Class	Description
Class 1 .....	An oxidizer that can undergo an explosive reaction due to contamination or exposure to thermal or physical shock. Additionally, the oxidizer will enhance the burning rate and can cause spontaneous ignition of combustibles.
Class 2 .....	An oxidizer that will cause a severe increase in the burning rate of combustible materials with which it comes in contact or that will undergo vigorous self-sustained decomposition due to contamination or exposure to heat.
Class 3 .....	An oxidizer that will cause a moderate increase in the burning rate or that causes spontaneous ignition of combustible materials with which it comes in contact.
Class 4 .....	An oxidizer whose primary hazard is that it slightly increases the burning rate but which does not cause spontaneous ignition when it comes in contact with combustible materials.

\* <https://law.resource.org/pub/us/code/ibr/icc.ifc.2009.pdf>.

This means that according to table 2703.1.1<sup>38</sup> of the fire code it would be classified as a high hazard (H-1) when the max allowable quantity is exceeded. Because agricultural materials are exempt from H-1 classification, AN would then be reclassified as moderate hazard storage (S-1).

<sup>31</sup> <http://www.ok.gov/okag/forms/cps/cfa.pdf>.

<sup>32</sup> <http://www.ok.gov/okag/cps-fertilizer.htm>.

<sup>33</sup> <http://www.oregon.gov/ODA/pest/Pages/fertilizer.aspx>.

<sup>34</sup> [http://oda.state.or.us/dbs/heavy\\_metal/search.lasso](http://oda.state.or.us/dbs/heavy_metal/search.lasso).

<sup>35</sup> [http://www.oregon.gov/ODA/PEST/docs/pdf/2011\\_fert\\_guide\\_0.pdf](http://www.oregon.gov/ODA/PEST/docs/pdf/2011_fert_guide_0.pdf).

<sup>36</sup> [http://www.dallascityhall.com/building\\_inspection/building\\_inspection\\_faqs.html#A5](http://www.dallascityhall.com/building_inspection/building_inspection_faqs.html#A5).

<sup>37</sup> [http://www2.iccsafe.org/states/oregon/07\\_structural/07\\_PDFs/Chapter%203\\_Use%20and%20Occupancy%20Classification.pdf](http://www2.iccsafe.org/states/oregon/07_structural/07_PDFs/Chapter%203_Use%20and%20Occupancy%20Classification.pdf).

<sup>38</sup> <https://law.resource.org/pub/us/code/ibr/icc.ifc.2009.pdf>.

TABLE D2.—EXCERPT OF TABLE 2703.1.1 FROM THE INTERNATIONAL FIRE CODE

Material	Class	Group when the maximum allowable quantity is exceeded	Solid pounds (cubic feet)
Oxidizer ...	4 .....	H-1 .....	1.
	3 .....	H-2 or H-3 .....	10.
	2 .....	H-3 .....	200.
	1 .....	Not Applicable .....	4,000.

*Requirements.*—The information required for a CO varies from city to city. Although each is unique, much of the information is consistent such as address, business name, total area, floor plan, and other fields.<sup>39 40 41 42</sup> Some CO applications are very detailed and contain useful information such as a full inventory and MSDS for all chemicals present, however this is not a general requirement. Some applications ask only whether or not hazardous chemicals are present on site.<sup>43</sup> Also, the CO application is just the first step. In order to obtain a CO, the building is commonly inspected by a building inspector or by a fire inspector. In order to see what additional information the inspectors looked for and how much of the information the fire fighters had access to, the local building permit office and fire department in College Station, Texas were interviewed.

The building permit office has an application that contractors must complete before a new building is built or before making alterations to an existing building.<sup>44</sup> These applications are all public records that can be requested from the office, and filtered based on their answers to a checklist found in the document. They also keep a database of all submissions to the office according to date submitted.<sup>45</sup> Below is an excerpt of their June 2013 submissions.

Commercial - Addition/Alteration/Renovation								
Date	Permit #	Address	Subdivision	Contractor	SF-H	SF-UN	Value	
06/03/13	13-1597	3203 Freedom Blvd	Casa Ole	Mario Pinteiro	1	2,000	0	\$35,000.00
06/06/13	13-1497	3200 Cavitt Ave	Midway Place	JDB Contracting	1	2,006	0	\$60,000.00
06/07/13	13-1757	1601 S Texas Ave	Boney	Anchor Foundation	1	43,022	0	\$6,960.00
06/12/13	13-1678	3113 E SH 21	Carrabba Estates	Bravo Construction	1	20,000	10,000	\$100,000.00

Unfortunately, the information this document contains is focused on zoning issues and does not ask about the quantities and types of chemicals that can be found at different locations.

The College Station, TX fire department was also interviewed about building occupancy permits. The fire department has a database with a list of hazardous chemicals handled by local industries. Unfortunately, some companies file commercial names of their products rather than the actual chemical names, but provide accurate information about the hazards of the chemicals and include the NFPA fire diamond. While this is useful for fire departments, it might not be helpful in finding which companies store which chemicals. According to the Fire Marshal, the most reliable and complete source of information is the Tier II reports.

<sup>39</sup> <http://www.dallascityhall.com/pdf/Building/CertOfOccupancy.pdf>.

<sup>40</sup> <http://www.ci.garland.tx.us/documents/COOtherPackage811.pdf>.

<sup>41</sup> <http://www.ci.greenville.tx.us/DocumentCenter/Home/View/924>.

<sup>42</sup> [https://webapps1.sanantonio.gov/dsddocumentcentral/upload/form\\_CertificateOfOccupancyApplication.pdf](https://webapps1.sanantonio.gov/dsddocumentcentral/upload/form_CertificateOfOccupancyApplication.pdf).

<sup>43</sup> <http://www.ci.garland.tx.us/documents/COOtherPackage811.pdf>.

<sup>44</sup> <http://www.bryantx.gov/resources/Bldgpermit.pdf>.

<sup>45</sup> <http://www.bryantx.gov/departments/?id=435>.

STATEMENT OF RICK HIND, LEGISLATIVE DIRECTOR, GREENPEACE

AUGUST 1, 2013

LESSONS OF THE WEST, TEXAS CHEMICAL DISASTER

*Department of Homeland Security's Chemical Security Statute Is Fatally Flawed  
New Clean Air Act Rules Could Eliminate the Catastrophic Consequences of an At-  
tack, Accident, or Natural Disaster*

## INTRODUCTION

Too often key stakeholders are not at the table in Washington when important issues are discussed. In this case, it's the safety of more than 100 million Americans who live and work in "vulnerability zones" similar to West, Texas. The following are some words of wisdom from a few them:

"Should there be a successful terrorist attack on a chemical facility, the first question policy makers will be asked is this: 'Why, when you've known for more than ten years that America's chemical facilities were vulnerable to terrorist attack, did you consistently fail to take the steps needed to reduce that vulnerability and save lives?'"

"Members of Congress need to think long and hard about how they'd answer that question if they continue to avoid taking the sensible steps required to make these facilities safer and less vulnerable to acts of terrorism."—Bob Bostock, Special Assistant to the Administrator (EPA) for Homeland Security (2001–2003).

"According to the 9/11 Commission, urgent warnings were ignored before the September 11 attacks. In addition, the Commission concluded that our government's first failure was a 'failure of imagination.' My husband was a victim of that failure. 'Yet today we continue to lack the imagination to prevent another tragedy. While we are all aware of the vulnerability and catastrophic hazards posed by our nation's highest risk chemical plants, we also know much more about the many safer chemical processes that can eliminate a plant's attractiveness as terrorist target."

"The fact that special interest lobby groups and allied politicians want to stand in the way of requirements to prevent such a disaster is unthinkable. I fear that when we suffer a catastrophic failure or attack at one of these facilities, those same elected officials will finally learn that the loss of human life is not worth the campaign dollars of moneyed special interests. Of course, by then, it will be too late."—Kristen Breitweiser, 9/11 widow.

"In the event of a catastrophic chemical release in a major U.S. city, first responders would likely face the same fate as thousands of workers and community residents who would quickly be overcome by poison gas before they had a chance to evacuate. In addition, our emergency room capacity to treat thousands of poison gas victims on such a mass scale would be overwhelmed. Preventing such a disaster is the only effective means of treatment."—Peter Orris, MD, MPH Professor and Chief of Service, Occupational and Environmental Medicine, University of Illinois Hospital and Health Science System.

"Our members work in many of these facilities. We know how vulnerable they are, not just to terrorist attack, but to plain old accidents caused by any number of system failures."—Michael J. Wright, Director of Health, Safety and Environment, United Steelworkers.

"Early in my career as a Fire Fighter, I responded to an accident at a chemical plant. As the workers were evacuating, we were going into the plant, unsure of what dangers we would encounter and unsure of our own survival. The risks to both fire fighters and plant employees have increased as a result of more chemical plants in urban areas and the threat of terrorism. These risks can be reduced using safer alternatives and safer chemical processes that can prevent catastrophic events and save lives."

"New regulations are needed to require the use of safer and more secure alternatives wherever they are feasible to lower the risk to first responders, plant employees, and residents in the surrounding communities."—Fire Captain Ed Schlegel, Ret. County of Los Angeles Fire Department.

"There are 473 chemical plants in the U.S. that each put 100,000 or more Americans at risk of a Bhopal-like disaster. In addition, several thousand other plants also use and store poison gases such as chlorine and anhydrous ammonia on their property. Too many of these facilities are in lower-income neighborhoods and communities of color. The families in these communities have already waited too long

for the federal government to make these neighborhoods safe from the dangers posed by these plants.

“The government needs to stop pointing fingers and take responsibility to eliminate the risks these facilities pose and prevent an avoidable chemical disaster.”—Stephen Lester, Science Director Center for Health, Environment & Justice, Falls Church, VA.

“How many lives must be lost before we have a policy that fully protects our communities and workers?”—Richard Moore of Los Jardines Institute (The Gardens Institute), and former chair of the EPA’s National Environmental Justice Advisory Council.

“Sheltering in place does not protect the health and well-being of residents and communities. Requiring the use of safer alternatives will provide communities real protection from needless catastrophic hazards.”—Michele Roberts, Environmental Justice Health Alliance.

“Regrettably, our world is becoming more dangerous and risky, and policymakers can ill-afford to ignore the potential of risk prevention as another element of mainstream mandatory regulation. Clearly, the risk prevention paradigm raises significant design and implementation issues that require careful attention and reasonable resolution. Yet, these issues are not unlike those faced by existing risk management programs and, thus, justify caution rather than rejection of this valuable regulatory approach.”—Timothy F. Malloy, University of California, Los Angeles Law School.

#### THE CHEMICAL FACILITY ANTI-TERRORISM STANDARDS (CFATS) DID NOT PROTECT WEST TEXAS AND WILL NOT PROTECT COMMUNITIES FROM PREVENTABLE HAZARDS

The April 17 disaster in West, Texas that claimed 14 lives and injured hundreds was an unnecessary, preventable tragedy. Among the Preliminary Findings of the U.S. Chemical Safety Board (CSB): “Industry has developed other forms of ammonium nitrate that are reported to reduce or eliminate the risk of accidental detonation. For example, compounding the ammonium nitrate with calcium carbonate (limestone) ‘practically eliminates any risk of explosion in its storage, transportation, and handling,’ while preserving the AN’s nutritive value. Calcium ammonium nitrate fertilizers have been widely used in Europe. Ammonium sulfate nitrate also has been found to be non-explosive provided the percentage of AN is held below about 37%.”

Without the use of a safer formulations of ammonium nitrate or other fertilizers a number of interim policies will need to be implemented to at least mitigate risks if not prevent future explosions. These policies should include but are not limited to:

- Minimum buffer zones for facilities storing bulk quantities of ultra-hazardous materials must be established similar to what the Bureau of Alcohol Tobacco and Firearms and Explosives (ATF) has required for explosives.
- Enforcement of right-to-know laws to ensure that communities and first responders know of the location, volume, and nature all ultra-hazardous materials stored at local facilities.
- Establishment of strict fire-proof storage facility requirements and fire codes.
- Require minimum liability coverage for facilities commensurate with potential damage, injury, and death.

In the mean time, Federal Emergency Management Agency (FEMA) should designate West, Texas a Federal disaster zone, making it eligible for disaster relief so the city can rebuild.

#### WEST, TEXAS IS THE TIP OF A CHEMICAL DISASTER ICEBERG

U.S. chemical facilities were never designed to defend against terrorist attacks and predicting where the next attack or accident will take place is a fool’s errand. No one predicted that Timothy McVeigh would attack the Federal Building in Oklahoma City in 1995, killing 168 innocent people. And no one predicted the two fatal chemical accidents in Louisiana (Geismar and Donaldsonville) in June. Last October, Secretary of Defense Leon Panetta issued a warning to business executives in NY City regarding the increasing threat of cyber attacks saying, “The collective result of these kinds of attacks could be a cyber Pearl Harbor; an attack that would cause physical destruction and the loss of life . . .” He also gave the example of “computer control systems that operate chemical, electricity and water plants and those that guide transportation throughout this country.” <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5136>.

## A WORST-CASE ACCIDENT OR SUCCESSFUL ATTACK WOULD BE CATASTROPHIC

- In July, 2004, the Homeland Security Council estimated that an attack on a single chlorine facility could kill 17,500 people, severely injure an additional 10,000 and result in 100,000 hospitalizations and 70,000 evacuations.
- In January, 2004, the U.S. Naval Research Laboratory testified before the Washington, D.C. City Council warning that 100,000 people could be killed or injured in the first 30 minutes of a catastrophic release of a tank car of chlorine or similar chemical within blocks of Capitol Hill. They further estimated that people could “die at rate of 100 per second.”

## A COMPREHENSIVE PREVENTION PROGRAM IS ESSENTIAL AND THE EPA HAS THE AUTHORITY TO IMPLEMENT IT

Despite the inadequacy of existing regulatory measures, EPA has unambiguous legal authority under the Clean Air Act to take actions requiring safer technologies to reduce the possibility of catastrophic releases. In particular, section 112(r) of the Clean Air Act contains two sources of authority: (1) EPA’s hitherto unused authority under section 112(r)(7)(A) “to promulgate release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements.” 42 U.S.C. § 7412(r)(7)(A); and (2) the “general duty clause,” section 112(r)(1), which imposes an obligation on all owners and operators of facilities that use extremely hazardous substances to “design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur,” 42 U.S.C. § 7412(r)(1).

In outlining the policies he would implement if he were elected, President Obama stated that his administration would “[s]ecure our chemical plants by setting a clear set of Federal regulations that all plants must follow, including improving barriers, containment, mitigation, and safety training, and, where possible, using safer technology, such as less toxic chemicals.”<sup>1</sup> The President, Vice President, and other administration officials have repeatedly stated their support for inherently safer technology requirements. Former EPA Administrator Christine Todd Whitman has recently called upon EPA to exercise its powers under the section 112(r) to address chemical threats,<sup>2</sup> and Chemical Safety Board Chair Rafael Moure-Eraso has called upon EPA to make enforceable requirements for the use of safer chemicals and processes “a cornerstone of its accident prevention programs.”<sup>3</sup> As elaborated above, such requirements are necessary to protect the public against possible chemical releases, including those that may be caused by terrorist attacks, and are well within EPA’s existing authority under section 112(r) of the Clean Air Act.

On April 25, former EPA Administrator Lisa Jackson told MSNBC, “What needs to happen is that we need to use the authority that we have now . . . ” [http://www.nbcnews.com/id/51675545/ns/msnbc-all\\_in\\_with\\_chris\\_hayes/t/all-chris-hayes-thursday-april-th/#.Ufhk4XiNdMw](http://www.nbcnews.com/id/51675545/ns/msnbc-all_in_with_chris_hayes/t/all-chris-hayes-thursday-april-th/#.Ufhk4XiNdMw). The EPA drafted just such a proposal in 2002: <https://www.documentcloud.org/documents/332410-epachemsecurityrollout-june02.html>. Having already drafted safer chemical process requirements in 2002 and again in 2009 for security legislation, the EPA is well-positioned to begin rule-making proceedings under Clean Air Act section 112(r)(7), and take action to revise its guidance for enforcement of the general duty clause of Clean Air Act section 112(r)(1).

## CURRENT DHS RULES (CFATS) ARE FATALLY FLAWED

The best that can be said for the DHS’s chemical security regulations known as “Chemical Facilities Anti-Terrorism Standards” (CFATS) is that they represent an official recognition of the widespread vulnerability of U.S. chemical plants to terrorism. Unfortunately the 744-word “rider” (Section 550) to the Homeland Security Appropriations Act 2007 was designed to authorize “interim” regulations that were expected to expire on October 4, 2009 but have since been given a series of short-term extensions.

To the DHS’s and EPA’s credit they have repeatedly testified before Congress since 2009 recommending that CFATS be amended to require high-risk facilities to

<sup>1</sup> *Change We Can Believe In: Barack Obama’s Plan to Renew America’s Promise*, at 116 (2008).

<sup>2</sup> See *The Danger Downwind*, N.Y. Times, May 23, 2012, <http://www.nytimes.com/2012/05/24/opinion/the-danger-downwind-of-chemical-plants.html>.

<sup>3</sup> R. Moure-Eraso, “It’s time for government and industry to adopt inherently safer technology,” *Charleston Gazette*, June 23, 2012, <http://wvgazette.com/Opinion/OpEdCommentaries/201206230057>.

assess safer chemical processes and to conditionally require the highest-risk facilities to implement safer chemical processes where feasible. Examples of DHS and EPA testimony since October 2009 are at: [http://www.dhs.gov/ynews/testimony/testimony\\_1297438322830.shtm](http://www.dhs.gov/ynews/testimony/testimony_1297438322830.shtm), [http://www.epa.gov/ocir/hearings/testimony/111\\_2009\\_2010/2010\\_0728\\_ccd.pdf](http://www.epa.gov/ocir/hearings/testimony/111_2009_2010/2010_0728_ccd.pdf), [http://www.dhs.gov/ynews/testimony/testimony\\_1301517368947.shtm](http://www.dhs.gov/ynews/testimony/testimony_1301517368947.shtm).

In November of 2009 the House passed permanent, comprehensive legislation (H.R. 2868) that also included the DHS and EPA recommendations on prevention and eliminating security gaps but it never became law. If enacted H.R. 2868 would have seamlessly continued CFATS while addressing its fatal flaws.

Specifically, the underlying statute (Section 550) which authorized CFATS:

- *Bars the DHS from requiring any "particular security measure," including safer chemical processes, what Senator Lieberman (I-CT) called, "the only foolproof way to defeat a terrorist determined to strike a chemical facility." It therefore fails to reduce the consequences of an attack at any of approximately 4,000 "high-risk" chemical facilities now in the program.*—Alternatively H.R. 2868 conditionally required safer chemical processes. (Section 2111).
- *Exempts thousands of the 12,361 chemical facilities in the EPA's chemical disaster program, including an estimated 2,400 U.S. drinking water & waste treatment plants, and hundreds of chemical facilities located on navigable water ways including a majority of the U.S.'s 150 refineries.*—Alternatively H.R. 2868 covered all of these facilities. (Section 2103).
- *Fails to require deadlines for the completion of vulnerability assessment and facility security plans, or deadlines to notify facilities of a disapproval of security plans.*—Alternatively H.R. 2868 set deadlines for completion of vulnerability assessments and security plans. (Section 2103).
- *Fails to authorize unannounced inspections or increased inspectors.*—Alternatively H.R. 2868 authorized unannounced inspections and added at least 100 new inspectors. (Section 2104).
- *Fails to require annual progress reports to Congress on the numbers of security plans approved & disapproved, numbers of compliance orders, and penalties issued, etc.*—Alternatively H.R. 2868 required annual progress reports to Congress on security plans approved & disapproved, compliance orders, and penalties issued. (Section 2119).
- *Fails to provide for citizen enforcement suits or petitions of the Government to ensure implementation of required programs, or protection for whistleblowers.*—Alternatively H.R. 2868 provided for citizen enforcement suits, petitions, and whistleblower protections. (2116, 2117 & Sections 2108).
- *Fails to provide funding to convert publicly-owned water treatment systems or private chemical facilities to safer chemical processes.*—Alternatively H.R. 2868 provided grants for the conversion to safer processes at publicly-owned water treatment plants and privately-owned facilities. (Section 1433). An independent analysis of H.R. 2868 showed that 8,000 jobs would have been created, benefiting publicly-owned water systems and the chemical industry sectors the most: <http://www.misi?net.com/publications.html>.
- *Fails to require meaningful involvement of plant employees in developing security plans.*—Alternatively H.R. 2868 provided for employee participation in the development of security plans. (Sections 2103 & 2115).

Complaints about the DHS CFATS program have harped on the slow pace of approving site security plans (SSPs) and the general lack of transparency of the DHS in too many aspects of the program. Again, H.R. 2868 would have put the DHS on a schedule and made them and the industry more accountable through unannounced inspections, reports to Congress, citizen enforcement suits and petitions, etc.

A faster pace in the CFATS program envisioned in H.R. 2868 would also have coincided with a faster pass in reducing hazards and the consequences of a successful attack. The rush, however, to approve SSPs in today's CFATS program does not build confidence among the public. When airline passengers face a flight delay they are frustrated but they also don't want the flight rushed onto the runway at the expense of safety.

The adoption of Alternative Security Plans (ASPs) developed by the chemical industry lobbying organizations is also no comfort to millions of people living within vulnerability zones. They have too often "sheltered in place" or been assured that strange odors, flares, fires, or even explosions "released no harmful levels" of dangerous substances (U.S. refineries have reported an average of 45 fires per year since 2008). We are unaware of any ASPs that require disaster prevention measures such as safer chemical processes.

Conspicuously absent from oversight hearings on CFATS are questions about safer chemical processes that would prevent disasters. Given the limitations of the underlying statute, the DHS could at least issue a 19th Risk-Based Performance Standard (RBPS) to encourage high-risk facilities to evaluate safer available chemical processes or “methods to reduce the consequences” of an attack. This idea was raised by Senator Lieberman (I-CT) in his formal comments on the CFATS rules in 2007.

Regarding transparency, the DHS should also provide specific information on facilities that have legitimately left the CFATS program because they no longer use or store chemicals of interest (COI). Without giving away confidential business information, concrete examples of safer processes would be more useful to other high-risk facilities which may want to reduce their liability, save money on conventional security costs and have fewer regulatory obligations as the Clorox Company has done.

In 2012 the DHS reported only 35 facilities in the two highest-risk Tiers (1 and 2) that qualify as catastrophic “release” category facilities. This is out of a total of about 579 facilities in those two risk tiers. This is a symptom of how few high-risk facilities are in CFATS and how many are exempt. Meanwhile in the EPA’s RMP program there are 473 facilities that each put 100,000 or more people at risk. If CFATS were a comprehensive program all of those facilities would be in risk Tiers 1 or 2.

Some of the highest-risk facilities in the country are more loosely-regulated under other statutes such as the Maritime Transportation Security Act (MTSA), Clean Water Act, and Safe Drinking Water Act. None of these statutes contain prevention requirements. Moreover, the MTSA statute is petro-chemical lobby’s model for ASPs. Some of the highest-risk chemical facilities in the country are exempt from CFATS because they are located on navigable waterways and therefore regulated by the Coast Guard under MTSA. Although DHS is attempting to harmonize the two programs, the MTSA facilities are never-the-less explicitly exempt from CFATS requirements should they ever be enhanced.

There has also been little or no scrutiny of the Chemical Sector Critical Infrastructure Partnership Advisory Council (CIPAC) that operates autonomously and provides far too much access and opportunity for influence by the regulated industry over its regulator (DHS) both in the development of rules and their implementation. For more details, see the November 25, 2010 *Washington Post* story on CIPAC: <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/24/AR201011-2407022.html>.

The only non-Governmental members of the Chemical Sector CIPAC are chemical industry lobbying organizations or chemical company representatives. Although the DHS operates several committees under the Federal Advisory Committee Act (FACA), but the CIPAC is exempt from FACA regulations and most of its activity is done behind closed doors. Even the names of the individuals representing the trade associations are kept secret. The secrecy is rationalized as necessary to encourage candor by the industry. Rather than receiving “candid” comments from industry lobby groups who have led efforts to kill prevention policies, the DHS should seek regularized candid input from all stakeholders.

Currently no residents living near or rank-and-file employees working in high-risk plants, including community organizations or unions, technical experts from academia, or any nonprofit organizations that do not represent the industry are allowed to participate in CIPAC.

CIPAC’s budget is more than \$1 million a year and its charter expires March 16, 2014. The DHS Secretary has authority to terminate the council at any time or allow its charter to expire and create a FACA council that represents all stakeholders.

The legislation (Section 550) which authorized CFATS was never intended to be a comprehensive statute. Senator Susan Collins (R-ME), chair of the Senate Homeland Security and Governmental Affairs Committee addressed this in her February 7, 2007 comments to the DHS:

“In drafting Section 550, the intent of Congress was clear and unambiguous—this statutory provision provides the Department strong, interim authority for up to three years until permanent, comprehensive authority can be enacted . . .

“Section 550 was a streamline version of chemical security legislation; it was not the comprehensive authorizing legislation that Congress intended to be the final authority on this matter . . .

“The Department does not have broad discretion to regulate beyond the interim three-year period without a comprehensive authorization from Congress. Any contrary interpretation of the ‘sunset’ provision is plainly wrong.”

## SINCE 2009 THE ACTUAL NUMBER OF HIGH-RISK CHEMICAL PLANTS HAS GROWN

A November 16, 2012 CRS update of the number of high-risk chemical facilities in the EPA's chemical disaster or Risk Management Program (RMP) shows a growing number of chemical facilities that each put thousands of people at risk of a catastrophic chemical release. <https://www.documentcloud.org/documents/557127-crs-rmp-update-11-16-12.html>.

In 2012, there were 12,440 EPA facilities Nation-wide that possessed thresholds quantities of ultra-hazardous chemicals requiring reports to the EPA of their "worst-case" disaster scenarios. This was an increase of 79 facilities over the CRS's 2011 update on this EPA program. <https://www.documentcloud.org/documents/557129-crs-update-of-us-rmps-state-by-state-4-12-11.html>.

The increase in 2012 included 28 additional facilities that put between 10,000 and 99,999 people at risk in the following States: Arizona, California, Colorado, Kansas, Louisiana, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, and Washington. The 2011 CRS update also showed an increase of 332 in the total number of RMP facilities over the 2009 CRS update. <https://www.documentcloud.org/documents/557128-crs?update-2009.html>.

## SMART SECURITY CAN ELIMINATE THE CATASTROPHIC CONSEQUENCES OF AN ATTACK

In February 2008, the CEO of Association of American Railroads said, "It's time for the big chemical companies to do their part to help protect America. They should stop manufacturing dangerous chemicals when safer substitutes are available. And if they won't do it, Congress should do it for them . . .".

The good news is that there are many commercially-available safer processes for virtually all of the poison gas or toxic-by-inhalation (TIH) processes that pose the greatest risks to major urban centers. The Center for American Progress (CAP) has done several reports analyzing EPA's Risk Management Program data and in 2006 identified 284 facilities that have converted since 1999. See full report at: [http://www.americanprogress.org/issues/2006/04/b681085\\_ct2556757.html](http://www.americanprogress.org/issues/2006/04/b681085_ct2556757.html).

Examples of safer more secure chemical processes:

- The Blue Plains sewage treatment plant in Washington, DC halted its use of chlorine and switched to a safer chemical process 90 days after the 9/11 attacks due to fears of another attack. The plant had seven 90-ton rail cars of chlorine on-site following the 9/11 attacks. The conversion cost approximately \$0.50 per year for each water customer.
- By mid-2012, the Clorox Company converted all of its U.S. facilities to "strengthen our operations and add another layer of security," according to their CEO Don Knauss. Clorox also indicated that these changes "won't affect the size of the company's work-force." This conversion eliminated Clorox's bulk use of chlorine gas and catastrophic risks to more than 13 million people in nearby communities. <http://investors.thecloroxcompany.com/releasedetail.cfm?ReleaseID=420583>.

The 2006 CAP analysis also showed that 87% of the converted facilities spent \$1 million or less and one-third expected to save money, particularly from reduced liability costs and reduced regulation compliance costs. These costs pale in comparison to the billions of dollars incurred in disaster response, relocating communities, defending against personal injury law suits or resolving environmental clean-up liability or long-term conventional security costs which add nothing to the bottom line.

While the CAP analysis demonstrates the availability and feasibility of safer alternatives, most of the examples are not at the highest-risk facilities. A 2008 CAP analysis identified 300 chemical facilities that together put 110 million Americans at risk. At the current rate of voluntary conversions, without any new regulatory requirements, it could take 40 years to eliminate these hazards to our major cities.

Risk Management Solutions estimated that a "chlorine spill scenario results in 42,600 total casualties, over 10,000 of which are fatal. Insurance claims covering these casualties would exceed \$7 billion." [http://www.rms.com/NewsPress/PR\\_042904\\_CasualtyStudy.asp](http://www.rms.com/NewsPress/PR_042904_CasualtyStudy.asp).

## THREATS CONTINUE

A November 21, 2011 MSNBC reported on a hacker that "penetrated the network of a South Houston, Texas, water-treatment plant to expose the inherent vulnerabilities in critical industrial control facilities and prove how easily they can be compromised." The potential consequences of a real attack could result in the release of the contents of a 90-ton chlorine rail car which are routinely used to store

chlorine gas at water treatment plants. [http://www.msnbc.msn.com/id/45394132/ns/technology\\_and\\_science-security/#.TsvL17LNIGUA](http://www.msnbc.msn.com/id/45394132/ns/technology_and_science-security/#.TsvL17LNIGUA).

A November 2010 *Washington Post* report revealed that the Lashkar-e-Taiba terrorist organization that committed the 2008 attacks in Mumbai, India, had also asked a now-convicted U.S. ally to “conduct surveillance of an unnamed chemical plant in Maryland.” Lashkar-e-Taiba was reportedly gathering intelligence on U.S. targets as early as 2001. <http://tpmlivewire.talkingpointsmemo.com/2010/11/the-man-behind-mumbai.php>.

On August 2, 2010, two men were convicted of plotting to blow up jet-fuel tanks at John F. Kennedy International Airport, a plan authorities said was meant to outdo the September 11, 2001 attacks. <http://www.washingtontimes.com/news/2010/aug/2/ny-jury-convicts-2-jfk-airport-tank-blast-plot/?page=1>.

Since before 9/11, the Kuehne Chemical Company in South Kearny, NJ has put up to 12 million people at risk of a chemical disaster due to their chlorine gas storage adjacent to New York City. Former counter-terrorism operative for the CIA, Charles Faddis visited the Kuehne plant in July 2009. In his book *Willful Neglect* he wrote: “Anybody with minimal training in breaching and some basic equipment can go through those gates in moments. After that, it is all over. There is no way on earth that any guards inside are going to react, repel a team of armed assailants and prevent the inevitable. Every tank in the facility is going to be ruptured, either by satchel charges or vehicle-borne explosive devices, and what happens in the surrounding area is then going to be purely a function of meteorological conditions.” (For approximately 2 years the Kuehne website has claimed that the plant is in the process of converting to a safer process but no details have been made public.)

On August 29, 2007, a railroad tank car of chlorine rolled out of a rail yard in Las Vegas, Nevada and ran for 20 miles before it slowed to a stop on its own. During that 20-mile run it rolled through the heart of Las Vegas and densely-populated neighborhoods reaching speeds of up to 50 miles an hour. <http://www.lvrj.com/news/9466232.html>.

Security expert Stephen Flynn, a Senior Fellow in National Security Studies at the Council on Foreign Relations warned in his 2007 book, *The Edge of Disaster*: “. . . While attacks on the electric grid, oil and gas facilities, major ports, and the food-supply system have the potential to create the greatest cascading economic effects, it is chemical facilities near urban population centers that have the potential to inflict the greatest casualties . . . In most cases, chemical plants that threaten nearby populations can switch to less dangerous substances. This practice is known as ‘inherently safer technology,’ or IST . . . Without a strong mandate from the federal government, it’s unrealistic to think they ever will. Yet voluntary compliance is the premise of the legislation Congress passed last fall [2006]; the new rules rest on the assumption that companies will now suddenly begin taking steps they have so far refused to contemplate.”

---

ARTICLE SUBMITTED FOR THE RECORD BY RANKING MEMBER CLARKE

CHEMICAL THAT SPARKED DEADLY TEXAS EXPLOSION FOUND ACROSS U.S.

By Ryan McNeill and M.B. Pell, *New York, Wed. May 22, 2013 6:06pm EDT.*

(Reuters).—At least 800,000 people across the United States live near hundreds of sites that store large amounts of potentially explosive ammonium nitrate, which investigators are blaming as the source of last month’s deadly blast at a fertilizer plant in West, Texas, a Reuters analysis shows.

Hundreds of schools, 20 hospitals and 13 churches, as well as hundreds of thousands of households, also sit near the sites. At least 12 ammonium-nitrate facilities have 10,000 or more people living within a mile.

Fourteen people were killed and about 200 injured April 17 when a fire at West Fertilizer Co. was followed by a massive explosion. Ten of the dead were first responders from area fire departments.



The explosion destroyed an apartment complex and nursing home that sat within a few hundred yards of the fertilizer plant, damaged homes within a half mile of the plant and cracked windows even farther away.

Investigators say ammonium nitrate stored at the plant was the source of the explosion, but they have not identified the cause.

Since 1990, companies have reported more than 380 incidents involving ammonium nitrate to the National Response Center, a federal agency that collects reports of spills, leaks and other discharges within the United States. Eight people were killed, 66 injured and more than 6,300 evacuated in those incidents, according to the center's data. But reporting is voluntary, and center officials say the records cover only a fraction of all incidents.

Reuters' analysis of hazardous chemical inventories found schools, hospitals and churches within short distances of facilities storing ammonium nitrate, such as an elementary school in Athens, Texas, that is next door to a fertilizer plant. The Hiawatha Community Hospital in Padonia, Kansas, is less than a quarter-mile from one site and three-quarters of a mile from another.

The Athens school district said it is reviewing its emergency plans now, but until a reporter called on Friday had not considered the potential danger from the fertilizer plant.

"It's amazing how a tragedy like West makes us rethink things," said Janie Sims, assistant superintendent. "Who would have even mentioned it or thought of it before?"

Some sites are in heavily urbanized areas. Acid Products Co. in Chicago, which reported storing between 10,000 and 99,999 pounds of ammonium nitrate in 2012, is surrounded by about 24,000 people. Company officials declined to comment.

The number of people affected nationwide, as well as the count of nearby hospitals, churches and schools, are likely higher because Reuters was unable to get information from all 50 states.

Reuters spent about four weeks obtaining copies of hazardous-chemical inventories, known as Tier II reports, collected by states under the federal Emergency Planning and Community Right to Know Act. Twenty-nine states provided information, identifying 440 sites. Not all sites in those states were included in the analysis because of incomplete location information.

Reporters used mapping software, combined with Census and other data, to identify the nearby population, schools, churches and hospitals.

Of the 21 remaining states, 10 declined to provide their data, one declined to provide it in electronic form, and the rest either provided incomplete information, did not respond, do not maintain the filings electronically or are still considering the requests. Federal law allows 45 days to provide the information.

Among those that withheld data was Missouri, which The Fertilizer Institute, an industry association, said is the No. 1 user of ammonium-nitrate fertilizer in the United States. The group said Missouri accounts for 20 percent of the nation's use of the product.

*(M.B. Pell and Ryan McNeill reported from New York.; Edited by Janet Roberts and Michael Williams.)*

---

STATEMENT OF PAUL ORUM, CONSULTANT, COALITION TO PREVENT CHEMICAL DISASTERS

AUGUST 1, 2013

My name is Paul Orum. I thank the committee for the opportunity to present views important to a broad coalition of environmental health, labor, and community organizations known as the Coalition to Prevent Chemical Disasters. My background for 25 years is Government information policy regarding hazardous materials.

Recent deadly explosions in West, TX and Geismar, LA, among others, remind us of the need for more effective public protections from industrial chemicals in populated areas.

- These recent incidents are hardly rare. The National Response Center recorded more than 11,000 oil and chemical spills in the last year alone.<sup>1</sup>
- The potential for large-scale incidents is ever-present. A Congressional Research Service analysis indicates more than 470 facilities have vulnerability zones potentially affecting any of 100,000 or more people in the event of a worst-case toxic gas release.<sup>2</sup>
- Similar scenarios repeat. The fire and explosion at West Fertilizer is reminiscent of an event in Kansas City, Missouri, at which a construction facility storing ammonium nitrate first caught fire and then exploded killing six fire fighters after they had responded to the fire. That was November 29, 1988.

In general, the chemical safety landscape includes a lot of neglect, missed communication, static regulations, voluntary standards, and prosecution afterwards. There is not enough on prevention, technically competent inspections, community-wide awareness, producer responsibility, and safer alternatives. Regulations should not only control problems but also generate safer solutions. Accident prevention is ultimately more effective than response.

Risk management and emergency planning should be revised and updated in light of on-going and recent plant explosions.

(1) Risk management planning should include reactive chemicals like the ammonium nitrate that detonated at West Fertilizer. Where there is serious potential harm to the public, reactive chemical hazards should be included in Risk Management Plans (RMP) under the Clean Air Act, section 112(r). The Chemical Safety and Hazard Investigation Board has an open recommendation to EPA to this end:

“Revise the Accidental Release Prevention Requirements, 40 CFR 68, to explicitly cover catastrophic reactive hazards that have the potential to seriously impact the public, including those resulting from self-reactive chemicals and combinations of chemicals and process-specific conditions. (Recommendation No. 2001-1-I-H-R3)”

While the general duty clause of the Clean Air Act presumably covers all facilities that hold extremely hazardous substances—including reactive substances that pose catastrophic hazards—the general duty does not explicitly cover important proactive elements of RMPs, such as the requirement to assess and communicate chemical hazards. Adding ammonium nitrate to the RMP program could have informed the owner of West Fertilizer, first responders, and the public about the magnitude of the danger, including off-site consequences, and might have prevented or reduced the tragic consequences of the explosion.

(2) Management systems and controls do fail. Chemical facility owners and operators have a responsibility not only to understand their own chemical hazards, but also to understand less hazardous alternatives that are commercially available in their industry. EPA should require chemical facilities to review and include in RMPs available methods that prevent potential consequences of a worst-case inci-

---

<sup>1</sup>On-line search of National Response Center conducted June 20, 2013. NRC is the National point of contact for reporting oil and chemical spills.

<sup>2</sup>Congressional Research Service memorandum to Senator Frank R. Lautenberg, *RMP Facilities in the United States*, November 16, 2012.

dent. Such methods are often the most effective measures to protect workers at the site, emergency responders, and nearby populations.

Surveys show that the RMP process has prompted some companies to reduce or remove chemical hazards, one of the objectives of the program. The RMP process facilitates changes that companies may be considering for a variety of reasons, including safety, security, and other regulatory requirements.

- More than 554 drinking water and wastewater facilities converted from toxic inhalation hazard chemicals, removing dangers to more than 40 million Americans. (The 554 facilities are examples among other facilities that have converted to less hazardous operations.)<sup>3</sup>
- Facilities across some 20 industries already use options that do not pose the danger of a major toxic gas release, including bleach producers, water utilities, power plants, refineries, aluminum smelters, and many types of manufacturers.<sup>4</sup>
- Facilities that convert to safer operations may save money when all factors are considered, such as avoided costs of release control devices, liability insurance, regulatory compliance, personal protective equipment, site security, and emergency planning.<sup>5</sup>

These facilities typically substituted a less hazardous replacement chemical or process; used a chemical in a less hazardous form (such as less concentrated, or aqueous instead of gaseous); or adjusted the process design to minimize use or storage (such as generating the chemical on site as-needed without storage). These strategies are distinct from conventional risk management approaches such as containment, control, mitigation, or recovery of substances.

The House and Senate reports on the Clean Air Act Amendments of 1990 show that Congress viewed measures to remove avoidable chemical hazards as integral to the statutory goal of preventing accidental releases:

“Measures which entirely eliminate the presence of potential hazards (through substitution of less harmful substances or by minimizing the quantity of an extremely hazardous substances present at any one time), as opposed to those which merely provide additional containment, are the most preferred.”<sup>6</sup>

“Hazard assessments . . . include a review of the efficacy of various release prevention and control measures, including process changes or substitution of materials.”<sup>7</sup>

EPA took public comment on inherently safer approaches for facility design and operations when first implementing the RMP program.<sup>8</sup> Unfortunately the agency did not develop the approach at the time. As a result, covered facilities are not required to evaluate feasible chemical hazard reduction alternatives that may be the most effective safety measures. Basic prevention analysis elements such as the avoided costs and liabilities associated with alternate technologies are not standard elements of RMPs. Such elements are foundational to developing knowledge of solutions. They are among the elements that help make organizations intelligent about the advantages, costs, and feasibility of technology options.

In March 2012, EPA’s National Environmental Justice Advisory Council urged the agency to prevent chemical disasters by more fully using its authorities to advance safer chemical processes under the Clean Air Act.<sup>9</sup> In July 2012, more than 50 organizations petitioned EPA to commence rulemaking under the Clean Air Act and to revise agency guidance for enforcement of the general duty clause.<sup>10</sup>

The EPA Administrator has authority under the Clean Air Act, section 112(r), to incorporate methods that prevent potential consequences into RMPs and should do so.

<sup>3</sup>Center for American Progress, *Leading Water Utilities Secure Their Chemicals*, March 2010.

<sup>4</sup>Center for American Progress, *Chemical Security 101: What You Don’t Have Can’t Leak, or Be Blown Up by Terrorists*, November 2008.

<sup>5</sup>Center for American Progress, *Preventing Toxic Terrorism: How Some Chemical Facilities Are Removing Danger to American Communities*, April 2006.

<sup>6</sup>Senate Report on the Clean Air Act Amendments of 1990 Report No. 101–228 (S–1630), page 209.

<sup>7</sup>House of Representatives, Clean Air Act of 1990: Conference Report to Accompany S–1630. Report No. 101–952 (October 26, 1990), page 349.

<sup>8</sup>60 *Federal Register* 13526, March 13, 1995.

<sup>9</sup>National Environmental Justice Advisory Council letter to EPA Administrator Lisa P. Jackson, March 14, 2012.

<sup>10</sup>Petition to the Environmental Protection Agency to Exercise Authority Under Section 112(r) of the Clean Air Act to Prevent Chemical Facility Disasters Through the Use of Safer Chemical Processes, July 25, 2012.

(3) The explosion at West Fertilizer illustrates the importance of the Clean Air Act's general duty to operate safely. West Fertilizer was subject to an incomplete patchwork of chemical safety regulations regarding ammonium nitrate. The general duty clause holds firms responsible for understanding and managing their chemical hazards regardless of the completeness of Government actions to regulate those hazards. For example, the ammonium nitrate at West Fertilizer was not on the RMP list of substances and thresholds. The general duty is an important tool for not only enforcement but also prevention. EPA's implementation guidance for the general duty clause recognizes that removing chemical hazards can be an effective safety measure, but EPA should further develop the concept in this guidance. We strongly oppose restricting the general duty clause in ways that could hamper enforcement or prevention. We also oppose arbitrarily fragmenting Federal authorities between safety and security. By Presidential Directive, the U.S. EPA is the lead agency to oversee security at drinking water and wastewater facilities.<sup>11</sup>

(4) Emergency planning notification is incomplete. The ammonium nitrate that exploded at West Fertilizer was not on the Emergency Planning and Community Right to Know Act (EPCRA) section 302 list of substances that require emergency planning notification. EPCRA section 302 requires facilities that hold threshold amounts of listed chemicals to notify their State Emergency Response Commission (SERC) and designate a point of contact at the facility to participate in emergency planning. It should be acknowledged that local emergency response capacities are often starkly overmatched by the magnitude of chemical hazards, and that activity levels of Local Emergency Planning Committees (LEPC) vary widely. Too much is left to the mostly-volunteer LEPCs—States should have fee-based programs that support hazard reduction, inspections, and regular drills. Nonetheless, EPCRA 302 notifications are a starting point for local emergency planning. The EPA administrator has responsibility to modify the EPCRA 302 list and should do so. While lists and thresholds will inevitably fall short—hence the need for a general duty to operate safely—EPA should revise the EPCRA 302 list to include common substances that are known emergency hazards. This process should include both proactive listing criteria and a review of substances involved in serious incidents reported to the National Response Center.

(5) EPCRA inventory reporting is valuable but insufficient. Owners and operators of facilities that hold large amounts of hazardous chemicals have an obligation to clearly communicate chemical hazards to those who could be affected prior to an emergency. West Fertilizer did report ammonium nitrate to the Texas SERC under EPCRA section 312 (a Tier II report). Texas apparently maintains Tier II reports in an electronic format, which is important. EPA should continue to support and promote free electronic information management tools such as Tier II Submit, RMP\*Comp, and CAMEO. The EPA should also develop routine electronic access to EPCRA 312 Tier II data from each State through memoranda of understanding or other means (as should OSHA and DHS). EPA should also promote awareness of reporting and planning obligations among regulated facilities. However, simple awareness of chemicals on-site is not sufficient. Local emergency planners and responders need not only chemical inventories but also worst-case and planning-case scenarios (which are included in RMPs but not EPCRA Tier II reports). They also need regular information about the number and type of high-hazard shipments in all modes of transportation. Fee-based programs should support prevention, pre-fire planning, technically competent inspections, drills, and NFPA-compliant hazmat training—including clear reminders that evacuating may be the most prudent course of action.

(6) Independent investigations are important. The Chemical Safety and Hazard Investigation Board, also established by the Clean Air Act 112(r), produces root cause investigations and safety recommendations after the most serious chemical accidents. These activities are important to the public because they provide credible information and focused recommendations for change. Barriers to effective investigations, such as site access and preservation, should be resolved.

Issues beyond EPCRA and Clean Air Act, 112(r):

(7) Schools and nursing homes shouldn't be in potential blast zones. It is not an easy problem. Communities may grow up around chemical facilities or vice versa, but they are too close together in many places. State and local planners could benefit from Federal guidelines for substantial safe set-back distances, based on a worst-case scenario, in order not to continue to compound the problem when siting new buildings. School buildings were badly damaged by the blast in West, Texas. School siting criteria should take into account proximity to hazardous chemical fa-

<sup>11</sup>Homeland Security Presidential Directive/HSPD 7, *Critical Infrastructure Identification, Prioritization, and Protection*, December 17, 2003.

cilities. Recipients of Federal construction funds for buildings that will be used by potentially vulnerable populations (such as Head Start schools, hospitals, or nursing homes) should be subject to oversight to prevent building in the near zone of potential harm. In addition, the agricultural chemicals security tax credit assists agricultural distributors with conventional security measures such as fences and lights; it should assist facilities that want to move locally to safer locations.

(8) Hazardous chemical operations shouldn't be underinsured. West Fertilizer reportedly carried only \$1 million in liability insurance, a fraction of the estimated \$100 million in property damage alone. Companies that hold large amounts of extremely hazardous substances should be required to maintain sufficient liability insurance to cover a worst-case chemical release. Such a requirement would provide a reasonable cost incentive for companies to develop and use feasible alternatives. In addition, common carrier obligations encourage wide-spread overuse of railcars for shipping and storing extremely hazardous substances. Railroads have sought to have shippers share liability risks associated with extremely hazardous substances (which they are required to carry) and to have shippers develop safer substitutes.<sup>12</sup>

Sustained improvement in chemical hazard prevention, preparedness, and response is long-term and involves a range of actions. Among the most immediate lessons from the West Fertilizer explosion are for EPA to make sure major recognized hazards are: (1) Included in the programs designed to address them, (2) subject to safer alternatives analysis by the companies that hold them, (3) covered by appropriate lists and thresholds, and by the general duty to operate safely.

Thank you again for the opportunity to testify. I would be glad to take any questions.

---

STATEMENT OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

AUGUST 1, 2013

Mr. Chairman and Members of the subcommittee, we are pleased to provide testimony for the record from the U.S. Environmental Protection Agency (EPA) regarding issues concerning chemical facility safety. Our testimony focuses on emergency planning and community right-to-know efforts, and the EPA's Risk Management Program (RMP).

The EPA's Risk Management Program was one of the sources used by the Department of Homeland Security (DHS) in developing the Chemical Facility Anti-Terrorism Standards (CFATS) program. The essential approach of RMP is largely incorporated in the CFATS program. The CFATS program follows the RMP approach of employing a combination of lists of chemicals, the nature of chemicals, along with threshold amounts of those chemicals, to define the regulated community.

The EPA worked closely in support of DHS during the development phase of the CFATS program, providing detailed explanations as to how certain elements of the program worked and how the EPA implemented those elements. Since the launch of CFATS, the EPA has continued to support DHS in providing a regularly-updated database of the EPA-regulated RMP facilities, and has continued to provide chemical facility safety assistance to DHS as needed.

THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT

In response to the devastating chemical disaster in Bhopal, India in 1984, Congress passed the Emergency Planning and Community Right-to-Know Act (EPCRA) in 1986 to ensure that local communities have the authority they need to prevent, prepare for, and respond to chemical accidents. The EPCRA provisions help increase local planners, responders, and the public's knowledge and access to information on chemicals at individual facilities and risks associated with them. States and communities, working with facilities, can use the information to improve chemical safety and protect public health and the environment. The implementing regulations for emergency planning, emergency release notification, and the chemicals subject to these regulations are codified in 40 CFR part 355. The implementing regulations for community right-to-know reporting (or hazardous chemical reporting) are codified in 40 CFR part 370.

Subtitle A of EPCRA establishes the framework for local emergency planning. The Act requires that the EPA publish a list of extremely hazardous substances (EHSs). The EHS list was established by the EPA to identify chemical substances that could cause serious irreversible health effects from accidental releases (See 40 CFR part

---

<sup>12</sup>Center for American Progress, *Toxic Trains and the Terrorist Threat: How Water Utilities Can Get Chlorine Gas Off the Rails and Out of American Communities*, April 2007.

355 (52 FR 13378, April 22, 1987)). The agency was also directed to establish a threshold planning quantity (TPQ) for each extremely hazardous substance.

The purpose of the EHS's list is to focus initial efforts in the development of State and local contingency plans. Inclusion of a chemical on the EHS's list indicates a need for the community to undertake a program to investigate and evaluate the potential for accidental exposure associated with the production, storage, or handling of the chemical at a particular site and develop a chemical emergency response plan around those risks.

Under EPCRA section 302, a facility that has an EHS on-site in excess of its TPQ must notify the State Emergency Response Commission (SERC) and Local Emergency Planning Committee (LEPC), as well as participate in local emergency planning activities. Under the Statute, the LEPC shall then develop a community emergency response plan. Emergency Response plans contain information that community officials can use at the time of a chemical accident.

The EPA and the National Oceanic and Atmospheric Administration (NOAA) have developed a system of software applications used widely by States and local emergency planning committees to plan for and respond to chemical emergencies. This system is called the Computer-Aided Management of Emergency Operations (CAMEO) and it was developed to assist front-line chemical emergency planners and responders. Emergency responders and planners use CAMEO to access, store, and evaluate information critical for developing emergency plans. In addition, CAMEO supports regulatory compliance by helping users meet the chemical inventory reporting requirements of EPCRA. The CAMEO system integrates a chemical database and a method to manage the data, an air dispersion model, and a mapping capability. All modules work interactively to share and display critical information in a timely fashion.

Subtitle B of EPCRA established community right-to-know requirements in order to ensure information on chemicals in the community is provided to the public as well as emergency responders. Under EPCRA sections 311 and 312, facilities that have either: (1) A hazardous chemical present at or above 10,000 pounds or (2) an EHS present at or above its TPQ or 500 pounds—whichever is the lesser, are required to submit an Emergency and Hazardous Chemical Inventory form (Tier II) and a Material Safety Data Sheet (MSDS) for that chemical to their SERC, LEPC, and local fire department. A chemical is hazardous as defined under the Hazard Communication Standard (HCS) of the Occupational Safety and Health Act (OSHA). There is not a separate list of hazardous chemicals. If a facility is required by OSHA to develop and/or maintain a MSDS for that chemical and it is present at or above the threshold discussed above, it must be reported. Local fire departments receive this information and should use it to understand the chemical(s) present at facilities in their community and precautions they may need to take in responding to an accident at the facility.

Sections 311 and 312 of EPCRA make available to the local and State emergency planners information on other chemicals and facilities, beyond those identified under section 302, that they may wish to include in their emergency planning efforts. The EPA has specified in guidance that Tier II information under section 312 will provide specific information on the quantities and locations of hazardous chemicals. Thus, sections 311 and 312 provide information supportive of the emergency planning required under Subtitle A. The facilities identified as a result of that subtitle are only a "first cut" of the facilities and potential chemical hazards for which emergency planning may be necessary.

#### RISK MANAGEMENT PROGRAM

The Clean Air Act (CAA) 112(r) provisions build on the planning and preparedness groundwork laid by EPCRA. The CAA 112(r) provides the authority for the EPA's Risk Management Program. RMP regulations apply to the owner or operator of a stationary source with more than a threshold quantity of a CAA section 112(r)-regulated substance in a process. Section 112(r) chemicals and thresholds may overlap with chemicals listed under other rules, but are not identical to those on any other list. The section 112(r) list includes 63 flammable gases and liquids and 77 acutely toxic chemicals. To develop the list, several statutory factors were considered, including the severity of any acute adverse health effects associated with accidental releases of the substance, the likelihood of accidental releases of the substance, and the potential magnitude of human exposure to accidental releases of the substance. An accidental release is an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source. Many of these substances are also included on the EPCRA extremely hazardous substance (EHS) list. The section 112(r) chemical list and corresponding

thresholds for each chemical are published at 40 CFR 68.130. Under CAA section 112(r), the EPA is required to review the list of chemicals every 5 years or by its own motion or by petition. The EPA also provides an on-going review of new chemicals and hazards to see if any chemical warrants listing or delisting.

Under the RMP regulations, a covered facility is required to review the hazards associated with the covered substance, process, and procedures, as well as develop an accident prevention program and an emergency response program. The "Hazard Review" must identify opportunities for equipment malfunction or human error that could in turn cause the accidental release of the covered substance, as well as safeguards to prevent the potential release, and steps to detect and monitor for a release. A facility's compliance with these requirements is documented in a Risk Management Plan that is submitted to the EPA. Covered facilities must implement the Plan and update them every 5 years or when certain changes occur. The goal of the EPA's Risk Management Program is to prevent accidental releases of substances to the air that can cause serious harm to the public and the environment from short-term exposures, and to mitigate the severity of releases that do occur. Approximately 12,800 facilities are currently covered under Risk Management Program regulations.

Under the CAA section 112(r) RMP facilities must submit a risk management plan which includes:

- Facility hazard assessments, including worst-case release and alternative release scenarios;
- Facility accident prevention activities, such as use of special safety equipment, employee safety training programs, and process hazards analyses conducted by the facility;
- Past chemical accidents at a facility; and
- Facility emergency response programs and plans.

Another key component of Section 112(r) of the Clean Air Act, is section 112(r)(1), which is the General Duty Clause. This provision requires owners and operators of any stationary sources producing, processing, handling or storing an RMP substance or any other extremely hazardous substance to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which may occur. Under the General Duty, facilities are expected to comply with recognized and generally accepted good engineering practices.

Both EPCRA and the CAA section 112(r) Risk Management Program encourage communication between facilities and the surrounding communities about chemical safety and chemical risks. Regulatory requirements, by themselves, will not guarantee safety from chemical accidents. Those who are handling hazardous substances must take the responsibility and act to prevent, prepare for, and respond to chemical emergencies. Information about hazards in a community will allow local emergency officials and the public to work with industry to prevent accidents.

#### CONCLUSION

The EPA will continue its efforts to help prevent chemical accidents and releases under the Risk Management Program. Strong chemical accident prevention, preparedness, and response programs rely upon effective partnerships with the public and all levels of government. We will continue our outreach efforts to stakeholders and work with our Federal, State, and local partners to promote chemical safety, address chemical process safety issues, and explore opportunities for improving chemical safety.

Ms. CLARKE. I thank you, Mr. Chairman. I thank our panelists this morning, and look forward to further conversation.

[The statement of Ranking Member Clarke follows:]

STATEMENT OF RANKING MEMBER YVETTE D. CLARKE

AUGUST 1, 2013

Two hours after a fertilizer plant exploded in West around sunset on a Wednesday, on April 17, much of the town 18 miles north of Waco resembled a war zone. Some people were missing. Hundreds more were rushed off to area hospitals. Homes burned, others threatened to collapse. The Texas Department of Public Safety spokesman D.L. Wilson offered this grim but accurate assessment of the devastation many saw via TV: "Massive . . . just like Iraq, just like the Murrah Building in Oklahoma City."

The explosion destroyed an apartment complex and nursing home that sat within a few hundred yards, a nearby unoccupied elementary school was severely damaged, walls and roofs of homes and businesses within a half-mile of the plant cracked, and windows even further.

There are no Federal setback guidelines or requirements to separate extremely hazardous substances from surrounding populations, such as schools, houses, nursing homes, apartments, and businesses, based on a worst-case scenario.

I have been told at least 800,000 people across the United States live near hundreds of sites that store large amounts of potentially explosive ammonium nitrate, hundreds of schools, hospitals, and churches, as well as hundreds of thousands of households, also sit near the sites. Nationally, at least 12 ammonium-nitrate facilities have 10,000 or more people living within a mile, according to a Reuters analysis of hazardous-chemical storage data maintained by 29 States.

Complaints about the DHS CFATS program have recently focused on the fact that facilities that should be reporting to CFATS are not being contacted about their required reporting duty under the program. The program has also come under scrutiny about the slow pace of inspecting and approving site security plans, or SSP's.

A faster pace in the CFATS inspection and review process could have produced more tangible results in reducing vulnerabilities and consequences of a successful terrorist attack on a facility, and it could have also been a help for community emergency preparation for all-hazards events, such as the apparent industrial accident we are examining today. It seems to me they are intertwined.

However, the current rush to approve SSPs in today's CFATS program may not build confidence among the public. When airline passengers face a flight delay they are frustrated, and they complain, but they also don't want the flight rushed onto the runway at the expense of safety.

The tragic events in West, Texas, may bring into sharper focus the issue of how we as a country protect our citizens from not only the threat of a terrorist attack on facilities that store explosive chemicals, but how we identify and classify these types of facilities to begin with. Will these methods be enough to protect hundreds of thousands of people living within chemical facility vulnerability zones? And will it help local emergency planning committees prepare for events like the one in West, Texas?

As one of our witnesses will testify today, and it is just common sense, that an engaged and informed public is a vigilant public. Citizens, first responders, medical professionals, plant workers, and local officials all need to be better informed about local chemical security and safety information, in order to be prepared for all types of emergencies.

We do know that West Fertilizer did report the possession and storage of ammonium nitrate to the State Emergency Response Commission, or SERC. This was done under the Emergency Planning and Community Right-to-Know Act, or EPCRA. The SERC in Texas apparently maintains Tier II reports in an electronic format, which is important to remember.

I want to find out if The Department of Homeland Security did or did not compare their list of CFATS top-screen facilities to the Emergency Planning and Community Right-to-Know reports held electronically by each State, a relatively simple procedure that might have helped identify facilities that failed, like West, to conduct a Top-Screen under CFATS.

It would seem to me that DHS should have a Memorandum of Understanding with each State for routine electronic access to EPCRA data in that State. But I'm looking for answers, and I hope someone on the panels will be able to tell us today.

These questions, at the core of today's hearing, naturally produce other questions, like—what technological or business practice changes have enabled operating facilities that have submitted Top-Screens, to tier out of CFATS? I have been told there are apparently some 3,000 formerly tiered facilities, which are now considered less attractive terrorist targets and no longer of interest to DHS. Is there a specific development, technological or procedural, that encourages facilities to tier out? I'd like to learn more about that.

Another feature that I have learned about is that West Fertilizer seemingly lacked adequate liability insurance. While not a requirement in the CFATS program, companies that hold extremely hazardous substances and maintain liability insurance commensurate with a worst-case scenario would provide an incentive for companies to use methods that reduce potential consequences. This is just standard business practice, nothing earth-shattering. Another Critical Infrastructure piece involved in this tragic event is rail transportation. West Fertilizer apparently received shipments of ammonium nitrate by rail. Under common carrier obligations, do shippers of extremely hazardous substances, and rail carriers, routinely carry enough

insurance to cover liability associated with a worst-case release or explosion? I will be interested to find out.

Federal, State, and local interagency planning and cooperation may be the key to finding solutions to prevent events like West, Texas from happening, whatever the cause. DHS must step up to the plate on security, and find ways to identify outliers, and retool efforts to assess risk-based vulnerabilities.

Other agencies, like EPA, already have authorities under the Clean Air Act to incorporate methods to reduce consequences into their Risk Management Plans, and I understand the White House chemical security interagency group is working on this issue; it will be helpful to find out what the President's Executive Order, released this morning, will actually do.

Mr. MEEHAN. I thank the Ranking Member. Once again, I thank our panelists for your presence here today. I now recognize myself for 5 minutes of questioning.

Mr. Wulf, allow me to begin with you. Let's get to the heart of the issue that we are here for today, the outlier facilities. DHS, I appreciate, has concluded that this was not a terrorist attack, and so we are not implicated specifically in this. But nobody would deny that there was the possibility that better activity on the part of collaboration and communication should have been able to create enough recognition that somewhere we would have known about this facility and been able to take some kind of steps to have protected those fire fighters.

The report has come. Thirty tons of ammonium nitrate were there, and yet DHS had no knowledge of the facility, they had never even heard of West Fertilizer before the tragic event. So, have we gotten to the point where there are literally thousands of chemical facilities like West throughout the country that DHS is not aware of?

Mr. WULF. Yes, I don't think I am in a position to speculate as to the number of noncompliant facilities that are out there. But, you know, I can certainly tell you that we are absolutely committed to doubling down on the outreach efforts—

Mr. MEEHAN. Let me make sure that you don't believe that I am pulling this number out of the air. Your own—it was the—you know, the inspector's report from your own agency that estimated that there are thousands out there. You are aware of that?

Mr. WULF. The OIG report?

Mr. MEEHAN. Well, it is—yes, well I will give it to you.

Mr. WULF [continuing]. Report?

Mr. MEEHAN. Yes, I will get it for you. I mean, I have reviewed it myself. That is why I am asking. It is not a secret that there are thousands.

Mr. WULF. Yes—

Mr. MEEHAN. Somebody has estimated that there are thousands.

Mr. WULF. Certainly, the West tragedy underscores, you know, our need to ensure that we are doing all we can to reach facilities that we have not yet been able to reach and that have not complied with their obligation to report their holdings of high-risk chemicals of interest.

So, you know, we have, over the course of the CFATS program, done a significant amount of outreach. Actually, upwards of 11,000 separate outreach engagements, compliance assistance visits with facilities, presentations, outreach to State and local agencies, including first responders.

But we are looking anew at those efforts, and ensuring that where there have been gaps we are going to be in a position to fill those gaps. So that includes things like redoubling our efforts with State homeland security advisors and working with those State homeland security advisors to reach down to the level of State regulatory agencies so that where State regulatory agencies are aware of facilities that may not have come into our orbit. We can compare their lists against our lists. I have worked personally in the last several weeks with the State fire marshal for the State of Texas to ensure, together, that we have mutually-exchanged lists of facilities that have ammonium nitrate in the State of Texas.

Over the past 3 months, my staff has worked directly with the offices of all 50 State homeland security advisors. We are also working, and, you know, it was mentioned earlier this morning that we had worked well with the National-level trade associations, and that members of those associations, you know, have probably a heightened ability to be aware of their regulatory—

Mr. MEEHAN. Well, I think there is no doubt that there is a heightened ability. I mean, this is part of the problem. We have got a series of agencies, and we will explore some of this, with regard to—I know what the intentions are. We will explore some of this with regard to some of the other agencies: OSHA, EPA, State overseers, your partners in this who want to collaborate with you. Ag associations and others, all of whom, in different sets of responsibilities, are actually collecting this information. Yet it is not finding its way to you.

You are not able, somehow, to communicate with these other groups. So I hear what you are saying about what you would like to do. But we are 5 years into this program. We are close to half a billion dollars that have been given to your group to effectuate CFATS. Five years later we are beginning to hear about the fact that you may begin to do more in the way of conversations with other kinds of State partners. There was an effort that was undertaken with the EPA and it failed. Then you went back again and started another whole new way of comparing data.

Why wasn't that followed up on? What was the problem associated with that earlier effort to collaborate among existing Federal agencies, and how can it be that complex an issue? We can follow a package in the mail by the minute if we send it with UPS or even our own mail service. Here we are moving huge sums of chemicals and you are telling me you don't know where they are, and people just don't get it.

Mr. WULF. Yes, well, you know, I think, with regard to the earlier EPA effort it did not yield significantly useful results. I think largely, and this was in 2008–2009 time frame, because of incompatibilities in the respective databases. So we have done a lot of work organizationally, and we now find ourselves in a better position to do that sort of crosswalk. We have—

Mr. MEEHAN. Where—tell, me. Okay, I want to know, today, what do you believe are going to be the time lines and what do you believe are going to be the metrics so we can have some measurables on some performance with regard to this? If you are unprepared to give me that today I will accept that. But I want to

hear from you, very soon, with predictions on those metrics. Can you speak to them today?

Mr. WULF. I can speak with regard to EPA data. We have reinvigorated that effort and we have already conducted the crosswalk between the two databases. With regard to—

Mr. MEEHAN. What have you found?

Mr. WULF. We have found that there are some facilities, and I don't have the number with me on hand, that were found in the EPA database and that had not submitted Top Screens to us. I think, as well, and I don't want to speak on EPA's behalf, but there are—you know, there are facilities in our database that are not in EPA's. With regard to metrics, I think, you know, the metric, off the top of my head, would be the numbers of Top Screens that we receive from facilities.

I do think it is important to note that over the course of the program, as a result of the efforts we have undertaken to this point to get the word out—and it is not to say that there is not more to do because, certainly, you know, we are committed to doing all we can to get the word out—but we have received 44,000 Top Screens from facilities that have met their obligation to report their high-risk chemical holdings.

Mr. MEEHAN. All right. Well, I—my time has expired. I know we will talk a little bit more about top fliers among other things.

I thank you, and now turn it to the Ranking Member for her questions.

Ms. CLARKE. Thank you, Mr. Chairman. Mr. Wulf, would you please describe how DHS, ISCD does or does not access other relevant Federal, State, and local government agency and interagency chemical information that is routinely gathered, and that would have indicated threshold chemicals of interest in inventory at West, Texas?

Mr. WULF. Well, I talked a little bit about what we have been doing with EPA, recently having shared our respective RMP and CFATS databases of facilities. We are doing the same thing with our colleagues at the Bureau of Alcohol, Tobacco, Firearms, and Explosives, who are responsible for regulating Federal explosives licensees and permittees across the Nation. We are working also with the States, with State agencies, through the State homeland security advisory—

Ms. CLARKE. Has this been a standard practice, or is this in the wake of what happened in West, Texas?

Mr. WULF. We have certainly taken a look in the wake of what happened at West, Texas, but this sort of activity has happened, I would say, more episodically over the history of—

Ms. CLARKE. So it wasn't a norm or a standard protocol.

Mr. WULF. No.

Ms. CLARKE. Okay. So are you saying that you are now establishing a norm and a standard protocol with these agencies?

Mr. WULF. Yes. With respect to EPA, for instance, we have done this initial crosswalk. We are sort of evaluating a time line for repeating it on a regular cycle.

Ms. CLARKE. Mr. Caldwell, do you agree that this is an established norm or protocol that is in formation?

Mr. CALDWELL. We have not looked at the program since the West, Texas thing, but I think, obviously, the President's Executive Order is going to put additional emphasis on this to kind of force the agencies to work together to do the data sharing. I have not seen the Executive Order yet, but at least as to how it was summarized by Mr. Wulf.

Ms. CLARKE. This is just a, you know, a basic sort of 101 DHS mission, which is to coordinate and collaborate with other agencies to keep the homeland safe. You know, we have got to come up to speed. The American people really expect more of this agency. I just want to highlight that. Because we are constantly talking about information sharing and, you know, if we are, you know, not doing this, it is really flying in the face of the mission of this agency, and impedes its growth, quite frankly.

Mr. WULF. The information sharing is absolutely a priority for the CFATS program. Our inspectors across the country have been plugged in to their communities, including with first responders, local emergency planning committees. We have about 120 inspectors across the country, and it is a large country. In Region 6, which includes the State of Texas, we have 13 inspectors for a 5-State region that spans from New Mexico to Arkansas. So I can promise you they have been doing their best to ensure that they are communicating with, and sharing information with, local authorities, State and local authorities.

Ms. CLARKE. How long has this sort of staffing been the case—

Mr. WULF. As long as I have been in place, which has been about 2 years.

Ms. CLARKE. Well, that raises a concern for me. Mr. Wulf, please describe how Oak Ridge National Lab, which is involved in CFATS assessment tool development, gathers, stores, and communicates interagency EPA information it acquires with ISCD personnel, and why this relevant information was, or was not, passed on to the ISCD headquarters.

Mr. WULF. Well, we work for, you know, ISCD's part, we work with Oak Ridge. They are the folks who sort-of run the databases against one another; so crosswalk the databases. So responsibility, for example, we received from EPA the list of facilities that are regulated under the EPA's RMP program. We provided that to Oak Ridge. They did the crosswalk between our facilities and our database and the EPA database, and, you know, have communicated back and forth with us. So they are under contract with the Department for that purpose.

Ms. CLARKE. So if this is the nature of the relationship that you have with Oak Ridge, then why was this relevant information, why wasn't it passed on?

Mr. WULF. I don't believe I am familiar with an instance of information not having been passed on.

Ms. CLARKE. You feel like you are getting information in real time?

Mr. WULF. I feel confident in our relationship with Oak Ridge, certainly.

Ms. CLARKE. Okay.

Mr. Caldwell, the DHS office of inspector general reported that DHS has inspected only 47 of approximately 4,400 facilities regu-

lated under CFATS as of March 2013. Your office has audited similar data at ISCD. Can you give an estimate of how many chemical facilities that could likely contact COI above the threshold of required reporting for CFATS? Describe the plan you found in place to assess and contact the number of non-repeating outlier facilities nationally.

Mr. CALDWELL. I think Mr. Wulf in his statement provided the most up-to-date information on the number of inspections. So it sounds like the IG found there were 40-something inspections. Mr. Wulf's data shows, oh, something under 200, maybe. I don't remember the exact figure. So we did find they had a cumbersome process for doing these inspections. We also found that they were making it more streamlined, and they seemed to be doing that. We have a mandate to look at that again once they start their compliance inspections, which won't be for several months, to do that.

So we haven't looked at the inspection data yet. But in terms of your last question, in terms of to find more outliers, again, we haven't done new work since the explosion in West, Texas. So other than Mr. Wulf's discussion here of their new steps, we have no new information to add on that, ma'am.

Ms. CLARKE. Thank you.

Mr. Chairman, I yield back.

Mr. MEEHAN. Thank you. Let me just use the Chair's prerogative to follow up for a second on that questioning. I understand that you have got—I mean, there is a sort of an analysis, a full checklist, a review, complex undertaking. But we are asking about a specific bit of information. Why can't we get a baseline report on the presence and amount of chemicals at the facilities sent to you? Later on, you can go back and look at all of the questions as to whether they are appropriately stored or otherwise protected. But just the idea of knowing what is where.

The idea that we are going to wait long periods of time before we complete inspections at a place, and therefore now know about the presence of these facilities at other places, is there a way to report on the amount of ammonium nitrate and other highly dangerous chemicals that will allow us to have an understanding of the full map?

Mr. WULF. Yes, there certainly is. That is something that we can get done, and that we can make available, and have made available, through our CFATS share on-line tool, which is something that is available to State and local authorities.

Mr. MEEHAN. But you don't know now. I mean, again, we don't know where they all are. Again, I talk about—and these were the outliers. We keep talking about outliers, the facilities. The literally, potentially thousands of outliers who are there. We don't know about them.

Mr. WULF. Yes, we know about, you know, the facilities that have submitted the 44,000 Top Screens we have received. So we can, you know, produce that. As we are able to bring more outliers into the fold we will be able to aggregate that information, as well.

Mr. MEEHAN. Okay, yes.

The Chairman will ask unanimous consent that the gentlewoman from Indiana, Mrs. Brooks, and the gentleman from Texas, Mr. Flores, who, I know, has a special interest in this issue, be allowed

to sit on the dais and participate in today's hearings. Without objection, so ordered.

Mr. Flores has arrived, and he would therefore be the next to be recognized for his questions.

Mr. FLORES. Well, thank you, Mr. Chairman. Chairman Meehan and Ranking Member Clarke, thank you for holding this important hearing today. Additionally, I want to thank you on behalf of the community of West for including me in your discussion regarding the disaster that occurred in this small Texas town on April 17, 2013. Hopefully, through this hearing, we can learn from the incident in West and gain knowledge about similar facilities around the country in order to prevent future disasters of this nature.

The community of West has been through so much since the tragic explosion in April. This incident took 12 lives, including the 12 first responders that you see on the poster behind me. It injured hundreds and caused tens of millions of dollars in damage. The State of Texas and the entire West community have been working tirelessly to rebuild and recover with available resources. Since that day, the community has desperately been seeking Federal assistance necessary to rebuild. While FEMA has provided some important and much-needed resources and assistance, the community of West is still in dire need for additional assistance to rebuild their community.

In an effort to gain all of the necessary public assistance from FEMA under the Stafford Act, Governor Rick Perry requested a major disaster declaration on May 16, requesting all essential categories of public assistance. On June 10, despite reaching the monetary required threshold of uninsured damage, FEMA denied the MDD request. Following that denial, Governor Rick Perry, on July 9, appealed the President's decision to deny an MDD that would have provided additional Federal assistance to the people of West. While the State of Texas and the city of West still await the President's decision on that appeal, days continue to go by where people are still homeless, without schools, without basic infrastructure, and with a struggling community.

Now, looking forward, regarding the implications and lessons from the disaster, it appears that the building blocks of the incident were due to the following: The West Fertilizer Company's failure to comply with existing regulations and the lack of oversight and enforcement. It didn't occur from a lack of regulations, it appears. This is evidenced by the National Protection Program's director, or NPPD, failing to fully implement a comprehensive ammonium nitrate security program. Even though this was not a terrorist act, it is important to stress that a functional and efficient chemical facility antiterrorism standards programs should exist to prevent against any future exploitation.

Finally, the events in West, Texas raise serious concerns the Department of Homeland Security's chemical security inspectors were unaware that West Fertilizer Company was handling tons of potentially explosive ammonium nitrate. Furthermore, the Chemical Safety Board, or the CSB, reports that approximately 72 percent of their recommendations regarding the risk management of ammonium nitrate and other dangerous materials have been adopted. That, however, leaves 28 percent of their recommendations that

have not been adopted. This leads us to believe that the Federal—that the Environmental Protection Agency, or EPA, can and should immediately strengthen safety at facilities that handle dangerous chemicals by implementing and following the remaining guidelines set forth by the CSB.

Mr. Chairman, as you can see we have regulations on the books and we have regulations from agencies with subject-matter expertise. Now it is up to the Homeland Security department, the EPA, and related Federal agencies and private industry to act promptly to adopt safety measures that can save lives and prevent similar disasters. Before Congress or regulatory agencies consider new statutes or rulemaking, they should make sure that the ones we have are being properly implemented and adjudicated.

Again, Chairman Meehan and Ranking Member Clarke, on behalf of the citizens and the community of West thank you for having me here today. I appreciate this committee's work to address this important issue that is on the table today. We want to work hard to prevent future tragedies like this in the future.

Thank you, and I yield back.

Mr. MEEHAN. I thank the gentleman from Texas for his statement.

I now recognize the gentleman, Mr. Vela, for his questioning.

Mr. VELA. Thank you. I would like to also thank the leadership of our committee and our subcommittee for bringing the public's attention to this real tragedy. Sometimes life goes on, and we forget how significant and what kind of an impact these kinds of accidents have, and how they affect the people of the certain communities where they happen. I, too, wish to express my condolences to the people of West, Texas and to the families of those who were killed and to those that were injured.

I have a lot of questions arising from today's hearings, and I hope that this subcommittee will continue to delve into this very important matter so that we can ensure that a tragedy like this never happens again.

So given time limitations, I think where I would like to start is by taking the example of a refinery in, let's say, Corpus Christi, Texas. It is my understanding that from the Federal regulatory standpoint the agencies that would have jurisdiction over safety issues at companies like—at a refinery like that would be the EPA, OSHA. Are there any others?

Mr. WULF. Well, depending on the holdings at the refinery and the location of the refinery, it could be a CFATS facility. If it is on the water it could be regulated under the Coast Guard's Maritime Transportation and Security Program, MTSA.

Mr. VELA. Okay, so that would be two separate agencies?

Mr. WULF. Well, it would be one or the other. If it is a MTSA facility it is exempt from CFATS. If it is a CFATS facility, because it is not on the water.

Mr. VELA. Okay. So, for example, we have an eight—we are, using the example I am talking about which is a refinery which is basically on the water, then the three Federal agencies that would have jurisdiction over safety issues would be OSHA, EPA, and MTSA, for example.

Mr. WULF. Yes, the Coast Guard.

Mr. VELA. If we had a refinery that was not close to the water the agencies that would have jurisdiction over such would be OSHA, EPA, and CFATS.

Mr. WULF. I think that is accurate.

Mr. VELA. Would there be any other Federal agencies out there in this world that would have jurisdiction over these things?

Mr. WULF. Not that immediately pop into my head.

Mr. VELA. Relating back to the incident at hand, or facilities like this one in West, Texas, is it those same three agencies that have jurisdiction over, for example, the West Fertilizer plant?

Mr. WULF. Well, with respect to—I think EPA was involved in regulation at the West plant. I think OSHA certainly has some role there. I certainly don't want to speak for other agencies. With regard to DHS, based on the apparent chemical holdings at the facility, the facility did not meet its obligation to report to DHS whether such a report of those holdings through what we call the Top Screen process would have ultimately resulted in the issuance of a final tier, reflecting that it was a facility at high risk of terrorist attack. Because that is what the CFATS program is about, as you know; preventing, or fostering security measures at facilities at high risk of terrorist attack.

It is unclear, without more information, about what holdings were in place before the explosion. But for it to come into the, finally, into the regulatory ambit of DHS and the CFATS program it would have to have submitted that filing and been judged ultimately through the process to have been a high-risk facility.

Mr. VELA. So would OSHA have jurisdiction over a facility like this one in West, Texas?

Mr. WULF. My understanding is they would, but I am not an expert on OSHA regulations.

Mr. VELA. So relating—let's talk about a—let's assume we are talking about a refinery in central Texas that CFATS shares jurisdiction with EPA and OSHA. Can you give us an idea of how your agency coordinates with OSHA and the EPA to ensure that incidents like this do not occur?

Mr. WULF. Yes. Well, what we are doing with EPA and we will also be looking to do with OSHA is to share our respective databases so that if there is a facility that is, you know, known to one of us but not the other, we will be cognizant of that and ensure that we can work with the facility to bring it into compliance with the appropriate regulatory framework.

Mr. VELA. So if we had a list of every refinery in the country over which EPA, OSHA, and CFATS had jurisdiction over, would you be able to come in and give us an idea of what kind of interaction the three agencies had over concerning each of those facilities listed on such a list?

Mr. WULF. I think that would be a possibility, yes. You know, I would be remiss if I didn't mention that the Executive Order issued today is, you know, is designed to foster, among other things, the possibility of a shared database such as that. So one of the things that the working group that has been chartered by the President, the interagency working group, will be looking at is the feasibility of developing just such a consolidated database of chemical facilities.

Mr. VELA. So are you saying that, to date, the coordination between the three agencies when we are talking about a facility like that have just been lacking, or how would you describe the state of things up until today?

Mr. WULF. You know, my sense is that the coordination has been occurring in the field. So our chemical security inspectors and regional commanders have been working with their counterparts at the local and regional levels to, you know, to discuss and deconflict and coordinate their activities at facilities. But there is not, at this point, the consolidated National database of chemical facilities. That is something we are going to look at doing, going forward.

Mr. VELA. I think I have run out of time.

Mr. MEEHAN. I didn't want to interrupt the gentleman while he was on a roll.

Mr. VELA. Well, then, I yield back.

Mr. MEEHAN. Okay.

The Chairman now recognizes the distinguished woman from Indianapolis, Mrs. Brooks.

Mrs. BROOKS. Thank you, Mr. Chairman, for allowing me to participate in today's hearing. I do chair the Subcommittee on Emergency Preparedness, Response, and Communications, and so that is in part what I would like to talk with you about. But this particular topic is of particular interest to me as this unfortunate, incredibly devastating disaster affected some of my constituents, Jeanette and Tim White and their family directly. Kevin Saunders is one of those first responders who was killed. He is a brother to Jeanette, who lives in my district.

Having worked with the fire fighter community and law enforcement community, I ask unanimous consent to submit a letter that has been provided from Mr. White for the record, the brother-in-law.

Mr. MEEHAN. Yes, so ordered.

[The information follows:]

LETTER FROM TIMOTHY D. WHITE

JULY 25, 2013, *Zionsville, IN.*

Representative Micheal McCaul,  
*Chairman of the Homeland Security Committee.*

DEAR REPRESENTATIVE MCCAUL AND MEMBERS OF THE HOMELAND SECURITY COMMITTEE: Let me begin by thanking you for the opportunity to address the committee regarding the explosion at the fertilizer plant in West, Texas. My brother-in-law Kevin Sanders was one of the first responders that was killed in the explosion that day. Like many still grieving their loved ones, I would like to see changes made to the policies related to hazardous material regulation, use and tracking, but my career as a chemist and my upbringing in a Midwest farm family balance this need for change with the realization that change must be brought about with well-thought-out solutions that take all perspectives into account. The profound impact of this tragedy continues to affect our family daily and while the changes proposed here will not bring Kevin back to us, they will help ensure that other families and our country do not experience this type of tragedy again.

The explosion in West was preventable and while on the surface it appeared the necessary regulations were in place, the multiple agencies involved were not all adequately informed, which lead to a situation that ended in tragedy. While the current laws required the plant to report the amount of hazardous materials they had on-site, the Department of Homeland Security was not informed of the presence of ammonium nitrate that was well above the levels that require monitoring. Beyond reporting directly to an agency, there needs to be a mechanism in place to ensure that ammonium nitrate, and other dangerous chemicals, are tracked accurately which seems feasible when we are talking about tons and not ounces of material. Tracking

rail cars of material coming into facilities and then subsequent tracking by those facilities, like the one in West, should allow an easy electronic and constantly updated account of the amount of any hazardous substance on-site. This would require a financial investment by those companies but the technology to track shipments is readily available and the companies that manufacture the materials in bulk should also be accountable for helping the smaller distributors like Adair Grain Inc. in West, Texas. I can easily track my Amazon book order so tracking rail cars of material should be something that can be implemented in a reasonable time frame. A tracking system like this would avoid instances of "outliers" such as the one in West. The tracking of rail cars of material would require a scan in at their destination so it would not be possible for companies to exist undetected.

Until a system like this is in place, we are asking first responders to face unnecessary uncertainty. The assessment of the situation in West would have differed significantly if they had known that multiple tons of a compound which can explosively decompose were on-site and rather than fighting a fire they would have been evacuating the residents of West. We rely every day on the heroic actions of the brave first responders that protect us and they deserve to understand the potential additional dangers beyond the fire itself that they are encountering.

The current system requires small companies to report information to a number of agencies involved in protecting and monitoring potential safety issues. The tracking system mentioned above would allow local authorities to have up-to-date information about the materials that are on-site at the moment a fire call comes in. Additionally, at this time, information provided to one agency is not necessarily shared with other agencies that require the same information to guarantee safety to our country. This again highlights the importance of the communication between agencies that are all looking out for the safety of America that often overlap in sometimes unexpected ways. Electronic documentation of reports to these agencies should be able to automatically trip an alert to other agencies that require the same information.

A good example of how a system might be more effective is currently in place in Wyoming where 23 planning districts with membership including elected officials, law enforcement, health officials, transportation, media, community groups and owners of the facilities that are subject to reporting hazardous material. Wyoming alone has approximately 7,500 facilities that need to report chemical inventories to the State commission. This highlights the importance of a system that works and is interconnected at all levels of government and again most importantly to the first responders so they are aware of additional hazards they face when fighting a fire.

Everything I've highlighted above is necessary to fix the problem of tracking dangerous chemicals and keeping local authorities informed, but I think it is important to also consider the hazards of ammonium nitrate itself. While ammonium nitrate has been used for decades as an important, cost-effective fertilizer in agriculture, the key liability that manifested itself on April 17 was the explosive decomposition that is possible when the compound is exposed to the wrong conditions. Urea is an example of a valuable alternative that is successfully utilized when conditions in the soil have the appropriate moisture content and pH. Unfortunately, the dry pasture of Texas is perfect for volatilization of the nitrogen in urea due to the absence of regular soil moisture, so minimal levels of fertilizer actually remain in the ground when urea is used. This is the key reason that ammonium nitrate use is still prevalent in regions where these dry conditions exist for most of the year.

As a chemist, every day I'm confronted with reactions where cheaper but potentially more hazardous options exist to accomplish the chemistry at hand. Part of my job for the past several years has been to seek out safer ways to improve the synthesis of chemical compounds, but this change often comes with a financial cost. With this in mind, there are two important aspects to making an overall improvement beyond the current options, the biggest will be the innovation necessary to develop something that does not currently exist. The second will be financial help for small farmers that are not equipped to absorb the increased expense of new technology until the advances become common practice and thereby cost-effective. I grew up on a small farm in Illinois and my mother still owns and lives on that land so I personally understand how every penny matters for today's small farmers. An example of a potential replacement could be encapsulated urea where the urea would not be exposed until water is present to dissolve the outer coating revealing the urea inside and then, in the presence of water, would be readily incorporated into the soil. Also, because urea increases the acidity of the soil the encapsulation could potentially also include a basic component to correct the pH.

In closing, what has allowed our family to get through this horrible experience has been the outpouring of support especially from the brotherhood of fire fighters. The fire fighters are asked to perform dangerous and heroic work each and every

day and need the help of the entire country to ensure they can be as safe as possible. This is the opportunity for this committee to impart change to ensure this never happens again by monitoring the use and storage of ammonium nitrate and other dangerous chemicals along with developing new and innovative ways to ensure safer practices for fertilizer. This will require compromise, but the potential of subsidies to farmers where ammonium nitrate is the best option to help offset the cost for the innovation of a new delivery method should provide the necessary drive for everyone to achieve the goal of a safer and better country.

Respectfully,

TIMOTHY D. WHITE.

Mrs. BROOKS. Thank you, Mr. Chairman. Mr. White does point out in his letter that the first responders' assessment of the situation in West could have differed significantly if they had known exactly what was on that site. Mr. White, a chemist, by the way, thinks that the first responders, with the right information, would have potentially been evacuating those residents of West rather than fighting that fire.

As the U.S. Chemical Safety Board's investigation of the West explosion noted, West volunteer fire fighters were not made aware of the explosion hazard from the ammonium nitrate stored at West Fertilizer and were caught in harm's way when the blast occurred.

Now, we all know—and there have been far too many both natural and man-made disasters in this country—but we rely every day on the heroic actions of our brave first responders that protect us. They deserve to understand the potential harm and the dangers beyond the fire itself before they run into a disaster like this, and to be trained properly as to how to protect themselves and our communities. My question, Mr. Wulf, is, in 1986 the Emergency Planning and Community Right-to-Know Act, or EPCRA, was created to help communities plan for emergencies like this involving hazardous chemicals.

EPCRA established requirements for Federal, State, and local governments, tribes, and industry regarding emergency planning and a community's right to know reporting on hazardous and toxic chemicals. According to the EPA, West, Texas was in compliance with this reporting requirement. But did, my question to you is: Did DHS have access to this EPCRA information on West? If so, how was it used?

Mr. WULF. I am not aware that we had access to it. But going forward, among the things we are, you know, certainly looking at, as we talk with State agencies and State homeland security advisors, is ensuring that information is shared back and forth between, you know, the Department, our CFATS facility information, and information held by State agencies.

Mrs. BROOKS. So what is your plan, though, to make sure you are accessing this EPCRA information in communities across the country?

Mr. WULF. Yes, well, to the extent that the information is held at the State level and, I guess, in this instance it was held by the State Emergency Response Commission, I think we will work with the State homeland security advisors to ensure that the, you know, the information is flowing to us. Similarly, that information we hold about facilities that have holdings of high-risk chemicals flows to the States and localities. So we have been engaging in discussions and sharing information with State agencies and, certainly, intend to double down on those efforts going forward.

Mrs. BROOKS. Was there actually an unwillingness to leverage that information, or a lack of knowledge in the need to leverage that kind of information before this incident? Why does this seem to be a new step for DHS?

Mr. WULF. Yes. Now, there certainly wasn't an unwillingness. You know, outreach, getting the word out about CFATS and about the reporting requirements of facilities in the chemical sector was a high priority of the Department. You know, there, you know, have been sort of finite resources. We have had competing priorities. The need, for instance, to work with facilities that have submitted Top Screens have come into the program to develop their security vulnerability assessments and their site security plans and to conduct inspections.

You know, at the same time, we have, over the course of the program, conducted over 11,000 outreach engagements, including with State and local communities. So I think we have been doing that sort of sharing on a sort of regional, localized basis. But we are certainly committed to ensuring that we have National protocols in place to make sure that that happens.

Mrs. BROOKS. If I might, Mr. Chairman, I have one further question. I was U.S. attorney when the Department of Homeland Security was set up, and so I am familiar with the positions. When you talk about a lack of resources, what are the positions within DHS that actually are responsible for this in States? Is there a DHS position in jurisdictions that is responsible for this outreach to the—whether it is those, you know, in a chemical community or others? What is the title of that position?

Mr. WULF. Well, within the CFATS program we have regional commanders and district commanders who are responsible on the chemical side. But more broadly, my broader organization, the Office of Infrastructure Protection, manages the protective security advisor program. Those protective security advisors are the ones who do the more broad-based outreach and liaison with folks at the State level, and look at Nationally-critical infrastructure.

Mrs. BROOKS. How many protective security advisors does the Department of Homeland Security have?

Mr. WULF. Approximately 100, but I would have to get back to you with the exact number there.

Mrs. BROOKS. Okay, thank you. I yield back. Thank you.

Mr. MEEHAN. I thank the gentlelady from Indiana.

I am going to ask a couple of follow-up questions myself. Because we have the panelists that we have before us, there are a couple of issues I would like to further explore. One of them goes to the concept of outreach, as we are trying to do it. Let me say, Mr. Wulf, that I do appreciate that there is a big undertaking. You quote the numbers of 44,000 Top Screens and other kinds of things. I think that there had been some significant accomplishment in the form of the beginning recognition, particularly by many in the industry, about the desire to try to regulate—not regulate, to identify and oversee the presence of these chemicals, the dangerous chemicals.

Quite frankly, I think you would be the first to admit you got a lot of great cooperation from many of the folks in the industry. They are looking for more follow-up, having already taken great steps, made great investments. They are looking for the kind of

timely follow-up on the efforts that you have already undertaken with these Top Screens. I am a little concerned by testimony that Mr. Caldwell presented in his written testimony. If I am correct, Mr. Caldwell, you are talking about estimates just to continue to do some of these CFATS oversights of anywhere from 7 to 9 more years before we are going to be even completed with this process. Seven to 9 more years. Can we wait 9 more years for this kind of identification of critical information?

Mr. WULF. You know, I would note at the outset that 7 to 9 years, in my view and the view of the Department, is not an acceptable time frame for getting through the mass of site security plans that we have on hand. We are committed to ensuring that the pace of those authorizations, inspections, and approvals continues to pick up. You know, I am happy to say that although there is more to do, we have turned a corner and have begun to make progress. At this time last year we had yet to grant final approval to our first site security plan.

We are now coming up on 200 plans that will have been granted final approval. We had authorized sort-of the mid-range step about 50 site security—

Mr. MEEHAN. Well, how about, okay, so you are talking about 200, and you have got literally thousands to do.

Mr. WULF. Yes.

Mr. MEEHAN. So it is a great undertaking.

Mr. WULF. Yes.

Mr. MEEHAN. But 200 of thousands, I begin to question sometimes whether the process is, in and of itself, well conceived if, in fact, you can recognize that the end is so difficult to realize in a reasonable period of time. You can imagine how a business who has cooperated with you and is waiting for years for a follow-up can be tremendously frustrated. Now let me talk. Because today's thing is about the outliers. I am just talking about those who are compliant and working with you.

When we use the word "outliers," the concern that I have is that there is a suggestion that somehow these are people who are looking to dodge the system or to get away. I think the truth of the matter is, and sort of crystallized to me in testimony and commentary that we got from a variety of other people who are interested in this, and one of them came from a small farmer. Basically, he said, you know, the truth of the matter is we want to be compliant, but we are overwhelmed. We are overwhelmed with responsibilities, first, in just managing the facility.

Oftentimes, the person who is responsible for all the compliance is also the person who is responsible for running the operation at the facility. We don't have time to take a day off to go to a meeting at the local agricultural association. In fact, most probably aren't even members of the agricultural association. So you are outreach to the association is good, but it is just touching the core. But we are missing a whole number of people. They don't have the time, and they are confused. They are confused as was stated. The individual in West, Texas thought he was in compliance.

What he was in compliance with was a State requirement. They have got OSHA stopping in, they have the EPA that may stop in, they have you who may stop in, they got State facilities who may

stop in. Some will tell you that it becomes overwhelming. So don't we have a responsibility to coordinate just a little bit better, and have a single point of contact for some of these kinds of things, particularly with regard to the very specific question about how much we have in the form of certain chemicals on your property?

Mr. WULF. Yes, I think you are right that we do. You know, we are committed to doing just that. You know, the Executive Order that the President has signed incorporates a pilot through which we are going to work with our interagency partners—the EPAs, the OSHAs, ATF—to validate best practices, to look at doing joint outreach, to look at how we can do a better job—

Mr. MEEHAN. Let me, because my time is expiring and I want to ask Mr. Caldwell one specific question. But pilots and other kinds of things, I mean, I get it. I know you are working. But the bottom line is, there is a lot of information already out there. OSHA is already collecting it, EPA is collecting it, State facilities are collecting this very information. We seem to be continuing to try to remake the wheel. I had a friend that used to say ask me what time and they will tell me how to build a watch. Why can't we just go and do the simple process of asking about the presence of these chemicals, finding out who has them, tracking the chemicals through the system, and making sure people are reporting where they are?

Mr. WULF. That is exactly what we are doing with EPA, ATF, and with OSHA.

Mr. MEEHAN. Mr. Caldwell, you looked at something in your report, and you have studied this, called a more systematic response to outreach. Is that not the word you used, a systematic response, or a systematic plan, or—

Mr. CALDWELL. That is correct. There was—

Mr. MEEHAN. Can you explain to me what you mean by that, and then I will—

Mr. CALDWELL. Yes, there was a lot of outreach going on. The CFATS program was maintaining statistics on that. But what they weren't maintaining was the quality or results of that feedback, or the outreach. So we made a recommendation that, when they were doing this outreach they also look to see whether it is, look for measures of effectiveness. Are they are, you know, either hitting the right people, or are they doing it the right way? The Department has agreed with that recommendation, and is—

Mr. MEEHAN. So work doesn't necessarily mean productivity. So how would—

Mr. CALDWELL. Yes, and measuring results of the outreach.

Mr. MEEHAN. How do you recommend that they change that effort into productivity?

Mr. CALDWELL. We did not come up with specific ways, but just kind of thinking out loud here it could be either surveys back to the people that are a part of the outreach, or as part of the outreach having them respond to whether this is useful to them or not. Obviously, if it is not useful, then making adjustments so it would be useful. And get their views of the outreach, as well as just collecting the statistics on it, sir.

Mr. MEEHAN. It does seem to me that there is an awful lot of opportunity for us to work with colleagues that look to work with you.

They are not trying to hide this stuff. They are trying to cooperate with you, and they are asking for your assistance on doing it. We got a big challenge, and we got to get it right.

I now will turn it over to the Ranking Member for her follow-up questions.

Ms. CLARKE. Thank you, Mr. Chairman. I appreciate the opportunity to follow up with a few questions. Mr. Wulf, I understand the Department has sent letters to facilities in recent weeks asking that information be submitted for a Top Screen risk analysis by September 9. Mr. Chairman, I ask unanimous consent for a copy of the letter to be submitted into the record.

Given that the committee received, at least to my knowledge, no notification of this effort, how many of these letters were sent out? What is the universe of facilities that received these letters?

Did it go to facilities that have already been tiered, or did it go to facilities that have been previously tiered? Could you just enlighten us a bit about these letters?

Mr. WULF. Yes, those letters, the bulk of them, came out of our effort to do the crosswalk with EPA's RMP database, and to identify facilities that were in the EPA database, but that may not have been in our database, that may not have filed Top Screen. So it was an effort to try to bring into the fold non-compliant facilities.

Ms. CLARKE. Basically, doing some sort of reconciliation.

Mr. WULF. That is right. Another small segment of that were letters sent out to facilities in Texas that we had received through our mutual sharing with the State of Texas. We also sent some letters out to State-level agricultural executives in an effort, with the help of the Fertilizer Institute and Agricultural Retailers Association to reach down to that level and sort of fill that gap.

Ms. CLARKE. Once you have received your feedback after September 9, would you reach back to the committee and give us a sense of, you know, what the feedback has been in that reconciliation? Just to give us a sense of, you know, whether we have far more work to do in this regard or, you know, we are pretty, there are just a few out there?

Mr. WULF. Yes, absolutely.

Ms. CLARKE. That this is going to be important.

Mr. Caldwell, given DHS' approach for deciding whether a facility is high-risk, would the West, Texas facility, had it reported to DHS, been considered high-risk and thereby covered by the CFATS rule? If not, why not? Based on this committee's research, it appears that different States have different rules governing the handling, storage, and transfer of various chemicals, including ammonium nitrate. Does DHS work with the States to compile information about facilities that may have certain chemicals covered by CFATS rule to determine if the facilities may or may not have reported holdings to DHS?

Mr. CALDWELL. Ms. Clarke, let me just make one first comment here. I quoted a figure for you in terms of the number of inspections that they have done since you had quoted some of the figures from the IG and from Mr. Wulf's statement as 358 authorization inspections. I would also like to point out that if you look at the percentage of the inspections for the Tier 1 of the highest-risk fa-

cilities it is actually quite a bit higher. So as I said, they are concentrating on the highest-risk facilities.

I would also like to say that in my opening statement I did say that it is quite possible that the West facility would not have been considered. Again, because when they look at whether to, when they tour a facility the most important factor is the consequences. So they look at figures like population. I will just throw a question out there for, maybe, Mr. Wulf to answer if it is appropriate. What we are not sure about is whether, when they are doing the calculation of consequences and they look at the potential casualties do they use a overall figure, like the population density of that area. Or do they use something more tactical, like looking at that specific location; is there a school, is there a nursing home, is there something like that that is in or near the facility?

That is a question I don't quite know but, obviously, that would get to the heart of what the potential causalities might be. Just again, thinking out loud, you might have some rural areas where the population density is quite low, but that school does happen to be a facility. So during school hours, you could have quite a population there that would be put at risk, depending on the vicinity. Thank you.

Ms. CLARKE. So that is proximity that you are talking about.

Mr. CALDWELL. Correct. And Mr. Wulf can maybe address whether they do that level of analysis or not. Then the last question of working with States, again, we saw most of the outreach was focused on industry. I think to be honest, they were looking at who are the really big facilities out there, how do you reach them quickly. It is through the National associations, and it wasn't going through necessarily the State route. Although as Mr. Wulf said, they do have their protective security advisors at the State level off, working with the State government.

But every State is organized a little bit differently. So as you said, it could be regulated differently. In some cases maybe a State would regulate this under their department of agriculture or something like that. Other ones, it might be under their equivalent of their environmental agency. Or it could be under a public safety agency.

Ms. CLARKE. Another fact that I just wanted to sort of get your take on it is proximity to rail. So you have chemicals that are being railed in, as in the case of West, Texas. Wouldn't that be sort of a flag that, you know, that should be part of the calculation of, you know, the threat to a particular environment?

Mr. CALDWELL. Yes, I mean, I think the regulations as written are pretty specific to a facility. As Mr. Wulf has pointed out, several facilities have reported that they have moved some of these chemicals off-site. It could quite be possible that their moved site by—they are just not storing as much on-site because these are in railroad cars in some other place.

I don't remember. There was an explosion in Canada, I think, within the last month and I don't know what that chemical was. But obviously, chemicals on rail cars can present a threat. So how they are handled is important. Again, you know, this is a complex issue, complex Federal Government. I think the Transportation Se-

curity Agency actually has regulatory authority over the security of those things in transit.

Ms. CLARKE. Thank you, Mr. Chairman.

Mr. MEEHAN. Thank you. I know the gentelady asked for unanimous consent to enter a letter into the record, and so without objection so ordered.

[The information follows:]

Office of Infrastructure Protection  
National Protection & Programs Directorate  
U.S. Department of Homeland Security  
Washington, DC 20528



**Homeland Security**

CSAT communication number: FID49092-FS20130726-UI-332863  
July 26, 2013

[REDACTED]

Re: Notice of Potential Non-Compliance with Chemical Facility Anti-Terrorism Standards (6 CFR Part 27)

Dear [REDACTED]

Notification Code: 49092

Under the Chemical Facility Anti-Terrorism Standards (CFATS), 6 C.F.R. Part 27, the Department of Homeland Security (DHS or the Department) is responsible for regulating the security of high-risk chemical facilities. See Pub. L. No. 109-295 § 550 (2006), as amended. Appendix A to CFATS contains a list of chemicals of interest (COI) that, if possessed by a facility above the screening threshold quantity (STQ), triggers a requirement for the facility to complete and submit an online consequence assessment called a Top-Screen within 60 calendar days of coming into possession of the COI at quantities that meet or exceed the corresponding STQ. See 6 CFR § 27.210(a)(1)(i). Appendix A lists approximately 322 chemicals of interest and includes common industrial chemicals such as chlorine, propane and anhydrous ammonia as well as specialty chemicals such as arsine and phosphorus trichloride. Based on available information, it appears that [REDACTED] may possess one or more COI that meet or exceed the STQ specified in Appendix A to CFATS. To date, the Department has not received a Top-Screen from [REDACTED]

Pursuant to 6 CFR § 27.200(b)(1), DHS is instructing [REDACTED] to submit a Top-Screen by September 09, 2013 or to advise the Department why your facility is not required to file a Top-Screen based on one of the following reasons:

- The facility is owned or operated by the Department of Defense or the Department of Energy, or subject to regulation by the Nuclear Regulatory Commission, see 6 C.F.R. § 27.110;
- The facility is an agricultural production facility subject to the indefinite extension to the Top-Screen requirements detailed in 73 Fed. Reg. 1640 (Jan. 9, 2008).

If the facility does file a Top-Screen please enter the Notification Code Number at the top of this letter during the registration process.

Additional information about the CFATS regulatory program and Appendix A can be found at [www.dhs.gov/chemicalsecurity](http://www.dhs.gov/chemicalsecurity). If your facility fails to file a Top-Screen as instructed by this letter or advise DHS why it is not required to do so, the Department may pursue administrative enforcement action against the facility pursuant to 6 C.F.R. § 27.300.

If you believe that you have received this letter in error because your facility has already submitted a CFATS Top-Screen or is not required to complete a Top-Screen pursuant to one of the legal justifications listed in the previous paragraph, please contact ISCD at [Compliance.Assistance@hq.dhs.gov](mailto:Compliance.Assistance@hq.dhs.gov) or IP/ISCD, Mail Stop 8100, Department of Homeland Security, Washington, D.C. 20528-8100, as soon as possible. The Department is also available to answer questions about CFATS and the reporting requirements (including the Top-Screen submission process) via the CSAT Helpdesk at 1-866-323-2957. Please include the Notification Code Number at the top of this letter in any correspondence.

The Department appreciates your prompt attention to this letter. Again, if you have any questions, please contact DHS via one of the methods listed above.

Sincerely,

David M. Wulf  
Director, Infrastructure Security Compliance Division

The Chairman now recognizes Mr. Flores.

Mr. FLORES. Thank you, Chairman Meehan. Director Wulf and Mr. Caldwell, thank you for joining us today to help us as we work through this important subject. Director Wulf, you recently told the Global Security Newswire that CFATS is absolutely a shared responsibility. You all, you further noted, “Facilities that are in the business of dealing with high-risk chemicals have an obligation to do that reporting, just as I have an obligation to file our taxes with the IRS. The IRS doesn’t necessarily come out and look for us.”

So as you have said, I also think that most stakeholders would agree that enhancing security and building a resilience across the chemical sector is not something that a single agency or a single company, or industry or even Government, can do by itself. Just as you know, I agree with what you have said. But that said, how do you envision DHS’ role among all the players that are involved in this effort? To what extent do you believe that DHS should take the lead in this effort?

Mr. WULF. I think with respect to chemical facility security, DHS does have an obligation to lead in this area. We are committed to doing just that. We are part of a broader picture on an interagency basis. I think that is reflected in the President’s Executive Order signed today. But with respect to chemical facility security, we are committed to doing all that we can to get the word out. But as I said, it is a shared responsibility. Businesses do have an obligation to know their regulatory responsibilities.

We will continue to do all we can, and we will, you know, redouble our efforts to ensure that we get the word out there as broadly as possible, including to folks at the State and local levels, to include first responders. We are absolutely committed to doing that.

Mr. FLORES. Thank you, Mr. Chairman. I have no further questions.

Mr. MEEHAN. Thank you.

The Chairman now recognizes Mr. Vela. Do you have any follow-up questions?

Mr. VELA. I do not—

[Off mike.]

Mr. WULF. Yes, yes, I wish we had a—

Mr. VELA. [Off mike.].

Mr. WULF. Yes, but that is accurate.

Mr. VELA. I didn't to pose it in such a fashion, in an accusatory fashion. I just—going forward, I know that we have got a lot of work to do in regard to this issue to make sure we figure out how, what the Federal Government could have done, if anything, to prevent this accident. Just as importantly, to make sure that in the future we prevent any further tragedies like that. That was the purpose of the question.

Mr. WULF. Yes, absolutely.

Mr. MEEHAN. I thank the gentleman.

The Chairman now recognizes Mrs. Brooks.

Mrs. BROOKS. Thank you, Mr. Chairman. A bit of a follow-up on my previous question regarding the resources, Mr. Wulf, that you have dedicated to this. You have testified that DHS representatives have participated, it is in your written testimony, in more than 5,260 meetings with Federal, State, and local officials, and held more than 4,600 introductory meetings with owners and operators of CFATS potentially-regulated facilities. Those are impressive statistics, but yet how is it possible?

Maybe it is because of your resource issues that still so many State and local authorities and so many small facilities say they have never heard from the Department about CFATS. What is it that is needed in order for you to touch and make sure that our State and local authorities and the smaller facilities, you know, become familiar with what these obligations are?

Mr. WULF. I think that what is important to do and what we have been doing is to start to do more targeted, more systematic outreach. To ensure that we are funneling through folks like the State homeland security advisors, through State emergency response commissions. Sort of strategically ensuring that the message gets out at the, at kind-of the State and local level. That also includes working through industry groups at the State level. We can work with our stakeholders at the National association level, as well, to ensure that we get that done.

So, you know, we are committed to getting the job done. You know, the resources are what they are. We have, certainly, a lot on our plate. But we have very hardworking, committed folks on the team who, you know, get up every day looking to ensure that we safeguard our high-risk chemical facilities from terrorist attack and prevent incidents such as the one that occurred at West, Texas from occurring again. So, you know, we will continue to keep at it. On the outreach front, to work strategically to get the word out even more broadly.

Mrs. BROOKS. Having worked with the one person I am familiar with in Indiana, and that is all I believe Indiana had at least when

I was U.S. attorney, has there been any discussion about reallocation of resources within the Department, and within your Department specifically, to provide you with more resources to make sure, especially post-West incident, to try to expedite the efforts of outreach?

Mr. WULF. You know, we have not had extensive discussions in that respect. I do think that as we get into a, you know, cycle of compliance inspection activity, which is actually going to begin in September, we are going to begin conducting the first compliance inspections of facilities that received their final site security plan approvals. As we move forward to implement an ammonium nitrate security program we are going to have to look at the resources, as we also continue to look at trying to ensure that we keep up the pace of strategic and targeted outreach.

I would say another thing, if I could add, that would be helpful to ensuring that, you know, facilities understand that the program is here to stay, would be for the Congress to permanently authorize the program. I think that would go a long way to helping us get that word out to facilities that, you know, may not have received that word.

Also to provide an important measure of stability to our industry stakeholders who, as they consider looking to make significant investments in security measures and to argue for budget dollars in a constrained environment, even on the private-sector side, can speak to their companies about the importance of the program and the need to comply with its regulatory framework.

Mrs. BROOKS. Thank you for that suggestion. I want to just thank the men and women who do that work out around the country. It has been received very favorably. There just aren't enough of them. Thank you.

Mr. MEEHAN. I thank the gentlelady. I thank this panel for your presence here today. Mr. Wulf, I know you have got a big job to do. I have asked you to look at the specific issue with regard to the outliers and give us some metrics and give us some time lines with regard to how you need to do it. I also know the issue of the reauthorization of this program will soon be front and center. It is as, you know, we want to support you in these efforts.

That is our objective is to work with you, not against you. But we have got to ask some tough questions, and an awful lot of the times performance is going to be the biggest part of the equation. You would be, I am sure, the first to admit that the performance to this point, albeit a great challenge, has raised a lot of fodder for questions. We have put a lot of money into this, and we have got to be able to start to demonstrate the ability to narrow so that the effort is matched with productivity, as I said at the outset.

I thank you. There may be some committee Members who will ask further questions with written questions. If they are submitted, we ask that you do your best to be timely in your response to them. I thank you for your presence here today.

Mr. WULF. Thank you.

Mr. CALDWELL. Thanks.

Mr. MEEHAN. So I dismiss the first panel, and the Members of the subcommittee will now take a moment while we invite our second panel to join us.

The Chairman is very grateful for the presence of our panel. I thank you for taking the time to sit through the first line of questioning. One of the opportunities and advantages, although I am sure you may have wanted to ask some questions yourself as you may be able to make a comment with regard to some of the issues that were discussed. I invite you to do that. But allow me to take a moment to introduce each of you.

We are joined by Mr. Donnie Dippel. He is the president for the Texas Agricultural Industries Association. Previously, Mr. Dippel served in the Texas Department of Agriculture from 1988 to 2002, ending in 2002 as assistant commissioner for pesticide programs. Before joining the Texas Department of Agriculture, Mr. Dippel worked as a manager and commercial pesticide applicator for a farm service center.

Mr. Paul Derig is the environmental health and safety manager for the J.R. Simplot Company, a large agribusiness firm. As manager, Mr. Derig has to support regulatory affairs, functions, and compliance within the company, and represents J.R. Simplot in trade associations, organizations, and activities.

Mr. Timothy Scott is the chief security officer and corporate director of emergency services and security for the Dow Chemical Company and a member of Dow's corporate crisis management team. Mr. Scott currently serves on the advisory board of the International Center for Chemical Safety and Security, and is a member of the G8 Global Partnership subworking group on chemical security. Previously, Mr. Scott served on the executive committee of the Chemical Sector Coordinating Council for the Department of Homeland Security.

Last, we are joined by Mr. Sean Moulton, who is the director of open government policy program at the Center for Effective Government, a nonpartisan watchdog group which aims to promote Government accountability and openness. Previously, Mr. Moulton served for several years as a research fellow and contract employee at the United States Environmental Protection Agency.

I want to thank all of you for being here. Your full written statements will appear in the record, and I ask you do your best to contain your testimony to the 5 minutes. We will look forward to engaging you in questions.

So the Chairman now recognizes Mr. Dippel for 5 minutes.

**STATEMENT OF DONNIE DIPPEL, PRESIDENT, TEXAS AG  
INDUSTRIES ASSOCIATION**

Mr. DIPPEL. My name is Donnie Dippel. I am president of Texas Ag Industries Association. Subcommittee Chairman Meehan, Subcommittee Ranking Member Clarke, and distinguished Members thank you today for letting Texas Ag Industries testify at this committee meeting.

Before I begin my testimony, I would like to extend my thoughts and prayers to the fellow Texans who have expected such great loss as the result of the West, Texas explosion.

Texas Ag Industries Association membership is comprised of manufacturers, distributors, retail dealers, and allied companies involved in the sale of fertilizer, agriculture chemicals, and related services. TAI's mission statement is to advocate, influence, educate,

and provide services to support its members in their quest to foster a sustainable business environment while being productive stewards of agriculture. TAI has always worked with its industry members and non-members to help them in their compliance issues.

The Asmark Institute is a not-for-profit resource center that provides compliance materials and services, develops common-sense solutions to new regulation requirements, and monitors enforcement. As stated earlier, I served as president of TAI for since 2003. Prior to coming to Texas Ag Industries Association I worked with the Texas Department of Agriculture, serving as assistant commissioner for pesticide programs. Prior to the Texas Department of Agriculture I managed a farm and ranch retail business somewhat similar to the West, Texas facility.

I currently serve on the Texas Feed and Fertilizer Control Advisory Committee. TAI holds a minimum of five education programs a year to help our industry be apprised of current practices and concerns in crop production, laws, regulations, and environmental issues. It has always been a concern that we do not have more dealer participation at our educational meetings. After surveying the dealer membership to find out ways to improve participation, we found that many retail dealers cannot leave their business to attend an all-day meeting without closing the doors for the entire day.

Small dealers also do not have additional employees to operate their business if they are not there. I believe this is also a problem we see in regulatory compliance issues. Small retail dealers may have one or two individuals that are trying to run a business, and regulatory issues may not be their main concern each day in operating their facilities. Nor are they always aware of the extensive list of regulations that pertain to their business. In contrast, distributors and manufacturers typically have designated employees whose only job is to ensure that they are in compliance with all the laws and regulations, and that best management practices are implemented.

After the fire and explosion at West, Texas fertilizer, our office was overwhelmed with calls; first from the press, wanting us to speculate on what caused the tragedy. Next came several calls from the manager at West Fertilizer Company. As you can imagine, he had a tremendous difficulty even talking about what happened that night. Being from a small town, he most likely knew every one of the individuals who perished in the explosion. On one of the calls, he expressed his concern that the news was saying that West Fertilizer Company was not registered with the U.S. Department of Homeland Security.

He told me, "I had the certificate hanging on my office wall that said we were registered to handle ammonium nitrate." I asked him if he was sure that they had completed a Top Screen with DHS. He said that he had inspectors that came to his plant to check the security of ammonium nitrate and check the sales records. Then I realized he was referring to the inspectors from the Texas Feed and Fertilizer Control Service. The Texas Feed and Fertilizer Control Service estimates there are approximately 546 retail dealers in the State of Texas, and approximately 129 are registered to handle ammonium nitrate.

Texas law provides that the office of the State chemist, whom the Texas Feed and Fertilizer Control Service is under, with the responsibility for ensuring that facilities handling ammonium nitrate are able to secure the product at all times from theft and misuse, and that they have records of every sale.

In addition to the State laws, once Homeland Security finalizes the pending ammonium nitrate security program they should know where every facility selling ammonium nitrate is located, as this program will require anyone selling or purchasing ammonium nitrate to register with them.

After the tragedy at West Fertilizer Company, TAI mailed out a letter to every fertilizer retail dealer in the State, asking them to make sure they are compliant with all the regulations pertaining to their operation. With the help of Asmark Institute, we were able to offer retail dealers access to Asmark's compliance assessment tool. The compliance assessment tool assists retail dealers with identifying the specific activities in their business, and the program provides them with a summary of their regulatory requirements and offers suggested best management practices.

Asmark also made the compliance assessment tool available to retail dealers across the United States through our National associations, the Fertilizer Institute and Agriculture Retailers Association. After sending the letter, we received many calls from retail dealers, which led us to discover that confusion between registering with DHS and the Texas Feed and Fertilizer Control Service was very prevalent. The first question I asked was: Do you handle ammonium nitrate? If so, are you registered with DHS?

We have worked with several retail dealers to help them register with Homeland Security. I have several more requests on my desk. One of the big problems we have run into in getting retail dealers registered is the requirement that they must have a secure e-mail address. Many of the retail dealers use e-mail addresses such as Hotmail, Gmail, AOL, GoDaddy, and others that are not considered secure. The retail dealers also have to be able to identify the longitude and latitude location of their business. The Top Screen registration offers a program to help find the location, but many times these coordinates are not correct and they are not accepted by the program.

The majority of the registrants' attempts have been helped over the phone. Many of the retail dealers' computer skills are very limited and they have become very frustrated and have asked to quit or have to quit the registration process to set up a new e-mail address or find out why the program is not taking their coordinates.

Even though ammonium nitrate is an east Texas fertilizer, and very little is used west of the Interstate 35, the area is simply too big to allow my travel to help each one of these individual retail dealers that has problems registering.

The situations I have outlined I do not believe are unique to Texas. There are many, many small retail dealers like West Fertilizer Company throughout the United States. One suggestion I would have is that DHS work with its local inspectors, the State fertilizer officials such as Texas Feed and Fertilizer Control Service, and through State associations such as TAI to come up with a process to help these small facilities. Several of the retail dealers

have chosen to use the Asmark Institute's compliance services. Many will use their insurance company. Some will try to do it on their own.

Whatever way they choose, TAI will continue to work with the agriculture industry through Texas to help them comply with their regulatory requirements. Again, I thank you for the invitation to testify at this hearing, and I will be glad to answer any of your questions.

[The prepared statement of Mr. Dippel follows:]

PREPARED STATEMENT OF DONNIE DIPPEL

AUGUST 1, 2013

Chairman McCaul, Ranking Member Thompson, and Subcommittee Chairman Meehan, Ranking Subcommittee Member Clarke, and Members of the House Homeland Security Committee, Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, thank you for allowing the Texas Ag Industries Association (TAIA) the opportunity to testify today on "West Fertilizer, Off the Grid: The Problem of Unidentified Chemical Facilities." Before I begin my testimony, I would like to extend my thoughts and prayers to my fellow Texans who have experienced such great loss as a result of the West, Texas explosion.

Texas Ag Industries Association's membership is comprised of manufacturers, distributors, retail dealers, and allied companies involved in the sale of fertilizer, agriculture chemicals, and related services. TAIA's mission statement is "to advocate, influence, educate, and provide services to support its members in their quest to foster a sustainable business environment while being productive stewards of agriculture." TAIA has always worked with its industry members and non-members to help them with their compliance issues. For the last several years TAIA has been affiliated with the ASMARK® Institute. The ASMARK® Institute is a not-for-profit resource center that provides compliance materials and services, develops common-sense solutions to new regulatory requirements and monitors enforcement. I have served as president of TAIA since 2003. Prior to coming to TAIA I worked for the Texas Department of Agriculture serving as assistant commissioner for the Pesticide Programs. Prior to the Texas Department of Agriculture I managed a farm and ranch retail business somewhat similar to the West Fertilizer Co. facility. I currently serve on the Texas Feed and Fertilizer Adviser Committee representing TAIA.

TAIA holds a minimum of five educational programs a year to keep our industry apprised of current practices and concerns in crop production, laws, regulations, and environmental issues. It has always been a concern that we do not have more dealer participation at our educational meetings. After surveying the dealer membership to find ways to improve participation, we found that many retail dealers cannot leave their business to attend an all-day meeting without closing the doors for an entire day. Small dealers also do not have additional employees to operate their business if they are not there. I believe this is also the problem we see with regulatory compliance issues. Small retail dealers may have one or two individuals that are trying to run a business and regulatory issues may not be their main concern each day in operating their facility nor are they always aware of the extensive list of regulations that pertain to their business. In contrast, distributors and manufacturers typically have designated employees whose only job is ensuring that they are in compliance with all the laws and regulations and that best management practices are implemented.

After the fire and explosion at West Fertilizer Co. our office was overwhelmed with calls, first from the press wanting us to speculate on what caused the tragedy. Next came several calls from the manager at West Fertilizer Co. As you could imagine, he had a tremendous difficulty even talking about what happened that night. Being from a small town, he most likely knew every one of the individuals who perished in the explosion. On one of the calls he expressed his concern that the news was saying that West Fertilizer Co. was not registered with the U.S. Department of Homeland Security (DHS). He told me "I had the certificate hanging on my office wall that said we were registered to handle ammonium nitrate." I asked him if he was sure they had completed a Top Screen with DHS. He said that he had inspectors that came to his plant to check the security of ammonium nitrate and checked his sales records. I then realized he was referring to the inspectors from the Texas Feed and Fertilizer Control Service (TFFCS). The Texas Feed and Fertilizer Control

Service estimates that there are approximately 546 retail dealers in the State of Texas, of which approximately 129 handle ammonium nitrate.

Texas Law provides, the Office of the State Chemist, whom Texas Feed and Fertilizer Control Service is under, with the responsibility for ensuring that facilities handling ammonium nitrate are able to secure the product at all times from theft and misuse and that they have records of every sale. In addition to State laws, once Homeland Security finalizes the pending Ammonium Nitrate Security Program the should know where every facility selling ammonium nitrate is located as this program will require anyone selling or purchasing ammonium nitrate to register with them. After the tragedy at West Fertilizer Co., TAIA mailed a letter to every fertilizer retail dealer in the State asking them to make sure they are in compliance with all the regulations that pertain to their operation. With the help of the ASMARK Institute, we were able to offer retail dealers access to ASMARK's Compliance Assessment Tool. The Compliance Assessment Tool assists retail dealers with identifying the specific activities in their businesses and the program provides them with a summary of their regulatory requirements and offers suggested best management practices. ASMARK also made the Compliance Assessment Tool available to retail dealers all across the United States through our National associations, The Fertilizer Institute and the Agricultural Retailers Association.

After sending the letter we received many calls from retail dealers which led us to discover that the confusion between registering with DHS and the Texas Feed and Fertilizer Control service was very prevalent. The first question I asked was "Do you handle ammonium nitrate and if so are you registered with DHS?" We have worked with several retail dealers to help them register with Homeland Security and I have several more requests for help on my desk. One of the big problems we have run into with getting retail dealers registered is the requirement that they must have a secure email address. Many of the retail dealers use email address such as Hotmail, Gmail, AOL, GoDaddy, or others that are not considered "secure." The retail dealers also have to be able to identify the longitude and latitude location of their businesses. The Top Screen registration offers a program to help find the location, but many times these coordinates are not correct or not accepted by the program. The majority of the registration attempts we have helped with are over the phone. Many of the retail dealer's computer skills are limited and they become very frustrated and ask to quit or have to quit the registration process to set up a new email address or find out why the program is not taking their coordinates. Even though ammonium nitrate is an East Texas fertilizer and very little is used west of Interstate 35, the area is simply too big to allow my travel to help each individual retail dealer that has problems registering.

The situations I have outlined I do not believe are unique to Texas. There are many, many small retail dealers like West Fertilizer Co. throughout the United States. One suggestion I would have is that DHS work with its local inspectors, the State fertilizer control officials such as the Texas Feed and Fertilizer Control Service, and through State associations such as TAIA, to come up with a process to help these small facilities.

Several of the retail dealers have chosen to use the ASMARK Institute's compliance services, many will use their insurance company; and some will try to do it on their own. Whatever way they choose, TAIA will continue to work with the agricultural industries in Texas to help them comply with their regulatory requirements. Again I thank you for the invitation to testify at this hearing. I will be glad to answer any questions you may have.

Mr. MEEHAN. Thank you, Mr. Dippel.

Mr. Derig, you are now recognized for your testimony.

**STATEMENT OF PAUL DERIG, ENVIRONMENTAL HEALTH AND SAFETY MANAGER III, J.R. SIMPLOT COMPANY**

Mr. DERIG. Thank you, Chairman Meehan, Ranking Member Clarke, and distinguished Members of the subcommittee. As introduced, my name is Paul Derig, and I am here to testify on behalf of the Agricultural Retailers Association. ARA is a trade association which represents America's agricultural retailers and distributors of crop inputs, equipment, and services. On behalf of ARA, our members, and in particular myself, I also want to express heartfelt condolences and prayers for the people of West after this tragic incident that they have had to endure.

ARA members are scattered throughout all 50 States, and range in size from small family-held businesses to farmer-owned co-ops, and larger companies with hundreds of retail outlets. I happen to be the H&S manager for a very diversified agricultural company, and we operate approximately 100 farm retail distribution centers throughout our network.

During the time that I have been in the retail business, which covers a span of 35 years, I have played a dual role, also as a public responder. So I understand what is happening with those families and the loss that they have had for the fire fighters that they had injured.

I have also spent a large amount of time, because when EPA's program came out I saw the tie between the hazardous materials that I worked with on a day-to-day basis in the retail business and what EPA was trying to do under SARA Title III. So I played a dual role for over 10 years, also being on a regional hazardous materials response team in the State of Oregon. So as playing those dual roles, I think it is important because the ag retail sector plays an important role in feeding the world. Our public responders play an important role in protecting those people.

We provide essential crop inputs like seed, fertilizer, crop protection products. With that, we face a complex problem. It is a multifaceted issue. It involves not only the retailers, not only the regulators, but a number of other areas within our communities.

Prior to April 17, the ARA board of directors initiated the largest undertaking in their history: The establishment of an ammonia code of practice to help dealers in the retail world understand the storage and handling of that product.

We have also expanded that down to include ammonium nitrate. Ammonium nitrate was not originally considered because as an industry we have had initiatives along those lines in the past with storage and handling. The result of this initiative we call responsible ag, a member-led performance management system that will establish foundational EH&S practices at or above compliance with third-party independent audit programs. We ask for agency collaboration and communication within this effort.

For ARA members, many handle products that are on the chemical of interest list under DHS, including the high-profile products like ammonium nitrate and anhydrous ammonia, which are regulated under the CFATS program. Also regulated under a number of other regulatory agencies. ARA members that have filed under the CFATS program, for the most part fall out of the tiering process. Those that are tiered are tiered in the lower tiers, 3 and 4, in that CFATS-regulated community.

The Department of Homeland Security's current leadership has made great strides in reforming the CFATS program and outreach efforts. However, more needs to take place. ARA would like to discuss the following enhancements: Reevaluating the ammonium nitrate registration program; target unidentified chemical facilities through intergovernmental and industry cooperation; check the partnership model; raise partnership outreach within industry, and reassess CFATS' small facility compliance.

The West facility was required to comply with many regulations: Compliance with OSHA's hazard communication standard, DOT's

transportation of hazardous materials security program, as well as Department of Homeland Security and—as well as standards that cover handling and storing of ammonium nitrate. Some of those could have prevented this incident. I don't believe that, or we don't believe that DHS alone would have prevented what happened. For example, ANS stored in a warehouse close to seed. The OSHA standard forbids commingling of organic and combustible material, such as seed, with ammonium nitrate.

ARA urges the Department of Homeland Security to issue an ammonium nitrate fertilizer registration program that documents and tracks the sales of the product without unduly burdening the farmer's access. ARA testified before this committee in support of the secure handling of ammonium nitrate in 2005, which eventually became law in 2007. But nearly 6 years later, there is still no rule. Congress should consider ARA's letter to advise DHS advising them to take the following immediate steps.

First, DHS should enter into a cooperative agreement with State departments of agriculture or other agencies to perform inspections and outreach. For example, the agricultural community is already familiar with the restricted-use pesticide program, where they need to be licensed and obtain a permit to handle and apply certain products.

Second, leverage U.S. Department of Agriculture's expertise and the effect it will have on food production. Include only straight ammonium nitrate fertilizer at this time, and exclude ammonium nitrate fertilizer mixtures. According to DHS, we heard West was unidentified in their database. However, other Federal and State agencies were aware of the facility.

Mr. MEEHAN. In the interest of time, may I ask you to proceed to the conclusion?

Mr. DERIG. Yes. We just think it important for the collaboration and the communication to be able to enhance compliance and use the industry initiatives that we spoke about.

Mr. MEEHAN. Thank you.

Mr. DERIG. Thank you.

[The prepared statement of Mr. Derig follows:]

PREPARED STATEMENT OF PAUL DERIG

SAFETY, SECURITY AND FEEDING THE WORLD IS A TOP PRIORITY FOR THE AGRICULTURAL INDUSTRY

Thank you, Chairman Meehan and Ranking Member Clarke, I appreciate the opportunity to appear before this subcommittee. My name is Paul Derig, and I am here to testify on behalf of the Agricultural Retailers Association (ARA), a trade association which represents America's agricultural retailers and distributors of crop inputs, equipment, and services. ARA members are scattered throughout all 50 States and range in size from small family-held businesses and farmer cooperatives to larger companies with hundreds of retail outlets.

I am an environmental, health, and safety (EHS) manager for the J.R. Simplot Company, which is headquartered in Boise, Idaho and is one of the largest privately-held firms in the country. In more than 70 years, the company has grown into a global food and agribusiness company with products that are sold in every State and many foreign countries. We are a diversified agricultural company, with three main operating groups; AgriBusiness, known for the fertilizer manufacturing and ag retail outlets. We operate a retail farm supply distribution system, Simplot Grower Solutions, and a professional product distribution system Simplot Partners, comprised of over 100 facilities in 16 western States that provide products, technical, and field services to local farmers, horticulturists, and landscapers. Land and

Livestock raises cattle and grows crops, including potatoes, for which we are widely known, and the Food group known for production and processing food items, many of our company products are consumed by Americans every day. This hearing is important to the company as the ability to safely handle crop input products is vital to our industry and food production.

I am directly responsible for the regulatory support and oversight of regulatory programs for the J.R. Simplot AgriBusiness Retail operations, including security. Over the past 30 years, I have been involved with many aspects of fertilizer handling and security, both through industry experience and as a public responder, where I have served as a fire fighter and member of the State of Oregon Region X Hazardous Materials Response team, State and National Fire Academy instructor, and as a departmental and regional training officer for the public sector. In my Simplot career, I also work with hazardous materials, including leading Hazardous Waste Operations and Emergency Response Standard (HAZWOPER). Because of the many roles that I have been able to play, I understand the importance of safety and security in the public and private sectors.

Before I address issues concerning the Chemical Facility Anti-Terrorism Standards (CFATS) Program, I would like to explain the important role that agricultural retailers play in feeding the world—because it is too often taken for granted. Agricultural retailers provide farmers with crop input products like seed, fertilizer, crop protection products, and equipment. Agricultural retailers also provide their farmer customers with crop consulting and custom application services. Agricultural retailers can perform soil sampling so that the right kind and amount of fertilizer is applied in the right place at the right time; thus, providing sustainability.

#### PROACTIVE APPROACH TO THE WEST FERTILIZER INCIDENT: RESPONSIBLE AG

On behalf of our members, we appreciate the opportunity to provide the committee with the fertilizer industry's perspective on the tragic incident that took place on April 17 at the fertilizer facility in West, Texas. By working together, we will do everything we can to prevent tragedies like West from happening again. Our employees live and work in communities small and large across the country, and nothing is more important than protecting our workers, first responders, and their neighbors. A majority of our employees, like myself, are or have been first responders in their communities. We are an accountable and responsible industry committed to the safety of the communities in which we live and operate.

Prior to April 17, the ARA Board of Directors initiated the largest undertaking and most important mission in the Association's history—the establishment of an Ammonia Code of Practice—with the intent of establishing Codes of Practices for other products such as ammonium nitrate (AN) fertilizer. The Fertilizer Institute was invited to join the initiative and is a partner. The result—a Responsible Ag management system that will help facilities establish foundational EHS&S performance practices.

This member-led effort will lead to uniform guidelines that promote continuous improvement in EHS&S performance for all fertilizer storage facilities and designed to be sensitive and responsive to community needs and public concerns. To ensure compliance with these guidelines, a third-party inspection program will also be established.

Currently work is being done to reach our goal of designing a system that is transparent, simple, and efficient for fertilizer storage facilities, effective in improving safety, and provides more frequent and efficient inspections than regulatory agencies. To ensure that we are adequately responding to public concerns, this system will include independent third-party audits and the adherence to stringent industry and regulatory standards. Agricultural retailers, distributors, and other fertilizer storage facilities' implementation of this Responsible Ag program includes a commitment to comply with all relevant EHS&S regulations as they affect company operations. We are also soliciting Government, academia, and industry stakeholders for input.<sup>1</sup>

#### Responsible Ag Guiding Principles:

- Communicate with and engage employees, business partners, and the community to foster a greater understanding of EHS&S matters regarding fertilizers and other hazards;

<sup>1</sup>ARA reached out to the academic community such as Texas A&M for input on AN storage. ARA has also sent letters requesting regulatory checklists from: The Department of Transportation, Occupational Safety and Health Administration, Environmental Protection Administration, etc. (See letters attached)

- Foster new and continuing partnerships between the agricultural industry, local first responders, and Local Emergency Planning Committees;
- Develop a code of practice for ammonium nitrate & anhydrous ammonia storage and handling;
- Create a comprehensive and efficient third-party auditing/inspection process for facilities.

#### ARA SUPPORTS CURRENT AND FUTURE IMPROVEMENTS TO CFATS

For ARA members, crop input products like anhydrous ammonia and ammonium nitrate fertilizer and pesticide fumigants are classified as Chemical of Interest (COIs) and are regulated under the CFATS Program. ARA members account for a large portion of the lower risk (Tier 3 & 4) CFATS-regulated community. It is important for these chemicals to be handled at the retail facility, as they become significantly less regulated and in the case of CFATS not regulated at all once they are on the farm.

DHS's current leadership has made great strides in reforming the current CFATS program and outreach efforts. The CFATS approach allows facilities to utilize a full range of potential security enhancements depending on local site conditions and risk thus maximizing their potential effectiveness. The level of inspections has increased substantially over the last year, but inspection projections for lower-risk facilities could improve from stakeholder input, which DHS plans to solicit in a rulemaking.

ARA suggests the following enhancements on both the CFATS program and the Ammonium Nitrate Fertilizer Registration Program:

- (1) Reevaluate the Ammonium Nitrate Fertilizer Registration Program;
- (2) Target Unidentified Chemical Facilities Through Intergovernmental and Industry Cooperation;
- (3) Check the Partnership Model;
- (4) Raise "Partnership" Outreach With Industry;
- (5) Reassess CFATS Small Facility Compliance Burdens.

#### REEVALUATE THE AMMONIUM NITRATE FERTILIZER REGISTRATION PROGRAM

Some claim that if a functional AN registration program was implemented the West fertilizer accident would have never happened. We believe that under the proposed registration framework, West fertilizer would have at least registered under the program. West might have paid more attention to their operations and AN inventory if the rule was issued, but there is no way to make that determination.

The West facility was required to comply with specific OSHA regulations, including the Hazard Communication Standard<sup>2</sup> and Explosives and Blasting Agents Standard.<sup>3</sup> It can be argued that compliance with these programs could have prevented or mitigated the incident, while it's not clear what the compliance status of the facility was at the time of the incident.

The Explosives and Blasting Agents Standard has many measures that would have prevented or mitigated the incident.<sup>4</sup> For example, the AN was stored in a warehouse, in very close proximity to the seed area. "Ammonium nitrate shall be in a separate building or shall be separated by approved type firewalls of not less than 1 hour fire-resistance rating from storage of organic . . ." <sup>5</sup> Seed is an organic and combustible material, which could propagate the fire to areas where AN was stored. Storage of AN at an adequate distance from the seed area might have helped in preventing the explosion. Unfortunately, we may never have the answer; however, it's time to look forward to solutions.

Therefore, ARA urges the U.S. Department of Homeland Security (DHS) to issue an ammonium nitrate fertilizer registration program that documents and tracks the sale of the product without unduly burdening the agricultural sector's access to AN for farming and other legitimate agricultural purposes. The fertilizer industry approached Congress in 2005 to seek traceability regulations for ammonium nitrate. ARA testified before this committee in support of The Secure Handling of Ammonium Nitrate Act on December 14, 2005. This legislation was eventually signed into law on December 2007. We feel that the program should remain focused on reg-

<sup>2</sup> 20 C.F.R. § 1910.1200 (1994).

<sup>3</sup> 29 C.F.R. § 1910.109 (1978).

<sup>4</sup> This conclusion is also supported by academic experts. See *Oversight of Federal Risk Management and Emergency Planning Programs to Prevent and Address Chemical Threats, Including the Events Leading Up to the Explosions in West, TX and Geismar, LA before the Senate Comm. on Environment and Public Works*, 113th Cong. (2013) (statement of Dr. M. Sam Mannan, PE, CSP).

<sup>5</sup> Id.

istered AN facilities and AN purchasers as originally intended by Congress.<sup>6</sup> ARA certainly understands the challenges faced by DHS in implementing a final AN rule, but it has been nearly 6 years since this law was enacted.

Congress should consider ARA's letter<sup>7</sup> to DHS advising them to take the following immediate steps:

- DHS should enter into cooperative agreements with State agencies, either State departments of agriculture or agencies within the land-grant universities like Texas A&M to perform inspections and audits. Because State inspectors are more familiar with the product and their regions it would be more efficient for them to perform inspections and outreach. ARA along with various State departments of agriculture support this model. For example, farmers and the agricultural community are already familiar with the Restricted Use Pesticide (RUP) program, where they need to be certified and obtain a permit to handle and apply the product.
- Leverage the U.S. Department of Agriculture's (USDA) expertise in agricultural-based products and the effect it will have on food production. Currently to our knowledge, USDA does not play a role in advising DHS.
- Include only straight AN at this time and exclude "mixtures" in the definition of AN.
- Include AN fertilizer and exclude explosive-grade AN regulated by the Alcohol Tobacco and Firearms (ATF).
- There should be a "no-limit" threshold—cold packs of AN should be regulated to prevent terrorism.

In absence of a formal AN rule issued by DHS, ARA will continue to work diligently with our members and various Government agencies to implement voluntary measures that: (1) Secure AN fertilizer storage (Responsible Ag), (2) screen purchases of AN fertilizer, and (3) provide resources for AN facilities to use in response to suspicious activities or actors.

#### TARGET UNIDENTIFIED CHEMICAL FACILITIES THROUGH INTERGOVERNMENTAL AND INDUSTRY COOPERATION

DHS should ensure that facilities with chemicals of interest are notified by DHS when they fall within the purview of the CFATS program. The comprehensive Federal regulatory program requires high-risk chemical facilities to register with DHS (Top Screen), conduct a thorough site security assessment and implement protective measures that comply with 18 risk-based performance standards. According to DHS, West Fertilizer was an unidentified chemical facility because they failed to file a Top Screen under the CFATS program; however, other Federal and State agencies were aware of the facility such as:

- EPA's Risk Management Program (RMP);
- Department of Transportation's Pipeline Hazardous Material Safety Administration;
- Emergency Planning and Community Right-to-Know Act (EPCRA) Tier II reporting requirements;
- Occupational Safety and Health Administration (OSHA);
- Office of the Texas State Chemist (OTSC).

DHS should leverage Government partners to round up unidentified chemical facilities and, then work with industry towards outreach. There are a number of Federal and State databases that can assist DHS in reaching its target objective ranging from State departments of agriculture to EPA's RMP.<sup>8</sup>

#### CHECK THE "PARTNERSHIP" MODEL

ARA finds that DHS should reevaluate the partnership model to develop better cooperation. Partnership is a relationship between individuals or groups that is characterized by mutual cooperation and responsibility, as for the achievement of

<sup>6</sup>Section 563 of the 2008 Consolidated Appropriations Act, Secure Handling of Ammonium Nitrate (Section 563) granted the Department of Homeland Security (DHS) the authority to regulate the sale and transfer of ammonium nitrate "to prevent the misappropriation or use of ammonium nitrate in an act of terrorism." In October 2008, DHS published an Advanced Notice of Proposed Rulemaking (ANPRM) detailing the activities expected to be covered under the ammonium nitrate regulations and seeking comment from interested parties. In August 2011, DHS published an ammonium nitrate Notice of Proposed Rulemaking (NPRM).

<sup>7</sup>See ARA letter "Agricultural Retailers Association suggestions on Ammonium Nitrate Security Program" to Ms. Caitlin A. Durkovich, Assistant Secretary for Infrastructure Protection U.S. Department of Homeland Security (July 8th 2013).

<sup>8</sup>EPA's Risk Management Program data can be utilized by DHS for chemical release threats like anhydrous ammonia.

a specified goal. ARA members and DHS are both responsible to safeguard against fertilizer misuse and manipulation but mutual cooperation can be enhanced.

In terms of dry fertilizer, State chemists and State departments of agriculture can share data for facilities above the COI thresholds. For products like ammonia nitrate (AN), there are already State programs that regulate this product with databases. Lastly, information from Department of Transportation safety program could yield more unidentified chemical facilities.

Too often industry participates in the last stage of the decision-making process. Placing key stakeholders<sup>9</sup> in the early stages of policy development would: (1) Lessen Congressional interference; (2) enhance the mutual understanding between the private and public sector; (3) reduce time and funds dedicated towards the rule-making functions; (4) and overall increase mutual trust and cooperation towards outreach.

#### RAISE "PARTNERSHIP" OUTREACH WITH INDUSTRY

Outreach is an integral part of putting facilities like West on notice that facilities need to protect their assets and comply with the law(s). Facilities can't comply with CFATS if they don't know who and what to comply with. This approach should be the focus of targeting unidentified chemical facilities. Easy, simple ways of communication works best, as well as fast and effective campaigns.

ARA has a long history with other agencies towards tangible and successful partnerships:

- *Federal Bureau of Investigation (FBI)*.—ARA collaborated with the FBI in the production of a "Potential Indicators of Terrorist Activities" bulletin for display at facilities that carry products that could be manipulated to make improvised explosives. The bulletin/poster assists retailers in identifying suspicious purchases and directs them to report suspicious behavior to the FBI. Currently, there are 1,500 FBI bulletins in distribution amongst ARA members.
- *Department of Defense's Joint Improvised Explosive Device Defeat Organization (JIEDDO)*.—ARA is working with the JIEDDO to counter global and enduring IED threats in Afghanistan. We receive general unclassified fertilizer threat information that keeps our members informed on how fertilizers are being manipulated into IEDs.
- *First Responders Organizations*.—ARA consulted first responders in drafting "ARA's First Responder Guidance" for use by industry, LEPCs, and local first responders. The guidance sets the stage for a coordinated and effective emergency response communication. In addition, it lays the basis for building a close relationship with the first responders through emergency response management.
- *National Fire Protection Association (NFPA)*.—For many years the fertilizer industry has served on the NFPA Technical Committee for Hazardous Chemicals (NFPA 400), which is the committee of jurisdiction over the fire code for recommendations for storage and handling of AN. The fertilizer industry supports compliance with NFPA's code for AN.
- *Environmental Protection Agency (EPA)*.—ARA coordinated with EPA and submitted comments to EPA's Ammonium Nitrate Alert in order to further educate the industry on the hazards of AN storage.
- ARA partnered with EPA on other outreach opportunities, such as: The container and containment rules for pesticides, Spill Prevention, Control, and Countermeasure Plans and others. DHS could learn some lessons from other agencies regarding outreach. Great models do exist. Even prior to West, DHS has made considerable efforts to engage ARA members and understand the way we operate, but often Government bureaucracy has got in the way.

ARA members would like DHS to step up partnership outreach to continue the Chemical Sector Security Summit, develop alternative security plans and promote CFATS compliance via webinars, targeted publication ad postings, and flyers.

<sup>9</sup>The Chemical Sector Coordinating Council (CSCC) is one of 18 critical infrastructure committees that were established under the protection afforded by the Critical Infrastructure Partnership Advisory Council (CIPAC). The purpose of the CSCC is to facilitate effective coordination between Federal infrastructure protection programs with the infrastructure protection activities of the private sector and of State, local, territorial, and Tribal governments. Pursuant to the Homeland Security Act of 2002, the Council helps to facilitate strategic planning and effective discussion of critical infrastructure issues and to provide appropriate protection for sensitive critical infrastructure information.

With the above positive steps, more can be done. ARA would also like to see more efforts towards (electronic/video)<sup>10</sup> training and outreach opportunities targeting facilities that use, store, or distribute chemicals above specified quantities listed under the CFATS program. This includes quick and efficient co-branding literature for distribution.

To ensure effective outreach, DHS must be able to co-brand information for distribution with the trade associations and stakeholders. DHS headquarters must quickly and effectively respond and produce effective products for distribution. Often the cake-like layers of bureaucracy hinder the ability to effectively get a pamphlet or bulletin from DHS. This is a deterrent to the “partnership” model.

#### REASSESS SMALL FACILITY COMPLIANCE BURDENS

We all share a responsibility to protect our chemical facilities; but, regulations need to be practical, economically feasible, and not outweigh the perceived benefits. As far as the current implementation of the CFATS program is concerned, here are some suggestions that may improve the program:

- Quicker response from DHS on site security plans—some members have submitted their site security plans and it has been over 2 years with no response.
- DHS should continue to work with ARA on alternative security plans and increased inspections for lower-risk facilities.
- Reform the Personnel Surety Program (PSP)<sup>11</sup>—Under the CFATS Interim Final Rule issued in April 2007, it states that DHS “may disapprove a Site Security Plan (SSP) that fails to satisfy the risk-based performance standards established in 27.230”. Section 27.230 lists the Risk-Based Performance Standards (RBPS) each CFATS facility must select, develop in their SSP, and implement appropriate measures to satisfy the performance standards, which includes Personnel Surety.<sup>12</sup>
- ARA acknowledges that several aspects of the PSP improved thanks to our open and continuous discussions. However, “electronic verification” for individuals already enrolled in legally equivalent programs such as Hazardous Materials Endorsement (HME) Programs, still remains an obstacle.
- DHS plans to limit the initial CFATS PSP implementation to only Tier 1 and Tier 2 high-risk chemical facilities. The current PSP requirements do not vary by risk-based tier. The assistant secretary should accept measures used to meet standards on a risk-based approach.<sup>13</sup>
- ARA members would like to see DHS leverage existing credentialing programs by a reasonable visual inspection if the facility can demonstrate a likelihood of detecting and preventing fraudulent entry.<sup>14</sup> This would be similar to the visual inspection of Government-issued credentials by TSA security officials.
- It should be recognized that a “facility-centered” background check program cannot take advantages of portability similar to a “personnel-based” programs, like the HME program. DHS should look into employee-based models.

#### PERMANENT CFATS OR LONG-TERM REAUTHORIZATION IS NEEDED FOR REGULATORY CERTAINTY

The CFATS program is not perfect, but it’s not broken. We understand that Congress will make efforts to reauthorize or permanently reauthorize the CFATS program. ARA believes that it is essential for DHS to be principal in chemical regulation and enforcement. ARA supports the CFATS program because it ensures safety, security, and efficiency by safeguarding our critical infrastructure. Mandates on inherently safer technology and allowing civil suits will not make facilities any safer. We hope that Congress will provide DHS permanent statutory authority for the CFATS program, thus providing regulatory certainty and operational stability that is necessary for capital investments to be appropriately planned and budgeted.

DHS leadership is committed to working through the current issues and working with stakeholders to improve the implementation of the CFATS program. ARA also

<sup>10</sup> See Simplot First Responder Training Video as an example.

<sup>11</sup> 6 C.F.R. § 27.230 (2007).

<sup>12</sup> RBPS No. 12 was issued for personnel surety and DHS has developed a CSAT application for high-risk chemical facilities to submit information about facility personnel and, as appropriate, unescorted visitors with access to restricted areas or critical assets at those facilities. The goal as stated by DHS is to identify known or suspected terrorists. While we fully agree with this goal we question the manner in which DHS has decided to fulfill this RBPS as we feel it goes beyond the statutory intent of Congress for chemical facilities to take measures designed to identify people with terrorist ties.

<sup>13</sup> 6 C.F.R. § 2.230(a) (2007).

<sup>14</sup> Id.

urges Congress to provide the agency with sufficient resources to ensure that chemical facility security is implemented in a timely fashion.

We look forward to working with the committee, Congress, and DHS to further improve the CFATS program so that agricultural retailers and distributors are able to continue to safely and securely provide these important crop inputs to our farmers.

Mr. MEEHAN. Mr. Scott.

**STATEMENT OF TIMOTHY J. SCOTT, CHIEF SECURITY OFFICER, CORPORATE DIRECTOR, EMERGENCY SERVICES AND SECURITY, DOW CHEMICAL**

Mr. SCOTT. Thank you, Chairman Meehan, Ranking Member Clarke, and Members of the subcommittee. I am Tim Scott, chief security officer for the Dow Chemical Company. I am speaking today on behalf of Dow and the American Chemistry Council, the Nation's largest chemical industry trade representative.

We all mourn the loss of life suffered in West, Texas. While the exact cause of the explosion may never be known, the path that led to this disaster is clear: Noncompliance with established regulations, lack of regulatory oversight, no community awareness of the risk, no training for local first responders, no warning system, no security.

This disaster might have been avoided, or at least the impact minimized, if any one of those steps had been corrected. There are regulations already in place at both the State and Federal levels that require the submission of data relative to chemicals of interest in quantities on-site. Compliance with any one of these regulations would have identified this facility as a potentially high-risk site. Clearly, the facility owner, and the State and Federal regulatory agencies, failed in their responsibilities. More regulations are not the answer, but rather communication, understanding compliance, and enforcement of the established regulations already in place.

While DHS has had many issues with the implementation of CFATS, they are now making significant progress in identifying, inspecting, and securing the high-risk sites in the U.S. chemical sector. The facility in West, Texas flew below the radar, and we can't have sites operating outside the regulations for any reason. We support a multi-year reauthorization of CFATS and DHS to continue this progress and bring stability, compliance, and enforcement to the chemical security process.

Non-complying outlier sites pose a risk to the communities in which they operate, and that is of most importance. But they also pose a risk to the chemical industry. By "outlier sites," I mean those facilities that may produce, mix, store, or distribute chemical-related products, but are not a part of the established chemical industry, members of chemical-related industry associations or participants in the local emergency planning committees. They are not the chemical industry to which Dow and ACC belong, but their actions or lack of action cast a shadow over our industry nonetheless.

ACC and Dow have been proactive in calling for chemical security legislation for almost a decade now in order to bring everyone, including these outlier sites, into the compliance process. Public-private partnerships are successful. DHS and the chemical industry, working together on common goals and finding solutions that address the concerns of both partners, have proven these partner-

ships can work. This public-private partnership concept, initiated by DHS here in the United States, along with the Responsible Care Code, have made their way around the world and are accepted and promoted by the International Council of Chemical Associations and the International Center for Chemical Safety and Security in their efforts to develop a chemical safety and security culture in developing nations.

The DHS concept of public-private partnership is a leading and recognized standard around the world. In addition to the regulations already in place, there are many established programs and partnerships that can address the issues around the West, Texas disaster. At Dow, we implement the Responsible Care Code at all sites around the world. This includes the security code and also the Community Awareness and Emergency Response, or CARE, initiative in the communities near our facilities in the TransCare initiatives in communities along the transportation routes used to distribute our products.

These initiatives include community advisory panels, training and awareness for emergency responders, integrated community or industry emergency response plans and systems, and awareness for the general public, schools, hospitals and what we call “nearby neighbors.” We participate in local emergency planning committees, or LEPCs, created under Federal regs in the mid-’80s and still in force and viable today. These LEPCs, by law, include members of the community, media, special interest groups, local government, emergency responders, and industry.

These local partnerships are where the rubber meets the road. If additional appropriations are being considered, it is at the local level where they can do the most good. West, Texas can and will recover from this terrible tragedy, but we must identify and eliminate similar risks across our Nation. We must enforce the regulations already in place. We must bring outlier sites into the process. We must build robust and all-inclusive public-private partnerships for chemical safety and security at the local community, State, and Federal levels.

We must implement initiatives like CARE and TransCare at the local level to be sure the communities and responders are aware of potential hazards and capable of responding to emergencies. We must constantly strive to do better at identifying, communicating, regulating, mitigating, and responding to the risk. ACC and Dow will continue to be industry leaders in this effort, and we look forward to your questions. Thank you.

[The prepared statement of Mr. Scott follows:]

PREPARED STATEMENT OF TIMOTHY J. SCOTT

AUGUST 1, 2013

INTRODUCTORY STATEMENT FROM TIMOTHY J. SCOTT ON THE TRAGEDY IN WEST, TEXAS

The disaster in West, Texas, was both a National tragedy and a deeply personal tragedy for the families of the brave first responders that lost fathers, husbands, and even a grandmother. It is our shared responsibility to fully examine this catastrophe and apply what we learn to prevent future incidents and loss of life. While the cause of the explosion may never be known with certainty, the path that led to this disaster is clear—non-compliance with established regulations, lack of regulatory oversight, little or no community awareness, little or no training for local first responders, no warning system, and little security at the West Fertilizer Company

facility. There were clear missed opportunities to avoid this tragedy or minimize the impact.

West Fertilizer was what we refer to as an outlier site. Outlier sites are facilities that store or distribute chemical-related products, but are not part of the established chemical industry, are not members of chemical-related industry associations, are not part of an industry performance improvement program such as Responsible Care, or participants in the local emergency planning committees (LEPCs) in which they operate. Outlier sites can pose a threat not only to the local communities in which they operate, but also to the chemical industry as a whole, to ACC and The Dow Chemical Company. ACC and Dow have been proactive in calling for legislation that will level the playing field and bring these outlier sites into compliance.

The State and Federal regulatory agencies with oversight responsibilities for the West, Texas facility must understand they could have done better. There are regulations in place at both the State and Federal levels that require the submission of data relative to chemicals of interest and quantities on-site that would have identified this facility as a potentially high-risk site. Compliance and enforcement of these existing regulations is needed.

West, Texas, will recover from this terrible tragedy. On a National level, we must work to build on a robust and all-inclusive public-private partnership for chemical safety and security, which was built from the local communities up through the Federal Government and across the Nation. ACC and Dow stand ready to join that partnership.

#### SAFETY AND SECURITY ARE A TOP PRIORITY FOR THE CHEMICAL INDUSTRY

The American Chemistry Council (ACC) represents the leading chemical companies that produce essential products critical to everyday life. The business of chemistry is a vital aspect of our Nation's economy since it employs more than 780,000 Americans and touches more than 96 percent of all manufactured goods.

Because of our critical role in the economy, our commitment to our customers and shareholders and our responsibility to our neighboring communities, safety, and security remain a top priority.

The men and women of the chemical industry have worked hard to develop a culture that has put our industry at the forefront of manufacturing when it comes to safety. We are very proud of the fact that the worker injury rate for the chemical sector is among the lowest of any manufacturing sector according to U.S. Bureau of Labor Statistics.

And, members of ACC have sought to build upon the overall industry's safety performance through Responsible Care®, the chemical industry's world-class environmental, health, safety, and security performance initiative. Under Responsible Care, ACC members work with emergency responders and communities to coordinate response plans and to continually improve industry performance. Implementation of Responsible Care is mandatory for all members of ACC, as well as for Responsible Care Partner companies, who represent chemical transporters, distributors, warehouses, logistics planners, and others along our supply chains.

The results of the program speak for themselves. Responsible Care companies have reduced injury and illness rates at their facilities by 79 percent since 1990. Thanks to this effort, these same companies have a worker injury rate 5 times lower than the U.S. manufacturing sector as a whole and nearly 3 times better than the business of chemistry overall. They also have reduced the number of process safety incidents that resulted in a product spill, fire, explosion, or injury by 58 percent since 1995.

In addition to Responsible Care, ACC's CHEMTREC® provides 24/7 emergency response assistance to requests from companies and from emergency responders to help coordinate and communicate critical product safety information that may be needed in mitigating a hazardous material-related incident. In addition, ACC sponsors TRANSCAER® (Transportation Community Awareness and Emergency Response), a voluntary National outreach effort that focuses on assisting communities prepare for and respond to a possible hazardous material transportation incident. For example, TRANSCAER® has trained more than 60,000 emergency responders just during its first year of anhydrous ammonia training. TRANSCAER® was founded in 1986 by the Dow Chemical Company and Union Pacific Railroad. Dow alone has completed 210 events for 6,825 people under TRANSCAER® since 2007.

Together, Responsible Care, CHEMTREC, and TRANSCAER® include community advisory panels, training, and awareness for emergency responders; integrated community and industry emergency response plans and systems; and awareness for the general public, schools, hospitals, and nearby neighbors.

ACC and its member companies care deeply about the communities where they operate. They do not just run businesses; they also live in and contribute to the vitality of their towns and cities. They work hard to establish relationships with their neighbors as well as local officials and emergency responders to help address potential safety and security issues. Our industry's on-going efforts are intended to benefit not just the people we employ but also the communities surrounding our facilities. Our commitment to harnessing the latest technologies and innovations to help enhance safety and security has never been stronger.

#### STRONG SUPPORT FOR REGULATORY OVERSIGHT

Because the Nation depends on chemical producers every day to form the building blocks and processes necessary for safe drinking water, a plentiful food supply, life-saving medicines, and modern technologies, the Federal Government has established a comprehensive set of laws to regulate all aspects of safety and security at chemical facilities.

In fact, multiple agencies, including the U.S. Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), U.S. Department of Homeland Security (DHS), U.S. Department of Transportation (DOT), and the Transportation Security Administration (TSA), have the authority to regulate the safety and security of chemical facilities through a comprehensive array of regulatory programs (see appendix).

ACC and its members fully support compliance with these Federal regulations and believe that agencies should have the appropriate resources to enforce safety and security regulations. We fully support the role of the Government in overseeing safety and security through the numerous Federal programs in place that regulate the operation of chemical facilities, and we believe that agencies should have the appropriate resources to effectively train its field inspectors, educate the regulated community, and enforce regulations. And just as important, we believe companies have an obligation to understand their legal and regulatory obligations and take action to comply.

We also value the Chemical Safety Board's (CSB) independent and technical insight. The CSB investigation of accidents and subsequent recommendations are vital to determine what actions might be warranted based on the root causes of incidents. As part of our effort to continuously improve our performance, the chemical industry captures and disseminates lessons learned from incidents and utilizes those lessons to improve performance, as well as standards and practices.

#### CRITICAL ROLE OF CFATS

DHS has created a solid regulatory framework under the Chemical Facility Anti-Terrorism Standards (CFATS). ACC believes that CFATS has had a positive impact on enhancing security, and we fully support implementation of the program. Under CFATS, DHS has analyzed nearly 40,000 chemical facilities across the United States, identifying more than 7,000 facilities as potentially high-risk chemical facilities. Since then nearly 3,000 facilities have reduced their potential security risks by making operational changes that reduced or eliminated on-site chemical inventories. As a result, the CFATS regulated community currently includes approximately 4,500 facilities across the Nation.

While DHS has faced some challenges implementing the CFATS program, these challenges are not insurmountable. Since the release of the DHS internal memo, the agency has made progress on implementing the action items and putting in place a workable management structure that will enable an effective CFATS implementation process. The industry has seen considerably increased inspection activity, improved quality of inspections and expedited authorizations. Key management positions have been filled with permanent, qualified professionals who have regulatory program experience. DHS has reengaged the public/private-sector security partnership that was so valuable early in the program and is now providing an opportunity to make additional strides as we work together to secure the Nation's chemical infrastructure.

DHS leadership has demonstrated a commitment to working through the current issues and working with stakeholders to improve the implementation of the CFATS program. ACC urges Congress to provide the agency with sufficient resources to properly handle the workload and to ensure that chemical facility security is implemented in a timely fashion. Eventually, we hope that Congress will provide DHS permanent statutory authority for the CFATS program, thus providing regulatory certainty and operational stability that is necessary for capital investments to be appropriately planned and budgeted. These improvements will also ensure that long-

term security decisions can be made without concern as to whether the regulatory landscape under the CFATS program will be altered.

#### THE PATH FORWARD

Just as we have seen with CFATS, a strong partnership is fundamental to success. While determining the root cause of the West incident and CSB's recommendations will be instrumental in pointing to specific areas for improvement, we should act on an opportunity that is available to us right now to enhance safety and security.

We need to make sure that the regulations are being implemented fully and properly and that the agencies have the necessary resources to get the job done. In addition, Federal officials at all levels have to work together and coordinate their activities across all regulatory programs. Equally significant is strengthening the partnership between Government officials and a facility operator is sorely needed. Everyone must be on the same page and working together when it comes to protecting workers and communities. This can be accomplished by first redirecting agency priorities towards training and educational resources for the regulated community and for on-site field inspectors to ensure they have the appropriate knowledge, skills, and proficiencies to focus on verifying compliance with the various programs.

Investing in compliance assistance programs for Federal, State, and local officials that are responsible for certifying the accuracy and applicability of agency reports will ultimately ensure the safety and security of the community and environment. Moreover, an affirmative investment in effective and consistent outreach programs for facility owners and operators is equally imperative to ensure the regulated community thoroughly understands the mission of each agency. A strong financial and administrative commitment to educational outreach and assistance programs and devoting technical resources to consistently maintain, assess, and oversee the current chemical database systems will likely improve overall compliance and understanding of agency objectives, thus reducing ambiguities and inaccuracies in reporting and auditing.

Facility operators need to be actively engaged in local communities' emergency planning processes and ensure that local responders are aware of the materials being used on their sites. This includes opening plant gates to provide periodic tours for local officials and coordinated training and drills. Emergency planning and coordination does not have to be limited to plant events which can impact the community. As I said earlier, we live in the communities where we operate and there are other threats, both natural—hurricanes, tornadoes—and man-made, for which local responders must prepare.

Local Emergency Planning Committees (LEPC) created under Title III of the Superfund Amendments and Reauthorization Act (SARA Title III) in the mid-1980s are still in force and viable today. Each State was required to establish a State Emergency Response Commission, which in turn specified where LEPCs needed to be established. These LEPCs include members of the community, media, special interest groups, local government, emergency responders, and industry. LEPCs need strong support and active participation of facility operators as well as continued support from local officials. LEPCs are a first line of defense for the community and they deserve all the support the private and public sectors can give them.

The Federal Government needs to work with industry to help share and leverage existing best practices and industry program to make sure "outliers" are aware there are tools and resources available to them. ACC and its members remain committed to working with government officials at all levels to enhance safety and security at our facilities, so we all continue to enjoy the essential benefits of a strong and growing chemical industry in America.

#### APPENDIX—CURRENT SAFETY & SECURITY REGULATORY PROGRAMS

##### SAFETY

##### OSHA

*Process Safety Management (PSM) Regulations (29 CFR 1910.119).*—This regulation helps prevent accidental releases of highly hazardous chemicals, thus protecting employees, contractors and people who live and work around chemical operations.

- a. Chemical National Emphasis Program (NEP) establishes policies and procedures for inspecting workplaces that are covered by OSHA's process safety management (PSM) standard, protecting workers from catastrophic releases of highly hazardous chemicals.

*Combustible Dust Rulemaking.*—OSHA believes a comprehensive dust standard is needed to prevent dust explosions and is therefore pursuing a combustible dust rulemaking.

*Voluntary Protection Program (VPP).*—Many member companies participate in VPP, a program that promotes effective worksite-based safety and health.

Emergency Planning and Community Right-to-Know Act (EPCRA)

- a. There are four major provisions of EPCRA:
  - i. Emergency Planning (Sections 301–303);
  - ii. Emergency Release Notification (Section 304);
  - iii. Hazardous Chemical Storage Reporting (Sections 311–312);
  - iv. Toxic Chemical Release Inventory (Section 313).

*Responsible Care Process Safety Metrics.*—Responsible Care companies are committed to the safe operations of their chemical processes. The enhanced Process Safety Code sets forth this collective commitment to a culture of process safety throughout chemical facility processing operations, management systems, and leadership organizations. It is also intended to complement regulatory requirements, such as OSHA's Process Safety Management (PSM) standard and EPA's Risk Management Program (RMP) standard.

#### *EPA*

*Risk Management Program (RMP).*—Under the authority of section 112(r) of the Clean Air Act, the Chemical Accident Prevention Provisions require facilities that produce, handle, process, distribute, or store certain chemicals to develop a Risk Management Program and prepare a Risk Management Plan (RMP).

#### *U.S. Chemical Safety and Hazard Investigation Board (CSB)*

While industry is not regulated by them, their recommendations are factored into decision making.

#### *Department of Transportation*

The Hazardous Materials Regulations (HMR) govern the transportation of hazardous materials by highway, rail, vessel, and air. The HMR addresses hazardous materials classification, packaging, hazard communication, emergency response information, and training.

### CHEMICAL SECURITY REGULATIONS

#### *Department of Homeland Security*

The Chemical Facility Anti-Terrorism Standards (CFATS), also known as 6 CFR, Part 27, are a set of U.S. Government security regulations for high-risk chemical facilities such as chemical plants, electrical generating facilities, refineries, and universities. The U.S. Department of Homeland Security promulgated the Final Rule on April 9, 2007. The regulations came into effect on June 8, 2007, apart from material covered in Appendix A, which took effect upon its publication in the *Federal Register* on November 20, 2007.

#### *U.S. Coast Guard*

The Maritime Transportation Security Act of 2002 (MTSA) (Pub. L. 107–295) was signed into law by President George W. Bush on November 25, 2002. This law is the U.S. implementation of the International Ship and Port Facility Security Code (ISPS). It requires port facilities to conduct vulnerability assessments and develop security plans that may include screening procedures; security patrols; establishing restricted areas; personnel identification procedures; access control measures; and/or installation of surveillance equipment. The act creates a consistent security program for all the Nation's ports to better identify and deter threats. The U.S. Coast Guard issued regulations to enact the provisions of the act and to align domestic regulations with the maritime security standards of SOLAS and the ISPS Code. The regulations are found in Title 33 of the Code of Federal Regulations, Parts 101 through 107. Part 105 contains port facility security regulations, including those that apply to chemical facilities.

Mr. MEEHAN. Thank you, Mr. Scott.

The Chairman now recognizes Mr. Moulton.

#### **STATEMENT OF SEAN MOULTON, DIRECTOR, OPEN GOVERNMENT POLICY, CENTER FOR EFFECTIVE GOVERNMENT**

Mr. MOULTON. Chairman Meehan, Ranking Member Clarke, Members of the subcommittee thank you for inviting me to testify

today on the Chemical Facility Antiterrorism Standards, CFATS, and steps needed in the aftermath of the West Fertilizer tragedy. I want to also offer my deep condolences to the West, Texas community and the families that lost loved ones.

My name is Sean Moulton, and I am the director of open government policy at the Center for Effective Government, formerly OMB Watch, an independent nonpartisan policy organization dedicated to ensuring Government is effective and responsive to the priorities of the American people. I wish to make four points. First, excessive secrecy and information restriction contribute to gaps, oversights, and inefficiencies in chemical security efforts in the CFATS program specifically.

CFATS was unaware of the West Fertilizer plant and its storage of ammonium nitrate. EPA knew about the facility through its risk management program, but didn't know about the ammonium nitrate. State emergency officials knew about the ammonium nitrate through hazardous chemical inventory reports, but didn't know the facility was missing from CFATS. These gaps are especially troubling because much of the needed information was reported, but not reported to everyone. The information that was reported wasn't sufficiently shared.

These breakdowns reveal disturbing loopholes in the regulatory system and a fundamental problem with the way we manage chemical security and safety information. We have adopted an overly-secretive approach to this information, which slows sharing and impedes risk mitigation. This need-to-know approach also promotes cultures of secrecy and isolation in agencies, which lead to information gaps such as unreported facilities in CFATS.

This raises my second point: Better collaboration among Federal agencies and State authorities is needed to address these gaps. The most effective way for agencies to share information and avoid bureaucratic, technical, and other barriers is to narrow the amount of protected information and make the rest public in open data formats. Need-to-know access tools, such as requiring special logins and requesting approval for access, impedes sharing and limits cross-agency collaboration, and should only be used for the most sensitive information.

If a list of CFATS' facilities was public, perhaps an official in Texas or a plant employee would have noticed that West Fertilizer was not on this list. Third, engaging and informing the public is essential to protecting communities from chemical facility risks. Citizens, first responders, plant workers, and local officials all need to be better-informed to prepare for chemical emergencies. Basic information, such as facility location, identity and quantity of chemicals, compliance status are vital for communities to properly identify and prepare for chemical risk.

On the other hand, excessive secrecy could cost lives in a chemical emergency. The tragedy at West Fertilizer may be an example of this. Emergency guidelines for large ammonium nitrate fires recommend evacuation and trying to contain the fire from a distance. However, the West fire fighters, apparently unaware of the ammonium nitrate, may not have been able to properly judge the situation and adopt these tactics. Furthermore, greater public access to information can help reduce or eliminate risk.

Adopting safer chemicals and processes can remove dangerous substances from communities and better protect Americans. Preliminary findings indicate that West Fertilizer's ammonium nitrate could have been mixed with calcium carbonate to eliminate the risk of explosion, while preserving its use as a fertilizer. Communities and agencies need more complete information on current chemical storage to be able to advocate for safer alternatives.

Finally, increased transparency for CFATS can improve its effectiveness and accountability. When programs operate behind closed doors with little public oversight, they often suffer from delays, wasted resources, and management problems. The DHS inspector general and the Government Accountability Office both recently found delays and significant management problems in the CFATS program. We need transparency to know if reform efforts are working. CFATS should publish data on assessments received and reviewed, security plans certified, inspectors trained, and inspections completed.

Citizens understandably want and deserve more than a trust-us approach to programs addressing their safety. In conclusion, to be successful, CFATS and other chemical safety programs should rein in secrecy, partner with other agencies to identify and address gaps, strike a better balance in public disclosure and engage communities as participants in upholding chemical safety and security. The Executive Order released earlier today is a welcome step towards closing regulatory and information gaps among the main agencies overseeing chemical facilities.

However, Congressional action may well be needed to achieve all these reforms in a timely way.

I sincerely thank you for the opportunity to address this committee. Chairman and Members of the subcommittee, I look forward to your questions.

[The prepared statement of Mr. Moulton follows:]

PREPARED STATEMENT OF SEAN MOULTON

AUGUST 1, 2013

Chairman Meehan, Ranking Member Clarke, Members of the subcommittee: My name is Sean Moulton and I am the director of Open Government Policy at the Center for Effective Government, formerly OMB Watch—an independent, nonpartisan policy organization dedicated to ensuring Government is effective and responsive to the priorities of the American people. We believe transparency of Government actions promotes accountability and empowers citizens. The Center for Effective Government has been a leader on environmental right-to-know issues since the late 1980s when it created RTK NET as an on-line public source of environmental data. This resource helps citizens gain information about workplace and public health risks from chemical exposure.

Thank you for inviting me to testify today about how we can improve the effectiveness of the Chemical Facility Anti-Terrorism Standards (CFATS) so that the program better ensures the security of our chemical plants and the safety of the American people.

The massive explosion at the West Fertilizer plant on April 17 that killed 15 people and injured more than 200 was a terrible tragedy. In its aftermath, it has become clear that the network of regulatory programs that seeks to identify facilities with chemical risks in order to ensure the protection of workers, first responders, and nearby communities failed. The facility had never filed a risk assessment with the CFATS program despite the approximately 270 tons of explosive ammonium nitrate stored on-site. The Department of Homeland Security (DHS) seemed unaware of the facility and its lack of compliance with CFATS reporting. This raises serious

questions about the CFATS program and its effectiveness in collecting, managing, and sharing information necessary to its mission.

In March, the DHS Inspector General issued findings from its review of the management practices to implement the CFATS program. The assessment found significant problems, specifically:

“Program progress has been slowed by inadequate tools, poorly executed processes, and insufficient feedback on facility submissions. In addition, program oversight had been limited, and confusing terminology and absence of appropriate metrics led to misunderstandings of program progress. The Infrastructure Security Compliance Division still struggles with a reliance on contractors and the inability to provide employees with appropriate training. Overall efforts to implement the program have resulted in systematic noncompliance with sound Federal Government internal controls and fiscal stewardship, and employees perceive that their opinions have been suppressed or met with retaliation.”<sup>1</sup>

In April, the Government Accountability Office (GAO) released the results of its investigation into the progress made under the CFATS program in assigning facilities to risk tiers, reviewing security plans, and communicating with owners and operators to improve security. While improvements from early efforts were noted, significant problems were discovered. The GAO estimated that it could take the program another 7 to 9 years to review all the security plans, which would mean the rest of the regulatory process, including compliance inspections, could take 8 to 10 years to be completed.

My testimony will examine four issues.

- First, the culture of excessive secrecy and limited information sharing has contributed to gaps, oversights, and inefficiencies in chemical security efforts in general and the CFATS program specifically.
- Second, better collaboration among Federal agencies and between Federal and State authorities will be needed to address these gaps and make the CFATS program operate more effectively.
- Third, engaging and informing the public is essential if CFATS is to become an integral part of the broader Government effort to protect communities from chemical facility risks.
- Fourth, increased transparency in the CFATS program is necessary to improve its long-term effectiveness and accountability to the public it serves.

#### EXCESSIVE SECRECY AND RESTRICTED ACCESS DON'T WORK

Despite operating for 6 years and having received thousands of risk assessments from facilities around the country, the CFATS program was unaware that the West Fertilizer plant had large amounts of ammonium nitrate stored on-site. The facility never filed a risk assessment with the program. There is no indication that CFATS knew the assessment had not been filed. There has been no announcement of commutations with the facility urging it to file the assessment and no notices of violations or fines.

According to the preliminary findings of the U.S. Chemical Safety Board (CSB), local first responders “were not made aware of the explosion hazard from the ammonium nitrate stored at West Fertilizer.”<sup>2</sup> And nearby residents, including an elementary school, hospital, and retirement home, all within a mile of the facility, were almost certainly unaware of the risks posed by the facility.

This lack of oversight is a troubling discovery for a program charged with such an important responsibility. Gaps could mean that dangerous facilities go without improved security and safety plans. And statistically, it is highly unlikely that West Fertilizer is the only facility with significant quantities of hazardous chemicals missing from CFATS.

These informational gaps are especially troubling because the plant had been filing Risk Management Plans with the Environmental Protection Agency (EPA) since 1999 and been reporting the quantity of ammonium nitrate it stored to State officials in its Tier II Hazardous Inventory reporting under the Emergency Planning and Community Right to Know Act. So information was collected and reported to certain agencies, but it seems it wasn't sufficiently utilized or shared.

These communication breakdowns reveal a fundamental problem with the way chemical security and safety information is managed by the CFATS program and

<sup>1</sup> Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program, Department of Homeland Security, Inspector General, March 2013, p. 1.

<sup>2</sup> Preliminary Findings of the U.S. Chemical Safety Board from its Investigation of the West Fertilizer Explosion and Fire, U.S. Chemical Safety Board, July 2013.

other related regulatory programs. Since the Sept. 11, 2001 terrorist attack, there has been an excessive level of secrecy related to chemical safety and security, which slows sharing and impedes risk mitigation.

When the Department of Homeland Security established the CFATS program, it created a category of information called Chemical-terrorism Vulnerability Information (CVI). The rules made clear that access to CVI would be limited to those persons with “a need to know.” But such a “need-to-know” approach creates unclear lines of authority for determining access to information and unnecessary bureaucracy that significantly interferes when emergencies arise.

Need-to-know approaches also cultivate broader cultures of secrecy and isolation within the agencies and programs that utilize them. Such isolation can directly contribute to information gaps, such as unreported facilities in CFATS, because of non-existent or difficult information sharing with other agencies and programs.

The 9/11 Commission recognized the problems that arise when information isn’t shared. In 2005, in testimony before the House Committee on Homeland Security, Lee Hamilton, former Vice Chair of the 9/11 Commission, stated: “Poor information sharing was the single greatest failure of our government in the lead-up to the 9/11 attacks.”<sup>3</sup> To remedy the problem, Hamilton concluded that the Government had to change its approach to information collection and control:

“The 9/11 story included numerous examples of how a mentality of limiting information sharing to those with a ‘need to know’ in fact kept information from getting to the right people at the right time. Cultures will not change without policies in place that actively encourage such change, and without the sustained implementation of those policies.”<sup>4</sup>

The CFATS program has not embraced or encouraged that needed change. Instead, it has continued to cling to a flawed “need-to-know” framework and culture that leaves agencies isolated and individuals who need chemical security or safety information in the dark.

#### BETTER SHARING ACROSS AGENCIES IS CRUCIAL

There are various Federal and State agencies responsible for different aspects of chemical safety and security, and these agencies need to do a much better job of cooperating and collaborating among themselves.

- Section 550 of the Department of Homeland Security Appropriations Act of 2007 authorized the CFATS program at DHS to assess the risk of chemical plants and require high-risk facilities to develop and comply with a security plan.
- The Clean Air Act Amendments of 1990 authorized the EPA to establish the Risk Management Plan program, which requires facilities storing significant quantities of 140 toxic or flammable chemicals to submit a plan describing the facilities’ activities to prevent the accidental release those chemicals and how it would respond to any emergencies involving such a release.
- The Emergency Planning and Community Right to Know Act of 1986 required Emergency and Hazardous Chemical Inventory reports that detail the hazardous materials stored on-site at facilities and are submitted to the local fire department, State Emergency Response Commissions, and Local Emergency Planning Committees.
- And the Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration (OSHA) to ensure safe and healthful working conditions by setting and enforcing standards and by providing training, outreach, education, and assistance.

Those are just a few of the agencies and programs that had some overlapping coverage of chemical security and safety at West Fertilizer and other plants. But these agencies do not sufficiently share information or collaborate on chemical plant safety. Many have such significant restrictions on accessing their information that even other Government agencies can have difficulty using the data. For instance, many States treat the Emergency and Hazardous Inventories as restricted or classified information, refusing to post the information on-line or disclose it in response to requests.

The CFATS treats even the most basic information about its program with the same type of protected secrecy. If a public list of facilities that had submitted information to the CFATS program for evaluation existed, perhaps a State or local offi-

<sup>3</sup>Prepared Statement of Lee H. Hamilton before the Committee on Homeland Security, U.S. House of Representatives, November 8, 2005, p. 1.

<sup>4</sup>Ibid., p. 5.

cial in Texas or a plant employee would have noticed that West Fertilizer was not on that list.

The solution to the secrecy problem is to narrow the amount of protected information and broadly share the other information. State and local officials should be able to find information through on-line searches and immediately access it. Requiring public officials to apply for access, get approved, establish log-ins, etc. will create a huge disincentive for officials to gather information. And that means cross-agency collaboration will be minimal.

The collaboration among agencies should not be limited to the exchange of information. The CFATS program should be using the personnel of other State and Federal agencies to expand its capacity to inspect facilities and perform other necessary on-site activities. Combined, the Federal and State agencies that overlap in their concern for chemical facility security and safety have more on-the-ground personnel than any single agency. While it is difficult to say how many personnel they could contribute to a shared chemical facility inspection approach, collaboration would certainly undertake significantly more inspections than CFATS could alone. This expanded network of inspectors could identify and address more risks than the individual agencies can do on their own.

DHS should also be collecting information from people closest to the facilities—employees, local first responders, and community members. Such stakeholders can have a wealth of information about potential problems with chemical storage, security, or emergency preparedness that may not be submitted on company filings. There needs to be a mechanism or process to collect this information as it could help identify missing outlier facilities, fill in other data gaps, and correct erroneous information the program may have received.

And when a plant employee or State official steps forward and reports on-going and unaddressed problems or vulnerabilities, those people should be protected from any retaliation by their employers.

#### AN INFORMED AND ENGAGED PUBLIC MAKES COMMUNITIES SAFER

An engaged and informed public is a vigilant public. Citizens, first responders, medical professionals, plant workers, and local officials all need to be better informed about chemical security and safety information in order to be prepared for emergencies.

I am not suggesting that all the information collected by CFATS and other regulatory programs addressing chemical plant safety and security should be open to the public. I am suggesting we have not yet found the right balance between disclosure and information security.

Unfortunately, we have all but abandoned early efforts to provide useful information to the public while restricting access to truly dangerous, detailed information.

We continue to try to solve the complex problem of information management with an overly simplistic solution of blanket secrecy. Those wishing to damage chemical facilities and harm the public need detailed, specific information. Secrecy may be justified in some limited instances—vulnerability assessments, plant operations details, etc.—where specific information may need to be restricted.

But when we hide such basic information as facility identities and locations, chemicals stored, and compliance status, we trade away citizen vigilance and important agency collaboration that can ensure more accurate information and better emergency preparedness. This type of information can be essential for use by other officials and the public.

Studies done on hazardous materials placards,<sup>5</sup> digital maps and global positioning information,<sup>6</sup> and biological research<sup>7</sup> have each found that openness and disclosure is essential to keeping the public safer, and it helps us stay ahead of terrorists. For instance, in 2003, the Department of Transportation explored the possibility of removing hazardous materials placards from trucks, railcars, and shipping containers to better protect the materials from theft or use by terrorists. But the study found that “removal of placards offers little to no security benefit” and that

<sup>5</sup>The Role of Hazardous Material Placards In Transportation Safety and Security, Jan. 15, 2003. U.S. Department of Transportation, Research and Special Programs Administration, Office of Hazardous Materials Safety and John A. Volpe National Transportation Systems Center.

<sup>6</sup>Mapping the Risks: Assessing the Homeland Security Implications of Publicly Available Geospatial Information, 2004. RAND National Defense Research Institute, John C. Baker, Beth E. Lachman, David R. Frelinger, Kevin M. O’Connell, Alexander C. Hou, Michael S. Tseng, David Orletsky, Charles Yost.

<sup>7</sup>Globalization, Biosecurity, and the Future of the Life Sciences, 2006. Committee on Advances in Technology and the Prevention of Their Application to Next Generation Biowarfare Threats, National Research Council.

the placards were a critical source of hazard information that facilitated effective emergency responses and protected lives.

Excessive and unnecessary secrecy around chemical security programs like CFATS could cost lives in the event of a chemical emergency. If an emergency occurred at a chemical facility, people might not know where to go and could evacuate into the path of a chemical hazard. Schools would be ill-prepared to evacuate children and inform parents. Doctors would not know how to treat those exposed, and first responders would not know what emergency equipment to use. Awareness, preparedness, and prevention save lives.

The catastrophe in West, Texas may wind up being an example of this problem. In its preliminary findings, the CSB notes that the National Fire Protection Association recommends that fire fighters evacuate from massive ammonium nitrate fires and that the Department of Transportation's Emergency Response Guidebook recommends flooding large ammonium nitrate fires with water from a distance. Despite the lack of clarity on judging the size of a fire or exactly how much distance should be used, it's clear that at least some ammonium nitrate fires should be dealt with by evacuating the area and trying to contain the fire from a greater distance. However, the West volunteer fire fighters were unaware that they were facing a fire with ammonium nitrate, so they could not properly judge if these tactics should be used.

Carolyn Merritt, then-chair of the CSB, stressed the importance of community awareness and preparedness in responding to and mitigating the impacts of a chemical accident during Senate testimony in 2007. She noted a "lack of chemical emergency preparedness that our investigations have found among many communities where accidents strike."<sup>8</sup> Merritt illustrated the consequences of such situations with a compelling real-life example:

"When a small chemical firm in northwest Georgia experienced a reactive chemical accident that released toxic vapor into the community, fire fighters and police lacked the planning, equipment, and training to respond effectively, and the city lacked an emergency notification system for residents. More than 200 families had to be evacuated, and 154 people had to be decontaminated and treated at the hospital. The most seriously-impacted were police officers, who were instructed to conduct the community evacuation without protective gear."<sup>9</sup>

Beyond emergency preparedness, greater public access to chemical safety and security information can allow communities to engage in dialogs with officials and company representatives about reducing the risks through Inherently Safer Technologies (IST). There are many safer chemicals and processes that industry can use to replace dangerous substances and better protect Americans in the process. In fact, some communities no longer face risks of dangerous chemical exposures because nearby plants have switched to safer alternatives. For example, in 2009, the Clorox Company announced it would replace bulk quantities of chlorine gas with safer chemicals.

The preliminary findings of the CSB for the West Fertilizer explosion indicate that there are IST options to more safely store, ship, and handle ammonium nitrate as a fertilizer. Compounding the ammonium nitrate with calcium carbonate practically eliminates any risk of explosion while preserving its use as a fertilizer.

Hundreds of chemical facilities have switched to safer and more secure chemicals and processes since 2001, but more work is needed. Agencies and communities need to use the collected information and become advocates for IST solutions in more facilities.

A better approach to management of chemical security and safety information would disclose basic information necessary to inform the public of risks from chemical facilities, explore the use of safer alternatives to eliminate the risk, and enable community members to participate in emergency planning. For instance, disclosing the names and locations of facilities, identities and quantities of chemicals stored, status of facilities' reporting, status of inspections, notices of violations, and other general information would allow the public to better understand which facilities are following safety rules (and which aren't). Information restrictions should be limited to detailed information about facilities' vulnerability assessments and chemical security plans. No detailed information about specific chemical security vulnerabilities and facilities should be released.

<sup>8</sup>Prepared Statement of Carolyn W. Merritt, Chairman U.S. Chemical Safety Board before the Committee on Environment and Public Works' Subcommittee on Transportation, Safety, Infrastructure Security, and Water Quality, U.S. Senate, July 10, 2007, p. 8.

<sup>9</sup>Ibid, p. 9.

## PUBLIC TRANSPARENCY WORKS

When programs are allowed to operate behind closed doors with little to no ongoing public oversight, they often suffer from delays, wasted resources, and management problems.

We have seen the importance of transparency in addressing the significant delays and other management problems in the CFATS program with the investigations conducted by the DHS Inspector General and the Government Accountability Office. They prompted increased oversight and public scrutiny that should help motivate CFATS leadership to fix the problems.

But we need continued transparency to know that reforms are actually being put in place. Basic information about the CFATS program activities and progress should be made public on a regular time table. Statistics on the number of assessments received and reviewed, facilities placed in risk-based tiers, security plans certified, inspectors trained, and inspections completed should be made available to the public on an on-going basis.

Because the DHS Inspector General review found an over-reliance on contractors, as well as noncompliance with internal controls and fiscal stewardship, the program should also regularly provide information on its spending, including contracts awarded and status of work being conducted. Finally, to address the other management and program problems identified in the Inspector General and GAO reports, the CFATS program should offer regular updates on the steps taken to address the management issues. Such information would allow the public and oversight officials to better understand and evaluate the progress toward achieving chemical safety.

Chemical security is supposed to be about protecting the public. As such, the public has a fundamental right to know and understand the oversight the Government has in place. Citizens understandably want and deserve more than a "trust-us" approach to their safety.

## CONCLUSION

Like the committee, the Center for Effective Government wants the CFATS program to succeed and help ensure the safety and security of chemical facilities. To accomplish that, CFATS must become a more integral and collaborative component of the regulatory network overseeing facilities with significant amounts of hazardous chemicals. The other programs within this network also need to update their disclosure policies and improve their collaboration efforts.

We encourage CFATS to take the lead and become a genuine partner with agencies and stakeholders, to strike a new balance in information disclosure, and to engage first responders, facility employees, and communities as participants in chemical safety and security.

I sincerely thank you for the opportunity to address this committee. Chairman and Members of the subcommittee, I look forward to your questions.

Mr. MEEHAN. Well, thank you, Mr. Moulton. I would like to thank each of the panel members, not only for your preparation and your appearance here, but I know that you have all professionally been committed to work in this important area. I thank you for sharing your expertise with us here today.

So I now recognize myself for 5 minutes of questions. Mr. Dippel, you, I had actually used your testimony when I asked some of the previous questions. Because to me, it reflected so well the sense of the independent operator. He is not trying to be an outlier, but there is a tremendous sense of frustration and you used the words, "confusion out there." Can you tell me? You have been experienced in this area. What are we missing in terms of the ability to reach out to the kind of operator that you have, I think you called them "dealers."

Mr. DIPPEL. Yes, sir.

Mr. MEEHAN. So what is missing, what can we do better?

Mr. DIPPEL. Well, I think it is just the cooperation with our State agency, Texas has an ammonium nitrate law. They are one of the six States that has ammonium nitrate law which requires that the product be secured. You cannot ship to a retailer before they have

a plan in place with the Feed and Fertilizer Control Service. So all they would have to do is contact the Feed and Fertilizer Control Service and they would know where every facility is in—

Mr. MEEHAN. Has that ever happened, to your knowledge?

Mr. DIPPEL. Not to my knowledge they have not.

Mr. MEEHAN. This is a big part of the failure for the connection to be made to the State and local level, where there is already oversight and information contained.

Mr. DIPPEL. Yes, sir. They have to, they protect ammonium nitrate very securely in Texas, in that every sale has to be registered and you would have to have identification of the person that is buying it. It is very similar to the CFATS law.

Mr. MEEHAN. Mr. Derig, you had discussed this idea, and it may tie into this. I think when I was going through your testimony this concept of third-party identification or third-party participation, it speaks to the issue of we have got a lot of resources out there but it seems to me people are either not asking for those who have some expertise and capacity here in this area to participate with DHS. Or there is some other kind of an impediment to information sharing even with agencies that have the same information. So can you explain to me what you mean by this sort of third-party verifier program and how that might operate?

Mr. DERIG. Yes, that is the initiative under Responsible Ag that ARA and TFI are partnering on. What that does is, as Mr. Dippel stated, there is confusion out there. There are a lot of rules, a lot of agencies that apply to the retail business. What we want to do is consolidate those rules into what we might consider to be a management plan or a system from the ag retailer to get involved in, know where they need to be for compliance for the products that they handle, and then have a third-party auditor certified to come through periodically, whether it is annually or every other year, and do an audit of that management system to ensure that compliance is taking—

Mr. MEEHAN. So would you include in that, now, you are down in Texas. Are you in Texas?

Mr. DERIG. I am actually in Idaho.

Mr. MEEHAN. No, you are in—

Mr. DERIG. We do have facilities in Texas.

Mr. MEEHAN. Okay, but, whether you are in Idaho. I mean, we are talking about Texas, but suppose you have a facility in Idaho and Texas. Is it your idea that you would consolidate both the Federal requirements and State and local requirements so that your agency would sort of help somebody in Idaho and in Texas?

Mr. DERIG. That is correct. Actually, one of the working groups are right now, presently as we speak, is working on what we call the common codes of practice. So they would be working specifically with State rules as they tie to the Federal rule so an ag retailer, no matter what State they are in, would be audited under their State rules and how they overlap with the Federal rules.

Mr. MEEHAN. Okay, and the idea being that even if something may be a little bit different from a local perspective or in a different State, you would still have the capacity to try to consolidate these. That would be part of the audit process, would be the local auditor might know what is expected locally.

Mr. DERIG. That would be correct.

Mr. MEEHAN. I will be curious too, have you had communications with DHS on this process?

Mr. DERIG. We have spoken to them, and as this process goes along we certainly want their cooperation, we want to partner with them as well as to other agencies that have a regulatory authority to get their input and recognize the system as industry's approach to products stewardship and ensuring that our industry is strong and vital, into the future.

Mr. MEEHAN. Well, thank you. Mr. Scott, you had talked a little bit about this concept, not altogether different—maybe a little bit different approach. But the concept is the same. The public-private partnership, if I am correct in your testimony. Certainly you have got a tremendous amount of experience, looking at this from the perspective of a large company, to be sure, but your chemicals are going down to local dealers, and I know you have a great deal of interest in assuring the security of those all the way through the process.

Tell me what your process, explain a little bit further what you mean by this public-private partnership and how you think it could be realized to help us to reach these outliers.

Mr. SCOTT. The way it works, it has worked at least for us and for the ACC companies at both the Federal levels, the State levels, and down at the local level. When DHS was first launched, we worked very closely to sit down and really work on a common issue of securing the chemical industry, and what makes sense, and how can it be beneficial and not overly burdensome for either side. We worked through a lot of details in a collaborative effort that made the process at least a workable process to move forward and start to make some progress.

We have started to see some progress. There have been a lot of downsides on the DHS implementation. But I think they are fixing those right now. At the local level, I think that is where you can really make the progress. If you look at the West, Texas incident this was a local issues that had a National impact. If you look at the local emergency planning committees that have been in place for 20-plus years now, in every county in the United States you can go to a local, you should be able to find a local emergency planning committee that involves all the industry that is in the community. The media, the—

Mr. MEEHAN. They know the community. They are living there.

Mr. SCOTT. They are there. They know the people, they know the industries. It is an information-sharing process that the community and the companies that are there, the chemical companies that are there, have to share information. You have to show them information of what you have on the site, and you have to have integrated emergency plans so that people know what to do. If there is an emergency, how are they going to know about an emergency? What should they do in an emergency? How should they react?

It is a very collaborative process. So at the State and the local levels, it works very well and we have had very good relationships with things like the CARE—

Mr. MEEHAN. From your awareness, has that kind of a local emergency coordinating group ever been reached by DHS with regard to their cooperation or collaboration on this issue?

Mr. SCOTT. In some States, I would say yes. I mean, it is typically the States where we were very active ACC members or Dow is very active, and you bring the two together to come out. In other States, I don't know. But that is the easiest route for the State DHS folks that we talked about earlier, the PSAs that Mr. Wulf talked about, can reach out to the local community and be a part of that. They should be a part of that.

The local sheriff and the fire departments and DHS and TCEQ in Texas, the environmental groups, and the media and the public are all members of those LEPCs.

Mr. MEEHAN. Well, my time has expired so I will have a follow-up question.

But let me turn it now to the Ranking Member for her questions.

Ms. CLARKE. Thank you, Mr. Chairman, and I thank our panelists for bringing your observations to bear here. I want to pick up a bit on what you have just stated, Mr. Scott, and actually pose a question to Mr. Dippel. Because it is interesting that Texas has a law regulating ammonium nitrate, but does it concern you, Mr. Dippel, that West, Texas had a wooden storage facility under, I mean, is that part of Texas State law?

Mr. DIPPEL. No, it is not, and probably 95 percent of the facilities in Texas are wood. You know, their bands are made of wood. So that is not uncommon in the State of Texas.

Ms. CLARKE. Um-hmm. As a result of this, has there been new guidance put out about storage, or is it too much of a financial burden for, you know, smaller firms to look at changing that?

Mr. DIPPEL. It is a big financial burden, and I have met with the fire marshal and we have discussed this. It is something they are recommending possibly that they change their facilities. But again, the, I think there are bigger concerns, you know, than just your walls and your seals. It is a lot of the locations of the facilities similar to West.

Ms. CLARKE. Yes.

Mr. DIPPEL. There again, you know, West was a facility that was brought in probably in 1963 and all these things were built up around it. So there, again, there is a zoning problem in a lot of these small cities that bring on these problems.

Ms. CLARKE. Very well. Let me turn to you, Mr. Moulton. You have testified today and written extensively on the issue that engaging and informing the public is essential if CFATS and other programs are to become an integral part of the broader Government effort to protect communities from chemical facility risk, and I agree. Would you expand on the concept that culture of excessive secrecy and limited information sharing has contributed to the gaps, oversights, and inefficiencies in the chemical security efforts in general and, specifically, in the CFATS program?

Mr. MOULTON. Sure. I think there are a number of barriers that impede sharing of information between agencies and CFATS' program specifically. There are regulatory barriers. CFATS' program, when it established its information category, the chemical terrorism, vulnerability information it basically treated the informa-

tion as almost classified. It treated very similar to that. It was a very broad definition of the information. So understandably that creates a regulatory restriction on what you can do with the information very easily.

There are bureaucratic barriers. This need-to-know approach means that people have to ask to get access and wait for approval and wait for logins. It depends on the fact that whoever at the other end, whether it is DHS deciding whether or not to share their information or EPA deciding whether or not to share their RMP information, it depends on that agency making the right determination of this person deserves access and at what level. We don't always get those decisions right.

There are cultural barriers, as I said. Agencies, interagency cooperation has long been a difficult issue. When it comes to areas where security gets involved and security concerns are raised, it becomes even more difficult for agencies to release information and share it more freely. Finally, I would say there is a technical barrier. These agencies have their own information and their own systems. Those systems don't often talk to each other very well.

We heard Mr. Wulf this morning talk about when they first tried to access RMP data at EPA it was hard to get the system to work with their system right and get the information they needed from it. Again, if we leave these systems separate and closed you are going to run into those technical barriers more often. If we open them up and release more information out to the public in open formats it removes all of these barriers. The agencies can use it. Citizens, first responders, they can use it as well.

Ms. CLARKE. It would seem to me that in a case like West, where, as Mr. Dippel has already stated, you have sort of an older facility that had development grow around it, it would have been flagged at some point along that continuum. That the zoning challenges of building nursing homes, you know, those types of facilities in proximity to the place it would have been apparent. So I think that there are a whole host of ways in which this information sharing becomes critical to the mission of homeland security.

I want to thank you for your testimony, and yield back, Mr. Chairman.

Mr. MEEHAN. I thank the Ranking Member.

The Chairman now recognizes Mr. Vela for any questions he may have.

Mr. VELA. Mr. Scott, you mentioned that for 10 years that your organizations have tried pushing forward certain pieces of legislation. Can you elaborate on that?

Mr. SCOTT. Well, we have been behind chemical security regulations and focused on DHS, getting them as the authorized agency so we get some clarity around the whole security process. A big part of pushing for legislation is to get everybody on the same playing field so that one industry is not doing one thing while another one is doing a different thing. So we wanted to push legislation to get that clarity around what agency is responsible for chemical security and who are all the players that are involved.

We are still not there yet. But we have got the legislation, but we have got to get everybody around the table.

Mr. VELA. Now, have there been bills along those lines filed, or have you not even gotten to that point?

Mr. SCOTT. Well, we have been working, every time there is a piece of legislation out or a committee working on chemical security we have been involved in that. So yes, we were very involved in the whole CFATS discussion from the very beginning.

Mr. VELA. I guess what I am asking is, are there any current proposals that you would be asking us to take a look at as we move forward?

Mr. SCOTT. Well, I—one thing we wanted, we would like to get is, get authorization, a multi-year authorization, for DHS. I mean, that is one of the issues that you have is it is getting very difficult. We have spent about \$250 million on security upgrades for Dow Chemical alone. As the economy gets tougher, it is harder to get that money to complete the upgrades. With the uncertainty of, well, is DHS going to be here next year, is there going to be somebody else, it gets very difficult to sustain the program internally.

Mr. VELA. Now, you mentioned there was quite a difference in terms of the regulatory jurisdiction, or maybe regulatory action, if you compared, for example, the role that these agencies might play in a Dow Chemical plant versus the role that they play at West Fertilizer. What can you tell me about that? What is the difference?

Mr. SCOTT. There really is no difference except in size. I mean, we have very big sites. But we have sites that are regulated by EPA and DHS for security and environmental incidents. We have sites that are regulated by the Coast Guard and EPA. So we have multi-jurisdictional issues at most of our sites. OSHA is involved at all of our sites in the United States and similar government agencies outside the United States.

Mr. VELA. I guess what I am asking is: Do you see or prior to this accident would you have seen, a difference in the level of action to prevent this accident by those agencies if we compare how actively they were involved in doing what they are supposed to do at, for example, Dow Chemical plant versus the West Fertilizer plant?

Mr. SCOTT. Well, I mean, we are surmising here. But a lot of the risk analysis that you do, whether it is EPA or whether it is DHS, are population-related. So when you go through and look at, if you put the chemicals of interest in the computer, and it comes out that you do have a chemical of interest, and this is the quantity that you have the risk is also based on the impact, off-site impact, to the population around you. So smaller population areas typically are a lower risk type of scenario in the DHS and EPA worlds for that off-site impact.

So I think the risk analysis is very different from site to site, depending on where that site is located. Regardless of if you have the same chemicals or not.

Mr. VELA. Now, in reference to insurance liability rules, what insurance liability, what Federal rules are there that would require a Dow Chemical plant, for example, to have certain liability limits?

Mr. SCOTT. I don't know of any regulations. I know that in order to be approved for the SAFETY Act through DHS, and our DHS, our sites, our site security programs and our transportation security programs, are both designated under the SAFETY Act with

DHS. The Responsible Care program is also authorized, or designated, under the SAFETY Act, with DHS Responsible Care program that ACC implements. There is a liability requirement associated with the SAFETY Act application.

Mr. VELA. Do you know what that is, or what those limits are?

Mr. SCOTT. No, not off the top of my head.

Mr. VELA. So the place to look would be the SAFETY Act?

Mr. SCOTT. Well, that is only for people that are applying for the SAFETY Act designation. That is not everybody. That is different from the regulations. We are covered by CFATS under regulations, but we also apply for SAFETY Act recognition from the DHS SAFETY Act Office. SAFETY Act is an acronym for something, I don't know what it is. But there is a requirement for insurance coverage there, and both ACC and Dow have met those requirements.

Mr. VELA. You may not know the answer to this. I mean, are there any Federal regulations that would have required the West Fertilizer plant to have a certain level of insurance limits?

Mr. SCOTT. I don't know the answer to that.

Mr. VELA. I will yield back.

Mr. MEEHAN. I thank the gentleman. I have just a quick follow-up question. Mr. Dippel, I was sort of intrigued, again, by your observation speaking for the common man out there; people who are dealing with this, and a local dealer being asked to have to create a second kind of secure communication capacity on computers. To your knowledge, was that limited just so that they would be able to report back and forth about the compliance issues with the chemicals?

Mr. DIPPEL. I am not sure. But, you know, it is, you got to understand that in these small facilities there is very limited computer skills to start with. I got a call the other day on the way up here and talked to a lady, and asked her. I told her I was coming to help her in a couple of weeks. And told her make sure they had a secure e-mail address. She said we don't have e-mail. So this is what you are dealing with. To make it complicated on top of this, it is really hard for these dealers to work with.

I got another call that said, you know, they called DHS for help and they stayed on the line for an hour-and-a-half waiting for somebody to answer the phone. You know, so things like that just gets these guys frustrated and they just, you know, it just needs to be made simple and make it workable. When they got to go through the list of chemicals it is pages and pages and pages, and probably they only have one or two chemicals that possibly could be on that list. So it is very complicated, and I think it just needs to be simplified a lot. To make people come into compliance it would sure help.

Mr. MEEHAN. Mr. Moulton, you have been an advocate for simplification and, you know, openness in this kind of a process. I will ask you to comment on that kind of a requirement. But let me just flip it for one second because I need to know—DHS isn't here—put your hat on and make yourself a member of DHS. Why the necessity for certain kinds of security? I am assuming it relates to not wanting to tip our hand as to where the location is, recognizing that these drugs can be used by drug dealers looking to make methamphetamine, can be targets for any other kind of person that

wants to use that fertilizer, you know, for a criminal act or a terrorist act.

So is it not unreasonable for some level of secrecy, and where is the boundary?

Mr. MOULTON. No, I don't think it is unreasonable for some level of secrecy. I certainly wouldn't say we should throw the doors open and release all information that we are collecting. But I think we waste time, energy, and resources trying to protect secrets that aren't really secrets. The names and locations of these facilities, they are not secret. That is just the reality. They report to lots of other systems, EPA, OSHA, there are lots of ways to find them.

So by trying to hide who is in CFATS, who is reported to CFATS, who is in what tier even, we are only hiding CFATS. We are only hiding the program itself and what it is accomplishing and if it is not accomplishing something. What I think we need to do is, we need to really focus in and be very specific about what are the critical, detailed pieces of information that do need security. These are the vulnerability assessments, the site security plans. This isn't the basic information that is going to help first responders and the public and State officials to better understand these facilities in the broad strokes and prepare for chemical emergencies.

I think the need for this, again, another technical hurdle here, this need for a secure transmission of information because CFATS is treating almost everything as on par with classified information again makes the program more difficult and makes it more difficult for facilities out there that want to comply to do so.

Mr. MEEHAN. Well, you couldn't have given a better closing argument for, often, why a program gets in its own way in the form of why, in terms of the objective that needs to be realized. I mentioned the tremendous frustration that I know many in the industry share. We are 5 years into a program, and by the very testimony of the inspector general or that was here, they are looking at another 7 years just to finish this part of the process. Yet, by your articulation, there is very simple information already contained in many places that should be able to be communicated and need not even be private.

So I thank you for bringing, again, as I said, the common man's perspective, the understanding of those out in the industry. We do get the frustration that you feel. I mean, I don't want to constantly just beat up DHS. There are a lot of people there with a tough mission that are working very, very hard to accomplish it. But sometimes what you set out to do, designing that appropriately, so that you accomplish what you need to accomplish without creating a million other things that get in the way of the resolution of your objective I think can, would move us far down the path.

I thank you for your testimony here today. I thank you particularly for your presence on what we know is a tough issue. Tough because it has a lot of complexity and deals with your companies. But toughest because we know that real people have paid a price where information may have been sufficient to have enabled them to continue doing what they do and not being the casualties that we know them to be. So I thank you for your presence here today. I thank you for your continuing effort.

We look forward to working with you to try to get this right. I thank my panel for all of their good work on this. So you may get some follow-up questions from members of the panel. If, in fact, that happens we ask that you do your best to be as responsive as you can in a timely manner. So without objection, the subcommittee stands adjourned.

[Whereupon, at 12:42 p.m., the subcommittee was adjourned.]

