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ONE HUNDRED FIFTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

June 12, 2018

To: Subcommittee on Environment Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on "The Chemical Facilities Anti-Terrorism Standards Program (CFATS) – A Progress Report"

On **Thursday, June 14, 2018, at 10:00 a.m. in room 2123 of the Rayburn House Office Building**, the Subcommittee on Environment will hold a hearing on "The Chemical Facilities Anti-Terrorism Standards Program (CFATS) – A Progress Report."

I. CHEMICAL FACILITY ANTI-TERRORISM STANDARDS

Chemical facilities use and store chemical substances that, if released, can endanger people at the facility and in nearby communities. Terrorists could also steal chemicals from these facilities to create improvised weapons of mass destruction.

In the fall of 2006, Congressional appropriators included a provision in the Department of Homeland Security Appropriations Act that directed the Department of Homeland Security (DHS) to promulgate interim regulations to help ensure that chemical facilities are protected from terrorist attacks.[1] These regulations, known as the "Chemical Facility Anti-Terrorism Standards" (CFATS), were finalized on April 9, 2007, and intended to sunset in October 2009.[2] Congress extended this program, however, through annual appropriations until passage of the "Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014," which

[1] Pub. L. No. 109-295 (2006).

[2] Department of Homeland Security, *Chemical Facility Anti-Terrorism Standards*, 72 Fed. Reg. 17688 (Apr. 9, 2007).

modified the program and extended its authority. Absent action by Congress, the authority to operate the CFATS program will terminate in January 2019.[3]

The CFATS program requires certain high-risk chemical facilities to address risk by evaluating and addressing performance standards in 18 areas, including securing site assets, preventing theft and diversion, and restricting the area perimeter.[4] In 2009, the House of Representatives passed H.R. 2868, which expanded the CFATS program to include drinking water and wastewater facilities, and required covered facilities to reduce risk. However, the 2014 law that established the current authorization for the program did not make changes in these areas.

The law requires owners of covered facilities to prepare site security plans (SSP), but prohibits the disapproval of a site security plan based on the presence or absence of any specific security measure. This effectively blocks DHS from requiring any specific measure, no matter how much merit that it may have. The law also specifically exempts from the regulations several potentially significant facilities: public water systems regulated under the Safe Drinking Water Act; treatment works as defined in section 212 of the Clean Water Act; facilities regulated pursuant to the Maritime Transportation Security Act of 2002; and any facility owned or operated by the Departments of Defense or Energy, or any facility subject to regulation by the Nuclear Regulatory Commission.[5]

Any facility that is not exempted as described above, and possesses more than a specified threshold of certain "chemicals of interest," must complete a DHS survey known as a Top-Screen. Based on the data from the Top-Screen, DHS determines which facilities are deemed high-risk, and thus subject to the program's risk-based performance standards. Once a facility is deemed high-risk, DHS assigns it to one of four risk tiers, and the facility must prepare a SSP that details how it will meet the risk-based performance standards appropriate for its tier.[6] As of May 30, 2018, the CFATS program identifies 3,395 facilities as high-risk, with 159 facilities placed in tier 1(the highest tier), 78 facilities in tier 2, and the remainder in tiers 3 and 4.[7]

Certain stakeholders believe that the CFATS program can better safeguard our nation's chemical facilities, and that Congress should make changes to the program to make it more effective. Recommended changes include reducing chemical targets by storing smaller amounts

[3] Pub. L. No. 113-254 (2014).

[4] Congressional Research Service, *Chemical Facility Anti-Terrorism Standards* (Mar. 2018) (IF10853).

[5] *See* note 3.

[6] *See* note 4.

[7] Email from Legislative Affairs Staff, U.S. Department of Homeland Security, to Minority Staff, House Committee on Energy and Commerce (June 5, 2018).

on site or shifting to a less dangerous chemical, and making better use of facility employee input.[8]

II. RISK MANAGEMENT PLAN (RMP) PROGRAM

Chemical facilities are also regulated by the Environmental Protection Agency (EPA) under its Risk Management Plan (RMP) program.[9] The RMP program is focused on reducing chemical risk at the local level in the event of an accidental release. The program requires owners and operators of a facility that manufactures, uses, stores, or otherwise handles certain flammable and toxic substances to develop and submit to EPA a risk management plan that identifies the potential effects of a chemical accident, identifies actions to prevent an accident, and establishes emergency response measures. RMP information helps local fire, police, and emergency response personnel prepare for and respond to chemical accidents, while allowing citizens to understand chemical hazards in their communities.[10]

Approximately 12,500 facilities have filed RMPs with EPA.[11] In 2017, EPA estimated that roughly 177 million Americans live close enough to an RMP facility to be affected by an accident, and that the associated risks disproportionately fall on low-income and minority communities.[12]

On April 17, 2013, the West Fertilizer Company storage and distribution facility located in West, Texas exploded, injuring over 200 people and killing 15, including 12 first responders and volunteer firefighters.[13] In response to this and other catastrophic chemical facility incidents and calls from Congress for a more effective program, President Obama issued Executive Order 13650 aimed at enhancing the safety and security of chemical facilities by modernizing policies, regulations, and standards.[14] The order created a Federal Interagency Working Group tasked

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[8] Testimony of Paul Orum, House Committee on Homeland Security, *Hearing on Industry Views of the Chemical Facility Anti-Terrorism Program*, 115th Cong. (Feb. 15, 2018).

[9] Clean Air Act Section 112(r).

[10] Environmental Protection Agency, Risk Management Plan (RMP) Rule (www.epa.gov/rmp/risk-management-plan-rmp-rule-overview) (accessed Jun. 11, 2018).

[11] Environmental Protection Agency, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act,* 83 Fed. Reg. 24850 (May 30, 2018) (hereinafter Proposed RMP Reconsideration Rule) (www.gpo.gov/fdsys/pkg/FR-2018-05-30/pdf/2018-11059.pdf).

[12] Environmental Protection Agency, Office of Land and Emergency Management, and Office of Emergency Management, *Regulatory Impact Analysis Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7)* (Dec. 16, 2016) (www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-0734).

[13] Chemical Safety Board, West Fertilizer Explosion and Fire (www.csb.gov/west-fertilizer-explosion-and-fire-/) (accessed Jun. 11, 2018).

[14] *See, e.g.*, Letter from Henry A. Waxman and Bennie G. Thompson to President Barack Obama (May 2, 2013); Executive Order 13650, *Improving Chemical Facility Safety and*

with reviewing existing CFATS and RMP programs, as well as the developing regulatory and legislative proposals to address identified weaknesses in chemical facility programs.[15]

In January 2017, the Obama Administration finalized an RMP Amendments Rule to improve chemical process safety, assist local emergency authorities in planning for and responding to accidents, and improve public awareness of chemical hazards at regulated facilities.[16] The rule required a safer technology alternatives assessment, root cause analysis of incidents, third party audits, improved coordination with emergency planners and first responders, and increased public availability of chemical hazard information. Notably, the amendments were developed in consultation with DHS to ensure consistency, avoid duplication, and to complement CFATS requirements.

On June 14, 2017, EPA Administrator Pruitt delayed the 2017 RMP Amendments Rule, and on May 30, 2018, EPA proposed a reconsideration of the RMP program.[17] The RMP Reconsideration proposal rolls back virtually every accident prevention measure adopted in 2017.[18] Since blocking the 2017 RMP Amendments Rule, roughly 46 incidents have occurred at RMP facilities that could have been avoided with the safety improvements required by the rule. Stalling or repealing the protections of the 2017 RMP Amendments is especially dangerous for workers and first responders, and minority and low-income populations who are most likely to live in communities near chemical facilities.[19]

Security, issued on August 1, 2013 (obamawhitehouse.archives.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security).

[15] Department of Labor, *Actions to Improve Chemical Safety and Security – A Shared Commitment* (www.osha.gov/chemicalexecutiveorder) (accessed Jun. 11, 2018).

[16] Environmental Protection Agency, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 82 Fed. Reg. 4594 (Jan. 13, 2017) (hereinafter 2017 RMP Amendment Final Rule) (www.gpo.gov/fdsys/pkg/FR-2017-01-13/pdf/2016-31426.pdf).

[17] Environmental Protection Agency, *Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act*, 83 Fed. Reg. 24850 (May 30, 2018) (hereinafter Proposed RMP Reconsideration Rule) (www.gpo.gov/fdsys/pkg/FR-2018-05-30/pdf/2018-11059.pdf).

[18] Earthjustice, *Disaster in the Making* (Apr. 3, 2018) (earthjustice.org/sites/default/files/feature/2018/chemical-disaster-rule-report_2018-06-07.html).

[19] *Id.*

III. RESILIENCY OF CHEMICAL FACILITIES

Beyond accidents and intentional acts, chemical facilities in the United States are also vulnerable to changes in climate and natural disasters.[20] For example, heavy rainfall during Hurricane Harvey caused a power outage and equipment failure at the Arkema chemical plant in Crosby, Texas. This failure resulted in chemicals burning and releasing into the air. Recently, the U.S. Chemical Safety Board (CSB) released its investigation report on the Arkema incident, and highlighted the susceptibility of hazardous chemical facilities to climate change events such as flooding, hurricanes, snowstorms or droughts. The CSB recommended the development of

> broad and comprehensive guidance to help companies assess their U.S. facility risk from all types of potential extreme weather events. Guidance should … cover actions required to prepare for extreme weather, resiliency and protection of physical infrastructure and personnel during extreme weather, as well as recovery operations following an extreme weather event.[21]

IV. WITNESSES

The following witnesses have been invited to testify:

Panel I

David Wulf
Acting Deputy Assistant Secretary for Infrastructure Protection
Department of Homeland Security

Panel II

Chris P. Currie
Director, Emergency Management, National Preparedness, and Critical Infrastructure Protection
Homeland Security and Justice Team
Government Accountability Office

Yvette Arellano
Policy and Research Grassroots Advocate
Texas Environmental Justice Advocacy Series

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[20] *Floods Are Getting Worse, and 2,500 Chemical Sites Lie in the Water's Path*, New York Times (Feb. 6, 2018) (www.nytimes.com/interactive/2018/02/06/climate/flood-toxic-chemicals.html).

[21] CSB, *Organic Peroxide Decomposition, Release, and Fire at Arkema Crosby Following Hurricane Harvey Flooding*, at 127 (May 2018) (www.csb.gov/csb-releases-arkema-final-report).

Mike Wilson, Ph.D., MPH
National Director for Occupational and Environmental Health
BlueGreen Alliance

Steve Roberts
Principal
Chemical Safety Group

Doug Brown
President and COO
Brown Chemical Co.

James W. Conrad, Jr.
Conrad Law and Policy Counsel
On behalf of the Society of Chemical Manufacturers and Affiliates (SOCMA)