

## The Honorable Henry A. Waxman

**The Department of Homeland Security's outreach to facility owners and operators as well as stakeholders, including state and local governments and trade associations was one focus of the Government Accountability Office's testimony for this hearing, but outreach to other stakeholders was not described.**

### **1. What communication and outreach have you and other members of the Blue Green Alliance received over the course of the CFATS program?**

NOTE: The Coalition to Prevent Chemical Disasters is made up of more than 100 organizations including major unions, public health, national security, 9/11 widows, environmental justice and national green groups. The Blue Green Alliance, like Greenpeace is one of many participating organizations in this coalition.

The April 17, 2013 disaster in West, Texas is a grim reminder of the catastrophic hazards posed by facilities that use and store ultra hazardous substances.

[http://www.nytimes.com/2013/04/19/us/huge-blast-at-texas-fertilizer-plant.html?\\_r=0](http://www.nytimes.com/2013/04/19/us/huge-blast-at-texas-fertilizer-plant.html?_r=0)

Tragically we have yet to set safety standards that will prevent these disasters or dramatically reduce their lethality by switching to safer processes. There are more than 470 chemical facilities in the U.S. that each put 100,000 or more people at risk of serious injury or death. Given these continuing hazards and the availability of safer more secure processes the only responsible public policy is to adopt safety standards that protect workers and communities when industrial systems fail, hurricanes strike or terrorist attack.

Members of our coalition have continually reached out to the DHS throughout the course of the CFATS program. We have requested meetings, submitted comments and a requested greater access to the DHS in the development and implementation of the CFATS program.

Greenpeace and other organizations and members of Congress submitted formal comments criticizing the DHS's proposed interim CFATS rules. For example, Greenpeace's May 17, 2007 comments are at:

<https://www.documentcloud.org/documents/684443-gpcommentsondhsproposedregs.html>

Our coalition submitted comments on CFATS Risk Based Performance Standards on November 25, 2008:

<https://www.documentcloud.org/documents/684440-chemseccoalitioncomments-to-dhs-rbps-nov-2008.html>

Labor has also had conversations with DHS about background checks as part of the personnel surety portion of CFATS on Oct 15, 2012. This included the ICWUC, USW, Teamsters, CWA and UAW. Labor, a crucial stakeholder, has only been marginally involved by DHS over the course of the CFATS program while industry has had enormous influence, in some cases, at the expense of workers' rights.

In addition in an August 24, 2010 letter to the DHS Greenpeace raised concerns about excessive secrecy and conflicts of interest regarding the non-FACA advisory group made up of chemical industry trade associations and chemical companies known as the Chemical Sector Critical Infrastructure Partnership Advisory Council (CIPAC). Although CIPAC is paid for by the federal government, it operates autonomously and provides

regular access and opportunities for inappropriate influence by the regulated industry over its regulator 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/AR2010112407022.html>

Greenpeace sent the DHS a complaint about CIPAC on August 24, 2010

<http://research.greenpeaceusa.org/index.php?a=view&d=4849>;

On November 2, 2010 the DHS defended CIPAC but agreed to meet with our coalition twice a year. <http://research.greenpeaceusa.org/index.php?a=view&d=4847>

In our November 4, 2010 response we urged them to dissolve the CIPAC and run it under the rules of the Federal Advisory Committee Act:

<http://research.greenpeaceusa.org/index.php?a=view&d=4846>

Since that time representatives of our coalition have met in person or by conference call with DHS staff approximately twice a year.

**The GAO and officials at the Department have reported on the development of a new strategic communication plan for the CFATS program.**

**2. Have you or other members of the Blue Green Alliance been consulted in the development of this strategic communication plan?**

We are unaware of any coalition partners who have been consulted by the DHS on their strategic communications plan.

**3. Please provide a list of public interest stakeholders that you believe should be included in communication efforts under the strategic communication plan.**

All members of our coalition should be included, most of which are listed on the June 21, 2011 letter to the U.S. House of Representatives from more than 100 organizations:  
<http://research.greenpeaceusa.org/index.php?a=view&d=6001>

**When the Committee drafted H.R. 2868 in the 111th Congress, several provisions were included to guide the tiering process for CFATS facilities and provide greater transparency. That bill also would have closed significant security gaps, so that a higher proportion of holdings of substances of concern would be secured.**

**4. Based on your analysis of publicly available information on holdings of substances of concern, are you satisfied that the CFATS program is covering a high proportion of those holdings?**

No. There is no publicly available accountability information on which facilities are in the CFATS program or even which facilities have adopted safer processes and are no longer in the CFATS program. The DHS has provided aggregate data which confirms that potentially thousands of high risk facilities continue to be exempt from CFATS. For example, in the testimony from Undersecretary Rand Beers dated March 14, 2013 he stated: "As of March 5, 2013, CFATS covers 4,380 high-risk facilities nationwide." Compared to the 12,440 facilities reported in the Nov 6, 2012 survey by Congressional Research Service of the EPA's risk management program this does not constitute a "high proportion" of these holdings. This data also shows that very few facilities that pose a catastrophic "release" risk remain in the CFATS program. For example there are only

35 “release” category facilities in risk tiers 1 and 2. Meanwhile there are 473 facilities in the EPA’s RMP program that each pose a hazard to 100,000 or more people. If CFATS were a comprehensive program it would cover these facilities.

Some of the highest risk facilities in the country are instead nominally regulated by a patchwork quilt of statutes such as the Maritime Transportation Security Act (MTSA), Clean Water Act and Safe Drinking Water Act (an estimated 2,400 water facilities). None of these statutes require risk reduction or prevention measures to be taken. In fact, the MTSA has historically been the industry model for “alternative security programs” (ASPs). Exempt facilities include the infamous Kuehne Chemical plant in South Kearny, NJ which puts 12 million people at risk and the largest chemical facility in the nation, Dow Chemical’s Freeport, Texas facility and a majority of U.S. refineries.

On April 16, 2013 the United Steelworkers (USW) released a new report, “A Risk Too Great” that lists 50 refineries that together put more than 26 million people at risk. Do the communities adjacent to these plants or their members of Congress know which security standards each these facilities are held to? The USW report is at:<http://assets.usw.org/resources/hse/pdf/A-Risk-Too-Great.pdf>

By contrast the EPA's RMP program has seen a net increase in high risk facilities over the last two years. A November 16, 2012 Congressional Research Service (CRS) update of the number of highrisk 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 nationwide 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 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>

#### **5. Are you satisfied that tiering under the program has been accurate to date?**

The criteria for tiering is too secretive to provide credible public accountability as to whether facilities are put in the correct tier. Moreover if the program continues to focus on risk management over risk reduction or prevention it will continue to ignore the most fool proof security measures available, safer and more secure chemical processes. The current tiering also apparently does not account for the shifting of hazards onto inherently vulnerable modes of transportation, in particular the use of rail cars to ship Toxic Inhalation Hazard substances. This could in part be improved by issuing new performance standards or new legislation. In the absence of new performance

standards or legislation we recommend that the EPA use its authority under the Clean Air Act to issue new risk reduction or prevention rules and guidance as the Agency proposed following the 9/11 attacks in 2002.

**6. Do you and other members of the Blue Green Alliance still support provisions in H.R. 2868 to close security gaps, guide tiering, and increase transparency?**

Yes, our June 21, 2011 coalition letter to the U.S. House of Representatives from more than 100 organizations restates support for those fundamental improvements to chemical security policies at: <http://research.greenpeaceusa.org/index.php?a=view&d=6001>

**H.R. 2868 also would have required all facilities to assess methods to reduce the consequences of a terrorist attack, and would have required the highest risk facilities to implement those methods where feasible. The Department of Homeland Security continues to support that approach.**

**7. Do you and other members of the Blue Green Alliance continue to support requirements for assessments and where feasible implementation, of methods to reduce consequences of a successful attack?**

Yes, our June 21, 2011 coalition letter to the U.S. House of Representatives from more than 100 organizations restated our support for that policy at: <http://research.greenpeaceusa.org/index.php?a=view&d=6001>

It was also recently included in an April 16, 2013 report by the United Steelworkers, "A Risk Too Great" at: <http://assets.usw.org/resources/hse/pdf/A-Risk-Too-Great.pdf>

**8. Do you and other members of the Blue Green Alliance support consistent requirements for consideration and adoption of methods to reduce the consequences of an attack across sectors, including water facilities, government owned or operated facilities, and facilities regulated under MTSA?**

Yes, this is also restated in our June 21, 2011 coalition letter to the U.S. House of Representatives from more than 100 organizations at: <http://research.greenpeaceusa.org/index.php?a=view&d=6001>

The coalition and member unions such as the United Steelworkers strongly support requirements for inclusion of facilities currently not included in CFATS. Many of union members work in public sector water treatment facilities and at oil refineries or chemical plants that are located on waterways and are therefore covered under MTSA. These facilities are no less vulnerable to a release or attack than facilities covered by CFATS.

An example of this was the April 16, 2013 report by the United Steelworkers, "A Risk Too Great" about refineries that together put more than 26 million people at risk while safer processes go unutilized: <http://assets.usw.org/resources/hse/pdf/A-Risk-Too-Great.pdf>

**One frequently cited measure of success for the CFATS program is the number of facilities reducing their chemical holdings to no longer be deemed high risk.**

**9. What efforts have you undertaken to gather information about the data behind this measure of success, e.g. types of facilities making this change, as well as**

## **chemicals, processes, and technologies used to reduce the facilities holdings of substances of concern?**

The Center for American Progress (CAP) has done several reports analyzing EPA's Risk Management Program data. The first in 2006 identified 284 facilities that have converted from the use of large amounts of acutely hazardous substances 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)

A 2010 CAP project identified 554 water and wastewater treatment facilities that had converted to a safer and more secure alternative. These facilities are identified at: <http://www.americanprogress.org/issues/security/news/2010/03/02/7539/safer-chemicals-create-a-more-secure-america/>

While the CAP reports provide concrete examples of the availability and feasibility of safer alternatives, most of the examples of converted facilities are not at the highest risk facilities, indicating that many of the highest hazard facilities are not converting under the current CFATS program. Nonetheless, a CAP report, Chemical Security 101, identified facilities in many of the highest hazard industries that already conduct operations without posing the danger of a major toxic gas release. The CAP also produced a fact sheet that listed intrinsically more secure options:

“Intrinsically More Secure: Alternatives for Many Industries

- Bleach manufacturers eliminate bulk chlorine gas by generating chlorine as needed “just in time” on-site, eliminating transportation and storage vulnerabilities.
- Petroleum refineries avoid dangerous hydrofluoric acid alkylation by using less hazardous sulfuric acid; others are developing solid acid catalysts.
- Water utilities eliminate bulk chlorine gas by using liquid bleach, ozone without storage, and ultraviolet light as appropriate.
- Paper mills eliminate bulk chlorine gas by using hydrogen peroxide, ozone, or chlorine dioxide without bulk storage.
- Pool service companies eliminate chlorine gas by using chlorine tabs or liquid bleach.
- Manufacturers of polyurethane foams eliminate bulk ethylene oxide by substituting vegetable-based polyols.
- Soap and detergent manufacturers eliminate bulk oleum and sulfur trioxide by using sulfur burning equipment on-site.
- Manufacturers of ferric chloride eliminate bulk chlorine gas by processing scrap steel with less concentrated liquid hydrochloric acid (less than 37 percent) and oxygen.
- Titanium dioxide producers eliminate bulk chlorine gas by generating chlorine on-site as needed without storage, or by using the sulfate process.
- Secondary aluminum smelters eliminate bulk chlorine gas by removing impurities with nitrogen gas injected with magnesium salts.
- Manufacturers of semiconductors, silicon wafers, and metal products eliminate concentrated hydrofluoric acid by using less concentrated forms (less than 50 percent).
- Power plants eliminate bulk anhydrous ammonia gas by using cleaner combustion or by using aqueous ammonia or urea in pollution control equipment; they also remove chlorine gas by using liquid bleach to treat cooling water.
- Wholesale chemical distributors eliminate most bulk chlorine gas and sulfur dioxide gas by distributing alternatives such as liquid bleach and sodium bisulfite.
- Pulp mills, food processors, wastewater plants, and hazardous waste recovery operations eliminate bulk sulfur dioxide gas by, as appropriate, generating sulfur compounds on-site or purchasing sodium bisulfite, metabisulfite, hydrosulfite, or other alternatives.
- Diverse manufacturers eliminate bulk chlorine gas by generating chlorine on-site as needed without storage, such as for fuel additives, water treatment chemicals, and aramid polymers used to make bulletproof vests.”

The April 16, 2013 USW report, "A Risk Too Great" also suggests that refineries currently using hydrofluoric acid (HF) switch to safer more secure alkylation processes: <http://assets.usw.org/resources/hse/pdf/A-Risk-Too-Great.pdf>

Unlike the data available at the EPA's reading rooms, the DHS has refused to make public the facilities that no longer are in the CFATS program due to a change in their use of regulated chemicals. After requesting this information from the DHS numerous times over the past few years, on May 18, 2012 Greenpeace asked for this information in a Freedom of Information Act request: <https://www.documentcloud.org/documents/684442-foia-to-dhs-5-18-12.html>

That FOIA request was denied on March 13, 2013:

<https://www.documentcloud.org/documents/684441-dhs-foia-interim-response-letter.html>

## **10. What have you been able to find out about the data behind this measure of success?**

We believe that the federal government lacks systematically gathered information about methods that are available to reduce the consequences of a chemical disaster at a chemical facility. The federal role would be immeasurably strengthened and made more knowledgeable by requiring tiered facilities under CFATS to assess and report to DHS on methods to reduce the consequences of a terrorist attack. We also strongly support requiring facilities covered by the Risk Management Planning requirements of the Clean Air Act assess and report to EPA on methods that reduce the consequences of an accidental release. Lack of familiarity with safer and more secure chemical process is a major hindrance to an effective federal response to chemical safety and security issues.

We have repeatedly asked the DHS for specific examples of facilities that have "tiered out" of CFATS by changing their processes or eliminating the use of ultra-hazardous chemicals of interest (COI) regulated under CFATS. On May 18, 2012 we requested this information under the Freedom of Information Act

(FOIA):<https://www.documentcloud.org/documents/684442-foia-to-dhs-5-18-12.html>

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Withholding this information is not in the public interest. If these facilities are no longer attractive targets they could be a model for other facilities to also become unattractive targets.

In 2011 USW members at a facility alerted the union's Health, Safety & Environment Department that the company they worked for was parking multiple rail tankers containing highly hazardous chemicals outside the plant's fence line. The risk of an accidental or criminal action causing a release was even more likely for these rail cars that sat unguarded. The experience of finding a government agency to hold the company accountable was alarming. No agency, including DHS under CFATS, would say that it was within their jurisdiction. The chemicals were outside the fence and therefore not necessarily required to be reported although they certainly posed a risk. Due to a labor dispute at the facility, we do not know the precise reason for parking them outside the fence; but this is an example of risk shifting. While there is no way to gauge how common risk shifting is at CFATS-covered facilities, it remains a concern when facilities report reducing their holdings of substances of concern without disclosing how that was done.

**During the hearing, ISCD Director David Wulf testified that feedback from facility operators regarding inspections was "favorable" and "positive." Industry witnesses also testified that the inspection experience under the CFATS program has been congenial. One witness even testified that "Inspectors are providing sufficient details with facilities prior to their arrival, which aids the planning process to ensure resources and facility personnel are available." Section 550 does not require unannounced "inspections, and they are not currently conducted.**

**11. Are unannounced inspections important to ensuring compliance with the CFATS standards?**

Unannounced inspections are critical to ensuring compliance and are commonplace in government safety regulations. We see unannounced inspections by OSHA, MSHA and in other areas of safety regulations including food and fire safety. Good actors have nothing to fear from unannounced inspections, and bad actors don't have time to hide noncompliance when they don't receive advanced notice. Another critical aspect of productive inspections is involving the union or a designated worker representative at facilities. These workers truly know what is happening on-the-ground in the facility and would be a valuable resource during CFATS inspections. At this time CFATS inspections do not include union or worker representation.

Unannounced inspections were contained in H.R. 2868 as a common sense component of enforcement and accountability.

**Many of the problems now identified in the CFATS program were brought to light when an anonymous whistleblower leaked the internal November 2011 memorandum. Without that whistleblower action, many of the deficiencies might still be hidden from view.**

**12. In your view, how important are whistleblower protections to ensure that policy makers and the public are aware of issues in the implementation of the CFATS program?**

Strong whistleblower protections are very important not only for DHS implementation of the program, but also at CFATS-covered facilities where workers or others may need to blow the whistle on a company failing to comply or properly implement CFATS. Whistleblower protections are particularly important due to part of the personnel surety portion of CFATS. The program allows companies to do background checks that are far beyond identification, immigration status, criminal background and the terrorist database. Under CFATS companies can unnecessarily look into high school transcripts, credit reports, misdemeanor records, and other irrelevant documents that can be used to intimidate workers who want to speak out. Whistleblowers need to know that they will be protected.

In addition, comprehensive chemical security legislation should include regular public reports to Congress on the progress of the program (including the use of background checks). Such provisions were included in H.R. 2868 as passed the House in 2009. These reports would have brought to light many of the current deficiencies in CFATS in a time manner, had they been enacted.

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