



Statement of

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Before the

U.S. House of Representatives Homeland Security Committee
Subcommittee on Cybersecurity, Infrastructure Protection, and Security
Technologies

Subcommittee Hearing: West Fertilizer, Off the Grid: The Problem of
Unidentified Chemical Facilities

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 firefighter 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.¹

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
- 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

¹ 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)

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 Standard² and Explosives and Blasting Agents Standard³. 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.⁴ For example, the AN was stored in a warehouse, in very close proximity to

² 20 C.F.R. § 1910.1200 (1994).

³ 29 C.F.R. § 1910.109 (1978).

⁴ 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*,

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...”⁵ 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 14th 2005. This legislation was eventually signed into law on December 2007. We feel that the program should remain focused on registered AN facilities and AN purchasers as originally intended by Congress.⁶ ARA certainly understands the challenges faced by DHS in implementing a final AN rule, but it has been nearly six years since this law was enacted.

Congress should consider ARA’s letter⁷ 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 US 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.

TX and Geismar, LA before the Senate Comm. on Environment and Public Works , 113th Cong. (2013) (statement of Dr. M. Sam Mannan, PE, CSP).

⁵ *Id.*

⁶ 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).

⁷ 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).

- 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.⁸

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 a specified goal. ARA members and DHS are both *responsible* to safeguard against fertilizer misuse and manipulation but **mutual cooperation** can be enhanced.

⁸ EPA’s Risk Management Program data can be utilized by DHS for chemical release threats like Anhydrous Ammonia. In terms of dry fertilizer, state chemists and state department 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 stakeholders⁹ 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 rulemaking 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.

⁹ 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.

- 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.

With the above positive steps, more can be done. ARA would also like to see more efforts towards (electronic/video¹⁰) training and outreach opportunities targeting facilities that use, store or distribute chemicals above a 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 two 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)¹¹ - 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.¹²

¹⁰ See Simplot First Responder Training Video as an example.

¹¹ 6 C.F.R. § 27.230 (2007).

¹² RBPS #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

- 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.¹³
- 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 entry¹⁴. 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 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.

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.

¹³ 6 C.F.R. § 2.230(a) (2007)

¹⁴ *Id.*