

June 12, 2018

TO: Members, Subcommittee on Environment

FROM: Committee Majority Staff

RE: Hearing entitled “The Chemical Facilities Anti-Terrorism Standards Program (CFATS) – A Progress Report”

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## I. INTRODUCTION

The Subcommittee on Environment will hold a hearing on Thursday, June 14, 2018, at 10:00 a.m. in 2123 Rayburn House Office Building. The hearing is entitled “The Chemical Facilities Anti-Terrorism Standards Program (CFATS) – A Progress Report.”

## II. WITNESSES

- **David Wulf**, Acting Deputy Assistant Secretary for Infrastructure Protection Department of Homeland Security;
- **Chris Currie**, Director, Emergency Management; National Preparedness; and Critical Infrastructure Protection Homeland Security and Justice Team, U.S. Government Accountability Office;
- **Steve Roberts**, Principal, Chemical Security Group, LLC;
- **Doug Brown**, President and COO, Brown Chemical Co.;
- **Mike Wilson, Ph.D., MPH**, National Director for Occupational and Environmental Health, BlueGreen Alliance;
- **James Conrad**, Principal, Conrad Law and Policy Counsel, on behalf of the Society of Chemical Manufacturers and Affiliates; and
- **Yvette Arellano**, Policy Research & Grassroots Advocate, Texas Environmental Justice Advocacy Services.

## III. BACKGROUND

After the terrorist attacks of September 11, 2001, Congress took steps to address perceived vulnerabilities to intentional acts designed to harm America’s critical infrastructure. Rather than providing the Federal government general authority to address every potential

problem or rely on various Federal agencies to cobble together existing authorities to address these vulnerabilities, Congress enacted laws targeted to each critical infrastructure sector.

In 2006, Congress passed the Chemical Facilities Anti-Terrorism Standards Program (CFATS) to address vulnerabilities at facilities with chemicals. Under CFATS, the Department of Homeland Security (DHS) promulgated regulations establishing risk-based performance standards that governed required vulnerability assessments and site security plans by covered facilities and DHS-led oversight and inspections. Most importantly, to avoid overlapping with other Federal programs, CFATS was designed to foster collaboration between the government and regulated parties. The law explicitly prohibited DHS from disapproving security plans based on the presence or absence of a specific security measure (i.e. meaning it was process and technology neutral). Also, facilities could get onsite help from DHS in understanding the law's requirements prior to a compliance inspection subjecting them to penalties.

On April 9, 2007, DHS issued its first CFATS regulations for facilities with chemicals that the DHS Secretary determined present a high-level security risk. A "top screen" is an initial DHS risk assessment that measures potential facility vulnerabilities due to onsite amounts of 322 "chemicals of interest" that are provided to DHS by that facility. Based on a "top screen," DHS determined if a facility's risk status merited CFATS regulation. Those facilities deemed high risk by DHS were sorted into four risk-based tiers, with higher risk tiers required to meet more stringent standards than lower risk tiers.

Once assigned to a tier, and unless it opts for an Alternate Security Plan, a facility must complete and submit to DHS a facility vulnerability assessment followed by a site security plan. Each is subject to DHS approval. DHS also must conduct site visits for the purpose of determining whether the vulnerability assessment and site security plan are adequate and to ensure compliance with an approved site security plan.

#### **A. Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014**

In 2014, Congress extended the authorization of the CFATS program, with some modifications, through the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (Public Law 113-254). This Act reinforced the core elements of the CFATS program and added a few others. Specifically, the 2014 law did the following:

- Mandated a security risk assessment approach and corresponding tiering methodology for covered chemical facilities that incorporates threat, vulnerability, and consequence.
- Required the criteria for determining the security risk of terrorism associated with a covered chemical facility to account for: (1) relevant threat information; (2) potential economic consequences and the potential loss of human life in the event of the facility being subject to an act of terrorism; and (3) vulnerability of the facility to an act of terrorism.

- Created a voluntary, expedited approval process for site security plans at tier 3 and 4 facilities and authorized DHS to develop templates with prescriptive site security plans for tier 3 and 4 facilities to use in lieu of creating and certifying their own.
- Established a process for regulated chemical facility employees to report confidentially CFATS violations to DHS, require DHS to acknowledge, review, and respond to the reported allegations, and protect such allegations from public disclosure. In addition, it introduced whistle-blower protections for employees making a report and required posting of worker rights.
- Instituted new procedures for the Personnel Surety Program (a program used by covered chemical facilities to determine whether persons with access to their facility may have ties to terrorism) that: (1) does not require an owner or operator of a facility that voluntarily participates in the Program to submit information about an individual more than one time, (2) provides a participating owner or operator with relevant information based on vetting the individual against the terrorist screening database, and (3) provides redress to an individual who believes that the personally identifiable information submitted to DHS by a facility for such vetting was inaccurate.<sup>1</sup>
- Required DHS to consult with other Federal, state, and local governments, as well as business associations and organized labor, to identify all chemical facilities that should be participating in CFATS.

## **B. CFATS Program**

CFATS does not just apply to chemical manufacturers, but to a vast array of facilities. In the past, DHS has testified to the breadth of facilities it covers. According to DHS, even universities, labs, and hospitals have “tiered” into the CFATS program.<sup>2</sup>

Recognizing that Congress has already acted to prepare certain types of facilities with chemicals against terrorist or other intentional acts designed to disrupt substantially their operations, Congress has consistently exempted these facilities from CFATS compliance. These excluded facilities include: drinking water systems, facilities owned or operated by the Department of Defense or Department of Energy, facilities regulated by the Nuclear Regulatory Commission, and facilities regulated under the Maritime Transportation Security Act of 2002 (Public Law 107-295).

Not every facility containing “chemicals of interest” is subject to CFATS. According to the Congressional Research Service (CRS), as of December 2017, DHS reported that 40,000 “unique facilities” had submitted top-screen, but only 3,556 (about 9 percent) sites qualified as

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<sup>1</sup> <https://www.congress.gov/bill/113th-congress/house-bill/4007?q=%7B%22search%22%3A%5B%22cite%3APL113-254%22%5D%7D&r=1>

<sup>2</sup> Response of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security to Question from Representative John Shimkus, Hearing before the House Energy and Commerce Subcommittee on Energy and Environment, October 1, 2009, Serial No. 111-68.

being high risk.<sup>3</sup> In addition, only about 4 percent of facilities are in the highest risk tier.<sup>4</sup>

CFATS requires information that is developed under this Act to be protected from public disclosure consistent with the protection of similar information in the National Maritime Transportation Security Plan. Such protected information is also exempted from disclosure under the Freedom of Information Act. CFATS, however, permits the sharing of information, as DHS determines appropriate, with state and local government officials possessing a need to know and the necessary security clearances, including law enforcement officials and first responders. In addition, CFATS directs DHS to provide to state, local, and regional fusion centers and state and local government officials such information as is necessary to help ensure that first responders are properly prepared and provided with the situational awareness needed to respond to security incidents at covered chemical facilities.<sup>5</sup>

### C. CFATS Implementation and GAO

While the CFATS program has generally enjoyed broad support, the program has faced implementation problems.

In May 2010, CFATS program officials realized that improper inputs were used to tier facilities, resulting in the mis-tiering of 600 facilities – among these, 148 facilities were tiered at a lower risk tier, 99 facilities were found not to need a tier and no longer subject to CFATS regulation, 41 facilities had either data errors that still need correction or have their redetermination under review, and 175 facilities remained in the same level, but will have the risk levels for their chemicals of interest decrease.<sup>6</sup>

In November 2011, a leaked internal memorandum detailed an array of management flaws, personnel issues, and achievement gaps within the CFATS program.

The GAO was subsequently asked to assess the CFATS program and determine where deficiencies exist. GAO has consistently overseen CFATS efforts since that time, periodically reporting to Congress on its work – GAO is expected to conclude its CFATS work with a final report later this summer. GAO has previously reported the following assessments of the CFATS program:

- *Risk Assessment:* In 2013, GAO found the risk assessment approach used in CFATS was based primarily on consequences arising from human casualties, but it did not consider economic consequences, as called for by the National Infrastructure Protection Plan (NIPP) and CFATS. GAO also noted that approach did not consider vulnerability, consistent with the NIPP.<sup>7</sup> In 2014, GAO stated that DHS had begun to

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<sup>3</sup> <http://www.crs.gov/Reports/IF10853?source=search&guid=695dca22da1a45b799e156d9def2f9d5&index=0>

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Majority Memorandum for the February 3, 2012, Environment and the Economy Subcommittee Hearing

<sup>7</sup> <https://www.gao.gov/products/GAO-13-353>

enhance its ability to assess risks and prioritize facilities.<sup>8</sup>

- *Full Implementation:* In 2013, GAO declared that CFATS would likely be fully implemented in 8 to 10 years (2021-2023).<sup>9</sup> In 2015, GAO revised that prediction to say DHS had made “substantial improvement in reviewing and approving security plans.”<sup>10</sup>
- *Outreach:* In 2013, GAO reported DHS 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 went on to recommend a systematic approach for gathering feedback and measuring the results of its outreach efforts to help DHS focus greater attention on targeting potential problems and areas needing improvement.<sup>11</sup>
- *Outlier Facilities:* In 2014, after the explosion at a fertilizer retailer in West, Texas and Executive Order 13650, GAO noted that DHS had begun to work with other agencies to identify facilities that should have reported their chemical holdings to CFATS.

#### **D. New Risk Assessment Implementation**

After complaints by GAO and confusion among regulated stakeholders, DHS implemented changes to its risk assessment engine and the web portal for collecting Top Screen information from facilities in 2017. DHS reports that as of February 2018, it has designated 3,485 facilities as high risk under the new methodology compared to 2,900 under the previous methodology. According to DHS, the Homeland Security Studies and Analysis Institute agrees that the new methodology addresses all their reported concerns. The GAO has not yet reported whether its concerns are sufficiently addressed by the new methodology.<sup>12</sup>

#### **IV. ISSUES**

- How well has DHS implemented the program and is implementation aligned with current congressional intent?
- How is DHS addressing the challenges GAO has identified with the program in the past, including risk assessments and tiering, stakeholder outreach, and pace of work?
- Do CFATS and associated regulations appropriately balance homeland security and stakeholder needs?

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<sup>8</sup> <https://www.gao.gov/products/GAO-14-365T>

<sup>9</sup> Op. Cit.

<sup>10</sup> <https://www.gao.gov/products/GAO-15-614>

<sup>11</sup> Ibid.

<sup>12</sup> Op. Cit.

- Should CFATS authority be reauthorized, modified, or allowed to expire? What are the implications of each of those actions?

**V. STAFF CONTACTS**

If you have any questions regarding this hearing, please contact Jerry Couri or Mary Martin of the Committee staff at (202) 225-2927.