

Honorable Janet Napolitano
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

Honorable Suzanne Spaulding
Acting Under Secretary
National Protection and Programs
U.S. Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Napolitano and Acting Under Secretary Spaulding:

As you know, the fire and subsequent explosions at the West Fertilizer Company facility in West, Texas on April 17, 2013 killed 15 people, injured hundreds more, and caused an estimated \$100 million in damage. Initial reports implicated a large amount of anhydrous ammonia as the source of the explosions, but authorities have since determined that the explosions were caused by ammonium nitrate stored at the facility.

Facilities that use hazardous chemicals are typically subject to regulations by an array of federal and state agencies for different environmental, worker safety and other concerns. For instance, the Environmental Protection Agency (EPA) regulates the anhydrous ammonia at West Fertilizer and also oversees a community right-to-know statute regarding hazardous chemicals at the site. The Occupational Health and Safety Administration (OSHA), meanwhile, regulates worker safety around hazardous materials such as ammonium nitrate. The West Fertilizer Company was also subject to various state and local regulations.

For its part, the Department of Homeland Security (DHS) regulates “high risk” chemical facilities for security purposes under the Chemical Facility Anti-Terrorism Standards (CFATS). We plan to conduct oversight over the intersection of the various requirements that existed for the West Fertilizer Company, and I write today to seek information about the Department of Homeland Security’s role in regulating West Fertilizer and similar facilities, and what lessons can be learned from this tragic incident. As the Chairman of the Homeland Security and Governmental Affairs Committee, I have responsibility to oversee the proper implementation and execution of the CFATS program.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and Texas Fire Marshal officials have narrowed down the source of the fire to one of three possibilities: a golf cart on site, the facility’s electrical system, or arson. The CFATS program is a security program - intended to secure chemicals from wrongdoers – and is not intended to prevent the types of accidents identified as the first two possible sources of the initial fire. However, the event clearly exposed certain shortcomings with the CFATS program as well as raised questions about whether the program should be adjusted in certain ways. Further, if officials ultimately determine that the explosion was caused by a criminal act, there may be more direct implications for the CFATS program.

As you are aware, both anhydrous ammonia and ammonium nitrate have been designated by the Department of Homeland Security (DHS) as “chemicals of interest,” subject to regulation by the CFATS program when possessed above certain threshold amounts. Following the disaster at West Fertilizer, DHS determined that the facility had not complied with requirements to submit a so-called Top-Screen

under CFATS and program officials were unaware the facility existed. The Top-Screen is a questionnaire that provides information about facilities that possess one or more chemicals of interest so that DHS can establish whether they pose a significant security risk that should be regulated under CFATS.

The CFATS program is mandatory, not voluntary, but it relies on self-reporting in the form of a Top-Screen submission to identify which facilities must be assessed for possible regulation as high-risk facilities. DHS has dedicated significant resources and time to outreach to facilities to make them aware of the program and as a result, more than 44,000 Top-Screen questionnaires have been submitted; however, the West Fertilizer disaster clearly shows that some facilities – described by Department staff as “outliers” - that should have submitted Top-Screens have not done so.

I am concerned that DHS has not done all it can to identify facilities that should have filed Top-Screens under CFATS, and to deter such outliers. The West Fertilizer Company was registered with another federal program – the Risk Management Program at the Environmental Protection Agency (EPA). There is considerable overlap between facilities regulated by the Risk Management Program (RMP) and by CFATS. I understand that DHS made an effort to cross-reference the RMP data in the early stages of the CFATS program for purposes of identifying facilities that should submit a Top-Screen, but the effort was abandoned because it was cumbersome, time consuming, and did not deliver results. Committee staff members were told the information sharing arrangement was subsequently ended. They also learned that RMP information is still being shared between EPA and DHS, but is not being used by the CFATS office. Specifically, it appears that RMP data is delivered regularly to the Chemical Security Analysis Center (CSAC), which is part of the Science and Technology Directorate, and to the Office of Infrastructure Protection. As you are aware, the Office of Infrastructure Protection houses the CFATS program.

I am even more concerned that the RMP information was not shared more effectively among DHS entities with related missions, and that the CFATS program was unable to make use of this important database even as other entities within DHS were apparently able to do so. More broadly, we want to understand how CFATS has sought to identify and notify facilities that are required to submit Top-Screens under CFATS so we can correct other potential missed opportunities.

It is unclear whether or not West Fertilizer would have met the threshold for CFATS regulation, had they submitted a Top-Screen questionnaire. In light of the destruction witnessed in West – and the far greater tragedy that might have occurred had the schools near the plant been occupied at the time of the explosion – it is important to examine whether the risk assessment methodology for the CFATS program appropriately considers all relevant factors. I am also interested in how CFATS might have impacted conditions at West Fertilizer, had they been subject to the program.

To that end and to fully understand the role of the Department as a regulatory body for the West Fertilizer facility, we would appreciate answers to the following questions by June 28, 2013:

1. How does DHS identify facilities that possess chemicals of interest? Does DHS maintain a list of all chemical facilities known or believed to store chemicals of interest?
2. Does DHS leverage relationships with Protective Security Advisors or State Homeland Security and Emergency Services personnel to engage in information sharing regarding chemical facilities? Do DHS and local emergency planning authorities exchange information regarding chemical facilities?
3. What efforts have been made to find outliers in the CFATS program since its inception? Please provide any relevant written protocols or procedures related to this effort and the number of outliers identified.

4. What offices and individuals at DHS receive EPA RMP data either via disk or online portal? Please include copies of any request letters and related correspondence sent by DHS to EPA requesting the data. For what purposes was DHS receiving the EPA RMP information? Why was the Infrastructure Information Collection Division able to make use of the data while the Compliance Division could not?
5. To what extent does DHS use EPA Tier-2 reports, which include facilities that possess ammonium nitrate?
6. Has the explosion at the West Fertilizer Company in any way caused the Department to reconsider or change any aspects of the CFATS program, or its implementation?
7. Has the explosion at the West Fertilizer Company caused the Department to reconsider how a facility qualifies to be regulated under the CFATS program or how the tiering model currently works?
8. How does the Department assess penalties for CFATS noncompliance? To date, how many facilities have been penalized for noncompliance and for what violations?
9. To date, how many: (a) Top-Screen questionnaires have been submitted; (b) facilities has DHS preliminarily assessed to be high risk; (c) facilities has DHS finally tiered; (d) Site Security Plans has DHS reviewed; and, (e) SSPs has DHS approved?
10. DHS proposed an Ammonium Nitrate Security Program rule in August 2011 to establish a registration system and other requirements regarding the sale and purchase of ammonium nitrate. That rule has not yet been finalized. What is the status of the proposed rule? If the proposed rule had been in effect at the time of the West Fertilizer Company explosion, how would it have affected the facility and would it have had any bearing on issues being examined in light of the explosion?
11. In the aftermath of the West Fertilizer disaster, is there any effort underway within the Department or the Administration to determine whether the various federal regulatory programs dealing with hazardous chemicals – as well as related regulatory efforts at the state or local level – could have done more to improve the safety and security of that facility?

With best personal regards, I am

Sincerely yours,