



**Testimony of
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before the
US Senate Committee on Homeland Security and Governmental Affairs
on
Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
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Chairman Carper, Ranking Member Coburn and members of the Committee, thank you for the opportunity to testify today. My name is Anna Fendley. I am here on behalf of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union – USW for short. We represent 850,000 workers in the sectors I just mentioned and many others, including the majority of unionized workers in the chemical industry and hundreds of thousands of men and women whose workplaces use and store large quantities of industrial chemicals.

Our members are well aware of the hazards and the potential for widespread damage to critical infrastructure and the communities where they work and live. Small accidental releases occur more often than the public realizes, and it is only a matter of time before the next large explosion or release. I spoke recently with one of our members at a chemical plant on the west coast. He described a normal procedure that turned atypical several months ago and caused a release of sulfuric acid that sent workers at the warehouse next door to the hospital. Luckily this release was stopped relatively quickly. However, that may not be the case in every situation.

Americans have witnessed and read the news about catastrophic events at chemical facilities like the massive explosion last year at the West Fertilizer Company in West, TX that killed fifteen people and injured hundreds more by destroying a nursing home, an apartment complex, schools, and private homes. Or like the fire at the Chevron refinery in Richmond, CA that made thousands of people ill. Events like these have brought acute national attention to the danger of chemical facilities and the need to prevent catastrophic events caused either by accident or by the intentional actions of terrorists.

The Chemical Facility Anti-Terrorism Program (CFATS) was intended to be an interim measure when the 109th Congress passed legislation providing the Department of Homeland Security (DHS) with statutory authority to regulate chemical facilities for security purposes. Since that time subsequent Congresses have continued to extend the authority to DHS for the CFATS program through appropriations. These

appropriations have not addressed recognized problems within the implementation and scope of the CFATS program and have instead allowed an inadequate status quo. Moving forward with a legislative path must address these recognized problems within CFATS in order to protect the millions of workers and community members who are now at risk.

There are ongoing activities within the federal government related to the implementation of CFATS and, more broadly, to the prevention of releases, fires and explosions at chemical facilities. USW encourages you to include the recommendations and outcomes of the following activities and prior legislative efforts as you consider a legislative path forward for the CFATS:

- In a March 2013 report, the Office of Inspector General (OIG) found that the program continued to face implementation challenges in the areas of submission tools and processes, representation and oversight, human capital, and fiscal stewardship.¹ OIG made 24 recommendations to improve implementation of the CFATS program.
- President Obama’s Executive Order (EO) 13650 on Improving Chemical Facility Safety and Security requires DHS participation in a working group to improve operational coordination with state and local partners; enhance federal agency coordination and information sharing; modernize policies, regulations and standards; and work with stakeholders to identify best practices.² A status report is due to the president in May that will include the working group’s recommendations for implementing and updating CFATS, among other things, to better prevent catastrophic incidents.
- During the 111th Congress, the House passed HR 2868, the “Continuing Chemical Facilities Antiterrorism Security Act of 2010.” USW and other unions supported that legislation which would have solved many of the recognized problems in CFATS by:
 - requiring all covered facilities to make plans for the use of technologies that reduce the potential consequences of an attack;
 - authorizing the government to require implementation of such plans, where technically and economically feasible, at those facilities that present the greatest release risk;
 - mandating employee training and participation in plant security, including in compliance inspections;
 - allowing states to set more protective standards;
 - allowing workers and communities to enforce protections through citizen suits against government agencies and by petitioning agencies for enforcement against individual facilities; and
 - requiring the government to report on enforcement and compliance so the public can know the law is being implemented, while avoiding publication of the vulnerabilities of individual facilities.

¹ http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-55_Mar13.pdf

² <http://www.whitehouse.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security>

A legislative path forward needs to address the inherent weaknesses of CFATS, five of which of which I will cite in detail today:

First, CFATS coverage does not extend to chemicals shipped or stored outside of a facility's fence line in nearby rail yards or elsewhere that may have little or no security measures. Currently CFATS does not prevent or document this type of risk shifting from one location to another. I have seen pictures and gotten accounts from our members of rail cars full of hazardous chemicals parked for days outside the fence line within yards of a busy road near homes and other businesses. Employers may engage in this practice to be taken off the list of high-risk facilities, or risk shifting could be an established practice occurring for years because workers and management do not recognize the hazard and the potential for a criminal act. Under CFATS there is no way of knowing if and how these risks are being shifted, which leaves communities in danger. DHS claims that "more than 3000 facilities removed, reduced, or modified holdings of chemicals of interest" but maintains no information as to how these reductions in holdings were achieved.³ The program does not know or track whether the risk was shifted.

Second, DHS is prohibited from requiring a CFATS-covered facility to use any "particular security measure" including a fence in a particular area, a specific control on a unit, or any other measure that is well documented through past practice in the industry to prevent catastrophic incidents. This capacity building measure would require covered facilities to conduct a structured review of options that avoid catastrophic chemical hazards in well-documented assessments and plans that are reported to DHS. My colleagues and I work with employers every day. Many take safety measures that go above and beyond, but there are always some that will only do the minimum required by law and, as we all know, some who refuse to even do the minimum required.

Third, CFATS should develop and promote the most effective means of reducing a catastrophic chemical incident, which is reducing the potential consequences by using safer chemical processes. DHS,⁴ EPA⁵ and the US Chemical Safety Board⁶ have all highlighted the effectiveness of assessing and, where feasible, implementing safer alternatives at high risk facilities. Some companies have shifted to safer processes or reduced their inventory of hazardous chemicals so they are no longer listed as high risk. In fact, according to a report from DHS to the Coalition to Prevent Chemical Disasters, since the inception of the CFATS program nearly 1300 facilities have completely removed their Chemicals of Interest and approximately 600 no longer possess a Chemical of Interest at the threshold that requires submission of a Top-Screen to DHS. But many companies will never even look into innovating with safer chemical processes without a legal requirement to do so. Legislation that passed the House in the 111th Congress included the requirement that CFATS-covered facilities "assess alternatives, in particular 'the technical feasibility, costs, avoided costs (including liabilities),

³ http://www.dhs.gov/sites/default/files/publications/CFATS%20Update_February2014.pdf

⁴ <http://www.dhs.gov/news/2011/03/30/written-testimony-nppd-house-committee-energy-and-commerce-hearing-titled-hr-908>

⁵ http://www.epa.gov/ocir/hearings/testimony/111_2009_2010/2010_0728_ccd.pdf

⁶ http://www.nytimes.com/2014/01/29/opinion/the-next-accident-awaits.html?smid=pl-share&_r=0

personnel implications, savings, and applicability of implementing each method to reduce the consequences of a terrorist attack'.⁷ Safer chemical processes can include a range of controls including:

- Reducing the quantity of hazardous material or energy;
- Substituting a hazardous material or process with an alternative that reduces the hazard; or
- Simplifying a process by using automation, sensors, alarms, automatic shutdowns, improved operating procedures, and changed equipment design.⁸

Fourth, the Personnel Surety Program (PSP) under CFATS has the potential for unintended consequences. Many have expressed concerns about duplication of efforts and the burden for multiple background checks. The Transportation Worker Identification Credential (TWIC) is an option to use under CFATS. Many of our members have successfully obtained a TWIC card, but it is not without concerns about the burden on workers to obtain them and the burden on industry to install readers when the Coast Guard has not issued a final rule for TWIC readers.

Another concern about the PSP is that, within the current context of the CFATS program, individual chemical facilities are responsible for clearing workers under their PSP. CFATS does not prevent the collection of unnecessary personal employee data by employers or third parties that may be full of inaccuracies due to errors in reporting. There is not an adequate appeals process for workers who are wrongly discriminated against during the PSP process. In a February 3, 2014 Federal Register notice, DHS stated that employment decisions based on background checks are outside of the scope of CFATS and that DHS expects employers to comply with applicable federal, state and local law regarding employment and privacy.⁹ Workers are seeing DHS apathy about their jobs play out in facilities across the country. In fact, one of our local unions recently received a letter from their employer that said, "Although [COMPANY NAME] and its representatives are not required to notify its employees or union leadership of this requirement prior to conducting background investigations, we believe it is a prudent and a good business practice to do so." Not all employers will do the right thing by telling their employees about new security measures without a requirement by DHS to do so. On the whole this is inadequate. Workers need to be informed about new security measures, including background checks being performed on them, and workers need an appeals process should they be unjustly disqualified from their job due to an employer-conducted background check.

This brings me to my fifth point. CFATS lacks the requirement for a meaningful role for workers in chemical security. It is our observation that DHS stakeholder engagement with industry is very productive. However, DHS does not adequately engage workers and their representatives at either the federal level or within a facility. Workers who operate and maintain chemical facilities know the most about what needs to be done to reduce vulnerability and protect against a terrorist attack. They would be hurt first and worst in an attack on a facility, and therefore have the largest stake in ensuring safety. CFATS should require meaningful

⁷ HR 2868 – 111th Congress. <http://beta.congress.gov/bill/111th-congress/house-bill/2868>

⁸ Atay and Komosinsky. (2012) *Inherently safer technology implementation – Risk reduction and risk shifting*. New Jersey Department of Environmental Protection. Prepared for presentation at 8th Global Congress on Process Safety.

⁹ <http://www.gpo.gov/fdsys/pkg/FR-2014-02-03/pdf/2014-02082.pdf> (page 6436)

involvement of plant employees in developing security plans and provide whistleblower protections for those who engage in the process in any way including by reporting a security vulnerability either to their employer or to DHS. At a very minimum this could help DHS identify facilities that are covered by CFATS but are not complying with its requirements. DHS should also be required to include an employee representative when the agency visits a facility. The Occupational Safety and Health Administration¹⁰ and the Environmental Protection Agency¹¹ both have policies that could be used as a model for DHS to include workers in inspections.

Any legislation authorizing the program must be responsive to the identified shortcomings and challenges of CFATS, the oversight recommendations, and other activities at the federal level regarding the CFATS program. Congress should not merely require more metrics from an inadequate program when there is consensus about problems in the program. Legislative action based the recommendations from OIG, the EO Working Group, and other stakeholders is necessary to address the gaps in CFATS that leave millions of American workers and communities at risk.

Thank you again for the opportunity to testify today.

¹⁰ https://www.osha.gov/Firm_osh_data/100006.html

¹¹ <http://www.epa.gov/compliance/resources/policies/monitoring/caa/caa112r-rmpguide.pdf>