Center for EFFECTIVE GOVERNMENT
Formerly OMB Watch

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Before the
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Subcommittee on Cybersecurity, Infrastructure Protection, and the Security Technologies

On
West Fertilizer, Off the Grid: The Problem of Unidentified Chemical Facilities
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Chairman Meehan, Ranking Member Clarke, members of the subcommittee: My name is Sean Moulton and I am the Director of Open Government Policy at the Center for Effective Government, formerly OMB Watch – an independent, nonpartisan policy organization dedicated to ensuring government is effective and responsive to the priorities of the American people. We believe transparency of government actions promotes accountability and empowers citizens. The Center for Effective Government has been a leader on environmental right-to-know issues since the late 1980s when it created RTK NET as an online public source of environmental data. This resource helps citizens gain information about workplace and public health risks from chemical exposure.

Thank you for inviting me to testify today about how we can improve the effectiveness of the Chemical Facility Anti-Terrorism Standards (CFATS) so that the program better ensures the security of our chemical plants and the safety of the American people.

The massive explosion at the West Fertilizer plant on April 17 that killed 15 people and injured more than 200 was a terrible tragedy. In its aftermath, it has become clear that the network of regulatory programs that seeks to identify facilities with chemical risks in order to ensure the protection of workers, first responders, and nearby communities failed. The facility had never filed a risk assessment with the CFATS program despite the approximately 270 tons of explosive ammonium nitrate stored on site. The Department of Homeland Security (DHS) seemed unaware of the facility and its lack of compliance with CFATS reporting. This raises serious questions about the CFATS program and its effectiveness in collecting, managing, and sharing information necessary to its mission.

In March, the DHS Inspector General issued findings from its review of the management practices to implement the CFATS program. The assessment found significant problems, specifically:

> Program progress has been slowed by inadequate tools, poorly executed processes, and insufficient feedback on facility submissions. In addition, program oversight had been limited, and confusing terminology and absence of appropriate metrics led to misunderstandings of program progress. The Infrastructure Security Compliance Division still struggles with a reliance on contractors and the inability to provide employees with appropriate training. Overall efforts to implement the program have resulted in systematic noncompliance with sound Federal

Government internal controls and fiscal stewardship, and employees perceive that their opinions have been suppressed or met with retaliation.[1]

In April, the Government Accountability Office (GAO) released the results of its investigation into the progress made under the CFATS program in assigning facilities to risk tiers, reviewing security plans, and communicating with owners and operators to improve security. While improvements from early efforts were noted, significant problems were discovered. The GAO estimated that it could take the program another seven to nine years to review all the security plans, which would mean the rest of the regulatory process, including compliance inspections, could take eight to ten years to be completed.

My testimony will examine four issues.

- First, the culture of excessive secrecy and limited information sharing has contributed to gaps, oversights, and inefficiencies in chemical security efforts in general and the CFATS program specifically.
- Second, better collaboration among federal agencies and between federal and state authorities will be needed to address these gaps and make the CFATS program operate more effectively.
- Third, engaging and informing the public is essential if CFATS is to become an integral part of the broader government effort to protect communities from chemical facility risks.
- Fourth, increased transparency in the CFATS program is necessary to improve its long-term effectiveness and accountability to the public it serves.

Excessive Secrecy and Restricted Access Don't Work

Despite operating for six years and having received thousands of risk assessments from facilities around the country, the CFATS program was unaware that the West Fertilizer plant had large amounts of ammonium nitrate stored on site. The facility never filed a risk assessment with the program. There is no indication that CFATS knew the assessment had not been filed. There has been no announcement of commutations with the facility urging it to file the assessment and no notices of violations or fines.

According to the preliminary findings of the U.S. Chemical Safety Board (CSB), local first responders "were not made aware of the explosion hazard from the ammonium nitrate stored at West Fertilizer."[2] And nearby residents, including an elementary school, hospital, and retirement home, all within a mile of the facility, were almost certainly unaware of the risks posed by the facility.

This lack of oversight is a troubling discovery for a program charged with such an important responsibility. Gaps could mean that dangerous facilities go without improved security and safety plans. And statistically, it is highly unlikely that West Fertilizer is the only facility with significant quantities of hazardous chemicals missing from CFATS.

[1] Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program, Department of Homeland Security, Inspector General, March 2013, p. 1.
[2] Preliminary Findings of the U.S. Chemical Safety Board from its Investigation of the West Fertilizer Explosion and Fire, U.S. Chemical Safety Board, July 2013.

These informational gaps are especially troubling because the plant had been filing Risk Management Plans with the Environmental Protection Agency (EPA) since 1999 and been reporting the quantity of ammonium nitrate it stored to state officials in its Tier II Hazardous Inventory reporting under the Emergency Planning and Community Right to Know Act. So information was collected and reported to certain agencies, but it seems it wasn't sufficiently utilized or shared.

These communication breakdowns reveal a fundamental problem with the way chemical security and safety information is managed by the CFATS program and other related regulatory programs. Since the Sept. 11, 2001 terrorist attack, there has been an excessive level of secrecy related to chemical safety and security, which slows sharing and impedes risk mitigation.

When the Department of Homeland Security established the CFATS program, it created a category of information called Chemical-terrorism Vulnerability Information (CVI). The rules made clear that access to CVI would be limited to those persons with "a need to know." But such a "need to know" approach creates unclear lines of authority for determining access to information and unnecessary bureaucracy that significantly interferes when emergencies arise.

Need-to-know approaches also cultivate broader cultures of secrecy and isolation within the agencies and programs that utilize them. Such isolation can directly contribute to information gaps, such as unreported facilities in CFATS, because of nonexistent or difficult information sharing with other agencies and programs.

The 9/11 Commission recognized the problems that arise when information isn't shared. In 2005, in testimony before the House Committee on Homeland Security, Lee Hamilton, former Vice Chair of the 9/11 Commission, stated: "Poor information sharing was the single greatest failure of our government in the lead-up to the 9/11 attacks."[3] To remedy the problem, Hamilton concluded that the government had to change its approach to information collection and control:

> The 9/11 story included numerous examples of how a mentality of limiting information sharing to those with a 'need to know' in fact kept information from getting to the right people at the right time. Cultures will not change without policies in place that actively encourage such change, and without the sustained implementation of those policies.[4]

The CFATS program has not embraced or encouraged that needed change. Instead, it has continued to cling to a flawed "need-to-know" framework and culture that leaves agencies isolated and individuals who need chemical security or safety information in the dark.

[3] Prepared Statement of Lee H. Hamilton before the Committee on Homeland Security, U.S. House of Representatives, November 8, 2005, p. 1.
[4] Ibid., p. 5.

Better Sharing Across Agencies Is Crucial

There are various federal and state agencies responsible for different aspects of chemical safety and security, and these agencies need to do a much better job of cooperating and collaborating among themselves.

- Section 550 of the Department of Homeland Security Appropriations Act of 2007 authorized the CFATS program at DHS to assess the risk of chemical plants and require high-risk facilities to develop and comply with a security plan.
- The Clean Air Act Amendments of 1990 authorized the EPA to establish the Risk Management Plan program, which requires facilities storing significant quantities of 140 toxic or flammable chemicals to submit a plan describing the facilities' activities to prevent the accidental release those chemicals and how it would respond to any emergencies involving such a release.
- The Emergency Planning and Community Right to Know Act of 1986 required Emergency and Hazardous Chemical Inventory reports that detail the hazardous materials stored on site at facilities and are submitted to the local fire department, State Emergency Response Commissions, and Local Emergency Planning Committees.
- And the Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration (OSHA) to ensure safe and healthful working conditions by setting and enforcing standards and by providing training, outreach, education, and assistance.

Those are just a few of the agencies and programs that had some overlapping coverage of chemical security and safety at West Fertilizer and other plants. But these agencies do not sufficiently share information or collaborate on chemical plant safety. Many have such significant restrictions on accessing their information that even other government agencies can have difficulty using the data. For instance, many states treat the Emergency and Hazardous Inventories as restricted or classified information, refusing to post the information online or disclose it in response to requests.

The CFATS treats even the most basic information about its program with the same type of protected secrecy. If a public list of facilities that had submitted information to the CFATS program for evaluation existed, perhaps a state or local official in Texas or a plant employee would have noticed that West Fertilizer was not on that list.

The solution to the secrecy problem is to narrow the amount of protected information and broadly share the other information. State and local officials should be able to find information through online searches and immediately access it. Requiring public officials to apply for access, get approved, establish logins, etc. will create a huge disincentive for officials to gather information. And that means cross-agency collaboration will be minimal.

The collaboration among agencies should not be limited to the exchange of information. The CFATS program should be using the personnel of other state and federal agencies to expand its capacity to inspect facilities and perform other necessary on-site activities. Combined, the federal and state agencies that overlap in their concern for chemical facility security and safety have more on-the-ground personnel than any single agency. While it is difficult to say how many personnel they could contribute to a shared chemical facility inspection approach, collaboration would certainly undertake significantly more

inspections than CFATS could alone. This expanded network of inspectors could identify and address more risks than the individual agencies can do on their own.

DHS should also be collecting information from people closest to the facilities – employees, local first responders, and community members. Such stakeholders can have a wealth of information about potential problems with chemical storage, security, or emergency preparedness that may not be submitted on company filings. There needs to be a mechanism or process to collect this information as it could help identify missing outlier facilities, fill in other data gaps, and correct erroneous information the program may have received.

And when a plant employee or state official steps forward and reports ongoing and unaddressed problems or vulnerabilities, those people should be protected from any retaliation by their employers.

An Informed and Engaged Public Makes Communities Safer

An engaged and informed public is a vigilant public. Citizens, first responders, medical professionals, plant workers, and local officials all need to be better informed about chemical security and safety information in order to be prepared for emergencies.

I am not suggesting that all the information collected by CFATS and other regulatory programs addressing chemical plant safety and security should be open to the public. I am suggesting we have not yet found the right balance between disclosure and information security.

Unfortunately, we have all but abandoned early efforts to provide useful information to the public while restricting access to truly dangerous, detailed information.

We continue to try to solve the complex problem of information management with an overly simplistic solution of blanket secrecy. Those wishing to damage chemical facilities and harm the public need detailed, specific information. Secrecy may be justified in some limited instances – vulnerability assessments, plant operations details, etc. – where specific information may need to be restricted.

But when we hide such basic information as facility identities and locations, chemicals stored, and compliance status, we trade away citizen vigilance and important agency collaboration that can ensure more accurate information and better emergency preparedness. This type of information can be essential for use by other officials and the public.

Studies done on hazardous materials placards,[5] digital maps and global positioning information,[6] and biological research[7] have each found that openness and disclosure is essential to keeping the public

[5] The Role of Hazardous Material Placards In Transportation Safety and Security, Jan. 15, 2003. U.S. Department of Transportation, Research and Special Programs Administration, Office of Hazardous Materials Safety and John A. Volpe National Transportation Systems Center.

[6] Mapping the Risks: Assessing the Homeland Security Implications of Publicly Available Geospatial Information, 2004. RAND National Defense Research Institute, John C. Baker, Beth E. Lachman, David R. Frelinger, Kevin M. O'connell, Alexander C. Hou, Michael S. Tseng, David Orletsky, Charles Yost.

safer, and it helps us stay ahead of terrorists. For instance, in 2003, the Department of Transportation explored the possibility of removing hazardous materials placards from trucks, railcars, and shipping containers to better protect the materials from theft or use by terrorists. But the study found that "removal of placards offers little to no security benefit" and that the placards were a critical source of hazard information that facilitated effective emergency responses and protected lives.

Excessive and unnecessary secrecy around chemical security programs like CFATS could cost lives in the event of a chemical emergency. If an emergency occurred at a chemical facility, people might not know where to go and could evacuate into the path of a chemical hazard. Schools would be ill-prepared to evacuate children and inform parents. Doctors would not know how to treat those exposed, and first responders would not know what emergency equipment to use. Awareness, preparedness, and prevention save lives.

The catastrophe in West, Texas may wind up being an example of this problem. In its preliminary findings, the CSB notes that the National Fire Protection Association recommends that firefighters evacuate from massive ammonium nitrate fires and that the Department of Transportation's Emergency Response Guidebook recommends flooding large ammonium nitrate fires with water from a distance. Despite the lack of clarity on judging the size of a fire or exactly how much distance should be used, it's clear that at least some ammonium nitrate fires should be dealt with by evacuating the area and trying to contain the fire from a greater distance. However, the West volunteer firefighters were unaware that they were facing a fire with ammonium nitrate, so they could not properly judge if these tactics should be used.

Carolyn Merritt, then Chair of the CSB, stressed the importance of community awareness and preparedness in responding to and mitigating the impacts of a chemical accident during Senate testimony in 2007. She noted a "lack of chemical emergency preparedness that our investigations have found among many communities where accidents strike."[8] Merritt illustrated the consequences of such situations with a compelling real-life example:

> When a small chemical firm in northwest Georgia experienced a reactive chemical accident that released toxic vapor into the community, firefighters and police lacked the planning, equipment, and training to respond effectively, and the city lacked an emergency notification system for residents. More than 200 families had to be evacuated, and 154 people had to be decontaminated and treated at the hospital. The most seriously impacted were police officers, who were instructed to conduct the community evacuation without protective gear.[9]

Beyond emergency preparedness, greater public access to chemical safety and security information can allow communities to engage in dialogs with officials and company representatives about reducing the risks through Inherently Safer Technologies (IST). There are many safer chemicals and processes that

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[7] Globalization, Biosecurity, and the Future of the Life Sciences, 2006. Committee on Advances in Technology and the Prevention of Their Application to Next Generation Biowarfare Threats, National Research Council.

[8] Prepared Statement of Carolyn W. Merritt, Chairman U.S. Chemical Safety Board before the Committee on Environment and Public Works' Subcommittee on Transportation, Safety, Infrastructure Security, and Water Quality, U.S. Senate, July 10, 2007, p. 8.

[9] Ibid, p. 9.

industry can use to replace dangerous substances and better protect Americans in the process. In fact, some communities no longer face risks of dangerous chemical exposures because nearby plants have switched to safer alternatives. For example, in 2009, the Clorox Company announced it would replace bulk quantities of chlorine gas with safer chemicals.

The preliminary findings of the CSB for the West Fertilizer explosion indicate that there are IST options to more safely store, ship, and handle ammonium nitrate as a fertilizer. Compounding the ammonium nitrate with calcium carbonate practically eliminates any risk of explosion while preserving its use as a fertilizer.

Hundreds of chemical facilities have switched to safer and more secure chemicals and processes since 2001, but more work is needed. Agencies and communities need to use the collected information and become advocates for IST solutions in more facilities.

A better approach to management of chemical security and safety information would disclose basic information necessary to inform the public of risks from chemical facilities, explore the use safer alternatives to eliminate the risk, and enable community members to participate in emergency planning. For instance, disclosing the names and locations of facilities, identities and quantities of chemicals stored, status of facilities' reporting, status of inspections, notices of violations, and other general information would allow the public to better understand which facilities are following safety rules (and which aren't). Information restrictions should be limited to detailed information about facilities' vulnerability assessments and chemical security plans. No detailed information about specific chemical security vulnerabilities and facilities should be released.

Public Transparency Works

When programs are allowed to operate behind closed doors with little to no ongoing public oversight, they often suffer from delays, wasted resources, and management problems.

We have seen the importance of transparency in addressing the significant delays and other management problems in the CFATS program with the investigations conducted by the DHS Inspector General and the Government Accountability Office. They prompted increased oversight and public scrutiny that should help motivate CFATS leadership to fix the problems.

But we need continued transparency to know that reforms are actually being put in place. Basic information about the CFATS program activities and progress should be made public on a regular timetable. Statistics on the number of assessments received and reviewed, facilities placed in risk-based tiers, security plans certified, inspectors trained, and inspections completed should be made available to the public on an ongoing basis.

Because the DHS Inspector General review found an over-reliance on contractors, as well as noncompliance with internal controls and fiscal stewardship, the program should also regularly provide information on its spending, including contracts awarded and status of work being conducted. Finally, to address the other management and program problems identified in the Inspector General and GAO reports, the CFATS program should offer regular updates on the steps taken to address the management

issues. Such information would allow the public and oversight officials to better understand and evaluate the progress toward achieving chemical safety.

Chemical security is supposed to be about protecting the public. As such, the public has a fundamental right to know and understand the oversight the government has in place. Citizens understandably want and deserve more than a "trust us" approach to their safety.

Conclusion

Like the Committee, the Center for Effective Government wants the CFATS program to succeed and help ensure the safety and security of chemical facilities. To accomplish that, CFATS must become a more integral and collaborative component of the regulatory network overseeing facilities with significant amounts of hazardous chemicals. The other programs within this network also need to update their disclosure policies and improve their collaboration efforts.

We encourage CFATS to take the lead and become a genuine partner with agencies and stakeholders, to strike a new balance in information disclosure, and to engage first responders, facility employees, and communities as participants in chemical safety and security.

I sincerely thank you for the opportunity to address this Committee. Chairman and members of the Subcommittee, I look forward to your questions.