

Congress of the United States

Washington, DC 20515

July 22, 2013

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

Dear Secretary Napolitano:

In 2006, Congress authorized the creation of the Chemical Facilities Anti-Terrorism Standards (CFATS) program, to secure facilities with chemicals that “present high levels of security risk.” The program’s enacting statute directs the Secretary of Homeland Security to issue “regulations establishing risk-based performance standards for security of chemical facilities and requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities.” (P.L. 109-295 § 550).

While the interim final regulations issued in 2007 were faithful to the legislation, implementation since then has fallen far short of what the legislation and the regulations promised.

The Government Accountability Office (GAO),¹ the Department of Homeland Security (DHS) Office of Inspector General,² and the DHS Office of Infrastructure Protection itself³ have all recognized that, over the past five years, DHS’s ineffectual management and implementation of the CFATS program has frustrated the Department’s critical mission to secure America’s facilities containing chemicals of interest. As the authorizers and appropriators of this program, we write to you to express serious reservations about continuing to extend CFATS funding without evidence of substantial programmatic improvement. The basic programmatic building blocks of CFATS are missing, and we are running short on both patience and confidence with regard to the Department’s ability to correct its deficiencies.

Specifically, the risk evaluation system used to tier regulated facilities is not consistent with the Department’s basic standard, nor with what Congress expected based upon the 2006 CFATS legislation and the 2007 regulations. The Department’s standard for risk requires that threat, vulnerability, and consequence each be weighed. Yet, with regard to CFATS-covered facilities, consequence is only partially considered, while threat and vulnerability are not factored in at all. Because CFATS, by law, is a risk-based program, this failure to develop an accurate and effective risk evaluation system could not be more problematic.

¹ GOA-12-515T “Critical Infrastructure Protection: DHS is Taking Action to Better Manage its Chemical Security Program, but it is Too Early to Assess Results.” July 26, 2012.

² OIG-13-55 “Effectiveness of the Infrastructure Security Compliance Division’s Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program.” March 2013.

³ Memorandum from Penny Anderson, Director, Infrastructure Security Compliance Division, Office of Infrastructure Protection and David Wulf, Deputy Director to NPPD Undersecretary, Rand Beers: “Challenges Facing ISCD, and the Path Forward.” November 10, 2011.

Despite this flawed risk methodology, thousands of facilities across the country have attempted to comply with CFATS requirements by submitting their initial risk assessment information (the “top screen”), and have been assigned a final tier. These facilities have invested time and resources into the development of their site security plans. Yet, GAO estimates it could take up to nine years for the Department to review these plans and certify each facility’s security. Within that time, technology changes, plans become outdated, and facilities remain vulnerable to attack. The scope and pace of this backlog is simply unacceptable.

Perhaps the most basic step toward achieving the security of facilities with chemicals of concern is identifying those facilities that are at risk. Yet, even here, the Department has failed to implement an effective process. As the tragic explosion of the West Fertilizer Plant in April brought to light, DHS is unaware of the existence of thousands of small facilities across the country that are potentially covered under the statute. The identification of facilities at risk of terrorist infiltration is the very foundation of the CFATS program.

Additionally, we are concerned that it has been five years since Congress passed section 563 of the Fiscal Year 2008 Department of Homeland Security Appropriations Act (P.L. 110-161), which requires DHS to regulate the sale and transfer of ammonium nitrate to prevent the misappropriation or use of ammonium nitrate in an act of terrorism. Although DHS published the Ammonium Nitrate Security Program Notice of Proposed Rulemaking (NPRM) in the Federal Register in 2011, DHS has yet to issue any guidance on the Ammonium Nitrate Security Program.

Unfortunately, problems with the Department’s efforts to implement these programs are not limited to those discussed here. As the Chairmen responsible for authorizing and funding CFATS, we are convinced the program should not continue in its present condition. While the need to secure American facilities with chemicals of concern is a critical one, the CFATS program is simply not getting the job done.

The Committees on Energy and Commerce and on Homeland Security, as authorizers, did not object to the appropriation of funds to CFATS in the Fiscal Year 2014 Homeland Security Bill because the House Committee on Appropriations, in both its bill and its accompanying Report, requires the Department to formally justify its expenditures, create a plan to reduce its backlog, and report to Congress on its progress to correct some of its most serious shortcomings.

But these requirements will not be enough to justify the program in the long term.

As discussed, we believe in the vital importance of securing America’s facilities with chemicals of concern. Moreover, hundreds of millions of American tax dollars have been spent on developing the CFATS program, and private industry has spent billions of dollars complying with it. Therefore, we would like to see the program continue. However, what’s most important is that the security mission is fulfilled.

Over the course of this fiscal year, the Energy and Commerce Committee and the Homeland Security Committee will continue the rigorous oversight and strict guidance needed to get

CFATS on track. We intend to identify specific milestones the program must achieve in order to establish its viability. Ultimately, we would like to consider a multi-year reauthorization of CFATS – but only if it is the right program for the job.

To begin with, we would like to see the National Protections and Programs Directorate (NPPD) meet the requirements articulated in the Appropriations Committee Report Language Accompanying H.R. 2217 (H. Rept. 113-91). Among those requirements are the following:

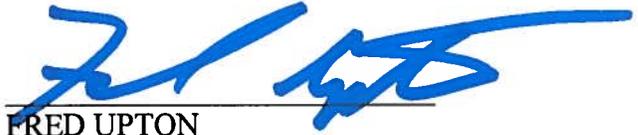
1. A report explaining how ISCD will further accelerate the review process for facilities which have already been assigned a final tier, reduce the current backlog of approximately 3,120 facilities, and detail the actions DHS is taking to better manage its chemical security program, including its progress in addressing the recommendations in the GAO report (GAO-13-353) and in implementing the associated action plan. Please submit this report not later than September 30, 2013.
2. A report to focus on program implementation, and collaboration and communication within the Infrastructure Security Compliance Division (ISCD) and between ISCD and the regulated community. Specifically, the review should address the following sets of questions: 1. How will ISCD improve its facilities identification methodology to include the full universe of covered facilities in the United States? Is the ISCD sharing information with State authorities overseeing CFATS-regulated facilities, such as State Emergency Management Directors? 2. Is the ISCD organized to efficiently and effectively carry out the requirements detailed in Section 563 of Public Law 110-161 (ammonium nitrate security)? If not, what are the organizational gaps? How should it be structured and staffed to ensure effective execution of Section 563 of Public Law 110-161? Does the program include the appropriate level of outreach to address valid stakeholder concerns? What mechanisms are in place to ensure consistent outreach? Additionally, the review should include a comprehensive update on the status of the corrective measures being taken to ensure that facilities with chemicals of interest are notified by ISCD when they fall within the purview of the CFATS program; an estimate of the potential number of outlier facilities unaware of the CFATS requirement; and a detailed performance evaluation of the Chemical Security Inspectors within ISCD. This report should be submitted not later than September 30, 2013.

We look forward to receiving these reports, and to working with you to help secure our nation against the risk of terrorism.

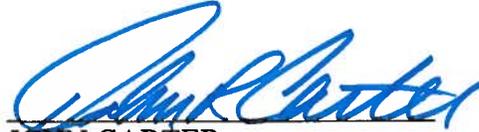
Sincerely,



MICHAEL T. MCCAUL
Chairman,
Committee on Homeland Security



FRED UPTON
Chairman,
Committee on Energy and Commerce



JOHN CARTER
Chairman,
Homeland Security Appropriations Subcommittee