

**Testimony of
Anna Fendley, MPH
United Steelworkers
before the
House Subcommittee on Cybersecurity, Infrastructure Protection, and Security
Technologies
on
The Chemical Facility Anti-Terrorism Standards Authorization and Accountability Act of
2014: Legislative Hearing
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Chairman Meehan, Ranking Member Clarke 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.

A massive explosion nearly a year ago at the West Fertilizer Company's storage and distribution facility in West, TX killed fifteen people and injured hundreds more. The blast also destroyed a nursing home, an apartment complex, schools and private homes. This incident has brought acute national attention to the vulnerabilities in our communities. As devastating as the West explosion was, the potential for much worse is present at other facilities across the country.

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. In one example, our members at a chemical plant on the west coast cite a normal procedure that turned abnormal last year 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.

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 and ineffective status quo. HR 4007 also neglects to address many of the inherent weaknesses of CFATS, five of which of which I will cite today.

First, HR 4007 does not extend CFATS coverage 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 this 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 form of risk shifting 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.¹ The program does not know or track whether the risk was shifted to just over the fence-line.

Second, HR 4007 does not change the prohibition within CFATS of any “particular security measure” by DHS including a fence in a particular area, a specific control on a unit, or any other measure that is well documented through past practice 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, HR 4007 does not develop or promote the most effective means of reducing a catastrophic chemical incident, which is the use of safer chemical processes. DHS,² EPA³ and the US Chemical Safety Board⁴ 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. Past legislation in the House has included the requirement that covered facilities “assess alternatives, in particular ‘the technical feasibility, costs, avoided costs (including liabilities), personnel implications, savings, and applicability of implementing each method to reduce the consequences of a terrorist attack’.”⁵ This provision would be a particularly effective addition to HR 4007.

Fourth, the Personnel Surety Program (PSP) under CFATS has the potential for unintended consequences. Within the current context of the CFATS program, individual chemical facilities are responsible for clearing workers under their PSP. HR 4007 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. CFATS does not include 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

¹ http://www.dhs.gov/sites/default/files/publications/CFATS%20Update_February2014.pdf

² <http://www.dhs.gov/news/2011/03/30/written-testimony-nppd-house-committee-energy-and-commerce-hearing-titled-hr-908>

³ http://www.epa.gov/ocir/hearings/testimony/111_2009_2010/2010_0728_ccd.pdf

⁴ http://www.nytimes.com/2014/01/29/opinion/the-next-accident-awaits.html?smid=pl-share&_r=0

⁵ HR 2868 – 111th Congress. <http://beta.congress.gov/bill/111th-congress/house-bill/2868>

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.⁶ On the whole this is inadequate. Workers need an appeals process and whistleblower protections under the CFATS.

Many have expressed concerns about duplication of efforts and the burden for multiple background checks. The Transportation Worker Identification Credential (TWIC) is an option, but it is not without concerns. What protections would be in place for workers who would suddenly be required to secure TWICs to continue working? What financial and operational burdens would the installation of biometric readers put on facilities? Relying on the TWIC program in this way could be problematic, particularly since the Coast Guard has not issued a final rule for TWIC readers, it will not be fully deployed in ports across the country, and there are examples of some problems with the appeals process.

And fifth, CFATS lacks the requirement for a meaningful role for workers in chemical security, and HR 4007 does not provide it. 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 involvement of plant employees in developing security plans. DHS should also be required to include an employee representative when the agency does inspections at a facility. The Occupational Safety and Health Administration⁷ and the Environmental Protection Agency⁸ both have policies that could be used as a model for DHS to include workers in inspections. Additionally, whistleblower protections should be added for workers or others who report problems, deficiencies and vulnerabilities to the Secretary of Homeland Security.

As the first panel cited, there have been a number of challenges with implementing the CFATS program. In a March 2013 report, the Office of Inspector General (OIG) found that the program continued to face challenges in the areas of submission tools and processes, representation and oversight, human capital, and fiscal stewardship.⁹ OIG made 24 recommendations to improve implementation of the CFATS program, and those recommendations should be considered. Additionally the recommendations in the April 2013 Government Accountability Office (GAO) report titled *Critical infrastructure protection: DHS efforts to assess chemical security risk and gather feedback on facility outreach can be strengthened* should be considered as the committee considers risk assessment under the CFATS program.¹⁰

Another current activity to consider is that the Joint Explanatory Statement for the Consolidated Appropriations Act, 2014 included a requirement that DHS provide a report to the House and Senate Appropriations Committees, the House Committee on Energy and Commerce, and this committee, the House Committee on Homeland Security by April 2014.¹¹ This report will outline how DHS is using existing resources and infrastructure to avoid duplication within

⁶ <http://www.gpo.gov/fdsys/pkg/FR-2014-02-03/pdf/2014-02082.pdf> (page 6436)

⁷ https://www.osha.gov/Firm_oshawebdata/100006.html

⁸ <http://www.epa.gov/compliance/resources/policies/monitoring/caa/caa112r-rmpguide.pdf>

⁹ http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-55_Mar13.pdf

¹⁰ <http://www.gao.gov/products/GAO-13-353>

¹¹ <http://docs.house.gov/billsthisweek/20140113/113-HR3547-JSOM-D-F.pdf>

the program and how DHS is working to ensure that that a facility meets the personnel surety standard. The information included in this report will be valuable to incorporate into any legislation concerning the CFATS program.

After the explosion in West, TX, President Obama signed Executive Order (EO) 13650 on Improving Chemical Facility Safety and Security.¹² The EO set up 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. The Working Group is co-chaired by the Department of Homeland Security, the Environmental Protection Agency, and the Department of Labor. It has been meeting regularly and has held listening sessions at locations across the country to gather stakeholder input about how the agencies can more effectively reduce the risks to workers and communities. Additionally, there is also a document out for public comment until March 31, 2014 requesting public input on policy, regulation, and standards modernization. As a part of that public comment, DHS is asking for input from stakeholders about the following issues specific to CFATS:

- Options to improve the secure storage, handling, and sale of ammonium nitrate;
- Potential updates to the CFATS chemicals of interest list and the screening threshold quantities of certain substances contained on that list;
- Options for improving the coverage of reactive substances and reactivity hazards;
- Options for addressing security of chemicals at agricultural production facilities;
- Opportunities to leverage industry best practices in chemical facility security;
- Methods for identifying economically and mission critical chemical facilities;
- Opportunities to harmonize facility security standards across different programs; and
- Approaches to identifying potential high-risk chemical facilities that have not yet complied with their initial CFATS obligations.¹³

A status report from the Working Group to the President is due on May 1, 2014 along with a comprehensive and integrated standard operating procedure that unifies the federal approach for identifying and responding to risks. These documents will be very valuable to consider as a part of CFATS reform.

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 on the recommendations from OIG, GAO, 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.

¹² <http://www.whitehouse.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security>

¹³ https://www.osha.gov/chemicalexecutiveorder/Section_6ai_Options_List.html