

August 23, 2019

The Honorable Frank Pallone
Chairman, House Committee on Energy and
Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Greg Walden
Ranking Member, House Committee on
Energy and Commerce
2322 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Pallone and Ranking Member Walden:

We write to thank the Committee on Energy and Commerce for the opportunity to comment on the reauthorization of the Chemical Facilities Anti-Terrorism Standards (CFATS).

The continuing findings of the U.S. Chemical Safety and Hazard Investigation Board (CSB) and the recent industrial disasters in Wisconsin (Husky), Texas (ITC) and Pennsylvania (Philadelphia Energy Solutions) illustrate that a major industrial chemical release, fire, or explosion can endanger workers and communities and can cause the closure of important industrial facilities. CFATS is a critical program to defend against these incidents.

Reauthorizing CFATS represents an important opportunity to strengthen its effectiveness. We believe the existing statute should be improved in several areas: it should include water treatment and maritime-covered facilities, for example, and should include a requirement that the Department of Homeland Security (DHS) verify statements submitted by facilities that claim to no longer fall within the jurisdiction of CFATS. In addition to these and other specific improvements, we offer six broad goals for the bill, each of which we would welcome the opportunity to discuss with the Committee.

I. Engage workers in decision-making.

CFATS should include clear employee participation rights, expanding upon those that are now required under California's October 2017 Process Safety Management (PSM) regulation for petroleum refineries.¹ These provisions should include the right of employees to:

- Select their representatives who participate in security planning and implementation;
- Participate throughout all phases of security planning and implementation;
- Accompany DHS compliance officers during CFATS inspections;
- be provided with facility information as necessary to participate in security planning and implementation;
- Be made aware that they are working at a CFATS-covered facility and to understand their rights under CFATS; and

¹ California Code of Regulations (CCR) Title 8, Subchapter 7, General Industry Safety Orders, §5189.1. *Process Safety Management for Petroleum Refineries*. Available online: <https://www.dir.ca.gov/OSHSB/documents/Process-Safety-Management-for-Petroleum-Refineries-txtbrdconsider.pdf>. See subsection (q), *Employee Participation*, at pp. 24-25.

- Act as whistleblowers when necessary, without fear of retaliation. This right should extend to former employees, employee representatives, contractors, and contractor employees and it should include timelines for DHS to respond to claims of retaliation—as well as a clear remedy procedure for those who are found to have been retaliated against.

II. Emphasize risk-reduction over management.

The CFATS program is a chemical *management* framework, which is based on the assumption that hazardous chemicals and processes cannot be eliminated or reduced and must therefore be “surrounded” by layers of security. A *risk-reduction* framework, on the other hand, is based on the assumption that the use of hazardous chemicals and processes should be reduced or eliminated to the greatest extent feasible, and that doing so reduces the facility’s desirability as a target of opportunity.

Both approaches are useful in the security context; the industry’s Center for Chemical Process Safety (CCPS), however, points out that risk-reduction measures—which seek to “minimize, substitute, moderate or simplify” hazardous processes—“form a protocol by which the risks associated with the loss of containment of hazardous materials or energy can be significantly reduced, and in some cases eliminated.”² The CCPS risk-reduction guidance document that highlights the importance of risk-reduction measures was produced and peer reviewed by technical experts from U.S. chemical and oil companies and government agencies.

In fact, the experience under CFATS illustrates that industry fully recognizes the value of risk-reduction measures. DHS reports that thousands of high-risk facilities have chosen to meet their CFATS obligations by implementing risk-reduction measures, including:

- Consolidating hazardous chemicals from multiple sites into one or two sites;
- Replacing a hazardous chemical with a less hazardous one;
- Reducing the total quantity of hazardous chemicals held onsite; or
- Switching to a less concentrated form of a chemical.³

Assuming DHS substantiates the veracity of these claims, these approaches represent the practical implementation of risk-reduction measures by CFATS-covered facilities.

The reauthorization of CFATS represents an opportunity to codify and advance risk-reduction as a primary line of defense for our nation’s process industries. To do so, CFATS will need to require covered facilities to demonstrate the security implications of their operations through site security plans that include risk-reduction measures to minimize, substitute, moderate, or simplify chemicals and processes.

² American Institute of Chemical Engineers Center for Chemical Process Safety, *Inherently Safer Chemical Processes: A Life Cycle Approach*. 2nd Edition, 2009. Authorship and peer review by public agencies and representatives technical experts Chevron Energy Technology Company, 3M, Celanese Chemical, Lubrizol Corporation, Air Products and Chemicals, Rohm and Haas, DuPont, Eastman Chemical, Shell Chemical, Bayer Material Science, Eli Lilly, BP, Monsanto, Olin Corporation, INEOS Olefins and Polymers, Rhodia.

³ DHS Under Secretary Suzanne E. Spaulding, “Correspondence to the Honorable Bennie G. Thompson, ranking member, Committee on Homeland Security,” January 11, 2017. Page 6, item 12.

CFATS site security plans will need to include explicit requirements of facilities to investigate, assess, implement and document risk-reduction measures, primarily because these strategies may involve significant up-front investments by a facility. Altering an industrial process to reduce the use of a hazardous chemical, for example, or to reduce its temperature or pressure, usually requires many more changes in engineering compared to erecting a fence, and managers can find it difficult to propose these changes when more expedient management approaches (such as fencing, lighting, and security personnel) are fully permissible under CFATS. Moreover, resources sunk into fences, lighting and security can become a barrier to the adoption of risk-reduction measures, even when risk-reduction measures are demonstrably more effective and durable.

III. Account for vulnerable communities.

Dangerous industrial facilities are concentrated in the nation's most vulnerable communities. The Center for Effective Government reported in 2016 that across the nation, "people of color make up nearly half the population in fence-line zones (11.4 million)."⁴ These communities consequently are at greater risk of harm from an intentional attack on a chemical facility.

The bill should require that the unique risks facing these communities be incorporated into the CFATS program, including in site security planning and facility risk-tiering. The bill should require involvement of representatives from fenceline communities in a CFATS advisory committee, which should be charged with providing guidance to DHS on strategies to better assess, reduce and mitigate security risks. The bill should also require community protection elements such as real-time fenceline release monitoring and community alert and notification systems.

IV. Give emergency responders the tools they need.

We strongly support the 2017 Risk Management Program (RMP) amendments—also known as the Chemical Disaster Rule—and we urge EPA to implement those amendments, rather than continuing to delay and weaken them. *If fully implemented*, those amendments will begin to address the deficiencies in industrial chemical information that face the nation's emergency responders, and which have emerged as a result of weaknesses in the Emergency Planning and Community Right-to-Know Act (EPCRA), with its reliance on Local Emergency Response Committees (LEPCs).⁵

The reauthorization of CFATS represents an opportunity to improve the effectiveness of emergency responders by: (1) requiring facilities to generate, document and effectively transmit actionable chemical and process information to fire departments and other first responders, including employees and their union representatives at self-responding facilities;

⁴ Center for Effective Government, *Living in the Shadow of Danger: Poverty, Race, and Unequal Chemical Facility Hazards*, 2016. Available online: www.foreffectivegov.org/sites/default/files/shadow-of-danger-highrespdf.pdf. Accessed December 2018.

⁵ Purifoy DM (2013). EPCRA: A Retrospective on the Environmental Right-to-Know Act. *Yale J. Health Policy Law Ethics*. 13(2):375-417. Available online: <https://www.ncbi.nlm.nih.gov/pubmed/24340825>.

and (2) requiring facilities to provide access to emergency response personnel, on request, for pre-incident planning and training purposes. The current CFATS program does not meet these objectives.

Having access to a facility for pre-incident planning and training, together with clear information about the chemicals and processes used on site, are necessary to ensure the most effective emergency response possible by firefighters to an industrial incident.

V. Avoid voluntary programs and Secretarial exemptions.

The bill should avoid provisions that allow facilities to implement voluntary programs under CFATS. Voluntary initiatives tend to motivate only the most responsible companies to invest in the targeted outcome (such as site security), which can result in laggard companies gaining a competitive advantage, at the expense of worker and community safety.

The bill should avoid provisions that give the DHS Secretary new, unmitigated authority to exempt facilities or chemicals from the CFATS program. These provisions undermine the credibility of the CFATS program and, over time, could lead to unequal treatment within and among industry sectors. CFATS must be fully enforceable, including through civil suits against DHS for failure to implement the program.

VI. Ensure independent program evaluation.

CFATS should provide for independent evaluation of the scope and sufficiency of risk determinations and countermeasures in order to address evolving threats, such as weaponized drones and cybersecurity.

Closing

It is essential that Congress take action to protect workers, emergency responders, communities, and the nation's industrial infrastructure from the threat of an intentional attack. The findings of the Government Accountability Office illustrate that the CFATS program is making progress in meeting this objective, but that much more can and should be done.

We would welcome the opportunity to discuss actions the Committee can take to strengthen security at the nation's chemical facilities, consistent with this letter, including by ensuring full implementation of—and drawing lessons from—the 2017 RMP Amendments. We believe those lessons and the information compiled in connection with that rule are relevant to the reauthorization of CFATS.⁶

⁶ NEJAC Letter, May 2019. Available online: <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-1993>; comments of Earthjustice, filed on behalf of Air Alliance Houston, Cal. Communities Against Toxics, Clean Air Council, Clean Wisconsin, Coalition For A Safe Environment, Colorado Latino Forum, Coming Clean, Community In-Power & Development Association, Del Amo Action Committee, Environmental Integrity Project, Environmental Justice Health Alliance for Chemical Policy Reform, Louisiana Bucket Brigade, Ohio Valley Environmental Coalition, People Concerned About Chemical Safety, Sierra Club, Texas Environmental Justice Advocacy Services, Union of Concerned Scientists, Utah Physicians for a Healthy Environment, and Western Resource Advocates, August 2018. Available online: <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-1969>; comments of United

Finally, we refer the Committee to the comments (and the related responses to questions for the record) submitted in connection with the CFATS proceedings of the House Homeland Security Committee.⁷

We commend the Committee for its efforts, and we urge you to consider the priorities we've outlined above.

Sincerely,

Alaska Community Action on Toxics
Asbestos Disease Awareness Organization (ADAO)
Association of Occupational and Environmental Clinics
BlueGreen Alliance
Breast Cancer Prevention Partners
California Communities Against Toxics
Center for Science and Democracy at the Union of Concerned Scientists
Citizens' Environmental Coalition
Clean Air Council
Clean Power Lake County
Clean Water Action
Coalition for a Safe Environment
COCO-Coalition of Community Organizations
Coming Clean
Communications Workers of America, AFL-CIO
Community Housing and Empowerment Connections Inc.
Del Amo Action Committee
Earthjustice
Empire State Consumer Project
Environmental Health Strategy Center
Environmental Justice Health Alliance for Chemical Policy Reform
Faith in Place Action Fund
Greenpeace USA
Health Care Without Harm
Interfaith Worker Justice San Diego

Steelworkers International Union, August 2018. Available online: <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-1970>; comments of Lt. Gen. Honore *et al.* Available online: <https://www.regulations.gov/document?D=EPA-HQ-OEM-2015-0725-1631>; comments of the Coalition to Prevent Chemical Disasters, Oct. 29, 2014. Available online: <http://preventchemicaldisasters.org/wp-content/uploads/2016/05/coalition-to-prevent-chemical-disasters-rfi-comments-10-29-2014-final.pdf>;

⁷ Comments of the BlueGreen Alliance, March 12, 2019. Available online: <https://www.bluegreenalliance.org/wp-content/uploads/2019/03/031218-BlueGreen-Alliance-CFATS-Testimony-vFINAL.pdf>; comments of the International Chemical Workers Union Council, March 12, 2019. Available online: <https://docs.house.gov/meetings/HM/HM08/20190312/109050/HHRG-116-HM08-Wstate-MorawetzJ-20190312.pdf>; comments of People Concerned About Chemical Safety, March 12, 2019. Available online: <https://docs.house.gov/meetings/HM/HM08/20190312/109050/HHRG-116-HM08-Wstate-NixonP-20190312.pdf>.

Just Transition Alliance
Louisiana Bucket Brigade
Minority Workforce Development Coalition
New Jersey Work Environment Council
OVEC-Ohio Valley Environmental Coalition
People Concerned about Chemical Safety
PhilaPOSH
Public Citizen
RICOSH
Science and Environmental Health Network
Sciencecorps
Texas Environmental Justice Advocacy Services (t.e.j.a.s.)
United Food and Commercial Workers International Union (UFCW)
United Steelworkers Union
UPSTREAM
Utah Physicians for a Healthy Environment
Western New York Council on Occupational Safety and Health
WisCOSH, Inc.
Women's Voices for the Earth