



The Committee on Energy and Commerce

Internal Memorandum

February 1, 2012

MEMORANDUM

To: Members, Subcommittee on Environment and the Economy

From: Committee Staff

Subject: February 3, 2012, Hearing on Operation and Implementation of the Chemical Facility Anti-Terrorism Standards program (CFATS)

On Friday, February 3, 2012, the Subcommittee on Environment and the Economy will hold an oversight hearing at 9:30 a.m. in room 2123 of the Rayburn House Office Building on implementation and operation of the CFATS program by the U.S. Department of Homeland Security (DHS).

I. WITNESSES

The Honorable Rand Beers
Under Secretary for the National Protection and Programs Directorate (NPPD)
Department of Homeland Security

Penny J. Anderson
Director, Infrastructure Security Compliance Division, Office of Infrastructure Protection
Department of Homeland Security

II. BACKGROUND

Section 550 of Public Law 109-295 (Section 550)

Section 550 provides the DHS statutory authority to regulate chemical facilities for anti-terrorism security purposes. Section 550 requires the Secretary of Homeland Security to issue interim final regulations establishing risk-based performance standards for chemical facility security, as well as the development of vulnerability assessments and the development and implementation of site security plans by covered facilities. These regulations apply only to those facilities with chemicals that the DHS Secretary determines present high levels of security risk.

Department of Homeland Security Regulations Implementing Section 550

The Department of Homeland Security issued an “interim final rule” regarding chemical facility security in April 9, 2007, that took effect on June 8, 2007. Under it, facilities with

certain chemicals must perform a “top screen” (i.e., initial assessment of potential facility vulnerabilities) and submit this information to DHS so that DHS can determine if a facility's risk status merits further coverage under CFATS. High-risk facilities are then categorized into four risk-based tiers. DHS established different performance-based requirements for facilities assigned to each risk-based tier with high-risk facilities engendering additional responsibilities including (1) vulnerability assessment development, (2) site security plan formation and submittal, and (3) required implementation of the security plan. High-risk facilities may develop vulnerability assessments and Site Security Plans (SSPs) using alternative security programs so long as they meet the tiered, performance-based requirements of the interim final rule. The Secretary may disapprove submitted vulnerability assessments or site security plans that fail to meet DHS standards but not on the basis of the presence or absence of a specific measure. In the case of disapproval, DHS will identify areas of the assessment and plan that need improvement.

Implementation

At the outset of the program, DHS expected that roughly 30,000 facilities would be required to comply with the reporting requirements of the regulations, with only 6,000 falling into one of the four (4) high-risk categories requiring further regulation.

On March 31, 2011, DHS Undersecretary of NPPD, Rand Beers, testified before the Subcommittee on Environment and the Economy that CFATS covered 4,744 high-risk facilities nationwide and that 4,126 facilities had received final high-risk determinations. In addition, Mr. Beers stated that while more than 4,100 facilities have submitted Site Security Plans (or Alternative Security Programs) to date -- and DHS was in the process of reviewing these submissions, DHS was still issuing final tier notifications to facilities across all four risk tiers.

In addition, Mr. Beers testified that more than 39,000 facilities had registered with DHS and completed the top-screen process. Of these facilities, DHS considered more than 8,064 as high risk and required them to submit a site vulnerability assessment.

Also, Undersecretary Beers testified that DHS was in the process of filling all its positions for chemical facility security officers and inspectors and that DHS planned to continue to hire throughout the fiscal year. He stated, too, that DHS has a total of 188 people either hired or in the process of on-boarding. In addition, DHS has hired 97 of 103 field inspector positions and all of 14 field leadership positions. Mr. Beers further testified that DHS began “inspections” of Tier 1 facilities in February 2010, had completed approximately 175 “pre-authorization inspections” and 350 “compliance assistance visits, and had completed four “authorization” inspections. Facilities that have successfully implemented their approved SSPs and have passed an inspection are in compliance.

Improper Tiering and Delayed Notification under CFATS

To determine if a facility is to be regulated as high risk and, if so, which tier it falls into, DHS uses a computer system that assesses risk based upon potential worst-case scenarios for a particular facility. On July 21, 2011, DHS officials informed Committee staff that in May 2010, CFATS program officials realized they had used improper inputs and modeling in the computer assessments for the formal tiering process, resulting in improper tiering of 600 facilities between

the end of 2009 and spring 2010. In addition, DHS officials made clear that CFATS officials at that time consciously chose to not tell anyone about it. After personnel changes for the CFATS program, an internal investigation in Summer 2011 led to notifications of those facilities that had received a corrected CFATS risk tier as a result of a June 27, 2011, re-tiering process.

Specifically, 148 facilities were tiered at a lower risk tier, 99 facilities were found not to need a tier and no longer became subject to CFATS regulation, 41 facilities have either data errors that still need correction or have their redetermination under review, and 175 facilities remain in the same level but will have the risk levels for their chemicals of interest decrease. Total overall numbers, per DHS, as of January 30, 2012 are:

Tier Level	# of Facilities Before Error	# of Facilities Assigned to Tier After Correction	# of Facilities to Change Tier	# of Facilities Awaiting Final Tier
1	216	115	101	7
2	538	456	82	51
3	1,129	1,081	48	175
4	2,243	2,050	193	537

DHS Internal Memorandum on CFATS

Following the “mis-tiering” episode, the new Director of Infrastructure Security Compliance Division, Penny J. Anderson, and her Deputy Director, David M. Wulf, conducted an internal review of the entire CFATS and Ammonium Nitrate programs at DHS, summarizing their findings in a November 10, 2011, memorandum to Undersecretary Rand Beers and Assistant Secretary David Keil. Fox News ran a print story about the contents of the report on December 21, 2011.¹

The report identifies five (5) main programmatic challenges for the CFATS program: inadequate training capability, an overreliance on hired consultants for expertise, inappropriate transitions for new hires, uncertainty from extremely short program authorizations, and issues regarding job descriptions and the presence of an employee union. It also lists nine (9) staffing challenges for the CFATS program, including inexperienced managers, personnel placed in jobs for which they are not qualified, inadequate internal staff control, and lack of regulatory compliance expertise. Following the internal memorandum, the Department prepared a list of recommendations for correcting the troubles plaguing the program. It identifies the highest program priorities: speeding up the SSP review process, preparing for compliance inspections, and development and implementation of a personnel surety program for CFATS. The only legislative recommendation made in the report was a long-term extension of the existing program.

On January 30, 2012, the Department provided the Committee with the November 10, 2011, Anderson memorandum, together with additional attachments. The document is labeled “For Official Use Only.” Members who wish to study the Anderson memorandum prior to the February 3, 2012, hearing may obtain a copy from room 2125 Rayburn House Office Building.

¹ <http://www.foxnews.com/politics/2011/12/21/exclusive-beset-by-strife-at-dhs-office-future-anti-terrorism-program-now-in/>

III. Staff Contacts

If you have any questions regarding this hearing, please contact Dave McCarthy (dave.mccarthy@mail.house.gov) of the Majority Committee staff at (202) 225-2927.

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DHS Funding for Chemical Facility Security Regulation by Fiscal Year (in millions)

Fiscal Year	Request (\$ in millions)	Appropriation (\$ in millions)	Full-time Equivalents
FY2007	10	22	0
FY2008	25	50	21
FY2009	63	78	78
FY2010	103	103	246
FY2011	105	96	257
FY2012	99	93	242

Source: Department of Homeland Security, Preparedness Directorate, Infrastructure Protection and Information Security, *FY2007 Congressional Justification*; Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Protection and Information Security, *Fiscal Year 2008 Congressional Justification*; Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Protection and Information Security, *Fiscal Year 2009 Congressional Justification*; Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Protection and Information Security, *Fiscal Year 2010 Congressional Justification*; Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Protection and Information Security, *Fiscal Year 2011 Overview Congressional Justification*; Department of Homeland Security, National Protection and Programs Directorate, Infrastructure Protection and Information Security, *Fiscal Year 2012 Congressional Justification*; [H.Rept. 109-699](#); [P.L. 110-28](#); the explanatory statement for [P.L. 110-161](#) at *Congressional Record*, December 17, 2007, p. H16092; the explanatory statement for [P.L. 110-329](#) at *Congressional Record*, September 24, 2008, pp. H9806-H9807; [H.Rept. 111-298](#); [P.L. 111-242](#), as amended; [S.Rept. 112-74](#); and [H.Rept. 112-331](#).