

Congress of the United States
Washington, DC 20515

May 20, 2014

President Barack Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Obama:

Following the massive ammonium nitrate explosion on April 17, 2013 at West Fertilizer, which killed 14 responders, caused at least 226 injuries and leveled a major portion of the town of West, Texas, Members of Congress asked the Government Accountability Office (GAO) to assess whether there are regulatory gaps that leave workers and nearby communities inadequately protected against similar catastrophic events. This letter highlights the findings from GAO's report entitled *Chemical Safety: Actions Needed to Improve Federal Oversight of Facilities with Ammonium Nitrate* and recommends administrative and regulatory actions to correct deficiencies.

Ammonium nitrate is stored and used in communities all across the United States, putting untold numbers of Americans at risk of experiencing a catastrophic event stemming from poorly regulated ammonium nitrate storage facilities, similar to the West Fertilizer disaster. We urge you to carefully consider the implementation of GAO's recommendations in order to better protect the safety of responders and residents in communities across the country.

Background:

The widespread use of ammonium nitrate fertilizer—coupled with inadequate coordination and oversight by federal agencies charged with worker and community safety—has created concern that more catastrophic incidents could be imminent, unless real change is made in the way this commodity chemical is stored and handled in communities all across the United States.

We applaud your leadership in issuing an Executive Order on Improving Chemical Facility Safety and Security, which directed federal agencies to improve operational coordination with each other, as well as with state and local partners, and to modernize policies, regulations, and standards. We eagerly await the results of the Working Group set up to review this matter.

The West Fertilizer facility was not an unusual facility. According to a report in the *Dallas Morning News*, 20,000 people live within a half mile of the over 70 sites in Texas that reported having large stores of ammonium nitrate¹, with many of those sites using wood or other combustible materials to store the chemical. Ammonium nitrate has been involved in numerous

¹ Dallas Morning News, June 9, 2013, http://res.dallasnews.com/interactives/West/0609_Pointsofconcern.html

other major incidents in both the United States and Europe since 1986. A 2001 explosion in France caused 31 fatalities, 2,500 injuries and widespread community damage. As of August 2013, over 1,300 facilities in 47 states have reported the storage of ammonium nitrate to the Department of Homeland Security (DHS), but numerous obstacles have prevented the DHS from obtaining a complete count of facilities. Further complicating matters, the Occupational Safety and Health Administration (OSHA) lacks information about facilities containing ammonium nitrate, and lacks the resources to provide adequate oversight. At its current staffing and inspection levels, it would take federal OSHA— an estimated 139 years to inspect each workplace under its jurisdiction just once.²

GAO Findings

Major Data Gaps: DHS's database captures only a fraction of the ammonium nitrate storage and blending facilities in the U.S., and cannot be relied upon to identify the location of such facilities. GAO sought to quantify that gap and found that as few as one-third of the facilities reporting ammonium nitrate storage to state agencies also reported to DHS.³ Some of the lack of reporting to DHS may be due to non-compliance; however, other facilities are not required to file with DHS because they are exempted by statute, rules or reporting thresholds.⁴ Additionally, GAO was unable to quantify the extent of potential reporting gaps, because officials in some states would not provide information on the location of ammonium nitrate fertilizer storage facilities to GAO due to differing state interpretations of whether the Emergency Planning and Community Right-to-Know Act (EPCRA) restricted such release.⁵ Whether this obstacle could be faced by other federal agencies should be assessed.

Lack of Data Sharing: GAO reported that DHS does not currently share its facility data with OSHA, which impairs OSHA's ability to design a targeted inspection program to monitor facilities storing and handling large quantities of ammonium nitrate. OSHA also bases its targeting for high hazard chemical facilities, in part, on facility reporting under Environmental Protection Agency's (EPA) Risk Management Program (RMP). While EPA shares information with OSHA on a quarterly basis, ammonium nitrate is not listed as a covered chemical under the EPA's RMP regulations, thus leaving both agencies unable to provide adequate oversight.

² Death on the Job, May 2014, AFL-CIO, pp. 192

³ For example, only 52 of 189 facilities in Texas reporting ammonium nitrate storage were also reporting information to DHS.

⁴ Such as those operated or regulated by MTS, DOE, DoD or NRC, engaged in agriculture, or fall below reporting thresholds.

⁵ Of the states queried by GAO, Tennessee and Missouri would not provide data on facilities with ammonium nitrate, contending that EPCRA limited information disclosure only to inquiries about hazardous material present at a specified facility.

Outdated and Ineffective OSHA and EPA Regulations:

- OSHA's Explosives and Blasting Agents Standard covers ammonium nitrate storage and handling, but it has not been updated since 1971 and contains gaps that may allow unsafe facilities to operate and poor planning to continue. For example, the outdated standard continues to allow the use of flammable materials for the construction of ammonium nitrate storage bins.
- OSHA's Process Safety Management (PSM) standard and the EPA's RMP rule both exclude ammonium nitrate. OSHA previously considered expanding its PSM standard in the late 1990s to add reactive chemicals, such as ammonium nitrate, but this effort ceased in 2001 under the Bush Administration. In 2002, the Chemical Safety Board also recommended that OSHA and EPA cover reactive chemicals under their respective rules. The OSHA PSM standard contains a "retailer" exemption, further limiting the standard's reach.
- A recurring appropriations rider prevents OSHA from inspecting at least 60 facilities storing ammonium nitrate because the facility employs 10 or fewer employees⁶.

Lack of Fertilizer Industry Knowledge of OSHA Requirements: OSHA's requirements for storing ammonium nitrate fertilizer in its Explosives and Blasting Agents standard are not well known by the fertilizer industry. For example, only one in four material safety data sheets prepared by manufacturers of solid ammonium nitrate even listed OSHA's Explosives and Blasting Agents standard as applicable to storage and handling of the chemical. It is understandable that the industry lacked awareness of OSHA's requirements. Prior to the West, Texas explosion, OSHA had cited only one facility for violations of its ammonium nitrate storage requirements in its over 40 year history and that was in 1997 in Florida following an employee complaint. OSHA's release of a chemical advisory in August 2013 and a February 2014 letter to facilities have helped to clarify how OSHA's existing regulations apply to fertilizer facilities. However, additional compliance assistance from OSHA is needed.

Other Industrialized Countries Have More Protective Standards for Ammonium Nitrate: Countries in the European Union and Canada have developed far more protective ammonium nitrate standards than the U.S., including prohibiting the use of wood for storage facilities, mandating routine inspections and requiring risk management plans.

⁶ This appropriations rider was first adopted in 1983. It exempts those establishments with 10 or fewer employees that are within an industry classification where the injury and illness rates are below the national average, except where there is a fatality, multiple hospitalizations or an employee complaint. The rider contains no exception for processes which pose a risk of catastrophic explosion or chemical release.

Recommendations:

As noted by the GAO, major gaps must be filled and loopholes closed in order to assure adequate protection for workers and communities from the dangers of improper storage and handling of ammonium nitrate fertilizer. We urge the Administration to adopt the following recommendations, based on GAO's findings:

- 1) Update OSHA's 43-year old Explosives and Blasting Agents standard to comport with best practices, and include a prohibition on the use of wood or other combustible materials in ammonium nitrate storage facilities, as has been done in other countries.
- 2) Expand OSHA's PSM standard and EPA's RMP rules to cover ammonium nitrate, requiring facilities to assess risks and implement safeguards to prevent future accidents.
- 3) Remove the "retail facilities" exemption under OSHA's PSM standard, which precluded OSHA's PSM standard from applying to anhydrous ammonia handling processes at the West Fertilizer facility, and which would effectively bar OSHA inspections even if ammonium nitrate is subsequently covered under revisions to the PSM standard.
- 4) Increase OSHA compliance assistance to the fertilizer manufacturing and distribution industry on OSHA's existing standards, which cover ammonium nitrate fertilizer.
- 5) Once information has been widely shared, OSHA should develop a targeted inspection program at higher risk ammonium nitrate storage and handling facilities.

As GAO noted, an appropriations rider prevents OSHA from inspecting at least 60 facilities storing ammonium nitrate because the facility employs 10 or fewer employees. We applaud and urge your continued support for a provision in your Fiscal Year 2015 budget request for the Department of Labor, which would allow OSHA to carry out inspections at small businesses (with 10 or fewer employees), excluding small family farms, if such establishments have processes with highly hazardous chemicals covered under the OSHA Process Safety Management Standard or the EPA's Risk Management Program.

Almost every state has some communities at risk of experiencing a catastrophic event stemming from poorly regulated ammonium nitrate storage facilities. The GAO has identified actions that should be taken to mitigate these risks. We urge you to give GAO's recommendations careful

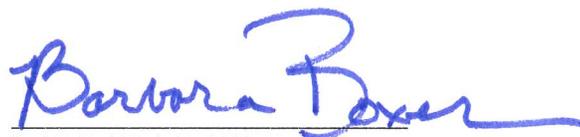
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consideration and look forward to working with you on our shared goal of improving protections that will prevent future disasters.

Sincerely,



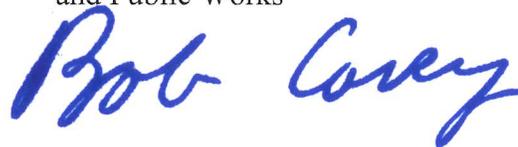
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Senior Democratic Member
Committee on Education and the Workforce



BARBARA BOXER
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Senate Committee on Environment
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JOE COURTNEY
Ranking Member
Workforce Protections Subcommittee
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ROBERT P. CASEY, JR.
Chairman
Subcommittee on Employment and
Workplace Safety
Senate Committee on Health
Education Labor and Pensions



PATTY MURRAY
Chairman
Senate Budget Committee

cc: The Honorable Thomas E. Perez, Secretary, Department of Labor
The Honorable Jeh Johnson, Secretary, Department of Homeland Security
Gina McCarthy, Administrator, Environmental Protection Agency
Mike Boots, Acting Chair, Council on Environmental Quality
Chemical Facility Safety and Security Working Group

Enclosure