

Thomas McGarity, Texas Perspectives: Before scuttling regulations, remember the deadly, destructive West explosion

Posted: Tuesday, November 29, 2016 12:01 am

It seems clear that in the coming years of Republican control many federal regulatory protections will be rolled back. No doubt some Americans voted for Donald Trump because of his broad, nonspecific campaign promises to relieve companies of the burden of complying with federal regulations.

But his supporters may be in for a surprise.

Take, for example, the April 17, 2013, fire at the West Fertilizer Company's fertilizer blending and distribution facility in West, Texas. The fire led to an enormous explosion that killed 15 people, hospitalized 260 others, destroyed the plant and destroyed or damaged 150 nearby buildings.

The fuel for the blast was 40 to 60 tons of highly explosive fertilizer-grade ammonium nitrate stored at the facility.

The explosion had many causes, but one contributor was the government's failure to protect Texans from the huge bomb that was primed to explode in the middle of McLennan County.

A comprehensive investigation of the explosion by the U.S. Chemical Safety and Hazard Investigation Board concluded that the federal Occupational Safety and Health Administration's (OSHA) efforts to oversee facilities that stored and handled ammonium nitrate prior to the explosion "fell short."

OSHA could have prevented the tragedy if its standards for explosives and blasting agents had been clearer and if it had not inadvertently omitted ammonium nitrate from the list of chemicals covered by its Process Safety Management standards.

And it would have helped if agency inspectors had visited the facility more frequently than the one time that they inspected it nearly 30 years prior in 1985.

President Barack Obama responded to the tragedy with an August 2013 executive order requiring OSHA, the Department of Homeland Security and the Environmental Protection Agency to come up with a plan to improve safety and security regulations for facilities that manufacture, store and distribute explosive chemicals.

OSHA then summarized its regulations on its blog and told its inspectors that fertilizer facilities storing ammonium nitrate were in fact covered by the regulation. It added that bins made of wood are acceptable so long as the wood is treated with an impermeable coating.

Earlier this year, the Chemical Safety and Hazard Investigation Board recommended that the agency go further to include ammonium nitrate in its stringent Process Safety Management regulations. Or that it

amend its explosives and blasting standard to clarify that it applies to agricultural chemical facilities; require storage bins to be composed of noncombustible material; and require sprinkler systems in all such facilities.

But here is where the rubber meets the road.

The anti-regulation agenda that Trump and other Republicans promised, and that many McLennan County voters seem to favor, will probably block these kinds of safety rules needed to protect against future disasters.

Any attempt to make the regulations more protective would also encounter a firestorm of opposition from the fertilizer industry and the U.S. Chamber of Commerce, which would argue that more protective regulations will put small companies out of business and destroy jobs.

In the meantime, the president-elect has already promised to revoke President Obama's chemical safety executive order. And it's highly unlikely that the new Congress will appropriate more funds for OSHA enforcement.

OSHA is also reluctant to implement the recommendation because it would require a years-long rule-making process that has become so cumbersome and expensive that the agency avoids it whenever possible. It would have to prepare an extensive cost-benefit analysis that would have to be approved by the White House Office of Information and Regulatory Affairs before it could publish regulations for public comment.

In truth, the proposed recommendations are quite modest as regulatory protections go, and compliance would not be especially burdensome for local fertilizer blending and distribution facilities like the one in West. An OSHA regulation implementing those recommendations would not be an example of regulatory overreach or a "bureaucracy run amok." It would be a sensible response to a serious problem that has slipped through the cracks.

Rural Americans need to tell the incoming administration that when they voted for change, they did not vote to roll back health, safety and environmental laws that protect them from explosions and other hazards that threaten their communities.

Thomas O. McGarity is a professor in the School of Law at The University of Texas at Austin. He has written or co-written five influential books: "The Preemption War: When Federal Bureaucracies Trump Local Juries," "Bending Science: How Special Interests Corrupt Public Health Research," "Workers at Risk," "The Law of Environmental Protection" and "Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy"