



Chemical Industry Update

www.BlankRome.com

February 2007 Vol. 1

Chemical Facility Security: DHS's Proposed Interim Anti-Terrorism Standards

New Development

On December 28, 2006, the Department of Homeland Security (DHS) published an Advance Notice of Rulemaking (ANR) titled "Chemical Facility Anti-Terrorism Standards." When finalized, the ANR will implement Section 550 of the Homeland Security Appropriations Act of 2007, which requires DHS to promulgate "interim final regulations" for the security of chemical facilities by April 4, 2007. The interim final regulations will require certain chemical facilities to develop site security plans utilizing risk-based performance standards. While DHS is not required to seek comments, the ANR requested comments on the proposed text of the regulations and on several policy issues integral to the development of a chemical facility security program. Comments were due by February 7, 2007.

Background

Since the terrorist attacks of September 11, 2001, Congress recognized the security risks associated with chemical facilities and has been debating how chemical facilities should be regulated, as Congress believed the voluntary programs adopted by much of the chemical industry were inadequate.

Last year, the House and Senate committees with jurisdiction for homeland security approved the Chemical Facility Anti-Terrorism Act of 2006, H.R. 5695 and S. 2145, respectively. When it became clear that neither bill would become law before Congress adjourned, an interim chemical security regime was included within the DHS Appropriations Act, which was signed into law in October 2006. We discussed this in the October 2006 *Alert* "[Chemical Facility Security: It's Here, but What Does It Mean?](#)".

Advance Notice of Rulemaking

Overview

The ANR discusses multiple regulatory and implementation issues, including triggers for the applicability of the chemical security regulations. Chemical facilities with the most significant risk profiles, however, would be addressed first, with a phase-in period for other chemical facilities. In short, chemical facilities meeting certain risk profiles would have to complete and submit a "Top Screen" risk assessment. DHS would use the assessment to determine if a particular chemical facility presents a high level of security risk such that it should be covered by the regulations. If so, the chemical facility would have to pre-

pare and submit for approval a vulnerability assessment and a site security plan. DHS defines "present high levels of security risk and high risk" to mean a facility that presents a high risk of significant adverse consequences for human life or health, national security, and/or critical economic assets if subjected to a terrorist attack, compromise, infiltration, or exploitation.

The ANR is organized in four main sections: Section I provides a summary of existing federal regulatory authorities related to chemical facility security and safety; Section II discusses the requirements of Section 550; Section III describes the proposed implementation schedule, with an immediate priority placed on high-risk chemical facilities; and Section IV addresses other legal and programmatic issues. DHS notes that regulations promulgated pursuant to Section 550 will build on pre-existing federal security initiatives and chemical safety programs.

Of note, DHS discusses in detail a risk assessment methodology it developed in conjunction with the American Society of Mechanical Engineers for the nation's critical infrastructure—the Risk Analysis and Management for Critical Asset Protection (RAMCAP). RAMCAP is composed of two parts—one is a

preliminary screening tool (“Top Screen”) and the other is a more thorough vulnerability assessment methodology. Top Screen is designed to be used through a secure DHS website. For chemical facilities, Top Screen solicits answers to a series of questions intended to assess the level of damage that could result from a terrorist incident. Questions relate to the potential loss of life; potential loss of the capability to execute a critical mission; exclusions; the presence of chemicals on site; security issues associated with such chemicals; and health and safety consequences; among others.

Significantly, DHS concludes that “chemical facility” does not turn on the name or type of facility, but rather on whether the facility uses, stores, or otherwise possesses dangerous chemicals. In addition, DHS states that all chemical facilities will not be regulated under Section 550, but only those that qualify as “high risk” facilities. Thus, DHS must determine which facilities present sufficient risk to be regulated and will draw on many sources, including the EPA Risk Management Plan (“RMP”) list, the schedule of chemicals from the Chemical Weapons Convention, the DOT Hazardous Materials list, and other sources.

DHS Request for Comments

DHS requested comments on the issues identified below, to assist the agency in developing the interim final regulations:

- Appropriate sources of information for evaluating chemical facility risks and whether it should look to hazard classes of particular chemicals.
- The RAMCAP Top Screen process.
- Contacting chemical facilities individually to request that they complete the Top Screen process, or publishing a notice

requesting that all facilities fitting a certain profile complete the Top Screen process. DHS also requested comments on whether RMP facilities, Chemical Weapons Convention facilities, and other facilities should complete the Top Screen process.

- Risk-based tiering among high-risk facilities, e.g., how many tiers, the criteria for differentiating among tiers, how the performance standards should differ among tiers, and what levels of regulatory scrutiny should apply to the tiers.
- Appropriate background check methodologies and standards, querying whether an access restriction, such as contained in the Transportation Worker Identification Credential program, would be appropriate.
- The viability and practicality of a phasing proposal, as it is considering a phased implementation. Phase 1 would begin immediately following issuance of the interim final rule in April and would focus on a select number of chemical facilities that pose the most significant risk to neighboring populations based on data from the RMP program and other sources. DHS contemplates Phase 1 would be completed during the first year and Phase 2 during the second year.
- Economic impacts, monetary and other costs that will be incurred, and benefits of the rulemaking.
- The interaction of the proposed regulations with existing state and local laws and regulations. DHS also discusses federal preemption and notes that state or local law may not frustrate the purpose of a federal law or reg-

ulatory program or pose an “obstacle” to such a regime. DHS then states that a state measure frustrating the balance achieved by risk-based performance standards will be preempted because it could create ambiguity that would delay or compromise implementation of security measures at the facility.

- The proposed performance standards and whether performance standards contained in the Maritime Transportation Security Act of 2002 should be adopted in modified form.

Recommendations

Since the applicability triggers have not been specified as yet, owners and operators of chemical manufacturing facilities, as well as owners and operators of facilities that store or utilize chemicals, should monitor the agency’s rulemaking process, in view of the discretion given to DHS in terms of interpreting the requirements and the significant impact this rule could have on facility operations. ■

For additional information:

If you have questions or desire assistance, please contact:

Jeanne Grasso
grasso@BlankRome.com

Jane Barrett
barrett@BlankRome.com

Jonathan Waldron
waldron@BlankRome.com

Margaret Hill
mhill@BlankRome.com

or

Charles Wagner
wagner@BlankRome.com

Or call 202.944.3000
or 215.569.5500.

Additional information on Blank Rome may be found on our website
www.BlankRome.com.



Chemical Industry Alert

www.BlankRome.com

October 2006 Vol. 1

Chemical Facility Security: It's here, but what does it mean?

New Development

On October 4, 2006, the President approved a new chemical industry security law by signing H.R. 5441, the Department of Homeland Security Appropriations Act of 2007 ("DHS Appropriations Act"). Section 550 of the DHS Appropriations Act pertains to chemical facility security, and requires chemical facilities to conduct vulnerability assessments and implement site security plans. Congress appropriated \$10 million to the Department of Homeland Security ("DHS") for implementation of this program. DHS must issue interim final regulations implementing the new provision by April 4, 2007.

Background

Since the terrorist attacks of September 11, 2001, Congress recognized the security risks associated with chemical facilities and has been debating how chemical facilities should be regulated, as Congress believed the voluntary programs

adopted by much of the chemical industry were inadequate. This year, the House and Senate Committees with jurisdiction for homeland security approved the Chemical Facility Anti-Terrorism Act of 2006, H.R. 5695 and S. 2145, respectively. The House and Senate versions, however, differed significantly. When it became clear that neither bill would become law before the current Congress adjourned, an effort commenced to include interim chemical security legislation within the DHS Appropriations Act. On September 29, 2006, the House of Representatives and the Senate enacted the Conference Report on H.R. 5441, the DHS Appropriations Act, that was subsequently signed by the President.

Chemical Security Legislation

Overview.

The newly enacted chemical security legislation requires the Secretary of DHS to issue interim final regulations within six months of enactment (*i.e.*, by April 4, 2007)

establishing risk-based performance standards for the security of those chemical facilities that "present high levels of security risk." The regulations will require chemical facilities to perform vulnerability assessments and develop and implement facility security plans, which must be approved by the Secretary. There is no date by which the plans must be submitted to or approved by the Secretary or, for that matter, implemented. The Secretary also has the discretion to approve "alternate security programs" established by private sector entities.

Applicability.

The facilities that will be subject to this requirement (*i.e.*, those that "present high levels of security risk,") will be defined in the rulemaking. However, the legislation specifically exempts those facilities already subject to the Maritime Transportation Security Act of 2002; "public water systems" as defined in the Safe Drinking Water Act; and "treatment works" as defined in the Federal Water Pollution Control Act; as well

as any facility owned or operated by the Departments of Defense or Energy, or any facility regulated by the Nuclear Regulatory Commission.

Site Security Plans.

Facilities will have the discretion to develop plans to appropriately address risks identified in the vulnerability assessment and the Secretary may not disapprove a plan based on the presence or absence of any particular security measure. Facilities may utilize layered security measures that, when used in combination, address the identified vulnerabilities and satisfy the risk-based performance standards.

Sunset.

The interim regulations issued under the DHS Appropriations Act will sunset in three years (*i.e.*, on October 4, 2009) or upon issuance of interim or final regulations promulgated under other laws that establish chemical security requirements, whichever comes first.

Protection of Information.

Information developed pursuant to the interim regulations, including vulnerability assessments, site security

plans, and other security-related records, will be given protections from public disclosure consistent with the Transportation Security Administration’s regulations governing Sensitive Security Information.

Audits and Inspections.

The Secretary is required under the DHS Appropriations Act to audit and inspect chemical facilities for the purpose of determining compliance with the interim regulations. There is no time period set forth, however, for the frequency of the inspections.

Penalties.

If the Secretary determines a chemical facility is not in compliance with the interim regulations, the Secretary must provide written notification of the deficiencies, provide an opportunity for consultation, and issue an order to comply by a date determined appropriate by the Secretary. Non-compliance with an order may result in civil penalties up to \$50,000 and an order to cease operations until such time as the deficiencies are remedied.

Recommendations

Since the term chemical facility has not been defined, owners and operators of chemical manufacturing facilities, as well as owners and operators of facilities that store or utilize chemicals, should closely follow this issue and the related DHS rulemakings in view of the discretion given to DHS in terms of interpreting the requirements and the significant impact this could have on facility operations. ■

For additional information:

If you have questions or desire assistance, please contact:

Jeanne Grasso
grasso@BlankRome.com

Heather Podesta
podesta@BlankRome.com

Jane Barrett
barrett@BlankRome.com

or

Jon Waldron
waldron@BlankRome.com

Or call 202.944.3000

Additional information on Blank Rome may be found on our website www.BlankRome.com.

To be added to or removed from any or all Blank Rome notices, please call 215.569.5500 ext. 4493 or email update@BlankRome.com

Office Locations		
1200 N. Federal Highway	Boca Raton, FL 33432	561.417.8100
210 Lake Drive East	Cherry Hill, NJ 08002	856.779.3600
201 East Fifth Street	Cincinnati, OH 45202	513.362.8700
11 Duddell Street, Central	Hong Kong	852.2537.8628
405 Lexington Avenue	New York, NY 10174-0208	212.885.5000
One Logan Square	Philadelphia, PA 19103-6998	215.569.5500
200 W. State Street	Trenton, NJ 08608	609.278.2320
600 New Hampshire Avenue, N.W.	Washington, DC 20037	202.772.5800
1201 Market Street	Wilmington, DE 19801	302.425.6400