

Washington Watch

Chemical Facility Anti-Terrorism Standards: The Final Rule Is Out, But the Debate Continues

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On April 2, 2007, the U.S. Department of Homeland Security (DHS) issued its much-awaited interim final rule on anti-terrorism standards for chemical facilities. The rule was published a week later in the *Federal Register*.¹ The interim final rule is quite similar to the proposed rule that DHS published under an Advance Notice of Proposed Rulemaking in December 2006.²

The interim final rule does manage to address several of the more controversial issues generated by the December proposal. As is usually the case, however, not everyone is happy with the outcome.

This column briefly reviews the legislative mandate authorizing the rule, summarizes the interim final regulation, and outlines the key issues that continue to inspire debate on the hot topic of chemical plant security.

Section 550 of the Homeland Security Appropriations Act

DHS issued the interim final rule in response to Congress's directive in Section 550 of the Department of Homeland Security Appropriations Act of 2007, which President Bush signed into law on October 4, 2006.³ Section 550(a) provides in its entirety:

No later than six months after the date of enactment of this Act, the Secretary of Homeland Security shall issue interim final regulations establishing risk-based performance standards for security of chemical facilities and requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities: *Provided*, That such regulations shall apply to chemical facilities that, in the discretion of the Secretary, present high levels of security risk; *Provided further*, That such regulations shall permit each such facility, in developing and implementing site security plans, to select layered security measures that, in combination, appropriately address the vulnerability assessment and the risk-based performance standards for security for the facility; *Provided further*, That the Secretary may not disapprove a site security plan submitted under this section based on the presence or absence of a particular security measure, but the Secretary may disapprove a site security plan if the plan fails to satisfy the risk-based performance standards established by this section; *Provided further*, That the Secretary

may approve alternative security programs established by private sector entities, Federal, State, or local authorities, or other applicable laws if the Secretary determines that the requirements of such programs meet the requirements of this section and the interim regulations; *Provided further*, That the Secretary shall review and approve each vulnerability assessment and site security plan required under this section; *Provided further*, That the Secretary shall not apply regulations issued pursuant to this section to facilities regulated pursuant to the Maritime Transportation Security Act of 2002, Public Law 107-295, as amended; Public Water Systems, as defined by section 1401 of the Safe Drinking Water Act, Public Law 93-523, as amended; Treatment Works as defined in section 212 of the Federal Water Pollution Control Act, Public Law 92-500, as amended; any facility owned or operated by the Department of Defense or the Department of Energy, or any facility subject to regulation by the Nuclear Regulatory Commission.

Based on the explicit language in Section 550, DHS properly concluded that interim final regulations establishing chemical facility anti-terrorism standards were required to be promulgated by April 4, 2007, leaving little time for the Department to complete a complex and difficult task.

Crafting the Rule

DHS noted in its proposed rule that the 2007 Appropriations Act did not require prior notice and comment on the interim final regulations, but wisely emphasized its belief that “public comment will be very helpful in formulating the interim final rule and structuring the program.”⁴

The proposed rule properly discussed “a number of issues related to promulgating chemical facility security regulations.” It invited comments on these issues, as well as “on proposals and ideas discussed in the preamble but not contained in the regulatory text because the Department is interested in comments on alternative approaches.”⁵

It should be emphasized that Section 550 is merely a “rider” to the 2007 appropriations bill for the Department of Homeland Security. As such, there is virtually no legislative history on the section. DHS notes in the preamble to its proposed rule that “Section 550 of the Act is a compact two-page set of mandates establishing the parameters of the Federal government’s first regulatory program to secure chemical facilities against possible terrorist attack.”⁶

Thus, from the outset, DHS had a challenging and controversial job to undertake in a short period of time. The Department had little guidance, and no more than a “set of mandates” on which to base comprehensive chemical facility anti-terrorist standards.

The chemical sector understandably took an early and active role on formulation of the proposed rule, working with DHS and other federal agencies through the Chemical Sector Coordinating Council.⁷ The Council consists of 16 trade associations with interests in the chemical sector, including the American Chemistry Council (ACC).

In crafting its proposal, DHS worked hard to solicit the views of these organizations and other diverse stakeholders. The Department met with many groups to ensure that the proposed rule reflected the diversity of perspectives offered on this controversial subject. DHS solicited comment on numerous aspects of its proposed rule, including:

- the proposed risk assessment process;
- whether DHS should request that the risk assessment process be completed by facilities subject to the U.S. Environmental Protection Agency's (EPA's) Clean Air Act Risk Management Program, by certain facilities subject to the Chemical Weapons Convention, and by other specified types of facilities;
- what constitute appropriate sources of information or methodologies for evaluating chemical facility risks; and
- to the extent DHS considers the nature of particular chemicals when classifying facilities, whether classifications should be based on a hazard-class approach.

The Interim Final Rule

As DHS proposed initially, the interim final rule will regulate high-risk chemical facilities. It will direct its authority to chemical manufacturers and other facilities that stage or use chemicals identified by the Department in the interim final rule in threshold quantities specifically determined by DHS.

Chemicals of Interest

The Department proposed a list of "DHS Chemicals of Interest" in Appendix A to the interim final rule.⁸ Comments on the list of chemicals are due by May 9, 2007. In identifying these chemicals, DHS looked to existing sources of information, including EPA's Risk Management Program, the Chemical Weapons Convention, and the Department of Transportation's hazardous materials regulations.

The list is also based on several criteria, including how the release of a chemical could adversely affect human health or the environment, whether a chemical could be used as a weapon or converted to a weapon, and whether the chemical could be mixed with other materials and used for sabotage.

Covered Facilities

In the interim final rule, DHS clarified that the term “chemical facility” means “any establishment that possesses or plans to possess, at any relevant point in time, a quantity of a chemical substance determined by the Secretary to be potentially dangerous or that meets other risk-related criteria identified by the Department.”⁹

This definition is quite broad, and could potentially take in many industrial or commercial sites that use or store significant quantities of chemicals.

Not all “chemical facilities” will be “covered facilities” under the rule, however. In the interim final rule, a covered facility is defined to mean a chemical facility that is determined “to present high levels of security risk, or a facility that [DHS] has determined is presumptively high risk.”¹⁰

The reference to presenting “high levels of security risk” and the term “high risk” denote chemical facilities that, in the discretion of the Secretary of Homeland Security, present a “high risk of significant adverse consequences for human life or health, national security and/or critical economic assets if subjected to terrorist attack, compromise, infiltration, or exploitation.”¹¹

These definitions effectively narrow the range of facilities to be regulated under the rule. Nevertheless, the absence of specific criteria to guide DHS’s sole discretion as to which substances should be included on its “chemicals of interest” list, and what quantities of chemicals will trigger regulation, has made some facilities nervous.

Top-Screen Risk Analysis and Risk-Based Tiering

DHS will determine the level of security risk posed by each facility based in large part on information the facility provides in a “top-screen” questionnaire. The Department will create up to four “risk-based tiers,” assign each covered facility to one of the tiers, and prioritize facilities within each tier.

These placement determinations are to be “based on any information available” that (relying solely on DHS’s discretion) indicates “the potential that a terrorist attack involving the facility could result in significant adverse consequences for human life or health, national security or critical economic assets.”¹²

Implementation of the Interim Final Rule

Covered facilities believed to pose the greatest potential risk will be addressed first under the interim final rule. Each covered facility will be required to conduct a Security Vulnerability Assessment (SVA), followed by development and implementation of a Site Security Plan (SSP) designed to satisfy risk-based performance standards (RBPSs) that DHS will develop at a later time.¹³

DHS will review each covered facility's SVA and SSP, conduct a site inspection, and determine whether the facility has properly discharged its obligations under the rule. Both the SVA and the SSP must be approved by the Department.

Facilities may challenge certain Department decisions, including SSP disapproval, determinations that find "a high level of security risk," and placement within the DHS risk-tier scheme.¹⁴

DHS is authorized to issue orders that compel facilities to achieve compliance with the RBPSs and other relevant provisions of Section 550. If a facility has achieved compliance, DHS will issue a Letter of Approval.

Failure to achieve compliance with the rule may result in issuance of an Order of Compliance. DHS may impose civil penalties of not more than \$25,000 per day for instances of non-compliance.

DHS intends to implement the regulations in a phased manner "selecting certain chemical facilities for expedited initial processes under these regulations and identifying other chemical facilities or types or classes of chemical facilities for other phases of program implementation."¹⁵ DHS retains the "flexibility to designate particular chemical facilities for specific phases of program implementation based on potential risk or any other factor consistent with [the final rule]."¹⁶

Finally, and importantly, DHS takes the position that its rule preempts certain state and local measures that conflict or interfere with the rule or its purpose. As discussed below, this aspect of the rule has been the subject of considerable debate.

Key Issues and Controversies

Almost immediately after the proposed rule was issued in December, controversy erupted. A review of the comments submitted on the proposal, and DHS responses as noted in the interim final rule, reveals several key issues.

Risk-Based Tiering

The first set of issues concerns the scope of the chemical security program and the concept of risk-based tiering. Under the DHS rule, tiers are used to differentiate among covered facilities, with the most rigorous levels of protection applying to facilities in the highest risk tier. Forthcoming guidance that DHS intends to issue on the application of the risk-based performance standards will address more precisely which standards apply to the different tiers.

Some interested parties, including Senator Joseph Lieberman (I-CT), Chair of the Senate Homeland Security and Governmental Affairs Committee, believe DHS has interpreted its authority under Section 550 too narrowly.¹⁷ In his comments on the proposed rule, Senator Lieberman acknowledges that DHS cannot regulate every facility that manages chemicals. He notes, however, that the Department's proposal "to separate the covered facilities into tiers and to

address the tiers in phases" raises "the possibility that only a small number of facilities will be required to submit vulnerability assessments and security plans, and to have those plans reviewed by DHS, in a timely manner."¹⁸

Similarly, the U.S. Public Interest Research Group (U.S. PIRG) expressed concern with the limited scope of the proposal, noting that "DHS is either reluctant or unwilling to exercise the authority necessary to establish a robust and protective program."¹⁹

Some industry representatives expressed favorable opinions of the proposed rule. For example, ACC supported DHS's designation of "high-risk" facilities (as a subset of chemical facilities posing risks of greatest significance) and has expressly endorsed DHS's tiered system of regulation.²⁰

By contrast, the American Forest & Paper Association (AF&PA) urged DHS to eliminate tiering altogether or to revise the proposal as to the use of tiers.²¹ According to AF&PA, DHS was too vague about how tiers would be established and how facilities would be affected by being placed in a particular tier.

AF&PA suggested that DHS eliminate the tiers. Alternatively, if tiers were retained, AF&PA asked DHS to ensure that all tiers are "truly high-risk"; develop clear and objective criteria for delineating tiers; and ensure that tiers have a clear purpose (including phased implementation of the interim final rules so that they apply to the highest-tier facilities first, and allowing for "guidance that clearly makes the burden of the risk-based performance standards proportionate to the tier involved").²²

In the interim final rule, DHS decided to retain the tiered model, reasoning that risk-based tiering allows the Department to focus its efforts on the highest risk facilities first. DHS noted that it will use a variety of factors in determining where to place facilities within the tiered system, including information about:

- public health and safety risks,
- economic impact and mission-critical aspects of the chemicals present at the facilities, and
- chemical threshold quantities.

Omission of "Safer" Chemical and Technology Options

A second area that generated considerable comment relates to the proposed rule's failure to include any reference to using "safer chemicals and technologies" to help reduce risk.

According to Senator Lieberman's comments, during consideration of the House and Senate chemical security bills, there "was considerable discussion of the extent to which using less dangerous chemicals or technologies could help deter a terrorist attack on a facility, or help limit the consequences if an attack does occur."²³ While Senator Lieberman acknowledges that

DHS cannot require implementation of a safer chemical or technology, he states that “there is no reason covered facilities should not be directed, or at a bare minimum encouraged, to consider these approaches”²⁴

Greenpeace expressed similar concerns.²⁵ Noting that DHS has “wide discretion” in setting risk-based performance standards, the organization urged DHS to establish standards that deter attack or mitigate the consequences of attack “by safeguarding, reducing or eliminating the risk or desirability of the facility as a target.” In the view of Greenpeace, this could be achieved by “issuing guidance to suggest that counter measures include the use of safer, more secure technologies to meet the performance standard or opt out of the regulations entirely.”²⁶

U.S. PIRG went even further. According to this organization, “[o]ne of the primary focal points of legislative efforts to secure chemical facilities has been the availability of inherently safer technologies (IST).” In U.S. PIRG’s view, DHS has ignored the IST component, and “has consistently shown disdain for even considering the availability of safer technologies as effective security measures.”²⁷ U.S. PIRG encouraged DHS to use “the site security plan guidance document to encourage the adoption of safer technologies as an effective method of consequence reduction.”²⁸

Industry groups largely remained silent on the IST controversy. In general, they have endorsed the DHS interpretation of Section 550 with respect to the set of performance standards set out under the proposal.

In responding to comments on the IST issue, DHS noted that Section 550 prohibits the Department from disapproving a site security plan “based on the presence or absence of a particular security measure,” including inherently safer chemicals or technologies. DHS noted, however, that covered facilities are “free to consider” such options and that their use may “reduce risk and regulatory burdens.”

Preemption of State and Local Regulations

A third area of debate relates to the rule’s preemptive effect on certain state and local regulations.

Senator Lieberman was particularly upset with the proposed rule in this regard. He urged that the DHS regulations remain silent on the issue of preemption, as Congress did in crafting Section 550. In his comments, Senator Lieberman remarked, “It is clear from the legislative history that Section 550’s silence on the question of preemption was a deliberate decision by Congress, not simply an oversight.”²⁹

He noted that the Chemical Facility Anti-Terrorism Act of 2006 (S. 2145), as reported out by the Senate Homeland Security and Governmental Affairs Committee, expressly included a non-preemption provision “indicating that the federal regulation should only displace a state or local regulation where there was a direct and unavoidable conflict.”³⁰

U.S. PIRG and Greenpeace expressed similar concerns about the preemption issue.³¹

By contrast, industry groups (including ACC and AF&PA, among others) strongly supported DHS's position. ACC noted that it did "not believe existing state chemical facility security programs, as currently implemented, conflict with the draft federal program."³²

Dow Chemical Company offered a slightly different perspective in its comments. The company noted its concern over "[t]he federalism disputes that will likely arise between Federal government and the states over the State Law and the scope of preemption."³³ Nonetheless, the company stated, "Dow supports the position that DHS has taken in the proposed rule. Dow is convinced that a strong Federal and state partnership is critical to success in addressing chemical facility security."³⁴

In the interim final rule, DHS went out of its way to clarify that its regulation does not "wholly displace state and local laws." Rather, state and local laws cannot be allowed to conflict or interfere with federal measures. In other words, the federal regulation "is not intended to be the equivalent of 'field preemption' for facilities determined to be high risk."³⁵

Next Steps

Congress directed DHS to issue final chemical plant security regulations by April 4, 2007 -- and DHS met the deadline with two days to spare. Even with the interim final rule out, however, integral parts of the process have yet to unfold as of this writing in spring 2007.

The "chemicals of interest" list will not be finalized until sometime after May 9, 2007, when the relevant comment period ends. Any facility that possesses threshold quantities of any chemical on the list will be required to complete an electronic "top-screen" questionnaire.³⁶ The information provided by the facility will help DHS determine the facility's vulnerability to terrorist attack, and plan for any consequences of such an attack.

Other important aspects of Section 550 will be defined in yet-to-be issued DHS guidance documents. Some stakeholders are particularly concerned about how these guidance documents may be affected by new Executive Order 13422, which governs regulatory planning across the federal government.³⁷

This executive order, which was issued in January 2007, imposes new requirements on agencies before they can draft regulations or (importantly for this discussion) issue guidance documents. Detractors claim that it gives the Office of Management and Budget (OMB) broad authority to control federal agency rulemaking and the scope of guidance documents -- potentially including those issued by DHS to give effect to Section 550. Critics also claim that the executive order will further politicize the rulemaking process and impede the exercise of federal agency discretion.

Whether the new executive order will have any effect (let alone a material one) on DHS's implementation of Section 550 is unclear. Plainly, however, some stakeholders are concerned about the possibility of greater OMB engagement in federal agency rulemaking and in development of guidance documents.

Much will depend on whether DHS seeks public comment on the guidance documents. The absence of public comment, coupled with enhanced OMB review of these guidance documents, could well be the subject of future controversy.

Another important question that remains unanswered is what will eventually replace Section 550. By law, this section will expire in October 2009. Section 550 was adopted with the expectation that Congress will enact more permanent, comprehensive legislation to supersede it. Whether such legislation will be enacted, and how it will align with DHS's current framework for implementing Section 550, are unclear.

What is clear, however, is that Congress's makeup has changed considerably since the adoption of Section 550, which was added to the Homeland Security Appropriations Act before the Congressional elections of 2006. There is no guarantee that a new Congress will see things in the same light as the legislators who adopted Section 550.

Further, the 2008 elections will bring in a new President, whose views on the subject are certain to influence the outcome of any new legislation on a topic as hot as chemical facility anti-terrorism standards.

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Notes

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- ¹ Chemical Facility Anti-Terrorism Standards, Final Rule, 72 Fed. Reg. 17687 (April 9, 2007) (to be codified at 6 C.F.R. pt. 27).
- ² Chemical Facility Anti-Terrorism Standards, Proposed Rule, 71 Fed. Reg. 78275 (December 28, 2006).
- ³ Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 550(a), 120 Stat. 1355 (2006).
- ⁴ 71 Fed. Reg. at 78280.
- ⁵ *Ibid.*
- ⁶ *Ibid.*
- ⁷ See Chemical Sector Coordinating Council, <http://www.chemicalcybersecurity.com/coordinatingcouncil.cfm>.
- ⁸ 72 Fed. Reg. at 17739.
- ⁹ *Ibid.* at 17690, 17730 (to be codified at 6 C.F.R. pt. 27.100).
- ¹⁰ *Ibid.* at 17730.
- ¹¹ *Ibid.*
- ¹² *Ibid.* at 17731 (to be codified at 6 C.F.R. pt. 27.205).
- ¹³ *Ibid.* at 17731-17732 (to be codified at 6 C.F.R. pts. 27.215, 27.225, 27.230).
- ¹⁴ *Ibid.* at 17737 (to be codified at 6 C.F.R. pt. 27.245).
- ¹⁵ *Ibid.* at 17730 (to be codified at 6 C.F.R. 27.115).
- ¹⁶ *Ibid.*
- ¹⁷ Senator Joseph Lieberman, Comments on Chemical Facility Anti-Terrorism Standards, DHS-2006-0073-0076.1 (February 7, 2007) (hereinafter Lieberman Comments). Available online at <http://www.regulations.gov>.
- ¹⁸ *Ibid.* at 2.

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- ¹⁹ U.S. Public Interest Research Group, Comments on Chemical Facility Anti-Terrorism Standards, at 3, DHS-2006-0073-0032.1 (February 7, 2007) (hereinafter PIRG Comments). Available online at <http://www.regulations.gov>.
- ²⁰ American Chemistry Council, Comments on Chemical Facility Anti-Terrorism Standards, at 3, DHS-2006-0073-0078.1 (February 7, 2007) (hereinafter ACC Comments). Available online at <http://www.regulations.gov>.
- ²¹ American Forest and Paper Association, Comments on Department of Homeland Security's Chemical Facility Anti-Terrorism Standards, at 9-11, DHS-2006-0073-0039.1 (February 7, 2007) (hereinafter AF&PA Comments). Available online at <http://www.regulations.gov>.
- ²² *Ibid.*
- ²³ Lieberman Comments, op. cit. note 17, at 2.
- ²⁴ *Ibid.* at 3.
- ²⁵ Greenpeace, Comments on Department of Homeland Security's Chemical Facility Anti-Terrorism Standards, DHS-2006-0073-0043.1 (February 7, 2007) (hereinafter Greenpeace Comments). Available online at <http://www.regulations.gov>.
- ²⁶ *Ibid.* at 4.
- ²⁷ PIRG Comments, op. cit. note 19, at 8.
- ²⁸ *Ibid.* at 9.
- ²⁹ Lieberman Comments, op. cit. note 17, at 4.
- ³⁰ *Ibid.*
- ³¹ PIRG Comments, op. cit. note 19, at 11-14; Greenpeace Comments, op. cit. note 25, at 3-4.
- ³² ACC Comments, op. cit. note 20, at 4.
- ³³ Dow Chemical Company, Comments on Chemical Facility Anti-Terrorism Standards, at page 14, DHS-2006-0073-0018.1 (February 5, 2007) (hereinafter Dow Comments). Available online at <http://www.regulations.gov>.
- ³⁴ *Ibid.*
- ³⁵ 72 Fed. Reg. at 17727.

³⁶ *Ibid.* at 17731 (to be codified at 6 C.F.R. pt. 27).

³⁷ Exec. Order No. 13422, 72 Fed. Reg. 2763 (January 23, 2007) (further amending Exec. Order No. 12866 on regulatory planning and review).