

## Washington Watch

### Chemical Facility Anti-Terrorism Standards: Chemicals of Interest

Lynn L. Bergeson

In the last issue of *Environmental Quality Management*, this column discussed the April 2, 2007, U.S. Department of Homeland Security (DHS) interim final rule on anti-terrorism standards for chemical facilities.<sup>1</sup> On the same day the interim final rule was issued, DHS also issued (and requested comment on) a list of 344 “chemicals of interest,” included in Appendix A to the rule.

This "Washington Watch" briefly reviews key issues associated with the chemicals of interest, as well as the comments received on the proposed chemical list, and the Department's likely next steps in this regard.

### Chemical Facility Anti-Terrorism Standards: A Brief Review

Before launching into a discussion about the Appendix A chemicals, a brief summary of the context in which the list was issued is in order. As noted in last issue's column, DHS promulgated the interim final rule on chemical facility anti-terrorism standards in response to a Congressional directive contained in Section 550 of the Department of Homeland Security Appropriations Act of 2007, which President Bush signed into law on October 4, 2006.<sup>2</sup>

Section 550(a) of the Act requires the Department to issue interim final regulations to assure the security of domestic “high risk” chemical facilities. A "high-risk" facility is one which, “in the discretion of the Secretary of Homeland Security,” is viewed as presenting "high levels of security risk." This phrase refers to any facility found to “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.”<sup>3</sup>

Under the interim final rule, chemical facilities will be required to complete a “top-screen” electronic questionnaire. DHS will use the information it collects through the top-screen process to determine whether chemical facilities present a high risk.

DHS will also create a system of “risk-based tiers,” assign each covered facility to one of the tiers, and prioritize facilities within each tier. Risk-tier placement determinations are to be based on "any information available" indicating “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.”<sup>4</sup>

Covered facilities believed to pose the greatest potential risk will be addressed first. Each covered facility will be required to conduct a Security Vulnerability Assessment (SVA) and then develop and implement a Site Security Plan (SSP). SSPs must be designed to satisfy risk-based performance standards (RBPSs) that DHS will develop at a later time.<sup>5</sup>

Both SVAs and SSPs must be approved by the Department. 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. DHS is authorized to issue orders compelling facilities to achieve compliance with 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.

Facilities may challenge certain DHS decisions, including SSP disapproval, "high level of security risk" determinations, and risk-tier placement.<sup>6</sup>

DHS intends to implement the new 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."<sup>7</sup>

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]."<sup>8</sup>

### **Chemicals of Interest**

In identifying the 344 "chemicals of interest," DHS reportedly looked to existing sources of information, including the U.S. Environmental Protection Agency (EPA) Risk Management Program, the international Chemical Weapons Convention, and the Department of Transportation (DOT) hazardous materials regulations.

DHS also based its decision to include chemicals in Appendix A on several stated 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.

In addition to listing proposed chemicals of interest, DHS specified a "screening threshold quantity" (STQ) for each. The STQs range from "any amount" (for almost a third of the chemicals) to 15,000 pounds, with lesser amounts identified for most chemicals.

### **Concerns About the Chemicals-of-Interest List**

While the foregoing might appear relatively straightforward, commenters identified several strong concerns with the proposed list, the suggested STQs, and other issues associated with Appendix A. The discussion below briefly summarizes the key concerns.

## ***Criteria Used in Creating Appendix A***

A number of commenters expressed significant concern with the criteria DHS apparently relied upon in creating its chemicals-of-interest list. Some, for example, questioned why Appendix A contains an extensive number of chemicals that do not appear on either EPA or Chemical Weapons Convention lists. They note that many of these chemicals do not seem to create the type of imminent risks to life or health contemplated by DHS, but rather pose chronic exposure risks.

These concerns ultimately reflect the central questions raised by commenters regarding the Department's selection criteria, namely: What are the specific criteria DHS relied upon in selecting some chemicals over others? And what role, if any, did factors such as explosive potential, flammability, reactivity, and related characteristics play in the Appendix A chemical-selection process?

### ***STQs***

Many commenters expressed concern about the STQs proposed for the chemicals. Several entities noted that the proposed STQs for Risk Management Program-listed chemicals were 2,500 to 5,000 pounds *lower* than the RMP levels, with no reason offered for the differential.

Of significant concern to many commenters was the proposed “any amount” STQ, which was assigned to almost one-third of the chemicals in Appendix A. Some commenters characterized the “any amount” STQ as arbitrary and without justification, and noted that using such a standard will likely ensnare thousands of facilities that were never intended to be included in the chemical facility rule.

Other commenters expressed concern about assigning STQs that differ from RMP and/or DOT threshold values, noting that such inconsistencies will probably give rise to confusion.

To address these concerns, commenters offered a number of useful suggestions. Some urged DHS to adopt a *de minimis* threshold level of 500 to 1,000 pounds (depending upon the chemical). Others recommended that the Department strive for greater consistency with RMP and/or DOT thresholds in order to avoid confusion, and adopt RMP or DOT threshold values for chemicals that are now assigned an “any amount” value. Several commenters noted that their suggestions would allow the Department to better focus its efforts on addressing potentially serious hazards, while diminishing or eliminating the reporting of inconsequential risks.

### ***"Plans to Possess"***

Under the interim final rule, a facility that possesses or “plans to possess” chemicals of interest in amounts equal to or greater than the STQs is required to complete the initial top-screen questionnaire. Many commenters expressed significant concern with the vagueness of the phrase “plans to possess,” and urged DHS to clarify what exactly this phrase means.

The Aerospace Industries Association (AIA), for example, urged DHS to “include [only] chemicals that are stored in containers or tanks at the facility site [and] exempt transportation emissions and chemical emissions during routine process operations, such as engine exhausts and combustion products.” The specific concern expressed by AIA relates to the rule's treatment of chemicals incidental to transport. Commenters urged DHS to clarify that the staging of listed chemicals incidental to transport is excluded under the rule.

### ***Chemical Mixtures and Chemicals in Articles***

Another theme running through many comments concerns how STQs apply to chemical mixtures and articles, with several commenters complaining about lack of clarity. Some expressed the view that STQs should apply only to the pure “neat” form of chemical substances, and they urged DHS to clarify that STQs do not apply to mixtures.

A number of commenters also claimed that the proposal was unclear in its treatment of chemicals included in articles. Many urged DHS to exclude chemical substances found in articles, citing a range of other environmental and occupational, safety, and health regulations as support for their position. For example, they noted that products meeting the definition of an article are exempt under the Occupational Safety and Health Administration's Hazard Communication Standard.

### **Next Steps**

DHS intends to issue a final Appendix A list of chemicals sometime during summer 2007. The Department is expected to clarify many of the issues discussed above within the context of the preamble to the final rule.

In so doing, DHS will need to walk a fine line between “clarifying” issues and making statements that might be characterized as additional “rules” (such that the Administrative Procedure Act's notice-and-comment provisions apply). If stakeholders conclude that the “clarifications” are too extensive, their likely recourse would be a judicial challenge, which would protract the discussion on these issues for an indeterminate time.

Based on information available as of this writing, DHS is expected to eliminate all “any amount” STQs and replace them with RMP or other thresholds; clarify that only chemicals in their pure form are covered by the STQs; exclude articles; and clarify that chemicals incidental to transit are exempt. Until the rule is issued in final form, however, these questions remain unresolved.

Other important aspects of Section 550 will also be refined further -- not in any final rule, but in DHS guidance. As noted in last issue's column, some stakeholders are particularly concerned about how Executive Order 13422<sup>9</sup> might affect these guidance documents.

This executive order governs regulatory planning across the federal government and imposes new requirements on agencies before they can draft regulations or issue guidance. Detractors claim that the order gives the Office of Management and Budget broad authority to

control federal agency rulemaking and the scope of guidance documents, including those issued by DHS to give effect to Section 550. Critics also contend that this executive order will further politicize the rulemaking process and impede the exercise of federal agency discretion.

Another important question that remains unanswered is: What will eventually replace Section 550? By law, this section is set to expire in October 2009. It was adopted with the expectation that Congress would enact more permanent, comprehensive legislation that will supersede the provisions of Section 550.

Whether such legislation will be enacted, and how it might compare with DHS's framework for implementing Section 550, are unclear. Much can happen between now and October 2009, so it is not possible to speculate on the outcome of this issue. The future is all the more uncertain given the intervening presidential election coming up in November 2008 -- the result of which is certain to influence the outcome of this debate.

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**Lynn L. Bergeson** is managing director of Bergeson & Campbell, P.C., a Washington, D.C. law firm focusing on conventional and engineered nanoscale chemical, pesticide, and other specialty chemical product approval and regulation; environmental health and safety law; chemical product litigation; and associated business issues. Ms. Bergeson is also President of The Acta Group, L.L.C. and The Acta Group EU, Limited, with offices in Washington, D.C. and Manchester, UK.

## Notes

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- <sup>1</sup> The rule was published a week later in the *Federal Register*: Chemical Facility Anti-Terrorism Standards, Final Rule, 72 Fed. Reg. 17687 (April 9, 2007) (to be codified at 6 C.F.R. pt. 27).
- <sup>2</sup> Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 550(a), 120 Stat. 1355 (2006).
- <sup>3</sup> 72 Fed. Reg. at 17730.
- <sup>4</sup> *Ibid.* at 17731 (to be codified at 6 C.F.R. pt. 27.205).
- <sup>5</sup> *Ibid.* at 17731-17732 (to be codified at 6 C.F.R. pts. 27.215, 27.225, 27.230).
- <sup>6</sup> *Ibid.* at 17737 (to be codified at 6 C.F.R. pt. 27.245).
- <sup>7</sup> *Ibid.* at 17730 (to be codified at 6 C.F.R. 27.115).
- <sup>8</sup> *Ibid.*
- <sup>9</sup> Executive Order No. 13422, 72 Fed. Reg. 2763 (January 23, 2007) (further amending Executive Order No. 12866 on regulatory planning and review).