

Utility Solid Waste Activities Group

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February 7, 2007

VIA U.S. MAIL AND ELECTRONIC SUBMISSION

IP/ CNPPD Dennis Deziel
Mail Stop 8610
Department of Homeland Security
245 Murray Lane, SW
Washington, DC
20528-8610

Re: Comments on Department of Homeland Security Chemical Facility Anti-Terrorism Standards: Advanced Notice of Rulemaking, Docket No. DHS-2006-0073, 71 Fed. Reg. 78276 (Dec. 28, 2006).

Dear Sir or Madam:

The Utility Solid Waste Activities Group (“USWAG”)¹ submits these comments on the Department of Homeland Security’s (“DHS” or “Department”) chemical facility anti-terrorism standards proposal to establish the framework for implementing a chemical plant security program. 71 Fed. Reg. 78276 (Dec. 28, 2006).

By way of background, USWAG represents a number of electric and gas utilities that use various chemicals in the generation and distribution of electricity and natural gas to customers throughout the United States. Some of these facilities have prepared and submitted Risk Management Plans (“RMPs”) to EPA pursuant to § 112(r) of the Clean Air Act, generally as a result of their use of air pollution control and water

¹ USWAG was formed in 1978, and is an informal consortium of approximately 80 energy industry operating companies and associations, including the Edison Electric Institute (“EEI”), the National Rural Electric Cooperative Association (“NRECA”), the American Public Power Association (“APPA”), and the American Gas Association (“AGA”). EEI is the principal national association of investor-owned electric power and light companies. NRECA is the national association of rural electric cooperatives. APPA is the national association of publicly owned electric utilities. AGA is the principal national association of natural gas utilities. Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S., and service more than 95% of the nation’s consumers of electricity and over 93% of the nation’s consumers of natural gas.

treatment chemicals. Pursuant to DHS' proposed regulatory program, these facilities potentially would be required to submit site specific information to the Department so that it could determine whether they are "high risk" facilities for which vulnerability assessments and site security plans would need to be developed and implemented. While USWAG has attempted to assess the potential implications of the new requirements on utilities and provide meaningful comments to DHS on the proposal, we have unfortunately found the proposal to be too vague in nature to provide DHS with many substantive comments, including especially commenting on the criteria for "high risk" facilities and evaluating the types of security measures such facilities would need to implement.

While USWAG appreciates the difficulty of establishing an entire regulatory program by an aggressive statutorily-mandated deadline, our primary concern with the proposal is that the Department makes no attempt to define the substantive components of the program and limits the preamble and proposed regulatory text to a discussion of the *procedural* framework of the program. While the proposal defines *how* facilities will be required to supply information, develop vulnerability assessments and site security plans, DHS neither identifies what particular degree of risk is associated with the storage of various types and quantities of chemicals nor identifies the security measures that various facilities will be required to take to address these risks. Without more information concerning how the Department intends to implement its proposal, including the degree of acceptable risk and the types of security measures DHS will require, it is difficult for USWAG and the rest of the potentially-regulated community to provide substantive comments on the proposal including determining whether and how the proposed rule will impact their respective facilities.

An example of this is the Department's interpretation of Section 550(a) of the Department of Homeland Security Appropriations Act of 2007 (the authorizing legislation) that provides DHS with the discretion to determine which chemical facilities "present high levels of security risk" for which vulnerability assessments and site security plans must be developed and implemented. In the preamble to the proposed rule, DHS proposes to adopt a tool such as the "Top-screen" questionnaire to assist the Department with identifying these "high risk" facilities. 71 Fed. Reg. at 78282. Appendix A to the proposed rule also details the methodology by which the "Top screen" tool will work and lists several "types of questions" that might be included in the questionnaire. *Id.* at 78302-78303. However, DHS does not identify the specific parameters that the Department will use to identify "high risk" facilities (*e.g.*, a specific volume of a chemical within a certain distance of a population center of specific size, or any other type of formula for otherwise identifying a "high risk" facility).

Similarly, DHS identifies a number of general performance standards that "high risk" chemical facilities must satisfy based on their particular risk tier, but the Department neither identifies what measures must be taken to meet these performance standards nor explains how these tiers will be defined (*e.g.*, the size of the population at risk). For example, the performance standard to "secure and monitor the perimeter of the facility" (*see id.* at 78284) could be met by a number of measures, ranging from installing a chain-link fence and periodically inspecting the fence for damage to

establishing armed guard towers and patrols. While we appreciate that DHS intends to issue guidance specifying the security measures that would presumptively satisfy these performance standards (*id.* at 78285) the lack of more detailed information in the proposal makes it difficult to provide informed comment to the Department.

To address these concerns, USWAG urges DHS to issue draft guidance documents for public comment on all areas of the chemical facility anti-terrorism standards proposal that have not yet been defined by the Department. These documents should identify the specific methodologies, factors and formulas that the Department will use to determine which facilities are “high risk,” how the facilities will be divided into risk tiers, what specific performance standards must be met for each tier and what measures facilities should take to satisfy these performance standards, as well as any other substantive and/or procedural aspect of the proposed rule that has not yet been identified and issued for public comment.

USWAG believes that DHS should publish these draft guidance documents in the Federal Register, invite public comment, respond to each of the comments submitted, and issue final guidance documents after taking these comments into consideration. In fact, these procedural requirements are now required for all “economically significant guidance documents” issued by federal agencies (*i.e.*, those that may reasonably be anticipated to have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy or a sector of the economy) pursuant to the recently issued OMB Final Bulletin for Agency Good Guidance Practices and Executive Order 13422. 72 Fed. Reg. 3432, 3439-3440 (Jan. 25, 2007). Making the Department’s methodologies transparent and well-informed will assist DHS in properly identifying “high risk” facilities and selecting the most cost-effective security measures. Furthermore, shielding site specific vulnerability assessments and security plans from public disclosure should adequately ensure that information developed in compliance with the new program cannot be used for terrorist purposes, even if the Department’s broader decision-making is transparent.

To protect facility specific information from misuse, USWAG recommends that the Department eliminate any option for submitting information electronically by potentially-covered facilities, regardless of the apparent level of security offered by any applicable technology. The Department should also impose strict controls for the use of any facility specific information by states and local governments. These controls should, at minimum, prevent the disclosure of this information through any state freedom of information act or similar statute and be at least as protective as the Protected Critical Infrastructure Information (“PCII”) requirements for disclosure to state and local governments at 6 C.F.R. § 29.8 (requiring that state and local governments not share information with any other party, or remove PCII marking, without first obtaining authorization from the entity that submitted the information). The use of strict measures to prevent the dissemination of facility specific security information should help to ensure that this information is not used for terrorist or other nefarious purposes.

USWAG appreciates the opportunity to comment on DHS’ proposed chemical facility anti-terrorist standards and looks forward to working with the Department as it

designs the specific substantive requirements of the program. If you have questions about these comments, please contact me (202-508-5645; jim.roewer@uswag.org) or USWAG counsel Doug Green (202-861-3893; douglas.green@dlapiper.com).

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Jim Roewer', with a long horizontal flourish extending to the right.

Jim Roewer
USWAG Executive Director