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February 7, 2007

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Department of Homeland Security
Mail Stop 8610
Washington, DC 20528-8610

Re: Advanced Notice of Rulemaking
Chemical Facility Anti-Terrorism Standards
DHS-2006-0073, RIN 1601-AA41, 6 CFR Part 27
State of New Jersey Comments

Dear Mr. Deziel:

We are writing jointly today to provide comments on the Advance Notice of Rulemaking for the Chemical Facility Anti-Terrorism Standards, 6 CFR Part 27. We are very supportive of federal regulations to help ensure that chemical facilities in the United States have critical safety measures in place to protect our citizens against potential threats to health and safety. This is a matter of vital importance to our State and to the safety of all New Jerseyans, who, unfortunately, know too well the horror of terrorism, having lost hundreds of our citizens in the attacks of September 11, 2001. While we commend the efforts taken by the Department of Homeland Security, we have serious concerns, which we have expressed on a number of occasions, about any language in federal regulations that has the potential to preempt existing state chemical security initiatives or limit future state actions to address unique vulnerabilities. We find this aspect of the proposed rulemaking unacceptable.

In response to the risks posed by a possible terrorist attack on New Jersey's chemical facilities, New Jersey has taken significant steps to strengthen the security precautions at these plants. Best Security Practices were adopted for the Chemical Sector working cooperatively with industry leaders on September 18, 2003. Since November 2005, New Jersey went further and adopted enforceable plant security practices for its chemical facilities as well as facility security assessments to evaluate potential security threats and vulnerabilities. The facilities that pose the most significant risks are subject to the State's Toxic Catastrophe Prevention Act (TCPA) program, which incorporates

EPA's Risk Management Program but is stricter and broader in scope than the 112 requirements. New Jersey's enforceable plant security practices are vital to providing the state with an accurate picture of the current state of preparedness within the Chemical Sector and provide a foundation to move forward with the appropriate actions to safeguard our citizens.

We have been extremely pleased with the compliance levels we have seen to our standards. We anticipate compliance with the all of the New Jersey requirements to exceed 98 percent. The Standards required facilities that are subject to either the Toxic Catastrophe Prevention Act (TCPA) or the Discharge Prevention, Containment and Countermeasure (DPCC) program, and report under certain Standard Industrial Classification (SIC) or North American Industrial Classification System (NAICS) codes to, among other things, demonstrate compliance with the following:

- Prepare a site specific security vulnerability assessment (SVA) utilizing an approved methodology.
- Develop a prevention, preparedness, and response plan (PPRP) that addresses all of the Chemical Sector Best Practices.
- Afford employees and their collective bargaining representatives an opportunity to identify issues that should be addressed in the SVA and PPRP.
- TCPA regulated facilities shall conduct an inherently safer technology (IST) review.

Although New Jersey took critical steps to address chemical facility security well over three years ago, we recognize that most states have not taken action and therefore, federal regulations to create minimum national chemical facility security standards are essential. At the same time, it is also important not to penalize those pro-active states and allow the states to retain the authority to adopt enhanced security requirements if states determine they are necessary. No two states are alike, and the risks posed by every facility present unique challenges based on location, population size, and other factors. Security standards that are appropriate to safeguard a facility in a rural area, for example, may not be sufficient for a facility located in one of the most densely populated and heavily traveled sections of the country. Simply put, one size does not fit all.

New Jersey's critical infrastructure concentration and high population density may have no comparison in the United States; our state needs to retain the ability to go beyond any Federal security baseline standard to ensure that our preparedness is measured in line with our potential vulnerabilities. Yet, as currently written, 6 CFR Part 27.405 could severely undermine that authority and potentially threatens even our existing protections. Paradoxically, enactment of this legislation as currently written could actually have the effect of weakening chemical security and leaving New Jersey and its neighbors –including New York City—more vulnerable to devastation from a terrorist attack on our chemical facilities.

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We need federal standards, but they must be a floor ensuring a base level of protection, not a ceiling that constrains our ability to protect our citizens, as well as our neighbors. We must emphasize again our vehement objection to any preemption language that would limit New Jersey's ability to maintain our current standards or if necessary impose additional requirements in the future to protect our citizens. Governor Corzine has gone on record previously to express his concern for the safety of New Jersey's residents. In serving Governor Corzine, it is our duty to protect the citizens of our State and it is imperative that federal legislation enhances, rather than undermines New Jersey's ability to protect our chemical sector critical infrastructure. Detailed comments on the entire proposal are attached for your consideration.

Sincerely,



Richard L. Cañas
Director
Office of Homeland
Security and Preparedness



Lisa P. Jackson
Commissioner
Department of Environmental
Protection

State of New Jersey Comments
Chemical Facility Anti-Terrorism Standards
6 CFR Part 27
DHS-2006-0073
RIN 1601-AA41

The comments are ordered as they appear in the Advanced Notice of Rulemaking.

27.100 Definitions

“Chemical Facility” – New Jersey supports defining a chemical facility based upon the substances being used, stored, or possessed at a site regardless of the specific type of business being conducted at the site.

27.105 Applicability

New Jersey has concerns regarding the exemption of any facility subject to regulation by the Nuclear Regulatory Commission (NRC). This exemption should be revised to exempt only those facilities holding an NRC power reactor license. Although an analysis has not been undertaken, it is very likely that a chemical facility may be subject to NRC regulation due to the possession of a small amount of radioactive material integral to the operation of process equipment or other types of instrumentation. As written, a chemical facility would be exempt from the proposed regulations for any and all types of licenses issued by the NRC.

The regulations issued pursuant to Section 550 will also not apply to public water systems (as defined by section 1401 of the Safe Drinking Water Act) and water treatment works facilities (as defined by section 212 of the Federal Water Pollution Control Act). New Jersey disagrees with exempting public water systems and treatment works from 6 CFR Part 27 as these facilities many times pose a higher risk than sites currently captured under the definition of covered facility. Unlike the mandatory security programs in place at the exempted NRC and the Maritime Transportation Security Act (MTSA) facilities, the water and wastewater industries are only subject to voluntary standards which cannot be considered equivalent to that proposed under 6 CFR Part 27. Since an equivalent security program is not in place for the water and wastewater industries, these facilities should not be exempt from the requirements of 6 CFR Part 27. Facilities that present a high level of security risk should be subject to these regulations, regardless of the industry in question, unless it can be demonstrated that equivalent mandatory requirements are already established.

27.205 Determination that a Chemical Facility “Presents A High Level Of Security Risk”

Although there are multiple criteria that could potentially justify a determination of high risk, the first Top-screen question is whether the toxic release worst-case scenario as identified under the EPA Risk Management Program (RMP) might expose a residential population greater than or equal to 200,000 persons. The second question is whether a flammable release worst-case scenario might expose a residential population greater than or equal to 1,000 persons. In the case of New Jersey, this consequence threshold would

result in approximately 13 percent of the facilities subject to the Toxic Catastrophe Prevention Act program potentially being a covered facility pursuant to 6 CFR Part 27. It is logical that the DHS would set the regulation threshold at a very high level considering the vast number of chemical facilities throughout the country. However, it is difficult to justify 87 percent of the EPA RMP universe being exempt from 6 CFR Part 27 considering that the majority of those facilities do have significant off site consequences even though they are less than 200,000 and 1,000 persons for a toxic and flammable release, respectively. Consideration should be given to reducing the toxic consequence to 20,000 persons to appropriately capture facilities that present a high level of security risk.

New Jersey supports the position that all RMP facilities be required to complete the Top-screen. In addition, this should not be a one time process since facilities routinely change the amount and type of substances being stored and handled. A requirement to update the Top-screen based upon submission of an updated RMP would ensure that the universe of covered facilities is accurate. However, since RMPs are required to be updated for various reasons that would not affect the Top-screen and resulting tier designation, changes should be limited to those that increase or decrease the amount of extraordinarily hazardous substances on site, modify the off-site consequence analysis, or otherwise impact preparedness and response activities.

27.220 Tiering

Risk-based tiering among high-risk facilities is an appropriate strategy. However, based upon the proposed Top-screen methodology very few facilities would meet the definition of covered facility. As a result, there appears to be limited utility in differentiating between those sites. However, if the Top-screen process was modified to increase the scope of covered facilities tiering could be accomplished by consequence or the overall Top-screen results. The performance standards could apply to all tiers with appropriate discretion given to lower tiers regarding compliance determinations. Frequency of inspections could be decreased based upon a reduction in the tier designation. However, the update requirements should be consistent for all facilities as that information will be critical to determining any change in tier designation and any required enhancements to site security plans.

27.230 Risk-based performance standards

We have two suggested changes to certain of the risk-based performance measures to ensure that there are no gaps in evaluation of the performance standards:

- 27.230(a)(5) should include, as part of the performance measure, a provision for securing and monitoring the “storage” of hazardous materials in addition to securing and monitoring of the shipping and receipt of hazardous materials.
- 27.230(a)(15) should include, as part of the performance measure, a provision for reporting significant security incidents to local law enforcement in addition to the report to the Department.

27.245 Inspections and Audits

The Department of Homeland Security is considering a program for certain tiers of facilities involving the certification and use of appropriate Third-Party Auditors. Third-

Party Auditors should be limited to appropriate state and local government officials with familiarity of the chemical process safety and security systems currently in place at the chemical facility in question. This requirement is important to ensure the credibility and effectiveness of the inspection and auditing program.

27.400 Chemical-terrorism vulnerability information

We are in agreement with DHS that the information provided by chemical facilities pursuant to these regulations should be protected from public disclosure and that the current Sensitive Security Information (SSI) and Protected Critical Infrastructure Information (PCII) Programs would not provide adequate protection to the information that will be provided pursuant to these regulations. Thus, we are in agreement with DHS' desire to establish a new security regime for this information.

27.405 Review and Preemption of State laws and regulations

It is imperative that States retain the ability to require enhanced security measures, as appropriate to ensure that preparedness is measured in line with potential vulnerabilities. A one size fits all standard is not practical across our diverse nation. A minimum standard set by DHS will ensure a level playing field for the chemical industry with the understanding that jurisdictions with unique vulnerabilities have the ability to implement enhanced standards to adequately safeguard their citizens.

Since November 2005, New Jersey has required enforceable plant security practices for its chemical facilities as well as facility security assessments to evaluate potential security threats and vulnerabilities. These programs are vital to providing New Jersey with an accurate picture of the current state of preparedness within the Chemical Sector and provides a foundation to move forward with the appropriate actions necessary to safeguard our citizens.

Although New Jersey has taken critical steps to address chemical facility security, most States have not taken such action. We recognize that State borders alone are insufficient to protect the citizens of one State from chemical threats in a neighboring State. For this reason, federal regulations to create minimum national chemical facility security standards are essential.

At the same time, it is also important that States retain the authority to adopt enhanced security requirements if States determine they are necessary. No State is alike and the risks posed by every facility present unique challenges based on location, population size, and other factors. Security standards that are appropriate to safeguard a facility in a rural area may not be sufficient to secure a facility located in one of the most densely populated and heavily traveled sections of the country.

New Jersey's critical infrastructure concentration and high population density may have no comparison in the United States; our state needs to retain the ability to go beyond any threshold Federal security standards to ensure that our preparedness is measured in line with our potential vulnerabilities. Yet, as currently written, 6 CFR Part 27.405 has the potential to severely undermine that authority. Paradoxically, implementation of these regulations as currently written could actually have the effect of weakening chemical security and leaving New Jersey and its neighbors –including New York City—more

vulnerable to devastation from a terrorist attack on our chemical facilities. We need federal standards, but they must be a floor ensuring a base level of protection, not a ceiling that constrains our ability to protect our citizens, as well as our neighbors. Federal regulations should enhance, rather than undermine New Jersey's ability to protect our citizens and infrastructure. If there is no intent to interfere with Federal and State environmental and safety laws regulating the chemical industry that fact should be expressed in the preamble and in 27.405.

With these comments in mind, the following additional comments address our specific concerns with the preemption provision (Section 27.405):

- We question the Department's authority to preempt state measures under these regulations. Section 550 of the Homeland Security Appropriations Act of 2007 is completely silent regarding the Department's authority to preempt. At minimum, the introductory remarks should clearly define the statutory/regulatory/judicial authority upon which the Department believes they have the authority to preempt.
- If the intent is not to preempt state laws, but to create additional flexibility for the federal government, we recommend amending the introductory remarks to read "The provision found at Section 27.405 is based solely on a theory of Implied Conflict Preemption." DHS should then clearly detail that an evaluation of a conflict preemption claim will look at the state regulation at issue and determine whether: (1) it is impossible to comply with both these regulations and the state regulation or (2) the state regulation poses and obstacle to the purpose (or frustrates the purpose) of these regulations.
- DHS must also clearly articulate the purpose of these regulations in order for parties to properly conduct a preemption analysis. While it would seem obvious that the purpose of these regulations is to "enhance security at high risk chemical facilities," that purpose is no where stated and the introductory remarks seem to suggest otherwise. At pg. 78293, the remarks suggest that "Congress created a carefully balanced regulatory relationship between the Federal Government and chemical facilities" and it is that regulatory balance which is the purpose of these regulations. The remarks state "A state measure frustrating this balance will be preempted." Arguably, any state measure would upset such a regulatory balance and we do not believe that was the intent of these regulations. Thus a clear articulation of the purpose of these regulations – presumably to enhance security at high risk chemical facilities - would significantly ease the concern of the State regarding the preemption provision.
- Finally, the provision is overly broad. Section 27.405(a) could read "No law regulations, or administrative action ... shall have an effect if such law, regulation, or decision conflicts with, hinders, poses an obstacle to or frustrates the purpose of these regulations to enhance security . . ."

Section 27.410 Third Party Actions

The scope of the exclusivity of the right of action provided to the Secretary under this provision is broader than what was intended by the authorizing statutory language.

Section 550(d) of the Homeland Security Appropriations Act of 2007 states, in part “. . . That nothing in this Section confers upon any person except the Secretary a right of action against an owner operator of a chemical facility to enforce any provision of this section.” However, language found within the introductory remarks at pg. 78291 is much broader, claiming a State would be prohibited from bringing an action (for example, a Writ of Mandamus) against the Department requesting that the Department carry out its duties pursuant to the statute or regulations. While we do not disagree that the statutory language would bar a State from taking enforcement action against an owner or operator for violation of these regulations we see no support in the statute revealing an intent to bar State action against the Department (or other non-owners or non-operators). To have the scope of the provision consistent with the statutory intent, we would suggest that the provision read as follows:

(a) Nothing in this Part shall confer upon any person except the Secretary a right of action AGAINST AN OWNER OR OPERATOR, in law or equity.....

Additional General Comment - Delegation

We strongly recommend consideration of permissive enabling language toward delegating oversight responsibility to State governments, along with appropriate levels of Federal funding to support homeland security efforts. This would include a petition process to DHS by interested State governments and granting of delegated authority on a discretionary basis. DHS is not currently staffed to evaluate 14,600 EPA RMP facilities and the thousands more expected to complete the Top screen process and it is not realistic that any one agency could effectively handle such a universe. With an enabling provision, DHS could retain oversight authority, but would delegate programmatic responsibility and commit resources to authorized States, similar to how EPA has handled air and water regulations and the “Agreement State” program run by the Nuclear Regulatory Commission. In the case of the former, NJDEP has an overarching Performance Partnership Agreement with Region 2 of USEPA which guides the efficient administration of both Federal and State resources toward the common goal of environmental protection. This approach may serve as a model for delegated homeland security programs. The specific state agency tasked with this responsibility is likely to vary depending on the existing and potential capabilities of the current State homeland security and environmental protection agencies. It is also likely that a number of states may not be interested or have the resources to assume a delegation status. In those cases, DHS would retain sole regulatory control for the purposes of homeland security of the chemical facilities of concern located in that jurisdiction.

In the case of New Jersey, the actions taken in chemical security preparedness since September 11 have left the State well qualified to undertake such delegated responsibilities. State security (Office of Homeland Security and Preparedness and New Jersey State Police) and chemical process safety experts (Department of Environmental Protection) are intimately familiar with the high risk sites in question and have conducted multiple security and safety inspections at each site over the last five years. Leveraging and augmenting State resources is vital to ensuring that our chemical facilities are adequately protected from acts of terrorism.