

February 7, 2007

IP/CNPPD/
Mr. Dennis Deziel
Mail Stop 8610
Department of Homeland Security
Washington, D.C. 20528-8610

**RE: Department of Homeland Security Advance Notice of
Rulemaking: Chemical Facility Anti-Terrorism Standards;
DHS-2006-0073**

Dear Mr. Deziel:

The Food Industry Environmental Council (FIEC) is pleased to submit these comments on the Department of Homeland Security (DHS)'s advance notice of rulemaking to establish a chemical facility security program. See 71 Fed. Reg. 78276 (Dec. 28, 2006). FIEC is a coalition of over fifty national food trade associations and companies that together represent more than 15,000 facilities across the country, employing approximately 1.5 million people. FIEC members represent a large number of facilities nationwide that utilize anhydrous ammonia in their refrigeration systems. Because anhydrous ammonia is a chemical regulated under the Clean Air Act Risk Management Program (RMP), and because DHS proposes to base its chemical security rules at least in part on the RMP program, FIEC members have a strong interest in DHS's approach to chemical security.

I. Applicability of the Chemical Security Rules

Although DHS has not definitively established the parameters for applicability of the chemical security rules, it is clear that the RMP program, and the chemicals regulated under that program, will be a key starting point for the security regulations. See, e.g., 71 Fed. Reg. at 78281 ("to determine which facilities present sufficient risk to be regulated . . . [t]he Department may draw on many sources of available information, including . . . the EPA RMP list"). As an initial matter, FIEC is concerned about the use of RMP data to determine the coverage of the chemical security program.

Mr. Dennis Deziel
February 7, 2007
FIEC Comments
DHS-2006-0073

The worst-case risk analyses conducted for RMP purposes focus on offsite health and environmental impacts of a chemical release; these data, and the underlying assumptions, may not be appropriate for use in determining which facilities present the greatest risk to neighboring populations so as to necessitate coverage under the chemical security rules. For example, RMP worst-case scenario projections assume a complete release of ammonia in ten minutes or less. It is extremely unlikely, if not impossible, that such a quick and complete release could occur from an ammonia refrigeration system as a result of a terrorist incident. In ammonia refrigeration systems, the anhydrous ammonia is located in tanks and piping covering a wide area; it is not located in one place so as to be instantaneously released in the event of an explosion or other system damage. Moreover, even if a portion of the ammonia were to be released due to a terrorist incident, the ammonia would dissipate into the air rather than causing the types of off-site consequences that are assumed under the RMP projections. Please refer to the comments submitted by the International Institute for Ammonia Refrigeration (IIAR), a FIEC member, for more detailed information about realistic risks associated with potential releases from ammonia refrigeration systems.

As noted above, many FIEC facilities are regulated under the RMP program due to their use of anhydrous ammonia in refrigeration systems. However, FIEC strongly believes that these are not the types of facilities that Congress intended to be covered by the chemical security program. First of all, to the best of FIEC's knowledge, there have been no offsite releases of anhydrous ammonia from refrigeration systems resulting in fatalities or other significant health, security or economic consequences of national significance due to exposure to ammonia. In addition, the anhydrous ammonia at FIEC facilities typically is located in miles of pipeline covering a broad area across the plant. The ammonia is not present in sufficient quantity in one location so as to pose a threat through theft, sabotage or other misuse by terrorists. Thus, it seems highly unlikely that FIEC facilities could be viewed as presenting the "high level of security risk" needed to be covered by the chemical security regulations. See 71 Fed. Reg. at 78295 (proposed 6 C.F.R. § 27.205). DHS should exempt food industry facilities – those covered by North American Industry Classification System (NAICS) code 311 (food manufacturing), 312 (beverage manufacturing) and 49312 (refrigerated warehousing) - that use anhydrous ammonia in refrigeration systems from the anti-terrorism rules.

II. Food Defense Activities

Mr. Dennis Deziel
February 7, 2007
FIEC Comments
DHS-2006-0073

FIEC members are heavily engaged in a variety of programs and initiatives intended to protect the safety of the nation's food supply. These programs impose a wide range of requirements that serve not only to prevent accidental contamination of the food supply, but also to deter any intentional contamination, such as might occur through a terrorist attack. For instance, the Food and Drug Administration (FDA)'s Sector Specific Plan (SSP) for the food sector sets forth the goal of protecting against an attack on the U.S. food supply that would pose a serious threat to public health, safety, welfare or the national economy. In addition, FDA – together with DHS, the Department of Agriculture (USDA) and the FBI – established the Strategic Partnership Program Agroterrorism (SPPA) Initiative. Under the SPPA Initiative, food sector companies participate in assessment programs to determine vulnerabilities, identify indicators that could signify planning for an attack, and develop mitigation strategies to reduce the threat of or prevent an attack. As of November 2006, assessments had been conducted under the SPPA Initiative for nineteen different food industry sectors. Another example is ALERT, FDA's food defense awareness initiative with USDA, the Centers for Disease Control, and state and local food, public health and agriculture organizations. ALERT is an acronym for Assure, Look, Employees, Reports, Threat, and is designed to heighten awareness within the food sector on key food defense issues such as product security and reporting of suspicious behavior. Also, FDA has issued several industry guidance documents identifying preventive measures to minimize the risk that food will be subject to tampering or other malicious, criminal or terrorist action. Finally, food industry-initiated programs address such security measures as background checks and facility access. FIEC believes that these programs are highly effective and that FIEC members should continue to focus on the important job of safeguarding the nation's food supply. FIEC is concerned that requiring food companies to focus instead on requirements designed to prevent terrorist attacks involving chemical facilities will only detract from the food safety mission. As noted above, FIEC is aware of little evidence suggesting that ammonia refrigeration systems could present a significant security risk. On the other hand, the potential adverse consequences of a deliberate attack on the food supply could be enormous. FIEC strongly believes that its members should concentrate their resources and efforts on this latter threat.

FIEC views potential threats to the food supply to be the major terrorism concern of the food industry. Furthermore, FIEC believes that the food defense programs outlined above adequately address the potential threat to the food supply. Therefore, FIEC urges DHS to consider these programs to be alternative

Mr. Dennis Deziel
February 7, 2007
FIEC Comments
DHS-2006-0073

security measures for any food industry facility determined to be subject to the chemical security rules.

III. Performance Standards

DHS proposes to issue risk-based performance standards and guidance for compliance with those standards. FIEC supports the notion of performance standards that do not mandate particular actions or compliance methods, since such an approach is consistent with the chemical security legislative mandate and enables regulated facilities to choose the most appropriate means of compliance. However, FIEC is concerned that specific compliance options outlined in future DHS guidance may become de facto baseline requirements for state-sponsored chemical security programs. FIEC urges DHS to clearly establish that any methods listed in future guidance documents are not intended for broader adoption in state chemical security programs. In fact, as discussed below, FIEC believes that any such state programs should be preempted by the federal program.

IV. Coverage Determinations

Under the proposed chemical security program, DHS would use a screening process to assess whether or not facilities are high risk, and therefore subject to the requirements for site assessments, security plans and other measures. The proposed regulations include a provision under which a facility that does not complete the screening process as requested by DHS would be deemed presumptively high risk. See 71 Fed. Reg. at 78295 (proposed 6 C.F.R. § 27.200(b)). If the facility completes the screening process and DHS determines that it does not present a high level of security risk, its status as presumptively high risk would terminate and DHS would issue a notice to that effect. FIEC recommends that the regulations clarify that DHS will issue a notice to *any* facility that, after completing the screening process, DHS has determined does not present a high level of security risk. As discussed in the following section, this notice will enable facilities which have already taken on the burden and cost of collecting data and completing the screening process to avoid repeating their efforts under any other chemical security program.

V. Preemption

FIEC supports the statements made in the advance notice of rulemaking regarding the preemptive effect of the DHS regulations. FIEC agrees that addressing the threat of terrorist attacks is a matter of national concern, and

Mr. Dennis Deziel
February 7, 2007
FIEC Comments
DHS-2006-0073

that states should not be allowed to frustrate the federal chemical security program by imposing their own requirements. In particular, FIEC believes that DHS is the entity charged with determining whether or not a security threat is present at a particular facility, and whether or not the facility should be subject to chemical security rules. Accordingly, FIEC believes that any notice issued by DHS finding that a facility is not a high risk facility should be considered to have preemptive effect in the event of a state law that would mandate additional chemical security screening or compliance measures. Because chemical security is a matter properly left to federal jurisdiction, DHS's pronouncements regarding which facilities should be covered by chemical security standards and which should not, must be given preclusive effect.

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FIEC appreciates having the opportunity to comment on these very important chemical security issues. If you have any questions, please call Robert Garfield at (703) 821-0770.

Sincerely,

American Bakers Association
American Feed Industry Association
American Frozen Food Institute
American Meat Institute
Corn Refiners Association
Grocery Manufacturers/Food Products
Association
Independent Bakers Association
Institute of Shortening & Edible Oils
International Dairy Foods Association
Midwest Food Processors Association
National Oilseed Processors Association
National Renderers Association
Pet Food Institute
Snack Food Association