POLICY ISSUE
(Information)

March 9, 2011 SECY-11-0034

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. NUCLEAR REGULATORY COMMISSION AND THE U.S. DEPARTMENT OF HOMELAND SECURITY ON CHEMICAL FACILITY ANTI-TERRORISM STANDARDS

PURPOSE:

To provide the enclosed Memorandum of Understanding (MOU) between the U.S. Nuclear Regulatory Commission (NRC) and the U.S. Department of Homeland Security (DHS). In late November 2010, DHS Under Secretary Rand Beers, National Protection and Programs Directorate, signed the enclosed version of the MOU, which the staff intends to sign near the end of March 2011. This paper does not address any new commitments or resource implications.

BACKGROUND:

In Section 550 of DHS Appropriations Act for Fiscal Year (FY) 2007 (Public Law 109-295), Congress directed DHS to issue interim final regulations: (1) establishing risk-based performance standards for the security of chemical facilities determined by the DHS Secretary to present high levels of security risk and (2) requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities. On April 9, 2007 (72 FR 17688), DHS published the Chemical Facility Anti-Terrorism Standards (CFATS) interim

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final rule (Title 6 of the *Code of Federal Regulations* (6 CFR) Part 27); the rule went into effect on June 8, 2007. On November 20, 2007 (72 FR 65396), DHS published a final rule that revises the list of chemicals of interest and screening threshold quantities that appear in Appendix A, "DHS Chemicals of Interest," to 6 CFR Part 27. Appendix A identifies more than 300 chemicals of interest. If a facility possesses these chemicals in an amount that meets or exceeds a specified quantity (referred to as a "screening threshold quantity"), it must complete a consequence assessment tool, called Top-Screen and submit it to DHS.

Top-Screen is an online tool with which a facility answers a series of questions to assist DHS in making an initial determination whether the facility presents a high level of security risk and, therefore, would be subject to the CFATS regulations. From this questionnaire, DHS estimates the potential consequences to public health from the chemicals that each facility possesses based on local population density. Approximately 7,000 chemical facilities in the United States are expected to possess inventories of chemicals that will be characterized as high-risk and, therefore, will be subject to the CFATS regulations. Chemical facilities that require protection are graded into four categories that range from Tier 1 (those facilities for which the consequence of a successful terrorist attack is potentially the most severe) to Tier 4 (those for which the consequence of a terrorist attack is least severe, yet still unacceptable).

The regulation defines 18 performance standards that sites must meet. These were provided to the Commission in 2008, along with the draft DHS guidance document. (See http://www.dhs.gov.xlibrary/assets/chemsec_cfats_riskbased_performance_standards.pdf to view the final version of this guidance document.) The robustness of each security measure that the facilities implemented to meet the performance standards would need to be commensurate with the tier assigned by DHS to each facility.

Section 550 of the DHS Appropriations Act for FY 2007 also states that the regulations issued by DHS under that section shall not be applied, "…to any facility subject to regulation by the Nuclear Regulatory Commission." However, during the development of the CFATS regulations, it soon became evident that at some NRC-regulated facilities, using a literal application of this exemption under some circumstances might result in a significant gap in security with respect to chemicals that could present a significant risk if left unsecured. As a result, in consultation with the NRC, DHS chose not to adopt a literal interpretation and included the following explanatory language in the preamble to the CFATS interim final rule:

> The Department…will apply the statutory exemption [for facilities subject to NRC regulation] to facilities where NRC already imposes significant security requirements and regulates the safety and security of most of the facility, not just a few radioactive sources. For example, a power reactor holding a license under 10 CFR Part 50, a special nuclear material fuel cycle [facility] holding a license under 10 CFR Part 70, and facilities licensed under 10 CFR Parts 30 and 40 that have received security orders requiring increased protection will all be exempt from 6 CFR Part 27. A facility that only possesses small radioactive sources for chemical process control equipment, gauges, and dials will not be exempt.

Congress also exempted other facilities from DHS regulations. Specifically, Section 550 also exempts any facility owned or operated by the Department of Energy (DOE) from application of the regulations issued by DHS under that Section. Those facilities do not need to submit a

Top-Screen questionnaire to DHS, even if a facility that is owned and operated by DOE is licensed by the NRC or is located at an NRC licensee's site.

DISCUSSION:

The staff plans to enter into the enclosed MOU with DHS to delineate clear lines of responsibility between the parties, based on their legal authorities, for the security of high-risk chemical facilities subject to DHS regulation and for the security of chemicals at facilities subject to NRC regulation. The safe use, storage and disposal of chemicals are intentionally not addressed by CFATS or the MOU. Facilities are required to comply with all relevant chemical safety regulations promulgated by Federal and State agencies (e.g., U.S. Environmental Protection Agency, U.S. Occupational Safety and Health Administration, U.S. Department of Transportation and equivalent State agencies). The intention of the MOU is to describe the parties' relationship in identifying which facilities are subject to NRC regulation and thus are, in whole or in part, exempt from the chemical facility security regulations issued by DHS. The MOU was signed at the Undersecretary level for DHS and will be signed at the Office of the Executive Director for Operations level for the NRC to allow arbitration at higher levels in each agency, as described in Section 5.c. of the MOU. Once the MOU has been signed by both agencies, the NRC and DHS will jointly publish the MOU in the *Federal Register*.

The term facilities is used for all NRC licensed facilities and activities to be consistent with the language in the DHS CFATS regulation. Exemptions apply to entire facilities or areas within facilities. This approach was used since the purpose of the exemption is to prevent dual security regulation. Security is usually applied in areas of a facility, thus the concept of areas.

The MOU is needed to establish what is meant by the exemption to enable the NRC to identify the proper regulatory approach and to inform the licensed community as to what is meant by the exemption, so that licensees who are not exempt can consider how they might be impacted by the DHS regulations. Once the MOU is signed, the NRC will provide a list of exempted facilities by facility type to DHS. NRC will obtain a list of facilities meeting the requirements for exemption from each of the Agreement States so those facilities can be included in the list provided to DHS. Once agreement has been reached with DHS on the list of facilities that are exempt, NRC will make that list available to licensees, Agreement States and the public. NRC staff will follow this paper with a second paper providing the Commission with regulatory options for securing high-risk chemicals at NRC licensed facilities not subject to DHS CFATS regulations. Although areas of facilities and entire facilities are exempt from the CFATS regulations because the NRC for security purposes already regulates them, the security areas and levels of security at some NRC-licensed facilities may require adjustment in order to adequately secure all of the facility's high-risk chemicals.

The NRC has coordinated the issue of exemptions within this MOU with the Agreement States over the past 2 to 3 years, and the specific wording of the MOU has been coordinated with all the impacted program offices and with the Office of the General Counsel (OGC). The major provisions of the MOU are generally described below. Section 3.c. of the MOU states, "The NRC has the authority to regulate facilities consisting of structures or containing materials or activities that are covered by the Atomic Energy Act of 1954 (42 United States Codes 2167) and to ensure that such facilities implement appropriate security measures." Section 4 defines "facility subject to regulation by the NRC" and "NRC-licensed material."

Section 5 of the MOU discusses principles and procedures related to overall security responsibility, clarification of NRC exemption, methods to be employed to identify and notify exempt facilities and protection of classified and sensitive but unclassified information associated with facility security measures. If a facility is unsure if it is exempt from CFATS, it may request a determination from DHS or the NRC. In the event that a licensee inquires whether it is exempt, the NRC will coordinate with DHS and the applicable Agreement State to support DHS in their response to the licensee, as outlined in Sections 5.c., 5.d and Section 6 of the MOU. Once DHS and the NRC agree on a final determination regarding a facility's exempt status, DHS will notify the facility and provide the NRC with a copy of the notification. If there is dual regulation of a facility (i.e., only part of the site is exempt from DHS regulation) and DHS determines that the facility needs to implement security measures under CFATS, then DHS, the NRC, and the Agreement State, if applicable, will develop a specific standard operating procedure for the site to identify which regulatory body is responsible for security in what parts of the site. A similar approach currently exists for DOE facilities that are licensed or certified by NRC. For each of these facilities, NRC and DOE entered into an MOU to address security responsibilities. These MOUs may have to be amended to address the security of high-risk chemicals if they are present at these facilities. In the event that the NRC determines the exempt status of a licensee no longer exists, the NRC will inform DHS of the change in status.

Section 6 of the MOU lays out agreements on the NRC's identification of exempt facilities by type. Section 7 of the MOU lists the categories of the NRC-regulated facilities at which the NRC will solely regulate the security of chemicals of interest and those at which DHS may have a regulatory role based on consultation between the two agencies. Section 8 of the MOU contains provisions on the establishment of facility standard operating procedures, the severability of the MOU, rights and benefits, amending the MOU, the period of agreement, and the fact that the MOU does not obligate a transfer of funds.

In order to determine whether the chemical inventories at facilities subject to the NRC regulation are protected at levels comparable to those detailed in the CFATS regulation, the NRC staff contracted with Sandia National Laboratories in the second half of 2009 to conduct a study (1) to assess the status of chemical security at facilities under the NRC regulation and identify any significant vulnerabilities, (2) to compare the current security measures to those indicated in CFATS guidance, (3) to assess prudent security actions that the NRC might undertake for chemical security regardless of whether the current requirements meet or exceed those in CFATS, and (4) to identify a recommended approach to integrate chemical security regulation into the overall NRC regulatory approach. The study was coordinated with the Agreement States (five participated in site visits), DHS, and DOE. The staff is considering the results of this study in the development of a separate Commission Paper that will provide options to the Commission for regulating the security of high-risk chemicals at NRC-licensed facilities that are not subject to DHS CFATS regulations. Specific rulemaking activities will be coordinated with Agreement States, DOE, DHS, and EPA, among others. The staff expects to provide this options paper by end of May 2011.

COORDINATION:

OGC has reviewed this MOU and paper and has no legal objection.

/RA Martin Virgilio for/

R. W. Borchardt
Executive Director for Operations

Enclosure:
MOU

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