# MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF HOMELAND SECURITY AND THE U.S. NUCLEAR REGULATORY COMMISSION MARCH 31, 2011

## 1. PARTIES

The parties to this memorandum of understanding (MOU) are the U.S. Department of Homeland Security (DHS) and the U.S. Nuclear Regulatory Commission (NRC).

## 2. PURPOSE

The purpose of this MOU is 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 regulations and for the security of chemicals at facilities subject to NRC regulations. The parties intend this MOU to describe their relationship for the purpose of identifying those facilities that are subject to NRC regulations and are thus exempt, in whole or in part, from the chemical facility security regulations issued by DHS. To this end, the parties will cooperate in accordance with the principles and procedures in this MOU.

## 3. BACKGROUND

a. Congress conferred upon DHS the authority to regulate the security of high-risk chemical facilities and required DHS to develop risk-based performance standards for security at high-risk chemical facilities. DHS published such standards as an interim final rule (Volume 72 of the *Federal Register*, page 17688 (72 FR 17688)) on April 9, 2007. (See Title 6 of the *Code of Federal Regulations* (6 CFR) Part 27, "Chemical Facility Anti-Terrorism Standards (CFATS))."

b. Congress has exempted certain facilities, including facilities subject to NRC regulations, from DHS regulations. Those exemptions are reflected in 6 CFR 27.110(b) of the CFATS rule and discussed in 72 FR 17699.

c. The NRC has the authority to regulate facilities consisting of structures or encompassing materials or activities that are covered by the Atomic Energy Act of 1954 (42 U.S.C. 2167) and to ensure that such facilities implement appropriate security measures.

## 4. DEFINITIONS

The following definitions apply to this MOU and any amendments:

a. The terms, "consult" and "consultation," mean that each of the parties to this MOU will ask for the advice or opinion of the other party on issues pertaining to the implementation of this MOU and will confer with the other party for the purpose of arriving at agreement on such issues. The parties will exchange views promptly on issues that arise on matters addressed by the MOU.

b. The term, "facility subject to regulation by the NRC," means a facility or site, or an area within a facility or site, (1) for which the NRC or an Agreement State imposes significant security requirements that protect an NRC-licensed or Agreement-State-licensed material, activity, or structure from unauthorized access and (2) at which the licensee has implemented security requirements.

c. The term, "NRC-licensed material," means source material, special nuclear material, or byproduct material as defined in Section 11 of the Atomic Energy Act of 1954.

d. The term, "Agreement State(s)," means a State that has entered into an agreement with the NRC under Section 274b of the Atomic Energy Act of 1954.

e. The term, "chemical facility," has the meaning prescribed in 6 CFR 27.105, "Definitions"

f. The term, "NRC exemption," refers to the exemption described in section 550(a) of the Department of Homeland Security Appropriations Act of 2007, Pub. L. 110-295, and in 6 CFR 27.110(b).

**5. PRINCIPLES AND PROCEDURES**

The parties agree to the following principles and procedures:

a. Overall Security Responsibility. DHS is responsible for regulating security at high-risk chemical facilities under the CFATS rule. Facilities, or portions of facilities, that are subject to NRC regulations are exempt from the CFATS rule if they are identified within, or fall within, the categories identified in Section 6(a) or Section 6(b) of this MOU. DHS and the NRC acknowledge that a facility that is subject to NRC regulations could contain areas that are not subject to NRC regulations and that such areas, as determined by the parties under Section 6(b) of this MOU, may be subject to DHS regulations under CFATS. An example of such a situation might be the campus of a large institution, such as a university, which contains a structure that houses a research and test reactor subject to NRC regulations.

b. Clarification of Exemption. DHS and the NRC agree that the exemption provided by the CFATS rule for facilities subject to NRC regulations applies to a facility for which the NRC or an Agreement State imposes significant security requirements and regulates the safety and security of most of the facility. The NRC exemption does not apply to facilities at which the claim for exemption is based on NRC-licensed material that consists only of a number of small radioactive sources or to portions of facilities not subject to NRC security requirements. For example, a facility at which NRC-licensed material only consists of a small number of radioactive sources for chemical process control equipment, gauges, or dials will not be considered exempt. (See 72 FR 17699.)

c. Identification of Exempt Facilities. Within 60 days after the MOU is signed, the NRC will, to the extent possible, identify all facilities by category, licensee name, facility name (if any), and address that are subject to NRC regulations and that the NRC believes are exempt from the CFATS rule. For all such facilities, the NRC will inform DHS if it believes the entire facility or an area within the facility should be exempted from CFATS. For any facility for which the NRC believes that only an area within the facility should be exempted from CFATS, the NRC will provide DHS with sufficient information to identify any area within the facility that should not be subject to the exemption from the CFATS rule. DHS and the NRC will work together to make a final determination on whether a facility or an area within a facility is subject to NRC regulation and is thus exempt from DHS regulation. If the DHS and NRC staffs cannot reach agreement on a final determination, the Deputy Secretary of DHS and the Executive Director for Operations of the NRC will resolve the matter.

d. Exempt Facility Notifications. Once DHS and the NRC agree on a final determination regarding a facility's exempt status, DHS will notify the facility of the final determination and provide a copy of the notification to the NRC. If a facility's status under NRC regulations changes in a manner that warrants reconsideration of the final determination on its CFATS exempt status, the NRC will inform DHS in a timely manner of any such changes, and DHS and the NRC will reevaluate the facility's exempt status under the process described in Section 5(c) of this MOU. This reevaluation applies both to facilities that have been determined to be wholly or partially exempt from CFATS and to facilities that have not been declared wholly or partially exempt from CFATS.

e. Sensitive but Unclassified Information. The parties will take appropriate actions to protect Chemical-terrorism Vulnerability Information, as prescribed in 6 CFR 27.400, and Safeguards Information, as prescribed in Section 147 of the Atomic Energy Act of 1954 and its implementing regulations in 10 CFR Part 73, "Physical Protection of Plants and Materials," or directives in NRC implementing orders.

f. Classified Information. The parties will take appropriate action to protect classified information as prescribed in Executive Order 13526, "Classified National Security Information" (75 FR 707; January 5, 2010).

## 6. EXEMPT STATUS OF CERTAIN FACILITIES SUBJECT TO NRC REGULATION

Under the process described in Section 5(c) of this MOU, DHS and the NRC will jointly determine which facilities, or areas within a facility, are exempt from CFATS regulations. If a facility is licensed by an Agreement State, the NRC will consult with the Agreement State when a determination of exemption of such a facility is considered under this MOU. Facilities regulated by the NRC in accordance with its regulatory responsibility for chemical security will be assigned to one of the following categories:

a. Facilities Subject to NRC Security Regulations. Because of the extensive nature of NRC security requirements applicable to the facilities and categories of facilities listed below, DHS and the NRC agree that the NRC will be responsible for security, including the security of all chemicals of interest, at those facilities, and DHS will have no responsibility for such facilities under the CFATS rule. These facilities include the following:

- power reactors (licensed under 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," or 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants")
- Category I, II, or III facilities (licensed under 10 CFR Part 70, "Domestic Licensing of Special Nuclear Material")
- gaseous diffusion enrichment plants (operating under certificates issued under 10 CFR Part 76, "Certification of Gaseous Diffusion Plants")
- enrichment facilities (licensed under 10 CFR Part 70)
- the Honeywell uranium conversion facility (licensed under 10 CFR Part 40, "Domestic Licensing of Source Material")

- the International Isotopes Uranium Deconversion Facility, if licensed

b. Facilities That May be Subject to Both NRC and DHS Security Regulations. At a number of facilities subject to NRC regulation, the NRC security requirements are not applicable or are not required to be implemented in all areas of the facility. The areas of such facilities subject to NRC security regulations shall be exempt from the CFATS rule. The areas of the facility subject to NRC security requirements are those areas in which the licensee has implemented additional security measures (and hence have significant security requirements), as described in Section 5(b) of this MOU, in response to orders or regulations issued by the NRC and are therefore exempt from CFATS regulations. DHS and the NRC agree that an area of such a facility in which NRC security requirements are not imposed and implemented, as determined on a case-by-case basis by DHS in consultation with the NRC, may be subject to DHS security regulations under the CFATS rule if DHS determines that such areas present high levels of chemical security risk. In such circumstances, the NRC will consult with the relevant Agreement State, as appropriate, to help inform the final determination, made by DHS in consultation with the NRC, on which areas are subject to NRC regulations and are therefore exempt from CFATS regulation. These facilities may include the following:

- research and test reactors and nonpower reactors (licensed under 10 CFR Part 50)

- manufacturers and distributors (licensed under 10 CFR Part 32, "Specific Domestic Licenses To Manufacture or Transfer Certain Items Containing Byproduct Material") and possessors of large irradiators (licensed under 10 CFR Part 36, "Licenses and Radiation Safety Requirements for Irradiators") that are subject to additional security measures imposed under common defense and security as specified in the Atomic Energy Act of 1954, if those measures have been implemented

- radioactive materials licensees (licensed under 10 CFR Part 33, "Specific Domestic Licenses of Broad Scope for Byproduct Material"; 10 CFR Part 34, "Licenses for Industrial Radiography and Radiation Safety Requirements for Industrial Radiographic Operations"; 10 CFR Part 35, "Medical Use of Byproduct Material"; and 10 CFR Part 36) that have been issued increased control orders or license conditions to enhance security and that have implemented the enhanced security measures

## 7. OTHER PROVISIONS

a. Facility Implementing Agreements. After this MOU becomes effective, DHS and the NRC may jointly establish implementing agreements specific to the responsibilities and authorities of their respective agencies at any facility subject to both DHS and NRC regulation, as well as information-sharing protocols, or similar agreements with respect to such a facility.

b. Severability. Nothing in this MOU or any amendment thereto is intended to conflict with current law, regulations, DHS Secretarial and NRC orders, or DHS Secretarial directives. If any provision of this MOU or any amendment thereto is inconsistent with such authorities, then that provision will be invalid to the extent of such inconsistency, but the remainder of that provision and all other provisions, terms, and conditions of this MOU

and any amendment thereto will remain in full force and effect. In the event that either party to this MOU believes that such an apparent inconsistency exists, that party will promptly notify the other party and provide a reasonable opportunity to the other party to consult on which portions of this MOU may be invalid before the party that believes that the inconsistency exists makes a final decision.

c. Rights and Benefits. No part of this agreement is intended to diminish or otherwise affect the authority of any agency to carry out its statutory, regulatory, or other official functions. Furthermore, no part of this agreement is intended to create any right or benefit, substantive or procedural, enforceable by law by any party against the United States, its agencies or officers, or State agencies or officers carrying out programs authorized under Federal law or against any other person.

d. Amendment and Modification. This MOU and any amendments hereto may be amended or revised at any time by written agreement of the parties or by their authorized signatories. Both parties will use their best efforts to reach agreement on any amendment within 90 days of the date on which either party gives written notice to the other party of the proposed amendment.

e. Period of Agreement/Termination. This MOU will be effective as of the date of the final signatures of both parties and will remain in effect until (1) either party terminates it or (2) the DHS authority over security at high-risk chemical facilities terminates. Termination of this MOU by a party requires a written notice to the other party within 90 days.

f. Nonfund Obligating Document. No part of this MOU shall obligate either DHS or the NRC to obligate or transfer funds.

THE PARTIES HERETO have executed this instrument:

Martin J. Virgilio
Deputy Executive Director for Operations
for Reactor and Preparedness Program
U.S. Nuclear Regulatory Commission

Rand Beers
Under Secretary
National Protection and Programs
Directorate
U.S. Department of Homeland Security