

**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.

The Commissioners

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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

**MEMORANDUM OF UNDERSTANDING BETWEEN THE
U.S. DEPARTMENT OF HOMELAND SECURITY AND THE
U.S. NUCLEAR REGULATORY COMMISSION**

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 the NRC regulations. The parties intend this MOU to describe their relationship for the purpose of identifying those facilities that are subject to the 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 the 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 containing 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 the 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 the 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 the 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 Reactor
and Preparedness Programs
Office of the Executive Director for Operations
U.S. Nuclear Regulatory Commission

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