



National PROPANE GAS Association

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February 7, 2007

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

**Re: Chemical Facility Anti-Terrorism Standards (DHS-2006-0073; RIN 1601-AA41)**

Dear Sir:

The purpose of this letter is to provide comments of the National Propane Gas Association (NPGA) on the Department of Homeland Security (DHS) Advanced Notice of Proposed Rulemaking (ANPRM) addressing regulations for the security of certain chemical facilities.

**Introduction**

NPGA is the national trade association of the LP-gas (principally propane) industry with a membership of about 3,500 companies, including 39 affiliated state and regional associations representing members in all 50 states. Although the single largest group of NPGA members is retail marketers of propane gas, the membership also includes propane producers, transporters and wholesalers, as well as manufacturers and distributors of associated equipment, containers, tanks and appliances. Propane gas is used in residential and commercial installations, in agriculture, in industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and nonroad engines such as those used in forklifts.

Since 1931, NPGA's primary mission has been to increase the safety of propane use. Since September 11, 2001, NPGA's scope of activities has broadened to include security considerations. Our efforts began with intensive outreach to industry members to facilitate their interaction with federal officials representing agencies such as the Department of Transportation's (DOT) FMCSA and RSPA (now known as PHMSA) and the Department of Defense. We distributed DOT's Security Awareness Training CD-ROM to the industry and invited key policymakers to address our association meetings. NPGA's Security White Paper (copy attached) provides an overview of our activities. In addition, the propane industry sits on the Oil and Natural Gas Sector Coordinating Council providing direct interaction with other industries and federal security personnel.

Perhaps the most important initiative, however, has been the modernization of the primary propane safety standard to include security measures. National Fire Protection Association (NFPA) Standard 58, *LP-Gas Code*, is updated triennially to make continual improvements in safety for the storage and handling of propane. This standard is adopted by reference or by transcription in all 50 states and has included security-specific language since the 2004 edition. Section 6.16.5 of NFPA 58 prescribes requirements for the security and protection against tampering for propane systems. It also requires the facility operator to provide security measures to minimize entry by unauthorized persons and, at a minimum, security awareness training. Other requirements cover industrial-type fencing, guard service, lighting and ignition source control.

The vast majority of propane industry members are small, private companies serving a local customer base in a very seasonal manner. A 2006 NPGA survey showed that 99.1% of respondents are intrastate marketers. Of the approximately 3,000 propane marketers in NPGA's membership, 1,634 operate a single facility; 2,148 two or fewer facilities; and 2,737 less than 5 facilities. Intrastate marketers operate an average of 4.6 local delivery trucks, and 79.9% of intrastate marketers depend on common carrier delivery of propane supplies to their storage facilities instead of operating their own transports. Intrastate marketers operate an average of 2.2 facilities for the transaction of business, and 84.9% of intrastate marketers sell less than 3 million gallons of propane annually.

NPGA strongly believes that it is not appropriate for DHS to require small seasonal propane companies to deal with regulatory requirements of the scale and depth being proposed in the ANPRM.

#### Federal Research into the Use of Flammable Gases for Terrorist Acts

On April 25, 2006, the DHS Office of Intelligence and Analysis released a Homeland Security Assessment (copy attached) entitled, "Terrorist Use of Flammable Gases." The assessment addressed the attempted use of flammable gases overseas to increase the destructive effects of improvised explosive devices (IEDs). The report indicated that "Department of Defense and Bureau of Alcohol, Tobacco, and Firearms studies show that the addition of fuels to an explosive does not add to the blast effect of a detonation. Consequently, flammable gases do not strengthen the blast overpressure of an IED." NPGA is not asserting that propane is not flammable or that it does not need to be handled with care. We do believe, however, that this report supports our position that facilities storing flammable fuels do not warrant coverage under the current DHS regulatory proposal.

#### Comments on the DHS Proposal

Congress directed DHS to issue an Interim Final Rule (IFR) on chemical facility security standards within six months of enactment of the authorizing legislation, i.e. Homeland Security Appropriations Bill of 2007 (*P.L. 109-295, section 550*). Congress limited this authority by stating in subsection (f) that: "*Nothing in this section shall be construed to supersede, amend, alter or affect any Federal law that regulates the manufacture, distribution in commerce, use, sale, other treatment, or disposal of chemical substances or mixtures.*"

To balance these mandates, the Department has been working under an aggressive timeline to comply with this requirement, and although published as an ANPRM, this proposed rule serves the same purposes as a NPRM. NPGA believes that this opportunity for public comment is critically important and urges DHS officials to carefully consider all the points made in this and other comment letters before issuing an IFR. The complexity of the proposal and the potential for disruptive effects to the propane industry are too great for DHS to act hastily.

#### List of Chemicals for Screening Analysis

The proposal seeks to establish chemical facility security standards for those facilities deemed to ‘*present high levels of security risk.*’ DHS defines this phrase to be “...*a chemical facility that, in the discretion of the Secretary of Homeland Security, presents a high risk of significant adverse consequences for human life or health, national security and/or critical economic assets if subjected to terrorist attack, compromise, infiltration or exploitation.*”

The agency approach to determining which facilities may fall within this category begins with a screening analysis of a given set of facilities that meet a certain profile. Those facilities that meet the profile must then perform a vulnerability assessment and develop a site security plan as well as comply with a number of recordkeeping requirements. Moreover, none of these planning activities is complete until submitted to DHS and DHS officials have approved the written site security plan and made actual site inspections.

Considering the comprehensive nature of these requirements, along with their administrative burdens and future legal implications, NPGA believes that the key task for DHS is to keep the scope of covered facilities as narrow as possible. To achieve this goal, the most fundamental task for DHS is how to keep the list of chemicals used to initiate the first screening analysis to a minimum.

There are many chemical lists that have been developed over the years to implement numerous laws related to the storage, transportation and use of chemicals. Probably the most comprehensive list is the Department of Transportation’s hazardous materials list found in 49 CFR Part 172, Subpart B. The Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) also administer comprehensive lists for environmental and workplace safety regulations. Indeed, EPA manages a “List of Lists Database” covering the many substances regulated under five separate environmental laws. Alternatively, DHS could contact specific chemical facilities individually requesting they complete the screening analysis.

NPGA opposes use of the list of DOT hazardous materials contained in 49 CFR Part 172, Subpart B as it is far too broad and would capture many chemicals for which the screening exercise would be unnecessary. DHS even acknowledges in the ANPRM that not all chemical facilities present a high level of security risk, so it would be impractical to include all hazardous materials in the initial screening process. This is an important acknowledgement that reflects the Department’s understanding of the intent of Congress to avoid duplication or overlapping with other existing laws regulating the use, transport or storage of chemical substances. Similarly, NPGA opposes DHS arbitrarily identifying a list of chemical facilities to complete an initial screening analysis with no apparent basis upon which to make this determination.

We believe DHS could use an existing list as the basis for which to begin the initial screening process, and that the most appropriate would be the EPA's toxic chemicals list which underpins the Risk Management Plan (RMP) program specified in 40 CFR Part 68. The purpose of the RMP program is to prevent accidental releases that could affect the public or environment.

Approximately 15,000 Risk Management Plans are on file with EPA. While NPGA strongly believes that, notwithstanding the impact on the private sector, DHS operations themselves would be jeopardized were the Department to apply all of the proposed requirements to these 15,000 facilities. In advocating EPA's RMP list of toxic substances, NPGA believes that DHS can maximize its program's effectiveness by concentrating on the facilities handling these toxic materials. This approach would also have the benefit of not disrupting the regulatory regime enacted by Congress for non-toxic flammable fuels such as propane within the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act (*P.L. 106-40*). The implementing regulations from this Act were codified in 40 CFR 68.126 in a March 13, 2000 *Federal Register* Final Rule (65 FR 13244). Section 68.126 specifies that flammable substances used as a fuel, or held for sale as fuel at retail facilities, are excluded from the RMP requirements.

The only exception to these RMP exclusions is if a substance were to cause a fire or explosion that resulted in acute adverse health effects from human exposure to the substance or its combustion byproducts. However, EPA determined in its review that any flammable substances that were also toxic were already listed in the toxic substances list. In addition, any toxic combustion byproducts would be a fraction of the total mass and not likely to exceed the applicable threshold for coverage by the RMP rule. Quantities below the threshold would be unlikely to have significant consequences. Therefore, EPA concluded that there were no flammable substances that met the exception to the RMP exclusions.

A DHS decision to cover only toxic substances would also ensure that OSHA regulations pertaining to flammable fuels were not duplicated. OSHA's Process Safety Management (PSM) Standard is the workplace counterpart of EPA's RMP program. PSM requirements protect workers from accidental releases of highly hazardous substances in the workplace, while the RMP rule protects the public and environmental from the offsite consequences of those releases. OSHA provides an exemption from the PSM Standard for hydrocarbon fuels used solely for workplace consumption as a fuel (e.g. propane used for comfort heating) if such fuels are not part of a process containing another highly hazardous chemical covered by the standard. The PSM Standard also exempts such substances when sold by retail facilities which has been clarified to be those at which more than one-half of the income is obtained from direct sales to end users.

It should be noted that retention of the RMP exclusions would be consistent with Section 550(f) of the DHS authorizing legislation. NPGA believes that if DHS were to disregard the exclusions established under the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act (*P.L. 106-40*), it would violate the terms of the authorizing legislation, which was meant to ensure there is consistency in the application of the laws pertaining to chemicals. Moreover, it would be counter to the previous actions of Congress whose efforts to achieve consistency between the RMP and PSM standards were based on the minimal impacts or offsite consequences of a release of these substances.

Regarding the subject of background checks, DHS requests comments on the proper application of the background check requirement and the method by which the checks should be performed. First, NPGA agrees with the statement in the ANPRM that most operators of facilities already perform background checks on their employees. Certainly, propane companies fulfill this requirement as part of their compliance with the existing DOT security plan requirements in 49 CFR Part 172, Subpart I, which pertain to personnel security. Also, drivers of propane vehicles must undergo a fingerprint-based background check before receiving their hazardous materials endorsement on their commercial driver's license as part of TSA's security requirements.

NPGA believes that covered facilities should be allowed to continue to determine the best method to perform the background checks. In addition, we would oppose any requirement by DHS to have a fingerprint-based background check requirement for any facility employees beyond those already required to have one, i.e. commercial drivers seeking a hazardous material endorsement. An examination of the existing TSA fingerprint-based program would reveal a myriad of problems encountered by industry in seeking to comply with this requirement. A shortage of locations to submit fingerprints as well as lengthy processing times are two examples that greatly hindered the implementation of the program. Given this experience, to require fingerprint-based background checks on employees, beyond commercial vehicle drivers, would be unwieldy, at best, and a regulatory implementation nightmare at worst.

In the broader sense, NPGA believes that DHS must take into account the actions already taken by facilities regarding security plans developed under the DOT requirements specified in 49 CFR Part 172, Subpart I. These requirements specify that anyone offering for transportation a hazardous material develop a security plan and they must address three elements that include personnel security, unauthorized access, and en route security. Several of the performance standards identified by DHS in the site security plan requirements overlap with those of DOT's security plan requirements and the agency should ensure there is no duplication of effort by covered facilities.

### Federal Preemption

NPGA supports the DHS determination that federal preemption applies to the proposed chemical facility security requirements. We agree with the agency's assertion that regulatory efforts at the state or local level could 'frustrate' or create a conflict with federal requirements, and, thus compromise the implementation of security measures at a covered facility. Many covered facilities are operated by multi-state companies and uniformity of regulations at the federal level is paramount in allowing these companies to develop consistent security measures.

### Summary

NPGA urges DHS to not cover propane within its chemical facility anti-terrorism standards. Not only is propane non-weaponizable, but covering propane within the standards would violate Congressional intent. To the extent that DHS needs to designate covered substances, it should use EPA's RMP list of toxic substances as the basis for which DHS can begin selecting chemical facilities for the initial screening process. We also believe that covered facilities should have the option to determine the best methods of compliance with the site security plan requirements.

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Lastly, NPGA supports the Department's assertion that federal preemption should apply to the regulations governing chemical facility security standards.

NPGA appreciates the opportunity to comment on the ANPRM. Please feel free to contact us if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Calderera". The signature is written in black ink and is positioned below the word "Sincerely,".

Michael A. Calderera  
Director, Regulatory and Technical Services

Attachments: 1) NPGA Security White Paper  
2) Homeland Security Assessment "Terrorist Use of Flammable Gases"