



National PROPANE GAS Association

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IP/CSCD/Dennis Deziel
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Attention: Docket 2006-0073

Dear Mr. Deziel:

The purpose of this letter is to present the comments of the National Propane Gas Association (NPGA) on the Chemical Facility Anti-Terrorism Standards, including Appendix A, published by the Department of Homeland security on April 9, 2007, and appearing at 72 Fed. Reg. 17688. All of the concerns expressed in this letter by NPGA stem from DHS' inclusion of propane and its corresponding Screening Threshold Quantity (STQ) of 7500 pounds in Appendix A. These concerns can be summarized as follows:

1. DHS has published an internet-based regulation that is neither workable nor fair. Requiring Top-Screen submittals only via the internet is an unnecessary and arbitrary burden on companies and citizens either not online or not possessing broadband connectivity.
2. DHS rules can be expected to decrease safety in the propane industry by creating significant incentives to keep storage levels low, thereby increasing the frequency of shipments and product transfer operations.
3. DHS rules will lead to a degradation of American environmental quality due to fuel switching by customers. Propane is an environmentally friendly fuel listed in the Energy Policy Act and the Clean Air Act. Energy sources with greater environmental impacts that compete with propane for customers stand to benefit from the burdensome requirements imposed on propane storage through this rule.

4. DHS has ignored the limitations placed on its authority by Congress in Section 550 of the Homeland Security Appropriations Act regarding overlap with other health, safety, and environmental laws. The Top-Screen process will require retail and customer propane facilities to perform, in effect, a “Risk Management Program” (RMP) “worst-case release scenario” evaluation, despite the fact that they have been exempted from doing so under federal law.
5. DHS has not undertaken adequate analysis of the substances it intends to regulate or the engineering aspects of their storage requirements. DHS has not provided any rationale for or description of its decision-making process for why particular substances were listed at particular threshold quantities. Because of this, DHS has vastly underestimated the number of facilities that will be brought under the rule by setting the threshold quantity for propane at 7500 pounds.
6. In its haste to publish something, DHS has ignored the Administrative Procedure Act, which is designed to protect American citizens from arbitrary agency rulemaking.
7. DHS fails to provide the regulated community of “fair notice” of the conduct it seeks to regulate, in violation of the Due Process Clause.

Description Of NPGA And The Industry. NPGA is the national trade association of the LP-gas (principally propane) industry with a membership of over 3,600 companies, including 39 affiliated state and regional associations representing members in all 50 states. Although the single largest group of NPGA members are retail marketers of propane gas, the membership includes propane producers, transporters and wholesalers, as well as manufacturers and distributors of associated equipment, containers and appliances. Propane gas is used in over 18 million installations nationwide for home and commercial heating and cooking, in agriculture, in industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks.

Fundamentals Of Propane. Propane is a colorless, odorless flammable gas that is derived from natural gas processing and crude oil refining. Propane is non-toxic, and has a narrow range of flammability. Transportation and storage infrastructures are highly regulated at the federal, state, and local levels and have led to a high level of safety in all areas of usage. In 2004, the latest year for which data are available, approximately 11.1 million gallons were sold for use as fuel in residential, commercial, engine fuel, industrial, and agricultural sectors.

Propane Industry Activities To Increase Security. Since September 11, 2001, NPGA’s scope of activities has included security as a top concern. 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) Federal Motor Carrier Safety Administration (FMCSA) and Research and Special Programs Administration (RSPA) (now known as the Pipeline and Hazardous Materials Safety Administration (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 published a Security White Paper on our activities (attached to our comments on the December 28, 2006 Chemical Facility Anti-Terrorism Standards Advance Notice of Rulemaking). In addition, the propane industry has been engaged with the Oil and Natural Gas Sector Coordinating Council since its founding.

Perhaps the most important initiative, however, was the modernization of the primary propane safety code 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 contains 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.

Description Of Section 550 Of The SSA. Section 550 of the Homeland Security Appropriations Act of 2007 (Public Law. No. 109-295) was signed into law by President Bush on October 4, 2006. Section 550 reads as follows:

SEC. 550. (a) No later than six months after the date of enactment of this Act, the Secretary of Homeland Security shall issue interim final regulations establishing risk-based performance standards for security of chemical facilities and requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities: *Provided*, That such regulations shall apply to chemical facilities that, in the discretion of the Secretary, present high levels of security risk: *Provided further*, That such regulations shall permit each such facility, in developing and implementing site security plans, to select layered security measures that, in combination, appropriately address the vulnerability assessment and the risk-based performance standards for security for the facility: *Provided further*, That the Secretary may not disapprove a site security plan submitted under this section based on the presence or absence of a particular security measure, but the Secretary may disapprove a site security plan if the plan fails to satisfy the risk-based performance standards established by this section: *Provided further*, That the Secretary may approve alternative security programs established by private sector entities, Federal, State, or local authorities, or other applicable laws if the Secretary determines that the requirements of such programs meet the requirements of this section and the interim regulations: *Provided further*, That the Secretary shall review and approve each vulnerability assessment and site security plan required under this section: *Provided further*, That the Secretary shall not apply regulations issued pursuant to this section to facilities regulated pursuant to the Maritime Transportation Security Act of 2002, Public Law 107-295, as amended; Public Water Systems, as defined by section 1401 of the Safe Drinking Water Act, Public Law 93-523, as amended; Treatment Works as defined in section 212 of the Federal Water Pollution Control Act, Public Law 92-500, as amended; any facility owned or operated by the Department of Defense or the Department of Energy, or any facility subject to regulation by the Nuclear Regulatory Commission.

* * *

(f) 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.

The rules implementing Section 550 of the Homeland Security Appropriations Act were published on April 9 as an Interim Final Rule (IFR), and the only aspect upon which DHS is soliciting comments is Appendix A, DHS Chemicals of Interest, which includes screening threshold quantities for each listed substance. Under the IFR, *any facility* that possesses or plans to possess more than 7,500 pounds of propane, whether in bulk or not, must complete and submit to DHS an internet-based questionnaire known as the “Top-Screen”. The questionnaire is intended to assess the level of damage that could result from a terrorist incident at the facility. We have not seen it yet, but we believe questions will include items such as facility and personnel identifying information (address, key contact, and geographic location); potential loss of life and life changing injuries on or near the facility as a result of an incident; and whether a flammable release worst-case scenario might expose a residential population greater than or equal to 1,000 persons.

The only way to complete the Top-Screen questionnaire is through the internet. Responses submitted in any form other than online, such as by mail or fax, will not be allowed. DHS will then run the answers through a computer program that will determine whether a facility is high risk by independently calculating populations at risk and potential consequences. Interestingly, despite the emphasis on electronic submission of top-screen data, persons registering for access to the Chemical Security Assessment Tool (CSAT) are still required to mail or fax a hard copy of signed materials to DHS before being approved to provide information.

If DHS’s computers say that a facility is high risk, two additional reports will be required. A **Security Vulnerability Assessment** must be completed within 60 days of notification by DHS, and must include an asset characterization; threat assessment; security vulnerability assessment; risk assessment; and countermeasures analysis. Subsequently, a **Site Security Plan** must be developed within 120 days of the initial DHS notification and must address each vulnerability; describe how security measures will address various potential modes of terrorist attack; and describe how security measures will meet or exceed DHS-mandated performance standards. Both of these reports must be sent to DHS for review and approval. Violations of these regulations will bring *finest of up to \$25,000 per day*.

DHS Has Published An Internet-Based Regulation That Is Neither Workable Nor Fair. Requiring Top-Screen submittals only via the internet is an unnecessary and arbitrary burden on companies and citizens either not online or not possessing broadband connectivity. Propane typically serves customers “beyond the mains”, meaning this customers who work or reside outside natural gas utility service. In our shorthand, we talk about “Propane Country.” Citizens and businesses that desire the benefits of gas in space heating, water heating, engine fuel, and/or cooking can look to propane to fulfill their energy needs. Certainly, rural Americans have become much more computer savvy in recent years and many have access to the internet. However, it is wrong to assume that all facilities storing more than 7,500 pounds of propane have internet access, or are willing to use it to register their storage with DHS.

Requiring the submission of the Top-Screen via internet only will require entities subject to the IFR to either (1) obtain a computer and internet access for a one-time event, (2) go to a public location which may not provide a secure connection to submit their Top-Screens, or (3) choose not to submit either because they cannot afford a computer and internet connection or do not have public access to a computer and the internet in close proximity, in which case they face substantial penalties.

DHS Rules Can Be Expected To Decrease Safety In The Propane Industry By Creating Significant Incentives To Keep Storage Levels Low, Thereby Increasing The Frequency Of Shipments And Product Transfer Operations. We saw this effect when the Environmental Protection Agency (EPA) was preparing to implement its RMP regulations in 1999. Customers began demanding their suppliers not deliver more than the threshold quantity of propane (then 10,000 pounds). This, in turn, required propane marketers to increase the number of deliveries to each customer in order to ensure they had enough to meet their onsite demands. Our industry then, as now, was very concerned that this actually decreased customer safety. During the extensive HM-225 negotiated rulemaking with DOT, industry and governmental representatives reviewed in detail accident histories to prioritize safety activities in the propane delivery process. It quickly became very clear that the product transfer operation represented the higher risk of an incident relative to product storage. Because of this, industry and government agreed to a rigorous hose inspection and delivery monitoring regime that was phased-in over the course of several years. The DHS regulations will “turn back the clock” on safety. Despite our success in reducing the risk of incidents during product transfer, it remains the greater risk compared with propane storage. Requiring customers and propane marketers to comply with the chemical facility regulations will therefore have the effect of reducing safety of propane storage.

DHS Rules Will Lead To A Degradation Of American Environmental Quality Due To Fuel Switching By Customers. Again, our experience dealing with the EPA RMP regulations is instructive. The burdens imposed by the RMP regulations caused customers to switch to other energy sources. Often, this meant customers turned to fuel oil and/or coal-fired electricity. In fact, one jurisdiction in California asserted that fuel switching was an entirely appropriate means to comply with the intent of the RMP rules. NPGA believes that the fuel switching potential of the DHS rules is even higher than for the RMP because the compliance threshold is 25% more stringent. Propane is an environmentally friendly fuel listed in the Energy Policy Act and the Clean Air Act. Energy sources that compete with propane for customers, but which have greater environmental impacts, actually stand to benefit from the burdensome requirements associated with this rule.

DHS Fails To Recognize That The Proposed Lower Threshold Will Increase The Potential For Terrorist Theft Of Propane. By proposing a 7,500 pound threshold for propane, DHS fails to recognize that its efforts may increase theft or diversion of propane while in transit and may increase transportation-related incidents involving propane. This is because propane consumers may choose to maintain their propane tanks at a capacity less than 7,500 pounds to avoid being potentially subject to DHS’ regulations. Assuming, as it likely will, that consumption remains the same, this will cause more frequent shipments of propane to these consumers. More frequent shipments of propane will mean more trucks and rail cars traversing

cities with the potential for more terrorist opportunity to steal or hijack a propane vehicle. In addition, more frequent propane shipments will increase the likelihood of transportation-related accidents involving propane vehicles/tank cars.

DHS Has Ignored The Limitations Placed On Its Authority By Congress In Section 550 Of The Homeland Security Appropriations Act Regarding Overlap With Other Health, Safety, And Environmental Laws. As we noted in our comments on the Advance Notice of Rulemaking (ANRM), Congress directed DHS to issue an IFR on chemical facility security standards within six months of enactment of the authorizing legislation, i.e. Homeland Security Appropriations Act of 2007 (*P.L. 109-295, section 550*). However, 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.*” DHS has violated this statutory restriction by requiring retail and customer propane facilities to complete an RMP worst-case release scenario despite the fact that they have been exempted from doing so under federal law. In effect, DHS has “amend[ed], alter[ed] or affect[ed] . . . Federal law” in violation of this statutory prohibition.

The IFR requires in Section 27.200(b)(2) that any facility possessing any of the substances listed in Appendix A above the Screening Threshold Quantity to go through the Top-Screen process. Propane is listed in Appendix A with an STQ of 7500 pounds. DHS directs covered facilities to undergo screening through the online CSAT. Unfortunately, DHS has not included in the final rule any description or presented any information about what questions or categories of information will be sought from facilities through CSAT. Although a glimpse is available in Appendix A to the ANRM, DHS states that “the following appendices will not appear in the Code of Federal Regulations,” and, thus, it is clear that they will not have the force of a regulation, they will not be subject to challenge, and they will be changeable outside the normal notice and comment process. These flaws notwithstanding, DHS describes the three segments of the CSAT: (1) identifying information from the facility; (2) a series of exclusionary questions; and (3) identifying which chemicals are present at facilities. It is in this third segment of the CSAT that we learn that the facility will be asked “whether a flammable release worst-case scenario (as *identified by the facility under the EPA Risk Management Program*) might expose a residential population greater than or equal to 1,000 persons.” (emphasis added.) Answers to this and other questions will be fed into the computer to determine automatically whether a facility is, in fact, high risk.¹

¹ DHS states

“The Top-screen tool has the ability to calculate populations at risk and other potential consequences based upon factors such as geo-location and type and quantity of chemical without further information from the provider. The top screen tool will be part of a sophisticated system that allows the importation of data from the National Geospatial-Intelligence Agency and other such data repositories, as well as the importation and use of modeling tools from the National Laboratories System. Accordingly, DHS will calculate consequentiality based upon the data that facilities provide during the Top-screen process.” (78703)

As we noted in our comments on the ANRM, facilities storing propane for sale as fuel or use as a fuel are exempt from the RMP regulations. On August 5, 1999, President Clinton signed into law 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.

NPGA finds it inconceivable that DHS could construe its regulations as not violating the restrictions on its authority found in Section 550 related to overlap with other law. The DHS regulations will require facilities storing propane as fuel, or for sale as fuel, to do an RMP from which they are exempt under federal law. This cannot be allowed to remain in the IFR, and DHS must remove propane from the Appendix A list of covered substances or adopt the flammable fuel exclusions from RMP enacted by Congress in 1999.

DHS Should Act In Accord With Congress' Direction In The Chemical Safety Information, Site Security And Fuels Regulatory Relief Act. Propane is identified in Appendix A with a STQ of 7,500 pounds. Unlike under the RMP, where propane used as a fuel and propane held for sale by retail facilities is not subject to the RMP, there is no such exclusion in proposed Appendix A. This will create confusion in the regulated community given that DHS purports to use the RMP list of chemicals as the basis for its Appendix A. As DHS is aware, Congress explicitly prohibited EPA from regulating propane under the RMP when held as a fuel and for sale by retail facilities pursuant to the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act, Pub. Law No. 106-40 (August 5, 1999). In enacting this legislation, Congress concluded, as stated by Senator Burns during floor debate on the legislation:

[G]iven that public safety is adequately protected through existing federal laws and state building and fire codes, I believe no further requirements are needed. Also people who store flammable fuels are very safety conscious given the unstable nature of the product they work with. The safety record on the storage of flammable fuels is good and demonstrates that current regulatory requirements are adequate. Without any clear problem of the existing framework of protections, I do not see why these substances should be further regulated under Section 112 of

NPGA believes that this means that a "high risk" designation will be an automatic function of the CSAT perhaps without human corroboration or analysis. We further believe that this is highly inappropriate considering how little detail we know of the program other than DHS assertions of robustness and excellence.

the Clean Air Act. 145 Cong. Rec. S4342 (April 28, 1999) (statement of Senator Burns).

NPGA believes that propane should not be included in Appendix A when held for use as a fuel or when held by a retail facility for sale. Identifying propane for regulation based on all possible use/possession scenarios will lead to confusion by the regulated community, as will the proposed lower threshold. Furthermore, DHS does not provide any justification for its proposed inclusion of propane in Appendix A for all uses at the STQ of 7,500 pounds.

DHS has not undertaken adequate analysis of the substances it intends to regulate or the engineering aspects of their storage requirements, which has led DHS to vastly underestimate the number of facilities that will be brought under the rule by setting the threshold quantity for propane at 7500 pounds. While we understand the pressure exerted on DHS to meet its responsibilities under Section 550, we do not understand the inability to anticipate the scope of its proposal. In fact, DHS may have missed the mark by an order of magnitude for propane alone. The Executive Summary accompanying the April 1, 2007 Regulatory Assessment states that “DHS currently estimates that as many as 50,000 facilities will register and complete a Top-Screen to better define the population of facilities to be covered by the IFR.” (p. 9) However, this estimate was adjusted downward by 20% to 40,000 facilities in the IFR. We believe the fact that DHS published two different estimates that were 20% different in the course of little more than one week is troubling. What is more troubling, however, is the fact that DHS believes only 40-50,000 facilities in the United States possess any of the 344 covered substances in amounts over the STQ.

Here are some statistics from the propane industry that puts this into perspective. Using private industry data, NPGA calculates that approximately 1.7% of all propane customers store more than 7,500 pounds. If each retail storage facility serves even 1,000 customers included in this estimate, this means that there will be on average 17 covered facilities per retail storage facility. Knowing as we do that there are approximately 8,000 retail propane storage facilities, this means that there are conservatively 136,000 propane customers having to perform a Top-Screen. Add in the retail storage facilities and you exceed 144,000 sites *for propane alone*. Using DHS cost estimates of doing the Top Screen (\$2,300-\$3,500 per facility), and assuming a cost of \$5,000 per facility to perform a flammable worst-case scenario analysis, the total regulatory cost *for only propane facilities* is \$1,051,200,000-\$1,224,000,000.

The absurdity of the situation becomes clear in light of DHS research into propane effectiveness as a terrorist tool. As we stated in our comments on the ANRM, on April 25, 2006, the DHS Office of Intelligence and Analysis released a Homeland Security Assessment 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 states 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.

Should DHS decide to include propane on Appendix A, NPGA believes that DHS must redo its cost estimate for the chemical security rule to account for increased propane shipments and, in turn, evaluate the costs associated with the increased potential for terrorist theft or diversion of propane and transportation-related accidents resulting from more propane shipments.

DHS's Proposed Appendix A Fails To Comport With The Administrative Procedure Act. DHS fails to provide the regulated community with sufficient explanation regarding the development of Appendix A to provide meaningful comment, in violation of the Administrative Procedure Act ("APA"). Under the APA, an administrative agency engaged in rulemaking must provide the regulated community with, among other things, the "terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). Continuing on, when an agency promulgates a final rule based on the comments received, the agency must "[a]fter consideration of the relevant matter presented, incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). The U.S. Supreme Court has stated, in interpreting these obligations, that "[i]t is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a rational connection between the facts found and the choice made.'" *Bowen v. American Hospital Ass'n*, 476, U.S. 610, 626 (1986).

DHS states that Appendix A is based on "existing sources of information," including the EPA's RMP list of chemicals, the Chemical Weapons Convention ("CWC") list of chemicals, and DOT's list of hazardous materials ("HAZMAT"). 72 Fed. Reg. at 17696. However, there is no discussion as to how DHS selected specific chemicals and, in turn, developed the corresponding STQs. The best discussion of DHS' methodology in its 57 page single spaced, three column *Federal Register* notice is found in a single sentence: "[T]he Department has sought to be sufficiently inclusive of chemicals and quantities that might present a high level of risk under the statute without being overly inclusive and therefore capturing facilities which are unlikely to present a high level of risk." 72 Fed. Reg. at 17696. However, this tells the regulated community nothing regarding the chemical evaluation and selection process, or how the STQs were established.

Continuing on, DHS asserts that Appendix A is based on three security issues: (1) "the potential for significant adverse consequences for human life or health" resulting from a release of the chemical ("release"); (2) the potential for theft or diversion and the resultant use of the chemical "to create significant adverse consequences for human life or health" ("theft or diversion"); and (3) the potential for mixing the designated chemicals with "readily-available materials" and the resultant "potential to create significant adverse consequences for human life or health" ("sabotage or contamination"). *Id.* However, nowhere in either the preamble or docket is there any discussion regarding the evaluation of specific chemicals and development of the associated STQs in light of these three security issues.

DHS presumably evaluated the chemicals and associated thresholds (as applicable) from the RMP, CWC, and HAZMAT lists as part of its implementation of Section 550; however, DHS's evaluation methodology is nowhere to be found in either the *Federal Register* preamble

or the rulemaking docket materials. For example, propane is identified on the RMP list (when not being held for retail sale or for on-site fuel consumption) and DOT HAZMAT list, but DHS does not explain why propane is on Appendix A for all possible activities with a threshold of 7,500 pounds, when the RMP threshold is 10,000 pounds and is only applicable to certain non-fuel uses.

Perhaps in trying to alleviate concerns that a chemical's presence on Appendix A is not the sole factor in concluding that a chemical facility possessing that chemical is a high risk facility, DHS asserts that Appendix A is "merely a baseline threshold requiring a facility to complete and submit a Top-Screen." 72 Fed. Reg. at 17690. However, Appendix A is much more than merely a baseline threshold. Although a facility possessing Appendix A chemicals and associated STQs may ultimately be deemed to not present a high level of risk, the possession of these chemicals at a facility will carry the stigma of the facility being a possible terrorist target.

Although an administrative agency is afforded deference when it promulgates a regulation pursuant to a grant of statutory authority, that deference does not allow an agency to hide behind an assertion by the agency that there is "some rational basis within the knowledge and experience of the [agency]" that was used to discharge its statutory obligations. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). As recognized by the Supreme Court: "Our recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgment in both. 476 U.S. at 598 (emphasis added). This admonition by the Court that an administrative agency must explain the rationale and factual basis for its decision in order to provide the regulated community with sufficient notice to provide meaningful comment is born out by a recent decision by the U.S. Court of Appeals for the Second Circuit ("Second Circuit").

In this case, the Second Circuit was asked to review a final rule promulgated by EPA pursuant to the federal Clean Water Act intended to protect aquatic organisms from being harmed by power plant cooling water intake structures. *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2nd Cir. 2007). In promulgating the rule, EPA purported to evaluate the economic practicability of various regulatory scenarios as part of its rulemaking; however, the Agency did not provide the underlying evaluation. In its decision to remand the rule to EPA to explain its conclusions, the Second Circuit noted:

[I]t is difficult to discern from the record how the EPA determined that the cost of closed-cycle cooling could not be reasonably borne by the industry. . . . We see no adequate comparison in the Rule's proposal, the final Rule or its preamble, or the EPA's submissions to this Court of the effectiveness of closed-cycle cooling and the group of technologies whose effectiveness provided the basis for the Phase II Rule's performance standards. In a technical area of this sort, it is difficult for judges or interested parties to determine the propriety of the Agency's action without a justification for the action supported by clearly identified substantial evidence whose import is explained. 475 F.3d at 103-104 (emphasis added).

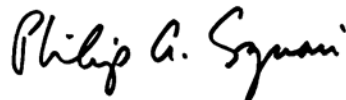
The conclusory statement by DHS that “the Department has sought to be sufficiently inclusive of chemicals and quantities that might present a high level of risk under the statute without being overly inclusive and therefore capturing facilities which are unlikely to present a high level of risk” is not sufficient to withstand judicial review of Appendix A. *See* 72 Fed. Reg. at 17696. In order to provide meaningful comment on Appendix A, DHS must make publicly available for comment its rationale for the list of Appendix A chemicals and proposed STQs beyond merely providing a single sentence in a 57 page *Federal Register* notice. *Id.*

DHS’s IFR, When Read In Conjunction With Appendix A, Does Not Provide The Regulated Community With Sufficient Certainty To Ascertain What Conduct Is Being Regulated, In Violation Of The Due Process Clause. DHS states in the IFR that a facility is required to complete a Top-Screen “within 60 calendar days of the effective date of Appendix A for facilities that possess any of the chemicals listed in Appendix A at the corresponding STQs, or within 60 calendar days for facilities that come into possession of any of the chemicals listed in Appendix A at the corresponding STQs.” 6 C.F.R. § 27.210(a)(1)(i). DHS does not define the term “possess” anywhere in its regulations. Continuing on, DHS states that an establishment subject to the IFR must also submit a revised Top-Screen within 60 days of the establishment making a “material modification” to its operations. 6 C.F.R. § 27.210(d). As before, DHS does not define what constitutes a “material modification.”

The Due Process Clause requires that regulated entities receive “fair notice” of the conduct that a government agency expects them to adhere to prior to imposing penalties. As noted by the U.S. Court of Appeals for the District of Columbia Circuit, the Due Process Clause “prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.” *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). In the absence of this “fair notice,” for example, whereas here DHS’s IFR “is not sufficiently clear to warn a party about what is expected of it”, the agency may not “deprive a party of property by imposing civil or criminal liability.” *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

For all the reasons set forth above, NPGA urges DHS to remove propane from the Appendix A list of covered substances. As an alternative, DHS should adopt the flammable fuel exclusions for propane held as fuel or held for sale as fuel found in Fuels Regulatory Relief Act of 1999. Thank you for this opportunity to provide comments. Should you have questions or require further information, please don’t hesitate to contact me.

Sincerely,



Philip A. Squair
Senior Vice President
Public and Governmental Affairs