

# K&LNG Alert

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## Environmental and Homeland Security New Law Grants Homeland Security Broad Powers to Mandate Security Measures at Facilities Having Chemical Substances

On October 4, 2006, President Bush signed the Department of Homeland Security (DHS) spending bill for fiscal year 2007. The bill includes landmark language authorizing the Homeland Security Secretary to set and enforce performance standards for chemical plants that pose a high risk to the nation's security. This compromise legislation was enacted after almost four years of debate that saw the proposal of no less than four different stand-alone chemical facility security bills, including bills offered up by both houses earlier this year.<sup>1</sup> The most significant feature of the legislation may be what it does not do: it defers virtually every major issue that has prevented passage of previously proposed stand-alone legislation to the rulemaking process. Moreover, the law requires that DHS promulgate regulations governing these issues *within the next six months*.<sup>2</sup> This Alert discusses some of the key questions that will likely be the focus of significant debate during the regulatory process.

The legislation provides that:

- regulations will apply to those "chemical facilities" that the Homeland Security Secretary determines (at the Secretary's discretion) "present high levels of security risk;"<sup>3</sup>
- a regulated facility's "site security plan" cannot be disapproved based on the presence or absence of certain security measures, but the Secretary may disapprove a plan that fails to meet the "risk-based performance standards" which are in turn prescribed by regulation issued by the Secretary;

- the Secretary may approve "alternative security programs established by private sector entities, Federal, State, or local authorities, or other applicable laws," so long as they satisfy any regulations promulgated by the Secretary;
- the regulations will not apply to: (1) facilities regulated under the Maritime Transportation Security Act (MTSA), (2) drinking water utilities,<sup>4</sup> (3) wastewater treatment facilities,<sup>5</sup> (4) facilities owned by the Departments of Defense and Energy, and (5) facilities subject to regulation by the Nuclear Regulatory Commission;
- the Secretary's authority under the new legislation terminates three years after its enactment date, and the interim final regulations may be superseded by regulations promulgated pursuant to other laws;
- if a facility violates the regulations, the Secretary must provide it with written notice and issue an order mandating compliance. If the facility does not comply, the Secretary may order the facility to cease operation until compliance occurs.<sup>6</sup> Civil penalties may also be assessed.

### WHO IS COVERED?

Since 2003, there has been extensive debate over the most fundamental question: what kind of facilities will be required to conduct vulnerability assessments and implement security measures? Previously proposed stand-alone chemical facility security legislation, dating back to 2003, attempted to use section 112(r) of the Clean Air Act as the triggering

<sup>1</sup> See Barry M. Hartman, et al., *Senate Considers Competing Bills to Address Security at Chemical Manufacturing and Processing Facilities*, K&L Homeland Security Bulletin (July 2003), available at [http://www.king.com/files/Publication/0e5662c8-f3da-4943-b0b7-37f4925610d9/Presentation/PublicationAttachment/7f69bfc3-b8b4-459e-8b0e-0fcfd5ca10/hsb\\_0703.pdf](http://www.king.com/files/Publication/0e5662c8-f3da-4943-b0b7-37f4925610d9/Presentation/PublicationAttachment/7f69bfc3-b8b4-459e-8b0e-0fcfd5ca10/hsb_0703.pdf); see also Chemical Facility Anti-Terrorism Act of 2006, S. 2145, 109<sup>th</sup> Cong. (2006); Chemical Facility Anti-Terrorism Act of 2006, HR 5695, 109<sup>th</sup> Cong. (2006).

<sup>2</sup> Under the terms of the new law, DHS must 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." Pub. L. No. 109-295 § 550(a).

<sup>3</sup> *Id.*

<sup>4</sup> Specifically, "Public Water Systems, as defined by section 1401 of the Safe Drinking Water Act, Public Law 93-523, as amended." Pub. L. No. 109-295 § 550(a).

<sup>5</sup> Specifically, "Treatment Works, as defined in section 212 of the Federal Water Pollution Control Act, Public Law 92-500, as amended." Pub. L. No. 109-295 § 550(a).

<sup>6</sup> The co-authors of the bill, Senator Collins (R-ME) and Representative King (R-NY), have asserted that it "gives the secretary the strongest possible authority: the power to shut down dangerous plants." Susan M. Collins and Peter T. King, Letter to the Editor, *Chemical Plant Security*, N.Y. TIMES, Sept. 28, 2006, at A22.

mechanism.<sup>7</sup> This provision currently imposes obligations on facilities to “prevent the accidental release and to minimize the consequences of any such release”<sup>8</sup> of those hazardous substances that “pose the greatest risk of causing death, injury, or serious adverse effects to human health or the environment from accidental releases.”<sup>9</sup> This obligation is imposed on facilities where certain chemicals are present in certain amounts. The previously-proposed bills directed the DHS Secretary to impose the toughest security requirements on those facilities that handle substances of “greatest risk.”<sup>10</sup> There was extensive debate, however, over whether such a triggering mechanism, created to address accidental chemical releases, was appropriate when considering dangers from intentional acts of terrorism.

Signaling a marked change from the prior stand-alone bills, this new legislation gives the DHS Secretary broad and somewhat largely undefined powers to define what it means to be a “high risk” “chemical facility,” and thus subject to regulation. It is unclear whether Congress’s ultimate rejection of the 112(r) trigger should be taken to mean that DHS should employ some alternate measure when determining which facilities pose a high security risk.

#### WHAT MUST THE REGULATED COMMUNITY DO TO COMPLY?

The legislation authorizes DHS to establish “risk-based performance standards” but does not define the term. Again, reference to the protracted history of legislative efforts concerning chemical facility security demonstrates just how contentious this term can be. The fact that Congress could not reach agreement on a more well-defined standard suggests that debate during the rulemaking process—where these lingering ambiguities must be resolved—will be significant.

Indeed, the standards established by the Secretary could take on a number of forms. For example, DHS could craft a standard requiring that each facility create a site plan that limits the risk of a terrorist

successfully breaching facility security, or the regulations might require that each facility craft a plan that limits the risk of release of a dangerous chemical, should a security breach occur. Both approaches were debated in Congress.<sup>11</sup>

It does appear, however, that the use of a “risk-based performance” approach, which typically focuses on the outcome desired rather than the method used to achieve that outcome, may result in facilities maintaining a considerable level of discretion in determining how to meet the standards. This potential outcome is reinforced by the new law’s provision that prevents the Secretary from disapproving a site security plan merely because it employs a certain type of security measure. Again, this section of the compromise legislation may have been included to resolve at least some of the contentious debate in Congress; a sticking point in past proposals was the issue of whether Congress should mandate that facilities consider specific changes in processes, such as the implementation of “Inherently Safer Technology” (IST), when crafting security plans.

#### WHAT ARE “ALTERNATIVE SECURITY PROGRAMS ESTABLISHED BY PRIVATE SECTOR ENTITIES, FEDERAL, STATE, OR LOCAL AUTHORITIES, OR OTHER APPLICABLE LAW”?

In the years leading up to this new legislation, there have been multiple efforts by a variety of industrial sectors to adopt alternative security programs. For example, the American Chemistry Council developed a security program for its members following the 9/11 attacks.<sup>12</sup> New Jersey now requires high-risk chemical plants in the state to complete vulnerability assessments, consider the use of ISTs, and submit security plans to the state’s environmental protection department.<sup>13</sup> The federal law appears to contemplate that, in lieu of a site security plan crafted in response to DHS regulations, the DHS Secretary may approve of a security plan prepared pursuant to an alternate program, so long as that program meets the federal standards.

<sup>7</sup> See Chemical Security Act of 2003, S. 157, 108<sup>th</sup> Cong. § 3 (2003); Chemical Facilities Security Act of 2003, S. 994, 108<sup>th</sup> Cong. § 3 (2003).

<sup>8</sup> Clean Air Act § 112(r)(1) (codified at 42 U.S.C. 7412(r)(1)).

<sup>9</sup> *Id.* § 112(r)(3); see also 40 C.F.R. § 68.130 (listing chemicals subject to regulation pursuant to 112(r)).

<sup>10</sup> See, e.g., S. 2145, § 3(c).

<sup>11</sup> See, e.g., 151 CONG. REC. S14065-68 (2005) (noting that “sometimes the best security will come not from adding guards and gates but from reexamining the way chemical operations are carried out”) (statement of Sen. Lieberman); see also H.R. 5694, 109<sup>th</sup> Cong. (requiring that high risk facilities craft site security plans that address both facility security and release mitigation).

<sup>12</sup> See American Chemistry Council, Responsible Care Security Code, available at [http://www.americanchemistry.com/s\\_acc/bin.asp?CID=373&DID=1255&DOC=FILE.PDF](http://www.americanchemistry.com/s_acc/bin.asp?CID=373&DID=1255&DOC=FILE.PDF).

<sup>13</sup> See Best Practices Standards at TCPA/DPCC Chemical Sector Facilities available at <http://www.nj.gov/dep/rpp/download/ChemSectBPStand.pdf>.

What criteria the Secretary will use to determine whether these alternative security programs meet the new federal requirements is unknown, and the legislation does not provide guidance on what the basis for these standards will be. Another important question which remains unanswered is whether entities with existing security programs—including New Jersey’s—will be required to seek federal approval in order to continue enforcing them. Additionally, once DHS determines that an alternate program is adequate, it is not known whether the program will have to be reapproved by DHS each time the entity maintaining the program modifies it.

#### WHAT WILL BE THE ROLE OF STATE AND LOCAL REGULATORY EFFORTS?

The new federal legislation provides that facility security programs created pursuant to other laws—including state and local law—may satisfy the new DHS requirements; however, it does not expressly bar states from imposing additional security-based regulations on chemical facilities within their own borders. Moreover, the new bill does not address whether federal regulations will preempt state legislation that imposes stricter or different standards, or whether the Secretary of DHS has authority to promulgate a regulation that preempts such state or local laws. Because of this, organizations with facilities in multiple jurisdictions may face additional burdens. For example, because an organization-wide plan that satisfies federal DHS standards may not necessarily satisfy additional requirements imposed by state and local authorities, organizations with facilities in multiple jurisdictions may be forced to either implement jurisdiction-specific plans or, alternatively, craft an organization-wide plan that satisfies the strictest jurisdiction in which they have a facility.

#### HOW WILL DHS PROMULGATE REGULATIONS IN JUST SIX MONTHS?

Normally federal regulations take years to promulgate. They often begin with Advanced Notice of Proposed Rulemaking, followed by a formal proposal and comment process, followed by extensive agency review. Typically agencies must also certify the impact of new rules on small business and must consider the paperwork burdens that the

rules may impose.<sup>14</sup> In addition, the Office of Management and Budget has its own extensive internal review process for all major new federal regulations.<sup>15</sup> This process often includes extensive involvement by other agencies. In this case, there is little doubt that the Environmental Protection Agency (EPA) will be involved deeply in this interagency effort.

Under this new legislation, Congress has given DHS only six months to craft and issue the interim final regulations; accordingly, DHS may not have the ability to allow for significant public comment before the regulations come into effect, much less complete the otherwise lengthy promulgation process, at least as it is usually followed. The Administrative Procedure Act (APA) contains good cause exceptions.<sup>16</sup> Pursuant to this exception, an agency may forego, at least temporarily, the APA “notice and comment” requirements when it determines that it is “impracticable, unnecessary or contrary to the public interest” to follow them. In the past, DHS has invoked the exception in order to fast-track certain security regulations. For example, in crafting regulations designating certain classes of aliens for removal from the country, DHS cited to the regulation’s impact on national security, along with the fact that the enabling statute left the details of the designation to the complete discretion of the DHS Secretary, as reasons for forgoing the notice and comment period.<sup>17</sup> In this case, given the six-month deadline, coupled with the fact that Congress has left essentially all of the substantive regulatory decisions to the discretion of the DHS Secretary, DHS could invoke the good cause exception and order regulations effective without the opportunity for comment.

With this in mind, it is clear that promulgating a chemical security program within six months of the bill’s enactment will be a challenge of enormous proportions for DHS. Stakeholders may wish to involve themselves early and often in this process.

#### WHAT WILL BE THE IMPACT OF THE THREE YEAR SUNSET PROVISION?

It is entirely unclear what the impact will be of the bill’s three-year sunset provision. In addition to the sunset, a security program established pursuant to

<sup>14</sup> Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601); Paperwork Reduction Act, Pub. L. No. 104-13, 109 Stat. 164 (codified at 44 U.S.C. §3501 et seq.).

<sup>15</sup> See U.S. General Accounting Office, *OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (Washington, D.C.: Sept. 22, 2003).

<sup>16</sup> 5 U.S.C. §§ 553(b)(3)(B); 5 U.S.C. 553(d)(3).

<sup>17</sup> See Designating Aliens For Expedited Removal, 69 Fed. Reg. 48887, 48880 (Aug. 11, 2004).

this legislation can be superseded by regulations promulgated pursuant to other legislation, which could make it through Congress as early as next year.<sup>18</sup> This aspect of the bill likely will impact both DHS's rulemaking process and targeted facilities' methods of compliance with the new requirements. Clearly, facilities targeted by the interim regulations face the possibility of investing significant resources to meet the interim standards, and there is no guarantee that those efforts will be adequate under any superseding legislation. Additionally, facilities such as drinking water utilities and wastewater treatment plants, which are expressly exempt under the current law, may face regulation under subsequent legislation. Thus, even after DHS completes its rulemaking, all potential stakeholders in this process will be left with some level of uncertainty.

#### WHAT WILL BE THE IMPACT OF LEGAL CHALLENGES ON THESE REGULATIONS?

Regulations issued by the DHS Secretary are governed by the provisions of the Administrative Procedures Act;<sup>19</sup> these provisions allow aggrieved parties to seek judicial review of agency actions.<sup>20</sup> Parties adversely affected by DHS regulations have invoked the APA in the past to challenge, successfully, final rules promulgated by the agency<sup>21</sup>; accordingly, those entities aggrieved by rules

ultimately promulgated under the chemical security legislation could pursue judicial review as one method of relief.

Finally, it should be noted that parties on all sides of the chemical security debate believe that this legislation is a stop-gap measure added to an appropriations bill during a midterm election cycle, with the operating assumption being that comprehensive regulation is certain to follow. This would not be the first time, however, that a program was established as an interim security measure and then never replaced.<sup>22</sup> Moreover, sunset provisions are often extended.<sup>23</sup> Given the largely undefined powers conferred on DHS under this new law and the interim nature of the legislation, facilities that may be subject to regulation—as well as those organizations that could face regulation under subsequent, related legislation—should make efforts to monitor the rulemaking process, provide input to DHS when appropriate, and watch Congress for continuing developments in this area.

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<sup>18</sup> See Press Release, Senate Committee on Governmental Affairs and Homeland Security, Congressional Spending Panel Approves Senator Collins, Rep King's, Chemical Security Provision (Sept. 25, 2006) available at [http://hsgac.senate.gov/index.cfm?fuseAction=PressReleases.Detail&Affiliation=C&PressRelease\\_id=1340&Month=9&Year=2006](http://hsgac.senate.gov/index.cfm?fuseAction=PressReleases.Detail&Affiliation=C&PressRelease_id=1340&Month=9&Year=2006) (noting that the current legislation provides interim authority until "permanent, comprehensive authority" is enacted).

<sup>19</sup> 6 U.S.C. § 112 (e).

<sup>20</sup> 5 U.S.C. § 702.

<sup>21</sup> See *Nat'l Treasury Employees Union v. Chertoff*, 385 F. Supp. 2d 1 (D.D.C. 2005), *aff'd in part and rev'd in part*, No. 05-5436 (D.C. Cir. June 27, 2006) (holding that certain regulations governing collective bargaining for DHS employees were unlawful).

<sup>22</sup> For example, many provisions in the USA PATRIOT Act, scheduled to sunset in 2005, were renewed in late 2005 and ultimately made permanent in 2006. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 125 Stat. 192 (2006).

<sup>23</sup> See *id.*

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