

May 12, 2009

The Honorable Ivan K. Fong
General Counsel
U.S. Department of Homeland Security
Washington, D.C. 20528

Via Overnight Delivery

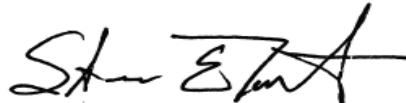
Re: Petition for a Declaratory Order Pursuant to 5 U.S.C. § 554(e)

Dear Mr. Fong:

Pursuant to 5 U.S.C. § 554(e), the International Liquid Terminals Association, on behalf of its affected members, hereby petitions the Department of Homeland Security to declare gasoline, as a mixture with a National Fire Protection Association flammability hazard rating of 3, exempt from the Chemical Facility Anti-Terrorism Standards codified at 6 CFR Part 27.

The petition and supporting exhibits are enclosed.

Respectfully submitted,



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PETITION OF THE
INTERNATIONAL LIQUID
TERMINALS ASSOCIATION
FOR A DECLARATORY ORDER
PURSUANT TO 5 U.S.C. § 554(e)

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PART I. INTRODUCTION

Pursuant to 5 U.S.C. § 554(e), the International Liquid Terminals Association, (“ILTA”) on behalf of its affected members, hereby petitions the Department of Homeland Security (“DHS”) to declare gasoline, as a mixture with a National Fire Protection Association (“NFPA”) flammability hazard rating of 3, exempt from the Chemical Facility Anti-Terrorism Standards (“CFATS”) codified at 6 CFR Part 27.

ILTA is an international trade association that represents eighty-five commercial operators of bulk liquid terminals, aboveground storage tank facilities, and pipeline companies located in forty-three countries. In addition, ILTA includes in its membership more than three hundred companies that are suppliers of products and services to the bulk liquid storage industry.

ILTA member facilities include deepwater, barge, and pipeline terminals whose bulk liquid commodities are essential to the national and international economies. These terminals interconnect with and provide services to the various modes of bulk liquid carriers, including oceangoing tankers, barges, tank trucks, rail cars, and pipelines. The commodities handled include a variety of chemicals, crude oil, petroleum products, renewable fuels, asphalt, animal fats and oils, vegetable oils, molasses, and fertilizers. Customers who store products at these terminals include oil producers, chemical manufacturers, product manufacturers, food growers and producers, utilities, transportation companies, commodity brokers, government agencies, and the military.

ILTA believes that DHS regulation of gasoline stored in aboveground liquid terminals lacks a sound scientific basis. Therefore, it is arbitrary and capricious and should be rescinded. This position is supported by two arguments.

First, DHS is concerned that a terrorist attack against gasoline stored in aboveground liquid terminals could lead to an exploding vapor cloud that could result in significant offsite human life or health consequences. This is contrary to the best available scientific evidence that demonstrates that gasoline stored in aboveground liquid terminals does *not* pose a vapor cloud explosion risk in a security context for three primary reasons: (i) gasoline stored in aboveground liquid terminals presents a *de minimus* vapor cloud explosion risk in general; (ii) it is unrealistic to conclude that any of the five attack scenarios contemplated by DHS would create an explosive vapor cloud; and (iii) were a fire initiated by an attack, any vapor cloud explosion risk would be eliminated by the fire itself.

Second, in promulgating its chemical facility regulations, DHS generally followed the Environmental Protection Agency’s (“EPA”) Risk Management Program (“RMP”) rules that cover *accidental* releases to determine Screening Threshold Quantities (“STQs”). However, by including gasoline with a flammability hazard rating of 3 stored in aboveground liquid terminals, DHS unreasonably deviated from the RMP. Unless DHS’s concern is reasonable, that *intentional* attacks pose at least a similar (if not a greater) risk, DHS’s departure from the EPA RMP rules cannot withstand scrutiny. As this petition and its exhibits demonstrate, that concern is not reasonable.

For these reasons, ILTA is requesting that DHS declare gasoline stored in aboveground liquid terminals to be exempt from CFATS.

Additionally, it is ILTA's position that DHS violated the Administrative Procedure Act ("APA") when it added provisions covering mixtures to the final version of Appendix A to 6 CFR Part 27. DHS failed to provide notice that it proposed to include mixtures, such as gasoline.

This failure to provide notice was compounded for several reasons: (i) DHS's prior issuances under the CFATS program (i.e., the proposed version of Appendix A to 6 CFR Part 27) excluded mixtures, such as gasoline; (ii) DHS issued a public notice stating that it was significantly relying on the EPA RMP rules as a primary source for its rules; and (iii) a DHS official gave specific and explicit assurance that the final version of Appendix A would exclude mixtures. When the mixtures provisions covering gasoline (§ 27.203(b)(1)(v) and the related provision in § 27.204(a)(2)) were added without notice, DHS violated the "logical outgrowth test" governing adequate notice in APA rulemaking.

Furthermore, since the April 9, 2007 publication of the CFATS Interim Final Rule ("IFR"), DHS has issued (and continues to issue) "guidance" documents and information that contain binding requirements and applications. These "guidance" documents and information go beyond the statute, the IFR, and the final version of Appendix A. Because DHS has not subjected these requirements to notice-and-comment, they also violate the APA.

And finally, DHS failed to consider the economic costs and impacts on the nation's energy supply, as required by Executive Order 13211.

Therefore, pursuant to 5 U.S.C. § 554(e), ILTA hereby petitions DHS (and requests a prompt response under 5 U.S.C. § 555(e)) for a declaratory order terminating this controversy and removing uncertainty by declaring gasoline, as a mixture with an NFPA flammability hazard rating of 3, exempt from CFATS. Accordingly, as a permanent clarifying change to the Code of Federal Regulations, ILTA proposes the following revisions to Appendix A to 6 CFR Part 27:

In section 27.203, revise the beginning of subparagraph clause (b)(1)(v) to delete references to fuels with flammability hazard ratings of 1, 2, and 3, so it reads as follows:

In fuels that have a flammability hazard rating of 4, as determined by using

In section 27.204, revise the first two sentences of subparagraph (a)(2) to delete the cross reference to § 27.203(b)(1)(v), so it reads as follows:

If a release-flammable chemical of interest is present in a mixture in a concentration equal to or greater than one percent (1%) by weight of the mixture, and the mixture has a National Fire Protection Association (NFPA) flammability hazard rating of 4, the facility shall count the entire amount of the mixture toward the STQ. If a release-flammable chemical of interest is present in a mixture in a

concentration equal to or greater than one percent (1%) by weight of the mixture, and the mixture has a National Fire Protection Association (NFPA) flammability hazard rating of 1, 2, or 3, the facility need not count the mixture toward the STQ.

In addition, ILTA proposes corresponding revisions to the preamble to the final version of Appendix A as follows:

First, by revising the paragraph in the second column of 72 Fed. Reg. 65,399, beginning with “Second,” to read as follows:

Second, facilities must also include chemicals of interest in fuels when stored in above-ground tank farms, including tank farms that are part of pipeline systems. See § 27.203(b)(1)(v). This includes fuels with a National Fire Protection Association (NFPA) flammability hazard rating of 4. Fuels with an NFPA flammability rating of 1, 2, or 3 are excluded from DHS’s flammable mixtures provisions. EPA excludes these fuels by virtue of the provisions in its mixtures rule for regulated flammable substances.

Second, by revising the third-from-the-last sentence of the discussion of “c. Minimum Concentration (Mixtures)” that appears above the subheading “2. Release-Explosives” in the third column of 72 Fed. Reg. 65,402 by deleting the words “the entire weight of,” to read as follows:

If a release-flammable chemical of interest is present in a mixture in a concentration equal to or greater than one percent (1%) by weight of the mixture, and the mixture has an NFPA flammability hazard rating lower than 4 (i.e., NFPA flammability hazard rating of 1, 2 or 3), the facility need not count the mixture toward the STQ.

PART II. STATEMENT OF FACTS

A. The CFATS Rulemaking Process

Section 550 of Public Law 109-295 authorizes DHS to regulate security at high-risk chemical facilities. It provides that “no later than six months after the date of enactment of this Act,” DHS “shall issue interim final regulations” establishing risk-based performance standards for the security of chemical facilities, requiring vulnerability assessments, and the development and implementation of security plans. On December 28, 2006, DHS issued an advance notice of rulemaking discussing a range of regulatory and implementation issues. See 71 Fed. Reg. 78,276.

On April 6, 2007, two days after its statutory six-month deadline, DHS filed with the *Federal Register* its IFR responding to the comments to the advance notice of rulemaking and establishing a new Part 27 to Title 6 of the Code of Federal Regulations. With the exception of Appendix A to Part 27, the regulation took effect on June 8, 2007. See 72 Fed. Reg. 17,688.

DHS also released a proposed Appendix A containing a tentative Chemical of Interest (“COI”) list and sought public comment on the document until May 9, 2007. This preliminary COI list identified over three hundred chemical substances with a proposed STQ for each. The proposed COI list contained no mention of COI mixtures, generally, or gasoline, specifically.

On November 20, 2007, DHS published in the *Federal Register* the final version of Appendix A and provided a final COI list with accompanying STQs. *See* 72 Fed. Reg. 65,396. However, the final version of Appendix A did more than revise the proposed list of COIs and STQs. Among other things, it: (i) adjusted the STQ for many COIs; (ii) defined the specific Security Issue(s) implicated by each COI; and (iii) added new provisions on release-flammable mixtures. *See* 6 CFR §§ 27.203-.204.

When read together, the IFR and the final version of Appendix A require chemical facilities that meet or exceed the STQ for a particular COI to submit an electronic COI evaluation to DHS. Known as the “Top-Screen,” this evaluation permits DHS to make a preliminary determination regarding the facility’s risk status. If DHS preliminarily concludes that the facility is not high-risk, then no further action is required, barring a material modification.

On the other hand, if DHS initially concludes that the facility is high-risk, then DHS preliminarily places the facility into one of four risk-tiers (Tier 1 through Tier 4) and requires the completion of a Security Vulnerability Assessment (“SVA”). Following review of the SVA, DHS confirms or modifies each facility’s preliminary risk-tier determination. Facilities that remain high-risk are then required to complete a Site Security Plan (“SSP”) that incorporates, as applicable, the CFATS Risk-Based Performance Standards.

B. CFATS and the Treatment of Gasoline

Gasoline is a mixture of various hydrocarbons and is considered a Class 3 flammable liquid by the NFPA. Gasoline is *not* an Appendix A COI, though some discrete chemicals that comprise a minority concentration of gasoline (e.g., butane) are COIs.

There is no mention of gasoline within the IFR. Gasoline was introduced into the regulation in 6 CFR § 27.203(b)(1)(v): “in calculating whether a facility possesses an amount that meets the STQ for release chemicals of interest, the facility shall only include release chemicals of interest ... [i]n gasoline, diesel, kerosene or jet fuel (including fuels that have a flammability hazard ratings of 1, 2, 3, or 4) ... stored in aboveground tank farms, including tank farms that are part of pipeline systems....”

The requirement that facilities include release-flammable COIs in gasoline represents an exception to the otherwise narrow release-flammable mixtures provision of 6 CFR § 27.204(a)(2). In other words, *but for* the combination of 6 CFR § 27.203(b)(1)(v) and the second sentence of 6 CFR § 27.204(a)(2), facilities would *not* include quantities of release-flammable COIs present in gasoline toward the applicable STQ.

C. Top-Screen Submissions

Certain ILTA member companies submitted Top-Screens to DHS on or before January 22, 2008. The initial version of the Top-Screen then required by DHS did not solicit specific questions regarding gasoline storage, and, at that point, DHS had not provided sufficient or clear instructions regarding how to account for release-flammable mixtures on the Top-Screen.

Despite the deficiencies in the process and the inherent inaccuracies of the data produced by it—a problem that DHS later recognized and attempted to correct through the addition of gasoline-specific Top-Screen questions in November 2008—DHS used the January 2008 Top-Screen submissions to make initial decisions regarding preliminary risk pursuant to 6 CFR § 27.220.

Beginning the week of June 23, 2008, DHS notified approximately 435 facilities that they were initially designated high-risk due solely to the presence of the “COI” gasoline, provided each with a preliminary risk-based tier, and directed the completion of the SVA within a prescribed time.

ILTA believed (and still believes) that DHS improperly included gasoline stored in aboveground liquid terminals as preliminarily high-risk. ILTA—together with the American Petroleum Institute (“API”), the Association of Oil Pipe Lines (“AOPL”), and the National Petrochemical and Refiners Association (“NPR”)—sought information from DHS regarding its rationale.¹

DHS met with API, AOPL, ILTA, and NPR) representatives in a classified briefing on August 14, 2008. During the briefing, the industry representatives raised specific scientific questions regarding DHS’s faulty modeling of the vapor cloud explosion risk posed by gasoline stored in aboveground liquid terminals.

DHS agreed to discuss the matter further and requested additional information from the industry associations. Soon thereafter, on August 26, representatives of ILTA and AOPL met with the DHS Private Sector Office and the Infrastructure Security Compliance Division (“ISCD”) to express industry’s concerns about DHS’s lack of receptivity to perceived flaws in the rulemaking process. During this meeting, the industry representatives were requested to co-develop a technical paper explaining the risks posed by gasoline. On October 3, 2008, API, AOPL, ILTA, and NPR) provided a technical report to DHS entitled “Risks Associated with Gasoline Storage Sites” (the “Gasoline White Paper”). *See* Exhibit A.

On October 7, 2008, fully “aware that a significant number of gasoline storage facilities that previously submitted Top-Screens ... intend to file revised Top-Screens ... as a result of errors in the original Top-Screens or material modifications to the facilities’ operations or site,” DHS sent letters to facilities preliminarily determined to be high-risk due to “a significant quantity of gasoline.” The letters indicated that new gasoline-specific questions would be added to the Top-Screen on or about October 14, 2008. DHS stated that the addition of “a few new questions” to the Top-Screen would provide “additional information for evaluating the potential consequences

¹ API, AOPL, and NPR) are not co-petitioners in this administrative action.

associated with gasoline storage facilities.” See Exhibits B and C. Approximately four hundred facilities resubmitted the Top-Screen by the November 14, 2008 resubmission deadline.

On December 10, 2008, DHS responded to the Gasoline White Paper, stating that “we disagree with your conclusion that DHS is overstating the risks associated with gasoline storage facilities.” DHS expressed confidence that the gasoline “modeling approach we have applied ... is reasonable and appropriate.” DHS indicated that it was “in the process of evaluating the roughly 400 Top-Screen resubmissions” and invited API, AOPL, ILTA, and NPRA representatives to engage in additional dialogue with DHS if the industry believed “there to be significant new technical or factual issues that DHS has not previously considered.” See Exhibit D.

In a December 22, 2008 letter to DHS, the industry associations accepted this offer to engage in additional dialogue. Furthermore, the letter stated that DHS, in rejecting the conclusions presented in the Gasoline White Paper, failed to allow industry “to understand how the DHS application of EPA’s vapor cloud explosion model in a security application should differ from the results developed under a safety context.” See Exhibit E.

On February 13, 2009, DHS notified the approximately four hundred facilities that submitted a revised Top-Screen whether they remained preliminarily high-risk and, if so, their tier ranking. For the 355 facilities that retained their preliminarily high-risk status, DHS established May 14, 2009, as the SVA submittal deadline.

API, AOPL, ILTA, and NPRA representatives met with DHS officials on April 24, 2009. Although DHS first proposed such a meeting in its December 10, 2008 letter, DHS scheduled and cancelled it several times: January 12, February 19, February 23, March 27, April 9, and April 15, 2009. At the meeting, DHS primarily focused its discussion around the idea of forming a scientific panel under the Federal Advisory Committee Act (“FACA”). The panel’s purpose would be to explore the scientific basis for conclusions reached by DHS. DHS was not, however, prepared to discuss the issues raised by industry in its December 22, 2008 acceptance letter. During the meeting, ILTA notified DHS that it would be submitting this petition. Subsequently, on May 4, 2009, DHS notified industry that it was suspending all efforts toward the formation of a FACA panel.

PART III. ARGUMENT

A. Substantive Deficiencies

1. There is no Rational Basis to Conclude that Gasoline Presents a Risk of Forming an Explosive Vapor Cloud in a Security Context

As the industry showed in the Gasoline White Paper, and as affirmed by Exhibits F, G and H, the best available scientific evidence demonstrates that gasoline stored in aboveground liquid terminals does not pose a vapor cloud explosion risk.

Although ILTA recognizes that the application of CFATS (*intentional* threats to public health and safety) and EPA's RMP rules (*accidental* threats to public health and safety) are somewhat different, the goals of these agencies are the same: preventing harmful consequences, whatever their origin.

Indeed, the regulation of threshold quantities of flammable substances at stationary sources under EPA's RMP rules parallels the regulation of COIs under CFATS. Despite this similarity, the only justification DHS has proffered to support its departure from EPA is a "concern that [aboveground terminals] could create significant [offsite] human life or health consequences if an intentional attack by a terrorist were successful." 72 Fed. Reg. 65,399. This is a conclusory statement that has no basis in the rulemaking record or in any other record.

In its response to the Gasoline White Paper, DHS stated:

As demonstrated by the Buncefield incident, a vapor cloud explosion at a gasoline terminal is possible, given the right set of physical and atmospheric conditions. DHS determined that the vapor cloud explosion model accurately reflects a plausible worst-case scenario within realistic parameters when calculating offsite consequences of an explosion involving release-flammable COIs, including gasoline.

See Exhibit D.

DHS's heavy reliance on the December 11, 2005 incident at the Buncefield Oil Storage and Transfer Depot in Hertfordshire, England, where no fatalities occurred, is unsupportable as a plausible outcome for an intentional attack. Buncefield shows how a confluence of prolonged and unlikely procedural and maintenance negligence, unusual tank farm configuration and geometry, and rare atmospheric conditions could create a very damaging incident. Nonetheless, ILTA submits that the rare conditions that combined to create the Buncefield incident are highly distinguishable from those in the U.S. gasoline terminal industry and have no relationship to the type of terrorism scenarios that are DHS's reasonable and appropriate concern. See generally BUNCEFIELD MAJOR INCIDENT INVESTIGATION BD., THE BUNCEFIELD INCIDENT 11 DECEMBER 2005 FINAL REPORT (2008). This statement is supported by the following facts:

- (a) The Buncefield incident involved an accidental overflow of a fuel storage tank. This is very different from the possible results from any of the DHS attack scenarios applicable to release-flammable COIs;
- (b) At Buncefield, product rapidly escaping from multiple overhead tank vents promoted rapid evaporation, thereby atomizing vapors and providing flow across an extraordinarily large wetted surface. Such an occurrence is unusual in a spill scenario. "The Investigation has demonstrated that 'overtopping' a tank with highly flammable fuel is more likely to produce a potentially

explosive mixture than pooling from a lower level escape, such as may result from a tank failure;”²

- (c) Conditions on the morning of the overflow, including a calm night and stable atmosphere, were ideal for a stagnant vapor cloud to form in low-lying areas in and around the facility. For any particular location, this combination of conditions is highly unlikely to occur at any given time;
- (d) The protracted overflow event lasted for over forty-one minutes. This permitted the rapid formation of gasoline vapors in air. These vapors had to be within a very narrow concentration range between gasoline’s lower explosive limit of 1.4% and upper explosive limit of 7.6% to allow for ignition. In contrast, a tank that fails as a result of deliberate attack would begin to release its contents in the presence of an ignition source, thereby resulting in an immediate fire rather than a protracted discharge allowing for vapor release and a possible explosion;³
- (e) Multiple alarms and automated emergency shut-off equipment had been disabled or failed. In normal operating scenarios, these would have been expected to provide redundant layers of protection against an overflow, including an immediate halting of pumping operations and/or prompt alerting of plant personnel;
- (f) The released fuel reportedly had a butane content of approximately ten percent and would have had a relatively high vapor pressure (i.e., it would be capable of evaporating rapidly to produce a flammable vapor); and
- (g) There was a dense concentration of obstacles surrounding the overflowing tankage, including piping, pump buildings, and even neighboring trees. The congestion helped enable the flame front to accelerate. The configuration at Buncefield has been recognized as more congested than most gasoline terminals in the United States.

² This quote is taken from the Buncefield Investigation Board’s initial report, which was released in 2006. The Final Report essentially confirms this statement, although not as concisely, stating that if petrol “is spilt or otherwise released (eg catastrophic tank failure) it will form a pool of stable liquid on the ground. . . . However, even with 10% butane, a winter grade of petrol is very unlikely to give rise to a large cloud of vapour, simply because the rate of generation is low and any air movement (wind) would aid its dispersal and dilute the cloud to below the lower flammability limits within a ‘relatively’ short distance. . . . At Buncefield, it seems likely that much higher rates of evaporation were achieved as a result of the manner in which the liquid was discharged from the tank.” BUNCEFIELD INVESTIGATION FINAL REPORT at 90.

³ Once a fire is initiated, any further vapor accumulation is prevented, thereby precluding the possibility of a subsequent vapor cloud explosion.

These differences not only are highlighted in the Gasoline White Paper but also are supported in the attached exhibits commissioned by ILTA from independent experts, namely AcuTech Consulting Group (“AcuTech”), Baker Engineering and Risk Consulting (“Baker”), and Williams Fire and Hazard Control (“Williams”). As indicated by Williams in particular, “it is unlikely all conditions ... could be humanly duplicated to repeat a ‘Buncefield- like’ incident.”

Indeed, it is difficult to envision a terrorist attack capable of initiating an overfill scenario that would go undetected for a sufficient enough time to enable the formation of a gasoline vapor cloud—even if the confluence of product identification and availability, unlikely weather conditions, and plant “congestion” necessary for the type of exploding vapor cloud that could produce significant offsite consequences were present.

It is worth noting that nowhere in the final Buncefield Investigation Report is there any conclusion that this incident could bear any relevance to enhanced risks due to terrorism, known all too well in the UK. This is particularly notable since the Chair of the Major Incident Investigation Board, Lord Newton of Braintree, also chaired the UK Committee that reviewed the operation of the Anti-terrorism, Crime and Security Act 2001.

Therefore, if the Buncefield incident remains part of the DHS calculus, DHS has a responsibility to demonstrate how circumstances allowing such an incident align in the context of a plausible terrorist attack. Considering that none of the terrorism scenarios contemplated by DHS envision a protracted attack that would enable the formation of a vapor cloud, such an explanation is especially necessary. This is supported by the following conclusions:

Exhibit F, Williams Letter (page 2): “While there is no doubt if any of the attack scenarios were executed effectively, it/they would result in a release of product and ignition. However, none of them support an incident resulting in an offsite event and in our experience, the DHS conclusions are unrealistic.”

Exhibit G, AcuTech Statement (pages 4–5): “Each of [the DHS scenarios relevant to release-flammable COIs] involve a violent attack against the asset using a weapon ranging from a large explosive charge directly applied in a VBIED or applied from a standoff distance causing a maximum initial impact. It is clear that the likely outcome of such an attack would be a high energy impact and immediate ignition rather than a delayed ignition. Once ignition generates a fire, any risk of subsequent vapor cloud formation and explosion is entirely eliminated. In considering the initiating scenario, DHS should consider that flammable releases of gasoline are likely to immediately ignite. If not, DHS would be forced to postulate a wide variety of potential scenarios. Regarding the likelihood of the initiating event itself, DHS should weigh carefully whether terrorists would be interested in attacking a gasoline terminal relative to numerous other available targets. This is especially important considering that an attack would most likely produce a pool fire and not a vapor cloud explosion.”

Exhibit H, Baker Statement (page 4): “We determined that aircraft attack, assault team, and stand-off weapon scenarios are all likely to result in a release of gasoline, but these attacks would provide prompt sources of ignition and would result in fires, not vapor cloud explosions. The

Vehicle Borne Improvised Explosive Device (VBIED) attack scenario is not expected to cause a significant release of gasoline at the distances specified by the DHS based on testing performed by the US Army Corps of Engineers.”

2. By Including Gasoline Stored in Aboveground Liquid Terminals, DHS Arbitrarily and Capriciously Deviated From EPA’s RMP Rules

a. *EPA regulates potentially disastrous accidental releases of chemicals*

Under the Clean Air Act (“CAA”), EPA regulates accident prevention in chemical facilities. The intent of the chemical accident prevention provisions is “to focus on chemicals that pose a significant hazard to the community should an accident occur, to prevent their accidental release, and to minimize the consequences of such releases.” 59 Fed. Reg. 4,479 (Jan. 31, 1994).

Section 112(r)(3) of the CAA required EPA to promulgate a list of “regulated substances” that are “known to cause, or may be reasonably anticipated to cause, death, injury, or serious adverse effects to human health or the environment if accidentally released” and to establish threshold quantities for each. *Id.* Congress statutorily required EPA to include certain chemicals.

In January 1994, EPA adopted its “List Rule,” which became effective on March 2, 1994. EPA included more than one hundred substances divided among three categories: toxics, flammables, and explosives. Subject to certain limitations, facilities possessing more than a threshold quantity of a List Rule substance were required to implement EPA’s regulations “for the prevention and detection of accidental releases and for responses to such releases.” *See* 59 Fed. Reg. 4,479.

Less than one month later, on March 29, 1994, API and other parties filed petitions for review challenging the List Rule in the United States Court of Appeals for the District of Columbia Circuit. Among other arguments, API claimed that (i) broad inclusion of certain flammable liquid mixtures places a substantial burden on industry without any environmental, health or safety benefit, and (ii) including methane on the list without a thorough review and understanding of the scientific evidence for such inclusion places a substantial burden on industry without any environmental, health or safety benefit.

In March 1996, EPA entered into a settlement of this litigation and agreed, among other things, to amend the List Rule “to provide that flammable regulated substances in gasoline used as fuel for internal combustion engines and flammable regulated substances in naturally occurring hydrocarbon mixtures prior to initial processing in a petroleum refining process unit or a natural gas processing plant (‘gas plant’) need not be included when determining whether a threshold quantity is present at a stationary source.”

Pursuant to the settlement agreement, EPA issued a notice of proposed rulemaking on April 15, 1996. Among other things, EPA proposed the modification of threshold provisions to exclude “flammable substances in gasoline” and other flammable mixtures. 61 Fed. Reg. 16,606. After receiving *twelve* letters in support of the exemption of gasoline, and *no* letters of opposition,

EPA adopted the proposed amendments on January 6, 1998 as a Final Rule. 63 Fed. Reg. 640. EPA stated that it “is exempting gasoline because it does not meet the NFPA 4 criteria . . . [and] does not represent a significant threat to the public of vapor cloud explosions.” 63 Fed. Reg. 641–42. EPA now excludes “regulated substances in gasoline, when in distribution or related storage for use as fuel for internal combustion engines” 40 CFR § 68.115(b)(2)(ii).

b. Until it added the new provision § 27.203(b)(1)(v) in the final version of Appendix A, DHS had relied heavily on EPA’s RMP rules

In its advance notice of rulemaking, DHS referenced EPA’s RMP regulation:

As the RMP chemical list and threshold limits were established by EPA based on a chemical’s potential for acute offsite health impacts in the event of a large air release, the Department believes that a number of the facilities regulated under this program may also qualify as “high-risk” facilities covered under Section 550.

71 Fed. Reg. 78,279.

In the preamble to the IFR, DHS again indicated that the RMP list was a significant (though not the only) source to develop its own COI list. 72 Fed. Reg. 17,696. DHS also acknowledged that several industry commenters supported using the RMP list both to help identify the initial group of regulated facilities and as a basis for selecting chemical facilities. *See* 72 Fed. Reg. 17,697. It further acknowledged that “one association felt that DHS should link its definition of chemical facility to those facilities covered by EPA’s RMP, because it is a clear and defined list.” *Id.*

In the final version of Appendix A, DHS followed EPA’s RMP in a number of particulars. It indicated that “[t]o identify the release chemicals for Appendix A, the Department looked to the list of substances in the EPA’s RMP rule.” 72 Fed. Reg. 65,401. DHS “adopted the EPA RMP [threshold quantities], because DHS accepts the same rationale that EPA used when setting its [threshold quantities]—i.e., that they are amounts that, if released, have the potential to create significant human health effects.” *Id.* DHS stated that “in developing these [threshold quantities], EPA collected extensive input and conducted a thorough analysis, and DHS wants to leverage that knowledge base.” *Id.* Accordingly, DHS explained that:

For release-flammable chemicals, DHS also uses the same listing criteria as EPA does for release-flammable chemicals. EPA, and now DHS, identifies flammable gases and volatile flammable liquids based on the flash point and boiling point criteria that the NFPA uses for its highest flammability hazard ranking (Class IA).

Id.

Logically, therefore, DHS also adopted exclusions in §27.203(a) that track many of the exclusions from the RMP rules. DHS reasoned that the exclusions were appropriate “because chemicals in such circumstances or forms are unlikely to contribute to the potential consequences of a successful attack.” 72 Fed. Reg. 65,398.

- c. *Even though EPA, after due consideration, exempted gasoline from its RMP rules, DHS included gasoline, notwithstanding that the risk of offsite consequences from an accidental release is considered to be greater than from any reasonably anticipated terrorism scenario postulated by DHS*

As demonstrated in the attached exhibits, gasoline vapor clouds develop in tank farms only in extremely rare circumstances involving overfills or other slow leaks that maximize evaporation, along with specific meteorological conditions and unusual physical congestion at the facility. Only after a cloud of sufficient size and density has developed is it possible for the cloud to ignite and result in severe offsite consequences. The normal consequence of a gasoline release is a pool fire that burns with onsite, localized consequences.

All of the terrorist scenarios envisioned for release-flammable COIs involve kinetic events that could be expected to pierce a tank. Yet, even if the attack pierced one or more tanks, the expected result would be an immediate fire, which *would itself remove the possibility of a vapor cloud build-up*. In this sense, the terrorism threat poses *less* hazard of offsite consequences than operator negligence.

Despite a heavy reliance on EPA's RMP rules and the contradiction inherent in DHS's application of CFATS to less dangerous scenarios than those exempted by EPA, DHS specifically includes gasoline. DHS did this by requiring that "fuels with any one of the four [NFPA] flammability hazard ratings and not just fuels with an NFPA flammability hazard rating of 4" be considered pursuant to § 27.203(b)(1)(v). This provision exists despite the fact that "EPA excludes these fuels by virtue of the provisions in its mixtures rule for regulated flammable substances [in 40 CFR 68.115(b)(2)(ii)]." 72 Fed. Reg. 65,399. DHS further introduced the coverage of "gasoline," *per se*, in § 27.203(b)(1)(v).

Why did DHS see fit to make this extraordinary departure from the EPA RMP rules? It was *not* in response to public comment recommending an exception to the RMP rules, the inclusion of flammable liquids with an NFPA hazard rating of 1, 2 or 3, or the express inclusion of gasoline within the final version of Appendix A. Rather, DHS justified this inclusion through an unsubstantiated claim that these fuels have "the potential to create a significant offsite impact in the event of a successful attack." 72 Fed. Reg. 65,399.

3. DHS Regulation of Gasoline Stored in Aboveground Liquid Terminals is Arbitrary and Capricious

Simply stated, DHS (i) has no rational basis for concluding that gasoline presents a vapor cloud explosion risk; (ii) improperly rejected EPA precedent; and (iii) disregarded expert opinion. As a result, DHS's inclusion of gasoline in the CFATS regulations is arbitrary and capricious.

Courts may set aside an agency action as an abuse of discretion on any of several grounds. *See* 5 U.S.C. § 706(2)(A). According to the American Bar Association's "Blackletter on Administrative Law," commonly applied bases for judicial reversal include the following formulations:

- The asserted or necessary factual premises of the action do not withstand scrutiny;
- The action is unsupported by any explanation or rests upon reasoning that is seriously flawed;
- The agency failed, without adequate justification, to give reasonable consideration to an important aspect of the problems presented by the action, such as the effects or costs of the policy choice involved, or the factual circumstances bearing on that choice;
- The action is, without legitimate reason and adequate explanation, inconsistent with prior agency policies or precedents;
- The agency failed, without an adequate justification, to consider or adopt an important alternative solution to the problem addressed in the action; or
- The agency failed to consider substantial arguments, or respond to relevant and significant comments, made by the participants in the proceeding that gave rise to the agency action.

By including § 27.203(b)(1)(v), DHS committed a number of these errors. Its asserted factual premises do not stand scrutiny, as evidenced by Exhibits F, G, and H. DHS's explanation to industry associations for the addition of gasoline to the final version of Appendix A, and some of its responses in its rebuttal to the Gasoline White Paper, were conclusory and "unsupported by any explanation." Its inclusion not only was inconsistent with the Department's overall reliance on the EPA RMP rules but, as evidenced by Exhibit I, was also contrary to assurances given to ILTA by an ISCD official. DHS failed to consider the alternative of exempting all gasoline stored in aboveground liquid terminals unless certain conditions were found, instead of including them unless certain conditions were not found. DHS also did not give affected parties a chance to comment on the proposal before adopting it.

It is not enough for DHS simply to seek deference because of its general technical expertise in security matters. *See Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 437 F.3d 75 (D.C. Cir. 2006). In *Tripoli*, which also involved fuel flammability, the Bureau of Alcohol, Tobacco, Firearms, and Explosives classified a propellant used by hobby rocket enthusiasts as an "explosive" based on its determination that the propellant functions by "deflagration." *Id.* at 81.

The court found that this determination was arbitrary and capricious because the agency did not offer a clear explanation for its classification of the fuel, never revealed how it determined that it deflagrates, and never specified a range of velocities that can lead a material to deflagrate. *Id.* The court prefaced its conclusion by stating that it "routinely defers to administrative agencies on matters relating to their areas of technical expertise." *Id.* at 77. Nonetheless, it failed to sustain the agency's determination and remanded it, stating "[w]e do not, however, simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment." *Id.*

B. Procedural Deficiencies

DHS has violated the APA's rulemaking provisions.

1. The Rulemaking Violated the Logical Outgrowth Test

Congress generally permitted DHS to use interim final rulemaking in the CFATS program, at least until April 4, 2007. When DHS sought comments on Appendix A separately, however, it engaged in the more orthodox notice-and-comment rulemaking. DHS provided a thirty-day comment period, starting on April 6, 2007, and stated:

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on Appendix A of this interim final rule. Comments that will provide the most assistance to DHS in finalizing the Appendix will reference specific chemicals and Screening Threshold Quantities on the list, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

72 Fed. Reg. 17,688.

The notice gave no indication that DHS was considering the two new provisions that were added in November 2007, which went far beyond the terms of proposed Appendix A. The addition of 6 CFR §§ 27.203–.04 is, thus, a violation of the logical outgrowth test—the standard test for determining whether agencies have, by virtue of significant changes in their final rule, failed to give sufficient notice in their notice of proposed rulemaking.

No precise definition exists for what constitutes a “logical outgrowth,” though courts have offered guidance. For example, a 1997 D.C. Circuit case stated:

Our cases offer no precise definition of what counts as a “logical outgrowth.” We ask “whether ‘the purposes of notice and comment have been adequately served.’” Notice was inadequate when “the interested parties could not reasonably have ‘anticipated the final rulemaking from the draft [rule].’” “[W]e inquire whether the notice given affords ‘exposure to diverse public comment,’ ‘fairness to affected parties,’ and ‘an opportunity to develop evidence in the record.’”

National Mining Ass’n v. Mine Safety & Health Admin., 116 F.3d 520, 531 (D.C. Cir. 1997); *see also Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (remanding a USDA rule as a result of a violation of the logical outgrowth test).

Indeed, there was a consensus among CFATS commenters that Appendix A *only applied to pure chemicals*, a belief supported by the *exclusion* of any mixture provisions in the April 9, 2007 rulemaking, the *complete absence* of any reference to mixtures in the June 2007 and September

2007 Top-Screen User's Manuals, and by DHS's own statements and representations to the industry.

A review of comments submitted to the record supports the conclusion that the final version of Appendix A was not a logical outgrowth of the proposal. Indeed, the *sheer volume* of comments DHS received demonstrates that *various industries* understood Appendix A to apply only to pure chemicals:

- The American Chemistry Council stated that “[a]ny list-based regulatory program inevitably generates complicated questions regarding their application to mixtures of chemicals, both mixtures of listed chemicals and mixtures of listed and unlisted chemicals. DHS has indicated that, at this time, it intends to avoid these questions by only addressing ‘neat’ or full-strength quantities of Appendix A chemicals.” Letter from Thomas J. Gibson, Senior Vice President of Advocacy, Am. Chemistry Council, to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep’t of Homeland Sec. (May 9, 2007).
- The American Forest and Paper Association (“AF&PA”) stated “[o]ne of the most important things for avoiding confusion and unnecessarily casting the net too widely is clarification that the chemical listings in Appendix A generally apply to the pure chemical compound, rather than to the chemical compound when contained in a mixture. AF&PA understands this to be DHS’ intent, and AF&PA fully supports that approach, and the remainder of these comments is written based on that understanding. That approach avoids numerous implementation questions and problems that would arise if mixtures containing a chemical listed in Appendix A triggered the requirement to prepare a Top-Screen analysis. In addition to the difficulty for DHS of determining appropriate STQs for various mixtures, the inclusion of mixtures in Appendix A would vastly complicate a facility’s determination of whether any STQs are exceeded at the facility. The net result would be to frustrate the purposes of the quick initial screening of facilities to determine which ones truly have the potential to be high-risk.” Letter from John L. Festa, Ph. D., Senior Scientist, American Forest and Paper Ass’n, to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep’t of Homeland Sec. (May 9, 2007).
- The Agricultural Retailers Association stated that it “agrees with DHS that pure chemical products, not mixtures or blends, are the primary focus of these new chemical regulations.” Letter from Jack Eberspacher, President and CEO, Agricultural Retailers Ass’n, to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep’t of Homeland Sec. (May 9, 2007).
- The Chemical Sector Coordinating Council stated that its comments “were provided with the understanding that the chemical listings in [proposed] Appendix A generally apply to the pure chemical compound, rather than the chemical compound when contained in a mixture.” Letter from the Chem. Sector

Coordinating Council et al., to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep't of Homeland Sec. (May 9, 2007).

- The Chemical Producers and Distributors Association stated “[t]he following comments are provided with the understanding that the chemical listings in Appendix A are limited to “pure” chemicals and do not include substances found in a chemical mixture.” Letter from the Chemical Producers and Distributors Ass’n, to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep’t of Homeland Sec. (May 9, 2007).
- The Corn Refiners Association stated that it “understands that DHS intends to address only pure or full-strength quantities of Appendix A chemicals. We strongly support this approach.” Letter from Jennifer White Snyder, Senior Director Regulatory Affairs, Corn Refiners Ass’n, to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep’t of Homeland Sec. (May 9, 2007).
- Far West Agribusiness Association “understood that the chemicals noted on Appendix A were to exclude blended products (mixtures), since the primary focus were pure chemical products.” Letter from Scott McKinnie, President Far West Agribusiness Ass’n, to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep’t of Homeland Sec. (May 7, 2007).
- The National Agricultural Aviation Association stated that it “agrees with DHS that pure chemical products, not mixtures or blends, are the primary focus of these new chemical regulations.” Letter from Andrew D. Moore, Executive Director, National Agricultural Aviation Ass’n, to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep’t of Homeland Sec. (May 9, 2007).
- The National Chicken Council, the U.S. Poultry & Egg Association, and the National Turkey Federation stated “[f]rom our inquiries to DHS technical assistance, it is our understanding that mixtures are not to be counted in determining threshold quantities and only pure or neat chemicals shall be considered.” Letter from George Watts, President, Nat’l Chicken Council, Don Dalton, President, U.S. Poultry and Egg Ass’n, and Joel Brandenberger, President, National Turkey Federation, to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep’t of Homeland Sec. (May 8, 2007).
- The National Petrochemical and Refiners Association stated that “Appendix A should clarify that, for purposes of calculating the [STQ] for a [COI], the facility shall aggregate only the quantities of pure chemical that are present on site, and exclude amounts of such chemical contained within a solution or mixture of other substances, chemicals or water. If DHS intends for facilities to incorporate chemicals contained in mixtures, the Department must provide clear, specific guidance to industry, keeping in mind any COI that exists as a component of a solution or mixture possesses characteristics that are inherently different and less

attractive than the characteristics of the pure COI.” Letter from Charles T. Drevna, Executive Vice President, Nat’l Petrochemical and Refiners Ass’n, to Dennis Deziel, Infrastructure Sec. Compliance Div., Dep’t of Homeland Sec. (May 9, 2007).

The need for notice-and-comment is more significant when an agency departs from its articulated policy. In April 2007, ILTA e-mailed Dennis Deziel, a DHS official in the ISCD. The e-mail asked Mr. Deziel to confirm his conversation with ILTA, specifically that:

Blended fuels containing threshold quantities of Appendix A chemicals are excluded from [CFATS]. The Appendix A list of chemicals and threshold quantities which trigger top-screen participation...are for NEAT products ONLY. A blend matrix or mixture policy has not been addressed and as such, blends or mixtures are not included in the rule as presented.

See Exhibit I.

Mr. Deziel responded that “[ILTA] has correctly summarized our position, yes.” This e-mail exchange occurred on April 5, 2007, just days before the issuance of proposed Appendix A on April 9. Given that specific assurance—and industry’s reliance on it—the addition of the fuel mixture provisions in the final version of Appendix A was completely unexpected and provides more evidence to suggest that DHS violated the logical outgrowth test.

Courts have limited agency discretion to change prior interpretations without using notice-and-comment rulemaking. In *Paralyzed Veterans of Am.*, the court concluded that “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.” *Paralyzed Veterans of America v. D.C. Arena LP*, 117 F.3d 579, 586 (D.C. Cir. 1997).

In *Alaska Professional Hunters*, the D.C. Circuit held that “[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule” and must use notice-and-comment rulemaking. *Alaska Prof’l Hunters Ass’n v. Federal Aviation Admin.*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). The court emphasized that “[t]hose regulated by an administrative agency are entitled to ‘know the rules by which the game will be played.’” *Id.* at 1035. The D.C. Circuit reaffirmed the decision in 2003. See *CropLife Am. v. Envtl. Protection Agency*, 329 F.3d 876 (D.C. Cir. 2003).

The Fifth Circuit has held similarly, stating in *Shell Offshore* “[w]e agree with the reasoning of the D.C. Circuit; the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation.” *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001). In cases where agencies change interpretations of a regulation without the opportunity for notice-and-comment, the Sixth Circuit has agreed. See e.g., *Dismas Charities, Inc. v. United States Dep’t of Justice*, 401 F.3d 666, 682 (6th Cir. 2005).

These cases have been applied most clearly and aggressively when the previous policy was longstanding and where parties had reasonably and justifiably relied on it. The very fact that commenters generally did not proffer comments on mixtures (aside from reiterating their understanding that mixtures were excluded from Appendix A) demonstrates the reasonableness and pervasiveness of industry’s reliance. This is reinforced by the knowledge that DHS was heavily relying on EPA’s RMP rules, which had not covered “flammable substances in gasoline.”

Had industry known that mixtures were the subject of consideration, there is little doubt—given the volume and sophistication of the comments that DHS *did receive* during the notice-and-comment period—that commentators would have specifically addressed mixture issues in great detail. *See Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 16–17 (D.D.C. 2004) (“For a plaintiff to establish prejudice on the basis of a “logical outgrowth” argument, a plaintiff generally must show ... that, ‘had proper notice been provided, they would have submitted additional, different comments that could have invalidated the rationale for the revised rule ...’”).

This deficiency cannot be justified by the suggestion that the November 2007 final version of Appendix A was simply an extension of the interim final rulemaking procedure. This argument is not supportable: as noted above, when DHS sought comments on Appendix A in its April 2007 notice of proposed rulemaking, it engaged in the more orthodox notice-and-comment rulemaking. At that point, the statutory six-month period for issuing interim final rules had expired, and the November 2007 amendments were promulgated long after that deadline.

Were DHS to argue that this was simply a second or “follow-on” “interim final rulemaking” that was not required to comply with the APA, then the six-month time limit on DHS would have been nugatory. DHS could have simply issued a brief or vague rule before the April 9, 2007 deadline, and then continued to amend it without notice-and-comment for the remaining months of the effective date period (i.e., until October 2009 when Section 550 expires on its own terms).

DHS may also claim that these were emergency rules or that it had good cause to find that notice-and-comment was “impractical” or “contrary to the public interest.” 5 U.S.C. § 553(b)(B). But this argument is unavailing. First, DHS must make that assertion at the time of the rulemaking. Second, this exemption is narrow. It is not sufficient for an agency to merely cite the health or safety applications or benefits of a rule—otherwise the exemption would swallow the provision. *See Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800 (D.C. Cir. 1983).

2. DHS “Guidance” Has Not Been Subject to Notice-and-Comment

Since the April 9, 2007 rulemaking, DHS has issued (and continues to issue) “guidance” documents and information, such as the Top-Screen User’s Manuals and its Frequently Asked Questions (“FAQ”) webpage. These documents and resources (i) contain binding requirements and applications that go beyond the statute, IFR, and the final version of Appendix A; (ii) are often inconsistent with each other; and (iii) unnecessarily burden entities subject to the regulation.

While agencies may avoid notice-and-comment by issuing either “interpretative” rules or “statements of general policy,” DHS may not circumvent the APA and add binding requirements in this manner. One law review article summarized the position of the D.C. Circuit on this issue:

[A]n agency may use a “general statement of policy” to announce policymaking initiatives, but only if the resulting document is wholly nonbinding. If an agency wishes to promulgate a more binding directive, it may use an “interpretative rule,” but only if the agency’s position can be characterized as an “interpretation” of a statute or legislative regulation rather than as an exercise of independent policymaking authority.

John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 916 (2004). An instructive appellate case is *Hector v. United States Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996). As described in “A Guide to Federal Agency Rulemaking:”

The USDA had previously issued a valid legislative regulation after notice and comment, pursuant to the Animal Welfare Act, requiring that structures used for housing wild animals be of sufficient strength and sturdiness for their own protection and containment. Hector, a dealer in wild animals, had built a containment fence and a six-foot perimeter fence. The Department subsequently issued an internal memorandum setting a minimum height requirement for perimeter fencing of eight feet and cited Hector for a violation. The court, per Judge Posner, held that the memorandum that purported to interpret the regulation was legislative rather than interpretive, and therefore was invalid for lack of notice-and-comment procedure.

JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 86 (4th ed. 2007).

The DHS guidance at issue here can fairly be characterized as final and binding. The additional requirements in these guidance documents and on the FAQ webpage—which are relied upon by industry for compliance purposes at the direction of DHS—frequently add to or change how regulated entities interpret and apply the final version of Appendix A and, therefore, should have been issued *after* notice-and-comment.

For example, DHS posted FAQ 1373, last modified on January 11, 2008, fifty-two days into the sixty-day Top-Screen submittal process, to address how to calculate release-flammable mixtures containing multiple COIs:

Q: If a mixture has multiple COIs as flammable release, does the facility need to list the entire weight of the mixture for each COI or does it only need to be listed once. Listing it multiple times would give the appearance that the facility has a lot more COIs than they actually do have.

A: On behalf of the Chemical Security Compliance Division (CSCD), thank you for your question. The facility should determine the percentage of each release flammable COI that exists in the mixture at or above 1%. Then the facility should select the release-flammable COI that exists in the highest percentage and enter the entire weight of the mixture next to that release-flammable COI at the appropriate place on the Top-Screen questionnaire. Thank you.

Based on this guidance, assume a facility has 1,000,000 pounds of gasoline, and butane exists in the gasoline in the highest concentration. On its Top-Screen, the facility would indicate that it has 1,000,000 pounds of butane. Though this is patently misleading, this is precisely the outcome that DHS required of the regulated community.⁴

Page 34 of the December 2007 Top-Screen User's Manual contradicts FAQ 1373 (emphasis added):

EXAMPLE (for fuels that contain Appendix A COI): Gasoline typically includes Appendix A chemicals of interest. A facility that possesses gasoline need only select "Fuel: Gasoline" and enter the total weight in pounds of gasoline at the facility. The facility should *not* select the constituents of its gasoline (e.g., butane) from the list of release-flammable COI in the Top-Screen.

Months later, on September 3, 2008, DHS added FAQ 1568, taking it verbatim from page 26 of the December 2007 Top-Screen User's Manual:

Q: How does a facility count the amount of release-flammable mixture with an NFPA rating of 4 if it is stored in either below or above ground tank(s)?

A: Release-Flammable Mixtures that are Fuels:

If a release-flammable chemical of interest is present in gasoline, diesel, kerosene or jet fuel (including fuels that have flammability hazard ratings of NFPA 1, 2, 3, or 4) stored in an aboveground tank farm, including tank farms that are part of pipeline systems, in a concentration equal to or greater than one percent (1%) by weight of the mixture, the facility must indicate the type of fuel it possesses and [sic] provide the entire amount of the fuel.

If the same release-flammable chemical of interest is present in a fuel stored in a concentration less than one percent (1%) by weight of the mixture, and the mixture has an NFPA flammability hazard rating of 1, 2, 3, or 4, the facility need not count for the release-flammable COI or mixture.

⁴ Interestingly, DHS corrected this problem through updates to the Top-Screen questions, which now permit a facility to select the type of fuel stored onsite (e.g., gasoline) from a list and enter the total quantity of that fuel.

This answer contradicts FAQ 1373, but DHS failed to amend, correct, or otherwise remove FAQ 1373. ILTA facilities that submitted Top-Screens prior to the September update—which is a majority, considering the Top-Screen submission deadline was in January 2008—did not have the benefit of this guidance.

Maintaining the January 2008 and September 2008 responses on the FAQ website not only represents a contradiction but also creates functional confusion for those who use the FAQ webpage. A user who accesses the FAQ webpage for guidance on this question, but who only reads the January 2008 entry, would fail to get the benefit of the additional information contained in the September 2008 entry. While both are accessible on the FAQ, the January 2008 entry is presented first. It is unreasonable to expect a user to continue searching for additional guidance on this topic.

On January 8, 2008, DHS posted FAQ 1371 regarding whether a Top-Screen must be completed when the facility possesses only fuels that do not contain any release-flammable COIs:

Q: Do I need to complete a Top-Screen if I only possess fuels like diesel, jet fuel and kerosene that do not contain any Appendix A release-flammable chemicals of interest?

A: No. A facility is required to submit a Top-Screen only if the facility has received written notice from DHS under 6 CFR sec. 27.200 or if the facility actually possesses any chemical of interest (COI) at or above the applicable Screening Threshold Quantity. However, if a facility is required to complete and submit a Top-Screen and possesses a release-flammable COI, then the Top-Screen will require information on the amount of diesel, jet fuel and kerosene at the facility even if those fuels do not contain any COI.

The exact same question is posed again in FAQ 1583, but the answer, posted on September 8, 2008, includes additional language regarding gasoline:

Q: Do I need to complete a Top-Screen if I only possess fuels like diesel, jet fuel and kerosene that do not contain any Appendix A release-flammable chemicals of interest?

A: No. However, if a facility is required to complete and submit a Top-Screen because it possesses a release-flammable COI, then the facility also is required to provide the amount of diesel, jet fuel and/or kerosene at the facility, even if those fuels do not contain any COI. However, a facility that possesses gasoline that contains a release-flammable COI stored in an above ground tank at or above 1% with a total weight of 10,000 pounds or more must select “gasoline” under “Fuels” and enter the total quantity at or above 10,000 pounds.

DHS has posted some FAQs twice. FAQ 1540, initially posted by DHS on July 15, 2008 was re-posted as FAQ 1567 on September 3, 2008.

Q: How does a facility count the amount of release flammable COI in a mixture that is not a fuel with an NFPA rating of 1, 2, or 3?

A: If a release-flammable chemical of interest is present in a mixture in a concentration equal to or greater than one percent (1%) by weight of the mixture, and the mixture has an NFPA flammability hazard rating lower than 4 (i.e., NFPA hazard rating of 1, 2, OR 3), and it is not a fuel, the facility need not count the entire weight of the mixture toward the STQ. Mixtures with an NFPA flammability hazard rating of 1, 2 or 3 are calculated by multiplying the percentage of the COI times the total weight of the mixture to see if the COI is at or above the STQ. If a release-flammable COI is present in a mixture, and the concentration of the chemical is less [sic] than one percent (1%) by weight, the facility need not count the COI or mixture in determining whether the facility possesses the STQ.

These confusing and contradictory FAQ's and manual provisions, many worded as "requirements" despite never going through the requisite APA rulemaking process, demonstrate the problematic application of CFATS in the context of release-flammable mixtures, generally, and gasoline, specifically.

3. DHS Failed to Consider Executive Order 13211

The final version of Appendix A indicates that "DHS prepared and placed in the docket a Regulatory Assessment addressing the economic impact of the IFR [which] is applicable to this final rule." 72 Fed. Reg. 65,418. Because the final version of Appendix A significantly amends the IFR, the Regulatory Assessment should have been amended as well, but DHS failed to do so.

Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* requires a "Statement of Energy Effects," which is a detailed statement by the agency responsible for the significant energy action relating to:

- (i) any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies) should the proposal be implemented; and
- (ii) reasonable alternatives to the action with adverse energy effects and the expected effects of such alternatives on energy supply, distribution, and use.

As illustrated by the following examples, agencies have included such required statements—even for regulations that have a far less direct impact on energy compared to CFATS.

The Natural Resources Conservation Service ("NRCS") in the Department of Agriculture proposed to clarify "the appropriate use of a program environmental assessment (EA) and align

its NEPA public involvement process with that of the Council on Environmental Quality's (CEQ) regulations that implement the NEPA. 73 Fed. Reg. 35,883. The NRCS included a "Statement of Energy Effects" and concluded that "this interim final does not constitute a significant energy action as defined in E.O. 13211." 73 Fed. Reg. 35,884.

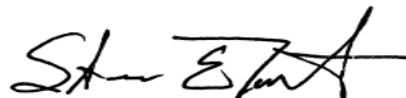
When EPA proposed a "national emission standard for hazardous air pollutants (NESHAP) for stationary combustion turbines," EPA included a "Statement of Energy Effects" but determined that "the proposed rule when implemented will not have a significant adverse effect on the supply, distribution, or use of energy." 68 Fed. Reg. 1,910.

Applying CFATS to aboveground gasoline storage terminals, however, would have a significant energy impact. Nowhere has DHS fully considered the increased costs of distribution and the likely closure of multiple distribution terminals due to CFATS. Storage terminals are capital-intensive and operate on narrow profit margins, and their operators generally do not own the fuel they handle. The economics of these facilities typically center upon logistical operations that are service-based and independent from the high value of the commodities being handled.

PART IV. CONCLUSION

For the foregoing reasons, ILTA, on behalf of its affected members, petitions DHS to declare gasoline, as a mixture with an NFPA flammability hazard rating of 3, exempt from the CFATS regulation.

Respectfully submitted,



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