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

Re: Docket Number DHS-2006-0073
RIN 1601-AA41

Dear Mr. Deziel:

The American Petroleum Institute (API) respectfully provides the following comments in response to the U.S. Department of Homeland Security (DHS) Advanced Notice of Rulemaking (ANRM) *Chemical Facility Anti-Terrorism Standards.* (December 28, 2006, 71 *Fed. Reg.* 78,276). API generally supports the DHS effort to develop facility security standards that are risk-based and performance oriented and that focus on facilities that present the highest level of security risk, because a "one-size-fits-all" approach to security could seriously compromise industry security and possibly worker safety. API is concerned that since many very important terms are not defined such as "high risk", "significant adverse impact" and "chemical facility", it is very difficult to assess the true impact of the ANRM on regulated industry facilities. API has provided comments below to the extent allowable, given uncertainty as to DHS' proposal presented in the ANRM.

API represents nearly 400 member companies involved in all aspects of the oil and natural gas industry and, as such, many API members could be directly impacted by the rulemaking and the subsequent interim final rule. API is pleased that DHS has chosen to seek input from the public on the technical and practical impacts of its chemical security facility regulation. API hopes these comments will assist DHS in implementing a reasonable security program that protects the American people without threatening our country's energy security future.

GENREAL COMMENT – Many API Member Company Facilities Are Not "High Risk" Facilities and DHS Should Therefore Exempt Them From Coverage under the Interim Final Rule

Under section 550, DHS must establish security rules for "high risk" facilities that threaten human health, national security, and/or economic security. If subjected to a terrorist attack, many API member company facilities would not likely pose

any significant adverse impacts to human health, national security, or the economy. Therefore, API believes these facilities should not be designated as "high risk" because such facilities: (1) rarely pose any explosion or overpressure threat outside the facility fenceline; (2) do not regularly handle chemicals which are generally threats outside the fenceline; (3) do not individually, or even in groups, supply enough of the petroleum product supplies required for national defense to seriously constitute a threat; and (4) do not individually, or even in groups, have enough effect on petroleum product supplies to cause long-term harm to the economy.

There are many examples of such facilities including on-shore exploration and production operations, natural gas processing plants, terminals, gathering systems, compressor/pump stations, and other small volume processing plants. Many such facilities are in remote locations and often have a very small number of employees. In addition, API believes pipelines and pipeline facilities including storage and breakout tanks are clearly not chemical facilities and not covered under this regulation. Furthermore, many petroleum refineries that are not regulated by the Maritime Transportation Security Act would meet the four elements described above and will ultimately not be covered by the interim final rule. As mentioned earlier, the intent of Section 550 is to authorize DHS to regulate the high risk facilities and not the types of low risk facilities discussed in the examples above.

Section-by-Section Analysis of the Rule.

In addition to the above general comment, API submits comments below on the ANRM in a section-by-section format.

- **Development of Guidance**
  There are several places in the ANRM where mention is made of guidance that will be developed to assist in the implementation of the regulations. API strongly urges DHS to include owner/operator participation in the development of such guidance, preferably from an early stage. It is API's experience that a "seat at the table," rather than "review and comment," prevents problems which lead to impractical applications, and in extreme cases, costly and time-consuming litigation. API believes that developing guidance using the existing industry sector working groups previously created by DHS would be efficient and would not require establishment of any new procedures. Since guidance can often affect the rights of regulated parties as much as rulemaking, and will likely be subject to judicial review, API recommends that any guidance should provide for as much public input as possible and as much attention from decision-makers as in the rulemaking process.

- **Section 27.100 Definitions**
  - **Chemical facility.** The current definition is too broad and really does not provide enough specificity to be considered a true definition. It would be helpful if DHS would publish a list of chemicals and the associated threshold quantities that a facility would have to possess in order to be considered a "chemical facility" for regulatory purposes. API suggests using the Environmental Protection Agency's "Risk Management Program" for the list of chemicals as long as the EPA RMP list is not used solely to complete the risk assessment. Also, the threshold quantities associated with the RMP list should be scaled up by DHS to reflect the "high risk" intent of the rule. Alternatively, API could also support a hazards-class approach as long as the threshold levels are scaled up to reflect the "high risk" intent of the rule.

  - **High risk.** The ANRM proposes to define a "high risk" facility as one presenting a "high risk of significant adverse consequences for human life or health, national security and/or critical economic assets if subjected to a terrorist attack." DHS has not defined the term "significant." API strongly urges DHS to define this term in a manner which does not leave the definition open to the interpretation that "any" risk could be "significant."

    Further, API suggests that DHS clarify that 'high risk' applies only to those facilities which could inflict "adverse consequences" that are of "national significance." API notes that a plant shutdown in a rural area could be adverse to a local economy by eliminating local employment and contracting opportunities but would not be nationally economically significant.

    API believes the open questions remaining on these terms underlines the need for DHS to collaborate with owner/operators and other recognized experts to determine the operational definition of "high risk" for purposes of these regulations.

- **Section 27.110 Implementation**

  The second sentence appears to provide too much discretion by providing flexibility to designate facilities into particular phases of the program based on factors other than potential risk. Section 505 clearly contemplated risk-based designation, and the final rule should limit classification of facilities to specifically risk-based decisions.

- **Section 27.200 Information Regarding Security Risk for a Chemical Facility**
  - Since the ANRM does not apply to facilities covered in Section 27.105(b), a statement should be added to Section 27.200(a) that "Facilities covered in Section 27.105(b) are not subject to these regulations and, for purposes of these regulations, will not be asked for provide information to DHS, including completing the "Top-screen process." Also, see the API comment on Appendix A, Section III. Top-Screen Questions below. Alternatively, the exclusionary statements, described to be in Part Two of the Top Screen, could be placed into Part One along with facility identifying information. Questions directed at criticality-related issues would then be moved from the proposed first segment to the second segment. This will allow exempt facilities to comply with the Top Screen expeditiously and efficiently.

  - Section 27.200(b) – API cautions DHS about the regulatory provision that a facility "presumptively presents a high level of security risk" if the facility fails to provide information in a timely manner. Section 550 authorizes the Secretary to apply regulations only to those facilities that present high levels of security risk. API does not believe the statute authorized the Secretary to presume that any facility for which it does not have perfect information presents a high level of security risk, and API recommends that DHS eliminate the wording "...reach a preliminary determination, based on the information then available, that the facility presumptively presents a high level of security risk. The Assistant Secretary..." Alternatively, if the wording is not deleted per API's suggestion, then wording should be added stating that DHS must have some reasonable grounds to support the decision to implement this provision.

    API makes this recommendation in the interest of encouraging stronger chemical security at facilities that present actual security risks, as clearly contemplated by the statute authorizing this action by DHS. API believes that classifying large numbers of smaller facilities as "high risk" when they, in fact, do not actually pose high risks, will not advance chemical facility security. The regulations enable DHS to levy penalties, conduct inspections and audits, and pursue other avenues for uncooperative facilities. Including low risk facilities within this regime will drain agency resources in response to litigation challenges to DHS' application of its regulatory authority to non-high risk facilities, occupy agency personnel in requiring security assessments and plans from small facilities that do not actually pose any real threat to national security, encourage noncompliance by otherwise high risk facilities, and discourage Congress from renewing DHS' chemical security regulatory authority. API strongly recommends that DHS rely on its general enforcement authority to secure

responses to top level screens or their equivalent, and limit the application of the new chemical security rules to those facilities which Congress has authorized DHS to include.

- **Section 27.205 Determination that a Chemical Facility "Presents A High Level Of Security Risk"**
  This section gives DHS broad discretion to determine a facility is "high risk." As mentioned in the comments above, DHS has provided no details on what "high risk" is and how it will be determined. DHS should collaborate with industry and other recognized experts to develop risk criteria in a way that captures facilities that are truly high risk. This approach will also help keep the number of those facilities to a manageable level for DHS, especially during the initial implementation of the program.

- **Section 27.210 Submissions Schedule**
  The requirement to submit vulnerability assessments within 60 days places an unrealistic burden on owner/operators of many sites. API recommends this requirement be changed to at least 90 days. Similarly, in order to incorporate responses from the vulnerability assessment into the site security plan, API suggests that the site security plan should be submitted within 180 days as opposed to the proposed 120 days.

- **Sections 27.215 Vulnerability Assessments & 27.225 Security Plans**
  Sections 27.215(c)(3) and 27.225(b)(3) require facilities to notify DHS of material modifications to the vulnerability assessments and site security plans respectively by submitting a copy of the revised assessment. It would be helpful to the regulated community if DHS would provide more information on what "material modifications" means so facilities have a better idea of when they would need to send revised assessments to DHS. As we have seen from MTSA, there have been some significant disparities of perceived security postures and facility ratings. This gap can be closed by more clarity of what "materials modifications" means.

- **Section 27.220 Tiering**
  API understands the DHS need to separate covered facilities into tiers to assist in the efficient implementation of the program, with emphasis on address the high risk facilities initially. However, since DHS has not shared the criteria that it plans to use to segregate between the various tiers, it is difficult for the regulated community to assess the impact or otherwise provide very meaningful comments. API encourages DHS to work very closely with owner/operators to ensure the criteria used for demarcation of the tiers results in appropriate levels of security measures. Since the difference in being placed in one tier versus another can have significant operational and economic impacts on the facility, it is imperative that the

criteria for determining the demarcation between the tiers be clearly communicated. In addition, the general tier determination criteria must be included in the interim final rule.

In addition to collaboration on the demarcation levels for the various tiers, DHS should also collaborate with owner/operators on which tier their facility falls into. While the ANRM does provide provisions to object to a placement in a tier, that mechanism is only meaningful if DHS discloses to the owner/operator how and why they were placed in a particular tier. Industry-DHS collaboration would also ensure that that the number of facilities determined to be high risk is kept to a manageable number of facilities that truly could have a significant adverse impact if attacked.

- **Section 27.230 Risk-Based Performance Standards**
  API supports DHS efforts to develop risk-based performance standards to reduce facility vulnerabilities as identified in the facility vulnerability assessments. The regulations state that DHS will issue guidance on the application of the performance standards to the risk-based tiers. API encourages DHS to work with the regulated community on the development of such guidance to ensure recognizes existing countermeasures, layered security efforts and other security, business and operations practices already undertaken by the facilities. Such collaboration will also help the regulated community understand which performance measures align with which tiers and why.

- **Section 27.235 Alternative Security Program**
  Many API member companies have facilities that are covered by the Maritime Transportation Security Act of 2002 (MTSA) and some facilities that are not MTSA facilities. To ensure uniformity across their facilities, many companies have implemented an "MTSA-like" approach to vulnerability assessments and security plans across their organizations even if some of their facilities are not regulated by MTSA.

  To recognize this situation, API recommends that wording be added to this section to explicitly note that security vulnerability assessments and facility security plans developed in accordance with the MTSA program is an example of an Alternate Security Program.

- **Section 27.240 Review and Approval of Vulnerability Assessments and Site Security Plans**
  API strongly supports the wording in Section 27.240(a)(3) stating that DHS will not disapprove a site security plan based on the presence or absence of a particular security measure and encourages DHS to retain this same wording in the interim final rule.

- **Section 27.245 Inspections and Audits**
  API is concerned about the use of third party auditors for DHS audits and inspections. While this section gives DHS authority to use certified third party auditors to perform audits and inspections however the ANRM does not provide any criteria that DHS plans to use to "certify" such auditors. It is not clear what kind of background and skills DHS is expecting such auditors to have, particularly with respect to physical security experience. Rather than using third party auditors, API recommends that DHS look to other government agencies for resources to assist with audits and inspections.

  In addition, Section 27.245 (b)(1) states that security measures should be in place at the time of the physical inspection required for final approval of the site security plan. If facilities address vulnerabilities through capital improvements, these security measure will likely not be in place within the stated time frame. In such cases, API recommends that DHS use a timeline approach and would be included in the site security plan and would detail an implementation schedule of prioritized security measures.

  This section also states that DHS will provide facility owners and/or operators with 24-hour advance notice before inspections. API believes that a 24-hour notice is not a sufficient amount of time to arrange for appropriate personnel to be available for the inspection. API suggests that five to seven days is a more reasonable amount of time for notice to facilities about a DHS inspection. API would support unannounced inspections for facilities that had significant deficiencies in the prior inspection or that have had an unusual number of breeches.

- **Section 27.320 Appeals**
  API suggests that an item (j) be added to state that DHS will not enforce the "cease of operations" order within 30 days of final agency action in order to allow the facility time to seek Federal judicial review.

  Contrary to language in the rule, objections to determination of high risk and placement in a high risk tier should be aligned with the deadlines for SVA and SSP submissions. Because timelines are short, facilities will be forced to complete the vulnerability assessment and site security plan regardless of the outcome of the appeal, thus rendering the appeals process moot.

- **Section 27.400 Chemical-terrorism Vulnerability Information**
  API questions the creation of a whole new category of protected information – CVI. This information could also be considered SSI (as in the MTSA model) and be subject to SSI protections. Also, the types of information requested

should be similar to that for MTSA and not include topics such as history of security activities and funding information.

- **Section 27.405 Review and Preemption of State Laws and Regulations**
  API believes the proposed section 27.405 would reasonably implement DHS' statutory mandate. Section 550(a) provided that the Secretary could approve alternate security programs, should he make a determination that "the requirements of such programs meet the requirements of this section and the interim regulations." By requiring any alternate state security program to conform to DHS' regulations, Congress clearly intended DHS to determine that state programs which conflicted with DHS' rules to be preempted. Though it was within DHS' authority under this subsection to "wipe the slate clean" by requiring every state security program to be submitted to DHS review prior to any continued enforcement, DHS has chosen to require regulated entities to challenge state security programs prior to their preemption. This burden-shifting appears to be intended to exercise DHS' authority in a manner as narrowly-tailored as possible. API supports this approach, and encourages DHS to fulfill its statutory obligations by retaining the language found in proposed section 27.405.

- **Section 27.410 Third Party Actions**
  API supports this language in this section and recommends that the wording be included in the interim final rule.

- **Appendix A, Section III. Top-Screen Process**
  Section 550(a) explicitly states that DHS "shall not apply regulations issued pursuant to this section to facilities regulated pursuant to the Marine Transportation Security Act of 2002." DHS' proposed rules note that there will be a second segment of the Top-screen process that will ask a series of "exclusionary" questions thereby giving DHS the ability to "screen out" those facilities that are excluded by law from this regulation. API opposes any attempt by DHS to extend its regulations to MTSA facilities, contrary to DHS' statutory authorization. Since DHS is fully-aware which facilities it already regulates under MTSA (through its Coast Guard MTSA program), any mandatory top-level screening of MTSA facilities is not statutorily authorized, a needless waste of duplicative efforts, and unsupportable as an information collection requirement. Before imposing millions of dollars in information collection requirements on chemical facilities, DHS must internally determine which facilities are already MTSA sites.

  In addition, given the multi-national nature of many organizations, along with the varying nature of corporate organizations, the most appropriate person to submit the Top Screen information may not meet all of the proposed

requirements of: 1) being an officer of the corporation; 2) be a U.S. citizen; and 3) be domiciled in the U.S. API would support language enabling the Corporation to designate a proper "submitter" of the Top Screen information.

Further, DHS' Top Screen questions appear to unreasonably place market analysis burdens on chemical facilities. To the extent that DHS has no statutory authority to regulate non-high risk facilities, requiring detailed market information which requires costly research from top screen submitters would appear to overstep DHS' authority. For example, questions that are meant to address national, economic and government mission impact may not be known to many owner/operators, such as:

- Is the facility the sole US supplier?
- Does the facility provide more than 35% of domestic production?
- Is the facility a major or sole supplier to a power generation facility, etc.?

- **DHS seeks comment on the strategy for updating and renewing Vulnerability Assessments and Site Security Plans.**
  The preamble language states that, in general, DHS believes that Tier 1 facilities should update and renew their vulnerability assessments and site security plans each year. API believes such a schedule is too frequent, inefficient and would not align with corporate capital budgeting processes.

  API recommends that an approach similar to MTSA should be applied in these regulations. That is, annual audits are conducted by the facility and changes to the vulnerability assessment and SSP are made as necessary based on that audit. Additionally, reviews would be triggered when facilities make an operational change that affects the security of the facility.

Conclusion

The American Petroleum Institute thanks the Department of Homeland Security for the opportunity to comment on the Advanced Notice of Rulemaking on "Chemical Facility Anti-Terrorism Standards." While there are still areas in the interim final rule that will need to be resolved, API commends DHS for taking the risk-based and performance-based approach with the ANRM. As noted in our comments, there are many areas in the rule where industry-DHS collaboration is warranted and API and its members look forward to working with DHS on those issues.

If there are any questions about the API comments, please feel free to contact me at 202/682-8176 or chittim@api.org.

Best regards,

Rob Chittim