

**Response to Comments on
Hazardous Material Security Regulations
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Respondents

Commentor	Affiliation	Comment Numbers
Liz J. Reilly, Manager, International and Federal Programs	Allen Irish Counsel, Government Affairs, National Paint & Coatings Association	1-7
Bruce A. Norton Environmental Management	Constellation Energy	8-11
Robert D. McArver, Director, Government Relations	Synthetic Organic Chemical Manufacturers Association (SOCMA)	12-15
Christine H. Porter, Director, Regional Environmental Coordination Department	Department of the Navy	16
Mark Callahan, President	Mid Atlantic Propane Gas Association	17
Terry J. Harris	Cleanup Coalition	18-32

Comments

NATIONAL PAINT AND COATINGS ASSOCIATION

Comment 1: The coatings industry is addressing security through its Coatings Care® Program, which incorporates a separate and distinct Code addressing security. Coatings Care® is similar to the American Chemistry Council’s Responsible Care® Program, but has been tailored to meet the specific needs of paint and coating facilities. Each and every member of NPCA has made a written commitment to implement the Coatings Care® program, including the Coatings Care® Security Implementation Guide. Through use of this code, paint and coatings manufacturers are able to perform vulnerability assessments, upgrade internal and external security systems, perform background checks on employees, and enhance the security of their facilities using tools such as fencing, guards, and video surveillance.

Response: The NPCA should submit its Coatings Care® Security Implementation Guide to the Department with demonstration or documentation that standards specified in 26.27.01.05(A) are met by the Guide or will be met by the facility using the Guide. If, upon review, it is determined to be consistent with the minimum requirements of the regulation, it can be incorporated into the implementation guidance under Section 1.1 and plans developed under this guidance submitted to the Department to satisfy the requirements of the regulation. Submit the documents specified in your comment to the Department with documentation and justification demonstrating that the requirements of the regulation are met. The Department may then incorporate those documents into the guidance by reference.

It may be that the Coatings Care® Program does not include a third party verification requirement, but that could be submitted with a company's security plan developed under the Coatings Care® plan. The statute requires third party verification and therefore the regulations must also include this requirement.

Comment 2: The implementation date of "on or before October 1, 2005" proposed in §26.27.03 is clearly infeasible. As with any new state requirement, companies need to be informed and given a reasonable amount of time to implement a complex new regulation. In light of the extensive requirements being placed on Maryland manufacturers by this proposal, a more reasonable implementation date would be not less than one year following the promulgation of any proposed regulation.

Response: The Department agrees and will allow up to 9 months from the effective date of this regulation to meet the requirements.

Comment 3: NPCA's Coatings Care® Security Code has already strengthened the coatings industry's ability to address any threats that face it. Any new regulation should take into consideration that as with most other chemical industry facilities, coatings, caulks, sealants, and other related manufacturers have implemented effective security measures, which are, in our case, embodied in Coatings Care®. We urge that any new guidance your committee considers acknowledge Coatings Care® as an acceptable security framework for the Paint and Coatings Industry.

Response: See Response to Comment 1.

Comment 4: Facilities that are in Compliance with Federal Hazardous Materials Security Regulations under 49 CFR 172.800 should be considered in compliance with these Regulations.

Response: The Department suggests that all facilities review the requirements of the regulations and the guidance published with this regulation. If a plan prepared under 49 CFR 172.800 meets the requirements it can be submitted to meet the requirements of this regulation. If approval for the industry Care Code is received, that too may meet the requirements of this regulation.

Comment 5: This proposed regulation, in Regulation .02, exempts facilities located in local jurisdictions that adopt hazardous material security standards that are at least as stringent as the requirements of Regulation .05A of this chapter, as well as facilities "subject to the federal Maritime Transportation Security Act, or any other comprehensive federal site security program."

The security program established by 49 CFR, however, is applicable to a wider constituency, as it applies to all those required to register under the federal hazardous materials transportation program -- for the paint and coatings industry, this means that any facility that offers or causes to be offered for transportation a placarded load of dangerous goods. There are three distinct components of a written security plan: personnel security at the facility; unauthorized access to the facility; and security enroute. Other similarities between the 49 CFR program and the

requirements contained within this proposal include documentation and recordkeeping requirements; internal audits; training requirements; and enforcement procedures.

The only significant difference between these programs is the requirement under Maryland's proposed regulation that there be independent verification of implementation of the security plan. The federal program under 49 CFR does not require such independent verification and NPCA respectfully argues, as noted elsewhere in these comments, that such verification is not necessary. NPCA member companies are already complying with these security regulations and in addition, are participating in NPCA's Coatings Care program. Requiring independent verification of implementation is a time-consuming and expensive endeavor. The resources that are spent on independent verification are better directed at activities directly related to implementation of security measures.

As the requirements of 49 CFR 172.800 are sufficiently similar both to the requirements of this proposed regulation and to the existing programs which would entitle a facility to exemption, NPCA urges the Department to incorporate language which would place compliance with the requirements of 49 CFR 172.800 on a par with the other proposed exemptions.

Response: See Response to Comment 4. In addition, the requirement for third party verification is a requirement of the statute and not subject to modification by regulation.

Comment 6: The proposed fine of \$1,000 per day is excessive. As a result of the lengthy planning cycles involved in conducting planning and other activities under this provision, a technical violation of this regulation could extend over an extensive time period. NPCA urges that a "per occurrence" approach be taken here.

Response: The civil penalty that is specified in the statute is "not exceeding" \$1000 per violation. It is therefore possible that the actual penalty assessed could be significantly less than \$1000, depending on the violation.

Comment 7: NPCA commends the Department for acknowledging, in §26.27.06, the value of self audits. Coatings Care® requires that NPCA member-participants adopt this practice and provides guidance on how to conduct a self-audit. We believe that this, in conjunction with the already extensive state and federal regulatory structure governing hazardous materials, is more than sufficient to ensure implementation of House Bill 493. However, should the Secretary believe that third-party verification must be required, then NPCA urges that §26.27.07 be clarified to acknowledge that audits conducted by a corporate headquarters element, parent company, or other higher corporate authority, if appropriately disclosed, would comply with that provision.

Response: Third party verification is clearly required by the statute. Corporate headquarters, parent company or other corporate authority does not constitute a "third party" and should not conduct the verification.

Comment 8: Applicability to Transportation-Related Facilities Regulated under US DOT Pipeline Safety Regulations [COMAR 26.27.01.01B(2)(b); 26.27.01.02C].

The proposed regulations explicitly exempt certain facilities that would otherwise be required to develop security plans when those facilities have planning requirements under maritime security, other comprehensive federal site security programs, or equivalent local planning requirements. Likewise, the proposed rules exempt certain facilities based on the purpose and use of otherwise regulated materials as provided for in 40 CFR 68.125-126. However, the proposed regulations do not explicitly extend all of the transportation-related exemptions provided in Part 68 to the definition of covered facilities. We are specifically concerned with the exemption for natural gas pipeline and storage facilities regulated under the pipeline safety regulations at 49 CFR Parts 192, 193 and 195, provided for in the definition of a “stationary source” at 40 CFR 68.3 (see 63 Fed. Reg. 640 at 644 (Jan. 6, 1998)). BGE’s Spring Gardens and Westminster LNG plants, and our Notch Cliff propane storage facility are exempt from regulation under Part 68 because of this provision. Although these facilities are similar in nature to those covered by Part 68.125, (they store flammable material for use as a fuel) we have never relied on this regulatory provision to determine their regulatory status.

As we noted, we believe that only those facilities subject to Part 68 are subject to regulation under COMAR 26.27.01-12. Likewise we are interpreting proposed COMAR 26.27.01 (B)(2)(b) to include those facilities that would otherwise be exempt from Part 68 due to their status as natural gas pipeline/transportation facilities because they store listed flammable materials for use as fuel. We request that the Administration advise us regarding this interpretation so that we can be certain as to the status of these facilities. In the alternative, and if the Administration did not envision the status of these facilities in the original rulemaking, we recommend an amendment to the rule that includes the exemption provided for transportation facilities provided at 40 CFR 68.3, either by adding language to the proposed rule, or as an incorporation by reference.

Response: MDE agrees that facilities excluded under 40 CFR 68.126 (flammable substances used as fuel or held for retail sale) or 40 CFR 68.3 (stationary sources) are exempted from regulation under COMAR 26.27.01.

Comment 9: Applicability to Facilities subject to “other comprehensive federal site security program” [COMAR 26.27.01.02C].

The exclusion included in the proposed .02C text does not adequately define “...other comprehensive federal security program(s).” The wording of the proposed exemption does not specifically include nuclear power generating facilities that are licensed by the federal Nuclear Regulatory Commission (NRC), such as Constellation’s Calvert Cliffs Nuclear Power Plant (CCNPP), located in Lusby Maryland. NRC licensees (nuclear power generating facilities) are mandated by NRC to maintain extensive security plans designed specifically for the security of the licensed nuclear source material and the facility. These plans require the inclusion of State and local law enforcement agencies in the facility’s security. Constellation Energy’s Calvert Cliffs Nuclear Power Plant maintains a close working relationship with both the Maryland State Police and the Calvert County Sheriff’s Department. The extensive and comprehensive nature of

security plans for NRC-licensed facilities makes the requirement for an additional security plan under the proposed COMAR 26.27.01 redundant.

Constellation recommends that additional, specific language (see below) should be added to .02C to clarify which “other comprehensive federal site security program(s)” would qualify under this exemption:

“C. This chapter does not apply to any facility subject to the federal Maritime Transportation Security Act, nuclear power generating facilities which are federally regulated and licensed by the Nuclear Regulatory Commission (NRC), or facilities regulated under any other comprehensive federal site security program.”

Response: MDE does not find it necessary to add the proposed language as nuclear facilities certainly have comprehensive site security programs. However, MDE affirms through this response to comments, which shall be part of the administrative record, that such facilities have comprehensive site security plans and are exempted from the regulation.

Comment 10: Mandatory duplicative systems for recordkeeping [COMAR 26.27.01.08A]

The Department’s proposed rules at COMAR 26.27.01.08 would require that both “...paper *and* (emphasis added) electronic supporting materials...” be maintained to document that the facility has conducted a recent analysis required by regulation .03A.

The Department should allow the facility to determine the most cost-effective means by which it could achieve compliance with this regulation. Allowing either paper or electronic recordkeeping options, would enable the facility to take advantage of current electronic recordkeeping technologies, yet ensuring the availability of those records during a compliance inspection or for facility needs. Paper copies of supporting materials can readily be produced from electronic media, if needed.

Constellation Energy recommends that the Department change the language at .08A to read: “Every facility shall maintain paper *or* electronic supporting materials...” to allow for the electronic retention of records and supporting materials.

Response: The Department believes there is a value in requiring both a paper and electronic version of supporting materials documenting the most recently conducted analysis required by the regulation. The availability of an electronic file serves the Department’s purposes in facilitating communication and review of the plan. The existence of a paper version may facilitate review by either facility employees or the Department in the event the electronic version is unavailable.

Comment 11: Third-Party Verification of Security Plans [COMAR 26.27.01.07]

The Department’s proposed rules at COMAR 26.27.01.07 would require that the facility retain an (independent) third party to verify that the facility has implemented the physical security measures that have been identified in the facility’s security plan.

The proposed rules at 07.D also require that “(T)he certification shall include the qualifications of the third-party demonstrating the appropriate skills and experience to adequately complete the verification.” However, the proposed rules do not specify what the required “qualifications” for the third-party entity might be, nor do the proposed rules reference any existing “security plan qualification” standards by which the facility may verify that a potential third party’s qualifications meet the intent of the rule. Absent any clearly defined criteria, the facility would not be able to guarantee the qualifications of their third-party verifier, and thus place the facility’s compliance status in jeopardy, should this become a compliance issue.

Constellation strongly recommends that the Department include specific criteria for the “third-party verifier,” or alternately, reference some existing standards that can be used as a benchmark for evaluating potential third-party verifiers, and that would meet the regulatory requirements. As an additional option, the Department could publish the “third-party acceptance criteria” in a guidance document, which would subsequently be available on the MDE web site, following proper notice and comment.

Response: The Department will be looking at the credentials of the third party with respect to education and experience to demonstrate that they are qualified to conduct such a review. Since both education and experience may vary widely, the Department is reluctant to be overly prescriptive and unnecessarily exclude qualified third parties.

THE SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION (SOCMA)

Voluntary Steps to Address Site Security Undertaken by SOCMA Members

In connection with their regular manufacturing operations, SOCMA members are required to participate in the association’s ChemStewardsSM program. The ChemStewards program is an environmental, health, safety and security program that promotes continuous improvement in chemical manufacturing.

As part of the ChemStewards program, members are required to:

- Conduct a security vulnerability assessment (SVA)
- Develop plans and procedures to mitigate the vulnerabilities
- Implement the plans and procedures, and
- Undergo third party verification of the plans and procedures at facilities with offsite consequences.

In addition to the ChemStewards program and the “Site Security Guidelines for the U.S. Chemical Industry” referenced in the draft guidance that accompanied the proposed rule, SOCMA has developed a Chemical Site Security Vulnerability Analysis Model and Manual (<http://www.socma.com/Products/VulnerabilityAnalysis.htm>) to assist members in assessing vulnerabilities at their facilities. This SVA has been recognized by the Center for Chemical Process Safety as meeting its SVA criteria. This computer-based tool considers inherent

hazards, attractiveness, potential consequences and existing security measures in a tiered screening process.

The Model allows users, in an iterative computer-based process, to investigate how changes in policies and practices may affect their overall vulnerabilities. However, the Model is not designed to provide quantitative or probabilistic risk assessments, with respect to terrorist or other third-party attacks or events at plant sites. SOCMA believes that this tiered screening process will be a valuable tool for companies' security efforts, whether conducted independently or in coordination with ChemStewards and other stewardship programs. These tools, which have been downloaded from the SOCMA website by more than 1,000 separate users, are freely available and suited to a wide range of the chemical sector.

The purpose of SOCMA's SVA tool is to provide chemical facilities with a mechanism to allow flexibility and efficiency in site vulnerability analysis. The SOCMA SVA tool can be used to help facilities analyze potential vulnerabilities and consider where resources will be most effective, as directed under the proposed rules.

Comment 12: SOCMA believes that both our ChemStewards program and the Chemical Site Security Vulnerability Analysis Model and Manual meet the Department's requirements for "acceptable analysis under this guidance" as listed under section 1.1.1.1.

Response: The Department is willing to accept industry security guidelines as long as they meet the requirements specified in the regulations, especially the requirements in 26.27.01.05. Submit the documents specified in your comment to the Department with documentation and justification demonstrating that the requirements of the regulation are met. The Department may then incorporate those documents into the guidance by reference.

Comment 13: SOCMA agrees that it is appropriate to exempt from coverage those facilities that are already covered by the Coast Guard's Maritime Transportation Security Act regulations.

Response: In view of the fact that there are additional comprehensive federal site security programs, the Department has reconsidered and will delete the reference to the Maritime Transportation Security Act regulations.

Comment 14: SOCMA has concerns about the risk assessment and prioritization process laid out in the compliance guide. It seems overly complicated and unnecessary, given the tools that are already available. In addition to the SOCMA SVA Model, the Center for Process Safety and Sandia National Laboratories have developed SVAs of their own, each of which considers key aspects of risk, vulnerability and consequence. These methodologies are familiar to chemical manufacturers and others covered by MTSA and by the voluntary programs such as ChemStewards that have been adopted by the industry. We encourage MDE to make clear in the final rule that tools such as these are sufficient to meet the requirements established therein.

Response: If other tools are available that the Department determines meet the regulation's requirements, they may be used. The risk assessment and prioritization in the guidance is offered as an option when there are no suitable industry standards. Further, the reference process is

actually very easy to implement, with readily available information and no complicated calculations or analysis.

Comment 15: SOCMA supports the proposed rule’s recognition of the importance of keeping information gathered in complying with the rules confidential. Facility security assessments and security plans often contain truly critical and sensitive information that should not be unnecessarily jeopardized by an across-the-board mandate that all such documentation be submitted. We believe Maryland has taken the right approach in allowing covered entities to keep their security plans onsite with the proviso that they must be made available to state authorities upon request.

Response: No response needed.

DEPARTMENT OF THE NAVY

Comment 16: .02 Scope C should be revised to read “This chapter does not apply to any Department of Defense facility, any facility subject to the federal Maritime Transportation Security Act, or any other comprehensive federal site security program.”

Response: See Response to Comment 13. MDE does not find it necessary to add the proposed language because, as you note, all DOD facilities are required to have such plans, thus all DOD facilities are covered and addressed by the phrase “any other comprehensive site security program.” However, MDE affirms through this response to comments, which shall be part of the administrative record, that such facilities have comprehensive site security plans and are exempted from the regulation.

MID ATLANTIC PROPANE GAS ASSOCIATION

Comment 17: The Association understands that the propane industry is exempt from the proposed regulations because of the exemptions defined by 40 CFR 68.125, .126 and .130.

Response: We cannot comment on an entire industry. If a facility is exempted under State or federal codes then they would also be exempted from 26.27.01.

CLEANUP COALITION

Comment 18: Baltimore should not be explicitly listed as that would require the Department to amend the regulations if it should change its requirements to be less stringent.

Response: Agreed, the reference will be deleted.

Comment 19: There is no statutory basis to exempt facilities subject to the Federal Maritime Transportation Security Act.

Response: The Maritime Security Transportation Act is only one law of several that requires a comprehensive federal site security program and does not need to be noted explicitly, therefore the reference will be deleted.

Comment 20: Subsection C is not clear as to whom it applies, to which information it applies, and there appears to be no statutory authority.

Response: It applies to the Department and the Department of State Police. The statutory authority is under 7-702 (F).

Comment 21: The statute requires “acceptable methodologies” but the regulations no longer require acceptable methodologies; guidance seems insufficient under the statute.

Response: The guidance indicates what the Department will consider to be acceptable methodologies. Since facilities vary widely and technologies are advancing rapidly, the prescription and specificity of regulations does not provide the needed flexibility. Guidance provides a more appropriate means of defining what will generally be considered acceptable methodologies.

Comment 22: The Department should require a simple annual certification that the audit has been completed or should require that the annual certifications be submitted every 5 years.

Response: Since internal audit will be part of the required plans, the completion of the internal audit will be verified by the third party in the five-year submission.

Comment 23: Other than contractual relationships that should be disclosed, the third party verifier should not have a financial, corporate or ownership interest in the facility it is verifying.

Response: The Department believes that the comment is addressed by the phrase “corporate or financial relationships.” If relationships exist that create an inappropriate conflict of interest, the Department will not accept the third party as qualified.

Comment 24: “Appropriate skills and experience for third part verifiers should be more explicit in the regulations.

Response: See the response to comment 11.

All comments below apply to the Guidance published concurrently with the regulations.

Comment 25 (Section 1.1.1): Industry designed voluntary codes are inappropriate because they may not be sufficiently stringent.

Response: The Department will ask that each industry wishing to use such codes document and demonstrate that the voluntary codes are as stringent as the statutory requirements.

Comment 26: (Section 1.2) Vulnerabilities should include identification of special circumstances relating to emergency response such as limited access and threats to natural resources.

Response: The Department agrees, and this will be added to the guidance.

Comment 27: (Section 3.0) The “likely scenario” anticipated by 3.1.3 should reflect the severity that would be caused by a security breach and should therefore reflect a catastrophic release.

Response: That will depend on the nature of the materials, how they are stored, secondary controls and the success of the attack. It will be up to the facility planners to develop appropriate scenarios, and the auditors (including the Department) and third party verifiers to assure that the scenarios are appropriate.

Comment 28: (Section 3.2) The weighting factors need to be reconsidered.

Response: MDE will consider all specific proposals and objective justifications regarding modifications to the weighting factors.

Comment 29: (Section 3.4 and 3.5.2) Intermittent Risks should not be excluded from the priority ranking process.

Response: Some modification is appropriate. Intermittent risks should be ranked separately, but high intermittent risks should be addressed before low, regular or continuous risks.

Comment 30: (Section 4.0) Inherent safety in both materials and process should be encouraged as a consideration in risk prevention, reduction and mitigation.

Response: The Department agrees and will add appropriate language to the guidance.

Comment 31: (Sections 6.0 and 7.0) Facilities should be required to participate in Local Emergency Planning Committees to facilitate communications with communities.

Response: The Department agrees with the comment, but that is not addressed in the statute and cannot be addressed by these regulations. For the most part, major facilities work with each other and surrounding communities on these issues.

Comment 32: (Section 9.2) Financial, corporate or ownership interests should disqualify the third party verifier.

Response: Please see Responses to Comment 11 and Comment 23.