



**Homeland
Security**

24 August 2015

Mr. Robin Rorick
Director, Midstream and Industry Operations
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005

Dear Mr. Rorick:

The Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) has forwarded to the Department of Homeland Security your March 2014 letter regarding the February 2014 Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program Information Collection Request (ICR). We are responding to your letter in concert with OMB's approval of the ICR.

Background--Statutory and Regulatory Framework

In the time since the CFATS Personnel Surety Program ICR was submitted to OMB, the President signed into law the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (the CFATS Act of 2014), Pub. L. No. 113-254, which adds provisions related to CFATS to the Homeland Security Act of 2002, as amended, Pub. L. No. 107-296.¹ The Homeland Security Act of 2002² affirmed that the Department must implement a Personnel Surety Program in which the Department is required to establish a capability for high-risk chemical facilities to comply with Risk-Based Performance Standard (RBPS) 12(iv) of CFATS.³ The CFATS Act of 2014 also established additional provisions for the CFATS Personnel Surety Program, to include allowing a high-risk chemical facility to visually verify certain credentials or documents that are issued by a Federal screening program that periodically vets enrolled individuals against the Terrorist Screening Database (TSDB). Under RBPS 12(iv) high-risk chemical facilities are required to implement security measures to identify individuals with terrorist ties. The approved CFATS Personnel Surety Program ICR aligns with the CFATS regulations and section 2102(d)(2) of the Homeland Security Act of 2002.

¹ Section 2 of the CFATS Act of 2014 adds a new Title XXI to the Homeland Security Act of 2002. Title XXI contains new sections numbered 2101 through 2109. Citations to the Homeland Security Act of 2002 throughout this document reference those sections of Title XXI. In addition to being found in amended versions of the Homeland Security Act of 2002, those sections of Title XXI can also be found in section 2 of the CFATS Act of 2014, or in 6 USC §§ 621 – 629.

² The CFATS Act of 2014 specifically adds Section 2102(d)(2) which requires the Department to implement a Personnel Surety Program.

³ The specific requirement is found at 6 CFR § 27.230(a)(12)(iv).

The CFATS Act of 2014 does not conflict with 6 CFR § 27.230(a)(12)(iv) as promulgated on April 9, 2007 and is consistent with the regulatory text of the CFATS Interim Final Rule (IFR). However, the CFATS Act of 2014 does conflict with IFR preamble because the preamble did not consider visual verification as a means to sufficiently verify an affected individual's enrollment in the Transportation Worker Identification Credential (TWIC) program, Hazardous Materials Endorsement (HME) program, or the Trusted Traveler program. The Department continues to believe that visual verification has significant security limitations. However, as a result of the CFATS Act of 2014, the Department will now accept visual verification of certain credentials or documents as a means to meet RBPS 12(iv).

It bears noting that the burden estimates of the ICR have not changed as a result of the CFATS Act of 2014 or as a result of any programmatic changes to the CFATS Personnel Surety Program. Therefore, the Department has the authority to implement the CFATS Personnel Surety Program as described in the CFATS IFR with modifications to account for new statutory requirements in the CFATS Act of 2104.

Multiple Options for Compliance with RBPS12(iv)

As mentioned above, in view of the Personnel-Surety-focused language of the CFATS Act of 2014, the Department will accept visual verification as a method to comply with RBPS 12(iv). Thus, in addition to the three options for complying with RBPS 12(iv) described in the 30-day Paperwork Reduction Act (PRA) notice,⁴ the Department is making available a fourth option for high-risk chemical facilities to comply with RBPS 12(iv): Option 4 – *Visual Verification Of Credentials Conducting Periodic Vetting*. Option 4 will allow a high-risk chemical facility to satisfy its obligation under 6 CFR § 27.230(a)(12)(iv) to identify individuals with terrorist ties using any Federal screening program that periodically vets individuals against the TSDB if:

- The Federal screening program issues a credential or document;
- The high-risk chemical facility is presented a credential or document by the affected individual; and
- The high-risk chemical facility verifies that the credential or document is current in accordance with its Site Security Plan (SSP).

As noted previously, however, visual verification of existing credentials carries with it inherent security limitations and provides less security value than the other options available under the CFATS Personnel Surety Program because a visual inspection of a credential alone cannot necessarily confirm whether a credential is expired, revoked, fraudulent or otherwise not valid. For example:

- The visual verification of a TWIC will not reveal if the TWIC has been revoked by the Transportation Security Administration (TSA); and
- The visual verification of an HME on a commercial driver's license will not reveal if the endorsement has expired or been revoked.

⁴ The 30-day Federal Register notice that solicited comment about the CFATS Personnel Surety Program ICR may be viewed at <https://federalregister.gov/a/2014-02082>.

High-risk chemical facilities are encouraged to review all the available options and carefully consider which option (or combination of options) best addresses their specific security situation. In addition to the options described in the 30-day notice and in this letter, high-risk chemical facilities are welcome to propose in their SSPs or Alternative Security Programs (ASP) options not described in this document. The Department will assess the adequacy of such alternative or supplemental options on a facility-by-facility basis.

Specific Questions Raised by American Petroleum Institute (API)

Having taken note of the changed landscape and additional options afforded by the CFATS Act of 2014 and noting that your letter to OMB was drafted several months prior to enactment of this significant piece of legislation, the Department would like to take this opportunity to address the specific questions and concerns you raised in your March 2014 letter.

- (1) API suggested that “RBPS 12 must: (1) increase the overall security of the [high-risk chemical] facility, (2) be feasible, and (3) meet the security objectives for both the enforcing agency and the implementing industry partner.” API suggested that “a procedure [should be] outlined in the ICR that describes notification criteria to [high-risk chemical] facilities or organizations when individuals seeking access to COI’s have been identified as having known or suspected ties to terrorism.”**

In the event of a positive match against the TSDB and in order to prevent a significant threat to a high-risk chemical facility or loss of life, a high-risk chemical facility will be contacted where appropriate and in accordance with federal law and policy, as well as law enforcement and intelligence requirements. This policy is consistent with other Federal security vetting programs and is consistent with RBPS 12.

- (2) API suggested that the Department “does not explain or justify why [high-risk chemical] facilities would be required to notify DHS when affected personnel no longer have access to restricted areas or critical assets.” API stated that “[i]t is not clear why DHS would need to stop vetting individuals at any point in time.”**

The CFATS Act of 2014 prohibits the Department from requiring a high-risk chemical facility to submit information about an individual more than one time under Option 1 or Option 2.⁵ Therefore, under Option 1 or Option 2, a high-risk chemical facility has the option, but is not required, to notify the Department when the affected individual no longer has access to any restricted areas or critical assets. The Department strongly encourages high-risk chemical facilities to notify the Department when an affected individual no longer has access to restricted areas or critical assets to ensure the accuracy of the Department’s data and, in so doing, to stop the recurrent vetting of the person who is no longer an affected individual.

The Department believes that there are substantial privacy risks if a high-risk chemical facility opts to not provide updates and corrections about affected individuals. Specifically, the accuracy

⁵ See section 2102(d)(2)(A)(i) of the Homeland Security Act.

of an affected individual's personal data being vetted against the TSDB for terrorist ties may be affected. Accurate information both (1) increases the likelihood of correct matches against information about known or suspected terrorists, and (2) decreases the likelihood of false positives. As a result, the Department encourages high-risk chemical facilities to submit updates and corrections as they become known so that the Department's checks for terrorist ties, which are done on a recurrent basis, are accurate. If a high-risk chemical facility is either unable or unwilling to update or correct an affected individual's information, an affected individual may seek redress as described in the CFATS Personnel Surety Program Privacy Impact Assessment.

(3) API suggested that “the 60-day timeframe to comply [and submit information about affected individuals that currently have access] may not be achievable[.]”

For affected individuals with existing access, the Department will expect, unless otherwise noted in an authorized or approved SSP or ASP, that the terrorist ties check will be completed within 60-days after receiving authorization or approval of an SSP requiring the high-risk chemical facility to implement measures to comply with RBPS 12(iv). High-risk chemical facilities that believe the 60-day timeframe is not achievable are encouraged to suggest alternative schedules, based on their unique circumstances, in their SSPs.

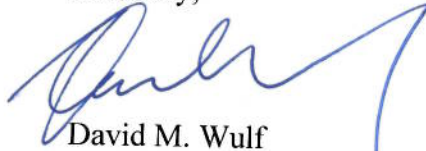
(4) API reiterated some of the assertions made in the March 2013 Office of the Inspector General Report. API also stated that “[i]t is also unclear, from the IG report and from the current ICR, why DHS needed to establish ‘specific CFATS vetting capabilities.’”

The March 2013 Office of the Inspector General (OIG) Report contained 24 findings of which Finding #7 concerned the CFATS Personnel Surety Program. In its written response to the OIG Report, the Department non-concurred with Finding #7 and provided a substantive response to the assertions described in the OIG Report on pages 95 and 96 of the OIG Report.

In its report, the OIG stated that although the National Protection and Programs Directorate (NPPD) did not concur with the recommendation, it considers the actions NPPD had taken to have been responsive to Recommendation 7 and considers this recommendation resolved, but open, pending receipt of documentation showing that OMB has approved the CFATS Personnel Surety Program ICR and that ISCD has sent names to the TSA for vetting.

You and API have been leaders in the personnel surety arena and in furthering the overall objectives of the CFATS program, and the Department is appreciative of your continuing efforts to secure America's highest-risk chemical facilities - an effort that is essential to the Nation's critical infrastructure security and resilience.

Sincerely,

A handwritten signature in blue ink, appearing to read 'David M. Wulf', with a long, sweeping flourish extending to the right.

David M. Wulf
Director
Infrastructure Security Compliance Division