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**Comments on Executive Order 13650 - Improving Chemical Facility Safety and Security, Working Group Scope, Work Activities, Options, and Listening Session Topics; Docket No. DHS-2013-0075**

Thank you for the opportunity to provide comments on the Executive Order on *Improving Chemical Facility Safety and Security*. The American Petroleum Institute (API) represents more than 580 companies involved in all aspects of the oil and natural gas industry including exploration, production, refining, marketing, pipeline, and marine transporters, as well as service and supply companies that support all segments of the industry. As such, API and our members are significantly affected by the Occupational Safety and Health Administration (OSHA) Process Safety Management (PSM) standard, the Environmental Protection Agency (EPA) Risk Management Program (RMP) rules, the Emergency Planning and Community Right-to-Know Act (EPCRA), the Department of Homeland Security (DHS) Chemical Facility Anti-

Terrorism Standards (CFATS), and the United States Coast Guard (USCG) Maritime Transportation Security Act (MTSA) regulations. API and its member companies support performance-based regulatory compliance and the goal of continuous improvement of the safety and security of its member company's facilities.

Since the release of Executive Order 13650 (EO), API understands that the EO Working Group (WG) has been engaging stakeholders in a dialogue dealing with four general topics:

- Improving operational coordination with States, Tribes, and local partners
- Enhanced information collection and sharing
- Modernizing regulations, guidance, and policies and
- Identifying best practices in chemical facility safety and security

In general, API supports agency efforts to improve information collection/sharing and interagency operational coordination with regional and local entities/partners. The comments provided herein respond to the EO WG options that are of relevance to API member companies as identified in the WG January 3, 2014 notice. However, with respect to modernizing regulations, guidance and policies, API's specific comments relating to OSHA's Request for Information on Process on Process Safety Management and Prevention of Major Accidents (OSHA Docket No. OSHA-2013-0020, RIN 1218-AC82, 78 Fed. Reg. 73756-73768) were submitted in response to that docket and are incorporated by reference here. Issues regarding modernizing regulations of other agencies are addressed in these comments.

API appreciates OSHA's efforts to provide an opportunity to engage in dialogue regarding the EO and hopes that the EO Working Group will find these comments and contributions helpful. Should you have any questions about the API comments, please contact me at 202/682-8176 or by email at [Chittim@api.org](mailto:Chittim@api.org). Thank you for the opportunity to provide input on these important topics.

Sincerely,



Senior Policy Advisor  
API

## **General Comments**

### ***1. Effectiveness of Safety and Security Regulations***

API believes the PSM standard has been effective in improving industry process safety and that the substantially similar RMP rule helped focus attention on chemical risk to the public. Also, EPCRA has helped develop a framework to support chemical emergency response, but this program is not as effective as it could be in spite of industry support because it is largely an unfunded federal mandate. API believes that it is too early to judge the effectiveness of the CFATS and MTSR regulations and the Department of Transportation (DOT) HM-232/1580 rules. Although there have not been any major domestic security incidents since the rules were promulgated, it is unknown whether these rules have had a preventative effect.

### ***2. Improved Data Collection and Sharing Among Agencies***

API supports efficient, reasonable, non-redundant collection of data pursuant to existing regulations. Before proposing to amend existing regulations, federal, State and local agencies' should improve data collection, sharing and coordination as well as prioritization according to risk. In general, federal agencies also have an opportunity to identify and minimize overlapping federal requirements with other federal agencies.

### ***3. Incident Data to Support the Need for Changing the Regulations Is Sparse***

Significant chemical industry incidents do not occur frequently but when they do, companies evaluate their root causes during incident investigations and implement corrective actions to prevent recurrence. For major incidents, organizations like OSHA and the U.S. Chemical Safety Board (CSB) may, along with the site, undertake root cause investigations and other agencies may undertake compliance investigations. Publicly available data from these internal and external investigations do not indicate that there are significant deficiencies in the regulatory framework.

Publicly available incident investigation results suggest that more effective enforcement of existing regulations would improve safety performance. API believes that nearly all of the major incidents that have occurred in the U.S. since the promulgation of process safety management regulations involve root causes that are related to compliance with the existing PSM regulations. Thus, API believes that there is little supporting evidence that changes or additions to these regulations are needed. Rather, agencies should focus on improving compliance and engaging in enforcement where warranted. API supports agency efforts to identify "outlier" companies, rather than increasing regulatory obligations for sites/companies that may already be in compliance. Lastly, the federal government should do a better job of collaborating with State and local agencies to more effectively enforce existing laws and regulations, as applicable.

#### ***4. Use of Voluntary Programs and Alternative Compliance Encouragement Means***

API supports the use of voluntary programs to support regulatory compliance such as OSHA's Voluntary Protection Program (VPP), Transportation Security Administration's (TSA) Pipeline Security Guidelines and the Department of Homeland Security's Customs & Border Patrol's (CBP) Customs & Trade Partnership Against Terrorism (C-TPAT) program. API supports regulatory improvement to enhance the competence and capacity of agency's inspection and enforcement personnel in terms of process safety, security knowledge and facility experience. The USCG's MTSA and Dock Safety Manual/Operations programs have been largely successful in that agency's compliance assessments, due to a formal hierarchically agency structure and strong program protocols and procedures for managing their compliance processes and dealing with local and State agencies at the regulated facility's level.

API encourages agencies to more regularly update their various publications, including interpretation letters and compliance guidelines, respecting that any substantive changes to the underlying regulations must go through notice and comment rulemaking as prescribed by the Administrative Procedure Act and other laws.

API members witness the increase of various social media. However, in the regulatory context, while social media can help connect stakeholders to more real-time information, API cautions the agencies to carefully consider the use of social media beyond simple use as an informal education and notification tool thereby avoiding potential unintended consequences.

### **Specific Comments Regarding Published Agency Options**

#### ***5. Modernizing the PSM, RMP, MTSA, CFATS Regulations***

PSM, RMP, and EPCRA are mature laws, each having at least 15 years of industry compliance experience. API supports effective, enforceable, performance-based improvements whose accident prevention value exceeds the anticipated costs. Broad expansions of existing rules not shown to be major risks would dilute agency and private sector resources away from higher risk areas. API has provided detailed comments directly to OSHA in response to its PSM RFI (OSHA Docket No. OSHA-2013-0020), and those comments on modernizing the PSM standard are incorporated by reference here.

Each of the federal agencies participating on the EO WG have not demonstrated a need, based on historical enforcement results, to support major changes to existing regulations (i.e., PSM, RMP, CFATS, MTSA, etc.) at this time. API also believes that agencies should first focus more on regulatory implementation and more effective enforcement of existing rules rather than on expansion of jurisdiction. Nonetheless, API understands that certain planned changes, some of which are significant, have already been recommended for CFATS by the CFATS Risk Tiering Methodology Review Panel. These changes, among others, include Appendix A revisions, new prescribed mandates for Personnel Surety measures, the inclusion of National economic

criticality and National security implications within the scope of tiering determinations for the “highest risk” critical infrastructure, as well as the numerous foundational program changes. However, with CFATS implementation just taking full effect, with no long-term authorization, and some program management issues to this point, changes to CFATS should either be delayed or be implemented all at once to reduce uncertainty and ever-changing flux of tiering and to avoid significant unwarranted capital expenditures in the private sector.

#### **6. *Updating the Regulation List of Covered Substances***

API does not believe that major changes to the various lists of covered substances are needed, although some minor PSM and RMP list harmonization may be appropriate. Again, the development of the basis for such changes or harmonization needs to be subject to the due process requirements for making regulatory changes and needs to be thoroughly documented. API believes that the various agency lists of regulated materials have different objectives and should not be harmonized for the sake of simplicity. These lists are tailored to the overall objective of the specific regulation scope in which they were developed. Moreover, while it may seem expedient to “harmonize” the various lists, such efforts should continue to reflect the very different technical and statutory safety, environmental and security risks for which the lists were developed to address, such as:

- PSM - onsite process safety effects;
- RMP - offsite community and environmental effects;
- EPCRA - less than catastrophic release effects and response;
- MTSA - marine transportation security;
- DOT (HM-232 and 1580) – ground and air modes of shipments of hazmat in transportation; and
- CFATS - chemical inventory control focused security.

Security regulations are far more comprehensive in scope because the security risk considers intentional as opposed to accidental releases, planned capability to optimize the attack to increase the number of fatalities and destruction of an asset. Attempting to have a single list may result in rules that over-protect, under-protect, or are inefficient uses of limited government and private sector accident prevention resources. API recommends that a robust, risk-based and well-documented scientific and economic analysis be the basis for DHS to amend/update CFATS Appendix A, including adding poisons and clarifying security threshold quantities (STQ’s) for flammable mixtures.

#### **7. *Improving Coverage of Reactive and Explosive Substances/Hazards***

API understands that there have been some significant incidents involving reactive chemicals. Addressing chemical reactivity is a very difficult technical challenge because the potential for a reactive chemical incident is dependent on site-specific factors that are separate from and beyond the intrinsic chemical reactivity hazards of potentially listed substances and how those

materials are stored (e.g., the type and strength of the container or vessel holding the materials, etc.). With scientifically supported documentation, API could support listing of certain substances based on their individual reactivity characteristics (e.g., NFPA 4 reactivity rating). API also could support the coverage of inadvertent mixing or off-normal process condition situations based upon a practical reactive chemical hazard evaluation of already-covered processes/chemicals. Any reactive chemical hazard regulation should be risk and/or performance-based that allows the facility to determine the best approach for evaluation.

### ***8. Best Practices and Lessons Learned Such as the “Safety Case”***

The PSM and RMP processes are already well developed and implemented at facilities throughout the U.S. They have been proven as being effective to assess and mitigate hazards and risks at facilities. Adopting an entirely new approach unfamiliar to employers and employees would add a layer of complexity that may detract from safe operations, thereby degrading safety.

Having stated that, API does not support adoption of requirements for the development of a “Safety Case” regulatory regime or the submission of “safety cases” to government agencies for endorsement. There is no industry-wide evidence that shows that a safety case approach will result in better safety performance than that resulting from the existing OSHA PSM and EPA RMP approaches. In addition, there is no data showing that the lack of having a “safety case” program were material causes in the occurrence of industry incidents. Imposition of a safety case regulatory regime would be a huge cost burden to the industry with no statistical incident rate improvement.

### ***9. Assessing Inherently Safer Alternatives***

IST decisions are extremely complex and cannot be and should not be determined by any governmental agency. The potential for creating unintended consequences is high, and the Environmental Protection Agency (EPA) has long held that IST requirements would not produce additional benefits beyond those that already exist in the current Risk Management Plan (RMP) program structure.<sup>1</sup>

Inherently safer approaches to manufacturing processes have been and will continue to be considered by facilities as a matter of course, and the facility operators—not the government—are in the best position to understand the full ramifications of implementing IST. No one regulatory program or government agency can properly address the broad range of factors such as risk shifting, technical efficacy, cost, and product quality that a facility must consider and address when choosing appropriate safety and security measures, much less all of the different site-specific scenarios for the approximately 12,000 facilities that could be impacted by an IST requirement under the RMP.

<sup>1</sup> Federal Register Volume 61, Number 120, FR Doc o: 96-14957 (Thursday, June 20, 1996): Pages 31668-31730, <http://www.gpo.gov/fdsys/pkg/FR-1996-06-20/html/96-14597.htm>

In addition, decisions by government officials to require alternatives could impose new risks, such as more hazardous materials in transportation, if facilities must reduce inventories of certain substances.

Operators need to take an all-inclusive approach when looking at the safety profile of a facility, and they must factor in the requirements of the numerous overlapping regulatory programs that help shape this approach. EPA, the Occupational Safety and Health Administration, the U.S. Department of Transportation, the U.S. Department of Homeland Security (DHS), and the Bureau of Alcohol, Tobacco, Firearms and Explosives all have existing regulatory programs that require operators to examine their operations and make them as safe and secure as possible. To attempt to overlay an IST requirement would negatively impact all of these various safety and security programs and create an impossible bureaucratic burden.

The current performance-based regulations in place today and in the marketplace itself already provide strong incentives for companies to consider and adopt “safer alternatives” such as IST. These programs allow facility operators to use all of the risk management tools and options at their disposal, while considering the complexities of their unique operating environment. Adding a new regulatory requirement focused on IST is not only unwarranted but potentially detrimental. At a minimum it would divert scarce federal agency resources away from the primary objective of the EO—namely, to identify and engage “outlier” facilities. At worst, IST would overwhelm federal agencies with thousands of complex evaluations, without requisite staff expertise to properly review the submissions. One EPA official has already said such an approach would be “monumentally difficult” for the Agency to accomplish.<sup>2</sup>

The IWG can help create a safer and more secure regulatory environment by addressing shortfalls through options that will improve coordination between government agencies and enhance outreach, while recognizing opportunities to better implement existing regulatory programs. Pursuing options related specifically to IST would ultimately jeopardize the success of the EO by both distracting attention from much needed improvements and threatening to create unnecessary and duplicative regulatory requirements that would not contribute to enhancing safety and security.

### ***10. Increasing Worker Involvement and Labor-Management Cooperation***

Employee participation is already identified as an element in the U.S. process safety management regulations. API supports and encourages continued worker involvement in relevant OSHA PSM and EPA RMP regulatory prevention program activities such as management of change (MOC), pre-startup safety reviews (PSSR), auditing, process hazards analysis (PHA), work permitting and incident investigation consistent with a site’s employee participation program.

<sup>2</sup> Larry Stanton, Director of EPA’s Office of Emergency Management, as quoted by Dave Reynolds, “EPA Looks To New Jersey Program As Possible Model for IST Requirements,” *Inside EPA* (December 2, 2013), <http://insideepa.com/Risk-Policy-Report/Risk-Policy-Report-12/03/2013/epa-looks-to-new-jersey-program-as-possible-model-for-ist-requirements/menu-id-1098.html>

Facility or site security plans (FSP/SSP) as required by various federal laws (e.g., DOT, TSA (Pipeline and Aviation), MTSA, CFATS) mandate document marking and control procedures and may not be shared with persons without a “Need to Know” (per the regulatory definition). Persons who have been specifically identified as requiring access to a federally-required FSP/SSP must first successfully meet all federal vetting requirements. Sharing security measures implemented to protect personnel and/or assets without such screening will violate existing law and may significantly increase security risk due to the widespread availability of communicated prevention measures.

#### ***11. Expanding Inspector Training to Include Best Practices beyond Regulatory Requirements***

API supports competency training of agency inspectors and enforcement personnel. Such training, if inclusive of “common industry practices”, needs to clearly define the performance-based criteria for application of such practices and notice that such application is up to the facility.

#### ***12. Enhancing EPA Software Tools for Emergency Responders***

API supports the improvement of such tools using reasonable levels of taxpayer funding. Any such improvements should be based upon a comprehensive review of user feedback on needs.

#### ***13. Applications of QRA to Explosives-Related Industry Operations***

API does not agree that quantitative risk assessment (QRA) -based requirements are necessary to improve safety for the manufacturing of and related industry operations use of explosives, for example, in exploration and production activities (e.g., well completions). Compliance with standards-based approaches and more effective enforcement have proven to be sufficient. The costs of any such imposition of QRA-based regulatory requirements would not meet a cost-benefit analysis because the costs would greatly exceed any possible benefits.

#### ***14. Mitigating Duplicative Federal Qualification and Inspection Requirements***

API supports the elimination of duplicative Federal qualification and inspection requirements, through federal agency collaboration, review and systematic program changes to reduce redundancy.

#### ***15. Leverage Industry Best Practices in Chemical Facility Security***

API does not support use of the term “best practices.” What may be “best” for one facility, company or industry, may not be fit-for-purpose or appropriate to another facility, company or industry. API prefers using the terms “common industry practices” or “effective practices” and in that context API supports the communication and sharing of information related to how different companies address improving security, including consistent CFATS Risk Based

Performance Standards. However, API does not support prescription of how a facility must meet a particular security requirement.

The industry has many venues within which to share and discuss security practices through conferences, workshops and summits (e.g., annual DHS Chemical Sector Security Summit, annual AFPM Security Conference, ASIS International 60th Annual Seminar). The industry shares practices on such topics as personnel surety, background check procedures, theft and diversion prevention techniques and alternative security plans. API encourages DHS participate in these events by providing examples from the CFATS compliance process and the voluntary protection program.

### ***16. Identifying Economically and Mission Critical Chemical Facilities***

API agrees that the risk-based tiering structure will allow DHS to focus and prioritize its efforts on the highest risk facilities, using a framework of four risk-based tiers of high-risk facilities, ranging from high (Tier 1) to low (Tier 4). API understands that DHS uses a variety of factors in determining which tier facilities will be placed, including information about the public health and safety risk, economic impact, and mission critical aspects of the given chemicals and Threshold Quantities (TQ) of the chemicals. API continues to have concerns about the lack of transparency in the factors that DHS uses to determine risk and recommends that DHS improve the transparency of its risk determination process and allow better dialogue with CFATS-regulated facilities during this process. API suggests appropriate information should be shared between DHS, OSHA and EPA.

DHS should clarify the criteria for determining economic and mission criticality for CFATS coverage and risk-tiering purposes. API believes that economic criticality should be determined based on truly national impacts to the nation as a whole. While impacts to the local economy/workforce are important, the scale of the CFATS program should address those issues that have a potential catastrophic effect on the national economy, which would more likely be the target of terrorism. Thus, mission criticality should be clarified to address national defense and significant effects to critical infrastructure that could pose a catastrophic effect on our ability to provide essential government services to the public including emergency response, health care, electricity and flow of commerce.

API member companies and other stakeholders including the regulated industry must be included in every step of the process for determining the economic criticality. DHS must recognize the complexity of estimating potential economic or mission impacts stemming from the loss of certain manufacturing (or other) capacity. Accordingly, facility owners must be engaged early on in efforts on developing a sufficiently clear picture of the chemical industry as a system in order to allow a reasonable analysis of economic and mission criticality. The rationale and basis for determining criticality must be transparent and based on sound economic principles that are widely recognized by society.

***17. Harmonizing Facility Security Standards Across Different Programs***

The Administration and industry must carefully evaluate the benefits and costs of any significant “harmonization or standardization” initiative. Generally, we do not see this option as providing significant benefits to government, industry, or public stakeholders, and conversely there is a significant risk of additional regulatory compliance and enforcement uncertainty, with the exceptions noted below.

API agrees that DHS should improve regulatory efficiency and effectiveness. Harmonization with all other agencies should result in the elimination of overlap and duplicative requirements on the industry. However, in the context of CFATS, policymakers should maintain the MTSA exemption for maritime facilities and ensure that regulated oil and gas facilities at ports have a consistent application of MTSA from DHS for facility security compliance issues.

Areas that should be explored include the Alternate Security Program, the Transportation Worker Identification Credentialing program and inspector training and coordination. Improved tools for data exchange and cross coordination of covered facility information would help DHS with its identification of and outreach to potential outlier sites thus eliminating duplicative request for information from the regulated community.

***18. Identifying Potential Non-Compliant, High-Risk Chemical Facilities***

API supports and encourages efforts to improve CFATS enforcement using information shared between relevant regulatory agencies and notification to facilities of non-compliance, with reasonable period to address deficiencies. DHS has undertaken efforts to better identify outlier facilities that should have submitted top-screens but did not do so. The Administration needs to strengthen coordination with other federal entities, such as EPA, USCG, as well as State and local authorities.

When implementing a new regulatory program like CFATS, significant outreach to the regulated community is a key element of success. Stakeholders need to ensure that facility safety and security regulations are being implemented fully and properly and that the agency and department officials have the necessary resources to do their jobs. In addition, federal officials at all levels need to work together, share information, and coordinate their activities across all regulatory programs. In addition to the cadre of CFATS inspection personnel, Protective Security Advisors should be leveraged to provide a local resource for informing members in the community about their regulatory obligations. DHS should establish a close relationship with state and local emergency response organizations such as the State Fire Marshalls Office.

**Comments on Related Listening Session Topics Not Otherwise Addressed Above*****19. Public Risk Exposure to Large Releases***

In several EO Working Group Listening Sessions, presenters suggested that EPA RMP Worst Case Scenarios (WCS) represent the risk of covered facilities. API disagrees with this mischaracterization. Simplistic consequence analysis results from WCS evaluations do not depict the public risk from accidents and should not be used for any substantive chemicals accident prevention and risk management decision making.

***20. Funding for SERCs, LEPCs, and Emergency Management***

API members and industry in highly industrialized areas provide strong support for LEPC activity. Nonetheless, LEPCs, particularly those in more rural, less industrialized areas, need funding support from the states and federal agencies in order to carry out their mission effectively. API supports increase of government funding support to LEPCs and SERCs via agency budget cycles. However, API does not support an expansion of the authority of LEPCs whereby LEPCs would have the authority to conduct on-site inspections or to collect specific information on the location of hazardous chemicals.