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News from the Indiana Chapter of  
the Air & Waste Management  
Association

## How the New Department of Homeland Security Chemical Facility Anti-Terrorism Standards (CFATS) Will Change the Way We Look at Chemicals

By: Barry LiMarzi, Ross Olsby and Dr. Valerian Simianu

### INSIDE THIS ISSUE

- 1 HOW THE NEW DEPARTMENT OF HOMELAND SECURITY CFATS WILL CHANGE THE WAY WE LOOK AT CHEMICALS
- 2 FROM THE OUTGOING CHAIRMAN'S CORNER
- 3 A MESSAGE FROM THE NEW INDIANA CHAPTER CHAIR
- 5 NEW RULES ON GREENHOUSE GASES ARE ON THE WAY
- 5 AIR POLLUTION CONTROL BOARD ADOPTS MERCURY RULE
- 6 VAPOR INTRUSION: A NEW CHALLENGE

Environmental managers, consultants and attorneys typically expect to receive environmental regulations from the EPA or OSHA. Here, however, is an atypical rule: the Chemical Facility Anti-Terrorism Standards (CFATS) from the Department of Homeland Security:

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-6363.htm>

In the light of today's increased vigilance, the Department of Homeland Security (DHS) is now also imposing comprehensive federal security regulations for what are considered to be "high-risk" chemical facilities that manufacture, use, store, or distribute certain chemicals. However, many of the substances in the list of Chemicals of Interest (COI) were not provided with a minimum threshold at which reporting would be required. This means that a large number of facilities manufacturing, using, storing or distributing any quantity of these substances will be subject to the new rule, even if they are not normally considered to be a "high risk" facility under other environmental regulations such as EPA's "Risk Management Plan Rule" or OSHA's "Process Safety Management Rule". Appendix A of the CFATS containing the potential list of COI was released earlier this year. On November 20, 2007, DHS published the final version of Appendix A in the Federal Register. The final list with the COIs can be viewed in the Federal Register (Vol. 72, No.233 / Tuesday, November 20, 2007) or online at: <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-5585.pdf>

With this formal publication, all provisions of the rule are now in effect. If a COI is present at a facility, that facility is required to comply with this new regulation. To comply, a facility must complete and submit what is called a "Top-Screen" assessment. The deadline in the CFATS final rule for submission of a Top Screen assessment is January 19, 2008 -- 60 calendar days from the date of publication of Appendix A in the Federal Register.

A facility must designate a "Preparer", a "Submitter" and an "Authorizer", complete the information, and register on the DHS's CSAT system. Upon verification, DHS will then issue a username and password to use in order for a facility to submit the Top Screen Assessment.

After reviewing the information submitted in the Top Screen, DHS will designate certain facilities that are determined to present a high security risk. Those facilities will then have to complete and submit to DHS for evaluation and approval a "Security Vulnerability Assessment" followed by a "Site Security Plan" that meets risk-based performance standards and addresses facility vulnerabilities. Failure to comply with CFATS could result in penalties as high as \$25,000 per day and closure of the facility.

(Continued on Page 4)

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## *From the Chairman's Corner:*

*By: Kristen Gobbi-Belcredi, Outgoing Chairman*

This is my last Chair message for the IN A&WMA newsletter and I want to thank everyone in the Chapter and on the Board for their continued support and participation in the Chapter. I want to thank Bryan Sheets of Eli Lilly for all his efforts and preparations for stepping into his new role as Chair. The Chapter will certainly continue to be a key source of information for Indiana environmental professionals with timely technical and regulatory information. I hope you will promote membership to all of your colleagues.

As you will see below, Bryan has many ideas on how to expand and further grow the Chapter, and I look forward to supporting him as our new Chair.

## *A Message From the New Indiana Chapter Chair:*

*By: Bryan Sheets, Incoming Chairman*

Happy New Year!

This is my first opportunity to provide a message to you as Chair of the Indiana Chapter of the A&WMA and I'd like to start by saying thanks to Kristen Belcredi who provided great leadership during her term as Chair. Congratulations should also be extended to all of the Officers and Directors elected during the annual December business meeting.

*(Continued on next page)*

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[www.inawma.org](http://www.inawma.org)

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With the New Year upon us, it's time for most of us to set goals for ourselves (hopefully, one's that we keep) that will improve our careers, health, and relationships. That's exactly what I'm asking the Board to do for the upcoming year during a planning retreat in January. In addition to the typical planning items (budget, programs, etc.), I will ask the Board to spend some time putting together our New Year's resolutions for the following items:

- **Committee Volunteers** – As I mentioned at the December meeting, the Chapter needs volunteers to help with various committee activities. We are a large (over 150 members) and diverse chapter with many areas of interest and expertise. I'd like the Board to find a way to tap our resources so we can provide great value to all of our members.
- **Networking Events** – Since I've been involved with the Indiana Chapter, we have typically focused our programs and events on technical agendas, from stack testing to SPCC plans. However, in the last couple of years we have explored more networking opportunities such as the Indianapolis Indians baseball game and wine tasting at Easley's Winery. These events have been successful and I believe there is an opportunity to provide more of these types of events in the future.
- **Modernizing the Newsletter** – Over the years, we have had a tremendous amount of support and positive feedback for the Indiana News, our Chapter newsletter. The articles are always well crafted, edited and published. However, there have been advances in technology in the last few years that would allow us to distribute a web-based newsletter via email that can save editing and publishing time as well as provide features which aren't available with the current newsletter. I'll ask the Board to look for an application that we can implement in the next year.

I hope you get a sense of my enthusiasm for leading the Chapter after reading these examples and I hope you are as excited as I am to be an active member of A&WMA and the Indiana Chapter.

I look forward to serving as Chair over the next two years, continuing the tremendous work that was started by my predecessors, and taking the opportunity to improve the Chapter for the benefit of our members.

I hope to see you at an A&WMA event in the near future.

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DHS identified the chemicals of interest in specific amounts for the preliminary screening based on their potential to create significant consequences to health or human life. Appendix A contains 325 substances considered to be chemicals of interest. It includes common industrial substances such as chlorine, propane, and anhydrous ammonia, as well as specialty chemicals such as arsine and phosphorus trichloride.

Since the list is very broad, this means that not only chemical facilities, but ANY facility that may possess, store, distribute, or manufacture these chemicals above the threshold is subject to the Top Screen process at a minimum. This has many implications, not only for manufacturers and distributors of chemicals but also for other operations such as academic facilities and retail stores.

Facilities are required to report the maximum total onsite quantity of each COI at any one time over the past 12 months. If a facility is designated as "High Risk", they will then be given a ranking on a scale of Tier 1 to 4 with Tier 1 being of the highest concern. DHS will then notify the facility of their Tier designation. That facility will then have 90 days to submit the "Security Vulnerability Assessment" and 120 days from the original notification date to submit a "Site Security Plan".

As many chemical facilities already maintain good inventory control records, it is a fairly easy matter to determine if the threshold for any individual substance is exceeded. However the DHS regulation also includes chemical blends and the individual ingredients within those blends when calculating a facility's threshold. This adds an entire new level of complexity above and beyond what many facilities are currently able to monitor in their inventory.

A facility employing an electronic database to organize and manage their chemicals can readily establish the rule's applicability and requirements, as well as monitor the ongoing use of these substances along with all of the other chemicals at the facility. A well designed database will not only tell you if the chemical exceeded the threshold, but can assist in complying with the new regulation by keeping a clean inventory of all the chemicals of interest in a secure database. A competent chemical management application should also be able to generate certain SARA reports (such as 304, 311 or 312) and VOC or HAP reports as required for air permits or NESHAP standards automatically.

Another requirement of the new DHS rule requires facilities subject to the Top Screen procedure to keep accurate records of employee training and provide that information to DHS upon request. Facilities having a comprehensive software application that monitors all of the training requirements and history should not have difficulty complying with the new rule. The specific section of the CFATS regulation applicable to training record keeping states:

Sec. 27.255 Recordkeeping requirements.

- (a) Except as provided in Sec. 27.255(b), the covered facility must keep records of the activities as set out below for at least three years and make them available to the Department upon request. A covered facility must keep the following records:
  - (1) Training. For training, the date and location of each session, time of day and duration of session, a description of the training, the name and qualifications of the instructor, a clear, legible list of attendees to include the attendee signature, at least one other unique identifier of each attendee receiving the training, and the results of any evaluation or testing.

For more information about CFATS, please go directly to the Department of Homeland Security, Chemical Security section at: [http://www.dhs.gov/xprevprot/programs/gc\\_1169501486179.shtm](http://www.dhs.gov/xprevprot/programs/gc_1169501486179.shtm)

The authors are representatives of M3V, LLC (317-574-0727) and M3V Data Management, LLC (317-823-2459). M3V Data Management, LLC offers comprehensive software for environmental health and safety management such as "Chemical Management Navigator" and "Training Tracker". Contact the authors at [info@m3v.net](mailto:info@m3v.net) or via [www.m3v.net](http://www.m3v.net).

## NEW RULES ON GREENHOUSE GASES ARE ON THE WAY

*By: Anthony C. Sullivan, Esq., and Timothy A. Haley, Esq., Barnes & Thornburg LLP*

In a presentation to the Clean Air Act Advisory Committee ("CAAAC") on September 20, 2007, EPA presented its near-term plans for developing new rules to regulate greenhouse gases. The CAAAC is a senior level policy committee established in 1990 to advise the U.S. EPA on issues relating to implementing the Clean Air Act Amendments of 1990. It consists of approximately 50 members and expert institutions, unions, trade associations, environmental public interest groups, utility, industry, and other experts.

In its presentation on September 20, EPA stated its intent to develop greenhouse gas rules relating to mobile sources. These rules derive from the Supreme Court's ruling in *Massachusetts et al. v. EPA* which classified CO<sub>2</sub> emissions from automobiles as "pollutants" under the Clean Air Act, and required EPA to consider whether rulemaking is appropriate for this pollutant. EPA's presentation relating to rulemaking from motor vehicles indicated its intent to propose a rule in the fall of 2007, with a final rule to be issued in the fall of 2008. This rulemaking will be dependent on an "endangerment" finding that will be performed by EPA who will rely on recently published analyses to determine whether in the EPA's judgment "greenhouse gases cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Their analysis will be consistent with the perceived timeframe of the effects of greenhouse gases, specifically over the next few decades and beyond to approximately 2100. This particular rulemaking analysis will be focused on vehicles and fuels.

As this rulemaking moves forward, it has been reported that EPA will simultaneously begin rulemaking for stationary sources to address CO<sub>2</sub> emissions. Such rulemaking may involve changes to the new source review ("NSR") requirements, which require BACT (or LAER) in instances of new construction of major sources or major modifications. This approach could pull in a huge number of facilities that have never had to follow NSR rules before because the major source thresholds are very low when applied to CO<sub>2</sub> emissions, and could require BACT analyses, etc., for their operations. For example, small commercial and/or residential boilers may trigger the CO<sub>2</sub> emission thresholds that trigger NSR.

It is likely that various options will be proposed to minimize the application of NSR for "small" facilities. Such options could include setting forth de minimis thresholds and/or plant-wide baseline levels, but would need to conform with the specific requirements under the Clean Air Act. One would expect significant public debate over the coming months.

*This publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your lawyer on any specific legal questions you may have concerning your situation. Tony Sullivan and Tim Haley are attorneys in the Environmental Department of Barnes & Thornburg LLP's Indianapolis Office. Mr. Sullivan may be reached at 317-231-7472 or [tsulliva@btlaw.com](mailto:tsulliva@btlaw.com). Mr. Haley may be reached at 317-231-6493 or [thaley@btlaw.com](mailto:thaley@btlaw.com).*

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## AIR POLLUTION CONTROL BOARD ADOPTS MERCURY RULE

*By: Anthony C. Sullivan, Esq., and Timothy A. Haley, Esq., Barnes & Thornburg LLP*

At its meeting on October 3, 2007, the Indiana Air Pollution Control Board (the "Board") finally adopted its version of the "Clean Air Mercury Rule" ("CAMR"). See 326 IAC 24-4. This rule will permanently cap and reduce mercury emissions from coal-fired boilers or combustion turbines serving generators larger than 25 megawatts that produce electricity for sale. The CAMR will reduce utility emissions of mercury from 48 tons to 15 tons per year nationwide, and is based on a market-based cap and trade program. The program is set up with two phases, Phase I which begins in 2010 and Phase II which begins in 2018. The Phase I cap for Indiana is 4,194 lbs (14% reduction from 1999 levels), and the Phase II cap is 1,656 lbs (66% reduction from 1999 levels). The rule will impact 71 units located at 23 power plants throughout the state.

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The Board's rule will follow the federal model rule with few changes, mainly involving the allocation methodology. Under the rule, affected units will be required to monitor emissions using continuous emission monitoring methods. Allowances will be allocated to the units based on historical heat input levels. The new rule also includes set-aside allocations for new units and clean coal technologies.

The adoption of this rule generated substantial public comment and public interest. Although adopting the federal rule as was done by the Board would result in substantial reductions in mercury emissions, certain groups of commenters advocated that the Board adopt a rule that goes beyond the federal requirements which were characterized as the "minimum." One proposal would have required each affected unit to reduce mercury emissions by 90%, instead of allowing a cap-and-trade program based on an allocation of system-wide allowances. It was argued that at least some other states went beyond the federal rule, and Indiana should also. On the other hand, it was argued that any additional reductions would result in little additional benefit, if any, and the costs would be substantial. Cost estimates differed, but some published estimates indicated a cost of \$64 and \$68 million annually for Indiana facilities for the federal rule and between \$207 and \$373 million annually for the 90% rule. According to the published Board Packet, written comments were submitted separately by eight entities, seven groups or companies, and one group collected and submitted comments from approximately 1,269 individuals.

The effective date of the rule is February 3, 2008. EPA also must review and approve the rule.

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## **VAPOR INTRUSION: A NEW CHALLENGE FOR REMEDIATIONS, REDEVELOPMENT AND TRANSACTIONS**

*By: John M. Kyle III and David R. Gillay, Barnes & Thornburg LLP*

Vapor intrusion ("VI") is the migration of volatile chemicals from underlying soil and groundwater into overlying buildings. This emerging contamination "pathway" presents significant challenges and complicates environmental remediation and Brownfield development projects, real estate and business transactions, and management of commercial/industrial real estate portfolios. VI issues are far-reaching and will affect thousands of sites across the country. Successfully dealing with VI issues requires a basic understanding of the complex science, rapidly changing regulatory landscapes at the state and federal level, and evolving legal doctrines that may increase your liabilities. This article provides a brief overview of key regulatory and legal issues to help you manage these issues.

Investigating and remediating VI issues often involves a phased or tiered approach. Many states have developed or are developing approaches to assess VI issues for two general categories of contaminants – chlorinated solvents (e.g., TCE and PCE) and petroleum hydrocarbons. TCE is a widely used industrial solvent. PCE is a common dry-cleaning solvent. These approaches can differ dramatically from state to state. For example, some states, apparently including Indiana, will not allow modeling to screen out VI concerns at many sites, and instead require sub-slab soil vapor and indoor air data. In addition, some states (e.g., New York) are re-evaluating VI at already-closed sites while other states (e.g., Illinois) have indicated they will not routinely re-evaluate closed sites.

In Indiana, senior IDEM officials have stated that IDEM presently has no intention to systematically review closed sites, but will re-evaluate such sites if it is determined there is a threat to human health from VI. IDEM's draft VI program was released in 2006 and continues to evolve as IDEM gains experience with addressing VI concerns. IDEM's draft VI program follows a sequential investigation approach. IDEM recently provided an update on its draft pilot VI program. Some of the more important updates include the following. Unlike some states, IDEM's guidance at least theoretically allows you to "screen-out" and avoid a VI assessment based on your site's soil and groundwater data as compared to IDEM's screening levels, although screening sites out in practice has proven *(Continued on next page)*

*(Continued from Page 6)*

difficult. If contaminant concentrations in soil or groundwater exceed the screening levels, you must then collect soil gas or sub-slab vapor samples. IDEM prefers sub-slab vapor sampling over collecting soil gas vapor samples away from the structure. However, if soil or groundwater concentrations are ten times higher than the screening levels, IDEM recommends prompt, simultaneous sampling of gas sub-slab vapor and indoor air. One of the biggest issues is whether soil gas samples will definitively show whether a pathway exists between a source area and a potential receptor, hence the desire for actual sub-slab and indoor sampling. Another issue is whether samples need to be taken over time.

There are also two important federal developments. First, a bi-partisan bill was recently introduced in the U.S. Senate that would require EPA to establish a concentration of TCE that protects susceptible populations from VI. If enacted, this bill would establish federal requirements that could substantially affect clean-up efforts at sites with TCE contamination. Second, EPA has created a new database of toxic vapor samples from sites across the nation. EPA is expected to send this database to state and federal regulators for review and comment over the next several months. EPA hopes to make this database generally available in the Spring of 2008.

Two national guidance documents attempt to provide a systematic process to manage the VI pathway. Earlier this year, the Interstate Technology & Regulatory Council (a national group of state and federal regulators) released “*Vapor Intrusion Pathway: A Practical Guideline.*” This technical document represented the combined efforts of more than 100 professionals from state and federal regulatory agencies, consultants, and industry. The guidance outlines a thirteen-step process to assess the VI pathway. In addition, an ASTM Committee has developed a draft standard practice for assessing VI into structures on property involved in real estate transactions. This standard (which may be finalized by year-end) would supplement ASTM’s Phase I Environmental Site Assessment standard and could help streamline environmental VI due diligence efforts. While these guidance documents can be useful tools, it is imperative to understand your state’s approach to assess, and if necessary, address VI concerns.

Potential cleanup or tort liability related to VI can arise under a wide variety of federal and state environmental statutes, contractual claims, and common law theories. In addition to potential liability associated with re-opening closed sites, an unresolved jurisdictional battle continues to develop between EPA and OSHA. OSHA has historically determined what indoor air levels are protective in the workplace. However, EPA has initiated a landmark move to regulate indoor air and assert jurisdiction over certain workplace settings. Some fear dramatically lower indoor air standards and increased clean-up costs if EPA ultimately succeeds in asserting workplace jurisdiction.

There is equal uncertainty when litigating the growing field of VI tort claims. Although the universe of reported VI cases is limited, some trends are emerging: First, citizen suits alleging imminent and substantial endangerment due to VI as well as common law claims (*e.g.*, nuisance, trespass, negligence) will often proceed to trial because of unresolved fact issues. Second, expert testimony is critical to successfully defend a VI claim and efforts to introduce and to exclude expert opinions on causation and other issues – much of which is quite novel – will be a centerpiece of these cases. Given the complex and novel technical issues, much of this litigation will likely be unpredictable, uncertain, and expensive.

One way to help manage your potential liability is to evaluate old and existing insurance policies, and to consider new environmental insurance products. Indiana has very favorable law allowing one to pursue historic Commercial General Liability (“CGL”) for environmental issues and may likely continue to provide coverage for VI claims based on historic contamination. At a minimum, companies facing VI claims should examine the potential for coverage under these policies. In addition, buying new Pollution Legal Liability and Cost-Cap policies can also be used in transactions and property transfers to manage VI (and other environmental) liabilities going forward.

Another strategy to help manage VI liability cost-effectively is to consider pursuing creative, site-specific remedies that focus on eliminating or controlling the VI exposure pathway by, for example, installing engineering solutions to prevent VI into structures. Often, moving directly to this kind of solution can avoid extensive investigations and arguments with regulators. You may also need or want to record restrictive covenants on your property that require maintenance of these barriers or ventilation systems. These approaches require a sophisticated understanding of risk-based closure options and institutional controls, as well as persistence in pursuing those options with the regulators.

*This publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your lawyer on any specific legal questions you may have concerning your situation. John M. Kyle III, Esq. and David R. Gillay, Esq., are attorneys in the Environmental Department of Barnes & Thornburg LLP’s Indianapolis Office and may be reached at 317.231.7284 or [john.kyle@btlaw.com](mailto:john.kyle@btlaw.com) and 317.231.7474 or [david.gillay@btlaw.com](mailto:david.gillay@btlaw.com), respectively.*



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