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CONCERNS WITH HAZARDOUS MATERIALS SAFETY IN THE U.S.: IS PHMSA PERFORMING ITS MISSION?

(111–57)

HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

September 10, 2009

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September 9, 2009

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Committee on Transportation and Infrastructure Majority Staff

SUBJECT: Hearing on "Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?"

PURPOSE OF HEARING

The Committee on Transportation and Infrastructure (Committee) will meet on Thursday, September 10, 2009, at 10:00 a.m., in room 2167 of the Rayburn House Office Building to receive testimony on concerns with the Pipeline and Hazardous Materials Safety Administration's (PHMSA) oversight and management of hazardous materials safety in the United States. This hearing is being conducted as one of several hearings that meet the oversight requirements under clauses 2(n), (o), and (p) of Rule XI of the Rules of the House of Representatives.

BACKGROUND

PHMSA is one of 10 agencies within the U.S. Department of Transportation (DOT), and is responsible for protecting the American public and the environment by ensuring the safe and secure movement of hazardous materials by all modes of transportation. While the modal administrations -- the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration (FMCSA), and the Federal Railroad Administration (FRA) - have the responsibility for enforcing hazardous materials safety, it is PHMSA's responsibility to promulgate a national safety program to minimize the risk of hazardous materials in commercial transportation. That program consists of evaluating safety risks; developing and enforcing regulations for transporting hazardous materials; investigating hazardous materials incidents and failures; conducting research; and educating the public and the regulated community about the risks in hazardous materials transportation.

PHMSA was created in 2004 under the Norman Y. Mineta Research and Special Programs Improvement Act (P.L. 108-426). Prior to that, the Research and Special Programs Administration

was responsible for pipeline and hazardous materials safety. In the law, safety is mandated to be PHMSA's highest priority.

Over the past year, the Committee has worked on legislation to reauthorize the hazardous materials safety program, which expired at the end of September 2008. It is expected to be reauthorized as part of the surface transportation bill. A draft of the proposal was released in June.

When Committee staff began preparing for reauthorization, we were informed by the DOT Office of Inspector General (OIG) that an ongoing audit of PHMSA's hazardous materials safety program, in particular the special permits and approvals program, had raised some significant safety concerns. A special permit allows an entity to perform a function that is not authorized under the hazardous materials regulations. It is essentially an exemption. In fact, special permits were called exemptions prior to enactment of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) in 2005, which replaced the term "exemption" with the term "special permit." Exemptions from regulations in any government regulatory entity are, by definition, supposed to be rare events, and the substitution of that term for the label, "special permit," may have been an attempt to make the program appear less controversial.

Under current law, the Secretary may exempt an entity from any requirement prescribed pursuant to 49 U.S.C. §§ 5103(b) (General regulatory authority), 5104 (Representation and tampering), 5110 (Shipping papers and disclosure), and 5112 (Highway routing of hazardous material) as long as the activity achieves a safety level at least equal to the safety level required by the law or regulation, or, if a required safety level does not exist, is consistent with the public interest. *See 49 U.S.C § 5117.* For example, entities can obtain exemptions from regulations relating to the transportation of hazardous material in commerce; the offering of hazardous materials for transportation in commerce; the design, manufacture, fabrication, inspection, marking or labeling (including placarding), reconditioning, repair, or testing of a package for use in transporting hazardous material in commerce; preparation or acceptance of hazardous material for transportation in commerce; shipping papers, which contain information regarding the hazardous material being transported; and highway routing designations over which hazardous material may or may not be transported by motor vehicle. An exemption, or special permit, may be issued for an initial period of not more than two years and subsequent periods of not more than four years (with the exception of highway routing exemptions, which may be renewed for additional periods of not more than two years).

"Approvals" are somewhat different from special permits. An "approval" can only be issued if there is a specific provision in the regulations that allows the Office of Hazardous Materials Safety to provide relief from a relevant regulation(s). If there is no specific provision allowing for an approval, the relief sought must be in the form of a special permit. *See 49 CFR § 107.401.* PHMSA's database contains more than 4,500 special permits and 125,000 approvals.

The DOT OIG's audit objectives were to assess the effectiveness of PHMSA's: (1) policies and processes for reviewing and authorizing special permits, approvals, and limited quantity or consumer commodity exceptions; and (2) coordination with the affected Operating Administration before issuing any of these special authorizations. In addition, the DOT OIG is reviewing PHMSA, FAA, FMCSA, and FRA oversight and enforcement of approved parties' compliance with the terms and conditions of these authorizations. The Inspector General will present preliminary findings of the audit at the hearing.

In the course of the DOT OIG audit, Committee staff launched its own investigation of PHMSA as part of the Committee's oversight responsibility. We interviewed numerous staff, including PHMSA's leadership and senior managers, within each of the eight program offices (including the Hazardous Materials Emergency Preparedness Grants Unit). We also interviewed each of the region chiefs in the Office of Hazardous Materials Enforcement, staff of the DOT OIG, the National Transportation Safety Board (NTSB), and other DOT personnel. In addition, we reviewed thousands of incident forms, hundreds of special permits, approvals, records of registration, grant applications and close-out reports, letters of interpretation, and other information over the course of the investigation. The Committee's investigation, coupled with the DOT OIG findings, strongly suggests that PHMSA's performance of its primary safety mission is less than diligent in far too many instances, because it appears to be inappropriately "cozy" with industry, which demands an immediate, high-level policy review. The details of the Committee's preliminary findings follow below.

- **PHMSA does not review prior incident or enforcement histories of applicants before authorizing special permits and approvals.** In processing and evaluating an application for a special permit, the Secretary must ensure that "the applicant is fit to conduct the activity authorized by the exemption or special permit. This may be based on information in the application, prior compliance history of the applicant, and other information available to the Associate Administrator." *See 49 CFR § 107.113.*

  PHMSA staff verified that PHMSA does not review the applicants' incident or enforcement histories prior to approving an application. Moreover, once the special permit has been granted, PHMSA neither monitors incidents or violations of permit holders, nor does the agency review incident and enforcement histories when a permit holder requests a renewal of a special permit. It is disturbing and indefensible that PHMSA could even consider renewing a special permit without reviewing past safety history, but this practice is virtually universal. Furthermore, it is clear that PHMSA is in no position to modify or withdraw a special permit since the agency is not continually monitoring the incident and enforcement histories of permit holders.

  The Committee's concern is illustrated by the fact that PHMSA failed to monitor the safety performance of permit holders of bulk explosives vehicles that transport explosives, oxidizers, corrosive and combustible materials, and detonators on the same vehicle. Since 1999, eight of the 83 permit holders experienced 169 incidents, 22 of which were serious. During the same period, these eight companies also incurred 86 enforcement violations. One permit holder alone experienced 53 incidents, nine of which were rollovers, and incurred 22 violations. Yet, the permits were, without exception, renewed in a pro-forma fashion, with no review by PHMSA of permit holders' incident or enforcement histories.

- **PHMSA does not verify whether an applicant for a special permit or approval is (or should be) registered to transport, or offer for transport, hazardous material in commerce before authorizing a special permit or approval.** Further, although PHMSA has been tracking unreported incidents, some of which have been deemed serious accidents involving fatalities and injuries, PHMSA does not check whether those entities involved in the incidents are or should be registered to transport hazardous materials.

Under current law, an entity that transports or causes to be transported in commerce any of the following must file a registration statement with the Secretary: (1) a highway route-controlled quantity of radioactive material; (2) more than 25 kilograms of a Division 1.1, 1.2, or 1.3 explosive material in a motor vehicle, rail car, or transport container; (3) more than one liter in each package of a hazardous material the Secretary designates as extremely toxic by inhalation; (4) hazardous material in a bulk packaging, container, or tank if the bulk packaging, container, or tank has a capacity of at least 3,500 gallons or more than 468 cubic feet; (5) a shipment of at least 5,000 pounds (except in bulk packaging) of a class of hazardous material for which placarding of a vehicle, rail car, or freight container is required under the hazardous materials regulations. In addition, the regulations require any entity that manufactures, assembles, certifies, inspects, or repairs a cargo tank or cargo tank motor vehicle to register with PHMSA. *See 49 U.S.C. § 5108 and 49 CFR § 107.608.*

Registration information is crucial in determining who is involved in the commercial transportation of hazardous materials in the United States, and to enforce hazardous materials regulations properly (each registered entity must acknowledge in writing that it is responsible for compliance with all applicable hazardous materials requirements, and certify that it is knowledgeable in those requirements).

In addition, these registration fees are the only source of funding for PHMSA's Hazardous Materials Emergency Preparedness grants program, which provides planning and training grants to States and Indian tribes to help public sector employees respond to accidents and incidents involving hazardous materials. At current levels, those fees will not be able to sustain the $28.3 million authorization starting in FY2010. PHMSA is drafting a rulemaking to raise the fees to fund the program at authorized levels. However, had PHMSA been conducting reviews of who should be registered, those fee increases may not have been necessary.

- **PHMSA could not provide the necessary support for granting an applicant's request for a special permit or approval.** The hazardous materials regulations require each applicant to provide: (1) the name, street, mailing address, and telephone number of the applicant or agent; (2) a citation of the specific regulation from which the applicant seeks relief; (3) specification of the proposed mode or modes of transportation; (4) a detailed description of the proposed special permit including drawings, flow charts, plans, and other supporting documents; (5) a specification of the proposed duration or schedule of events for which the special permit is sought; (6) a statement outlining the applicant's basis for seeking relief from the regulations; (7) an indication of whether the applicant seeks emergency processing, along with a statement of supporting facts and reasons; (8) identification and description of the hazardous materials planned for transportation under the special permit; (9) description of each packaging for alternative packaging, documentation of quality assurance controls, package design, manufacture, performance test criteria, in-service performance, and service-life limitations or life-cycle of a packaging; and (10) various employee certifications regarding Class 1 materials forbidden on aircraft. *See 49 CFR § 107.105.*

In addition, each applicant must demonstrate that a special permit achieves a level of safety at least equal to that required by regulation, or if a required safety level does not exist, is consistent with the public interest. PHMSA's regulation require that "at a minimum, the application must provide: (1) information describing all relevant shipping and incident

experience of which the applicant is aware that relates to the application; (2) a statement identifying any increased risk to safety or property that may result if the special permit is granted, and a description of the measures to be taken to address that risk; and (3) either: (i) substantiation, with applicable analyses, data or test results, that the proposed alternative will achieve a level of safety that is at least equal to that required by the regulation from which the special permit is sought; or (ii) if the regulations do not establish a level of safety, an analysis that identifies each hazard, potential failure mode and the probability of its occurrence, and how the risks associated with each hazard and failure mode are controlled for the duration of an activity." *See 49 CFR § 107.105.*

In processing and evaluating the application, the Associate Administrator must "determine that the application is complete and that it conforms with the requirements of this subpart." *See 49 CFR § 107.113.*

Committee investigators reviewed all "new" special permits issued, denied, and withdrawn from January 1, 2004, through August 31, 2009, and all approvals issued between January 1, 2007, and December 31, 2008. We also reviewed all supporting documentation for the special permits and approvals, including general correspondence, in PHMSA's internal database. We found that: (1) in many of the files on specific special permits and approvals, the original application (and thus the detailed description and safety analysis of the request) was missing (even though they were renewed several times); (2) many special permit and approval requests did not contain information required by the regulations, such as detailed descriptions of the request; (3) most files had no safety analysis; and (4) most applications contained no safety justification. We also found no documented evidence of a thorough internal evaluation for most of the applications, and there was little to no evidence of coordination with the modal administrations. In fact, staff of the Office of Hazardous Materials Special Permits and Approvals notified Committee investigators that most of the information on special permits and approvals issued prior to 2001 no longer existed because they moved everything to a new database.

Committee investigators requested copies of the original documentation to support four of the special permits issued to the bulk explosives companies (described above), which were routinely renewed over the course of the past 28 years. PHMSA staff took three days to respond, and when they did respond with a notebook containing all the documentation available for the four special permits issued: about 16 years of documentation was missing. All the original applications for the special permits were missing, with the exception of one application from 2005, and virtually no safety analyses or supporting documentation for the special permit requests was provided. When asked where the missing information was, no staff from PHMSA knew. We then asked why PHMSA had not asked the applicants for the original documentation over the course of the last 28 years; staff said that they "didn't think they [the applicants] would have it."

On August 14, 2009, PHMSA sent a "show cause" letter to these same permit holders, as a result of inquiries from the DOT OIG, stating that they were considering modifying the special permits. The letter stated:

> When the special permit was granted, the presence of these materials on one vehicle was evaluated and a determination was made that the combination of materials did

not present an undue risk of uncontrolled chemical reaction. We continue to believe that the initial and subsequent evaluations that supported our decisions to grant the special permits were appropriate. However, we will continue to evaluate the materials authorized to be transported under these special permits and will make appropriate changes in addition to those proposed in this letter based on our ongoing review of your operations if circumstances warrant.

While that statement of "belief" may be accurate, PHMSA was unable to provide evaluations supporting that rationale to Committee investigators, and absent documentation, it is impossible for PHMSA to defend such a decision under applicable Federal law. It is worth noting that a PHMSA evaluation of one of the special permit requests states that the hazardous materials mentioned in the special permit are capable of being detonated in the event of shock, impact, friction, or fire, and that "the mixing of Division 5.1 oxidizing liquids with Class 8 acidic liquids or combustible fuels could present a risk of formation of unstable or spontaneously combustible mixtures." It also states: "The worst case scenario would be that a process line would leak or accidentally pump the concentrated Sodium Nitrite solution into an ammonium nitrate containing blasting explosive or ammonium nitrate emulsion pre-mix, thereby producing an excessive amount of "gassing" of the mixture, rendering it extra-sensitive to shock or heat."

- **PHMSA largely relies on self-certification by the applicant for special permits and approvals.** As stated above, PHMSA regulations allow the Associate Administrator to "grant an application upon finding that: (1) the application complies with this subpart; (2) the application demonstrates that the proposed alternative will achieve a level of safety that (i) is at least equal to that required by the regulation from which the special permit is sought, or (ii) if the regulations do not establish a level of safety, is consistent with the public interest and adequately will protect against the risks to life and property inherent in the transportation of hazardous materials in commerce; (3) the application states all material facts, and contains no materially false or materially misleading statement; (4) the applicant meets the qualifications required by applicable regulations; and (5) the applicant is fit to conduct the activity authorized by the exemption or special permit." *See 49 CFR § 107.113.*

  Committee investigators found that little to no independent evaluation is documented by PHMSA to confirm the information submitted by the applicant, including information required to demonstrate that a special permit achieves a level of safety at least equal to that required by regulation. We believe that blindly approving applications for special permits, with little to no independent review of the certifications made by the applicant, could have serious safety consequences. Some in PHMSA have recently proposed requiring companies to self-certify the number of incidents and violations they have had in lieu of an independent safety fitness determination. We do not believe that is an appropriate solution to the problem; it is PHMSA's responsibility to do the research and make that determination on its own.

- **PHMSA allows an unlimited number of unrelated entities to utilize special permits granted to other parties.** To join another entity's special permit (called "party to" applications), all the applicant is required to do is identify the number of the special permit the applicant wants to join and state their name, street and mailing addresses, email address, and telephone number. If the applicant is not a U.S. resident, the applicant must provide a designation of agent for service. The applicant is not required to submit the same, detailed

information that is required of an applicant for a new special permit; however, the Associate Administrator is still required to "grant the application on finding that: (1) the application complies with this subpart; (2) the application demonstrates that the proposed alternative will achieve a level of safety that (i) is at least equal to that required by the regulation from which the special permit is sought, or (ii) if the regulations do not establish a level of safety, is consistent with the public interest and adequately will protect against the risks to life and property inherent in the transportation of hazardous materials in commerce; (3) the application states all material facts, and contains no materially false or materially misleading statement; (4) the applicant meets the qualifications required by applicable regulations; and (5) the applicant is fit to conduct the activity authorized by the exemption or special permit." *See 49 CFR § 107.113.*

We found no evidence that this occurs. Requests to join another special permit were submitted to PHMSA in the form of a one paragraph letter or email with no additional documentation. We found no evidence that the Associate Administrator assured that the applicant would achieve the level of safety that is at least equal to that required by the regulation, and we found no evidence that the Associate Administrator ensures that the applicant is fit to conduct the activity authorized by the special permit. This also holds true for renewals of special permits.

- **PHMSA does not know where special permits are being utilized.** An applicant for a special permit does not need to specify where they will utilize the permit even if they have hundreds of facilities. According to PHMSA enforcement staff, this poses a significant problem because without knowing where operations are being performed under a special permit, they cannot appropriately target compliance reviews or analyze where the risk might be greatest in their regions. Enforcement staff informed Committee investigators that they have raised this concern numerous times to the Office of Hazardous Materials Special Permits and Approvals and PHMSA leadership to no avail.

- **PHMSA issues special permits to trade associations and allows the association members to become 'party to' the permit without any evaluation as to their fitness and ability to carry out the terms and conditions of the special permit.** Committee investigators found 12 special permits representing a total of about 5,000 members that were granted to trade associations, who have no role in the actual transport of hazardous materials. It is difficult to defend the logic behind granting a special permit to a trade association, other than an often stated rationale during our investigation that it reduced the volume of applications, and thus reduces PHMSA's workload. In fact, it appears that there is no legal basis for this practice. It is the individual members that will operate under the special permit, and thus are responsible for legal compliance with the terms of the permit; not the association. Enforcement staff informed us that currently they do not know which members are actually utilizing the permit, and there is no legal basis to hold a trade association accountable for an individual member's actions. Further, when Committee investigators asked PHMSA staff how the agency intended to monitor what persons joined or withdrew from a trade association so that they would know who was able to utilize the special permit, staff stated that the trade associations "just had to send PHMSA a new membership list," and that no other actions were required to be "party to" the special permit. In fact, PHMSA personnel also informed Committee investigators that it is not even a requirement for an entity desiring to become a "party to" a trade association permit to be a member of that trade association.

On August 14, 2009, in response to concerns raised by the DOT OIG and the Committee, PHMSA published a new policy statement, entitled "Special Permits and Approvals Issued to Members of an Industry Association," intended to clarify that a special permit or approval is not issued to the association itself but to the members of the association, and that the members are individually responsible for compliance with all the terms and conditions of the special permit or approval. While we are encouraged by the new policy, we are concerned about the existing special permits and approvals that have been issued to trade associations. They begin to expire on September 30, 2009; some do not expire until late 2011 or mid-2013. We believe those special permits and approvals should be withdrawn and processed under the new guidelines.

- **PHMSA does not follow its own regulations for issuing emergency special permits.** PHMSA regulations provide for the emergency processing of a special permit if the permit is: "(1) necessary to prevent significant injury to persons or property that could not be prevented if the application were processed on a routine basis; or if (2) necessary for immediate national security purposes or to prevent significant economic loss that could not be prevented if the application were processed on a routine basis." *See 49 CFR § 107.117.*

When "significant economic loss" is cited as the reason for requesting emergency processing of an application, the Associate Administrator may deny emergency processing if timely application could have been made. A request for emergency processing on the basis of potential economic loss must reasonably describe and estimate the potential loss. The application must also conform to 49 CFR § 107.105 in that it must provide to PHMSA the documentation required for all special permits, including demonstration of an equivalent level of safety and a safety justification. The application must be submitted to officials within the appropriate modal administrations for consideration. On receipt of all information necessary to process the application, the receiving Department official must transmit it to the Associate Administrator, by the most rapid available means of communication, an evaluation as to whether an emergency exists and, if appropriate, recommendations as to the conditions to be included in the special permit. If the Associate Administrator determines that an emergency exists and that granting of the application "is in the public interest," the Associate Administrator grants the application subject to such terms as necessary and immediately notifies the applicant. Within 90 days following issuance of an emergency special permit, the Associate Administrator must publish in the Federal Register a notice of issuance with a statement of the basis for the finding of emergency and the scope and duration of the special permit. *See 49 CFR § 107.117.*

During the investigation, we reviewed all emergency special permits that were issued from January 1, 2004, through August 30, 2009. Many of them failed to: demonstrate why the request required emergency processing; describe and estimate the potential economic loss, where loss was the main factor in requesting emergency processing of a special permit; demonstrate an equivalent level of safety; provide a safety justification; and meet the public interest standard set forth by the Associate Administrator. In addition, most of the emergency special permits were not provided to the modal administrations and very few of them were published in the Federal Register. In fact, a senior program manager within PHMSA stated in an e-mail to Committee staff, dated August 27, 2009, that "an emergency special permit request is not required to be docketed."

- **PHMSA grants emergency special permits to applicants absent any meaningful justification for a waiver of the regulations.** Committee investigators found a few emergency special permits that were granted to transport military and space equipment, such as satellites, as well as some that were granted to transport equipment to remote locations that could not wait to be transported due to national weather conditions. In these cases, there appeared to be adequate legal justification for the emergency processing of the special permit. However, there was ample reason to question the emergency processing of many other applications that, in our view, could have been considered under the regular special permit process.

For example, one applicant requested an emergency special permit because PHMSA, three years prior to submission of the application, had adopted new regulations that prohibited the transportation of certain toxic gases in manifolded cylinders. The regulations were intended to address several NTSB safety recommendations. The applicant argued that prior to the rule change a number of exemptions authorizing the shipment of toxic gases in manifolded cylinders were issued and that this indicated that PHMSA has consistently recognized that toxic gases can be safely transported in manifolded cylinders – even though PHMSA had later issued regulations prohibiting such activities. We question why PHMSA would issue a regulation, especially when it was intended to address several NTSB safety recommendations, and then turn around and provide companies with exemptions from those regulations a few years later. We also question the reasoning for processing the application on an emergency basis when the applicant knew for three years leading up to submission of the application that the regulations had changed.

Another applicant applied for emergency processing of a special permit to allow the manufacturer of packages for certain torch lighters to be sold to airline passengers and thus transported in checked baggage on board passenger aircraft. A competitor later submitted a similar application; both of them were approved for "emergency" processing.

Another applicant requested an "emergency" special permit to transport 1,000 steel drums of paint that did not meet the pressure requirement for air transportation. The applicant stated that if they were required to comply with PHMSA regulations, they would have to pay an additional $30 per pail, which would be a financial burden on the company. The applicant proposed to ship the containers as is and to "duct tape the crimp points on the lids of the pail to prevent leakage." The safety justification provided was that air freight companies had been shipping this type of material for years in non-compliant packaging. "Even though this was not right," stated the applicant, "there has been no incidents reported or caused by this material being shipped in non-compliant packaging." Committee investigators question why a carrier would report an incident involving illegally transported hazardous materials. We also question why the cost of complying with PHMSA regulations is a reasonable justification for an exemption.

Another applicant applied for an emergency special permit to transport nitric acid in checked baggage on board passenger aircraft using the provisions of the "small-quantity exception." The "small quantity" exception allows shippers to avoid having to comply with certain hazardous materials safety regulations, including labeling, documentation (such as shipping papers), marking, pilot notification, and stowage requirements, when shipping small quantities of hazardous materials. See 49 CFR § 173.4. In order to use the small-quantity exception when offering dangerous goods for shipment by air, dangerous goods must be authorized for

transport on board passenger aircraft. Nitric acid, however, is not authorized for the small-quantity exception.

In November 1973, a Pan American World Airways Boeing 707 cargo aircraft crashed minutes short of an emergency landing at Boston's Logan International Airport and the three crewmembers died when spillage of nitric acid created smoke and impaired their vision and ability to function. Investigations by the NTSB showed that more than half of the chemicals on board were improperly packaged and almost all of the packages were not properly marked or stowed, including the nitric acid, which is an oxidizing material that reacts with many other materials causing intense heat and large amounts of smoke. The NTSB determined that the dense smoke in the cockpit, which it believes was caused by a spontaneous chemical reaction between the leaking acid and sawdust packing surround the acid's package, likely caused the accident because it seriously impaired the flight crew's vision and ability to function effectively during the emergency.

In the special permit application, the parties admitted that it was still possible to ship nitric acid on cargo aircraft, but that shipping the acid on cargo aircraft "would radically increase packaging costs, complicate delivery schedules, and require extensive documentation." PHMSA approved the application. We do not believe that the cost of having to comply with a safety regulation is reasonable justification from being exempt from a regulation. We believe this request should not have been approved for a special permit, much less an emergency special permit, but it was approved.

- **PHMSA is pre-disposed to approving requests for special permits, emergency special permits, and approvals.** Numerous PHMSA staff stated to Committee investigators that PHMSA is "pre-disposed" to approving applications for special permits and approvals. That is evident in PHMSA's own numbers. From January 1, 2007, through June 30, 2009, PHMSA approved 4,792 applicants for special permits. About two percent of those applications were actually rejected or denied. Those that were denied were mainly denied on the basis that the application was incomplete or the regulations allow the requested conduct and no permit was needed – not that the application was deficient in some other way (i.e., did not meet the equivalent level of safety).

The one special permit that PHMSA was apparently NOT "pre-disposed" to approving was an application submitted by the FAA to conduct covert testing to evaluate air carriers' compliance with the required acceptance procedures for hazardous materials shipments by air. In 2004, the DOT OIG conducted an audit of FAA's hazardous materials program and issued a report that recommended that the FAA develop and implement a covert testing program to evaluate such air carrier compliance.[1] The FAA concurred with the recommendations and drafted a set of targeted covert hazardous materials tests to gauge air carrier acceptance procedures for hazardous materials shipments by air. The FAA wanted to put non-hazardous materials in hazardous material packaging, which was in violation of PHMSA's regulations.[2] PHMSA denied the application because "it did not contain information to demonstrate that

[1] DOT OIG, *New Approaches Needed in Managing FAA's Hazardous Materials Program Federal Aviation Administration* (2004).
[2] A similar emergency special permit was approved to conduct covert tests using non-hazardous materials in hazardous materials packaging for purposes of conducting compliance testing of American Airlines hazardous materials acceptance and handling procedures.

FAA's proposal would be in the public interest." As a result, FAA says that it never conducted the covert tests.

- **There is no process established in the law for issuing approvals.** Approvals are created by the hazardous materials regulations, not by statute. The regulations establish procedures for the designation of agencies to issue approval certificates ("approvals") and certifications for types of packaging designed, manufactured, tested or maintained in the regulations. Explosives and fireworks are two examples or hazardous materials that cannot be transported in the United States without an approval being granted.

  Under PHMSA regulations, requests for approvals must contain: (1) the applicant's name and address; (2) a copy of the designation from the Competent Authority if the applicant's principal place of business is not in the United States; (3) a listing of the types of packaging for which approval is sought; (4) a personnel qualifications plan listing what each person will be required to use in the performance of each packing approval or certification (including ability to review and evaluate design drawings, design and stress calculations; knowledge of the applicable regulations; ability to conduct and evaluate test procedures and results; ability to review and evaluate the qualifications of materials and fabrication procedures), and (5) a statement that the applicant will perform its functions independent of the manufacturers of packaging concerned. *See 49 CFR § 107.401.*

  The hazardous materials regulations state that as long as the "application contains all the required information," the applicant will receive a letter of approval to transport the materials. With a few exceptions, we found little evidence that PHMSA performs an independent evaluation of the applicant's assertions. We found this to be a significant safety concern given the thousands of approvals that have been granted. In fact, enforcement staff stated that they were more concerned about the approvals that were being granted than the special permits because "at least the special permits process required a little more evaluation." Approvals are not published in the Federal Register so there is no "transparency" in the process; the regulations do not require safety reviews of the applicants; and there is no requirement to coordinate authorizations of approvals with the modal administrations.

- **PHMSA issues approvals to domestic "agents" representing foreign companies to carry hazardous materials in the United States without any evaluation of the fitness of the foreign company.** Simply put, PHMSA issues approvals to foreign companies where their incident and enforcement histories are entirely unknown, and there is little attempt to gain such information. Because the companies are foreign nationals, there is no means to collect enforcement data. In the United States, 95 percent of fireworks come from companies in China whose fitness is not evaluated. On July 4, 2009, there was an accident in Ocracoke, North Carolina when a truck filled with fireworks that were made in China exploded killing four people. It is disturbing that fireworks can enter the United States as a registered hazardous material, but no fitness evaluation of the foreign company or product is or can be done.

- **Investigators identified special permits that should be incorporated in the regulations.** For example, between 2005 and 2009, 30 special permit applications were granted to shippers authorizing the use of DOT specification tank cars having a maximum gross weight on rail of 286,000 pounds. We believe PHMSA should conduct an evaluation of existing special permits

- **PHMSA has failed to coordinate with the DOT modal administrations, in particular the FAA.** Committee investigators found very little evidence that PHMSA was coordinating with the modal administrations in issuing special permits and approvals. We are concerned about the impact this could have on transportation safety, and in particular the safety of crewmembers and passengers on board aircraft. There have been many instances in which the FAA has found out after the fact that a special permit or approval to transport hazardous material on board a passenger aircraft has been issued. For example, shaped charges, an explosive used to cut and form metal, initiate a chain reaction in nuclear weapons, and penetrate armor, are authorized under an approval to be transported on passenger aircraft. It was only during a routine hazardous materials inspection that FAA became aware of this approval. PHMSA did not coordinate with the FAA prior to granting the approval.

  FAA was also unaware of a special permit provided to a major intermodal carrier that allows them to transport certain hazardous materials such as 1.4 S explosives, and Class 3 flammable, Division 6.1 poisonous, and Class 8 corrosive hazardous materials in inaccessible locations on board cargo aircraft. Under current regulations, these materials must be transported in locations on the aircraft that enable crewmembers to gain access to them if there is a fire on-board the aircraft.

  PHMSA has also failed to coordinate with FMCSA. An exemption was provided to two intermodal carriers, one of which is the largest hazmat transporter in the United States, and which allows them to return via motor vehicle, certain shipments of hazardous materials, including explosives, flammable liquids, oxidizers, organic peroxides, and corrosives, that do not comply with shipping paper, marking, or labeling requirements within 150 miles from the point of discovery. Under this special permit, the companies can theoretically transport a package 150 miles to an airport, learn it was non-compliant with the hazardous materials regulations, and then transport it back another 150 miles without any sort of hazard marking on the package. This could have serious consequences in the event of an accident or incident where emergency responders would need information from a shipping paper on what is in a vehicle in order to determine how best to respond. Committee staff has concerns regarding these special permits, and even more concerns that there is no evidence that PHMSA coordinated their issuance with the FMCSA. Moreover, as in many cases reviewed by Committee investigators, there is no rationale that "equivalent level of safety" determinations have even been considered by PHMSA. Economic convenience appears to override safety determinations in a majority of cases.

  While some PHMSA staff insisted that the modal administrations were consulted on most special permits and approvals prior to their issuance, Committee investigators neither found any evidence to support these claims, nor could PHMSA provide such evidence. In fact, PHMSA staff stated that there was a tendency within PHMSA to find reasons to leave the FAA out of discussions and deliberations because they were seen as "obstructionists." Some staff within PHMSA told us that they warned against such actions, stating: "We don't want another accident like Valujet to occur as a result of a lack of coordination between PHMSA and the FAA."

Disregard for the FAA was most evident in interviews with PHMSA staff that are responsible for issuing and evaluating requests for special permits and approvals and for dealing with the FAA in the international standards-setting arena. PHMSA staff maintained that the FAA had no expertise in hazardous materials safety, and therefore had no basis for challenging PHMSA's findings. One PHMSA staff person stated that the FAA William J. Hughes Technical Center, widely-recognized as the premier aviation research and development, and test and evaluation facility "didn't know how to deal with hazardous materials." Previous DOT OIG investigations have repeatedly found the FAA/PHMSA relationship to be dysfunctional.[3]

Committee investigators also asked PHMSA staff whether they felt it was appropriate for the modes to be notified or have some input in the classification of hazardous materials, including explosives. When a material is classified, the hazardous materials regulations state how the materials can be shipped. The FAA, in particular, believes that it should have some input in that process since the material would be shipped on board passenger or cargo aircraft. PHMSA staff, however, believe these decisions are "mode neutral" and that the FAA and the other modal administrations should not be consulted; we strongly disagree.

- **PHMSA has largely ignored oversight and enforcement concerns.** Committee investigators found that PHMSA has taken little action to resolve documented safety concerns raised by PHMSA's own Office of Hazardous Materials Enforcement. When asked why PHMSA did not consider these safety concerns, a senior PHMSA staff person stated: "I take their [enforcement staff] views with a grain of salt."

Most of the enforcement staff were not surprised by that statement. Enforcement staff believe that when a safety concern is noted the burden of proof is on them, not the industry or the holders of the special permits. To quote one enforcement staff person: "If it's my explosives expert against an industry explosives expert, they're not going to listen to me even though I see what's going on in the field on a daily basis."

Enforcement staff pointed to several issues that have been raised and largely ignored by PHMSA leadership and senior program managers. We believe this attitude within PHMSA has had a dampening effect on enforcement, as several officials are withholding enforcement recommendations out of concern for retribution or that no one will listen to their concerns. For example:

On June 1, 2007, PHMSA's Chief of the Central Region sent a letter to the Director of the Office of Hazardous Materials Special Permits and Approvals recommending the modification of special permits to companies operating bulk explosives vehicles. The letter stated:

> "PHMSA's investigators have established a compliance history which reflects compliance problems with these special permits. More importantly, response to a recent rollover incident involving a vehicle using the configuration specified in [the special permit] has emphasized concerns expressed by investigators following recent inspections. The incident made it apparent that the conditions necessary for a catastrophic event were easily attained during rollover. Further, it is clear that these vehicles are very susceptible to rollover due to high center of gravity and density of

[3] DOT OIG, *New Approaches Needed in Managing FAA's Hazardous Materials Program Federal Aviation Administration* (2004).

product. There have been 3 reported rollover incidents in the last year and [our enforcement office] is investigating 4 more suspected rollovers."

Investigators recommended that the special permits be re-evaluated and actions be taken to mitigate the risk posed by operation of the vehicles. At that point, PHMSA leadership should have established a process for carefully considering the Central Region's concerns. While there were two internal briefings that were requested by the Central Region and a meeting held with industry, there was no clear course of action determined at the conclusion of those meetings other than some vague reference to a future meeting for continued discussions.

It was not until the DOT OIG issued a management advisory to the Acting Deputy Administrator of PHMSA on July 28, 2009 that PHMSA took action. Two weeks later, a show-cause letter was mailed out to four permit holders stating that PHMSA and the FMCSA are conducting an overall evaluation of the special permits, including the fitness of persons granted authority to transport hazmat under the terms of the special permits and is considering modifying the special permits in order to improve transportation safety. Committee investigators, however, were recently informed that there are three to four additional special permits authorizing the use of bulk explosives vehicles; we believe that the DOT should review those special permits and the permit holders as well.

On June 28, 2007, the Chief of the Central Region sent another memo to the Director of the Office of Hazardous Materials Standards (Standards) that documented concerns with a "Letter of Interpretation" issued by Standards in response to a question about whether a driver had to create or revise a shipping paper to reflect a partial delivery of a product. Hazardous materials regulations require accuracy in identification of the types and quantities of hazardous material being carried on a vehicle. This information is crucial in the event of an accident of incident and emergency responders need to get accurate information on what is or was in the vehicle.

The Letter of Interpretation responded to a question from a carrier about whether a driver transporting 10 drums of hazardous material had to change the shipping paper when two of the drums were delivered to reflect that eight drums were now on the vehicle. The Letter of Interpretation stated that a driver was not required to update a shipping paper to reflect a partial delivery but if additional quantities of hazardous materials were added to the vehicle then the shipping paper must be updated.

The Chief of the Central Region expressed concern about this interpretation, stating that first responders arriving on the scene of an accident might be searching for missing explosives, as well as notifying additional agencies, such as the Department of Homeland Security (DHS), at an accident site when in fact the explosives were not missing; they had been delivered. The letter stated: "In addition to these agencies utilizing valuable resources in a futile search for non-existing missing explosives and other hazardous materials, this action would also result in a lengthened duration of highway closures, added highway/traffic congestion, and more extensive evacuations." There is no evidence that Standards responded to the Central Region's concerns.

Enforcement staff informed Committee investigators that they expressed the need on numerous occasions to PHMSA leadership and senior managers to require special permit applicants and holders to state where they are going to utilize the special permit. A company could have 100 facilities and only use the special permit at two locations, but PHMSA only has a

record of the headquarters of the company as the main point of contact. This poses significant problems for enforcement staff who need to ensure compliance with the terms of special permits. No action has been taken on the recommendation.

Enforcement staff have also raised concerns about the Materials of Trade (MOTs) exception in the hazardous materials regulations. MOTs are hazardous materials that are carried on a motor vehicle to directly support a principal business of a private motor carrier that is other than transportation by motor vehicle; to support the operation or maintenance of a motor vehicle; or to protect the health and safety of the motor vehicle operator or passengers. A material of trade is limited to certain quantities in the hazardous materials regulations. For example: an airline that uses motor vehicles to transport hazardous materials in support of aircraft maintenance operations is excepted from hazardous materials regulations under MOTs. A company that transports less than 400 gallons of a Class 9 material does not have to put placards on the vehicle containing the material; it is excepted under MOTs. Enforcement staff stated that they have raised concerns about the expanding definition of MOTs over time – to the point where large amounts of hazardous material are being transported without placards and other safety requirements – but no one has addressed their concerns. *See 49 CFR § 173.6.*

- **PHMSA found that 60 to 90 percent of all accidents are unreported; little has been done to address it.** In an internal report dated May 11, 2007, PHMSA issued preliminary findings that as many as 60 to 90 percent of all hazardous materials incidents are not reported. PHMSA regulations require carriers to report incidents involving hazardous materials under certain conditions, such as an incident that involved a fatality. *See 49 CFR §§ 171.15 and 171.16.* Specifically, PHMSA reported that its examination of a three-year period (2004-2006) found: "[t]he incidents that are reported to us might represent only 10-40% of all incidents that are actually occurring." One example of what PHMSA's efforts produced is staggering. By using media and other information sources available, PHMSA discovered an additional nine fatal incidents in 2005, 75 percent more than what had been reported by carriers to the agency.

  The report also raises concerns as to whether all carriers report incidents consistently. For example, approximately two-thirds of all incidents reported from 2004-2006 were from only five registered carriers; one third of all incidents were reported by one carrier, FedEx. There seems to be a particularly large discrepancy between FedEx's reporting and UPS' reporting. FedEx reported 17,517 incidents from 2004-2006, while UPS reported just 7,726 incidents. Although the report was produced in May 2007, PHMSA leadership **could not identify** any major steps that were taken to address the extent of the under-reporting of hazmat incidents or to bring enforcement actions against those that were unreported. In fact, a review of 1,460 unreported incidents from 2006 through June 30, 2009, shows that only seven of them resulted in an enforcement action.

- **Contrary to its claims, PHMSA is <u>NOT</u> a data-driven agency.** During the investigation, Committee investigators met with a wide variety of PHMSA staff, all of whom should be able to reasonably rely on its agency's data. Universally, the staff believe that PHMSA's data is notoriously inaccurate, incomplete, and virtually useless. We question how PHMSA can ensure safety is its highest priority if it cannot rely on its own data. In our view, PHMSA and each of the modal administrations that utilize PHMSA's data cannot effectively target high-risk hazardous materials transportation concerns, draft appropriate regulations, conduct regulatory

and safety analyses, analyze whether a carrier should or should not be granted a special permit or approval, or target compliance reviews or enforcement activities when the data is so poor and analysis of the data is non-existent.

Of particular concern is PHMSA's incident database. Over the past six months, Committee investigators have reviewed approximately 50,000 to 60,000 incident reports filed between 2000 and 2009. We found that the data was incomplete, often leaving out important information, such as monetary damages, container type, and other necessary information needed to identify safety trends, develop rulemakings, and conduct appropriate compliance reviews. For example, in 2008, 14,879 of the 16,877 incident reports showed no monetary damages, yet there was a loss of material involved in almost all of the incidents, and damages resulting from clean-up costs and replacement value of the product lost.

Perhaps the best example is wetlines. Wetlines are unprotected piping located beneath a cargo tank that is used for the bottom loading of gasoline or other petroleum products. In April 2009, we asked PHMSA how many wetlines incidents occurred since 2000. PHMSA responded that there were a total of 23 wetlines incidents, resulting in two fatalities and no injuries, and that of those incidents, 21 occurred in 2000 and 2001. PHMSA also stated that since 2001, there had been only two incidents where a vehicle struck the wetlines – one in 2004 and one in 2008. PHMSA used this data to conclude that there was no need to prohibit the continued use of wetlines.

To validate the information provided by PHMSA, the Subcommittee on Railroads, Pipelines, and Hazardous Materials, using the same database, found over 100 wetlines incidents, one of which killed four persons in 2001 in Green Bay, Wisconsin. The Subcommittee asked PHMSA to analyze the findings and present an accurate number of wetlines incidents using its definition of what it considers to be a wetlines incident.

It took four months and a team of PHMSA staff and consultants to send us a "final" count of wetlines incidents exceeding 150. However, in reviewing their final count they noted that 10 other incidents are still being reviewed and then failed to incorporate in the numbers a fatality that was noted in the comments section of one of the incident forms. In other words, we still do not have a final number.

- **PHMSA developed a comprehensive plan to address its data issues; it was never implemented.** Although PHMSA has a Chief Information Officer (CIO), the responsibilities for data collection, analysis, and software development are largely "stove piped" in individual programs. In fact, the PHSMA CIO has no authority over the PHMSA information technology budget, which is difficult to understand. Standards utilizes one system for tracking regulations. The Office of Hazardous Materials Technology and the Office of Hazardous Materials Special Permits and Approvals utilize the Hazardous Materials Information System (HMIS) which is largely maintained by the Office of Hazardous Materials Planning and Analysis. The Office of Hazardous Materials Planning and Analysis also oversees the registration system and the system containing incident reporting forms. The Office of Hazardous Materials Enforcement uses its own inspection system, and the Hazardous Materials Emergency Preparedness (HMEP) Grants Unit has a separate system for tracking grants to States and Indian tribes. None of the systems talk to one another, and most of them contain redundant information. In searching the special

permits database, Committee investigators experienced, first-hand, lengthy delays in the system, with searches for individual permits often taking an hour or more.

Inadequate PHMSA information technology (IT) systems create significant problems, especially when it comes to enforcement. Some field supervisors reported that they found it difficult to present data to drive their enforcement program, but added that in each and every field office there was usually someone there that liked to "play with the data" and pass on some useful information to their colleagues. One field supervisor noted that their office keeps its own data in an Excel spreadsheet. Not only does this take time and resources away from the duties of inspectors, but it could lead to something major falling through the cracks.

PHMSA is developing a Multimodal Hazmat Intelligence Portal, which may help "stop the bleeding," but the problems within each system are so extensive that a more comprehensive plan to unify the data and help PHMSA achieve its safety mission must be implemented immediately. Our findings seem to be supported by PHMSA's own IT review, which was finalized on November 30, 2007. The report, conducted by Deloitte Consulting, found that: (1) PHMSA's IT landscape is too complex to navigate; (2) data was incomplete; (3) PHMSA users had difficulties performing effective analysis on data that already exists in the system, which in turn led to decisions being made with less information and less accurate information than should be available; (4) PHMSA staff were operating at less than optimal performance because of the lack of IT support; (5) the current system fosters a "stove pipe" method of system development; (6) there is no analysis of the data; and (7) PHMSA has difficulty in determining and tracking the efficiency and effectiveness of its programs. From that analysis, the CIO developed and circulated a plan that would align PHMSA's IT investments with its strategic goals; identify the business processes that need to occur to obtain those goals; and create an enterprise architecture[4] that supports the process to goal alignment. Numerous staff confirmed the plan was never implemented.

- **There have been concerns that PHMSA has failed to maintain an arms-length relationship with industry.** Throughout the course of the Committee's investigation, concerns were raised within PHMSA and DOT that senior PHMSA program managers were not maintaining a sufficient "arm's-length" relationship with the industry it was charged with regulating.

One senior staffer stated that PHMSA "had changed its focus from keeping the public safe to making industry happy." Another stated that PHMSA had "gone over the line more often than it should have," while others stated that PHMSA was acting more like a customer service agency than a regulator.

Many of the personnel interviewed stated that "industry ran the organization," and repeatedly pointed to two lobbyists, in particular, as examples of persons "who were being

[4] Enterprise architecture is a complete expression of the enterprise; a master plan which "acts as a collaboration force" between aspects of business planning such as goals, visions, strategies, and governance principles; aspects of business operations such as business terms, organization structures, processes and data; aspects of automation such as information systems and databases; and the enabling technological infrastructure of the business such as computers, operating systems, and networks.

treated as if they were administrators of the agency." Concern about the relationship between those individuals and PHMSA leadership was also expressed by staff within the DOT: "In all my dealings with different trade groups representing DOT regulated entities, I've never seen someone like [a well-known industry lobbyist]... who has carte blanche with PHMSA's time and resources."

Of particular concern to Committee investigators, were staff reports that PHMSA leadership routinely forwards internal documents to industry. Committee staff experienced this first-hand. Over the course of our investigation, several documents and details of conversations regarding the investigation were shared with industry without our approval. In mid-August, a senior PHMSA staff person shared a copy of the DOT OIG's management advisory on bulk explosives vehicles after the DOT OIG asked that it not be circulated. These activities call into question the integrity and the credibility of PHMSA's leadership, and Committee staff recommends a more thorough review of leadership and the legality of these actions.

In addition, Committee staff is concerned about reports that the enforcement process has been compromised due to political and industry influence. On October 28, 2008, the DOT issued a report entitled "DOT Surface Transportation Safety Review: An Evaluation of Risk Management Strategies and Approaches, Agency Safety Culture, and Internal Controls in the Federal Motor Carrier Safety Administration, Federal Railroad Administration, and Pipeline and Hazardous Materials Safety Administration." The report stated that there was a "widespread perception in PHMSA that the enforcement process for individual violation cases is compromised by political and industry influence." Committee investigators did not look into this issue, but we plan on reviewing it prior to issuance of our final report.

As part of our final review, we also intend to follow-up on concerns raised by PHMSA staff regarding creation of the new Systems Integrity Safety Program (SISP). According to PHMSA, SISP is a PHMSA Office of Hazardous Materials Enforcement operation to enhance and improve safety and security outcomes thru stakeholder collaborations. The program targets certain regulated entities based on the number of enforcement violations that have occurred over a three-year period. For example, an entity with more than 50 violations of failure to placard hazardous material may be targeted. The targeted entity is then offered an opportunity to partner with PHMSA to achieve compliance. If the company successfully completes the program, it will not be subject to PHMSA enforcement actions for probable violations discovered during the term of the agreement. PHMSA staff report that the program has been a success with one major retailer who was violating several hazardous materials regulations. In the past, however, the Committee has raised concerns about such partnership approaches in the modal administrations, including aviation and rail. The DOT OIG has issued warnings about similar "partnership programs" and the failure of DOT to be sensitive to the point in time when the partnership has gone far enough and traditional enforcement is most appropriate. We plan to continue monitoring this program.

Finally, we are concerned about senior staff claims that PHMSA "was spending too much time helping industry find ways around a regulation through issuance of special permits and approvals rather than requiring compliance with the regulation." This was evident in our review of an "emergency" special permit that authorized the transportation of boron trifluoride in DOT Specification 3AAX and 3AA manifolded cylinders. Prior to October 1, 2002, the shipment of

boron trifluoride and other toxic gases in manifolded cylinders were authorized in the regulations. New regulations that were issued to address several NTSB safety recommendations prohibited the shipment of certain toxic gases, such as boron triflouride, in manifolded cylinders. The regulation also removed DOT Specification 3AAX as an authorized cylinder for such gases. But three years after the regulations took effect, a regulated entity requested an emergency special permit because boron trifluoride's safe shipment history in manifolded cylinders was demonstrated prior to issuance of the rule. Essentially, the company disagreed with issuance of the rule. PHMSA granted the exemption on an emergency basis and then renewed it a few years later. Committee staff questions why this constituted an emergency and why an agency would prohibit certain activity in a regulation and then turn around a few years later and authorize the same activity through issuance of a special permit. Instead of finding ways around the regulation, PHMSA should have been educating the industry on how to comply with the regulation.

- **We have concerns regarding the HMEP Grant Program; a more in-depth review is warranted.** Under current law, the HMEP grant program provides grants to States and Indian tribes for planning and training of public sector workers to respond to accidents and incidents involving hazardous materials. In November 2008, a senior program manager within PHMSA wrote a letter to the DOT OIG that raised concerns about the management of the program and in particular the use of the grants. As a result of that letter, PHMSA conducted an internal evaluation of the HMEP program in March 2009, which identified several internal control deficiencies. Our own review of the 2007 close-out reports and 2008 grant applications submitted by States and Indian tribes indicated that funds were not being used for their intended purposes in a few cases. For example, it is possible from the information that we reviewed that some States used funds for school violence workshops; to purchase national weather service transmitters; develop plans for pandemic flu outbreaks; and conduct mass immunization/avian flu/influenza demonstrations. One county reported that it used $18,514 to support "a large regional exercise with a very real scenario (tornado), impacting a significant music event." Another county spent $4,471.54 on a drill revolving around a school shooter. We caution, however, that many States combine grant funds to conduct planning and demonstrations which end up mixing various sources of funding, so that may explain these uses, but our findings do warrant a closer review of the uses of the grants issued.

- **PHMSA has lost sight of its safety mission.** In 2004, Congress reorganized the Research and Special Programs Administration (RSPA) to focus more fully on pipeline and hazardous materials safety. As a result, portions of RSPA tasked with research and analysis was renamed the Research and Innovative Technologies Administration and the Office of Pipeline Safety and Office of Hazardous Materials Safety were combined in a new agency called the Pipeline and Hazardous Materials Safety Administration.

  Congress tasked PHMSA with ensuring the maintenance of safety as the highest priority. It was Congress' intention that safety would not just be the focus of PHMSA's leadership but be ingrained in all of PHMSA's programs. Many current employees of PHMSA, however, reported to Committee investigators that the agency's safety mission has been compromised in that safety has taken a backseat to economics and that there is little focus within the individual programs on how that program is driving the agency's safety mission. We believe our findings support that conclusion.

WITNESSES

Panel I

The Honorable Calvin L. Scovel, III
Inspector General
U.S. Department of Transportation

The Honorable John D. Porcari
Deputy Secretary of Transportation
U.S. Department of Transportation

Panel II

Mr. Lon D. Santis
Manager, Technical Services
Institute of Makers of Explosives

HEARING ON CONCERNS WITH HAZARDOUS MATERIALS SAFETY IN THE U.S.: IS PHMSA PERFORMING ITS MISSION?

Thursday, September 10, 2009

HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
WASHINGTON, DC.

The Committee met, pursuant to call, at 10:00 a.m., in room 2167, Rayburn House Office Building, the Honorable James Oberstar [Chairman of the Full Committee] presiding.

Mr. OBERSTAR. The Committee on Transportation and Infrastructure will come to order.

Today we have a hearing in the nature of a continuation of inquiry into the conduct of the Pipeline and Hazardous Materials Safety Agency.

In a way, you could say that this hearing began 22 years ago with the explosion of the gasoline pipeline in Mounds View, Minnesota, just outside my district, when a gasoline pipeline had lost its cathodic protection. There was a dent in the line that had been there for years unnoticed, and at that point there was a failure. Gasoline leaked from the pipeline into the ground. There was no shutoff valve, there was no sensor to detect the drop in pipeline pressure, and the gasoline leaked, apparently for days.

And the fumes worked their way up through the soil to the street level, and at 2:00 a.m. a car driving appropriately through the neighborhood, but with a loose tailpipe that dragged on the ground, sparked, ignited the fumes that exploded the street into a ball of fire, buckled and melted the pavement, and a homeowner, a mother and her six-year-old, saw the fireball, heard the sound, went out on their front porch and were incinerated, as was their house.

The National Transportation Safety Board did an extensive inquiry, found the failures: the rupture in the pipeline; the loss of cathodic protection, corrosion that resulted; the failure to have frequent, automatic sensors for pipeline pressure loss and for leakage; and that the agency had no measures in place, no procedures in place, and an insufficient numbers of inspectors both at the Federal level and those that are funded by the Federal Government in cooperation with the State.

I was Chair of the Investigations Oversight Subcommittee at the time. We held a very extensive hearing into the causes and preventive measures that should be taken and recommended steps to be taken. But what struck me at the time was that there was not a culture of safety at the pipeline safety agency; that the very top

person, the administrator of the agency, had no clear idea of what safety means.

And even though we provided—I moved legislation or amendment in our surface transportation in the authorizing Subcommittee to create additional positions for inspection, for inspectors at the Federal and State level and they were funded, but over time the attention was lost and the agency continued to operate in what I can only describe today as a deteriorated condition of public vigilance.

Safety is not a one-time snapshot. Safety is continuing vigilance. I lived it personally when I worked in the mines, when I was going through college, and I worked in a concrete Ready Mix concrete block factory, I worked on construction zones, street and highway construction. It is a matter of mind-set of safety and of vigilance, and this agency has lost its way and, along the way, has developed a very cozy relationship with the industry it regulates.

The oversight and investigations role and heritage of this Committee goes back to 1959, when then Speaker Sam Rayburn asked my predecessor over there, portrait in the corner, John Blatnik, to chair the special investigating committee on the Federal Aid Highway Program to uncover waste, fraud, abuse, as it turned out, criminal activity in the early days of construction of the interstate highway system. The result of those investigations over a period of six years resulted in 36 Federal and State and private contractor personnel being sent to State and Federal prison. Some of them are still there.

At the beginning of those investigations, no State had internal audit and review procedures in it highway program. As a result of those investigations, every State adopted such procedures and has continued to refine them.

The work of that committee was expanded into other areas of the Full Committee's jurisdiction, because we know that maintaining oversight of the Executive Branch agencies is the responsibility of the Congress. We pass the laws; they enforce them. It is our job to make sure they are doing the public's business, and we will continue to pursue that responsibility in this Committee.

PHMSA's culture appears plagued by a belief the agency should make things as easy as possible for the industry that it should be regulating. I have asked the staff, since the time we regained the majority, to take a special, careful, thorough review of this agency, based on my previous experience that I have already described. The investigation undertaken by our Committee staff, and also by the Inspector General of DOT, uncovered a shocking number of failures by the agency to follow Federal law in hazmat regulation, outright neglect in regulating the transportation of hazardous materials. We also heard from numerous employees, those with a real conscience and with a concern for the public interest, that their agency was entirely, as I suspected and have experienced over the years, too cozy with the industry.

This is a theme we have uncovered in previous investigations; in our Coast Guard hearing, where there was a similar relationship between the Coast Guard and Lockheed Martin, who were told to self-regulate. We saw it last year in the inquiry into failure of FAA to oversee safety at major airlines, including Southwest, which was

the subject of a very significant hearing. Again, the FAA inspector staff was told that the industry is our customer.

Safety is not a customer relationship, it is an arm's length relationship. And if the FAA treats an airline as the customer and the customer isn't satisfied with the oversight service they are getting, then they can ask for changes, and they did, and the principal maintenance inspector was pulled from the Southwest ticket, just as similar actions occurred at the Coast Guard.

In the result of our Coast Guard hearings and inquiry, and of the Inspector General's very thorough work, we have passed legislation that will change those practices at Coast Guard, and the Coast Guard itself has instituted changes. Similarly at FAA, we have moved legislation to change the way safety is conducted and taken out the customer service initiative. It has no place in safety. It doesn't mean that there should be an adversarial relationship, but it does mean there must be an arm's length relationship between the regulated and the regulators.

What we found is that PHMSA almost never turns down a request from industry for a special permit. A special permit is an exemption from regulations to carry hazardous material that normally would be prohibited by Federal regulation. This raises the issue—and I will ask the Inspector General and the under secretary to address the question of why there should continue to be rule by exception, why there should be special permit, and why shouldn't there be a permitting structure to govern this matter, rather than each case be considered; 5,000 such applications in a two-year period, and less than two percent were denied. Saying there is a cozy relationship with industry is an understatement.

PHMSA never performs fitness reviews, although required to do so, and it does not review the safety record or the enforcement record of applicants for special permits, and that is required by Federal regulations, they are defined in their own regulations. They have no idea, in this agency, where the special permits are being used. If you issue a special permit and you don't know where they are being used, then it is virtually impossible to monitor and enforce those permits.

Furthermore, the records are in appalling conditions. The vast majority of special permit applications our Committee staff and I reviewed, there was no safety analysis, there was no justification in the approval records. The agency relies almost entirely on self-certification by the applicant. That is a formula for failure, as we saw in the Coast Guard and the FAA inquiries.

Further, the agency grants special permits to industry trade associations, which then can distribute those permits to any of its members. Those trade associations are not safety agencies, they are advocacy groups. They are perfectly legal, but they are not safety responsibility agencies. This practice defies common sense. There is no way to hold a trade association accountable under the law, and often PHMSA, in response to our questions, has no idea who is using a particular special permit.

Furthermore, they operate all by themselves, PHMSA. They do not coordinate with FAA, with the Federal Railroad Administration, with Federal Motor Carrier Safety Administration, all of whom have safety responsibilities. There are cases where those reg-

ulatory agencies were opposed to granting of exceptions, and yet they were ignored.

PHMSA also issues approvals and permits to agents of foreign governments without any evaluation of the fitness of the foreign company. On July 4, 2009, this year, four people were killed in North Carolina when a truck loaded with Chinese fireworks exploded. PHMSA was unable to provide critical documentation on this permit.

They often ignore the concerns of their own enforcement personnel. Numerous of the staff told our Committee investigators that their warning and advisories have repeatedly been ignored by senior management. A senior manager told our Committee investigators I take enforcement personnel views with a grain of salt. That is reprehensible. This agency needs a house cleaning.

PHMSA itself needs that 60 to 90 percent of hazmat accidents go unreported and the agency has no data driven base. There was a universal view expressed within the agency that their data is inaccurate, incomplete, and virtually useless. That is unacceptable.

There are volumes more information, but it is clear this agency's relationship with the industry it regulates needs to be completely overhauled. Its current state is unacceptable, to say the least.

The industry will say, oh, we haven't had any fatalities—of course, there were those three or four people—but that is not a safety mind-set; that is what I called of the FAA a tombstone mentality. You wait until people are dead and then you start acting? That is not right. Twenty years ago I recommended more inspection, safety mind-set, higher standards within this agency. It has deteriorated from there.

Today's hearing marks a turning point in the history of that agency. The Deputy Secretary, Mr. Porcari, has taken action as soon as he became aware of these findings and those of the Inspector General. I am happy he is here. I am grateful to the Inspector General, Mr. Scovel, for his persistent work and detailed thorough and dispassionate detailed work on this issue.

Now the Chair is happy to recognize the gentleman from Pennsylvania, Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman. Let me start off first by saying happy birthday to you. I have exposed you.

Mr. OBERSTAR. Yes. Thank you. No songs.

Mr. SHUSTER. I am fortunate that you say no songs, because my voice isn't that pleasant to listen to. But, anyway, happy birthday to you.

Mr. OBERSTAR. Thank you very much.

Mr. SHUSTER. And many, many more.

Mr. OBERSTAR. At a certain point, birthdays are overrated.

Mr. SHUSTER. Well, good morning to everybody. Welcome to this hearing today on hazardous materials. Welcome to the Inspector General and to the Deputy Secretary. Thank you for being with us today.

The Department Inspector General has raised legitimate concerns about PHMSA's handling of special permits, approvals for hazardous materials, transportation practices that fall outside of the normal regulations, and, as the Chairman has documented, there are certainly a lot of improvements needed to be made at

PHMSA, especially in the record keeping and those areas; and that is what this hearing is all about today, to talk about those issues.

So I look forward to hearing from PHMSA and the Deputy Secretary on how they play to improve the process, including an explanation of the action plan that you have developed to take care of some of these problems.

I also look forward to hearing from the institute of the makers of explosives about advances in the safety of transporting blasting materials essential to mining and construction industries. Given the inherent risk associated with transporting materials designed to explode, the industry does have an outstanding safety record. The use of multi-purpose bulk trucks, or MBTs, allows the industry to move a wide range of materials necessary for blasting operations in the same vehicle, thereby reducing the total number of vehicles carrying hazmat over the highways; and, remarkably, these MBTs have never caused a single injury or fatality in transportation.

I think we need to strike a balance in hazmat transportation policy between making sure that appropriate safeguards are in place, while at the same time being careful that we do not unnecessarily burden the workhorse industries of our economy. Safe and efficient transportation of hazardous materials is enormously important to the national economy and our way of life.

Twenty-eight percent, or nearly a third, of all ton miles of annual freight on our roads, rails, waterways, and air cargo is considered a hazardous material. These shipments include everything from heating oil, gasoline, fertilizer, drinking water, chemicals, and medical materials use to treat sick folks. It is absolutely necessary that we are able to safely and quickly deliver a wide range of potentially dangerous materials without unnecessary bureaucratic interference.

Hazmat carriers have a remarkable safety record. The percentage of movement of hazardous goods resulting in an injury or fatality is an astonishing statistic. I have said it before, but .00002 percent result in injury and about .000014 percent of movements result in a fatality. There are about four times as many deaths caused by lightening strikes annually than by hazardous material transportation accidents.

As I said, this is a remarkable safety record and I think this is the measurement that we need to use to determine what we are doing, if it is right or if it is wrong, not how many permits are rejected. I think using that as a measurement is a false sense of what an agency is doing and an industry is doing and how it is performing.

Of course, when you are talking about moving dangerous goods, there is going to be risk and there are going to be accidents. There is no way to completely eliminate risk. What we need to do is make careful choices about where we can best use our resources to minimize the risks. I know that PHMSA is very short-handed and it is very difficult for the number of people they have to move forward on some of these things.

But we have to make the effort and we have to do what is necessary to make sure that they do keep the records, that they do have a process in place for these special permits, as much for safety as for industry, so that they know, when they are going to apply

for a permit, they know what the process is and they can count on some consistency when they are doing that. We don't want to knot the system up and create red tape that will cease to be effective for the user and that could damage our economy and our society.

So I look forward to hearing from our panelists and, with that, I yield back, Mr. Chairman.

Mr. OBERSTAR. I thank the gentleman for his comments.

Do other Members wish to be heard?

Ms. BROWN. Mr. Chairman?

Mr. OBERSTAR. Ms. Brown.

Ms. BROWN. Thank you, Mr. Chairman. First of all, I too want to say happy birthday and thank you for your service on this Committee. As I say, you are the guru of transportation.

Also, I want to thank Ranking Member Mica for holding this hearing today on the Hazardous Material Safety Program. I also want thank the staff for their hard work in investigating this serious issue.

Each day, nearly 1.2 million shipments of hazardous materials are moved by all modes of transportation. Over the last decade, there have been over 170,000 incidents involving the transportation of hazardous materials, resulting in 134 fatalities, 2,783 injuries, and more than $631 million in property damage. More disturbing, the Pipeline and Hazardous Materials Safety Administration has only 35 inspectors to cover over 300,000 hazmat-related entities.

This issue is so important to the communities that see hazardous material travel on their roads and railroads. At many of the hearings we have held dealing with rail safety, residents and local officials and firefighters and others have expressed their concern with the transport of these dangerous materials, and it is my guess that once they hear about what the Pipeline and Hazardous Materials Safety Administration has done or, more importantly, has not done, I am sure they will be even more concerned.

There was such a lack of oversight and inappropriate level of corporate influence during the Bush Administration that many agencies have become dysfunctional. This is why I am pleased to see that the Transportation and Infrastructure Committee is making the effort to provide proper oversight to the agencies within its jurisdiction.

In May of this year, I held a Subcommittee hearing on the Department of Transportation's Hazardous Materials Safety Program with all of the stakeholders to learn what improvements needed to be made for the new hazmat reauthorization bill.

During the hearing it became clear that there were significant problems in the program. The agency does not look at its own data on accidents and incidents; it does not follow up on unreported incidents; and it does not even review whether a carrier should be registered to transport hazmat materials. Let me say that again. The agency does not look at its own data on accidents and incidents; it does not follow up on unreported incidents; and it does not even review whether a carrier should be registered to transport hazmat materials.

It grants an alarming number of waivers from important safety regulations and provides with little or no oversight on permit holders. And it has so few inspectors that I cannot understand how

they can begin to inspect 300,000 hazmat entities to make sure that they are complying with the regulations and the terms of the waiver.

The subsequent investigations by Committee staff and the DOT Inspector General confirmed what the Subcommittee heard from witnesses at our hearing and even uncovered additional problems with current Hazmat Safety Programs.

I am hopeful that the new Administration is willing to work harder at administering these important Hazardous Materials Safety Programs and look forward to hearing how they plan to fix the serious problems.

With that, I want to welcome today's panelists and thank you for joining us. I am looking forward to hearing their testimony.

Thank you, Mr. Chairman, for holding this hearing.

Mr. OBERSTAR. And thank you for your previous work on the hearing that you conducted as Chair of the rail Subcommittee. It laid the groundwork for today's hearing.

Mrs. Capito.

Mrs. CAPITO. Thank you, Mr. Chairman. Briefly, I would like to make a brief opening statement. I would like to thank the witnesses for being here.

Representing the State of West Virginia, in looking at the States that are listed by consumption of explosive materials, our State is number two; number one being Wyoming, number two being West Virginia for, I think, rather obvious reasons. But, in West Virginia, if you want to built a road, you need explosive materials. If you want to create a mine, you need explosive materials.

So it is extremely important that these materials are safely transported to the mine site or the construction site. And it is done on a very frequent basis, obviously, in our State, traveling all of the roads, not just the major highways, but some of those little ones going up to where a lot of folks live in the hollows and more rural parts of our State.

So I am very interested in this report. I am interested to see what your plans are going to be going forward to address some of the issues. So I appreciate the Chairman bringing this to light and bringing it before the full Committee, and I look forward to the testimony of the witnesses. Thank you.

Thank you, Mr. Chairman.

Mr. OBERSTAR. I thank the gentlewoman for her statement.

Yes, Wyoming, with the Powder River Basin coal mining operations and West Virginia with highway and coal operations. We in Minnesota, in my district, the iron ore mining industry uses 300,000 pounds a day of explosives to extract the iron ore from the rock harder than granite that fuels our steel industry. We are very familiar with explosive materials. I have been on mine sites, I have worked in the iron ore mines myself, and I know what that is and what it means to have 55 to 60 million pounds a year of explosives on the roadways.

Other Members wish to be heard? Mrs. Napolitano?

Mrs. NAPOLITANO. Thank you, Mr. Chairman. I was going to wait, but you hit on some very key points, because, as I have stated before, the products coming in from abroad travel through my dis-

trict; mini trains, a mile and a half long carrying explosives or carrying all kinds of hazardous material.

I have been involved in the issue of chlorine because we have had spills in our Los Angeles area. You are talking about 12 million people and that is very, very important for us to understand whether the fire department's placarding is consistent, that they can read it as they are responding to an incident, or whether or not the railroad is maintaining the lines so there are no accidents because of hairline cracks in the rails. I mean, all those come to play.

So what I am very concerned is whether or not the agencies have enough budget, have enough personnel to be able to do all the follow-up that is going to be required to consistently apply to all the hazardous materials being carted so that there is better safety. And while I understand that there haven't been very many reported, what about the unreported accidents?

So those are things that I would like to hear, Mr. Chairman, and would be able to have a lot more of, how should I say, interest in. Thank you, sir.

Mr. OBERSTAR. Ms. Markey.

Ms. MARKEY. Yes, thank you, Mr. Chairman and staff, for holding this important meeting.

In my own district we have dealt with two tanker trucks crashing into the Poudre River in recent weeks. The Poudre River provides drinking water for two of the major towns in my district, Fort Collins and Greeley. The first spill, about three weeks ago, dumped 5,000 gallons of tar into the river and EPA contractors had to be brought in with cranes to lift out large sections of asphalt out of the river.

Within two weeks, a second tanker crashed into the same river, releasing 7,000 pounds of liquid asphalt and gallons of diesel fuel. Incidentally, because crews were still cleaning up the first spill, they were able to contain the second spill rather quickly. Both drivers were cited with careless driving and the main contractor is no longer allowed to have asphalt trucks on the highway until it can prove to the Colorado DOT that it has a safety plan in place.

Fortunately, in this situation, there was not a great threat to public health. However, I cannot imagine the repercussions if the asphalt had been a more hazardous chemical. I applaud the efforts of those who have helped contain the effects of these spills into the Poudre River and I look forward to discussing and establishing increased oversight of the Pipeline and Hazardous Materials Safety Administration.

Thank you.

Mr. OBERSTAR. Thank you for that very personal touch to this hearing; it brings it much closer to home when you have those experiences.

Mr. Hare.

Mr. HARE. I will just adapt, if that is OK with you, Mr. Chairman. Let me just thank everybody for being here today. I want to join my colleagues in wishing you a very happy birthday and I want to thank you and the Ranking Member for holding this important hearing today. I commend you for the sense of duty that you have in leading this Committee in effective oversight of the

United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration.

As we know, PHMSA is the leading agency responsible for regulating and monitoring the movement of hazardous materials. It was created in 2004 under the Norman Y. Mineta Research and Special Programs Improvement Act and was proceeded by the Research and Special Programs Administration. The role of PHMSA is clear: to protect the American people by ensuring the safe transportation of hazardous material.

Mr. Chairman, after learning of the finding of both the DOT Office of Inspector General's audit of PHMSA's Hazardous Material Safety Program, in particular the Special Permits and Approval Program, as well as findings from the Committee staff's recent investigation, I am very concerned that PHMSA is not fulfilling its role. I am most concerned with the revelation that PHMSA has failed to maintain an arm's length relationship with industry and, in doing so, has lost sight of its main focus, which is public safety.

Now it is our responsibility, as the Committee of jurisdiction, to examine these issues and ensure that PHMSA has what it needs to do the job that it was created to do, ensure safety of our hazmat workers and non-profits.

I look forward to hearing from the witnesses today.

Let me again thank you, Mr. Chairman and the Ranking Member, for holding this important meeting, and I would yield back.

Mr. OBERSTAR. I thank the gentleman.

Mr. Ortiz?

Mr. ORTIZ. I really don't have any statement, but this is a very, very important and serious hearing. With all the kind of material that is being moved, I would just hope that we could—and I am just waiting to see if I can stay here long enough, because I have another meeting—to listen to your testimony. But Texas is a big State, as you well know, and we move tons and tons of stuff all over the highways, and just because we haven't had an accident doesn't mean that there isn't one that could happen that could destroy a lot of lives.

So, Mr. Chairman, again, to you, happy birthday, 25th birthday. Congratulations. I wish you many more and thank you so much for having this hearing today, because it is a very, very important hearing. Thank you so much, Mr. Chairman.

Mr. OBERSTAR. Thank you. I thank all of you. In preparation for this landmark occasion, I went out and rode 75 miles over the weekend on my bike, not on my car.

If there are no other requests, we will begin with Inspector General Scovel.

TESTIMONY OF THE HONORABLE CALVIN L. SCOVEL, III, INSPECTOR GENERAL, U.S. DEPARTMENT OF TRANSPORTATION, WASHINGTON, D.C.; AND THE HONORABLE JOHN D. PORCARI, DEPUTY SECRETARY OF TRANSPORTATION, U.S. DEPARTMENT OF TRANSPORTATION, WASHINGTON, DC.

Mr. SCOVEL. Mr. Chairman, Ranking Member Shuster, Members of the Committee, thank you for inviting me here today to discuss PHMSA's Special Permits and Approvals Program. My testimony focuses on weaknesses we have identified and how PHMSA author-

izes and oversees these exemptions to hazmat regulations, weaknesses that call for a fundamental rethinking of PHMSA's approach.

As currently structured, PHMSA's Special Permits and Approvals Program carries little assurance that hazmat will be safely transported. This is evidenced by PHMSA's practice of granting permits without full knowledge of applicants' safety histories and the agency's record of inattention to longstanding safety issues.

First, PHMSA does not look at applicants' incident and compliant records when granting, renewing, or allowing party-to permits. We found this to be the case even when applicants had multiple incidents and enforcement violations for years prior to receiving their permit. For example, PHMSA granted a special permit to a company to operate bulk explosive vehicles, even though that company had 53 prior incidents, 9 of which were serious vehicle rollovers. Of particular concern is PHMSA's practice of granting special permits to trade associations, effectively giving a blanket authorization to thousands of member companies without any assessment of their safety histories or need for the permit.

PHMSA also grants special permits and approvals without thoroughly evaluating applications. PHMSA's reviews of 65 percent of the 99 permits and all 56 approvals we looked at were either incomplete, lacked evidence of an equal level of safety finding, or simply non-existent.

Further, PHMSA's risk-based oversight criteria omits a key rating factor that should drive compliance reviews, that is, whether a company holds a special permit or approval. However, our visits to 27 companies found that more than half did not comply with the terms of their permits. Some officials did not know which permits applied to their location and some were unaware that they even had a permit to abide by.

PHMSA's lack of coordination with FAA, FRA, and FMCSA exacerbates these weaknesses. These agencies may have critical safety data on applicants seeking a permit. Yet, we found PHMSA did not coordinate 90 percent of the new and party-to permits, or any of the renewals we reviewed. PHMSA also did not coordinate most of the emergency permits we reviewed, even though the law specifically requires that coordination.

The second vulnerability we identified is PHMSA's inattention to longstanding safety issues. Most notably, PHMSA ignored safety concerns regarding transportable explosives, concerns first raised by its own Office of Hazardous Materials and Enforcement over two years ago. We called for PHMSA to take action on this in our July 2009 management advisory.

This is not the first time longstanding safety concerns have gone unaddressed. There has been intense debate among PHMSA, FAA, NTSB, and other aviation stakeholders on the safe transport of lithium batteries by air. Last year, eight lithium battery incidents involving air carriers occurred, two of which were life-threatening, and we have seen six so far this year. Yet, PHMSA has not stepped up its coordination efforts or addressed all of FAA's and NTSB's concerns.

For example, we found PHMSA granted an emergency special permit in 2008 to ship lithium batteries by air with a poisonous gas

normally not allowed on aircraft. According to FAA, PHMSA did not explain how an equal level of safety would be met or provide safety measures for the pilots. PHMSA is working with FAA to propose changes to the Department's recently amended rule requiring safety measures for air transport of lithium batteries; however, these efforts only began after serious incidents and high-level departmental attention.

In closing, I want to recognize Secretary LaHood and Deputy Secretary Porcari for their leadership in directing PHMSA to develop an action plan in response to our recent advisory on PHMSA's special permit process. PHMSA's plan shows promise and we will continue to monitor its progress. In addition, we believe the actions described in Deputy Secretary Porcari's statement could address many other fundamental weaknesses we have identified. The Secretary and Deputy Secretary's continued support will be critical to successfully implement these planned actions and achieve the intent of the program, that is, to ensure permit holders safely transport hazardous materials.

This concludes my statement, Mr. Chairman. I would be happy to answer any questions you or Members of the Committee may have.

Mr. OBERSTAR. Thank you very much, Inspector General Scovel. Your entire document will be included in the Committee hearing record at this point. It is a comprehensive detailed analysis of this agency and its shortcomings, and your recommendations for improvements. We will get to those in a bit.

Deputy Secretary Porcari, congratulations, first of all, on your appointment to the position. I have known you from the time you served in Maryland as secretary and you have already made a good start within the Department.

Mr. PORCARI. Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Shuster, and distinguished Members of the Committee, on behalf of Secretary of Transportation Ray LaHood, I appreciate the opportunity to discuss the Pipeline and Hazardous Materials Safety Administration's Special Permits and Approval Program.

I have been briefed by your staff on a number of serious deficiencies in and concerns with the Hazardous Materials Program, including its Special Permits Program. I have also been briefed by the Department's Office of Inspector General regarding the Hazmat Special Permits Program and the advisory that the Office of the Inspector General issued on special permits for explosive mixing trucks. I have also been briefed on a 2008 internal review of PHMSA's safety culture regarding perception of the agency's employees as to the safety commitment of the agency.

Mr. Chairman, Members of the Committee, I share your concern that the agency is off track on its primary mission, safety. Let me be clear. Secretary LaHood and I regard transportation safety as the Department's primary mission and we are taking action to get PHMSA back on that mission. I would like to report briefly on the actions we have taken to begin this process and to address some of the immediate concerns.

First, the Department has a detailed action plan, which you have been provided copies of, to address the safety concerns raised by the Inspector General about the Special Permits and Approval Pro-

gram. Before I discuss the specifics of that, I would like to also briefly describe the importance of the Special Permits Program to our overall regulatory program.

DOT issues special permits under the authority provided in the Federal hazardous materials transportation law. Special permits allow the industry to quickly adopt and utilize new technologies and new ways of doing business that may not be accommodated in the regulations. DOT also issues special permits on an emergency basis to facilitate emergency transportation, such as to authorize the transportation of supplies to areas affected by natural or man-made disasters. By law, special permits must provide a level of safety equivalent to that required by the regulations or a finding that is consistent with the public interest and Federal hazardous materials law if a required level of safety does not exist.

Every year, DOT issues approximately 120 new special permits, authorizes approximately 100 modifications to existing special permits, and issues approximately 1100 renewals. New special permits may be authorized for up to two years, at which time they may be renewed for a period of up to four years.

Obviously, this is an important part of the program. We recognize there are deficiencies and we are working hard to address these deficiencies with the detailed action plan that is submitted. Briefly, we have taken the following actions: one, conducted a comprehensive top-to-bottom review of current written special permit policies, procedures, and practices to ensure that the safety goals are met; two, review the criteria, policy, and procedures used to make the legally required equivalent level of safety determinations and revise those procedures where necessary; three, develop enhanced written procedures to provide for better coordination for the issuance of permits with the Federal Motor Carrier Safety Administration, the FAA, the Federal Railroad Administration, and the Coast Guard; four, to clarify PHMSA policy to assure the trade associations are not holders of special permits; and, five, by February, the Pipeline and Hazardous Materials Safety Administration will have a business plan in place to create a centralized data analysis office to improve the data quality and the information technology systems that are currently in place.

This new technology will greatly enhance the productivity, accountability, and overall safety performance responsibilities of the Hazardous Materials Office of Special Permits. The new system will include an online application that will not be processed until completed, a mechanism for alerting holders of special permits 90 days in advance of the expiration of the permit and a notification system to communicate safety concerns.

An additional part of the action plan was developed to address the concerns raised in the OIG advisory related to explosive mixing trucks. It includes issuing a notice of proposed modification of the special permits for explosive mixing trucks to provide additional safety conditions, including vehicle inspection and maintenance, enhanced driver training, incident reporting and investigation, fire prevention and emergency response plans.

It also notifies special permit holders of the intent to evaluate each holder's fitness to operate these trucks. These stakeholder responses are due in September. It includes conducting fitness re-

views of current special permit holders to assure compliance with the permit terms and a review of expired permits; contracting for an independent risk assessment of explosive mixing trucks in transportation; reviewing documentation, including safety assessments and analysis, to ensure that documentation supports the issuance of a special permit; and rescinding any special permit authorized for a holder who is considered unfit to safely transport these materials. Our action plan will evolve and update as necessary.

As I mentioned, I was briefed late last week by your staff on the findings of the Committee investigation. You identified specific concerns. These are concerns that the Secretary and I share, including that our data analysis capability is totally inadequate to ensure that the hazmat program is data driven and able to focus on the greatest hazards. I want to assure the Committee that we will work with you to address all of these important issues that you so diligently raised.

The rest of that is submitted for the record. I would conclude by mentioning the lithium battery regulation. The Committee has expressed interest in the notice of proposed rulemaking on lithium batteries. It is clearly a very important issue. The Department has forwarded to OMB a notice of proposed rulemaking yesterday for review on that, and we will continue moving on that as well.

Finally, and perhaps most importantly, safety culture, which, Mr. Chairman, you clearly listed in your opening remarks. Re-establishing a safety culture is perhaps the top priority. It is an ongoing effort. We expect, within the next 90 days, the employees will once again view the organization and its leadership as strongly committed to its safety mission.

The fact that Secretary LaHood has specifically detailed me to oversee this I think is an indication of how serious we take this. We will, again, revise procedures; we will update requirements; we will institute new rulemakings where appropriate. Our first priority is and will continue to be safety. We will not tolerate agency actions that undermine our commitment to safety and we will rescind or deny renewal of permits for unsafe actors.

Thank you. With that, I will be happy to answer any questions.

Mr. OBERSTAR. Thank you very much, especially for those closing comments about addressing the need for a culture of safety at the agency. I would suggest a re-education session for them. There are some very good actors and very good conscientious personnel, and there are others who need to be retrained, who look to the trade association representatives for guidance, not to their leadership for guidance. That chain has to be broken, and that will take the Secretary's leadership, which he has already indicated, and yours, as you have already undertaken.

Your DOT action plan I think is excellent. I don't see anything there about association special permits, however. Have you addressed that issue?

Mr. PORCARI. Mr. Chairman, no permits will be issued to associations. We are in the process of, as part of the action plan, of making it clear that permits are not issued to associations. After appropriate review, they are issued to companies.

Mr. OBERSTAR. Does that mean that the Department will terminate those 12 association authorities?

Mr. PORCARI. We are in the process of and will modify, terminate, whatever is necessary to make clear that each of those permits and every permit is to an individual company, not to a trade association.

Mr. OBERSTAR. Report back to us when you have completed that.

Mr. PORCARI. I will be happy to do that.

[The information follows:]

SPECIAL PERMITS ISSUED TO ASSOCIATIONS
(Oberstar question; page 37 of transcript)

QUESTION: You are clarifying that special permits are issued to member companies and not associations. Have you completed the process of adjusting special permits documents to specify that each special permit is issued to an individual company rather than an association?

ANSWER:

- PHMSA"s policy has never been to issue special permits to associations or organizations. Unfortunately, erroneous language was inserted to special permits seemingly giving a special permit to a trade association on behalf of its members. Several steps have been taken. First we issued policy/guidance on August 14, 2009, clarifying for both current and new grantees that special permits are given to individual business entities and not trade associations and that responsibility for compliance falls directly on the member who is authorized to perform specific functions under the terms of the special permit.

- Second, we have reissued each erroneously issued special permit to assure that there is no language in any permit giving any trade association a special permit. September 4, 2009, all special permits issued to members of associations or organizations specify that the special permit is issued to an individual member rather that the association or organization and that each member is responsible for compliance with the terms and conditions of the special permit.

Mr. OBERSTAR. In the opening chapter of the law governing transportation of hazardous material, section 5101 states the purpose of this chapter is to protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce.

That is a rather unequivocal statement, yet, the trade industry witness says the law says that PHMSA regulates against unreasonable risk. That is a misstatement of the law. In section 5103, general regulatory authority, in the subsection designating material as hazardous, Secretary shall designate material—and it lists the various types of materials—as hazardous when the Secretary determines that transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property.

Do you have some recommendations for amendment of that provision?

Mr. PORCARI. Mr. Chairman, if there is something that we are not doing there consistent with the overall safety mission, we will modify it and do whatever we need to.

Mr. OBERSTAR. That is the current statutory language, form that may pose an unreasonable risk to health and safety or property. That is not the way safety is conducted or directed in the FAA Act.

Mr. PORCARI. That is correct, Mr. Chairman.

Mr. OBERSTAR. Safety, in the opening paragraph of the FAA Act of 1958, the directive is safety shall be maintained, safety in aviation shall be maintained at the highest possible level. It doesn't say acceptable or unacceptable risk; it sets the bar very high. And I invite your reconsideration of this language to something that is measurable. This is a very subjective statement in law, and we have the opportunity and the authorization of surface transportation law to make appropriate changes. So I would like your attention to that issue and report back to the Committee.

Mr. PORCARI. I would be happy to do that, Mr. Chairman. Again, safety as a culture is also an ongoing process, there is not an endpoint to it, and, in many ways, the Federal Aviation Administration is the leader in the Department in that. I should point out that Secretary LaHood has directed us to take other measures beyond the subject of the hearing today to institute safety as a Department-wide cultural imperative, and when we say safety is our number one priority, these are specific measures to make sure that that is the case across the board.

Mr. OBERSTAR. I welcome that initiative. I welcome the Secretary's firmness; he is a person of purpose and driven, and he will achieve results. He is no-nonsense.

Inspector General Scovel, why special permits? Why the modifications? Why 120 new special permit applications every year? Why some 100 modifications, from your testimony, to existing—I think maybe that is the Department's testimony—to existing special permits? Why 1,100 renewals? It seems to me that there is an inadequate structure to begin with. It seems to me that there is haphazard, a case-by-case approach to the regulation of safety in this agency.

Mr. SCOVEL. Mr. Chairman, we have had our audit ongoing for the last 14 months into PHMSA's Special Permits and Approvals

Program. It quickly became obvious to us, first from the sheer number of special permits and approvals—5500-plus permits, 118,000-plus approvals—that it appeared that the innovations and the advancements and the improvements that industry has come up with for the transportation of hazardous materials has essentially swallowed the body of law that is contained in the hazardous materials regulations in the Code of Federal Regulations.

The Department hasn't had a structure in place, a strategy in place to bring in the techniques and advancements represented by the special permits and approvals, to bring them into law. As a result, exemptions to the procedures and processes specified in the regulations have been granted in the form of these special permits and approvals. One of our strongest recommendations to the Committee and to the Department is that it establish a strategy for methodically, and in a disciplined way, bringing the current technology, the current practice, industry practice into regulations so that the entire practice of special permits and approvals can be brought under control.

Mr. OBERSTAR. That is a very important, very strong suggestion, and one that we will follow up on.

This is a special permit issued by the Pipeline Hazardous Materials Safety Administration. It was granted to a particular company plus 84 other cargo carriers. It authorizes transportation in commerce of hazardous materials in an inaccessible location aboard an aircraft. Inaccessible meaning the crew can't reach that place to put out a fire.

We heard this in the ValuJet crash with the oxygen bottles carried loosely onboard, not protected individually, not secured, and placed inside a tire that the aircraft was carrying to another destination. And when they exploded, that tire caught fire and provided fuel to the fire and brought the aircraft down and lost lives.

Now, the crew was in no way able to access that compartment, they were not aware that those oxygen bottles were onboard, they were not aware that onboard they were not secured or isolated one from the other; and that was 15-plus years ago. You would think that somebody had learned a lesson in the meantime. Apparently not. Explosives, flammables, poison, corrosives covered by this special permit. And it specifically says in any inaccessible compartment. How can they justify that? Did you talk to them about that, Mr. Scovel?

Mr. SCOVEL. We did not. We know that that is a particular concern of NTSB's with regard to the transport of lithium batteries in inaccessible locations aboard cargo aircraft. As the Committee may know, cargo aircraft aren't required to have fire suppression systems, and, in fact, the standard fire suppression system aboard any passenger aircraft isn't capable of suppressing most lithium battery fires should they happen in a passenger aircraft. It is a particular concern.

One of NTSB's key recommendations, in our view, is that when lithium batteries are to be carried in inaccessible locations, that they be carried in fire-resistant containers. NTSB has been fighting this battle for 10 years; it is still not satisfactorily resolved, in our view.

Mr. OBERSTAR. That is just unacceptable. There are many others. I will conclude for the moment on this one. Issued November 9, 2006, this emergency special permit authorizes transportation in commerce of nitric acid, etcetera, etcetera. It waives the requirements for marking, for labeling, for shipping papers; waives the requirement for aviation stowage requirement; it waives the requirement for notice to the pilot in command. In November 1973, nitric acid carried aboard an aircraft on a PanAm Airline aircraft resulted in emergency landing in Boston and three crew were killed.

The argument that there are only a few of these, until someone's life is lost. Now, if you are operating in a haphazard structure and comforting yourselves saying we haven't had many fatalities, only a few or it is only rare, then try being one of the family members. Try putting yourself in the position of those who have lost a loved one or being aboard one of those horrible accidents and dying a painful death. That is not acceptable.

Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman.

Mr. Scovel, I think we all agree, especially on the heels of what the Chairman said, that there has been haphazard, the process hasn't been in place that needs to be; we have uncovered a lot of shortcomings and failings at PHMSA in its record-keeping and the like. I don't know that I have seen it, but can you assess the overall safety record within the hazmat materials movement industry? What is the assessment of the IG's Office on the overall record?

Mr. SCOVEL. Mr. Shuster, I can't speak to the overall record of the industry as a whole. The focus of our recent audit has been the Special Permits and Approvals Program administered by PHMSA itself. We have found serious deficiencies in the program design and execution of the Special Permits and Approval Program that leads us to question, frankly, whether there has been the exercise of due diligence in that particular office within PHMSA and the safety culture, the understanding of safety culture within that office. My recent work wouldn't qualify me to speak to industry practice, however.

Mr. SHUSTER. It would seem to me that would be an important part of the IG's role, to assess the situation and what are the outcomes, good or negative. Again, the records I see are that it is still a remarkably safe record, in spite of the fact that the process is flawed and failed and needs to be improved.

You mentioned something about these special permits, that the advances in technology and improvements in industry have swallowed up the law. Can you be more specific? That sounds like a positive—well, it sounds like the law is lagging way behind and needs to be changed because there have been advancements in the industry. Can you address that more specifically?

Mr. SCOVEL. Yes, sir. In fact, I can give you an example. The hazardous materials regulation specifies a procedure for carrying certain hazmat in rail tank cars. In fact, the process for that that is specified in the regulation has been overtaken by events within the industry; a much safer rail tank car is now standard within the industry. By our accounts, it has an excellent safety record. Yet, the regulation itself hasn't been updated to incorporate the new

technology. Rail companies still need to apply for and renew special permits to use the latest technology instead of the older one.

To return to your earlier question, sir, about practice within the industry, I can say, from our experience with trade associations and the agency's practice of granting special permits to trade associations, that those bodies have not been diligent across the board either in keeping their members up to date on what the permits entail, indeed, even whether certain members are the recipients, through their trade association, of permits to begin with.

And we have had experience in our field visits with companies that told us, in fact, that they had recently been informed in kind of a good news-bad news phone call from their trade association, good news, oh, that practice that you have been engaged in for some time now, carrying hazmat in a particular manner, we forgot to tell you have a special permit, so you may be covered; bad news, there may be a team of OIG auditors on the way to check and see how you are carrying it out.

So I suppose that is an indicator of some sort on the state of play within the industry or at least how certain trade associations view their responsibilities.

Mr. SHUSTER. I would hope these trade associations, one of their roles should be informing and help to keep that industry up to speed on where safety issues are, and I think the trade industry is not doing that, is failing their membership significantly.

Mr. Scovel, do you believe that PHMSA's action plan addresses most of the concerns that you have raised?

Mr. SCOVEL. It does address most of the concerns and we are very grateful to Deputy Secretary Porcari and Secretary LaHood for their leadership at the top levels of the Department in bringing home to PHMSA the importance of both our findings and the Committee's staff's findings regarding deficiencies, in our case, of special permits and approvals. We do recognize, as we work through the action plan, that at this point it is rather high level. It has a list of actions, it has a time line for carrying those out. Of course, we recognize it is a work in progress; the Department will need to add detail to it, they will have to tag resources to actions, they will have to recognize limitations and develop strategies to overcome those.

The Chairman questioned the Deputy Secretary on an omission from the action plan regarding a plan to address special permits issued to trade associations. Frankly, it is not clear in my mind that PHMSA or the Department is going to follow up with all 5,000-plus individual members of trade associations who may have derivatively received special permits. The agency basically has to follow up with an individual fitness determination in the case of every single company, and we hope the Department will commit to that level of effort.

Mr. SHUSTER. That is going to obviously take resources. If I could, just one final question. Are the resources in place? I guess that is not a fair question; they are not in place, whether they are human resources or technological advances. Have you assessed is it going to take a lot more personnel or can you overcome some of these shortcomings by technology?

Mr. SCOVEL. It will take a combination of two, Mr. Shuster, certainly technology, better data systems are required. The Deputy Secretary acknowledged that in his statement to the Committee. It is going to take time and a strategy. Frankly, some sizeable number of those special permit holders that have received their permits supposedly through their trade associations, a good number of those aren't engaged in those practices at all, as we have learned in our field visits. Some of those can be sliced off the top. There will be some number, however, who are left who are engaged in the practice. The agency hasn't done an individual fitness determination in the cases of those companies and they need to get to it.

Mr. SHUSTER. Backtrack there a little bit. You said there are some companies that are doing a good job? Is that what I understood you to say?

Mr. SCOVEL. Yes. If I can be specific. As part of our examination of this practice of granting permits to trade associations, we visited 18 companies that belong to 7 of the 12 trade associations. We found that 10 of those 18 were not performing the activity in the special permit. So not applicable, they may be cut off from the permit, no further review needed.

Four companies were not located at the address provided by their association. Association clearly not on the ball. They didn't know, PHMSA doesn't know. That needs to be updated. Three companies, 3 of the 18, had compliance issues we found regarding shipping papers, training, security plans; and these are essential plans of any comprehensive hazmat program. Two companies didn't know that a special permit applied to their activities. Sir, basically, we found that one company out of the 18 appeared to be in compliance with the terms and conditions of the special permit.

Mr. SHUSTER. Thank you very much.

Mr. OBERSTAR. Those last comments are very powerful, very revealing, and troubling; more than troubling, disturbing. In further response to Mr. Shuster's question about safety, my dictum has been that safety begins in the corporate board room; not in the regulatory agencies, not in this Committee, and not in the Congress. It begins in the corporate board room. They have the first responsibility. Airline executives have that first responsibility.

But the role of safety in aviation goes back to 1926 and Herbert Hoover, when he was Secretary of Commerce, and more in the interest of developing aviation as a commercial activity than for safety of personnel. There was only the pilot, there was no passenger air service in those days. But he initiated the first aviation safety rulemaking of the Federal Government in 1926 as Under Secretary and later Secretary of Commerce.

In those days, it was not uncommon for a wing to fall off an aircraft in flight. It was not uncommon for an engine to fall off the aircraft in flight. That was bad manufacturing. But it went back to the corporate structure of being safe before you put an aircraft out in flight.

So there is and there are examples in explosives material transportation of board rooms with a culture of safety. I visited one over the past weekend in my district, where they typically handle 300,000 pounds of explosives a day during the mining years. They are very meticulous. They supervise their drivers; they put them

through training and retraining procedures. They have worked to perfect the transport vehicles themselves. I talked with every one of the drivers individually, apart and away from the company management. They are doing their very best. And they question the regulatory structure that is in place. They are doing what they think is the best practice.

And then as to the incidents, here is a report, an internal document in PHMSA, May 11, 2007, estimating the extent of under-reporting of hazmat incidents. There are many reasons to suspect that carriers are under-reporting hazmat incidents. It goes on in the opening paragraph, preliminary conclusion, the incidents that are reported to us might represent only 10 to 40 percent of all incidents that are actually occurring. That would mean that we are missing from 60 percent, that is, 26,000 incidents a year, to 90 percent, that is, 151,000 incidents a year. Our database reflects only 17,000 incidents a year.

From 2006 to June 2009, there were 1,450 unreported and only 7 enforcement actions. That is not a culture of safety. That is not carrying out your responsibility. This was an internal report and wasn't acted on by senior management; they just dismissed it.

Next, Ms. Brown.

Ms. BROWN. Thank you.

First of all, let me thank both of you gentlemen for your leadership in this area. As we begin to do the reauthorization, I guess a couple of things point out in my mind. First, I want to start with you, Mr. Secretary. My staff used a strong word, termination. I don't want to use that. I think the leadership should decide on whether someone should be terminated.

But I do think it should be some kind of a shakeup or a moving of the chairs. What has happened in the agency? Because I understand that there has been contact with the companies, letting them know investigations are going on. What is it that people in the agencies need to understand that safety doesn't have anything to do with who is in the Administration. Everybody needs to do their job.

Mr. PORCARI. It is an excellent question, ma'am. First, it starts at the top. As Deputy Secretary, I am directly engaged in this. I will stay engaged. I am not going away. It is a process that, as the Inspector General pointed out, as we go forward with the action plan, we will get into more and more detail.

Building a culture of safety and keeping that culture of safety in the agency is going to require that message from the top. We will shortly have a nominee as the administrator. That is an important part of the puzzle. The working relationship between the special permits process, the enforcement process, our sister agencies within DOT and referrals, all of those need to be fixed and will be, and we will make the organizational and personnel changes necessary to carry this out. Again, this is a public trust issue, it is a fundamental responsibility. These are substances that are necessary for our everyday lives and for our economy, but we are committed to doing this safely. It is, I think, clear that we took our eye off the ball at some point. We are focused like a laser on it now.

Ms. BROWN. Well, I want to thank you for your leadership in this area. As I said earlier, we have had hearings all over the Country

where these issues of hazardous materials coming through the community, whether it is the firemen that were talking to us when we went to Mrs. Napolitano's district, whether it was the elected officials, this is the issue that comes up. They are concerned. They want to know and they want to know that we are doing our job and we have the oversight. So I am very interested in what recommendations you think we need to put in the bill to make sure that we have the safeguards there.

Mr. PORCARI. It is clear, as, again, the Inspector General pointed out, from the size of the body of special permits that it is difficult to keep up with changing technology and the state of the art, and at the same time, as the Chairman pointed out, the level of safety and the requirements for safety, that bar is getting higher with time, as it should. I look forward to working with you through the authorization process because it really is an opportunity to fundamentally reevaluate where we are now, where we should be, and how that authorization can be one of the mechanisms to get there.

Ms. BROWN. I understand there are only 35 employees. It is not that I am interested in revving up, but we want to know that we have the appropriate number and we can use the new technology.

Mr. PORCARI. Staffing is certainly a part of it. Data is a very important part of it. Any safety process where you have safety management systems and you have a culture of safety, you can't do that without the proper data and mining and analyzing that data correctly. We are way behind the curve on that; that is clearly one of the most important parts of the effort here.

Ms. BROWN. Thank you.

Mr. Inspector General, thank you again for your leadership in this area. You have done a good due diligent job in keeping us informed and doing the oversight that is needed. I guess my question to you, in listening to the staff, they indicated there were eight serious violators that have—you know, when we did the research, they really have violated all of the rules. What can we do to flag them today as we speak?

Mr. SCOVEL. Ms. Brown, I would have to consult with my staff and probably Committee staff as well to understand those individual cases. However, if I can generalize by saying that, as the Deputy Secretary has acknowledged, proper acquisition of data, proper use of that data is a problem with PHMSA. As that problem is fixed—and I am very confident that, through the Department's leadership, it will be—that violators of the type you describe can be identified.

At that point there needs to be a very careful, a very diligent effort to make sure that, as part of the risk-based oversight system that PHMSA, like all modes in DOT, must employ, that those violators are flagged for further compliance reviews and, if necessary, any permits or whatever are terminated, suspended, addressed in the appropriate fashion as provided for due process and by regulation.

Ms. BROWN. Do you think that the Department of Transportation has the tools that they need working with other safety organizations to do the job for the communities that we represent?

Mr. SCOVEL. Not yet, ma'am.

Ms. BROWN. OK.

Mr. SCOVEL. And the Department itself has acknowledged that, both in terms of staff, perhaps numbers—I don't want to prejudge that, but in terms of staff outlook or safety culture, their training most certainly, because, in all fairness, some of these practices that we highlighted in our statement for the Committee today developed many years ago. For instance, the oldest trade association special permit that we identified dates back to February 1994, and it has become a practice, apparently, that nobody has questioned until now. So the current crew in Special Permits and Approvals, they have been working with what they have been given. They certainly need to be re-educated and retrained.

Ms. BROWN. Well, I am very interested in what your recommendations are as far as what we need to do as we develop and move forward on the reauthorization bill.

Thank you again for your leadership, both gentlemen.

Mr. SCOVEL. Thank you, ma'am.

Ms. BROWN. [Presiding] Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Madam Chair.

I am listening with great intent on the hazardous transportation of materials. In my particular area, we do a lot of chlorine because of water treatment plants that we have and others. Years ago, I went to one of the chemical companies to see how they were transporting chlorine. At the time, the transport tubs that were plastic were not double-walled. They were beginning to get into double-walled.

Well, that poses a great concern because they travel by truck to get them to these areas after they unload them from the railroad. Concern is there is the current thinking that there is a substitute to chlorine or that they should move the chlorine generation plants closer to the sanitation districts or to the water districts for being able to avoid these long transportation areas or having to transport them long distances.

Are you, in any way, shape or form, aware of anything that they are doing in transportation of chlorine gases?

Mr. PORCARI. Ma'am, I am not personally aware of any changes in the transportation of chlorine gases. What I would like to do is actually get that information to you and provide it to the Committee.

Mrs. NAPOLITANO. It would be very helpful, because I work with the Councils of Government and three of them represent probably about seventy-some odd cities out of the 85 in Los Angeles County alone, and they are all very, very concerned about any releases in their area because it is so compact.

[The information follows:]

SAFETY AND SECURITY OF CHLORINE SHIPMENTS
(Napolitano question; page 55 of transcript)

QUESTION: Chlorine poses a great transportation safety and security concern. Some suggest that we should identify a substitute for chlorine or move chlorine plants closer to the facilities where it is used. What is DOT doing to address these safety and security concerns?

ANSWER:

- Chlorine is one of the more stringently regulated hazardous materials. It is a poison gas (a material poisonous by inhalation or PIH material) that is lethal in relatively low concentrations; an uncontrolled release can endanger significant numbers of people. Most chlorine transported in the United States is transported by rail.

- Chlorine is transported to water treatment in one of several ways. Large plants (serving 10,000 or more people) generally have rail service where tank car shipments of chlorine are delivered. At medium sized facilities, shipment of chlorine may be made by truck using very large cylinders (ton tanks). At small facilities, smaller cylinders are the preferred means for obtaining chlorine for water purification.

- DOT's hazardous materials regulations require persons who offer for transportation or transport certain hazardous materials, including PIH materials such as chlorine, to develop and implement security plans addressing, at a minimum, personnel security, unauthorized access; and en route security of the hazardous materials. In addition, security plans much include an assessment of possible transportation security risks and appropriate measures to address the assessed risks.

- In the past year, DOT has published two final rules intended to significantly enhance the safety and security of rail shipments of chlorine.

- On November 26, 2008, PHMSA established regulations to require railroads to use the safest most secure routes to transport certain explosive, radioactive, and PIH materials, including chlorine.

    - Beginning July 1, 2009, railroads must annually collect and maintain data on the numbers of these shipments along its routes; seek relevant information from state, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to these routes; and use the data to conduct a risk analysis of the routes used and all available alternative routes.

- Using the results of the route analyses, the carrier must select the route posing the least overall safety and security risk. The initial route selections must be made and implemented by September 1, 2009, or March 31, 2010 (depending on whether the carrier chooses to analyze six or 12 months of shipments, respectively).

- On January 13, 2009, PHMSA published a final rule to implement enhanced safety measures for the transportation of PIH materials by rail. The rule mandates commodity-specific improvements in the design standards for newly manufactured tank cars used to transport PIH materials and imposes a 50 mph speed restriction for tank cars loaded with PIH materials. In addition, the final rule mandates an improved top fittings standard to ensure that top fittings can withstand conditions encountered in a derailment.

- The Transportation Security Administration (TSA) published a final rule on November 26, 2008, to enhance the security of rail shipments of explosive, radioactive, and PIH materials, including chlorine. The TSA rule, developed in cooperation with DOT, requires railroads to implement enhanced chain-of-custody requirements for rail shipments of PIH, explosive, and radioactive materials in High Threat Urban Areas to ensure that no car is left unattended as it is transferred from shipper to carrier, between carriers, or from carrier to consignee.

- For highway transportation, DOT regulations require chlorine to be transported in extremely robust packagings and to be identified with marks, labels, and shipping documentation that clearly state the hazards of the material and procedures to be followed in the event of an emergency. In addition, motor carriers that transport chlorine must obtain a safety permit from the Federal Motor Carrier Safety Administration (FMCSA). To obtain the permit, the carrier must have a "satisfactory" safety rating and a security program that includes a security plan and a communications plan that provides for periodic contact between the vehicle driver and the carrier. FMCSA regularly assesses the safety performance of the motor carriers operating under safety permits. Failure to comply with the provisions of the regulations and/or a special permit can result in suspension or revocation of the FMCSA-issued safety permit.

- Chlorine truck drivers must pass a finger-print based, security background check conducted by TSA.

- The Department of Homeland Security has implemented Chemical Facility Anti-Terrorism Standards (CFATS) that apply to facilities at which chlorine is used and stored. CFATS establishes risk-based performance standards for the security of our nation's chemical facilities. It requires covered chemical facilities to prepare security vulnerability assessments that identify facility security vulnerabilities, and develop and implement Site Security Plans that include measures to address the vulnerabilities identified.

- Chlorine is used as an elemental disinfectant for over 84 percent of large drinking water systems (those serving more than 10,000 people). It is our understanding that although the industry is exploring several alternatives to chlorine for water disinfection; however, none are feasible on a broad scale as yet.

    - For example, bleach could be used for water purification, but it would require much larger quantities than chlorine and is limited by a short shelf-life and decreasing effectiveness over time.

    - In Europe, ozone is used to purify water, but using ozone for water purification is not feasible in the United States because of restrictions imposed by EPA.

    - One example of a product substitution for chlorine occurred at the Blue Plains Wastewater Treatment Facility in Washington, DC. The facility switched to sodium hypochlorite, which is a safer alternative. However, utilizing sodium hypochlorite instead of chlorine at existing water treatment plants requires modifications to plant equipment and presents additional issues related to the physical quantity of the product required and storage of that product (in hot environments sodium hypochlorite must be stored in climate controlled areas). Accordingly, these requirements limit the practicality of converting existing chlorine water treatment facilities to sodium hypochlorite facilities.

- We agree that an effective means of reducing transportation risk is through shifting the supply chain model to enable co-location of small production chlorine facilities at existing chemical plants. By co-locating chlorine production facilities at locations where a certain amount of the chlorine can be used companies can reduce transportation to minimal requirements and ensure sustainable long-term supply streams for local communities that increase sustainability and recoverability after natural disasters. We will be monitoring a new project being undertaken by the Department of Homeland Security Chemical Security Analysis Center (DHS CSAC) looking at the broad concept of inherently safer technology. This will include assessing the risk of hazardous chemical release in storage, use, and transportation.

- In accordance with 49 U.S.C. § 333, FRA has conducted an on-going conference to permit railroads, hazardous materials shippers and receivers, as well as federal officials to study the feasibility of and benefits from potential coordinated industry approaches (e.g., market swaps, changes to shipping patterns, co-location of plants at end user locations, and product substitution) to reduce the rail ton-miles of PIH materials (including chlorine), and to further mitigate the safety and security risks associated with the rail movement of the materials on a system-wide basis. FRA will continue to make the conference available to the railroads to jointly evaluate the safety and security risks associated with rail movements of

high-risk hazardous materials across the entire rail system, and to evaluate risk-reducing arrangements on a national scale.

The other question I have is the hazmat placards on rail cars. That has been an issue in my communities for the last 15, 20 years, that I know of. Some railroad companies supposedly are looking to get rid of the hazardous material placards on railroads and keeping them within the engineer's cab. To me, that is ludicrous, because what if that particular train piece is injured or derailed, or in smoke, whatever? Then how are the hazmat folks being able to respond what is on that train?

Mr. PORCARI. Ma'am, the placarding is an important part of the safety process, knowing, as you point out, what is in that particular rail car or in that container. I am not aware of any pending waiver of those requirements, but, again, what I would like to do is go back and check that and report to the Committee.

Mrs. NAPOLITANO. OK. It seems to me there was some discussion, particularly on this Committee, a couple years ago in regard to the viability of being able to do away with them because of the terrorism issue, that they could target those particular cars. So that is what brought that particular issue. But I would really appreciate it if this whole Committee would be able to get that information.

Mr. PORCARI. I would be happy to do that.

[The information follows:]

RAIL CAR PLACARDING
(Napolitano question; page 56 of transcript)

QUESTION: Is DOT considering waiving placarding requirements for rail cars transporting hazardous materials?

ANSWER:

- No. Removing placards from rail cars containing hazardous materials would significantly inhibit state and local governments' ability to respond effectively to hazardous materials accidents and place fire-fighters, police, and other emergency responders at risk. Further, removing placards will make it more difficult for transport workers to assure that hazardous materials are handled safely and efficiently. Placards are the simplest and most effective way of communicating critical hazard information.

- On January 15, 2003, PHMSA completed a study of the role placards play for transportation safety and security. The study reviewed the use of placards to enhance hazardous materials transportation safety and evaluated both operational and technological alternatives to placarding. The study concluded the existing placarding system should be retained, but DOT should continue to review the use of operational procedures and technological developments as security enhancements and as alternatives to placards in specific high-risk situations as well as for broad application. DHS conducted a similar study and came to the same conclusion.

Mrs. NAPOLITANO. I am assuming that you work with the local entities like the Public Utilities Commission and the hazmat areas to request from them information about situations where it may not be reported by the carriers, whether it is rail or truck.

Mr. PORCARI. One of the deficiencies we have right now is actually gathering that kind of data to make sure that we have comprehensive information on incidents that may not otherwise be reported. We know that is one of the activities that we have to do a better job on and that is part of what we want to do going forward.

Mr. SCOVEL. Thank you, Mrs. Napolitano. Perhaps our work can shed a little bit of light on your concerns. Signage and placarding are tremendous issues when we are talking about any first responders, police or fire and so forth. As part of our examination of special permit or approval holders, we visited 27 companies in the field, and we found that 59 percent of them were not in compliance with at least some of the terms of their special permits, and those special permits specified the type of signage or placarding that would be required for that mode of transportation and that particular hazardous material, and signage problems were prominent among those that we identified among those special permit and approval holders.

Mrs. NAPOLITANO. Well, this concern came out from one of the local fire departments, who has a cooper rating, and one of the firemen lived in the general area where one of the BNSF trains would go by. He said he couldn't identify the hazardous placards. So, to me, that shows that there is no cooperation between them to be able to help standardize them so they can be recognized.

Then the last question very quickly is budget and personnel. While I know that you are short, there are not that many inspectors that you have, what will help to be able to ensure that we continue to focus on public safety?

Mr. PORCARI. As you correctly point out, ma'am, there are budgetary implications to this. We are looking at that right now, both personnel issues, the information technology needs, and there is substantial cost involved with that. In the conversations I have had with the Secretary on this topic, he has made it very clear that safety is paramount, that we need to, as we are working through the budget process on a multi-year basis, make sure that that is reflected in our priorities. We are in the process of sorting that out right now.

Mrs. NAPOLITANO. Thank you, Madam Chair. I think that would be very good information for the Committee.

Ms. BROWN. Thank you.

We are going to stand in informal recess for about 30 minutes. We have three votes and we are going to start with my friend when we come back. OK? All right, we are in informal recess.

[Recess.]

Mr. OBERSTAR. [Presiding] The Committee on Transportation and Infrastructure will resume its sitting. Apologies to all witnesses and Members and others for the over-long interruption by votes on the House Floor.

There are a few things yet to be reviewed. What troubles me, Mr. Secretary and Mr. Scovel, is this June 16 request or previously the

decision was made by Pipeline and Hazardous Materials, a request from FAA to test the compliance of various airlines' hazmat handling procedures. The FAA made that request in 2005, August of 2005.

It took nearly a year for the Office of Pipeline and Hazardous Materials to respond, and they denied the request of FAA to undertake compliance testing of their airlines' hazmat handling procedures, while at the same time approving a number of special permits and extensions and approvals, which are a curious component of this agency's operations.

How in heaven's name can they justify that conduct? The words of the denial are your application did not contain information to demonstrate that your proposal would be in the interest of the public. How can it not be in the interest of the public for the Federal Aviation Administration to conduct compliance review of airlines' participation in and compliance with movement of hazardous materials, especially in the aftermath of the Value Jet crash, especially in the aftermath of other incidents that we know about, that I know about of hazmat movement onboard aircraft?

Do you want to start, Mr. Scovel?

Mr. SCOVEL. Mr. Chairman, if I may, I confess I have no answer to you. We are as mystified as you appear to be by PHMSA's response to FAA's request. I will simply note that FAA's request was taken in response to a recommendation contained in our 2004 report, which examined FAA's own hazmat program. FAA, to its credit, accepted that recommendation, concurred in it and attempted to move out, and apparently was stymied by a PHMSA decision.

Mr. PORCARI. Mr. Chairman, likewise, I cannot explain the decision at the time. I will tell you, having been made aware of it and looking into it, it does not make sense to me. I have recently asked the FAA if they still believe it is worthwhile doing this and they want to do it. They have indicated yes and we are going to go ahead and do that.

If there are concerns about crew members, for example, being confused by this labeling, if that was the concern, we can certainly make accommodations to notify the crew as to what is going on. There are ways to do this. My observation is I thought it was actually a very valid and useful way of actually testing some of the processes and making sure that the labeling, packaging, and placement was correct. So FAA is interested in doing it; we are going to go ahead and do that.

Mr. OBERSTAR. Thank you for that response, but I would read from the request. The background, as Inspector General Scovel just said, the FAA says that the Department of Transportation's Office of Inspector General conducted an audit of FAA's hazardous materials program, issued a report and recommended that FAA develop and implement a covert testing program. That information was submitted to PHMSA.

Further, FAA said that the FAA plans to "package, mark, label, and document the shipments as if they were normal shipments of hazardous materials, but, for safety reasons, no actual hazardous materials will be used in conducting the covert tests." That is the responsibility of the agency, to test, to test their own people. They

conduct internal reviews, audits, and evaluations of FAA maintenance inspection personnel, procedures, activities.

This is an appropriate way to see whether the agency is doing its work, whether the airlines are doing their work; and they were denied, at the very same time that this agency approves hundreds of special permits for the industry to carry real hazardous materials.

All right, thank you for proceeding with that issue and getting FAA back on track to doing their responsibilities.

This is a good lead into the weaknesses found in the processing of approvals. The Inspector General's staff has found this; the Department is aware of it; our Committee investigative staff spent a good deal of time reviewing these. Approvals are different from special permits. An approval can be issued only if there is a specific provision in the regulation that allows the Office of Hazardous Materials to provide relief from a particular regulation. But consistently there is no showing of the need for that special approval, why the relief is requested, and it seems that while special permits have a limitation, there is no limitation or time limit on the approvals.

Mr. Scovel, you have spent a good deal of time on that issue. What are your recommendations?

Mr. SCOVEL. Mr. Chairman, we have a number of recommendations pertaining both to special permits and approvals. Our recommendation, if we were to speak very generally to the approval process, is that, like special permits, there needs to be a clearly defined and uniform approval application process, preferably web-based. We have met, my audit team has met twice with representatives of industry and this is one request that they have pointedly addressed to us, not expecting, of course, that we were in any position to approve it, but certainly hoping that we might incorporate it into our recommendations for the Committee's and the Department's consideration.

Mr. OBERSTAR. Mr. Porcari?

Mr. PORCARI. Mr. Chairman, I agree with the clearly defined and uniform part of it. We owe consistency and predictability and transparency. That starts with asking the right questions and making sure that we have a comprehensive application that includes all the details that it needs to have. We clearly do not have that in all cases now. That is one of the things, going forward, that I know that we can do very quickly and will do quickly.

Mr. OBERSTAR. These approvals are not published in the Federal Register. Will you direct the agency to do that in the future?

Mr. PORCARI. The approvals are required to be in the Federal Register; they will be in the Federal Register.

Mr. OBERSTAR. Have you sent a directive to PHMSA to do this or you just told them verbally that that is what they will do?

Mr. PORCARI. I believe that they are required in the Federal Register.

Mr. OBERSTAR. Yes, they are, but they are not published; they haven't been.

Mr. PORCARI. If they are not published, we will make sure that they are.

Mr. OBERSTAR. And once a year PHMSA publishes its final action on special permit applications. Once a year. That is not transparency, openness. That ought to be concurrent with their action.

Mr. PORCARI. Mr. Chairman, we are clearly living in a different era, where it is a lot easier to be transparent. And when we are reporting basically in real-time on contacts that we are having in meetings, we can certainly have better than annual reporting on our permitting process. Again, having it web-based is one of the ways to do that.

Mr. OBERSTAR. Now, an issue consistently over 20-plus years with this agency, the pipelines activity was grossly under-funded in the mid-1980's. I authored language in Committee and then on the House Floor in the appropriation process to increase the number of inspector positions for the pipeline inspection program, Federal and State, and increased funding for them. That has deteriorated over time and fallen off. Overall for the agency, first of all, how many inspectors does the agency have now for all of its activities? And both Mr. Scovel and Secretary Porcari, what are your recommendations for staffing improvements and increases?

Mr. SCOVEL. Mr. Chairman, Deputy Secretary Porcari may have more recent information than I do, but my audit team, in the course of the last 14 months, determined that, at the time of their addressing this question, there were 35 inspectors on PHMSA's staff, as has previously been noted here on the record, that are responsible for 300,000 or so entities transporting and shipping and packaging hazmat.

Our staff, we have kicked around the question of how PHMSA can gain better control of this inspection process. Certainly, the number of inspectors is one key target. As you well know, sir, FAA has wrestled with the same question in connection with their inspection process. It is universally acknowledged there can never be enough inspectors; however, with the proper risk-based oversight system and with the proper staffing study, both of which we think are now currently missing from PHMSA's effort, they can better leverage what they have.

It is also worth noting, sir, that the other modes in the Department, FMCSA, FAA, FRA, as well as various States, have inspector resources. PHMSA must better integrate those resources and leverage them together because they will never have enough inspectors of their own. But it is a multi-phased and a multi-pronged effort that PHMSA needs to undertake in order to strengthen its inspections.

Mr. OBERSTAR. So intermodalism would be a benefit to the entire inspection process. In the surface transportation assistance bill that we have reported from Subcommittee, I create a council on intermodalism and an under secretary for intermodalism, and require a monthly meeting of the modal administrators, among other responsibilities, to develop a national strategic safety plan to integrate the competencies of all the modes on safety; and, if we get this bill enacted, that will be a requirement and will be on the top of the priority list.

Meanwhile, you don't have to wait for that. Meanwhile, you can bring those modal administrators together and ask them to develop a common safety plan and how to harness the resources of—it

should be—it has been said many—one department, one DOT, everyone pulling together. So intermodalism will be a way to do that.

Mr. PORCARI. Absolutely, Mr. Chairman. First, just on the numbers, there are currently 35 inspectors and 7 field supervisors, for a total of 42.

The point about leveraging other inspectors in the field is a very important one that is an obvious way that we can work intermodally, and part of our plan going forward is to do just that, whether it is the Federal Aviation Administration, the Federal Motor Carrier Safety Administration, or any other asset in the Department. You can have a force multiplier by doing that.

Finally, on intermodal safety as an organizing principle, if I may, the perspective I am coming from is from a State DOT that is the one truly intermodal State DOT. That was how it was organized, and one of the early discussions with Secretary LaHood when I came on board was safety as an organizing principle at U.S. DOT. I do not want to steal the Secretary's thunder, and I am aware of the provision in the bill that has been marked up. But I will tell you that there are some very important steps forward in the Department with safety as an intermodal organizing principle that the Secretary has directed and perhaps, most appropriately, he should describe, but we are moving forward on that right now.

[The information follows:]

PUBLICATION OF APPROVALS
(Oberstar question; page 67 of transcript)

QUESTION: Will PHMSA publish approvals applications in the *Federal Register*? Will PHMSA publish notice of approvals that have been granted?

ANSWER:

- PHMSA will publish notice of all approvals that have been granted in the *Federal Register*. In addition, PHMSA will publish all approval applications for certain types of transportation not covered in the regulations to allow for a public comment period.

- Unlike special permits, there is currently no statutory or regulatory provision requiring PHMSA to publish approvals applications for comment nor is there a requirement for PHMSA to publish those approvals that it grants. PHMSA issues a number of different types of approvals. We are considering several ways to increase transparency in the way approvals are reviewed and issued, including publication on the PHMSA website.

- At a minimum, PHMSA will publish a summary of the approvals granted in the preceding six months in the *Federal Register* twice each year after classification, fitness, and qualification determinations and specifically notify modal agencies.

- PHMSA issues approvals for certain types of authorizations not specifically covered in the regulations or providing authorized alternatives specified in the regulations. Publishing applications for this type of approval and providing interested persons with an opportunity to comment on the transportation controls proposed as part of the approval could well provide useful data and information that would help to ensure that the proposed operations are conducted safely. PHMSA will begin publishing this type of approval application for comment in the *Federal Register*. PHMSA will publish a summary of these approvals in the *Federal Register* when they are granted and will post them on the PHMSA website.

Mr. OBERSTAR. That is very encouraging. I am delighted to hear that. That is the first good news, structurally, about this Department I have heard in a long time.

Just a little reminiscence. I was administrative assistant for my predecessor, John Blatnik, who was chair of the Executive and Legislative Reorganization Subcommittee of the Committee on Government Operations at the time that President Lyndon Johnson proposed establishing a Department of Transportation. He made that recommendation in January of 1966 and sent his staff up to meet with us and with Senator Magnuson's staff in the other body, and we spent from January through October crafting the proposal to bring 34 agencies of Government together under one roof in the Department of Transportation. Hearings and markup in Subcommittee and passage on the House Floor, conference with the Senate. In October, President signed the bill. We thought they are all going to work together. They haven't. It has been a disappointment.

With this legislation, the surface transportation bill, we are going to make that legislative change and cause this synergy to happen among all the modal administrations, and starting with safety.

Mr. PORCARI. Well, again, it is a very important point even in the absence or preceding any legislation. There is an awful lot that you can do as Secretary organizationally, and Secretary LaHood is actually in the process of doing that right now. There is much more intermodal work and cooperation specifically on safety issues than we have had in the past, and I think of it as low hanging fruit; it is something that is relatively quick and easy to do and get some measurable benefits from.

Mr. OBERSTAR. That is very important and good. I encourage you and Secretary LaHood to continue pressing forward with this. Also, we need to revisit the issue of special permits and approvals and the follow-ups to those and this rather incoherent process, two years and four years and unlimited time frames.

Mr. Scovel, do you have some recommendations for how this process of permitting can be rationalized?

Mr. SCOVEL. I do, Mr. Chairman. And if you will permit me to offer recommendations for the Committee's consideration, as well as the Department's, based on all of our audit work; it goes beyond simply the permitting and approval process.

I just mentioned the improved application process. Certainly, that is one that may well be low hanging fruit, in Mr. Porcari's terms, for the Department to implement.

Number two, special permits for trade associations. The Department, to its credit, has made clear that those will not be issued to associations, they will be issued to individual members. However, there is still the question of 5,000 members of associations in the field perhaps believing that they can continue to operate under special permits issued to their associations. That needs to be addressed. There hasn't been the level of fitness determination made company by company yet, and safety demands it.

Fitness definition, a precise definition of what constitutes an applicant's fitness to conduct the activity authorized by the permit or approval.

Next, safety history.

Mr. OBERSTAR. On that point, isn't there a standard for fitness in FAA?

Mr. SCOVEL. I believe there is, sir, but——

Mr. OBERSTAR. There are the three—fit, willing, and able—and fitness is a very clear standard established both in law and in practice in the FAA, and there should be some lessons learned and applied to PHMSA.

Mr. SCOVEL. I agree, sir. In fact, within the PHMSA context, the definition is not nearly as clear as it is applied in other modes. As you know, the regulation permits PHMSA to find that an applicant is fit based on prior compliance history, information in the application itself, and other information available to the associate administrator. Very broad; too general; not helpful to applicants, as well as to those who must administer the process.

That gets me, really, to my next point, and that is safety history as a factor in determining fitness. PHMSA fought and won this battle back in 1996. We determined, conducting our own little history study, at the time this regulation was written, PHMSA received industry conducts opposing the use of compliance history to assess an applicant's fitness.

At the time, RSPA, PHMSA's predecessor, disagreed with those comments and stated in the preamble to the final rule, and I will quote: "Enforcement actions may be indicative of an applicant's ability or willingness to comply with the applicable regulations. Because the associate administrator is considering whether to authorize compliance with specific alternatives to the HMR, the likelihood of an applicant's compliance with those alternatives is relevant to public safety." And the final rule did establish that an applicant's compliance history should be or may be considered, and that is the operative language here; it is not required, but it may be considered by the administrator in determining fitness.

Mystifying, as well, to us is why PHMSA, in the years since fighting and winning that battle, has ceded the ground to industry, for whatever reasons that can't be known to us at this point. But PHMSA has made clear that they do not consider safety history as a relevant factor in determining fitness. They confine their examination to the four corners of the applicant itself: action, process, package. That is pretty much all that they are looking at. That seems to us to fly in the face of common sense and we strongly recommend that the Department address that.

Mr. OBERSTAR. Should that be changed in law? Should law itself define that more clearly, instead of leaving it to regulation that can be changed and opposed and undermined from time to time?

Mr. SCOVEL. That is a policy question, of course, sir, but we would think that it is an important enough point to be enshrined in law.

Mr. OBERSTAR. Thank you.

Mr. SCOVEL. A couple of other points, and then I will yield.

Level of safety, as well, needs to be addressed for the benefit of applicants, as well as administrators.

The agency should establish a coordination working group. One of the points that we highlighted in our testimony today is the lack of coordination between PHMSA and the other modes in determining safety history, for one, enacting on applications.

Next, an enhanced risk-based approach to oversight. As our testimony today, our statement made clear, PHMSA does not cite as a priority factor in its oversight system whether a hazmat carrier may be a holder of special permits or approvals. We think that it is important enough to be included as a priority factor in addition to what PHMSA already recognizes; accident investigation, third-party complaint inquiries, and fitness inspections.

Finally, longstanding safety concerns, Mr. Chairman; time frames for resolving matters like bulk explosive vehicle questions, lithium batteries, and, as Mr. Porcari has mentioned, a process at the Department level to resolve such intermodal disputes.

Thank you.

Mr. OBERSTAR. That is a very comprehensive list. Thank you for that listing.

Mr. Secretary, do you want to respond to those points?

Mr. PORCARI. Just very briefly, Mr. Chairman. I think those are all very valid points. I would like to just underscore one of them in particular, the relevance of safety history in the fitness definition. We should—not may, but should—certainly take that into account. I think that certainly is common sense and directly relevant to the overall fitness of an applicant.

Mr. OBERSTAR. Thank you. Whatever you can do by regulatory change you should do. You are clearly on track toward doing that, and whatever else is necessary we will incorporate in legislative language in our crafting of the next transportation bill.

Inspector General Scovel, have you reviewed the Department's program for the future, the proposals listed in the Secretary's statement? This plan of action looks good on its surface. It seems to me that there is very specific time frames—within 10 working days, within 15 days, within 15 days, within 30 days—actions to be taken. Looks to me like a good checklist.

Mr. SCOVEL. It is, sir. Frankly, we were very impressed that the Department's senior leadership acted as quickly as they have in order to attempt to impose control from their level over PHMSA's process for special permits and approval, and that was really the subject matter of our own inquiry. As I previously noted this morning, details remain to be filled in. Although the action plan addresses special permits, very little, if any, mention made of approvals, for instance, a point that you made. And a continuing point for us, trade association permits. A plan needs to be put in place. Industry needs to be notified. The genie needs to be put back in the bottle regarding all of those 5,000-plus permits.

Mr. OBERSTAR. And as a corollary to that point, shouldn't there be some guidance, direction, understanding of a culture of safety of having an arm's length relationship with those whom the agency regulates?

Mr. SCOVEL. Yes. And that is a point that has been made repeatedly in this hearing room mode to mode to mode. As we look at it, Mr. Chairman, partnership is the term that is often used between modal administrators and their staffs and the industries that they regulate. In my view, partnership can sometimes cross the line into the goal, instead of being a means to the end of instituting as safe a program as we possibly can. That should be, we think, a key part

of any safety culture re-education effort within PHMSA, as well as other modes.

Mr. OBERSTAR. Mr. Secretary, apparently, you agree with that?

Mr. PORCARI. Mr. Chairman, you will find me agreeing that it is important to have a correct relationship with industry, and with all that implies. We certainly solicit input. We should never, and will not, cede the essential safety function and the regulatory role that serves that safety function.

Mr. OBERSTAR. This is the third in a series of failures within the Department. Well, the Coast Guard is no longer in the Department, but in my mind they still are. But there was this indistinguishable link between the Coast Guard and its contractor, Lockheed Martin, who were given authority to self-approve their work. The second was the FAA and the customer service index.

And the third now is PHMSA. Enough. We are drawing the line, cleaning house, changing the culture, putting it on the right track. We appreciate what you are doing and we will continue to oversee. Safety is an ever-vigilant responsibility. And for those who think that we have had the hearing, we had to look at the agency, and we can now take a deep breath and they will all go away, I am not going away and safety is not going away.

I grew up in the family of an underground miner, where lives depended on each other and on the equipment with which they worked, and I will never forget my father's comment when I asked—he was chairman of the safety committee for 26 years in the Godfrey underground mine. I said, what sticks in your mind, Dad? He said the most unforgettable sound in the underground is the screams of the men when the cable on the cage broke and there was nothing to stop their fall to their death. You never relax your vigilance on safety.

Thank you very much for your testimony.

Mr. PORCARI. Thank you, sir.

Mr. OBERSTAR. Our next witness is Mr. Lon Santis, Manager of Technical Services for the Institute of Makers of Explosives.

Mr. Santis, welcome to our Committee and to the hearing. Your full statement will be included in the record. You may summarize as you wish and proceed with your statement, which I read in great detail.

TESTIMONY OF LON D. SANTIS, MANAGER, TECHNICAL SERVICES, INSTITUTE OF MAKERS OF EXPLOSIVES, WASHINGTON, DC.

Mr. SANTIS. Thank you, Chairman Oberstar.

IME members are dependent on special permits, or SPs, issued by PHMSA to transport bulk blasting agents and oxidizers in multi-purpose bulk trucks, or MBTs, that are specially designed for this purpose. The SPs apply unique and applicable requirements which provide for the safest and most secure way to deliver blasting materials to the job site.

To our knowledge, there has never been a fatality, injury, or explosion attributed to the hazardous materials onboard these vehicles in over 10 million trips. This is only through the continual vigilance that the Chairman mentions and a culture of safety that exists within the explosives industry.

Nonetheless, IME has cooperated over the years with PHMSA on enhancements to the safety of this type of transportation, the most recent effort starting in May of 2008. After considerable study, we expect to adopt measures in our standard for this activity, SLP-23, by the end of this year that address the root causes of rollover accidents with these vehicles.

If SPs authorizing the use of MBTs are revoked or severely restricted, the resulting damage to the U.S. economy could be much worse than any single terrorist event. Industry does not have the capacity to deliver the billions of pounds of materials that are currently transported annually in MBTs by other modes or packaging. Additionally, risk to the public would increase because more sensitive products would replace those shipped by SP and more vehicles would be on the highways.

Given the importance of MBTs to the national recovery and infrastructure development, we urge the Committee to take a reasoned and rational approach. This has not been entirely the case with the recent OIG management advisory and PHMSA's response. We object to the agency's use of sensational descriptors, direct comparisons to terrorists' intentional acts, and unfounded accusations of misbehavior.

For example, statements that MBTs are bombs on wheels, catastrophes waiting to happen, and prone to rollover are out of proportion to any rational risk-based analysis of the operation of these vehicles. The public interest is not served by an appeal to emotion when objective analysis rooted in science is required.

In addition to the absence of any fatalities or injuries, the public should know the following. The typical MBT has a center of gravity height of 75 inches, which is lower than the center of gravity height of the average loaded semi trailer. We believe that the average rollover rate per mile for MBTs is many times better than other vehicles with the same center of gravity height and wheel width. These materials will not accidentally explode from the forces encountered in the normal course of transportation if the transportation is compliant with the HMR.

In an MBT accident, the risk is not increased if the materials mix, because sensitization only occurs within certain ranges of mixtures and methods of mixing that will not occur in an accident. There is very little probability that the bulk materials may explode in a fire, and MBTs minimize the overall risk to the public.

Even though several MBTs have burned to the ground without incident, it is out of an abundance of caution that we recommend that when explosives or oxidizers are involved in a fire, that a standoff perimeter be established. These materials must be exposed to a fire for a long period of time before reaction can take place, in which time emergency responders can evacuate people to safety. To help ensure proper response is taken with explosives incidents, IME and PHMSA updated and distributed a training program to every fire department in the United States of America in 2003 on how to respond to these incidents.

Several recommendations have been made that would impose unreasonable and onerous requirements on MBTs and increase risk. Perhaps the most serious of these is the suggestion to prohibit the transportation of class 8 materials on MBTs. This prohibition

would jeopardize the latest advancement in MBT safety, which involves sensitizing non-explosive materials after they have been loaded into bore holes by the MBT. The result would be more vehicles on the highway and more sensitive explosive products being transported and used.

IME has shared recommendations with both the OIG and PHMSA on how the SP program may be improved. The agency and Congress should focus on these deficiencies, not attempting to raise public fears and damage the reputation of the commercial explosives industry. MBTs do not present an unreasonable risk to health and safety or property, and the alternatives increase risk.

I would be happy to answer any questions.

Mr. OBERSTAR. You raise concern about characterization of the conveyance of explosive materials. I don't know to whom you have reference saying that they are bombs on wheels, but I have never, nor have my staff, characterized the movement of explosives by the industry in that way.

And you may be very understandably sensitive to comparison to the McVeigh situation you cite in your testimony. It is not unreasonable for people who are not specialists in the field to fear that movement of these individual materials separately could result in an accident that produces this kind of tragedy. That Murrow Building explosion certainly captured the public attention and fear and concern.

But that is not the purpose of this hearing. We are not here to ride herd on any individual company, but on the process by which PHMSA conducts its business and its oversight and establishes standards, and the issuance of special permits and then the approval process. The law makes it very clear the Secretary shall publish in the Federal Register a notice that an application for special permit has been filed and give the public an opportunity to inspect the safety analysis and comment on the application. That is not consistently done by PHMSA over all its years.

But there is no such requirement for an approval, and there are vastly more approvals than there are special permits. In what way would the industry be disadvantaged if those approvals also were published in the Federal Register as a means of public notification?

Mr. SANTIS. I am not sure the industry would be disadvantaged. However, I am not sure there would be a lot to gain by that. An approval is granted when a product meets certain specified criteria. It is a black or white issue; it either meets the standard, it passes the test that the United Nations has set or it doesn't.

Therefore, it is quite different than a special permit, in which the special permit is granted when someone wants to engage in an activity that is slightly different than what the regulations require. The approvals must be given based on what the regulations require.

Mr. OBERSTAR. But you have no objection to approvals being published in the Federal Register so that they are available to the public?

Mr. SANTIS. My only concern would be an added responsibility on an already stretched thin workforce.

Mr. OBERSTAR. That is their job. They can work more efficiently. And we will provide them with additional personnel. We will make

sure there is funding and staffing to carry this out. But the public interest should come first.

You also, in your testimony, state "The Institute of Makers of Explosives is taking steps to add measure in its standards to address the major causes of rollovers." What are those steps and what do you mean by adding measure? Explain that statement.

Mr. SANTIS. We have had a standard for MBTs for a number of years. When it was brought to our attention that PHMSA had concerns over the numbers of rollover incidents, we did not necessarily agree that the trucks are rollover prone and so forth, and thus did not believe that there was an imminent, an emergency situation. But, nonetheless, this industry is committed to safety, and as you have mentioned, there is a continuous vigilance on safety.

So, in order to address those rollovers—and no one wants to have a single rollover—we looked at the causes of those rollovers, and the two causes were primarily driver error and tire issues. These trucks have to travel off-road on very severe conditions, and the tires take much more abuse than a normal vehicle, so it stands to reason that the tires would be a little bit more of an issue.

So what we did was we pulled together not just the IME members, and this is one of the first times we have done this, we reached out to the entire regulated community and invited them to the table to talk about how we could improve or lower the probability that a rollover may occur. And we worked through that process and had many meetings, developed a number of recommendations relative to driver training, relative to the quality of tires.

That is currently going through our subcommittee, will most likely be reviewed by the Committee that is responsible for this document in October. At that point it will go to our legal affairs committee and then on to our board of governors for final approval.

Mr. OBERSTAR. I am very much familiar with the stability needed for MBTs; they operate in my district in the iron ore mines; travel on the highway in order to get to the mining location and then on location they have to go on very rugged terrain, and they have to have very careful training of the drivers and structural integrity of the vehicles so they don't roll over on the mine site. And there has to be very careful separation so that, should there be an accident, should these separate materials that have very powerful explosive capabilities, don't mix and accidentally explode.

In the case of mining explosives for both coal mining, iron ore mining, and other hard rock mineral blasting, the most serious thing that has occurred has been a terrible fire, a fire that, in one case, burned for days. Extreme heat; melted aluminum, melted steel. That is very serious.

So I understand what you are talking about. But I think that the agency itself needs to be doing a better job, and the question I would have is what is your view on conduct of safety fitness review by PHMSA of agencies that apply for special permits and approvals. Should they review the incident history? Should they review, as the Inspector General said, the safety history of the agency, its compliance history?

Mr. SANTIS. Well, I would say that it would stand to reason that PHMSA would examine data generated by the Federal Motor Car-

rier Safety Administration. My understanding is that that agency is primarily responsible for evaluating the fitness of motor carriers. They accumulate a lot of data and information, and I can't see any reason why that information should not be taken into account.

Mr. OBERSTAR. Very good. We will make sure that they do that.

Has PHMSA told your members, separate from the show cause letter, that their permits will be revoked? Have you heard any comment from PHMSA that permits will be revoked?

Mr. SANTIS. Not specifically. I think everyone realizes that a special permit is a privilege and that the specter of revocation always exists and that they must maintain the requirements to continue to hold that special permit. So they certainly know what can happen.

Mr. OBERSTAR. I raise that point because it has come back to me and to staff from various of your members that this hearing and this review by the Inspector General is going to result in revocations, and there is no such plan underway by the Inspector General, nor is it the purpose of this hearing to do that. But PHMSA does propose modifications to special permits. Do you have any comments? Are you aware of their proposals and do you have comments on them?

Mr. SANTIS. Yes. You are referring to the show cause letters, I believe?

Mr. OBERSTAR. Yes.

Mr. SANTIS. Yes. There are, well, essentially, most of these recommendations I think are based on the recommendations that the Institute brought to PHMSA in March of this year, so the things that we recommended and that are going to go into SLP-23 that are in the show cause letter, we certainly support.

However, we do believe there are a couple of things in here that are not justified on a cost benefit basis. We believe that some technology that is discussed in here doesn't exist. We are not aware, for example, of a fuel cutoff device for these types of vehicles that will function at 45 degrees angle. We are just not aware of it.

So there are some concerns and I think they have been expressed to the agency, and hopefully this process will continue on and we will come up with the meaningful and important additions to these——

Mr. OBERSTAR. One of the proposals of PHMSA is driver qualification and training, "The special permit grantee must annually audit its program for the qualification and training of the persons who operate the vehicles authorized under these special permits" and lists three reasons or standards to be observed in that qualification and training. Do you have any objection to that?

Mr. SANTIS. No. No. We train our drivers way beyond what the regulations require in our industry, and——

Mr. OBERSTAR. Are their records annually or periodically reviewed, that is, apart from the commercial driver license activity, their conduct in driving of their personal vehicle?

Mr. SANTIS. Yes.

Mr. OBERSTAR. If they are stopped for a DUI?

Mr. SANTIS. Yes. Yes, we support that. We support examining a driver's off-duty record in consideration of their fitness to drive an MBT, certainly.

Mr. OBERSTAR. That is a standard that is used in aviation and that is important, and I am glad you are in conformity.

On vehicle inspections and tire standards, do you have any objections to those items? You are familiar with them?

Mr. SANTIS. Only some minor concerns about the tires. I know we have—we believe that a tire should not be in service for more than six years. However, the show cause letter goes a little bit further and says that a tire over six years old should not be on the vehicle. Part of the concern there is that people sometimes buy tires in large quantities and may not put the tire on until several years, and it is stored in a climate controlled condition so that it doesn't deteriorate. So we believe in the six year service life.

Mr. OBERSTAR. Well, our purpose is not to modify or propose modifications of this show cause order, but it is part of the compliance spirit that I think is important both with PHMSA and within the industry. Do you have any other comments that you would like to make about questions I raised with Mr. Scovel or the Deputy Secretary?

Mr. SANTIS. Only that we think that PHMSA must have the information that they need to do their job, and, in my experience, IME has always provided the information and PHMSA has made the decision. Providing that information gives PHMSA power. It especially gives PHMSA power at the United Nations.

And as you may be aware, we participate in the Committee of Experts on the Transport of Dangerous Goods at the United Nations. IME has an NGO status; DOT is the United States' representative. At those meetings in Geneva, the IME and PHMSA come together to represent the United States. We are on the same team at the United Nations, and that requires a good deal of good deal of close interaction, simply because PHMSA does not have the personnel and the information on explosives that the industry has because it is our life's work, and they must regulate an entire cadre of hazardous materials and know a little bit about a lot of things; whereas, we have people that know pretty much everything about one thing.

Mr. OBERSTAR. That is an interesting observation. The U.S. does this in many other—the International Maritime Organization has both U.S. Government and industry representatives, and the same with ICAO, the International Civil Aviation Organization, there are industry and Government personnel represented. So that is an interesting thought.

As we conclude—I have to be at another Committee activity shortly—I want to just highlight your comment which was in your written testimony and which you delivered in your oral presentation: there has not been sufficient attention paid to the absence of any fatalities or injuries from these accidents. The absence of failure is not the presence, is not necessarily the presence of safety.

That comment would be similar to saying that too much attention was paid in 1984 and 1985 to the reports of near midair events by the FAA when no fatalities resulted from aircraft flying too close to each other in the airspace. We got those reports. I was Chair of the Investigations Oversight Subcommittee at the time and the industry said, oh, pooh pooh, that doesn't mean that the airspace is unsafe.

And then two aircraft collided over Cerritos, California. We had repeatedly raised this issue after we had repeatedly said we need something like a traffic collision avoidance systems and mode sea transponders onboard aircraft. And then when fatality occurred, the agency responded that is a graveyard tombstone mentality that must be banished from the safety arena. And it doesn't help to say these are incidents; these are accidents. These are situations that can and do result in fatalities.

So these sorts of conditions are precursor to impending failure.

Mr. SANTIS. That is right. We have a word for that in our industry; we call them near misses or lessons learned. And we pay an enormous amount of attention anytime something happens that could lead to a more serious event, and I believe that is how this industry has been able to improve itself to the point where—well, let me go back 100 years, when——

Mr. OBERSTAR. Black powder and dynamite.

Mr. SANTIS. Black powder, dynamite. Hundreds of people being killed annually in events. Today, we can count annual fatalities on one hand, and sometimes don't even need any fingers in a year; and that is through the continual vigilance that you talk about. It is through looking at lessons learned. For example, the rollovers. There were no explosions, fires from the rollovers.

But that is not acceptable to us. The rollover indicates that there could be something happen; therefore, we need to address the rollover. Any time there is something that happens in our workplace that is the near miss, the close call, whatever word you use, we pay enormous amount of attention to it and treat it almost as if it was the catastrophe, because we know it could have been; and then we look at it and say what could we do to prevent that near miss from happening. We are ahead of the disaster that way.

Mr. OBERSTAR. I thank you for those comments and hope that you take this hearing as a call to continued vigilance, and that the agency straightens out, they adopt a compliance attitude and an oversight responsibility. We will continue to review and monitor the actions of the agency and the industry's compliance therewith.

Thank you very much for your testimony.

Mr. SANTIS. Thank you.

Mr. OBERSTAR. The hearing is adjourned.

[Whereupon, at 1:22 p.m., the Committee was adjourned.]

Statement of the Honorable Corrine Brown, Chairwoman
Subcommittee on Railroads, Pipelines, and Hazardous Materials
Full Committee Hearing Hazardous Materials Safety Program in the U.S.: Is PHMSA Performing its Mission
September 10, 2009

I want to thank Chairman Oberstar and Ranking Member Mica for holding today's hearing on Hazardous Materials Safety Programs. I also want to thank the staff for their hard work in investigating this serious issue.

Each day, nearly 1.2 million shipments of hazardous materials are moved by all modes of transportation. Over the last decade, there have been over 170,000 incidents involving the transportation of hazardous materials, resulting in 134 fatalities, 2,783 injuries, and more than $631 million in property damage. More disturbing, the Pipeline and Hazardous Materials Safety Administration (PHMSA) has only

35 Inspectors to cover over 300,000 hazmat-related entities.

This issue is so important to the communities that see hazardous materials travel on their roads and railways. At many of the hearings we have held dealing with rail safety, residents and local officials have expressed their concern with the transport of these dangerous materials and my guess is that once they hear about what the Pipeline and Hazardous Materials Safety Administration has – or more importantly, has **NOT** – done, I'm sure they will be even more concerned.

There was such a lack of oversight and inappropriate level of corporate influence during the Bush Administration, that many agencies became

dysfunctional. That is why I am pleased to see the Transportation and Infrastructure Committee making the effort to provide proper oversight to the agencies within its jurisdiction.

In May of this year I held a subcommittee hearing on the Department of Transportation's Hazardous Materials Safety Program with all the stakeholders to learn what improvements needed to be made in the new hazmat reauthorization bill.

During the hearing it became clear that there were significant problems in the program. The agency does **not** look at its own data on accidents and incidents; it does **not** follow-up on unreported incidents; it does **not** even review whether a carrier should be registered to transport hazmat. It grants an alarming number of waivers from important safety

regulations, and provides with little to no oversight of permit holders. And it has so few inspectors that I cannot understand how they even begin to inspect 300,000 hazmat entities to make sure they are complying with the regulations and the terms of the waivers.

The subsequent investigations by committee staff and the DOT Inspector General confirmed what the subcommittee heard from witnesses at our hearing and even uncovered additional problems with current hazmat safety programs.

I am hopeful that the new Administration is willing to work harder at administering these important hazardous materials safety programs, and look forward to hearing how they plan to fix the serious

problems at the Pipeline and Hazardous Materials Safety Administration.

With that, I want to welcome today's panelists and thank them for joining us. I look forward to hearing their testimony.

James L. Oberstar

STATEMENT OF
THE HONORABLE JAMES L. OBERSTAR
OVERSIGHT AND INVESTIGATIONS HEARING ON
"CONCERNS WITH HAZARDOUS MATERIALS SAFETY IN THE U.S.: IS PHMSA PERFORMING ITS MISSION?"
SEPTEMBER 10, 2009

Today's hearing continues the Oversight and Investigations heritage of this Committee, established by my predecessor, Congressman John Blatnik, when he was appointed by Speaker Sam Rayburn in 1959 to head the Select Subcommittee on Investigation of the Federal-Aid Highway Program. I myself continued this legacy as Chairman of the Subcommittee on Investigations and Oversight from 1985 through 1989, and as Chairman of the Subcommittee on Aviation from 1989 through 1995.

Today's hearing continues this long history of in-depth investigations of the administration of the transportation and infrastructure programs we authorize. Many of these investigations have focused on whether the Executive Branch is adequately protecting the safety of those who work on transportation systems or use them.

The subject of today's hearing is an investigation of the agency responsible for ensuring the safety of hazardous materials transport in the U.S. And unfortunately, as we will hear today, it appears that complacency and neglect permeate the culture of the Pipeline and Hazardous Materials Administration (PHMSA). It seems PHMSA has become misguided in its mission. The PHMSA culture appears plagued by a

belief that agency should make things as easy as possible for the industry it should be regulating.

In the investigation conducted by our Committee staff, and also by the DOT Inspector General, we discovered a shocking number of failures by PHMSA to follow Federal law in hazmat regulation, as well as outright neglect in regulating the transport of hazmat. We heard from numerous PHMSA employees who told our investigators that their own agency was entirely too "cozy" with the industry. Unfortunately, this is a theme we've seen in several of our previous investigations, most notably in FAA's relationship with the airline industry.

The Committee and DOT IG investigations uncovered a pervasive pattern of regulatory abuse and neglect at PHMSA including the following findings:

- PHSMA almost <u>never</u> turns down a request from industry for a special permit, which is really an <u>exemption</u> from the regulations, to carry hazmat which would normally be prohibited by Federal regulations. Out of nearly 5000 applications from 2007-2009, less than 2% were denied. In this case, calling PHMSA "cozy with industry" would be an understatement.

- PHSMA never performs fitness reviews and does not review the safety record, or enforcement record of applicants for special permits, which is required by Federal regulations.
- PHSMA has no idea where special permits are being utilized, which makes effective monitoring and enforcement virtually impossible.
- PHSMA records are in appalling condition. In the vast majority of the special permit applications we reviewed, there was no safety analysis or justification in the approval records.
- PHMSA relies almost exclusively on self-certification by the applicant with no fact-checking.
- PHMSA grants special permits to industry trade associations and any member can utilize the special permit. This defies logic because there is no way to hold a trade association accountable under the law, and often PHMSA has no idea who is using a particular special permit.
- PHMSA does not coordinate approvals with the other modal administrations (FAA, FRA, FMCSA), and we discovered a number of cases where these regulatory agencies were opposed to the granting of these exemptions.
- PHMSA issues approvals and permits to "agents" of foreign governments without any evaluation of the fitness of the foreign

company. On July 4, 2009, four were killed in Ocracoke, NC, when a truck loaded with Chinese fireworks exploded, and PHMSA was unable to provide critical documentation on this permit.

- PHMSA often ignores the concerns of its own enforcement personnel. Numerous enforcement personnel told Committee investigators they have repeatedly had their warning and advisories ignored by senior PHMSA management, and one senior manager told Committee investigators, "I take their [enforcement personnel] views with a grain of salt."
- PHMSA itself admits that 60-90% of hazmat accidents go unreported to the agency, and it is not driven by data. In our interviews with a large number of PHMSA staff, there was a universal view expressed that PHMSA's data is notoriously inaccurate, incomplete, and virtually useless.

I could go on for a couple of hours, but it is clear that PHMSA needs to rethink its relationship with the industry it regulates, and it needs comprehensive, top-to-bottom reform of its procedures and processes. The current state of PHMSA is completely unacceptable.

On the positive side, I am encouraged by the quick reaction and involvement of Deputy Secretary of Transportation, John Porcari, once he became aware of the severity of our findings. I am happy he is with us today to address the Department's commitment to cleaning up this unacceptable situation.

In the past, many of our hearings have led to important reforms that have enhanced transportation policy. I hope that is the case with today's hearing as well, and I look forward to the testimony of our witnesses.

STATEMENT

THE HONORABLE JOHN D. PORCARI
DEPUTY SECRETARY OF TRANSPORTATION

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
UNITED STATES HOUSE OF REPRESENTATIVES

September 10, 2009

Introduction

Chairman Oberstar, Ranking Member Mica and distinguished Members of the Committee, on behalf of the Secretary of Transportation Ray LaHood, I appreciate the opportunity to discuss the Pipeline and Hazardous Materials Safety Administration's (PHMSA) Special Permits and Approvals Program.

I have been briefed by your staff on a number of serious deficiencies in and concerns with the PHMSA's hazardous materials program, including its special permits program. I have also been briefed by the Department's Office of the Inspector General (OIG) regarding the hazmat special permits program and an Advisory the OIG issued on special permits for explosives mixing trucks. And, I have been briefed on a 2008 internal review of PHMSA's safety culture—regarding perceptions of the PHMSA employees as to the agency's safety commitment. Mr. Chairman, Members of the Committee, I share your concern that the agency is off track on its primary mission—safety.

Let me be clear—the Secretary and I regard transportation safety as the Department's primary mission and we are taking action to get PHMSA back on mission. I would like to report on actions we have taken to begin this process and to address immediate concerns.

Special Permits Program for Hazardous Materials Transportation

First, the Department has a detailed Action Plan to address the safety concerns raised by the Inspector General about PHMSA's Special Permits and Approvals Program. A copy of this Action Plan is attached to the testimony. Before I discuss that I would like to briefly describe the importance of the special permits program to our overall regulatory program.

DOT issues special permits under authority provided in the Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*). Special permits allow the industry to quickly adopt and utilize new technologies and new ways of doing business that may not be accommodated in the regulations. DOT also issues special permits on an emergency basis to facilitate emergency transportation, such as to authorize the transportation of supplies to areas affected by natural or man-made disasters. By law, special permits must provide "a level of safety equivalent to" that required by the regulations, or a finding that it is consistent with the public interest and federal hazardous materials law if a required safety level does not exist. Every year, DOT issues approximately 120 new special permit applications, authorizes approximately 100 modifications to existing special permits, and issues approximately 1,100 renewals. New special permits may be authorized for up to two years, at which time they may be renewed for a period of up to four years.

Obviously, this is an important part of the program. We recognize there are deficiencies and we are addressing these deficiencies with a detailed Action Plan that I

have submitted for the Committee's consideration. Briefly, we are requiring PHMSA to take the following actions:

- Conduct a comprehensive, top-to-bottom review of current written special permit policies, procedures, and practices to ensure safety goals are met;

- Review the criteria, policy and procedures used to make the legally required "equivalent level of safety" determinations and revise those procedures where necessary;

- Develop enhanced written procedures to provide for better coordination for the issuance of special permits with FMCSA, FAA, FRA, and the Coast Guard;

- Clarify PHMSA policy to assure that trade associations are not holders of special permits;

- By February, the Pipeline and Hazardous Materials Safety Administration will have a business plan in place to create a centralized data analysis office to improve the data quality and the IT systems currently in place. This new technology will greatly enhance the productivity, accountability, and the overall safety performance responsibilities of the Hazardous Materials Office of Special Permits. The new system will include an online application that will not be processed until completed, a mechanism for alerting holders of special permits 90

days in advance of the expiration of the permit and a notification system to communicate safety concerns.

OIG Management Advisory on Special Permits for Explosives mixing trucks

An additional part of the Action Plan was developed to address the concerns raised in the OIG Advisory related to Explosives Mixing Trucks as follows:

- Issue a notice of a proposed modification of the special permits for explosives mixing trucks to provide for additional safety conditions including vehicle inspection and maintenance, enhanced driver training, incident reporting and investigation, fire prevention and emergency response plans. It also notifies special permit holders of the intent to evaluate each holder's fitness to operate these trucks. Stakeholder responses are due in mid September.
- Conduct fitness reviews of current special permit holders to assure compliance with the permit terms and a review of expired permits.
- Contract for an independent risk assessment of explosives mixing trucks in transportation;
- Review documentation, including safety assessments and analyses, to ensure that documentation supports the issuance of a special permit.
- Rescind any special permit authorized for a holder who is considered unfit to safely transport these materials.

Our Action Plans will evolve and change as we continue to solicit feedback and advice on how the Department can improve the safety of PHMSA programs.

House Committee on Transportation and Infrastructure Review

I was briefed late last week by your staff on the findings of your Committee's investigation of PHMSA programs. You identified concerns with the special permits programs including, among other concerns, (1) lack of written processes, (2) lack of fitness reviews and (3) lack of adequate coordination with FAA and with FMCSA. In addition, the staff was greatly concerned, as are the Secretary and I, that our data analysis capability is totally inadequate to assure that the hazmat program is data driven and able to focus resources on the greatest hazards. The concern extends to the safety culture of the organization. I want to assure the Committee that we will work with you to address the important issues you have so diligently raised.

Data Analysis

The development of a data analysis program will require significant resources and professional staffing. It will not occur overnight but I can assure the Committee that we will make this a priority in our planning and in our budget. I have asked PHMSA to develop within 90 days an Action Plan, addressing both business and budgetary needs, for creating a new Information Management Office (IMO). The IMO will likely centralize and standardize the data and information technology services across PHMSA. Such an approach has the advantage of improving data quality and integrity,

strengthening the linkage of program objectives to performance measures, providing vital safety decision support, and improving the performance and delivery of its IT systems.

Lithium Battery Regulation

The Committee has also expressed interest in PHMSA and FAA's progress drafting a Notice of Proposed Rulemaking (NPRM) on lithium batteries transported via air cargo. We have made significant progress. PHMSA has drafted, in coordination with the FAA, an NPRM. The department forwarded the NPRM to OMB yesterday for review.

Lithium batteries are found in products ranging from cell phones and laptop computers to hybrid automobiles and lifesaving medical equipment. Lithium batteries have evolved with advances in technology, so PHMSA has necessarily addressed its regulation of their transport three times in the last five years. As lithium batteries continue to evolve, further regulatory action is appropriate to address the dangers that more powerful lithium ion batteries pose in air transportation. Just this summer, there have been one international and two domestic incidents of lithium battery fires on airplanes. Thankfully, these fires did not lead to any catastrophic air accident.

Safety Culture

Finally, and perhaps most important, I have asked the leadership of PHMSA to submit a plan to reestablish a safety culture in PHMSA. This plan must include enhanced communication between field staff and senior leadership, enhanced training, enhanced written enforcement policies, leadership support for the communications of safety concerns and ideas, greater field and headquarters interaction and more transparency in decision-making. I expect that within ninety days the employees of PHMSA will once

again view the organization and its leadership as strongly committed to its safety mission-- promoting the safe transportation of hazardous materials.

Conclusion

Mr. Chairman, in conclusion, our goal is to rebuild the special permit program with revised written procedures, thorough reviews of the permit safety requirements and permit holder fitness, better coordination with the other modal Administrations, modernized technology and software programs, and aggressive enforcement.

While the Department recognizes the significant role hazardous materials play in this Nation's overall economy, our first priority is and must continue to be safety. The Department believes that the enforcement and incident histories of companies applying for special permits are extremely relevant to whether that company ultimately receives a permit. We will not tolerate agency actions that undermine our commitment to safety and will rescind and deny renewal of permits for unsafe actors.

I look forward to working with the Committee as we continue to enhance our safety oversight of the hazardous materials special permits program. Again, thank you for the opportunity to testify before you today.

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August 6, 2009

ACTION PLAN ADDRESSING OIG CONCERNS RELATED TO PHMSA'S SAFETY PERMITS PROGRAM AND THE OIG MANAGEMENT ADVISORY ON SPECIALIZED BULK EXPLOSIVE TRUCK OPERATIONS

Background

Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) authorizes the Department of Transportation to issue variances – termed special permits – from the Hazardous Materials Regulations (HMR) in a way that achieves a safety level at least equal to the safety level required under Federal hazmat law or consistent with the public interest and Federal hazmat law, if a required safety level does not exist. That authority is delegated to the Pipeline and Hazardous Materials Safety Administration (PHMSA).

PHMSA's procedures for applying for a special permit are set forth in 49 CFR, Part 107, Subpart B. An application must include the following information: (1) a citation of the specific regulation or regulations from which the applicant seeks relief; (2) the hazardous materials planned for transportation under the special permit; (3) the mode or modes of transportation that will be utilized; (4) a detailed description of the operation for which the special permit is requested (e.g., alternative ways to qualify packagings for hazardous materials transportation; alternative packagings; alternative hazard communication; alternative stowage or segregation plans; or other alternative procedures or activities) and written descriptions, drawings, flow charts, plans, and supporting documentation; (5) the time period for which the special permit is requested; (6) a statement outlining the reasons for requesting the special permit; and (7) a description of the packaging that will be used under the special permit.

In addition, the applicant must demonstrate that a special permit achieves a level of safety at least equal to that required by regulation or, if the required safety level does not exist, that the special permit is consistent with the public interest. At a minimum, the application must include information on shipping and incident history and experience relating to the application; identification of increased risks to safety or property that may result if the special permit is granted and a description of measures that will be taken to mitigate that risk; and analyses, data, or test results demonstrating that the level of safety expected under the special permit is equal to the level of safety achieved by the regulation from which the applicant seeks relief.

PHMSA independently verifies and evaluates the information provided in the special permit application to determine that the special permit will achieve an equal level of safety as provided by the HMR or, if not, that the special permit is consistent with the public interest. This review includes a technical analysis of the alternative proposed in the application, an evaluation of the past compliance history of the applicant (including incident history, enforcement actions, and the like), and coordination with the Federal Motor Carrier Administration (FMCSA), Federal Railroad Administration (FRA), Federal Aviation Administration (FAA), and/or the U.S. Coast Guard to gather additional information relevant to the application and ensure the agencies' concurrence with PHMSA's conclusions. Before making a decision on a special permit, PHMSA also publishes a notice of the application in the *Federal Register* and asks for comments from the public as to whether it should be granted or denied.

OIG Investigation

The Office of the Inspector General (OIG) recently briefed PHMSA on its review of the Special Permits Program. The OIG issued a "Management Advisory" regarding special permits for "special use bulk explosives vehicles" raising safety concerns about the process for issuance of the permits. These concerns included: (1) the adequacy of documenting the "equivalent level of safety;" (2) whether PHMSA is adequately checking the fitness of applicants to conduct the activities authorized by the special permit; (3) the extent and formality of coordination with FMCSA on enforcement and fitness; and (4) the number of incidents that resulted in the release of explosive materials.

More broadly, both the OIG and the House Transportation and Infrastructure (T&I) Committee have suggested that PHMSA needs to strengthen its oversight of the Special Permits Program to ensure that special permits provide an equivalent level of safety as that provided under the Hazardous Materials Regulations (HMR) and that permit holders comply with the terms of the special permits and, indeed, all applicable HMR requirements.

The OIG plans to issue a final report in September. PHMSA has the opportunity to respond to the OIG before the report is completed.

The OIG has highlighted several areas where there are opportunities to enhance PHMSA's management and oversight of the safety permits program. Thus, in addition to evaluating company operations under the special permits applicable to special use bulk explosives vehicles, we want to review our current policies, procedures, and practices for the special permits program to ensure that our safety goals continue to be met. To this end, we have developed the following action plan:

Goals

- Enhance safety oversight of the Special Permits Program
- Improve operational efficiency within the Office of Special Permits and Approvals
- Improve coordination between Office of Special Permits and Approvals and its modal partners
- Improve data collection and analysis

Strategies

The action plan takes into account the resources available within the Office of Special Permits and Approvals, including both personnel and information technology; the process and procedures used to manage the program; the criteria used to make an assessment of an equivalent level of safety; the process for evaluating the fitness of applicants and their safety performance; increased compliance audits and oversight of special permit holders; enhanced accountability of those operating under the terms of special permits; and the need to modernize the information technology (IT) system that supports the program. Many of the initiatives will be initiated immediately and will be completed in 30 days or less while others (e.g. IT modernization) will take longer to complete.

With respect to special use bulk explosives vehicles, the initiatives in this plan are primarily aimed at enhancing transportation safety. PHMSA will also coordinate with DHS to address security concerns related to the operation of these vehicles.

ACTION PLAN TO ENHANCE SAFETY OVERSIGHT OF THE SPECIAL PERMITS PROGRAM

Action Item	Due Date	Completion
Special permits issued to associations. **Within 10 days,** develop and publish written policy statement on special permits issued to members of industry trade associations or similar industry organizations to clarify that special permits are issued to member companies only, not to the association or organization.	**Aug 16th**	**Aug 17th** ✓
Program review. **Within 30 days,** complete a broad-based, top-to-bottom review of the special permits program. This review will cover current operational procedures, staff responsibilities, documentation of procedures, criteria for equivalent level safety assessments, fitness review criteria, and coordination with DOT operating administrations. The review will identify any deficiencies in current processes and consider possible ways to enhance procedures, reduce redundancies, and increase oversight and accountability. Recommendations in these areas may be based on information collected from OHMS staff, modal administration staff, other government officials (e.g. OIG, House T&I staff) and stakeholder interviews.	**Sept 4th**	**Sept 4th** ✓
Safety documentation evaluations. **Within 30 days,** review the criteria, policy, and procedures used to make the statutorily mandated "equivalent level of safety" determination that must be met for the issuance of a special permit. As necessary, revise the criteria, policy, and procedures to ensure that the statutory standard for equivalent level of safety is met and supported with appropriate documentation. Develop process to ensure ongoing review and revision as necessary of safety criteria.	**Sept 4th**	**Sept 4th** ✓
Inter-agency coordination. **Within 30 days,** review and enhance procedures for coordinating the issuance of special permits with FAA, FRA, FMCSA, and the USCG, including methods to evaluate the fitness of applicants to conduct the activities authorized by the special permit	**Sept 4th**	**Sept 4th** ✓

Action Item	Due Date	Completion
Enforcement. **Within 30 days,** develop a plan to provide enhanced enforcement of the terms of special permits, taking advantage of the resources of all the modal administrations with responsibility for enforcing HMR and for enhancing the availability of data needed to appropriately and effectively provide the necessary oversight to ensure that holders of special permits are operating safely and within the conditions established in the special permits.	**Sept 4th**	**Sept 4th** ✓
Applicant "fitness." **Within 30 days,** review the policy and procedures for determining the fitness of special permit applicants, including the criteria considered in determining "fitness" (such as past safety record, previous incidents and violations, staffing and resources, and carrier safety rating if applicable) and the process and criteria for initiating on-site fitness reviews. As necessary, revise the policy and procedures to ensure that fitness determinations are well-founded and supported with appropriate documentation.	**Sept 4th**	**Sept 4th** ✓
Procedures for renewals. **Within 30 days,** review and revise current procedures for checking special permit renewals, expirations, and enforcement follow-up.	**Sept 4th**	**Sept 4th** ✓
Standard Operations Procedures. **Within 60 days,** review and update, as appropriate, written Standard Operating Procedures (SOPs) for the Special Permits Program, incorporating recommendations from the top-to-bottom review and the policies and procedures developed to address "equivalent level of safety," applicant fitness, and inter-agency coordination. The SOPs will detail the procedures utilized to review special permit applications, including interaction with the other DOT operating administrations and permit holders, and enhanced safety oversight measures.	**Oct 5th**	
Stakeholder brochure. **Within 90 days,** develop a brochure for stakeholders on "How to obtain a Special Permit from the Office of Hazardous Materials" to enhance the quality and completeness of special permit and approval applications and the data available to PHMSA and the modes to perform the necessary safety and fitness assessments.	**Nov 4th**	

Action Item	Due Date	Completion
Data Collection and Analysis **Within 90 days,** develop a plan of action and resource assessment for enhancing data collection and analysis including documentation of workflow and business processes to support the IT modernization task of this action plan.	**Nov 4th**	
IT modernization. **Within 180 days, award a** contract to modernize the information technology system that supports the work flow and processing of special permits and approvals to enhance productivity, accountability, and overall management of the safety function responsibilities assigned to the Office of Special Permits and Approvals. As part of this project, establish a mechanism for alerting holders of special permits 90 days in advance of the expiration of a special permit or approval and develop a notification system to communicate safety concerns or other issues with permit holders and to expedite notification of PHMSA and the operating administrations when incidents occur. The system will also include a data warning system for monitoring the performance of holders of specific special permits and approvals.	**Feb 5th**	
Special permits identified for further assessment. **Within 180 days**, review all open special permits to identify those that should be reviewed because of safety concerns. Identify any special permits or approvals where the prior safety justification requires further analysis and review. Develop a plan for completing such review and modifying or rescinding special permits as necessary.	**Feb 5th**	
Incorporation of special permits into HMR. **Within 180 days,** develop a plan, including identification of team members and an implementation schedule, for an ongoing review of all open special permits with a view towards identifying those that should be made part of the HMR. The plan will include a schedule for incorporating identified special permits into the HMR and will be included as part of the business plans for each participating office.	**Feb 5th**	
Website Updates – Special Permits**:** perform continual updates of documents and policies consistent with the noted completion dates in this action plan.		

ACTION PLAN TO ENHANCE THE SAFETY OF SPECIAL USE TRUCKS OPERATING UNDER SPECIAL PERMITS

Action Item	Due Date	Completion
Notice of intent. **Within 10 working days,** notify special permit holders of PHMSA's intent to evaluate their fitness and to modify the special permits to include additional safety conditions, if found to be necessary. The letter will suggest that the special permits may be modified to include additional vehicle inspection and maintenance (including tire replacement), driver training; enhanced incident reporting and accident investigation; fire prevention and mitigation measures; and a mandatory emergency response action plan. Holders will have 30 days to respond.	**Aug 16th**	**Aug 14th** ✓
Fitness review schedule. **Within 15 days,** in coordination with FMCSA, establish a schedule for fitness reviews and implementation plan to conduct safety performance and fitness reviews of the current special permit holders including how holders are complying with the terms of the permits and whether any previous holders are operating under expired permits. The schedule of compliance audits will be based on safety performance data provided by the OIG and further review of safety performance data by PHMSA and FMCSA.	**Aug 21st**	**Aug 14th** ✓
Documentation review. **Within 15 days,** review documentation, including safety assessments and analyses, to ensure documentation supports issuance of the special permits.	**Aug 21st**	**Aug 14th** ✓
Risk assessment. **Within 30 days,** complete a risk analysis to ensure that the special permits address all possible safety issues associated with the transportation of hazardous materials on specialized bulk explosives vehicles, including the potential for a high-consequence (catastrophic) accident. Based on the risk analysis, develop additional safety measures if necessary to address identified risks.	**Sept 4th**	**Sept 4th** ✓

Action Item	Due Date	Completion
Rescind/modify special permits. **Within 60 days,** determine whether the special permits should be rescinded or modified and issue letters to effect such rescissions or modifications.	**Oct 5th**	
Long-term action – stability control. Work with NHTSA and FMCSA to develop a pilot project for installing Electronic Control Stability systems on special use vehicles to prevent rollovers. Consider mandating these systems once the pilot evaluation is completed as a condition for operating these vehicles under the terms of the special permits.		
Long-term action – emergency response. Work with the International Association of Fire Chiefs to develop "best practices" for emergency response to a rollover of a special use truck and spilling ammonia nitrate in one compartment and fuel oil in another onto the highway. These best practices will be available on the "Fusion Center's website and PHMSA's "train the trainer" program will teach these best practices to emergency responders.		

TESTIMONY
Before

The United States House of Representatives
Committee on Transportation and Infrastructure

Hearing on

"Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?"

Presented By

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September 10, 2009

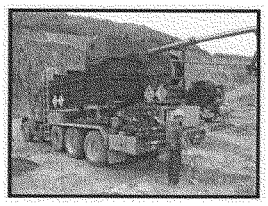
Chairman Oberstar, Representative Mica, and other members of the Committee on transportation and Infrastructure, I greatly appreciate the opportunity to appear before you at this hearing.

I am Lon D. Santis, Manager, Technical Services for the Institute of Makers of Explosives (IME). The IME is the safety and security institute of the commercial explosives industry. The Institute represents companies that are dependent on special permits issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) to ship, receive and transport bulk quantities of blasting agents and oxidizers in vehicles that that are specially designed for this purpose. These special permits recognize that the safest and most secure way to deliver blasting materials essential to the mining and construction industries – industries that underpin the economic well-being of the county – is by MBT.

Background

The special permits (SP) program administered by the US Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) is often held up by the Institute of Makers of Explosives (IME)[1] as a model of regulatory transparency for other agencies to follow.[2] The most vital special permits to the industrial explosives industry are those granted for the transportation of bulk Division 1.5 and 5.1 materials used for blasting from storage and manufacturing locations, over highways, to job sites in multipurpose bulk trucks (MBT). MBTs further process and sensitize the bulk materials at the job site ensuring that less sensitive, safer materials are transported on highways.

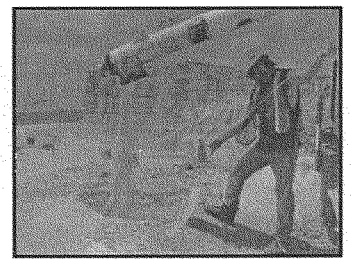
In 2007, the industrial explosives industry in the United States (US) provided 6.93 billion pounds of explosive and explosive precursor materials[3] to fuel the greatest economic engine in the world. Ninety-five percent of this material was delivered to the jobsite in bulk and a significant quantity of that material was transported under a PHMSA SP at some point in time. The highway is the only modal option to deliver blasting materials to worksites.

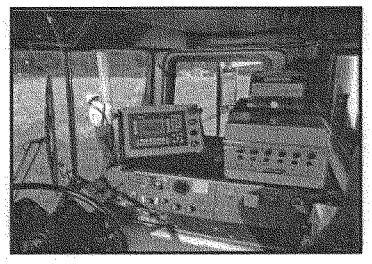


[1] The IME is the safety and security institute of the commercial explosives industry. Our mission is to promote safety and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations. The IME represents U.S. manufacturers of high explosives and other companies that distribute explosives or provide related services. IME's member companies produce over 98 percent of the commercial explosives consumed annually in the United States. These products are used in every state in the union and are distributed worldwide. The ability to manufacture and distribute these products safely and securely is critical to this industry.

[2] Typically once a month, PHMSA will publish in the Federal Register, notice that entities have applied for SPs or modifications to SPs. The name of the applicant, the regulations affected, and a summary of what the applicant has proposed is listed. Anyone can file comments on the fitness of the applicant or the merits of the application. About once a year, PHMSA publishes in the Federal Register its final action of the SP applications. At that time the public can see if a SP application was granted, denied, withdrawn, etc.

[3] http://minerals.usgs.gov/minerals/pubs/commodity/explosives/myb1-2007-explo.pdf





A management advisory issued by the DOT Office of Inspector General (OIG) to PHMSA has called the safety of MBTs into question.[4] The premise for the advisory is flawed. The facts about the explosives industry's use and safety record with MBTs follows:

1. The incredible advancements in the safety of industrial explosives are directly linked to bulk materials.

One hundred years ago, the nation consumed about 500 million pounds of explosives annually, half of it black powder and the other half dynamite. Records from this time are sketchy, but it is safe to say that hundreds of people died annually in explosives incidents. By the 1950's, consumption increased to 800 million pounds and nearly all of it was dynamite. Because dynamite was not sensitive to stimuli that would ignite black powder, accidents were reduced dramatically. But explosives work was still a very dangerous occupation. Data at the time indicates that, on average, one industrial mineral miner died in an explosives accident for every 14 million pounds consumed in industrial mineral mining.[5] Since the 1950's insensitive ammonium nitrate (AN) based explosives have taken over the market and annual fatalities in the US from industrial explosives in manufacturing, use, storage, transportation, and disposal have fallen to miniscule numbers, some years even zero. As compared to black powder and dynamite, AN's unique mix of reactivity, insensitivity and low cost allowed the US economy to grow immensely in the latter half of the 20th century. Consumption of industrial explosives increased 20 times more in the 50 years from 1950 to 2000 than from 1900 to 1950. In the same century, fatalities from explosives accidents have been reduced by more than a factor of 100. Factoring the combined growth and increased safety of the 20th century, it would be safe to say that the industrial explosives industry today is thousands of times safer than it was 100 years ago.

Although explosives comprised of AN plus a liquid fuel were patented in the 1800's, it was not until the 1950's, when technology allowed the production of abundant supplies of AN in prilled form, that the use of ANFO (AN plus fuel oil) increased dramatically. ANFO's limitations were quickly realized however. It cannot break very hard rock well and is very incompatible with water. Many methods have been tried to overcome these limitations over the years with AN-based emulsions and watergels (ANE) eventually becoming today's choice. ANEs are inherently resistant to combustion because of their high water content (5 to 15 percent), further enhancing the safe transportation these products over ANFO. The latest step in maximizing the safety of blasting operations has been to incorporate Class 8 material into the ANE just before loading. This allows transport and loading of a non-explosive, waterproof material that acquires its explosive properties in minutes, and only after it is loaded in the borehole. These safety enhancements

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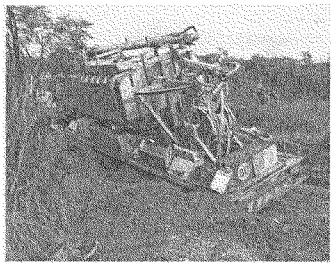
4 Management Advisory from OIG to PHMSA, dated July 28, 2009.

5 An Analysis of Recent Accidents During Use of Commercial Explosives, Santis, ISEE 2003

entirely depend on bulk delivery, and PHMSA's SPs have allowed this technology to evolve. MBT technology has been a leading factor in the industry's attainment of zero deaths or injuries during transportation.

The MBTs used to deliver bulk materials to the worksite are as diverse as the mines, quarries and construction sites serviced. MBTs employ technologies that meet risk assessments and strict engineering and design standards. Not only do the MBTs transport hazardous materials, they must carry a diverse array of equipment such as pumps, meters, and equipment to remove water from the boreholes before loading explosives. They serve as a mobile work platform for thousands of blasters daily in some of the harshest conditions imaginable. These units must be capable of going from paved interstate, to unpaved mine roads, to blast sites. Over the years, PHMSA has shown remarkable ability to maintain the modifications to the SPs necessary to keep the technology advancing, while at the same time, maintaining safety not only in transport, but also in manufacture, storage and use. We cannot afford to lose the advantages provided by bulk materials to our society and economy.



2. The transport of bulk materials for blasting over highways is safe.

An objective assessment of industry's safety record shows that the transportation of bulk materials for blasting under PHMSA SPs is safe, perhaps one of the safest activities that PHMSA regulates. While some may find any incident, or the possibility of any incident, unacceptable, the goal of the HMTA is not "zero risk." Any activity, including the transportation of hazardous materials, involves risk. The only way to achieve zero risk is to not engage in the activity. While we seek to learn from incidents and strive to be more vigilant, the goal is to manage risk.

Under its statutory authority, PHMSA is directed to regulate "unreasonable risk to health and safety or property."[6] (Emphasis added.) PHMSA espouses a risk-based approach that considers the probability of the event happening with the consequences of that event happening. Taking a consequence-only approach to managing hazards could lead to the end of all hazmat transportation and the end of commercial motor vehicles (CMV) as we know them. After all, in a car/CMV collision, the consequence will almost always be much worse for the occupants of the car. Due process is not served when explosives are held to a consequence-only standard, while likelihood is a factor considered for other hazardous materials.

Comparisons of the risk of commercial, regulatory-compliant bulk materials used for blasting to the materials rigged by Timothy McVeigh in the Oklahoma City act of terrorism are inflammatory. Likewise, using an industry trade name to sensationalize the issue, despite repeated requests to the contrary is improper. The public interest is not served by an appeal to emotion when objective analysis rooted in science is required.

Although there has been attention drawn to the number of serious incidents involving the SPs used to transport bulk materials for blasting, there has not been sufficient attention paid to the absence of any fatalities or injuries from these incidents or development of metrics that allow fair comparisons to other

[6] 49 U.S.C. 5103(a).

transportation activities. Any incident involving Class 1 or AN usually results in a road closure. A road closure triggers the designation of the incident as "serious." [7]

To our knowledge, there has never been a fatality or injury from the commercial explosives or precursors in transportation by MBT. During the 1999-present timeframe used in the OIG advisory, only two incidents resulted in injury from all Class 1 materials in transportation, neither incident involved SPs for transport of bulk materials. DOT data for the decade 1999-2008 show that there have been no incidents resulting in injury from bulk AN or ANE in transportation. On the other hand, 87 fatal incidents have occurred from bulk Class 3 materials in transportation since 1999.

The vast majority of the Class 3 incidents involve gasoline, and in fact, there have been 108 transportation incidents resulting in fatality or injury from gasoline since 1999. In this period, there have been about 100 million highway shipments of gasoline[8] which equates to an incident with fatality or injury rate of 1 every 900,000 shipments. In the same period, about 3.5 million shipments of bulk materials for blasting have been made without a single incident resulting in death or injury from the hazmat. Even if the first incident occurred tomorrow, based on incidents per shipment, the shipment of bulk materials for blasting would still be 3 to 4 times safer than the shipment of gasoline.

An objective assessment the industry's performance on the highways would compare the number of crashes, incidents or citations to miles driven, vehicles operated or inspections conducted. IME searched data from the DOT SAFER website for the last two years on 24 of the largest explosives service companies using bulk SPs. These companies reported a total fleet of 1,841 vehicles that drive over 40 million miles annually. These companies had 40 reported crashes for a rate of 2.17 percent. These companies also sport a median vehicle out-of-service (OOS) rate of 10.1 percent, driver OOS rate of 2.35 percent, and a hazmat OOS rate of 3.2 percent. These metrics indicate a sector that significantly outperforms the majority of other motor carriers in every metric.

Government officials have stated that MBTs have "high" center of gravity and are prone to rollover without providing objective data to prove their point. Stating that a certain number of rollovers have occurred is meaningless without the context of how many times the rollover did not occur or comparing that rate to other sectors. For example, if a particular motor carrier had half the rollovers but traveled three-fourths the total mileage, that carrier would be a stellar performer. MBTs cost hundreds of thousands of dollars so, aside from safety, industry has additional incentive to prevent a roll-overs (which usually "total" the vehicle). Although the IME is taking steps to add measures in its standards to address the major causes of roll-overs, it does not believe that MBTs are any more prone to roll-over than other bulk material transport vehicles.

A recent DOT report on cargo tank rollovers suggests MBTs are less prone to rollover than similar vehicles. The report says that the nominal height of semitrailers is 79 inches. This is higher than the typical MBT center of gravity height of 75 inches. The report also predicts a rollover rate of between 0.35 and 0.40 rollovers per million miles for vehicles with similar center of gravity height and wheel width as MBTs.[9] IME

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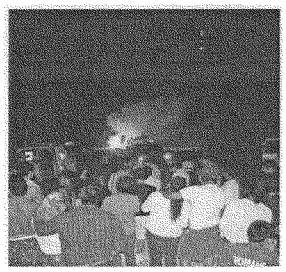
[7] DOT defines a "serious" incident as one where the release of a hazardous material results in one or more of the following: death, major injury resulting in a hospitalization, an evacuation of 25 or more persons, closure of a major transportation artery, alteration of an aircraft flight plan or operation, failure of a Type B radioactive packaging, release of over 11.9 gallons or 88.2 pounds of a severe marine pollutant, or release of a bulk quantity (over 119 gallons or 882 pounds) of a hazardous material.

[8] http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/app_b.pdf

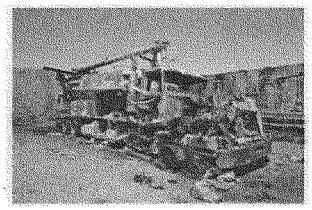
[9] http://www.fmcsa.dot.gov/safety-security/hazmat/cargo-tank-roll-stability-finalreport-april2007.pdf

estimates that MBT's travel several tens of millions of miles annually with about two rollovers per year, well below the report's prediction.

Recent transportation incidents involving Class 1 materials in the United States and Mexico have been held up as examples of what can go wrong in MBT accidents. In fact, these incidents illustrate how the system can succeed and fail, but have little direct bearing on the safety of MBTs operating under SPs. In 2005, an incident in Utah involved the transportation of Division 1.1, a material more sensitive than the Division 1.5 or 5.1 materials transported in MBTs. Proper emergency response was followed for this incident. As a result, there was no loss of life in the subsequent explosion that occurred during this incident. The material being transported in the 2007 incident in Mexico was a truckload of packaged, not bulk, Division 1.5 material. In this incident, in which there also was a subsequent explosion, emergency responders were not able to keep onlookers at a safe distance and bystanders were too close to the scene when the explosion occurred. The photograph to the right was taken 10 minutes before the Mexican explosion. Ironically, if transport of bulk materials were reduced, these Division 1.1 and packaged Division 1.5 materials would replace them on the highways.



There have been several off-highway incidents where MBTs have been totally consumed by fire without detonation. To our knowledge, there has never been an accidental explosion of an MBT in transportation or elsewhere.[10]



Although remote, the possibility of an explosion can never be eliminated. MBTs provide the materials necessary for mining and construction in the safest manner possible. Transportation risks are minimized by adhering to the most rigorous set of regulatory requirements of any hazardous material class, developing effective emergency response, and encouraging the transport of safer materials.

Class 1 materials are one of the most highly regulated commodities in the US. Class 1 is the only hazard class that shippers must obtain approval from DOT before these materials can be transported. Quite often, third-party testing is required to prove that a candidate explosive is safe to transport. A considerable number of other regulatory requirements apply only to explosives or to explosives and a few other hazmats. The Federal Motor Carrier Safety Administration's Hazardous Materials Safety Permit (HMSP)

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[10] There have been minor explosions of explosive materials in the vicinity of MBTs while they were off-highway, but none of these events resulted in propagation to the bulk material containers or were related to transportation activities. These events further prove the safety of the engineering and design of MBTs.

ensures that only the best performing motor carriers transport explosives. For example, a motor carrier cannot have an average of more than 1 hazmat OOS violation for every 22 roadside inspections to qualify for an HMSP. Special parking, routing and attendance rules apply as well to Class 1 materials.

PHMSA and the IME have partnered over the years to provide comprehensive training materials for emergency responders on explosives and guidance in the Emergency Response Guidebook. A training video cosponsored with PHMSA and an instructor's booklet are available from the IME.[11] Every firehouse in the Federal Emergency Management Agency's database was provided a copy of these training aids by IME and PHMSA in 2003. The payoff from this proactive approach to emergency response is evident from the lack of injuries or deaths from Class 1 materials in transportation.

PHMSA's SPs have fostered a US industry that transports the safest and least sensitive energetic materials possible, while at the same time, becoming the world leader in explosives technology. Obtaining SPs from PHMSA for bulk materials involves close scrutiny and technical review. Rarely has PHMSA met the 180-day statutory requirement to process SP applications involving explosives. For example, SP 11579 took three years of evaluation by PHMSA before it could be revised. There is no basis to suggest that PHMSA has not provided sufficient oversight of SPs for MBTs.

Other regulatory agencies have purview over bulk explosives operations and do not have major concerns over the safety of these operations. For example, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has jurisdiction over the storage of explosives remaining in any MBT parked overnight because the unit is considered a storage magazine. Since the MBT cannot meet some of the regulatory requirements for a magazine, ATF licensees had to obtain a waiver seeking alternative compliance from ATF. This practice has become so ubiquitous, safe, and secure that ATF recently issued a ruling eliminating the need for these waivers and spelling out the alternative conditions necessary for compliance.[12]

3. Without PHMSA's SPs for transportation of bulk materials, accidents will increase and the US economy would be devastated.

If PHMSA revoked the SPs for transportation of bulk materials for blasting, explosives manufacturers would not be able to meet consumer demands for the amounts of material needed to continue mining and construction. Productivity in these industries would be reduced dramatically, perhaps initially by half. Some mining sectors would be virtually shut down. The products that would replace bulk are more sensitive and the positive trend in safety experienced through the 1900's would be reversed as accidents in manufacturing, storage, transportation, use and disposal would be expected to increase.

The following table estimates that the nation would suffer a 30 percent reduction in capacity to deliver explosives to consumers if PHMSA revoked the SPs for transportation of bulk materials for blasting. This analysis only considers the final segment of transportation which ends in delivery down the borehole. Additionally, there would be negative impacts in the distribution chain upstream from this segment.

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[11] Responding to Trucking Incidents Involving Commercial Explosives with Leader's Guide, 2003 IME and PHMSA, Washington, DC.

[12] http://www.atf.gov/explarson/rules/atf_ruling2007-3.pdf

Type of Commercial Explosive	2007 Consumption (tons)	Annual Capacity without DOT Bulk SPs (tons)
Bulk ANFO	1,640,000	2,000,000[13]
Bulk ANE	1,640,000	50,000[14]
Packaged Division 1.5 and 5.1	139,000	278,000[15]
Packaged Division 1.1	45,100	90,200
Total	3,464,100	2,668,200

Although the industry could deliver 2 million tons of explosives to users as ANFO, many of them could not use ANFO due to site conditions or would suffer significant productivity losses. Blasting with packaged products is much less efficient than with bulk materials, so efficiency would be reduced anywhere packaged product use increased.

Aside from the laws of supply and demand, the impact of PHMSA revoking the SPs for transportation of bulk materials for blasting would have varying effects on different sectors and regions as shown below.

Type of Sector	Unique Factors	Consequences of Revocation of SPs
MN Iron Range and other mineral mining	Packaged products impractical. ANFO not effective. Foreign competition.	Nearly complete shutdown of sector.
Construction and Quarries	ANFO marginally effective. Dependant on ANE. High population density.	Increased public exposure to risk. Dramatic decrease in productivity.
Powder River Coal	Packaged products impractical. Dependant on ANE.	Made noncompetitive with other coal fields.
Appalachian Coal	ANFO somewhat effective. 1/3 of usage is ANE. Higher population density.	Increased public exposure to risk. Dramatic reduction in production.
Power Generation	Dependent on coal.	Dramatic reduction in capacity to generate electricity with coal.
All Other Industries	Dependent on sectors listed above.	Severe, perhaps unprecedented, economic downturn.

If PHMSA revoked the SPs for transportation of bulk materials for blasting, the long-term solution would be to move manufacturing and storage of raw materials on-site. This would result in thousands of locations where these security-sensitive materials are stored, and thus would create a security vulnerability where one did not exist before. It would take up to 20 years to migrate from the centralized distribution system of today to one based on on-site manufacturing. One IME member company has estimated that the cost of maintaining its customer base in this manner would cost them nearly 300 million dollars and 145 jobs. The loss of bulk products would be offset somewhat by an increase in packaged products, a trend that would also increase the nation's security vulnerability. Although bulk materials for blasting have never been used in a criminal bombing, packaged explosives have been used.

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[13] IME estimates that the current fleet of MBTs could deliver about 60% of current demand for bulk materials as ANFO. About 40% of the fleet can only deliver ANE.

[14] An SP is needed to transport bulk ANE on highways. This number reflects the current capacity to manufacture ANE on-site.

If PHMSA revoked the SPs for transportation of bulk materials for blasting, traffic accidents would increase because two or more vehicles would be needed to transport what was previously transported on one vehicle.

4. Industry Efforts to Achieve and Maintain Safety & Security of Explosive Materials.

The industrial explosives industry is one of the most proactive safety advocates in the US. At the explosives industry's bequest, Congress passed the first hazmat transportation act in 1908. Interestingly, although the bill was titled a hazmat bill, it only regulated explosives because other chemical producers advocated keeping their materials out of the bill. It would be decades before the transportation of other hazmats became regulated. This cooperative and proactive nature lives on today through the IME. IME standards call for a much higher level of performance than do the regulations. In fact, nearly every explosives regulation has its roots in IME standards. Today, IME, in partnership with the Department of Defense, is at the forefront of developing quantitative risk assessment modeling methods for explosives risk management.

Further proving the commitment to safety held by explosives manufacturers, IME members have had an average DART rate from the US Occupational Safety and Health Administration below the national average every year since 2003. A DART rating is given by OSHA and factors several different statistics on an employer to provide a single, overall safety rating for their workplace.

When PHMSA came to industry in 2008 to discuss MBT safety enhancements, industry developed recommendations to directly address the root causes of rollover incidents involving MBT. The root causes were determined to be driver error and tire issues. Despite our belief that no significant problem existed, and in pursuit of continuous improvement, the industry task force decided to recommend modifications to IME's construction standard for MBTs, SLP-23. These modifications will enhance the standard's recommendations which already go considerably beyond what is required by the SPs. Industry's substantial compliance with the recommendations of SLP-23 is another example of industry's self-motivated pursuit of the safest practices possible.

Conclusion

The mission of IME is safety and the security of the products we manufacture, transport, and use. We and our member companies have demonstrated this commitment through our safety standards, research, and our record. We continue to look for ways to improve our performance. We support the closely regulated environment envisioned under the HMTA because it has time and again proven to be the most efficient way to move hazardous materials safely and securely.

I would be glad to answer any questions.

Before the Committee on Transportation and Infrastructure
United States House of Representatives

For Release on Delivery
Expected at
10:00 a.m. EDT
Thursday
September 10, 2009
CC-2009-096

PHMSA's Process for Granting Special Permits and Approvals for Transporting Hazardous Materials Raises Safety Concerns

Statement of
The Honorable Calvin L. Scovel III
Inspector General
U.S. Department of Transportation

Mr. Chairman, Ranking Member Mica, and Members of the Committee:

We appreciate the opportunity to testify today on safety issues within the Pipeline and Hazardous Materials Safety Administration's (PHMSA) Special Permits and Approvals Program. As you know, special permits and approvals exempt their holders from certain Federal regulations governing the transport of hazardous materials. Currently, there are about 5,500 special permit holders[1] and 118,000 approvals.

On July 28, 2009, we issued a management advisory to PHMSA that outlined a number of concerns. My testimony today will focus on those concerns as well as new ones identified through our ongoing work. Specifically, (1) shortcomings in the processes for reviewing and approving special permits and approvals, (2) concerns with PHMSA's oversight of permit holders' compliance with safety requirements, and (3) long-standing safety issues that remain unaddressed by PHMSA.

In summary, we found that PHMSA grants special permits and approvals without exercising its regulatory authority to review applicants' safety histories and without coordinating with partner safety agencies. Despite these weaknesses, PHMSA does not target individuals and companies that hold special permits and approvals for safety compliance reviews. These issues—along with safety concerns previously raised by our office, the Federal Aviation Administration (FAA), and the National Transportation Safety Board (NTSB)—call into question the effectiveness of PHMSA's process for granting special permits and approvals.

We want to recognize Secretary LaHood and Deputy Secretary Porcari for their leadership in directing PHMSA to formalize an action plan addressing these and other concerns regarding the Special Permits and Approvals Program.

[1] There are now about 1,250 active special permits. The 5,500 referenced above include these plus all party-to permits.

BACKGROUND

PHMSA is the lead agency responsible for regulating the safe transport of hazardous materials, including explosive, poisonous, corrosive, flammable, and radioactive substances.[2] PHMSA regulates up to 1 million daily movements of hazardous materials, totaling up to 20 percent of all freight tonnage shipped each year in the United States. The FAA, Federal Motor Carrier Safety Administration (FMCSA), and Federal Railroad Administration (FRA) also oversee and enforce regulations for their respective industries.

Many hazardous materials are transported under the terms and conditions of special permits and approvals.[3] Special permits and approvals allow a company or individual to transport, package, or ship hazardous materials in a manner that varies from the regulations, provided they meet two key criteria for authorization:

- the company or individual is fit to conduct the activity authorized by the special permit or approval and
- the level of safety the company or individual is proposing is as safe as or safer than requirements from which the company is seeking relief.

Obtaining a special permit or approval allows a company to use technological innovations in transporting hazardous materials—improvements that have emerged since the regulations were first promulgated. Requests for special permits and approvals generally include "new," "renewals," and "party-to" applications (a party-to application applies only to special permits and is a request to "piggy-back" on a new or existing permit). New special permits may be authorized for up to 2 years, at which time they may be renewed for a period of up to 4 years.[4] Emergency special permits must be submitted directly to the affected Operating Administration, which evaluates and confirms the emergency, recommends any conditions for inclusion in the permit, then forwards its review to PHMSA. The exhibit to this statement describes the process requirements for special permit and approval applications.

PHMSA DOES NOT PROVIDE ADEQUATE REVIEWS OF APPLICATIONS FOR SPECIAL PERMITS AND APPROVALS

PHMSA does not review applicants' incident and enforcement histories—critical factors in assessing fitness—before authorizing special permits and approvals for individuals, businesses, and trade associations. We also found that PHMSA has granted special permits and approvals even though its reviews of requests do not

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[2] Hazardous Materials Regulations, 49 C.F.R. § 171-180 (2009).

[3] *Special permits* authorize a holder to vary from specific provisions of the Hazardous Materials Regulations; identify the section(s) from which relief is provided; and include provisions, conditions, and terms that must be followed in order for the special permit to be valid. An *approval* means written consent from PHMSA's Associate Administrator to perform a function that requires prior consent under the Hazardous Materials Regulations.

[4] The 4-year renewal period was authorized under SAFETEA-LU, Pub. L. No. 109-59 (2005).

always demonstrate that applicants will provide a level of safety equal to the regulations from which they seek relief. In addition, PHMSA does not sufficiently coordinate with other agencies that are involved in overseeing the transport of hazardous materials before issuing a special permit or approval.

PHMSA Does Not Consider Applicants' Safety Histories When Determining Fitness for Special Permits and Approvals

Hazardous Materials Regulations provide PHMSA the authority to review an applicant's safety history when assessing the applicant's fitness for a special permit or approval.[5] PHMSA's reviews, however, solely examine the safety of the requested action, process, or package—not the applicant's prior incidents or enforcement violations. According to PHMSA officials, applicants' incident and compliance histories have no bearing on their ability to safely carry hazardous materials—a safety issue we highlighted in our July 2009 management advisory. Specifically, we found that PHMSA had granted 1 company a special permit to operate bulk explosives vehicles,[6] despite the fact that over the last 10 years the company had 53 incidents—12 of which were serious with 9 of those involving vehicle rollovers—and 22 violations issued by PHMSA's or FMCSA's enforcement office.[7]

In addition, our ongoing review found no instances where PHMSA considered applicants' safety histories. However, our assessment of 99 non-emergency special permits found that 26 of those holders (26 percent) had at least 5 incidents or violations over the 10-year period preceding PHMSA's grant of the permit. For 8 (about 31 percent) of these 26 permits, each applicant had at least 100 incidents, some of which were serious. For example, 1 company was granted a special permit in September 2004 despite having 321 prior incidents and 5 prior enforcement violations. Further, the company's permit was renewed 2 years later despite having an additional 26 incidents and 5 enforcement violations.

We also found that PHMSA granted special permits to 12 trade associations—effectively a "blanket authorization" for about 5,000 member companies. PHMSA granted these permits without verifying member companies' fitness to carry out the terms and conditions of the permit. PHMSA also did not determine whether permits were needed or used, whether companies actually existed or provided accurate

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[5] 49 C.F.R. § 107.113f(5) (2009). The regulations state that the Associate Administrator may grant an application upon finding that, among other things, the applicant is fit to conduct the activity authorized by the exemption or special permit. This assessment may be based on information in the application, prior compliance history of the applicant, and other information available to the Associate Administrator.

[6] Permit holders are authorized to transport certain explosives, oxidizers, corrosive and combustible liquids, and blasting caps on the same truck.

[7] An incident generally involves the unintentional release of a hazardous substance or discovery of an undeclared hazardous material. PHMSA defines serious incidents as those incidents involving fatalities, serious injuries, closure of a major transportation artery, evacuations of 25 or more people, and hazardous materials releases of greater than 119 gallons or 882 pounds.

information about themselves, or whether they were even aware that they had a permit to abide by. For example, we visited 18 companies that were members of 7 of the 12 associations and found that:

- 3 of the 4 companies using an association-granted permit had compliance issues, including deficiencies with shipping papers, training requirements, certificates of registration, and security plans. In fact, at two facilities, the companies were unaware that a special permit applied to the function they were performing and so they were not meeting the terms and conditions of that permit. One of the companies explained they were recently made aware of the applicable permit after the trade association warned them of a possible investigation into permit compliance by DOT Office of Inspector General auditors.

- 4 companies did not reside at the address provided by their association (currently, the terms of the permit do not require trade associations to notify PHMSA of any changes with its member companies); and

- 10 had no reason to use their industry association's permit because they did not perform the activity for which the permit was granted.

Finally, PHMSA also granted approvals to applicants without examining their safety histories. Of the 56 approvals that we reviewed,[8] 5 were granted to applicants with prior safety incidents and violations, ranging from 6 incidents and 1 violation to 178 incidents and 23 violations.

PHMSA Has Granted Special Permits and Approvals Without Support for an Equal Level of Safety and Has Overlooked Incomplete Applications

PHMSA has granted special permits and approvals without sufficient data and analyses to confirm that the applicants' proposed level of safety is at least equal to what is called for in the Hazardous Materials Regulations. We reviewed 99 non-emergency special permits and found that for nearly 65 percent (8 new, 37 renewals, and 19 party-to status)[9] PHMSA's evaluations[10] were either incomplete, lacking evidence to support that the applicant demonstrated an equal level of safety, or simply nonexistent. Of particular concern is the lack of supporting documentation for renewal and party-to permits, which are based on evaluations PHMSA may have performed several years earlier when assessing the original (new) special permit application. According to PHMSA officials, some of this information was lost when the Office of Hazardous Materials Safety migrated to a new information system and

[8] We sampled a total of 68 approvals, 12 of which were denied, reducing our sample to 56.

[9] We sampled 62 new special permits, of which 16 were granted emergency status and 6 were denied, reducing our sample to 40 new special permits. We also reviewed a sample of 39 renewals, 1 of which was denied, reducing our sample to 38 renewals. Our sample also included 21 party-to permits.

[10] PHMSA's evaluations are generally performed by chemists, general and mechanical engineers, physicists, and physical science experts in PHMSA's Hazardous Materials Technology Office.

decided to transfer the most current special permit but not the historical records. Despite this lack of original information, PHMSA opted to renew permits or grant party-to status without conducting a new evaluation. Further, there was still information missing for the eight new permits—information needed to support an equal level of safety.

Evidence of an equal level of safety to support emergency special permits and approvals was similarly lacking:

- PHMSA's evaluations for 8 of the 16 (50 percent) emergency special permit applications we reviewed were either incomplete, not reviewed by PHMSA's technical staff, lacked a conclusion that an equal level of safety was demonstrated, or were not performed.
- Each of the 56 approval applications we reviewed lacked evaluation documentation by PHMSA to indicate how an equal level of safety was reached.

In addition, PHMSA is not holding applicants accountable for providing required information, as it has granted new permits and renewals to applicants who did not:

- provide relevant shipping and incident experience,
- demonstrate that a special permit achieves a level of safety at least equal to that required by regulation, and
- certify—for renewals—that the original application remains accurate and complete.

Within the 99 non-emergency permits we reviewed, we sampled 40 applications for new permits and 38 applications for renewals. The table below shows that for most of these, required information was either not provided by applicants or not validated by PHMSA.

Table. Insufficient Information on Special Permit Applications

Permit Type	Shipping/Incident Experience Missing	Shipping/Incident Experience Not Validated by PHMSA	Equal Level of Safety Not Supported	Accuracy and Completion of Original Application Not Supported
New	18	19	5	N/A
Renewal	1	37	N/A	7
Total Problems Found	**19**	**56**	**5**	**7**

Note: We did not examine what applicants provided for the 21 party-to permits since they generally provide limited information, given that they receive their permit based on PHMSA's evaluation of the original permit holder's application.

We also looked at applications for emergency permits, which require applicants to provide specific support to justify emergency processing. However, 3 of the 16 applicants (or about 19 percent) we reviewed who were granted emergency permits did not provide such support.

PHMSA Grants Special Permits and Approvals With Little or No Input from Partner Safety Agencies

While PHMSA is not required to coordinate with Operating Administrations before authorizing a non-emergency special permit or approval, the exchange of information among safety stakeholders, especially those with oversight and enforcement responsibilities, is fundamental to safety. According to officials we spoke with, coordination between PHMSA and FAA, FRA, and FMCSA mainly consists of informal e-mails and phone conversations.

Based on our review of 99 non-emergency special permits, we found no evidence that PHMSA coordinated with the affected Operating Administration in granting 36 of 40 (90 percent) new permits, all 38 renewals, and 19 of 21 (about 90 percent) party-to permits we sampled. Coordination with partner safety agencies prior to granting renewal and party-to permits is especially critical so they can ensure these applicants are still fit to conduct the authorized activity and that their proposed level of safety meets or exceeds the safety level required by the Hazardous Materials Regulations. Authorizing special permits that have not been fully vetted could ultimately lead to unsafe transportation of hazardous materials. Twelve of the 36 new permits that were not coordinated allowed transport by air (passenger and/or cargo), a particularly vulnerable transportation method if an incident were to occur.

FAA has also expressed dissatisfaction that PHMSA does not provide sufficient and consistent documentation upon which FAA can base its evaluation of the special permit or approval terms and conditions. For example, in 2008, PHMSA coordinated an emergency special permit application to transport by cargo aircraft several hazardous materials contained in spacecraft parts and components. The items included lithium batteries in a package that exceeded size parameters and a poisonous gas contained in pipes, which is normally prohibited by the Hazardous Materials Regulations for shipment by air. According to FAA, the request did not provide any additional safety measures for the pilots, and PHMSA did not include an explanation of how an equal level of safety would be met.

This example also illustrates the importance of coordination for emergency special permits, which is required by regulations.[11] Unlike non-emergency special permits, emergency special permits must be submitted directly to the affected Operating Administration, which evaluates and confirms the emergency, recommends any conditions for inclusion in the permit, then forwards its review to PHMSA. However,

[11] 49 C.F.R. § 107.117(d) (2009).

in 13 of the 16 emergency applications we reviewed, the applications went directly to PHMSA and were not coordinated with the affected Operating Administration. PHMSA also failed to publish 11 emergency permits in the Federal Register within 90 days of issuance as required by law for public safety and stakeholder notification.

The lack of coordination between PHMSA and FMCSA is also disconcerting, given that special permits for use of "bulk explosive" vehicles continue to be approved despite their number of serious incidents and violations—a key issue highlighted in our July management advisory to PHMSA. For the period October 2005 to July 2008, bulk explosives vehicles have experienced 14 serious incidents, 11 of which involved vehicle rollovers.

We also reviewed 56 approvals and found that none were coordinated with the affected Operating Administration. According to PHMSA, most approvals (e.g., explosive classifications, fireworks classifications, and retesters of cylinders) are mode-neutral and do not require coordination. We agree that not every approval needs to be coordinated, but certain approvals should be, especially those that provide exceptions from regulatory requirements or prohibitions, such as authorizations to transport lithium batteries in quantities greater than 77 pounds (anything under this weight does not require PHMSA approval). Our work underscores the importance of PHMSA and the affected Operating Administration jointly developing and implementing a Memorandum of Agreement on the type of approval requests that will be coordinated. This would provide each agency with an opportunity to share their knowledge about the party seeking an alternative method of compliance to the requirements in the Hazardous Materials Regulations.

PHMSA DOES NOT CONDUCT REGULAR COMPLIANCE REVIEWS OF INDIVIDUALS AND COMPANIES THAT HAVE BEEN GRANTED SPECIAL PERMITS AND APPROVALS

PHMSA's risk-based oversight approach considers three priority factors when selecting individuals and companies that transport hazardous materials for safety compliance reviews: accident investigations, third-party complaint investigations, and fitness inspections.[12] Conducting compliance reviews of special permit and approval holders is not considered a priority, even though PHMSA states it holds companies with special permits and approvals to a higher standard of compliance than non-permit holders. PHMSA contends that this does not need to be incorporated in its risk-based oversight criteria because special permit holders have demonstrated better compliance over the last 10 years than non-permit holders.

Our visits to 27 companies indicate otherwise. Sixteen of these companies (59 percent) held 91 special permits. We found that all 16 were not complying with

[12] Fitness inspections are usually referred from PHMSA's Office of Special Permits and Approvals to its Office of Hazardous Materials Enforcement (OHME).

various terms and conditions of 56 (62 percent) of the permits, such as training, shipping, and signage requirements. For example, one company failed to post a required sign on a vehicle that read "Warning, trailer may contain chemical vapor. Do not enter until vapors have dissipated." Officials from five companies were unaware of which special permits applied to their location, and two facility officials seemed confused as to what a special permit was and made several calls to their corporate office or manager to obtain clarification on their permit use.

We are particularly concerned about these weaknesses with regard to the many companies whose operations depend on special permits and approvals and those companies operating multiple permits, approvals, or both. For example, we identified 16 companies that each had 20 or more special permits, 7 companies that each had 30 or more special permits, and 1 company that had 65 special permits.[13] Omission of the priority factor, "holder of special permit and approval" from PHMSA's risk-based oversight criteria means it cannot increase oversight for those companies that may not be providing an equal or higher level of safety as specified by the terms of the permit and the Hazardous Materials Regulations.

LONG-STANDING SAFETY CONCERNS HAVE LARGELY GONE UNADDRESSED BY PHMSA

Safety concerns associated with bulk explosive trucks were raised to PHMSA more than 2 years ago but have only recently received attention. Although PHMSA formed an advisory group primarily comprised of industry representatives, the group did not produce actionable solutions to these vulnerabilities. Our recent management advisory to PHMSA brought this issue to the attention of the highest levels of the Department. In response to our advisory, PHMSA developed an action plan addressing our concerns related to specialized bulk explosive truck operations, as well as other issues found with the special permits program in general. We intend to monitor PHMSA's progress on this issue as this is not the first time identified safety concerns have gone largely unaddressed.

Safety Concerns Associated With Certain Bulk Explosives Special Permits Have Only Recently Received Attention

In June 2007, PHMSA's Chief of the Office of Hazardous Materials Enforcement (OHME), Central Region, sent a letter to the Director of the Special Permits and Approvals Office citing specific problems and risks associated with vehicles traveling under two special permits. The letter described the results of a PHMSA investigation of a rollover incident where the vehicle's tanks had ruptured and the different hazardous materials had mixed, creating the potential for a catastrophic event. As a precaution, the local fire department evacuated all areas within a 1.5-mile radius of the incident—1 mile beyond the emergency response handbook requirement.

[13] We excluded the Department of Defense as a holder of special permits in our analysis.

The two special permits in question—11579 and 12677—allow permit holders to transport certain explosives, oxidizers, corrosive and combustible liquids, and blasting caps all on the same truck. While this practice is prohibited by the Hazardous Materials Regulations, permit holders are exempted from these requirements if they can show that their method of transport meets or exceeds the level of safety specified in the regulations and that they are fit to conduct the activity authorized by the permit.

OHME made a series of recommendations, one of which requires all operators of vehicles with multi-hazard special permit authorizations to receive additional safety training that specifically addresses vehicle susceptibility to rollovers.

In May 2008, nearly a year after receiving OHME's letter, PHMSA formed an advisory group, comprised of DOT and industry representatives, which met and discussed several issues. These included vehicle rollover prevention, training for drivers of these vehicles, improved battery protection or relocation, and ways to minimize circumstances that would cause a fire in a rollover spill. We first raised our concerns about the number of incidents and violations associated with these special permits in January 2009. At that time, PHMSA officials told us that the advisory group was looking into this matter. In March 2009, the group met again, and the Institute of Makers of Explosives representatives presented recommendations for the increased safety of the vehicles operated under the special permits. At both meetings, OHME's recommendations were not pursued and no clear course of action was determined except that another meeting in the near future would be beneficial.

Long-Standing Safety Concerns Regarding Special Permits To Ship Lithium Batteries Have Not Been Addressed

In 1999, a pallet of lithium batteries caught fire while being handled between flights at Los Angeles International Airport. Following this incident, FAA raised safety concerns involving life-threatening accidents with the air transport of bulk shipments of lithium batteries. Further, the NTSB's investigation of this incident revealed that these batteries presented an unacceptable safety risk to aircraft and passengers. The NTSB made a series of recommendations, including that packages containing lithium batteries be identified and shipped as hazardous materials when shipped on aircraft.

During our 2003 through 2004 review of FAA's Hazardous Materials Safety Program, two serious incidents involving the shipment of lithium batteries occurred. In one of these incidents, which occurred in August 2004, a shipment of lithium batteries caught fire on a ramp of a major all-cargo carrier at Memphis International Airport. According to the shipping documents, the battery package was shipped under a PHMSA approval; however the materials were not packaged according to the terms of the approval, and the approval was never coordinated with FAA. Our November 2004 report ultimately concluded that discussions between FAA and PHMSA (known as the Research and Special Programs Administration at the time) on the safe

transport of lithium batteries and other issues on rules governing air shipments of hazardous materials had been ongoing for 5 years without any effective resolution.[14]

We reported that serious efforts to resolve these issues were only undertaken after the August 2004 incident; high-level Departmental attention; and issuance of FAA's technical report, which concluded that lithium batteries pose a unique threat in the cargo compartment of an aircraft because lithium fires cannot be extinguished by FAA's certified fire suppressant system. We made a number of recommendations to address these unique safety requirements. The Assistant Secretary for Transportation Policy concurred, stating that the Department "anticipate[s] having a process formalized by February 2005" to resolve such disputes between Operating Administrations. However, the Department has yet to implement such a policy.

In December 2004, the Department issued an interim final rule on the safe handling and shipping of lithium batteries by air. This rule was finalized in August 2007 and subsequently amended in January 2009. Both amendments mandated additional safety requirements to address FAA's concerns and the NTSB's safety recommendations. However, not all of FAA's and NTSB's concerns have been resolved. Currently, PHMSA, in consultation with FAA, is proposing changes to the January 2009 rule to include that all lithium batteries be designed to withstand normal transportation conditions and packaged to both reduce potential damage that could lead to a catastrophic incident and minimize the consequences of an incident. At the core of the current debate is the Air Line Pilots Association's perspective that shipment of lithium batteries by air should be strictly prohibited. The Department must be vigilant in resolving this issue, as incidents involving shipments of lithium batteries continue to occur, with eight such incidents in 2008 and two so far in 2009—most recently the burnt lithium battery package discovered on an aircraft at Honolulu International Airport on June 18, 2009.

OIG Management Advisory Presses PHMSA To Immediately Address Safety Concerns

On July 28, 2009, we issued a management advisory to PHMSA outlining concerns with weaknesses we have identified thus far with the special permit process. In short, our work shows that immediate attention is needed to prevent unsafe packaging and transport of explosives and explosive components traveling under Department of Transportation Special Permit Numbers 8554, 11579, and 12677.

PHMSA's August 6, 2009, response to our advisory outlines its plans to address these identified issues:

[14] OIG Report Number SC-2005-015, "New Approaches Needed in Managing FAA's Hazardous Materials Program," November 19, 2004. OIG reports are available on our website: www.oig.dot.gov.

- Special permits issued to trade associations – permits to be issued to member companies only, not to the associations.

- Safety documentation evaluations – revise policy and procedures to ensure that an "equivalent level of safety" determination is met and fully supported.

- Applicant fitness – revise policy and procedures to ensure that fitness determinations are well-founded and fully supported.

- Formally develop standard operating policies and procedures for the special permits program.

PHMSA's planned actions addressed some, but not all, of OHME's June 2007 recommendations. One such action is to develop a pilot project for installing electronic stability control systems on bulk explosive vehicles to prevent rollovers. However, PHMSA still needs to address OHME's remaining safety concerns. We will continue to monitor PHMSA's progress as it begins establishing implementation priorities in these areas and means to measure effectiveness.

CONCLUSION

Regulating and monitoring the movement of hazardous materials is a critical part of ensuring the safety of the Nation's transportation system, and it is PHMSA's role to properly assess all risks before allowing applicants to participate in commerce under special permits and approvals. However, a number of longstanding and new issues call into question the effectiveness of PHMSA's Special Permits and Approvals Program. The sheer number of active special permits and approvals alone—many dating back 10 years or more—underscores the need to reexamine the strategy for adopting special permits and approvals into the Hazardous Materials Regulations to keep the current regulatory framework in sync with today's operating environment. As PHMSA addresses these areas, it must re-focus its approach to proactively identify safety risks, work with partner safety agencies to resolve safety and practicality matters, and set targeted oversight priorities.

This concludes my statement, Mr. Chairman. I would be happy to answer any questions that you or other Members of the Committee may have.

EXHIBIT. PROCESS REQUIREMENTS FOR SPECIAL PERMIT AND APPROVAL APPLICATIONS

Table A. Process Requirements for Special Permit Applicants and PHMSA

What Applicants Must Provide	How PHMSA Processes the Request
New Permits	
• identification/agent information • citation of regulation relieved from • proposed mode of transport • all supporting documents (e.g., test results and drawings) • demonstration of equal level of safety • all relevant shipping and incident experience	• enter application into HMIS[\a] • submit to Technical Office if needed[\b] • 30-day period: determine conformity to requirements and accept or reject • evaluate equivalent level of safety • assess fitness of applicant to conduct the activity authorized • publish notice in Fed. Register • 15-day period: out for comments • draft permit with justification
Renewal Permits	
• identification/agent information • permit number for renewal • certification that original application remains accurate and complete • all relevant shipping and incident experience	• 15-day period: determine completeness/conformity • verify timely receipt and enter into HMIS • draft authorization letter for signature
Party-To Permits	
• identification/agent information • permit number seeking to join • demonstration of equal level of safety	• 30-day period: determine completeness/conformity • evaluate equivalent level of safety • assess fitness of applicant to conduct the activity authorized • verify "party-to" status not previously granted • draft authorization letter for signature
Emergency Permits	
• facts showing necessity to prevent injury, support national security, or prevent economic loss • the application to the DOT modal official for the initial mode of transportation to be utilized.	• determine necessity to prevent injury, support national security, or prevent economic loss • publish in Fed. Register within 90 days

\a Hazardous Materials Information System (HMIS)
\b If non-technical, the application is assigned to a non-technical Special Permit Specialist.

Table B. Process Requirements for Approval Applicants and PHMSA	
What Applicants Must Provide	**How PHMSA Processes the Request**
New Approvals	
• identification/agent information • section of regulation under which application is made • description of the activity for which the approval is required • proposed mode of transit • all supporting documents (e.g., any additional information specified in the section containing the approval, test results, drawings, and any required reports) Examples include classifications of explosives and fireworks, cylinder retesters, and manufacturers of cylinders ***For an approval that provides exceptions to the regulations, additional information is required:*** • demonstration of equal level of safety • identification of any increased risk to safety or property	• enter application into NetFYI Information Management System • submit to Technical Office if needed • evaluate equivalent level of safety • assess fitness of applicant to conduct the activity authorized • draft authorization letter
Renewal Approvals	
• identification/agent information • for approvals with expiration dates: renewals must be filed in same manner as original application • approval number for renewal	• determine completeness • draft authorization letter for signature

September 24, 2009

The Honorable James L. Oberstar
Chairman, House Transportation and Infrastructure Committee
2165 Rayburn Office Building
Washington, DC 20515-6256

Dear Mr. Chairman:

On behalf of the American Pyrotechnics Association (APA), I am writing to submit comments in connection with the September 9, 2009, House Transportation and Infrastructure Committee hearing on "Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission." First and foremost, the APA would like to thank you and the Committee for the opportunity to submit comments and for including them in the official hearing record. We greatly appreciate the opportunity to be heard.

Background on the Fireworks Industry

By way of background, the APA is the principal safety and trade association of the fireworks industry representing manufacturers, importers, distributors, retailers, suppliers and professional display firms. The APA has over 240 member companies. Along with their subsidiaries, APA member companies are responsible for 90% of the fireworks manufactured, imported, distributed and displayed in the U.S.

Approximately 280 million pounds of fireworks are used annually in the U.S. APA member companies produce shows for the Olympics, Super Bowl, and Fourth of July fireworks displays in communities from our Nation's Capitol to hometown celebrations around the country and the world. Additionally, APA member companies are responsible for entertaining millions of spectators at theme parks, rock concerts and community sporting events with pyrotechnic special effects. APA members also include the manufacturers, importers and distributors of consumer backyard fireworks which are typically sold at stores and road side stands and tents for family Fourth of July gatherings.

The vast majority of these fireworks (backyard and professional display fireworks) are imported primarily from China, because manufacturing restrictions in the U.S. have severely hindered the trade, and imported products are by far less expensive due to the labor intensive nature of the manufacturing process. In essence, all fireworks are "made by hand" with very little use of mechanical automation. APA estimates that only about 20% of the professional display fireworks used in the U.S. are manufactured in this country. The manufacturing, storage, sale and use of these professional fireworks devices are under the jurisdiction of the Bureau of Alcohol, Tobacco, Firearms and

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Explosives (ATF). Approximately 98% of the consumer or backyard fireworks in the U.S. are made in China, U.S. manufacture at present, is basically non-existent, representing a figure of less than 1% of U.S. consumption.

The chemical formulations, or family recipes, and the manufacturing techniques for fireworks have changed very little in the past century. With the exception of the industry eliminating certain heavy metals and known toxic chemicals and replacing chemicals due to stability and friction sensitivity, the formulas used to manufacture fireworks, have for the most part remained the same. Fireworks have a proven track record of being safe for transportation and for use in displays in close proximity to the general public, and for families to use at home backyard celebrations.

All fireworks are required to have an explosive (EX) approval, issued by the U.S. Department of Transportation's (DOT) Office of Hazardous Materials Safety, the Approvals Branch at the Pipeline and Hazardous Materials Safety Administration (PHMSA), before the fireworks can be transported from China or within the U.S. The vast majority of fireworks approvals issued by DOT are done in accordance with the procedures set forth in our APA Standard 87-1, Standard for the Construction and Approval of Fireworks for Transportation. [APA Standard 87-1 is adopted by reference in Title 49, Code of Federal Regulations.] APA's Standard contains detailed procedures for obtaining a fireworks approval, including the completion of a thermal stability test, adherence to a strict list of chemical compositions that may be used, and labeling criteria for consumer devices based upon the Federal requirements promulgated by the U.S. Consumer Product Safety Commission.

Role of PHMSA

Over the years, PHMSA has approved and assigned hundreds of thousands of EX Approvals for individual fireworks devices. The fireworks industry, based on the volume of fireworks used annually in the U.S., enjoys an outstanding safety record. The vast majority of fireworks-related injuries and accidents are attributable to product misuse or pyrotechnicians ignoring well-known safety practices.

We have reviewed the House Transportation and Infrastructure Committee report on the above-referenced hearing, and I attended the hearing on September 9. There are several points pertaining to the fireworks industry that the APA would like to clarify for the committee record.

First, the committee report on page 11 indicates that PHMSA issues approvals to domestic "agents" representing foreign companies to carry hazardous materials in the United States without any evaluation of the fitness of the foreign company. While this statement may be true for other industries, for the fireworks industry, PHMSA exercises due diligence and requires that foreign entities on approvals (e.g. China fireworks manufacturers) have a U.S. agent as a contact on all approval applications. APA understands that a procedure was implemented to assist PHMSA in obtaining necessary information on approvals (due to the language barrier in dealing with Chinese representatives) and to have a U.S. agent in the event of litigation.

To the best of our knowledge, no domestic agents are "transporting fireworks". These "agents" are serving as brokers or U.S. contacts for their foreign manufacturer; they are not engaged in handling hazardous materials or transport.

The vast majority of China fireworks producers are high-quality, long-standing manufacturers. Many are 4th and 5th generation producers which have long-standing business relationships with their 4th and 5th generation U.S. importers. U.S. industry members frequently visit the manufacturing factories in China and keep them up to date on the U.S. regulatory requirements. We do that to ensure that only the safest products are imported to the U.S. Moreover, the industry has an independent third-party testing entity, under contract of the American Fireworks Standard Laboratory (AFSL), to test products for the consumer market for compliance before they are exported to the U.S.

Ocracoke, North Carolina Accident

While this year's fireworks accident in Ocracoke, NC was tragic, it was not related to the products manufactured in China and was not caused by a failure in the approvals and fitness of foreign producers. As mentioned above, all products must have EX approvals for transportation in the U.S. The fireworks intended for the Ocracoke July 4 display were manufactured by well-known, long-standing fireworks manufacturers in China as well as several other countries. The APA has been involved in the Ocracoke accident from the moment it occurred, and the accident had nothing to do with the product. Our view is that it would not have mattered who produced the fireworks that were in that truck. The pyrotechnic crew violated well-known industry safety practices by working in the back of the truck, with no egress, inserting electric matches into the product to save time. That activity must always be done in an open area, where limited fireworks are present to minimize the risk in the event of an ignition. Unfortunately, the lead technician decided to bypass the company's (and industry) safety policy, and the tragic accident occurred.

APA's position is that the firework products could not have been part of the problem, as the Committee suggested. If product quality had been the problem, the industry most likely would have experienced thousands of product failures on July 4, because the product in that truck was produced by leading China suppliers and sold to the entire U.S. fireworks display industry, which conducted more than 14,000 displays over the July 4 holiday. It is unfair to characterize the entire fireworks industry in a negative way based on the accident in Ocracoke. The APA believes that the facts of the accident do not point to product quality, but negligence on the part of the lead technician to bypass standard industry policies.

Conclusion

We are concerned with the Committee's apparent directive that PHMSA not work with the fireworks industry. The APA believes PHMSA should work with the industry in a constructive fashion to improve compliance and reduce safety violations. Plenty of industries and individual hazmat entities are visited and issued violations each day by PHMSA. Our industry has had its fair share of penalties – but when you are small family businesses, it can be incredibly difficult to keep up with myriad regulatory agencies and their ever-changing regulations. APA's position is that PHMSA has done

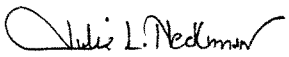
an excellent job, especially given the limited resources for enforcement. In our experience, engaging the industry and utilizing the expertise helps the agency develop sound regulations.

The APA believes PHMSA has done the best that they can to run the approvals program. For our industry alone, based on the sheer volume of fireworks approvals needing to be processed each year, PHMSA could use more staff with specialized expertise in fireworks chemistry. These approvals are not easy to process for PHMSA, and they take a great deal of time given that a thorough understanding of the chemistry and device configuration is required.

We share the view of Deputy Secretary of Transportation John D. Porcari, reaffirming PHMSA's goal in improving the approvals process and data base systems. APA's position is if PHMSA is allocated the appropriate resources, they can improve in the areas identified by the Office of Inspector General and the House Transportation and Infrastructure Committee as being deficient.

Thank you for allowing APA the opportunity to submit comments into the record on this important matter. Should you have any questions or desire additional information, please feel free to call upon us at (301) 907-8181 or via email at jheckman@americanpyro.com

Respectfully submitted,



Julie L. Heckman
American Pyrotechnics Association
Executive Director

September 23, 2009

The Honorable James L. Oberstar
Committee on Transportation and Infrastructure
US House of Representatives
Washington, DC 20515

The Honorable John L. Mica
Committee on Transportation and Infrastructure
US House of Representatives
Washington, DC 20515

RE: COSTHA Position on "Is PHMSA Performing its Mission?"

Dear Mr. Chairman and Representative Mica:

On behalf of the Council on the Safe Transportation of Hazardous Articles (COSTHA), I am requesting that this statement be included in the official record of the Committee on Transportation and Infrastructure's September 10th hearing "Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?"

The mission of COSTHA is to assist its members by providing knowledge and timely regulatory information to aid and develop their roles as hazardous materials professionals. In order to achieve the goals of our mission COSTHA assists its members in identifying and applying domestic and international regulations and legislation that affect their operations. COSTHA encourages and supports research and studies that enhance the safe transport of dangerous goods by all modes in all geographies. We actively participate in the rulemaking process and when appropriate develop and submit petitions for regulatory modifications to enhance safety. COSTHA also interacts with our members, industry groups, and government agencies to seek judicial review to optimize utilization of enforcement resources. We also conduct public information forums, conferences, workshops, seminars, webinars and other meetings to disseminate information, share expertise, and promote knowledge and understanding of the principles of safe shipping and transportation of hazardous materials. COSTHA members include carriers by all modes of transportation, manufacturers and shippers of chemicals, pharmaceuticals, automobiles and their components, household goods and cosmetics, as well as trainers and consultants. Our members represent domestic and international companies operating in the global marketplace. In all COSTHA programs and activities we foster regulatory compliance as the minimum standard while promoting industry standards of good professional practice beyond compliance.

The Council on Safe Transportation of Hazardous Articles, Inc.
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The Special Permit and Competent Authority Approval process is critical to enhancing the safety and efficiency of the United States transportation system by allowing for improvements due to new technology to be implemented where they meet or exceed the requirements of the current regulations without having to wait for regulations to be updated. The regulatory process must attempt to encompass a myriad of industry and government operations and is therefore designed to be broader in scope and sometimes quite cumbersome. Many articles and materials that fall within the purview of the Special Permit and Competent Authority Approval process are those that are on the forefront of the development of alternative fuel vehicles, satellite systems, NASA's space projects, and the Department of Defense materials and equipment to name just a few. Additionally products that entail re-formulations to reduce toxic properties as well as medicines and equipment that advance medical technology also fall under this large umbrella.

COSTHA supports PHMSA's mission "to protect people and the environment from the risks inherent in transportation of hazardous materials - by pipeline and other modes of transportation."

COSTHA believes that DOT must provide protection of the general public while also providing mechanisms to allow US industry to continue to innovate and thereby protecting our country's ability to be competitive in the global market place.

We agree that the special permit and approvals program needs improvement to ensure that it meets its objectives. COSTHA believes that PHMSA has historically been inadequately funded and therefore has been placed at a disadvantage to meet the demands of the rapidly changing industry. Therefore, historical funding and staffing shortfalls must be a priority issue addressed within DOT and with congressional appropriations.

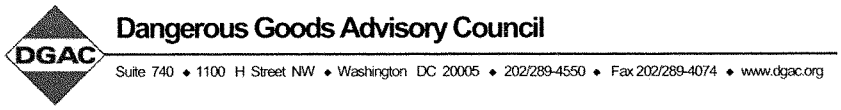
We also believe the main cause for the problem is a lack of adequate resources within PHMSA to manage the program and we hope that Congress will allocate necessary resources for the enhancement of this vital program.

Lack of regulatory harmonization increases the risk of non-compliance and creates an unsafe transportation environment. The US DOT must strive to enhance harmonization with the UN Model Regulations that form the basis for world-wide national and modal regulations. The Federal Aviation Administration (FAA) must incorporate or authorize the principles of the Technical Instructions for the Safe Transportation of Dangerous Goods by Air as set out by the International Civil Aviation Organization (ICAO) and Part 176 of 49 CFR must continue to incorporate or at least authorize the provisions of the International Maritime Dangerous Goods Code (IMDG Code) in order to enable international distribution of US goods.
While we commend the Congressional oversight as evidenced by these hearings, we respectfully express our concerns that Congress may restrict PHMSA to a domestic agenda that fails to address the US role in the global economy in regards to hazardous materials transportation.

Thank you for the opportunity to provide comments on this important subject.

Sincerely,

Lara Mehr Currie
Administrator



September 22, 2009

The Honorable James L. Oberstar
Transportation and Infrastructure Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable John L. Mica
Transportation and Infrastructure Committee
U.S. House of Representatives
Washington, DC 20515

Re: Statement for the record on the Committee hearing entitled "Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?" and the Staff Summary of Subject Matter.

Dear Mr. Chairman and Representative Mica:

DGAC is a non-profit educational organization that promotes hazmat transportation safety by providing classroom training, seminars and conferences, and participation in domestic and international regulatory activities in its promotion of not only safe, but also efficient transportation of hazardous materials/dangerous goods in commerce. We hereby provide our perspective on the issues discussed at the hearing and request that this statement be included in the official record of the hearing.

Concern Over the Characterization that PHMSA is too Cozy with Industry. We are concerned about what appeared to be a major premise of the hearing that PHMSA is too cozy with industry. DGAC members are engaged in shipping and transporting hazardous materials or otherwise involved in supporting the safe transport of hazardous materials. As safety professionals, DGAC members are committed to promoting hazmat transportation safety in the United States and around the world. As such, our members share a common safety goal with the PHMSA Hazmat Program.

Government and industry working cooperatively to achieve our common safety objective has long been recognized as the most effective approach. Past PHMSA Administrators, including former Deputy Secretary of Transportation Vice Admiral Thomas Barrett, upon recognition of a wide diversity of hazardous materials and transportation practices, have noted the need for PHMSA to take advantage of the wealth of knowledge available to them through industry. As an illustration of how industry and government both benefit from working collaboratively, DGAC and PHMSA recently cooperated in the development and distribution of a pamphlet entitled "What You Should Know: A Guide to Developing a Hazardous Materials Training Program." And last year, in recognition of regulatory deficiencies, we submitted a petition for rulemaking to PHMSA for new hazardous materials safety regulations applicable to the loading and unloading of railway tank cars and cargo tank motor vehicles. The attached petition was based on the collective broad experience of our members in addressing the loading and unloading of a

wide range of hazardous materials. The proposal also takes into account the recommendations of the National Transportation Safety Board based on several of its accident investigations as well as informally obtained NTSB staff recommendations. All of our dealings with PHMSA can and should be characterized as having been conducted on a professional level with each organization respecting the other's responsibilities.

Why are Special Permits and Approvals Necessary? In the United States, no person may offer for transportation or transport a hazardous material in commerce except in accordance with DOT's Hazardous Materials Regulations (HMR). Consequently, special permits are essential to innovation and technological advancement. As new technologies are developed by both industry and government agencies (e.g., DOD, NASA), it is often the case that the applicable regulations serve as impediments to the advancement of such technologies. The Special Permits Program allows these technologies to evolve without having to await the development of new regulatory amendments which can sometimes take years to develop. In other instances the technologies are of such specialized use that regulatory changes are not justified.

On a number of occasions during the hearing, special permits were represented as being exceptions to the regulations as if safety was compromised. We consider this a mischaracterization and are concerned about potential impacts on a program critical in numerous areas of national interest such as development of alternative energy sources, agriculture, space exploration, and defense. The United States Government is the holder of more special permits than any other entity, and also the holder of more approvals than industry combined.

Special permits are required to provide at least an equivalent level of safety as compared to the regulations they supplant. They often provide an even higher level. An example is a special permit (understood to be SP–14167) described by DOT's Inspector General. It authorizes a thicker, higher puncture resistant rail tank car than that specified in the regulations for the transport of chlorine. A University of Illinois study found that this tank car design reduces the probability of a release by 60 to 70 percent when compared to tank cars required at the time the special permit was issued. Further, contrary to the IG's remarks which suggest a lack of documentary evidence supporting the determination of an equivalent level of safety, extensive analysis was done in issuing this special permit. The special permit on bulk mix trucks also noted by the IG is another example. It provides a practical means of eliminating the need to transport large quantities of explosives to mining and construction sites nationwide by permitting far safer materials to be transported in a single vehicle so that the materials can be mixed to produce explosives at the point of their use. In permitting this practice, overall risk is substantially reduced from both the safety and security perspectives.

Criticisms of another special permit (understood to be SP- 11110) described at the hearing also seem unjustified. The materials this special permit authorizes to be transported in inaccessible cargo holds of cargo aircraft are materials characterized as posing a low level of hazard. Paint in small cans is likely the most common material covered. We would note that unlike the HMR, international regulations on the transport of dangerous goods by air that are issued by the International Civil Aviation Organization permit these materials, as well as many others, to be transported in inaccessible cargo aircraft holds. In effect the special permit allows something that is common practice throughout the rest of the world. We are unaware of significant safety concerns arising from this practice.

Approvals are also vital to the accomplishment of PHMSA's safety program. In most cases, when a regulation calls for an approval, it would be an affirmation of compliance with a process or procedure. The most predominate approval process relates to the testing and classification of explosives. It provides PHMSA an opportunity to conduct final reviews of proposed explosive classifications prior to their introduction into commerce. The majority of explosives approvals are issued to the Department of Defense after the subject explosives have been tested under the oversight of the DOD Explosives Safety Board. Commercial explosives are similarly tested by third party laboratories, including university facilities and the Canadian government test laboratory. Only those explosives that have been successfully tested in accordance with DOT's regulations are submitted to PHMSA for approval. The approval issued by DOT is the final step of a lengthy process. With this procedure in mind, it is no wonder the percentage of requests DOT approves is so high and supports our view that the criticism of PHMSA's high approval percentage is without merit.

PHMSA's Effectiveness. Finally, the Summary of Subject Matter report portrays a bleak picture of PHMSA's performance and suggests the agency is broken. Our experience has been quite the opposite in that we find the agency to be far more effective than many other agencies. The summary fails to note the large amount of work accomplished by a relatively small but efficient staff and this agency has been without an Administrator, Deputy Administrator, and Chief Counsel for more than eight months. In saying this, we agree that improvements in several of the program elements are desirable and, if as anticipated, new resources are provided, their correct allocation to address real safety issues will require serious deliberations. For example, if additional personnel are employed to improve data collection and analyses, will safety benefit significantly from such an allocation? While there is always opportunity for improvement, we believe the safety record for hazardous materials transportation to good. We note that even if PHMSA's fatality data showing 137 hazmat fatalities over a ten year period by all modes of transportation were to understate the actual number by 50%, it would still be far below the more than four hundred thousand fatalities on our highways during the same period. Considering the vast amount of hazardous material that is transported to support our economy---more than one million shipments in transit each day---, this suggests the agency is managing one of the most effective safety programs in the Department.

The Dangerous Goods Advisory Council (DGAC) appreciates the opportunity to provide its comments on the hearing and the report related thereto.

Sincerely,

Michael Morrissette

Mike Morrissette
President

Dangerous Goods Advisory Council
Suite 740 ◆ 1100 H Street NW ◆ Washington DC 20005 ◆ 202/289-4550◆ Fax 202/289-4074 ◆ www.dgac.org

November 19, 2007

Dr. Ted Willke
Associate Administrator for
Hazardous Materials Safety
Pipeline & Hazardous Materials Safety Administration
U.S. Department of Transportation
Washington, DC 20590

Re: Petition for rulemaking; hazardous materials transportation, loading, unloading and storage incidental to transportation

Dear Dr. Willke:

The Dangerous Goods Advisory Council (DGAC), in accordance with §106.95 of the hazardous materials regulations (HMR), hereby petitions for the adoption of a new Subpart J in 49 CFR Part 172, to establish requirements for loading, unloading, and storage incidental to transportation. We believe safety in transportation, as that term is defined in 49 U.S. Code 5102 and 49 CFR 171.8, compels adoption of nationally uniform new requirements applicable to these operations.

INTRODUCTION
DGAC is a non-profit educational organization that promotes hazmat transportation safety by providing classroom training, seminars and conferences, and participation in domestic and international regulatory activities in its promotion of not only safe, but also efficient transportation of hazardous materials/dangerous goods in commerce. Our members include shippers and carriers engaged in loading and unloading operations.

BACKGROUND AND JUSTIFICATION
The Pipeline and Hazardous Materials Safety Administration's (PHMSA) recent review of reported serious incidents confirms that at least one quarter, and possibly as much as one half, of those incidents were associated with loading and unloading operations involving bulk packagings (i.e., those having a capacity greater than 3000 liters). As noted at PHMSA's June 14, 2007, public work shop on this subject, the National Transportation Safety Board (NTSB) and the Chemical Safety Board (CSB) investigations demonstrate a need for regulation in this area and workshop attendees and comments to the docket support the need for responsive PHMSA rulemaking action.

While the HMR currently include some provisions applicable to these activities, they are not sufficiently comprehensive, particularly when operations are conducted outside the presence of the transporting carrier. For example, hazmat employee training, including function specific training on unloading procedures, would not be required if the work of unloading were performed by a person outside the presence of the transporting carrier. The current HMR provide few

specifics pertaining to the *processes* of loading and unloading, and planning needed for their execution, regardless of who performs those actions. In addition, the relationship between the bulk transportation equipment to be loaded or unloaded, and the fixed facilities and appurtenances used in transferring materials, is not addressed. This is in contrast to the "systems approach" provided by US Coast Guard regulations governing bulk transportation of hazardous materials by water which provide for safe and secure transportation and safe and secure loading, unloading and temporary storage.

A number of helpful industry practices have been developed to address these issues, but there is no requirement in the HMR compelling any person to follow such standards or practices. We believe national regulations setting out uniform and consistent requirements could best remedy current deficiencies evidenced by the high number of incidents reported.

To this end, we petition PHMSA to adopt requirements in a new Subpart J in Part 172 as shown in the attachment. Similar to existing Subparts H and I on hazmat employee training and security plans, the proposal is performance based. While establishing new requirements and clarifying regulatory obligations, it would allow the regulated industry sufficient flexibility to accommodate differences in products, sites, and operations.

In conclusion, we believe adoption of the attached requirements would enhance safety and security in transportation, clarify responsibilities, and provide for viable federal enforcement. We believe such a rule change would respond effectively to the incident record as well as to the recommendations and findings of the NTSB and the CSB. In the process of developing this petition for rulemaking, we have communicated directly with other organizations in an enterprise approach to enhancing transportation safety.

We do not consider a proposed rule change consistent with this petition to constitute a major rulemaking, as that term is defined. The majority of companies represented by our organization and those consulted have some provisions in place similar to the requirements we propose. To the extent costs may be incurred, we believe the expected reduction in incidents during loading, unloading, and related storage would justify those costs.

Please contact us directly if you have any questions on this petition for rulemaking.

Sincerely,

Michael Morrissette

Michael Morrissette
President

Attachment

Attachment

DGAC petitions PHMSA to adopt the following new requirements:

Subpart J –Loading, Unloading, and Incidental Storage Requirements for Hazardous Materials in Bulk Packagings

§172.900 (a) *General requirements.* This section applies to loading, unloading, and storage incidental to transportation of a hazardous material in a packaging having a capacity greater than 3000 liters.
(1) The offeror, consignee, or transloading facility operator shall assure that loading, unloading, or storage is performed in accordance with the provisions of this section.
(2) The operational procedures described in §172.901 and §172.902 shall be –
(A) written and updated as necessary; and
(B) available and provided upon request to each hazmat employee performing a loading or unloading function.

§172.901 *Operational procedures for loading and unloading.* The offeror, consignee, or transloading facility operator shall have operational procedures for loading or unloading that are based on safety and security analyses.
(a) Standards, protocols or guidelines issued by federal agencies or industry organizations (e.g., AAR Pamphlet 34 for rail tank car loading and unloading operations) may be used to satisfy the requirements in this section.
(b) Operational procedures shall, as appropriate, take into account the following:
(1) Designation of hazmat employees responsible for each aspect of the loading or unloading operation and attendance or monitoring of the operation.
(2) Protective equipment appropriate to the material being handled.
(3) Information on the hazards of the material to be loaded or unloaded, including measures to be taken relevant to the loading and unloading operations such as the control of temperature or pressure and the maximum filling limit.
(4) Conditions specific to the transfer location that could affect safety, including access control, lighting, ignition sources and physical obstructions.
(5) Measures to be taken to ensure the security of the transfer facility.
(6) Means of communication.
(7) Means of control and monitoring of conditions, including temperature of the lading and pressure of the containment vessel.
(8) Provisions for periodic testing and inspection of cargo transfer equipment.
(9) Pretransfer procedures, including –
(A) identification and verification of the material to be transferred;
(B) inspection of the transport unit and transfer area for safety and security purposes;
(C) securement of the transport unit against movement;
(D) grounding and bonding of the transport unit;
(E) inspection of transfer equipment, including hoses and valves, for condition, suitability to handle the material, and unexpired test dates;
(F) inspection of connections;
(G) identification and verification of the piping path, equipment lineups and operational sequencing;
(H) confirmation of communication methods, equipment, procedures and signals;
(I) spill containment; and
(J) identification of equipment and special operating procedures for emission control systems.

(10) Transfer procedures, including –
(A) initiating and controlling the lading flow;
(B) monitoring temperature of the lading and pressure of the containment vessel;
(C) monitoring filling limits; and
(D) terminating lading flow.
(11) Post-transfer procedures, including –
(A) evacuation of the transfer system and depressurization of the containment vessel;
(B) disconnection of the transfer system; and
(C) inspection and securement of transport unit fittings, closures, markings and placards.
(12) Emergency procedures, including –
(A) identification of emergency response equipment and individuals authorized in its use;
(B) incident response;
(C) use of emergency shut-down systems; and
(D) emergency communication and spill reporting.

§172.902 *Operational procedures for storage.* The offeror, consignee, or transloading facility operator with control and custody of the package in storage incidental to movement shall have procedures, as appropriate, to –
(1) monitor for leaks and releases;
(2) ensure the safe condition of the lading and the package; and
(3) address security concerns.

§172.903 Employees engaged in loading and unloading operations subject to this Subpart shall be qualified on the procedures commensurate with their responsibilities and shall follow them in the performance of their duties.

§172.904 Special Requirements for Chlorine
For chlorine unloading operations emergency shut-off systems that comply with Chlorine Institute Pamphlet 57 or equivalent must be in use.

Amend §173.30 to read as follows:

§173.30 Loading and unloading of transport units

A person who is subject to the loading and unloading regulations in this subchapter must load or unload hazardous materials into or from a transport vehicle or vessel in conformance with procedures required in Subpart J of part 172, as applicable, and with applicable loading and unloading requirements of parts 174, 175, 176, and 177 of this subchapter.

Note: As an alternative for consideration, it may be possible to incorporate proposed Subchapter J requirements in a revised and expanded §173.30.

Wednesday, September 9, 2009

The United States House of Representatives
Committee on Transportation and Infrastructure

RE: Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?

Ladies and Gentlemen:

The International Society of Explosives Engineers (ISEE) is a nonprofit association formed in 1974 as a professional society dedicated to promoting the safety, security and the controlled use of commercial explosives in mining, quarrying, construction, manufacturing, demolition, aerospace, forestry, avalanche control, art, automotives, special effects, exploration, seismology, agriculture, law enforcement, and many other peaceful uses of explosives.

With more than 4,600 members and 34 Chapters, the Society is recognized as a world leader in providing explosives technology, education, and information, as well as promoting public understanding of the benefits of explosives. In addition, ISEE, with individual members acting as resources, has consistently been at the forefront of efforts to address legislation and regulation related to explosives safety and security.

The ISEE appreciates the opportunity to comment on this issue. We support the comments submitted by the Institute of Makers of Explosives (IME) and agree that the industry has demonstrated its commitment to safety, security, consensus standards, research, and accountability. As an industry we are diligent in our efforts to improve the industry performance and the competency of our members. We support the closely regulated environment envisioned under the HMTA because it has proven to be the most efficient way to move hazardous materials safely and securely.

We would like to encourage the Committee on Transportation and Infrastructure to contact us should they desire any further clarification or discussion of the ISEE position on these issues.

Sincerely,

Jeffrey L. Dean, IOM, CAE
Executive Director & General Counsel
International Society of Explosives Engineers
30325 Bainbridge Road
Cleveland, Ohio 44139-2295
dean@en.com
CC: Christopher E. Howell

International Vessel Operators Hazardous Materials Association, Inc.
10 Hunter Brook Lane, Queensbury, NY 12804 - 518/761-0263 - FAX 518/792-7781
E-MAIL: mail@vohma.com - www.vohma.com

September 23, 2009

The Honorable James L. Oberstar
Committee on Transportation and Infrastructure
US House of Representatives
Washington, DC 20515

The Honorable John L. Mica
Committee on Transportation and Infrastructure
US House of Representatives
Washington, DC 20515

RE: VOHMA Position on Special Permits and Approvals

Dear Mr. Chairman and Representative Mica:

On behalf of the International Vessel Operators Hazardous Materials Association, Inc. (VOHMA), I am requesting that this statement be included in the official record of the Committee on Transportation and Infrastructure's September 10th hearing "Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?"

VOHMA has a membership comprised of the major ocean common carriers of the world, registered under the flags of many nations, including the United States, and operating in the global maritime trades. The safety of our mariners and vessels is our primary mission and outreach and education are the basic tools for accomplishing our mission. VOHMA actively participates in the domestic rulemaking activity of the United States Department of Transportation (USDOT) for the vessel carrier mode as well as interconnecting modes utilized in intermodal commerce throughout the world, including the United Nations Sub-committee of Experts on the Transportation of Dangerous Goods (UNSCOE) and the International Maritime Organization, Sub-committee on Dangerous Goods, Solid Cargoes and Containers (IMO DSC). VOHMA strongly believes that international harmonization regarding the regulations applicable to the transportation of dangerous goods/hazardous materials is essential to safe and efficient transportation.

The United Nations Transport of Dangerous Goods Model Regulations serves as the world-wide template for harmonization. These model regulations have been developed through proposal and mutual acceptance by recognized experts of all participating nations as well as inter-governmental and non-governmental agencies who have been granted consultative status to the UNSCOE. Industry experts are invited to participate at these sessions to provide their expertise to the delegations when formulating these Model Regulations. States and international modal administrations such as the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO) as well as regional regulatory codes such as the ADR/RID regulations of the European Union use the UN Model Regulations as the basis for their individual codes. The United States Code of Federal Regulations, Title 49, Hazardous Materials Transportation Regulations incorporates the basic principles set forth in the Model Regulations with certain additional provisions that the USDOT has determined are necessary to ensure the safety of our citizens and our environment.

Special permits (or exemptions as they are known internationally) and approvals are an integral part of international regulatory schemes and are therefore included within the language of the Model Regulations and subsequent modal and national regulations. These special permits and approvals are provided to authorize the participating modal and national authorities to exercise flexibility in ensuring that innovative provisions can be implemented without compromising the safety that is provided by compliance with the regulatory codes. It is recognized that the regulations could not possibly be comprehensive enough to include all materials, in all packaging types, under varying conditions of transport, presenting variable risks in transport. It is further not possible to envision future technological advancements and to codify controls that could be applied to all types of new technologies as they emerge throughout the world to coincide with the need to transport these new technologies to meet the needs of global development. New alternative energy and electrical storage systems designed to replace the use of fossil fuels and reduce our dependency on foreign oils while reducing harmful environmental emissions, state of the art medical research programs and materials, as well as innovative packaging designs that provide greater security and enhance safety all must be met with swift action to provide approvals and special permits that can be used to ensure an equivalent level of safety while not obstructing such innovative technology development. These approvals "buy the time" for regulators to assess the effectiveness of these controls and to take the time to determine and implement long range solutions that will meet present and future demands while ensuring continued safety and security.

The approvals process has developed over many years and is based on international conventions or treaties that recognize the sovereignty of the signatories thereto. The International Maritime Dangerous Goods Code (IMDG) is based on the International Convention for Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Pollution form Ships (MARPOL). Throughout the IMDG Code there are specific provisions where a competent authority (CA) approval is required as a condition of compliance with a regulatory section which authorizes the countries of origin to review the level of safety and to issue any conditions which they may feel are relevant as a condition of providing the written approval. Countries of transit and destination may review the CA approval and if an equivalent level of safety is provided, should accept the approval. In some cases the CA may have their own relevant regulations already codified which then serves as the CA approval if those regulations are followed.

VOHMA believes that the USDOT, including PHMSA and the modal administrations FAA, FRA, FMCSA, as well as the USCG under the United States Department of Homeland Security, since the United States is a signatory to the international conventions are bound to the provisions

applicable to competent authorities. The USDOT must not only continue, but must enhance the efficiency of the approvals process in order to permit US business interests to compete in the global marketplace. In order to ensure that the USDOT and PHMSA has the ability to meet the demand for review of technology and approvals for equivalent levels of safety, the US Congress must provide funding for adequate resources to match the pace of the regulated industry. VOHMA feels that the special permits and approvals process enhances the level of safety in both domestic and international transportation and that to deny such participation would not only be detrimental to safety but would also create a vacuum with insurmountable obstacles to international trade.

While VOHMA commends the Committee on Transportation and Infrastructure of the US House of Representatives for their oversight as evidenced by these hearings, we respectfully express our concerns that Congress may restrict PHMSA and their funding to a domestic agenda that fails to address their role in facilitating foreign trade through the US ports as well as providing access to the global marketplace for our US customers exporting through foreign ports which we call.

Thank you for the opportunity to provide comments.

Sincerely,

John V. Currie
Administrator and Senior Technical
Consultant

NATIONAL TANK TRUCK CARRIERS, INC.

950 North Glebe Road, Suite 520 • Arlington, VA 22203-4183
Tel: 703-838-1960 • Fax: 703-838-8860
www.tanktruck.org

September 24, 2009

The Honorable James Oberstar
Chairman, Transportation and Infrastructure Committee
U.S. House of Representatives
Washington D.C. 20515

The Honorable John L. Mica
Ranking Member, Transportation and Infrastructure Committee
U.S. House of Representatives
Washington D.C. 20515

Re: Statement for the record on September 10 hearing on PHMSA Performance

Mr. Chairman and Mr. Mica:

National Tank Truck Carriers Inc. respectfully asks that these comments be added to the record for the September 10th hearing: "Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?" and the Staff Summary of Subject Matter.

National Tank Truck Carriers is the safety advocacy organization that has represented the interests of the cargo tank industry and its suppliers in the safe, secure, and efficient delivery of essential hazardous bulk materials for over 60 years.

We are writing to ask that the record reflect the following: (1) a correction to material included in the Staff Summary and (2) a request for information developed by the U.S. Department of Transportation on this issue.

1. Correction to Wetlines Incident included in Summary of Subject Matter

On page 16 of the Summary, the report states:

> *To validate the information provided by PHMSA, the Subcommittee . . . found over 100 wetlines incidents, one of which killed four persons in Green Bay, Wisconsin.*

An objective review of that event would clearly show that the tragic accident and deaths were not a result of the cargo tank having product in the loading lines. We have reviewed the 5800.1 incident report connected with that accident, discussed the matter directly with the carrier

involved, and retrieved the related article in the Green Bay News Chronicle Online (see attached). This basic due diligence revealed that the pick-up truck which broadsided the cargo tank hit the tanker so hard that the front of the pick-up actually came out the other side of the cargo tank. The caption of a photo accompanying the article reads:

> *The charred front-end of pick-up truck protrudes from beneath a tanker truck trailer following a fiery crash . . .*

Indeed, product in the loading lines was certainly part of the 8,800 gallons that were lost in the incident when the tanker shell itself was cut open on impact by the pickup and a fire resulted. That fire would have happened had those lines been full of product or purged as the Committee's legislation would mandate. By definition, a true wetlines incident is an incident where there is a release of product that *would not have otherwise occurred* had there been no product in the lines. (This differs from a wetlines involved incident where product in the loading lines is included in product lost from the breeched tank, such as in a rollover and fire.) Clearly, this Green Bay incident was caused by the severe damage to the cargo tank shell by the pick-up truck and then some source of ignition. This tragic accident would have happened even had there been no loading lines on the trailer.

2. Request for information prepared by the Department of Transportation.

The Summary Report also states on page 16 that:

> *The Subcommittee asked PHMSA to analyze the findings and present an accurate number of wetlines incidents using its definition of what it considers to be a wetlines incident.*

NTTC has refrained from further comment on the wetlines legislation pending receipt of this new data from PHMSA. Given the terribly flawed data that was presented by a Committee member at the May 14th hearing, we readily agreed to use information PHMSA developed to analyze wetlines incidents being used to support this legislation. NTTC would be most willing to revise some of our earlier comments filed on this issue if we are provided with new data from PHMSA and/or the Committee that would so require.

On September 9th, the NTTC requested from Committee staff a copy of the PHMSA report. We were told that our request would be reviewed by Committee Counsel. We were provided numbers of deaths, injuries, and fires found in the PHMSA review, but we received absolutely no detail on the context of the review. Without knowing what definitions of wetlines PHMSA used or what incidents were reviewed, industry will not be able to determine what information the Committee is basing its decisions on, nor will we be able to correct misclassified incidents such at the Green Bay crash mentioned above.

We also were recently informed that since PHMSA continues to develop data that our request "*will be considered*" when PHMSA presents a final report. There is no assurance that we will be provided the data; just that our request will be considered.

National Tank Truck Carriers respectfully requests that any data PHMSA has provided on its review of wetlines incidents, specifically including the definition used in the review and incidents included in totals, be made immediately available to the public.

The Department of Transportation prepared this information on an issue of tremendous importance to the shippers, transporters, and receivers of hazardous materials in tank trucks. It is imperative that the public have the same information as the Committee to perform a meaningful analysis of the safety problems addressed therein and the ramifications of legislation to address those problems. We most respectfully ask that the U. S Department of Transportation or the Committee provide that information voluntarily and without further delay.

Thanks to the efforts of Congress, the U.S. Department of Transportation and the industries that produce and transport hazardous materials, the United States is the envy of the world in the remarkable hazardous materials transportation safety record that has been achieved and that we all work hard to improve on a daily basis. NTTC has sent copies of our country's regulations and discussed hazardous materials safety with agencies from countries such as Japan, Great Britain, and several third-world countries. Delegations come from around the world to learn how we promote hazardous materials safety in all modes. They listen to our delegates at international meetings and at the United Nations.

Clearly, all institutions in Washington – public and private – could do a better job of achieving their missions. We all should be reviewed and those problems identified should be corrected. The hearings have found such areas at PHMSA that are in need of improvement and we are confident action will be taken to make changes. These are process problems; not the problems of people who do not care or, worse, are some how corrupted by those of us who represent the shippers and carriers of the hazardous materials vital to our country's economy and way of life.

Sincerely,

John L. Conley
President

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Thick Fog Blamed For Fiery Crash, Four Deaths

KEVIN MOORE
The Green Bay News Chronicle Online

A fiery truck crash claimed the lives of four men Monday morning as they headed to a contracting job at the Pulliam Power Plant.

The men's names were being withheld pending notification of family. The men, ages 38, 31, 28 and 21, were floor installers for Trowelon Inc. of Ashwaubenon.

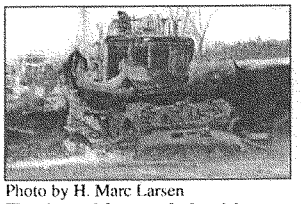

Photo by H. Marc Larsen
The charred front-end of a pick-up truck protrudes from beneath a tanker truck trailer following a fiery crash that claimed four lives Monday morning at the intersection of Bylsby Avenue and Hurlbut Street.

Green Bay police Lt. Joe Deuster said the pickup ran a stop sign in foggy conditions at Hurlbut Street and Bylsby Avenue and slid under a tanker truck, which had just been filled with 8,800 gallons of gasoline at a nearby terminal.

Green Bay Fire Department Chief John Troeger said heavy fog likely contributed to the 8 a.m. crash.

"The truck was way under the tanker," Troeger said. "It hit hard.

There wasn't anything we could do to help the people in the truck." The tanker driver was able to leave the tanker and run to safety.

Kent Bauman, owner of Condon Transport Inc., said the driver was fine, but he declined to release the driver's identity or driving record, preferring to wait until after police finish the investigation.

"Our hearts sure go out to their families, their loved ones," Bauman said of the victims.

Troeger said there was significant fire from the moment of impact. "We used foam to put the fire out, but our approach was slow and deliberate," he said. "There was no way we could do a rescue. The whole vehicle was on fire. It was a very hot fire, with all that gasoline."

Troeger said the impact of the pickup truck likely ruptured pipes on the outside of the tanker and ruptured the tank, causing the fire.

The fire was extinguished within about an hour, Troeger said.

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Some nearby power poles caught fire in the blaze, and about 25 nearby businesses lost power after the crash, Wisconsin Public Service Corp. spokesman Todd Steffen said. Power was restored by 3 p.m.

Steffen said power company workers could not enter the plant until 2 p.m. while emergency personnel worked at the crash site. The power plant was not affected by the fire, he said, and was not evacuated.

"It was pretty foggy out there," Steffen said. "I'm not sure if the driver saw the truck."

Jane Detampel, Trowelon vice president of administration, said the men were floor installers for the company, which has 45 employees.

"Our hearts, thoughts and prayers are with the families in this time of sorrow," she said. "We're still trying to determine what happened."

DNR workers set up dikes to keep the gasoline from seeping into nearby ditches and into storm sewers. A plume of thick black smoke was visible for miles.

"There's not much left to the tanker," said Chris Groth, a state Department of Natural Resources conservation warden handling cleanup procedures. "All you got is the bottom half of the round tube. The rest of it's all burned off."

The Associated Press contributed to this report.

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September 25, 2009

The Honorable James Oberstar
Chairman, Transportation and Infrastructure Committee
U.S. House of Representatives
Washington D.C. 20515

The Honorable John L. Mica
Ranking Member, Transportation and Infrastructure Committee
U.S. House of Representatives
Washington D.C. 20515

Re: REVISED Statement for the record on September 10 hearing on PHMSA Performance

Mr. Chairman and Mr. Mica:

National Tank Truck Carriers Inc. would like to thank the Committee staff for providing information that we requested in our comments filed on September 24 for the record. That information was prepared at the request of the Committee to PHMSA and included a review of cargo tank wetlines incidents. We appreciate the Committee staff's forwarding us the information today, shortly after they received it. We will use this information developed by PHMSA in any future communications on this most important issue.

I hope that the Committee will continue to consider National Tank Truck Carriers a resource on safety issues involving cargo tanks and the transportation of hazardous materials. We certainly agree that the Highway Reauthorization Bill and HMTSA 2009 should move "sooner rather than later."

Again, thank you and your staff for providing this information.

Sincerely,

John L. Conley

John L. Conley
President

The Fertilizer Institute

Nourish, Replenish, Grow

Ford B. West
President

September 23, 2009

The Honorable James Oberstar
Chairman
House Committee on Transportation and
Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Mica
Ranking Member
House Committee on Transportation and
Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Oberstar and Ranking Member Mica:

The Fertilizer Institute (TFI) requests that these comments be included in the official record in response to the Sept. 10 House Transportation and Infrastructure Committee hearing entitled *"Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?"*.

TFI is the national trade association representing fertilizer producers, importers, wholesalers and retailers of fertilizer. TFI's mission is to promote and protect the use of fertilizer in the public policy arena both at the legislative and regulatory level. Many of TFI's members ship and receive materials considered to be "hazardous materials" by the Pipeline and Hazardous Materials Safety Administration (PHMSA). As such, TFI and its members have a significant interest in the safe transportation of hazardous materials.

PHMSA, whose charge is to regulate hazardous materials offered into commerce, is essential to TFI and its members, who take safety and compliance with hazardous materials regulations to be of the upmost importance. TFI serves vital roles in communicating PHMSA's regulatory requirements to its members, facilitating dialogue with PHMSA, and collecting information from its members in response to PHMSA inquiries.

TFI is concerned with statements made during the hearing which were extremely critical of

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associations, such as TFI, and their role in working with PHMSA. In our opinion, government and industry working together cooperatively to achieve the highest level of safety is the most effective approach to hazardous materials transportation. TFI works with PHMSA in a professional manner, respecting its mission, to make sure fertilizers are transported safely. We believe that such a working relationship with PHMSA is a critical member service.

The hearing focused on the administration of the special permits and approvals program by PHMSA. TFI holds two very important special permits for its members and other companies affiliated with TFI. With both permits, considerable time and effort was put into the development of the applications by TFI and considerable discussions were held with the special permits staff prior to PHMSA granting approval. In both permits, we were able to demonstrate that safety would not be compromised and in fact improved if the special permits were granted. One permit has been in effect since 1995 and the other since 2005.

TFI would like to elaborate on these permits:

- SP-13554 was issued in 2005. It was found, through inspections at a fertilizer retailer facility, that the facility was operating nurse tanks, commonly referred to as "implements of husbandry" and used in agriculture for the application of anhydrous ammonia fertilizer, without the Department of Transportation (DOT) requirement for an American Society of Mechanical Engineers (ASME) identification plate. After further investigation, TFI learned that many nurse tanks throughout the country did not meet this requirement. Therefore, because the application of anhydrous ammonia is so vitally important to agriculture, TFI, working with its members, submitted an application to PHMSA for a special permit. As the result of TFI's special permit application, these tanks now have to conduct an external visual test, a pressure test and a thickness test every five years in order to remain in service without the ASME identification plate. Without the special permit, these nurse tanks would have to be taken out of service. The special permit has resulted in considerable safety improvements and allows these nurse tanks to remain in service.

  TFI holds the permit on behalf of its members and others because of the number of affected entities. TFI established a Web-based program for owners/operators to request party status to the special permit. On a regular basis, TFI sends an updated list of party status holders to PHMSA. Without the ability of TFI to hold the special permit, several issues would arise: (1) most nurse tank owners/operators would not understand the process of applying for a special permit and complying with it; and, (2) PHMSA would be overwhelmed in accepting thousands of applications for the special permit and processing them.

- SP-10950 was issued in 1994. TFI sought this permit for its members and others who are owners/operators of nurse tanks in the Pacific Northwest. In the Pacific Northwest, where it is necessary to operate on steep terrain, safety is improved if a nurse tank transporting anhydrous ammonia is securely mounted on a field truck as opposed to a farm wagon. The field trucks in this case are specially designed and equipped to improve safety and efficiency on the hilly terrain over which they operate. A special permit was required because under DOT regulations nurse tanks on field trucks are not authorized.

TFI submitted extensive data to PHMSA on the truck specifications and PHMSA agreed that safety would be improved, approved TFI's application and issued a special permit.

As the Committee further considers these issues, we urge you to take into consideration the accomplishments of PHMSA and the necessity of the special permits and approvals office. I welcome the opportunity to further discuss these issues with you. Should you have any questions, feel free to contact TFI's Vice President of Member Service Pam Guffain at (202) 515-2704.

Sincerely yours,

Ford B. West

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