

**REDUCING REGULATORY BURDENS AND
ENSURING SAFE TRANSPORTATION OF
HAZARDOUS MATERIALS**

(112-24)

HEARING
BEFORE THE
SUBCOMMITTEE ON
RAILROADS, PIPELINES, AND
HAZARDOUS MATERIALS
OF THE
COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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U. S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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April 8, 2011

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James H. Zola, Democrat Chief of Staff

SUMMARY OF SUBJECT MATTER

To: Members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials
From: Subcommittee on Railroads, Pipelines, and Hazardous Materials Republican Staff
Subject: Hearing on "Reducing Regulatory Burdens and Ensuring Safe Transportation of Hazardous Materials."

PURPOSE OF HEARING

The Subcommittee on Railroads, Pipelines, and Hazardous Materials is scheduled to meet on Tuesday, April 12, 2011 at 3:00 p.m. in 2167 Rayburn House Office Building to receive testimony related to the reauthorization of the hazardous materials safety programs of the Pipeline and Hazardous Materials Safety Administration (PHMSA). This hearing is part of the Committee's effort to reauthorize the hazardous materials safety programs which was last authorized under the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (HMTSSRA), which expired September 30, 2008. The Subcommittee will receive testimony from the PHMSA and the industry on how best to reduce the regulatory burdens while ensuring hazardous materials are transported in a safe and efficient manner.

BACKGROUND

The HMTSSRA is found in Title VII of Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (P.L. 109-59) (SAFETEA-LU). The HMTSSRA made a number of additions and amendments to 49 U.S.C. §§ 5101-28, "Transportation of Hazardous Material" (Federal hazmat law). Federal hazmat law places certain responsibilities on the Secretary of the Department of Transportation (DOT) to protect against the risks inherent in transporting hazardous materials. PHMSA is the agency within DOT primarily responsible for implementing the Federal hazmat law.

Specifically, PHMSA administers nationwide safety programs designed to protect the public and the environment from the risks associated with the commercial transportation of hazardous materials by air, rail, vessel, highway, and pipeline. The agency's two roles are pipeline safety and hazardous material safety. Under its hazardous materials safety program, PHMSA oversees the safe and secure shipment of nearly 1.4 million daily movements of

hazardous materials, such as explosive, flammable, corrosive, and radioactive materials. These materials include such common products as paints, fuels, fertilizers, alcohols, chlorine, fireworks, and batteries that are essential to the general public and local economies due to their use in farming, medicine, manufacturing, mining, and other industrial processes. In total, about 3 billion tons of hazardous material moves each year in the United States.

PHMSA promulgates and enforces, among others, the hazardous materials regulations (HMR; 49 C.F.R. parts 171-180) to carry out its mission. By statute, a material or group or class of material is considered hazardous if the Secretary determines that transporting that material in commerce in a particular amount or form may pose an unreasonable risk to health and safety or property. 49 U.S.C. 5103(a). Unlike other DOT agencies whose regulations apply to a specific transportation mode, such as rail, motor carrier, and aviation, the HMR applies to the product itself. The HMR categorizes hazardous materials into nine classes, and sets forth transportation requirements for packaging, marking and labeling, shipping papers, loading, placarding, and segregation.

Recent PHMSA Regulations and the Need for Transparency

Special Permits and Approvals

The Federal hazmat law and HMR prohibit the movement of hazardous materials unless a regulation, permit, or approval authorizes the movement. Special permits provide a means of varying from a specific provision of the HMR in a way that achieves a safety level at least equivalent to that required under the HMR or is otherwise consistent with the public interest. For example, if new, improved packaging for a certain hazardous material is developed, an individual may apply for a special permit to use that improved technology. Some special permits, if proven over time to be safe and are generally applicable, can and should be incorporated into the HMR. Similar to a special permit, an approval allows its holder to perform a particular function that requires prior consent under the HMR. For example, explosives and fireworks may only be transported with an approval. To be issued a special permit or approval, the applicant must have a fitness determination made by PHMSA.

In October 2009 and August 2010, PHMSA changed its procedures for conducting fitness determinations for special permits and approvals, respectively. Instead of going through usual notice and comment procedures, PHMSA made its changes by issuing standard operating procedures (SOP). Determining fitness procedures in this manner lacked transparency and stripped hazardous materials offerors and shippers of any opportunity to give their input on the procedures and criteria necessary for making fitness determinations. In response, a large industry group petitioned for a rulemaking in December 2010 explaining that the SOPs' processes and procedures differed dramatically from the historical fitness review, broadened the scope of the fitness review (essentially amending the existing HMR), and contained misstatements and inaccuracies. Moreover, the current criteria for judging fitness are not clear to the industry, which creates a climate of regulatory uncertainty.

During this same time period, PHMSA noticed a rulemaking that became final on January 5, 2011, requiring certain additional information be included in special permit applications. The additional information requires items like the name of the applicant's CEO

and a description of anywhere the permit may be used, which could entail thousands of locations, creating an unnecessary burden on business and increased costs, with little safety benefit. Hearing witnesses will describe the impact of these new requirements, and recommend ways to streamline the special permit and approval procedures; incorporate more special permits into the HMR; and establish fitness criteria in a manner that promotes consistency, predictability, and transparency. Increasing the transparency and predictability of the special permits and approvals process will allow businesses and the economy to grow, while enhancing safety.

Cargo Tank Wetlines

The term wetline refers to the external piping on cargo tank trucks, such as gasoline tankers, used to load and unload the product, which may contain some of the product in it during transportation. According to DOT's hazardous material incidents database, for the years 1999-2009, there were 8 incidents of fatality or injury attributable to wetline releases. There are over 50,000 cargo tank shipments of flammable liquids each day, meaning the risk of a fatal wetline incident is 1 in 30,000,000.

Despite this low incident rate, on January 27, 2011, PHMSA issued a notice of proposed rulemaking that would prohibit transportation of certain hazardous materials, like gasoline, in wetlines unless (1) the cargo truck was equipped with a bottom damage protection meeting certain requirements, or (2) certain performance standards are met through draining or purging the wetline. The data PHMSA used to justify the rulemaking, however, is questionable, because over the same ten-year period noted above it found 172 incidents of damaged wetlines. PHMSA did not detail that of those 172 incidents, 30 involved combustible materials (not flammable materials) which are not subject to the rule; 45 incidents involved more than 50 gallons of product, which is more product than a wetline could hold, meaning the tanker was penetrated as well; 7 involved straight line, not wetline, trucks; and 1 involved a truck equipped with the type of purging system contemplated by the rule. Simply put, the rulemaking overstates its benefits and underestimates the significant costs to the industry to retrofit tank trucks and the inherent risks of retrofitting tank trucks. Hearing witnesses will describe the potential impact of the proposed rule, identifying and quantifying the real-world risks caused by wetlines and costs associated with wetline regulation.

Package Opening

The HMTSSRA added new inspection and investigation authority to the Federal hazmat law. The intent of this new authority was, as the subsection title indicated, to help discover hidden shipments of hazardous material. On March 2, 2011, PHMSA issued final rules implementing that authority, including procedures for opening packages to identify undeclared hazardous materials, i.e., a package that is not marked, labeled, accompanied by shipping documentation, or otherwise identified as a hazardous material. The final rules, however, also allow for declared packages to be opened, inspected, and removed from transportation if the investigator has reasonable and articulable belief the package contains hazardous material and is not compliant with the HMR. Some concern has been raised that the final rule goes beyond the intended need to investigate undeclared packages. The opening of packages creates a potential unsafe situation for the inspectors, carriers, and the public. Furthermore, there is a concern with regard to indemnification of those involved in the transportation. Hearing witnesses will discuss

how to address the universal concerns about undeclared packages without creating undue regulatory overreach and unintended safety concerns.

Uniformity and Avoiding Duplication

Background Checks

Commercial motor vehicle drivers who haul hazardous materials at quantities requiring vehicle placards under DOT regulations must have a hazardous materials endorsement (HME) to their state-issued commercial driver's license (CDL). The USA Patriot Act (P.L. 107-56), prohibits states from issuing a license to operate a motor vehicle transporting in commerce a hazardous material without a determination by the Secretary of Homeland Security that the individual does not pose a security risk. TSA meets this mandate by requiring drivers seeking to apply for, renew, or transfer a HME to undergo a security threat assessment, which includes a finger-print based Federal Bureau of Investigation criminal history records check, a check for ties to terrorism, and an immigration status check. The disqualification standards under the HME program are identical to the standards TSA applies under the Transportation Worker Identification Credential (TWIC).

Industry and some labor groups have raised concerns that they are subject to duplicative background checks or credentials because some states and localities have started to conduct their own additional background checks of drivers. These additional credentials can cost approximately \$100 (or more) and require time off from work to undergo the application process, including fingerprinting. In most instances, however, the same FBI database is being checked, and the process is the same regardless of whether the hazardous material is weaponizable. These redundant background checks increase costs on drivers, have a chilling effect on the number of drivers, and do little to increase security. Hearing witnesses will discuss the best means of eliminating duplicative background checks and the associated financial burdens on drivers, while enhancing efficiency and security within the regulated community.

Equitable Enforcement

The HMR includes over 500 pages of regulatory text for transporting hazardous materials, and control over compliance with each regulation depends on where one is in the stream of transportation. The policy goal of enforcement is to encourage compliance with the HMR by the entity responsible. Much of the compliance rests with the offeror of the materials into commerce, who must properly classify the materials, select the packaging, mark and label the package, and prepare the shipping papers. Most of the violations of the HMR, however, are discovered during roadside, railyard, or terminal inspections and the carrier is often issued the citation, which may be for something over which the carrier had no control nor could have reasonably discovered. Violations can have consequences for a carrier's fitness to operate regardless of the fact that they did not have control over compliance with the regulations. The Committee will review the best means of addressing this inequity. Some industry stakeholders have recommended this could be accomplished through better distinguishing between functions normally performed by a shipper and those that are the responsibility of the carrier and clarifying that carriers are not responsible for violations from pre-transportation functions performed by another, unless the carrier has actual knowledge of the violation.

International Representation

The transportation of hazardous materials is one that spans the globe. Therefore, several international forums exist to ensure international hazardous material transportation safety and facilitate commerce through the harmonization of hazardous materials regulations and standards. (Two such organizations are the United Nations Committee of Experts on the Transport of Dangerous Goods and the International Civil Aviation Organization.) Since the creation of DOT in 1967, PHMSA and its predecessor agencies have been designated the lead agency in this international work. Recently, PHMSA was replaced as the lead U.S. representative in these forums. The industry is concerned that replacing PHMSA, the nation's expert agency on hazardous materials transportation across all modes (e.g., rail, air, motor carrier, etc.) with an agency whose expertise is focused on one mode of transportation could undermine a uniform approach to hazardous materials policy. Hearing witnesses will discuss how best to ensure the nation's experts in hazardous materials transportation safety play a lead role in representing the country internationally.

State Hazardous Material Permits

There are more than 40 separate state hazardous materials permitting programs. Complying with all of them creates a significant regulatory burden on the motor carrier industry. At the same time the safety benefit is questionable, as PHMSA has its own federal registration requirements and states may inspect hazardous materials carriers on the roadside. While some states may require a fitness review, for most it is an additional paperwork exercise for the industry. The Federal hazmat law provides for a voluntary uniform program for state hazardous material registration and permitting as a means of alleviating the burdens on the industry; however, only six states currently participate. The Committee will consider how to reduce these regulatory burdens and increase the effectiveness of the uniform program.

Preemption Issues

State Enforcement: To achieve the safe and secure transportation of hazardous material uniform regulatory requirements are necessary, which is why explicit preemptive authority is provided for in the Federal hazmat law. The HMTSSRA, however, added a provision to the statute to remove preemptive limitations on state enforcement authority. This allows states to use the enforcement authority loophole to impose inconsistent requirements on the industry. Hearing witnesses will discuss the impacts of state enforcement authority on inter- and intrastate commerce and recommend changes to Federal hazmat law to ensure enforcement requirements are uniform.

Incident Reporting: Federal hazmat law sets forth five specific areas of state, local, or tribal law that are preempted if substantively different from federal law or regulations. Currently, written notification of unintentional releases of hazardous materials are included on that list. States have been free, however, to impose different verbal incident notification requirements on the industry, resulting in dozens of individual reporting requirements that vary from jurisdiction to jurisdiction. This creates confusion for individuals operating within multiple jurisdictions as to what, if any, verbal reporting requirement there may be for the location of the release. Hearing witnesses will discuss how federal notification requirements can ensure that the

appropriate local emergency response officials are notified in the event of a release without the need for a variety of state, local, and tribal requirements.

INVITED WITNESSES

The Honorable Cynthia Quarterman
Administrator
Pipelines and Hazardous Materials Safety Administration

David W. Boston
President
Owen Compliance Services, Inc.

Heidi K. McAuliffe, Esq. (or designee)
Senior Counsel
American Coatings Association, Inc.

Paul Derig
Environmental, Health and Safety Manager
J.R. Simplot Company

Barbara Windsor
Chairman
American Trucking Association

LaMont Byrd
Director, Safety and Health
The International Brotherhood of Teamsters

**REDUCING REGULATORY BURDENS AND
ENSURING SAFE TRANSPORTATION
OF HAZARDOUS MATERIALS**

Tuesday, April 12, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON RAILROADS, PIPELINES, AND
HAZARDOUS MATERIALS,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to call, at 3:00 p.m., in room 2167, Rayburn House Office Building, Hon. Bill Shuster [chairman of the subcommittee] presiding.

Mr. SHUSTER. The hearing will come to order.

Good afternoon. Welcome everyone. Thanks for being at this subcommittee hearing on railroads, pipelines, and hazardous materials.

As you might notice, this is a fly-in day, so we might be light on members here. I am informed the ranking member will be here. She is en route. We are glad to have Mr. Filner here today.

The hearing today will focus on the reauthorization of hazardous materials safety programs of the Pipeline and Hazardous Materials Safety Administration, or PHMSA. The current authorization of these programs expires September 30th, 2008.

We also will be focused on how we can best reduce the regulatory burdens while ensuring hazardous materials are transported in a safe and efficient manner.

We have a distinguished panel of witnesses here with us today, and it is my pleasure to welcome back Administrator Cynthia Quarterman, the Administrator of PHMSA. I believe this is your first trip up here in 2011. In 2009 and 2010, I think we saw you here about every week, so we are very familiar with you, as you are with us. So, again, thanks for being here.

I think, as most people know, that the Transportation Committee is working on the reauthorization of a transportation bill, and it is important that I say transportation bill. In years past, it has really been called the highway bill, but Chairman Mica is going to put great focus on it being a transportation bill looking at the wide variety of transportation needs we have in this country.

In addition to a strong rail title which will be included in the reauthorization, we are looking to reauthorize hazardous materials safety programs in the transportation bill and look forward to the discussion here today.

I am interested in highlighting some of the key areas that I feel strongly must be given closer examination and that we have raised before: special permits and approvals and cargo tank wetlines.

Special permits provide a means for varying from a specific provision of the Hazardous Materials Regulation, the HMR, in a way that achieves at least an equivalent level of safety to regulations or is otherwise consistent with public interest.

Similarly, special permits and approvals allows its holder to perform a particular function that requires consent under the HMR. For example, explosives and fireworks may only be transported with an approval. To be issued, a special permit or approval of the application must have a fitness determination made by PHMSA.

In October of 2009 and August, 2010, PHMSA changed its procedure for conducting fitness determinations for special permits and approvals. I am concerned that PHMSA failed to go through usual notice and comment procedures in making these changes. Doing so in this manner lacks transparency and takes away the ability of stakeholders to give their input. Moreover, the current criteria for judging fitness are not entirely clear, which creates a climate of regulatory uncertainty.

During the same period of time, PHMSA noticed a rulemaking that became final on January 5, 2011, requiring additional information in special permit applications. Much of this additional information does little to increase safety, while creating unnecessary burdens on shippers, while also increasing costs.

We are focused on streamlining the special permit and approval procedures, incorporating more special permits into the hazardous materials regulations, and establishing fitness criteria in a manner that promotes consistency, predictability, and transparency. Doing so will both enhance safety and allow the economy to grow.

I also want to touch on the issue of cargo tank wetlines. We have addressed this issue in the subcommittee previously and will discuss it in more detail today.

According to the U.S. Department of Transportation, from 1999 to 2009 there were eight incidents of fatality or injury attributed to wetline releases. There are over 50,000 cargo tank shipments of flammable liquids each day, meaning the risk of a fatal wetline incident is one in 30 million. Despite this low incident rate, in January, 2011, PHMSA issued a notice of proposed rulemaking on this issue to require trucks to undergo retrofits or meet certain performance standards that would increase costs. Simply put, the rulemaking overstates the benefits of changes to wetlines regulation and underestimates the significant cost to retrofit tank trucks and the inherent risk of retrofitting.

In closing, I am looking forward to hearing from our witnesses regarding issues concerning maintaining uniformity and avoiding duplication. I continue to highlight in our hearings that, throughout our government, I am deeply concerned with the regulatory overreach that cripples our economy, stifles job creation, and ties our Nation in red tape.

I applaud President Obama for his recent comments on reducing the regulatory burden and for calling for a governmentwide review of burdensome regulations. However, it seems like every time I

turn around, another agency is making—moving forward with new, difficult, and expensive rulemakings.

We must ensure that our regulatory process maintains the highest level of safety while appropriately balancing the importance of promoting economic growth, innovation, and competitiveness and job creation. There is a significant disconnect between the President's word and the action of many of the agencies in his administration.

And, with that, I would like to yield to the ranking member, if she has a statement.

Ms. BROWN. Thank you for holding this important hearing on the reauthorization of the Department of Transportation hazardous materials safety program.

Last Congress, when I was chair of this subcommittee—it seems like a very long time ago—we conducted an extensive investigation, along with the DOT general, which raised some serious safety concerns within the agency. I am happy to be here today to hear from PHMSA and other stakeholders to see how the program is doing, how they have made it safer, and what we need to consider as we work to reauthorize the important safety program.

SAFETEA-LU made a number of significant changes in the hazardous materials safety program. The law provided DOT with enhanced inspecting authority. Last time we had a PHMSA in this room, we testified—I raised concerns about the number of inspectors we had. In 2009, it was just 35 inspectors to monitor in the entirety of the entire country. Today, I understand we are up to 51, which I believe will go a long way to conduct more adequate inspections and help ensure compliance with the regulations. Yet I believe there is still a lot of room for improvement. Fifty-one inspectors for 300,000 entities is not a lot.

SAFETEA-LU also strengthens training requirements and doubles funding for the firefighters training program. The hazardous material emergency preparation grant program is critically important for training firefighters and other workers on how to respond to accidents and incidents involving hazardous material. PHMSA estimated that the program provided more than two million emergency responses with initially trained or re-certifying trainees.

As we look forward to reauthorization, I think it is important to continue this program and to ensure that the level of training these firefighters and other HAZMAT workers are receiving is adequate.

I look forward to hearing today about what changes they have made to the special permitting and approval program, the subject of our investigation just 2 years ago. During our investigation, we discovered that the agency was not reviewing the applicant's safety record before issuing these exemptions from safety regulations. It did not follow up on unreported incidents. In many cases, it did not know whether a carrier was even authorized to transport hazardous material.

At that time, we issued an alarming number of special permits or exemptions from important safety regulations and provided little or no oversight to the program. Special permits and approvals are not a right but a privilege for carriers to be exempted from certain HAZMAT regulations. In law, safety is mandated to be the highest priority. We need to make sure that there is significant oversight

over this program, that exemptions are not just blindly handed out to individuals or trade associations. Safety background review and fitness determinations are a critical part of making this program a success so that, while commerce is not hindered, safety is not compromised.

I would like to state for the record that I think it would have been more appropriate that the DOT Inspector General testify before us today to discuss their investigations and recommendations.

I would like unanimous consent to submit for the record a copy of the DOT IG report and a copy of the committee's reports on its investigation and findings.

Mr. SHUSTER. Without objection, so ordered.
[The information follows:]

**NEW APPROACHES NEEDED
IN MANAGING PHMSA'S SPECIAL PERMITS
AND APPROVALS PROGRAM**

Pipeline and Hazardous Materials Safety Administration

Report Number: AV-2010-045

Date Issued: March 4, 2010



Memorandum

U.S. Department of
Transportation
Office of the Secretary
of Transportation
Office of Inspector General

Subject: **ACTION:** New Approaches Needed in Managing PHMSA's Special Permits and Approvals Program
Pipeline and Hazardous Materials Safety Administration
Report Number AV-2010-045

Date: March 4, 2010

From: Lou E. Dixon
Assistant Inspector General
for Aviation and Special Program Audits

Reply to
Attn. of: JA-10

To: Pipeline and Hazardous Materials Safety Administrator

This report presents the results of our review of the Pipeline and Hazardous Materials Safety Administration's (PHMSA) Special Permits and Approvals Program. PHMSA is the lead agency responsible for regulating the safe transport of hazardous materials, including explosive, poisonous, corrosive, flammable, and radioactive substances. PHMSA regulates up to 1 million daily movements of hazardous materials. Many hazardous materials are transported under the terms and conditions of special permits and approvals, which provide relief or exceptions to the Hazardous Materials Regulations.¹

On September 10, 2009, we testified before the House Committee on Transportation and Infrastructure regarding our review of PHMSA's Special Permits and Approvals Program.² Our review disclosed serious deficiencies in how PHMSA processes and oversees special permits and approvals. This report summarizes the results of our review and transmits our recommendations to strengthen the Special Permits and Approvals Program by addressing the issues we presented in our testimony. A copy of our hearing statement is attached for your information. Our audit objectives were to evaluate the effectiveness of PHMSA's (1) policies and processes for reviewing and authorizing special permits and approvals, (2) coordination with the affected

¹ Hazardous Materials Regulations, 49 C.F.R. § 171-180 (2009).

² OIG Testimony Number CC-2009-096, "PHMSA's Process for Granting Special Permits and Approvals for Transporting Hazardous Materials Raises Safety Concerns," September 10, 2009. OIG reports and testimonies are available on our website: www.oig.dot.gov.

Operating Administration³ before issuing any of these special authorizations, and (3) oversight and enforcement of approved parties' compliance with the terms and conditions of these authorizations. We conducted the audit from July 2008 through January 2010 in accordance with government auditing standards prescribed by the Comptroller General of the United States. Our objectives, scope, and methodology are detailed in the exhibit to this report.

IN SUMMARY

Our review identified safety issues that call into question the effectiveness of PHMSA's process for granting special permits and approvals for transporting hazardous materials. Specifically, PHMSA does not (1) adequately review applicants' safety histories, (2) ensure applicants will provide an acceptable level of safety, (3) coordinate with the affected Operating Administrations, and (4) conduct regular compliance reviews of individuals and companies that have been granted special permits and approvals. To alert PHMSA to our safety concerns with transport of specialized bulk explosives, we also reported these issues in a July 2009 management advisory. We note that PHMSA has developed action plans to address concerns we have raised about its Special Permits and Approvals Program. We will be monitoring the actions taken to ensure that each problem we raised is addressed. Our findings are summarized below:

- PHMSA does not look at applicants' safety history when assessing their fitness for a special permit or approval. For all of the 99 permits and 56 approvals we examined, PHMSA did not consider the applicants' incident and compliance records when granting, renewing,⁴ or allowing "party-to"⁵ permits. We found this to be the case even when applicants had multiple incidents and enforcement violations for years prior to receiving their permit. 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 has granted special permits and approvals without sufficient data or analyses to confirm that applicants' proposed level of safety is at least equal to what is called for in the Hazardous Materials Regulations. PHMSA's reviews of 65 percent of the 99 permits and all 56 approvals we examined were either incomplete, lacked evidence of an equal level of safety, or simply nonexistent. PHMSA also lacks sufficient supporting documentation for renewal and party-to

³ The Federal Aviation Administration, Federal Motor Carrier Safety Administration, and Federal Railroad Administration are responsible for inspection and enforcement of hazardous materials regulations for their respective industries involved in transporting hazardous materials in commerce.

⁴ A renewal is a request to extend the permit. Renewals can be valid for up to 4 years.

⁵ A "party-to" is a request to "piggy-back" on a new or existing permit.

permits, which are based on evaluations PHMSA may have performed several years earlier when assessing the original (new) special permit application.

- PHMSA did not coordinate with the Federal Aviation Administration, Federal Railroad Administration, or Federal Motor Carrier Safety Administration on 90 percent of the new and party-to permits or any of the renewals we reviewed, although these agencies may have critical safety data on applicants seeking a permit. Further, PHMSA did not coordinate most of the emergency permits we reviewed—even though the law specifically requires their coordination.
- PHMSA’s risk-based oversight program 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 planned actions address our concerns with the process and procedures used to manage the special permit program; the criteria used to assess an equivalent level of safety;⁶ 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 system that supports the program. PHMSA has already completed several of its action plan items, including:

- Developing and publishing written policy to clarify that special permits are issued to member companies only, not to the association or organization.
- Revising policy and procedures to ensure that an “equivalent level of safety” determination is met and fully supported with safety documentation evaluations.
- Revising policy and procedures to ensure that applicant fitness determinations are well-founded and fully supported.
- Developing formal standard operating policies and procedures for the special permits program.

While these actions and the remaining ones will require sustained management attention to fully analyze and resolve concerns with the special permit process, PHMSA must also focus attention on its approval process. Our work found that many of the weaknesses in the special permit process are also evident in PHMSA’s approval process. Specifically, PHMSA did not document applicants’ proposed level of safety for all 56 approvals we reviewed and had granted 5 approvals to applicants with prior

⁶ The proposed alternative will achieve a level of safety that is at least equal to what is called for in the regulation from which the special permit is sought.

safety incidents and regulatory violations—ranging from a company with 6 incidents and 1 violation to a company with 178 incidents and 23 violations. In October 2009, PHMSA developed and began implementing an action plan to enhance safety oversight of the approvals program. However, a number of longer term actions remain. These include developing a system to notify PHMSA and other relevant Operating Administrations of safety concerns and incidents and developing a pilot project for installing Electronic Stability Control systems on special use (bulk explosives) vehicles to prevent rollovers.

PHMSA should make it a top management priority to execute the action plans to improve both its special permit and approval processes. As PHMSA reexamines these processes, it must consider the age and number of special permits. We believe PHMSA would benefit from reviewing special permits that are more than 10 years old to determine if any can be included in the Hazardous Material Regulations. Based on our review of 39 renewal and 21 “party-to” special permits, we found that 60 percent were more than 10 years old and 33 percent were more than 20 years old. Also, the sheer number of active special permits—over 5,000—underscores the need to reexamine the strategy for adopting special permits into the Hazardous Materials Regulations to keep the current regulatory framework in sync with today’s operating environment.

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. While PHMSA’s action plans and senior management’s attention show promise, it will take time, resources, and sustained commitment to address longstanding and emerging issues. As PHMSA addresses these areas, it must refocus its approach to proactively identify safety risks, work with partner safety agencies to resolve safety and practicality matters, and set targeted oversight priorities.

RECOMMENDATIONS

Based on the results of our review, we are making a series of recommendations to the PHMSA Administrator that PHMSA should take now to strengthen its policies, procedures, and management oversight to ensure that the Special Permits and Approvals Program is operating efficiently. We recommend that PHMSA:

1. Finalize and fully implement the action plans to improve the effectiveness of processing special permits and approvals.
2. Finalize and fully implement formal standard operating procedures and policies for special permit and approval processes (i.e., application, evaluation, authorization; agency coordination; and oversight).
3. Establish priorities for implementing each of the initiatives in the action plans as well as a process to measure the effectiveness of each initiative and revise or update initiatives as necessary.
4. Resolve the issue of company fitness and level of safety for existing special permits issued to trade associations representing over 5,000 companies by requiring these companies to reapply under the new policy guidelines that require evaluating a company's fitness and level of safety.
5. Develop a precise definition of what constitutes an applicant's "fitness" to conduct the activity authorized by the special permit or approval. This definition should include reviewing an applicant's safety history—incidents and enforcement actions—prior to granting a special permit or approval.
6. Require the Office of Hazardous Materials Technology to conduct and prepare complete evaluations that document 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.
7. Establish a partner safety interagency working group to develop a uniform process for coordinating special permits, including new, renewal, "party-to," and emergency permits as well as new and renewed approvals.
8. Include "holders of special permits and approvals" as a priority factor in PHMSA's risk-based oversight approach in targeting companies for compliance reviews.
9. Establish timeframes for resolving and implementing long-standing safety concerns and periodically measure performance against the timeframes.
10. Establish a National Task Force to develop standard procedures for facilitating the adoption of special permits and approvals into the Hazardous Materials Regulations in order to keep the current regulatory framework in sync with advanced technologies and business practices.

**AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL
RESPONSE**

We provided PHMSA with our draft report on February 2, 2010, and received its formal response on February 25, 2010. PHMSA concurred with our first 9 recommendations and partially concurred with our 10th recommendation. Specifically, PHMSA agreed with the necessity for a regulatory framework that accommodates advanced technologies and business practices and spelled out the steps it is taking to accomplish this internally through a special team assigned to review all currently active special permits and identify those that should be incorporated into the Hazardous Materials Regulations. PHMSA's response is included in its entirety in the appendix to this report.

PHMSA's target completion dates and actions taken or planned for all 10 recommendations are reasonable, and we consider them addressed and subject to follow up under Department of Transportation Order 8000.1C. We appreciate the courtesies and cooperation of PHMSA representatives during this audit. If you have any questions concerning this report, please contact me at (202) 366-0500 or Scott Macey, Program Director, at (415) 744-0434.

Attachment

#

cc: Deputy Secretary
John Hess, PHA-30
Martin Gertel, M-1

EXHIBIT. OBJECTIVES, SCOPE, AND METHODOLOGY

Our audit objectives were to assess the effectiveness of (1) PHMSA's policies and processes for reviewing and authorizing Special Permits and Approvals; (2) PHMSA's coordination with the affected Operating Administration before issuing any of these special authorizations; and (3) PHMSA, Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), and Federal Railroad Administration (FRA) oversight and enforcement of approved parties' compliance with the terms and conditions of these authorizations.

We conducted this performance audit from July 2008 to January 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Our audit work began in July 2008 at PHMSA, FAA, FMCSA, and FRA headquarters offices. For the period January 2004 to August 2008, we statistically sampled 62 new special permit applications, 60 special permit "renewals" and "party to" applications, and 68 approval applications and assessed PHMSA's policies and processes for reviewing, coordinating, and authorizing approvals. See the table below for a breakdown of samples.

Table. Special Permits and Approval Samples				
Type of Application	Sample Size	Non-Emergency Reviewed	Emergency Granted/Reviewed	Denied
Special Permits				
New	62	40	16	6
Renewal/PTE	39/21	38/21	0	1/0
Permits Total	122	99	16	7
Approvals Total	68	56	0	12

We reviewed the various special permit and approval samples to determine if PHMSA adhered to its policies and procedures. Specifically, we examined applications to determine whether PHMSA required applicants to adhere to regulatory requirements.

We also assessed whether PHMSA coordinated with the modal administrations; showed evidence of completing evaluation forms; and considered applicants' fitness

Exhibit. Objectives, Scope, and Methodology

to conduct the authorized activity and proposed level of safety to ensure it met or exceeded the safety requirements from which the applicant was seeking relief.

During December 2008 and July 2009, we conducted 27 unannounced site visits to high-risk companies that included explosive manufacturers, chemical manufacturing plants, cylinder retesters, and other holders of special permits. The site visits were conducted to determine if PHMSA was carrying out its roles and responsibilities and if the companies were in compliance with the terms and conditions outlined in the special permits (i.e., special provisions, safety control measures, certificates of registration, security plan, shipping papers, and training requirements).

In June and July of 2009, we conducted 18 unannounced site visits to members of local trade associations in Washington, DC, Maryland, and California to determine if: (1) special permits applied to the respective sites and (2) the companies were in compliance with the terms and conditions outlined in the special permits.

We met with key PHMSA officials responsible for processing, reviewing, and evaluating the Special Permits and Approvals Program. We also reviewed Office of Hazardous Materials Safety special permits and approvals databases to review and analyze data in support of the review.

We met with industry associations such as International Air Transport Association, Air Transport Association, American Trucking Association, Association of American Railroads, and Air Line Pilots Association to obtain their views of PHMSA's Special Permit and Approvals Program.

On July 28, 2009, we issued a management advisory on bulk explosive trucks and other issues that arose during our review. On July 30, 2009, we briefed the Acting Deputy Administrator for PHMSA and her staff on the status of the review. In response, PHMSA briefed the Inspector General and the Deputy Secretary on the plan of action developed to address our management advisory.

We also interviewed FAA, FRA, and FMCSA officials regarding their coordination with PHMSA when special permits and approvals are issued.

Exhibit. Objectives, Scope, and Methodology

APPENDIX. AGENCY COMMENTS

U.S. Department
of Transportation
**Pipeline and Hazardous Materials
Safety Administration**

Administrator

1200 New Jersey Avenue, SE.
Washington, DC 20590

February 25, 2010

**INFORMATION MEMORANDUM TO THE ASSISTANT INSPECTOR
GENERAL FOR AVIATION AND SPECIAL PROGRAM AUDITS**

From: Cynthia L. Quarterman
x6-4433

Prepared by: Cindy Douglass
Assistant Administrator/Chief Safety Officer
x6-4461

Subject: Response to Draft Report on PHMSA's Special Permits
and Approvals Program

SUMMARY

The Pipeline and Hazardous Materials Safety Administration (PHMSA) has taken swift and comprehensive action to ensure that the process for issuing special permits and approvals for the transportation of hazardous materials functions effectively to protect public safety. PHMSA has fully addressed all specific issues identified in the DOT Office of Inspector General (OIG) review of the Office of Hazardous Materials Safety (OHMS) Special Permits and Approvals Program. PHMSA conducted a top-to-bottom review of its policies, procedures, practices, and staffing, and implemented action plans with aggressive timeframes that have already significantly improved oversight and accountability. We are dedicated to ensuring that operations authorized by special permits and approvals meet the same high safety standard provided by the Hazardous Materials Regulations (HMR).

PHMSA has committed to and is executing the following three action plans:

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- Action Plan for Special Permits Program;¹
- Action Plan for IT Modernization and Data Collection/Analysis; and
- Action Plan for Approvals Program.²

The Agency has completed the tasks within each of these plans on schedule and is on target to fulfill each action plan. The action plans are “living” documents that will be continuously reviewed to improve processes and regulations relating to special permits and approvals and ensure they are up-to-date. PHMSA is committing significant new budget and staffing resources to this effort and will continue to do so as it works with its partners within DOT and the U.S Coast Guard to manage the program. Our commitment to ensure the effectiveness of these vital programs includes PHMSA’s leadership and management team, the leadership of our partner agencies in DOT, as well as the Secretary and the Deputy Secretary.

PHMSA’s actions, in total, systematically address each of the issues identified in the OIG report, and offer decisive actions with regard to strengthening the special permits and approvals programs. As conveyed in the following responses to OIG’s specific recommendations, PHMSA has already completed action pursuant to several of the recommendations, with remaining actions well underway.

PHMSA ACTIONS TO ADDRESS RECOMMENDATIONS

1. **Finalize and fully implement the action plans to improve the effectiveness of processing special permits and approvals.**

PHMSA Response

Concur. On August 6, 2009, PHMSA finalized and began implementation of an accelerated and comprehensive action plan to improve its management of the special permits program. One main focus of the action plan is to ensure that the program functions as intended to provide a level of safety for transportation of hazardous materials authorized under special permits that is equivalent to the HMR. The action plan takes into account existing personnel, budget and information technology. It addresses: (1) the process and procedures used to manage the program; (2) the criteria used to assess and document an equivalent level of safety; (3) the process for evaluating the fitness of applicants and their safety performance; (4) the need for increased compliance audits and oversight of special permit holders; (5) the requirement of enhanced accountability of those operating under the terms of special permits; and (6) the need to modernize the information technology (IT) system that supports the program. All of the initiatives with specific deadlines are complete. For

¹ [Link to Action Plan for Special Permits](#)

² [Link to Action Plan for Approvals Program](#)

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example, PHMSA has completed the following action items to enhance its oversight of the special permits program:

- Published a written policy 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.
- Reviewed and revised 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 to ensure that the standard is met and supported with appropriate documentation.
- Reviewed and revised 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 to ensure that fitness determinations are well-founded and supported with appropriate documentation.
- Revised 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.
- Developed a plan to provide enhanced enforcement of the terms of special permits, taking advantage of the resources of all the operating administrations with responsibility for enforcing HMR.
- Developed a plan for enhancing the availability of data needed to provide the necessary oversight to ensure that holders of special permits are operating safely and within the conditions established in the special permits.
- Revised the standard operating procedures governing the entire special permits program, including procedures for evaluating applications, determining a level of safety equivalent to the regulations, and monitoring activities conducted under the special permits.

PHMSA completed a similar comprehensive review of its policies and processes for issuing approvals on November 6, 2009, and finalized an action plan to improve management and oversight of the approvals program on December 4, 2009. PHMSA has met all the deliverables to date and is on target to meet all planned deliverables in the approvals action plan. With the action plans finalized, and comprehensive actions underway to complete implementation, we consider the intent of this recommendation to be fulfilled.

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2. **Finalize and fully implement formal standard operating procedures and policies for special permit and approval processes (i.e., application, evaluation, authorization, agency coordination, and oversight).**

PHMSA Response

Concur. PHMSA completed and implemented standard operating procedures (SOPs) for the special permits program on October 5, 2009. The SOPs incorporate a number of program enhancements, including standardized documentation and retention requirements for applications, safety assessments, fitness evaluations, internal and intermodal coordination records, and all relevant background, data and analysis. Further, the SOPs incorporate a rigorous process for determining if a special permit will achieve an equivalent level of safety as provided by the HMR and a comprehensive review and inspection procedure for making determinations as to the fitness of special permit applicants, including specific processes and metrics for defining and evaluating fitness.

Pursuant to its Approvals Action Plan, PHMSA is in the process of developing similar SOPs for the approvals program. PHMSA has already finalized and implemented a number of enhanced procedures for the approvals program, including procedures for safety assessment, fitness evaluations, and internal and intermodal coordination. The Agency is on target to complete and fully implement all SOPs for the approvals program by March 4, 2010.

3. **Establish priorities for implementing each of the initiatives in the action plans as well as a process to measure the effectiveness of each initiative and revise or update initiatives as necessary.**

PHMSA Response

Concur. The initiatives in the action plans are listed according to a combination of criteria based on due dates, timeframes for completion, logical order for progression and their anticipated safety impact, overall urgency, staffing and budget resources. Thus, for each program, the first priority initiative was to complete a broad-based, top-to-bottom review covering current operating procedures, staff responsibilities, documentation of procedures, criteria for equivalent level safety assessments, fitness review criteria and processes, and coordination with DOT operating administrations. PHMSA has completed these reviews and identified a means to enhance procedures, reduce redundancies, and increase oversight and accountability.

Data improvement and IT modernization is another high priority, offering the potential to use enhanced data analysis to strengthen program oversight. The

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information system that supports the special permits program is at the end of its useful life and no longer effectively supports the program's requirements. System modernization will enable the agency to process applications and synthesize safety and performance information about companies applying for special permits and approvals more efficiently. Due to the importance of this initiative, PHMSA temporarily assigned a senior staff member to serve as a technical advisor, responsible for planning and executing this action plan.

The effectiveness of the actions taken to address each initiative is being monitored by a specially designated management team. We consider the initiatives in each plan to be "living" documents that may be revised based on lessons learned. The team routinely evaluates whether action items are complete or whether additional revisions are needed. Senior management reports to the Administrator and to the Deputy Secretary upon the completion of each item. With the priorities established for the action plans, and a special team established to ensure that actions taken are effective, we consider this recommendation to be complete.

4. **Resolve the issue of company fitness and level of safety for existing special permits issued to trade associations representing over 5,000 companies by requiring those companies to reapply under the new policy guidelines that require evaluating a company's fitness and level of safety.**

PHMSA Response

Concur. On August 17, 2009, PHMSA issued a written policy to clarify that special permits are only granted to members of associations, not to associations. Authority to perform a transportation activity under the terms of a special permit must be exercised by the individual business entity that bears responsibility for compliance under the terms of the special permit. (The policy is at [Link to Special Permit and Approval Policy](#))

As an interim measure, on September 4, 2009, PHMSA re-issued all special permits granted to members of associations to specifically indicate that it is the members of the association who are responsible for compliance with the terms of the special permit.

PHMSA plans to re-issue all safety permits previously granted to members of associations through their associations as quickly as resources permit. The Agency estimates that at least 20,000-30,000 entities will be affected. After May 1, 2010, (the date by which PHMSA will implement a new on-line application process for special permits), PHMSA will require all association members granted special permits to reapply. PHMSA will evaluate each firm's safety fitness before it re-issues the

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special permits. The timeframe for completing this process will depend on the number of entities that elect to reapply and available resources.

Currently, PHMSA processes about 3,000 special permits applications per year. Utilizing additional resources and the on-line application process will enhance the Agency's ability to evaluate special permit applications, but it will likely require at least two years to evaluate the fitness of those association members that re-apply for special permits. PHMSA will develop a more specific plan as it receives the applications.

Concurrently, PHMSA is reviewing the 20 active special permits issued to members of associations to identify those that should be incorporated into the HMR. Where appropriate, conversion of such special permits to regulations of general applicability is a major priority. PHMSA has already initiated two rulemakings to address association membership special permits related to cargo tank and rail tank car operations. The cargo tank rulemaking applies to a significant number of special permit holders. PHMSA expects to issue notices of proposed rulemakings for these two projects this spring and final rules as quickly thereafter as possible. Additional rulemakings to incorporate the remaining special permits issued to members of associations into the HMR will be completed by January of 2012.

5. **Develop a precise definition of what constitutes an applicant's "fitness" to conduct the activity authorized by the special permit or approval. This definition should include reviewing an applicant's safety history – incidents and enforcement actions – prior to granting a special permit or approval.**

PHMSA Response

Concur. PHMSA is working to more clearly define the process and criteria used to determine the fitness of applicants for special permits or approvals. This action will be completed by June 1, 2010. The determination of fitness in a complex and variable transportation operating environment exemplified by the special permits program requires the expert application of specific criteria concerning a company's safety performance together with an overall assessment of the risks inherent in the operations under consideration, including such factors as hazardous material type, quantity, and form; the transport mode and routes of operation; and the frequency and location of the operation.

Together with its safety partners in FMCSA, FRA, FAA, and the USCG, PHMSA completed a comprehensive review of existing fitness determination processes and developed a refined process for evaluating fitness, based on identified metrics related

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to a company's safety history. Utilizing safety data from several existing sources, the agencies can now use performance-based measures to evaluate an applicant's past safety history and ability to operate under the terms of the special permit as indicated in its application. PHMSA is working to further fine-tune this process.

Currently, PHMSA conducts fitness reviews of all entities applying for a special permit or approval using historical data records of incidents and violations. Where the record appears to be questionable, the company will be required to explain its record and the actions it has taken to resolve any safety problems, such as additional training or revisions to operating practices, as a condition of receiving the special permit or approval. If PHMSA determines that the company is unable to meet safety fitness requirements, PHMSA will not issue the special permit or approval and may take action to modify or terminate other special permits or approvals held by the company. PHMSA will prioritize the monitoring of such a company to assure that it meets the safety requirements of the special permit. If PHMSA determines that a company's safety record represents the risk of significant harm, PHMSA will terminate a special permit or approval.

6. **Require the Office of Hazardous Materials Technology to conduct and prepare complete evaluations that document the level of safety the company or individual is proposing is as safe or safer than requirements from which the company is seeking relief.**

PHMSA Response

Concur. PHMSA developed a new safety evaluation form to document pertinent information regarding whether a special permit will provide a level of safety that is at least equivalent to that provided under the HMR. The safety evaluation considers the risks of the materials to be transported, the type of packaging to be utilized, the mode of transport to be utilized, the conditions likely to be encountered during transportation, and pertinent special handling measures or operational requirements. These factors are all documented on the form. Further, on February 2, 2010, PHMSA implemented a similar process for consistent and uniform documentation of activities authorized under an approval. To ensure that the Agency has complete information, PHMSA is amending its procedural regulations to require applicants to provide additional data and information concerning the risks of the proposed operations and the measures to be utilized to address the risks. The Office of Management and Budget (OMB) must approve the new application requirements under the Paperwork Reduction Act. OMB approval is expected by December 2010.

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7. **Establish a partner safety interagency working group to develop a uniform process for coordinating special permits, including new, renewal, “party-to,” and emergency permits as well as new and renewed approvals.**

PHMSA Response

Concur. PHMSA established a working group with its partner safety agencies in DOT and the U.S. Coast Guard on September 4, 2009. The working group established specific interagency coordination and concurrence guidelines for special permit applications. The guidelines ([Link to Guidelines](#)) specify that PHMSA will approve or deny applications only after coordination with the operating administrations and provide for the operating administrations to notify PHMSA of any violations of a special permit by the grantee that would call its fitness into question. The special permits SOPs, implemented October 5, 2009, incorporate detailed procedures for coordinating special permit applications with the operating administrations. On February 2, 2010, PHMSA finalized and implemented a similar process for interagency coordination of approval applications. Therefore, the necessary actions envisioned by this recommendation are complete.

8. **Include “holders of special permit and approvals” as a priority factor in PHMSA’s risk-based oversight approach in targeting companies for compliance reviews.**

PHMSA Response

Concur. PHMSA’s Office of Hazardous Materials Enforcement has implemented a national business strategy to prioritize its activities. Activities authorized under Special Permits and Approvals are targeted as inspection and oversight priorities of the Office. This national business strategy is available online at ([Link to National Business Strategy](#)). In addition, on September 4, 2009, PHMSA in concert with its partner operating administrations issued a plan for enhanced enforcement of the terms of special permits and approvals, utilizing the resources of all the operating administrations with enforcement responsibility and available data to identify potential safety problems and target resources. The plan includes inspection procedures specific to special permit and approval grantees and inspection target goals. While the compliance reviews will be conducted on a continuous basis, with the priorities established, action on this recommendation is complete.

9. **Establish timeframes for resolving and implementing long-standing safety concerns and periodically measure performance against timeframes.**

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PHMSA Response

Concur. The OIG identified two long-standing safety issues involving special use bulk explosive vehicles and lithium batteries. PHMSA included a plan for addressing safety issues associated with special use bulk explosive vehicles as part of the special permits action plan it implemented August 6, 2009. Adhering to very aggressive timelines for completion, PHMSA completed safety performance and fitness reviews of the current special permit holders; performed a risk analysis to ensure the special permits address all possible safety issues, including the potential for a high-consequence (catastrophic) accident; and developed additional safety measures to address identified risks. PHMSA completed its review of these special permits on September 4, 2009, and issued revised special permits incorporating a number of enhanced safety requirements on October 5, 2009, resolving this issue.

PHMSA is also taking action to address lithium battery safety. On January 11, 2010, PHMSA published an NPRM to address comprehensively the safe transport of lithium cells and batteries. The NPRM represents another step in PHMSA's continuing process to ensure the safe transport of lithium batteries and builds on regulations published in 2004, 2007, and 2009. The rulemaking will strengthen the current regulatory framework by imposing more effective safeguards, including design testing, packaging, and hazard communication measures for various types and sizes of lithium batteries in specific transportation contexts. Several of the proposals are based on recommendations issued by the National Transportation Safety Board. PHMSA plans to publish a final rule by December 2010.

With the special use bulk explosive vehicles issue resolved, and a rulemaking in process for lithium batteries transport in process, timelines have been established for these issues, and this recommendation is considered closed. More broadly, PHMSA's enhanced oversight of the special permits and approvals programs, along with an enhanced working relationship with its partner agencies, will enable the agency to quickly identify potential safety issues to better ensure that future issues do not become long standing issues. In addition, for safety problems identified through PHMSA's enhanced monitoring and enforcement efforts, recommendations from the enforcement staff will be referred to a team of specialists to evaluate and act on the recommendations within specified timeframes.

10. **Establish a National Task Force to develop standard procedures for facilitating the adoption of special permits and approvals into the Hazardous Materials Regulations in order to keep the current regulatory framework in sync with advanced technologies and business practices.**

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PHMSA Response

Concur in part. PHMSA agrees with the necessity for a regulatory framework that accommodates advanced technologies and business practices, but is accomplishing this through alternative means. On February 5, 2010, PHMSA finalized a plan to establish a systematic process for reviewing outstanding special permits and incorporating them, where appropriate, into the HMR. As part of this plan PHMSA has designated a special team to review all currently active special permits – about 1,250 – and identify those that should be incorporated into the HMR. Once the review of all currently active special permits is completed, expected by mid 2013, PHMSA will routinely review recently granted special permits each year and will initiate a rulemaking to propose incorporating them into the HMR as warranted. PHMSA's Office of Hazardous Materials Standards is planning to add a unit that will focus on special permit issues and particularly on incorporation of special permits into the HMR on a routine basis as appropriate. PHMSA is developing a similar plan for incorporating the terms of certain approvals into the HMR. In addition, PHMSA plans to publish periodically a *Federal Register* notice requesting candidates for special permits and approvals that should be considered for incorporation into the HMR.

* * *

In closing, we want to emphasize that PHMSA has taken aggressive, comprehensive and expedited action to address the issues identified by the OIG. Actions have been completed or are underway to address each and every issue raised in both the special permits program and the approvals program. We have worked closely with the Department's leadership to secure additional staff and budget to continue addressing these commitments over the long term and further improve an already strong safety record.

cc: Calvin L. Scovel, Inspector General

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**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 holders¹ 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

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 information about themselves, or whether they were even aware that they had a permit

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.

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 evaluations¹⁰ 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 decided to transfer the most current special permit but not the historical records.

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.

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.

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, in 13 of the 16 emergency applications we reviewed, the applications went directly to PHMSA and were not coordinated with the affected Operating Administration.

¹¹ 49 C.F.R. § 107.117(d) (2009).

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 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

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

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.

The two special permits in question—11579 and 12677—allow permit holders to transport certain explosives, oxidizers, corrosive and combustible liquids, and blasting

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

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 until new regulations are in place to ensure the safe transport of hazardous materials. The Department must be vigilant in resolving this issue, as incidents involving shipments of lithium batteries continue to occur, with eight incidents in 2008—two of which were life-threatening—and six so far in 2009. The most recent of these include a burnt lithium battery package discovered on an aircraft at Honolulu International Airport on June 18, 2009, and another package that caught fire on a flight to St. Paul International Airport on August 14, 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.

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.

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

- 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
<i>New Permits</i>	
<ul style="list-style-type: none"> • 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 	<ul style="list-style-type: none"> • 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
<i>Renewal Permits</i>	
<ul style="list-style-type: none"> • identification/agent information • permit number for renewal • certification that original application remains accurate and complete • all relevant shipping and incident experience 	<ul style="list-style-type: none"> • 15-day period: determine completeness/conformity • verify timely receipt and enter into HMIS • draft authorization letter for signature
<i>Party-To Permits</i>	
<ul style="list-style-type: none"> • identification/agent information • permit number seeking to join • demonstration of equal level of safety 	<ul style="list-style-type: none"> • 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
<i>Emergency Permits</i>	
<ul style="list-style-type: none"> • 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. 	<ul style="list-style-type: none"> • 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.

Exhibit. Process Requirements for Special Permit and Approval Applications

Table B. Process Requirements for Approval Applicants and PHMSA	
What Applicants Must Provide	How PHMSA Processes the Request
New Approvals	
<ul style="list-style-type: none"> • 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) <p>Examples include classifications of explosives and fireworks, cylinder retesters, and manufacturers of cylinders</p> <p>For an approval that provides exceptions to the regulations, additional information is required:</p> <ul style="list-style-type: none"> • demonstration of equal level of safety • identification of any increased risk to safety or property 	<ul style="list-style-type: none"> • 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	
<ul style="list-style-type: none"> • identification/agent information • for approvals with expiration dates: renewals must be filed in same manner as original application • approval number for renewal 	<ul style="list-style-type: none"> • determine completeness • draft authorization letter for signature

Exhibit. Process Requirements for Special Permit and Approval Applications



U.S. House of Representatives
Committee on Transportation and Infrastructure
 Washington, DC 20515

James L. Oberstar
 Chairman

John L. Mica
 Ranking Republican Member

David Heymsfeld, Chief of Staff
 Ward W. McCarragher, Chief Counsel

September 9, 2009

James W. Cook II, Republican Chief of Staff

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, oxidizets, 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 of 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 exempted 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 exempted 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 NOT 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 PHMSA 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 architecture⁴ 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 *catté 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 trifluoride, 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 HMEBP Grant Program; a more in-depth review is warranted.** Under current law, the HMEBP 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 HMEBP 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

Ms. BROWN. And I ask unanimous consent for a statement from the Air Line Pilots Association to be included in the hearing records

Mr. SHUSTER. Without objection, so ordered.
[The information follows:]

WRITTEN SUBMISSION OF
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (ALPA)
BEFORE THE
SUBCOMMITTEE ON RAILROADS, PIPELINES,
AND HAZARDOUS MATERIALS
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

April 12, 2011

**“REDUCING REGULATORY BURDENS AND ENSURING
SAFE TRANSPORTATION OF HAZARDOUS MATERIALS”**

Air Line Pilots Association, International
1625 Massachusetts Avenue, NW
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(202) 797-4033

STATEMENT OF THE
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL (ALPA)
BEFORE THE
SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

**“Reducing Regulatory Burdens and Ensuring
Safe Transportation of Hazardous Materials”**

April 12, 2011

The Air Line Pilots Association, International (ALPA) represents more than 53,000 passenger and all-cargo airline pilots and has long advocated for improved transport requirements for lithium-ion and lithium-metal batteries. On two separate occasions in 2009, we appeared before this Subcommittee and cited numerous incidents wherein lithium batteries, carried either in the cabin of passenger aircraft or shipped as air-cargo, were involved in fires aboard aircraft. Unfortunately, the situation has not improved since that time. In fact, fires involving lithium batteries on airplanes continue to occur, destroying property and tragically, may have contributed to the death of two pilots flying for a U.S. all-cargo company.

The U.S. House of Representative’s recently passed FAA reauthorization bill, H.R. 658, contains a provision added on the House floor, Section 814 titled “Air Transportation of Lithium Cells and Batteries.” This section prohibits the Federal Aviation Administration from issuing or enforcing “any regulation or other requirement regarding the transportation by aircraft of lithium [batteries], if the requirement is more stringent than the requirements of the International Civil Aviation Organization.” ALPA strongly disagrees with this provision for the simple reason that these batteries are known to be capable of self-initiating intensely hot fires which airline pilots and/or onboard fire suppression systems may be incapable of extinguishing, and which could lead to the loss of an aircraft and everyone onboard.

Withholding a needed safety improvement on the basis that ICAO has not adopted it ignores several essential facts. The U.S. has historically led the world – including ICAO – in the creation and adoption of safety enhancements. For the U.S. government to defer to an international body on whether it is appropriate to take necessary precautions against a proven hazard which is demonstrably capable of causing loss of life and property represents a setback to our country’s standing in the aviation world. There are numerous examples of Federal Aviation Regulations (FARs) which exceed ICAO standards. If the U.S. government were to extend the philosophy expressed in Section 814 and revise our FARs in a manner to not exceed the stringency of ICAO standards, our aviation regulations would be weakened in a number of areas.

ALPA is aware of the arguments concerning the costs associated with safeguarding lithium batteries during air transport. Pilots want and need for their airline employers to be successful, and carrying cargo is a significant factor in airline profitability, but our members are opposed to betting their lives on making it home safely in exchange for haphazardly carrying lithium batteries that have a history of self-igniting and are capable of creating intensely hot fires onboard airplanes. We would reiterate that there are a myriad of industries – including, for example, those that manufacture household paint or dry ice – that both safely and profitably ship hazardous cargo under the full scope of dangerous goods regulations.

Background

In early 2010, responding to a perceived need for bolstered regulations governing the shipment of lithium batteries, the U.S. Department of Transportation (DOT) issued a Notice of Proposed Rulemaking (NPRM) intended to amend pertinent requirements in the Hazardous Materials Regulations. ALPA has publicly supported the majority of the proposed rule and would respectfully reiterate for the members of this Subcommittee the facts which substantiate our position on this issue.

While ALPA is not advocating for enhanced restrictions on the types of items individuals may personally carry on board aircraft, our concern remains focused on lithium batteries contained within equipment and/or transported as air cargo. If these shipments either initiate or become involved in a fire, they pose a significant risk to the safety and well-being of an aircraft and its occupants. While it is true that a fire involving a limited number of lithium-ion batteries may be controlled by the active fire-suppression system on an aircraft, Federal Aviation Administration (FAA) testing has shown that lithium metal batteries are unresponsive to Halon, the traditional extinguishing agent used aboard aircraft.

Unfortunately, lithium-ion and lithium-metal batteries remain excepted or exempt from many of the provisions of the Federal hazardous material regulations and the International Civil Aviation Organization (ICAO) Technical Instructions (TI) which regulate the transportation of dangerous goods (DG), including lithium batteries, by air.

The full regulation of lithium batteries as DG would have a significant positive impact on the safety of the air cargo supply chain. Improved packaging standards would help prevent damage to shipped batteries. Dangerous goods labels would ensure worldwide recognition that shipments have the potential to cause an incident if mishandled. An acceptance check would provide an opportunity to detect package damage or non-compliance with the regulations. Pilot notification through the notice to the captain (NOTOC) would increase the awareness of flight crewmembers to the presence of DG and allow them to communicate hazard information to emergency responders in the event of an incident and better position them to make critical decisions related to handling an in-flight emergency.

While we recognize that the risk associated with a single battery in a shipped package is low, we caution against permitting exceptions to the DG regulations for shipping small batteries based on this logic, as there is currently no regulation which prohibits hundreds or thousands of these

items from being consolidated in a single shipment. It is only through full regulation of the shipment of small batteries as DG that the quantity of batteries stored at a single location in an aircraft or in a single cargo compartment can be addressed. In the absence of such regulations, lithium batteries are handled as general freight and airline employees, including pilots, are often unaware of the total quantity of batteries offered for shipment or the risk that they pose to the aircraft.

Given that FAA continues to receive reports of fires directly related to lithium battery shipments and lithium batteries contained within equipment, we cannot afford to wait to fully regulate lithium batteries as DG. Every day we delay, people and property are being exposed to the potential danger of an in-flight fire that neither the aircraft's fire suppression system nor the flight crew may be able to extinguish. Immediate action is necessary to ensure the safety of lives and property involved in air cargo operations conducted on passenger and cargo aircraft.

ICAO Standards are Inadequate

ALPA strongly disagrees with the argument that the ICAO Dangerous Goods Technical Instructions are adequate for transporting lithium batteries by air. Current ICAO regulations except consumer-sized lithium batteries from many provisions of the regulations normally applied to other dangerous goods, resulting in a lower regulatory standard for these shipments. Specifically, the ICAO regulations for lithium batteries are inadequate in the following areas:

1. *No Required Notification to the Pilot in Command (NOTOC) That Lithium Batteries Are Being Transported On Their Aircraft.*

The knowledge that lithium batteries may be involved in an on-board incident or fire could influence a pilot's decision-making process, potentially impacting the selection of a diversion airport or other emergency actions needed to be taken. While the cause of the September 2010 fire aboard a UPS 747 that crashed near Dubai and fatally injured its two pilots has not yet been conclusively determined, it is known that large quantities of lithium batteries were carried as cargo on-board the aircraft. This information was not provided to the crew operating the flight. Had it been, that knowledge may have influenced their decision to return to their departure airport, as opposed to selecting a closer alternate airport at which to land. Providing information about the presence and quantity of lithium battery shipments to the flight crew also enables them to transmit valuable information to first responders in the event of an incident, aiding in the proper emergency response. The full hazardous materials regulations require notifying the flight crew of the presence of dangerous shipments, a system that has worked well over many decades. It is indefensible that a flight crew would be informed of a shipment of five pounds of flammable paint, but would have no knowledge of thousands of lithium batteries on a pallet in the cargo compartment, as current regulations now provide.

2. *No restriction on the quantity of lithium batteries on an aircraft.*

Under ICAO provisions for consumer-sized lithium batteries, there is no limit as to the number of lithium batteries that may be transported on an aircraft. It is permissible under current regulations to fill the entire cargo compartment of a passenger aircraft with lithium-ion batteries. The National Transportation Safety Board (NTSB) has recommended that the number of lithium batteries at a single location be restricted in order to improve the effectiveness of firefighting efforts should an incident occur.

3. *No Restriction on the Loading Location of Lithium Batteries.*

ICAO provisions allow lithium batteries to be loaded wherever cargo is permitted on an aircraft. Testing by the FAA Technical Center has determined that a fire involving lithium-ion batteries responds favorably to the Halon system in a Class C cargo compartment. ALPA and the NTSB have recommended that lithium-ion battery shipments be loaded in Class C cargo compartments. In order to adopt this recommendation, lithium-ion battery shipments must be fully regulated as hazardous materials, not excepted as in the ICAO provisions.

4. *Lithium-Metal Batteries Are Permitted On Passenger And Cargo Aircraft By ICAO.*

While the United States has prohibited carriage of lithium-metal batteries not installed in equipment on passenger aircraft, no such limitation exists in the ICAO provisions. The FAA Technical Center has found that lithium-metal battery fires do not respond to Halon, and in November 2010 stated, "No safe method for shipping lithium-metal cells is currently available." Yet, ICAO provisions allow unlimited quantities of these batteries on both passenger and cargo aircraft, without notifying the flight crew of their presence.

5. *No Dangerous Goods Labels Are Required.*

ICAO provisions for carriage of shipments of lithium batteries provide an exception for placing a dangerous goods label on the packaging. This label is designed to increase awareness of their presence by the ground handling staff while loading and unloading the aircraft, reducing the likelihood of a shipment being damaged or a damaged shipment being placed on an aircraft. Although not readily apparent, this is a highly significant issue since testing has shown that damage to a lithium battery shipment may, in many cases, result in a fire hours after the damage occurred. Requiring a label would increase awareness of and allow for safer handling of the shipment.

6. *No training is required for shippers/handlers of lithium batteries.*

While many of the incidents involving lithium battery shipments result from non-compliance with current regulations, in most cases, this non-compliance has resulted from a lack of knowledge or incorrect application of the regulations, as opposed to the willful evasion of requirements. Fully including lithium batteries under hazardous

materials regulations would reduce the complexity of the current regulations by eliminating a large number of exceptions relating to their shipment. Requiring shippers and handlers to be trained in mandatory compliance measures would result in a reduced number of incidents. Additionally, it would provide for improved oversight of shippers and handlers by enforcement agencies, and facilitate their ability to inspect shipping facilities and ensure that training and practices are in compliance with all regulations.

Recommendations

ALPA believes the U.S. must now take positive action beyond that required by ICAO to ensure the promulgation of measures which will protect the public, flight crewmembers, non-crewmembers traveling on cargo aircraft, and others involved in the air-cargo transportation system from the hazards currently associated with the shipment of lithium batteries by air.

Striking the language proposed in Section 814, Air Transportation of Lithium Cells and Batteries, is necessary for improving the overall safety of air cargo operations and the protection of lives and property whenever lithium batteries are moved through the air transportation system. Urgent action is needed now to bring these dangerous materials into the same regulatory framework that safeguards the shipment of hundreds of other hazardous materials in the United States and around the globe. While there may well be reasons to reduce regulations without a clear safety benefit, the air transport of lithium batteries clearly does not fall in that category and these regulatory protections must be promulgated immediately.

ALPA appreciates the opportunity to testify on this important safety matter.

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Ms. BROWN. With that, I thank the witnesses for appearing before our subcommittee today, and I look forward to hearing their testimony.

Mr. SHUSTER. I thank the ranking member; and, Mr. Filner, if you have an opening statement.

Mr. FILNER. Thank you, Mr. Chairman.

I would like to take advantage, though, first of the fact that there is Chairman Shuster in the room by moving that we reinstate all earmarks in the transportation bill.

Mr. SHUSTER. Without objection. I am OK with that. I have just got to get my leadership to go along with that.

Mr. FILNER. Thank you.

I want to talk just briefly, Mr. Chairman, about one issue that will come up in the testimony, and that is primary lithium metal batteries and cells.

As you know, we passed the FAA Reauthorization Act recently, which included a provision that prohibits the Department of Transportation from enacting safety standards for lithium batteries and cells that exceed the standards set by the International Civil Aviation Organization, ICAO. I think it is absurd that the United States government would be prohibited from doing anything to protect U.S. citizens beyond the standard set by an unelected group of these representatives. The convention that set up ICAO made clear that the U.S. and any other country would have the right to adopt regulations to protect the safety of its citizens and would not be prohibited from doing so by ICAO. This right was provided to each signatory which was signed in 1944.

This right to protect our citizens was also codified in our own law. Section 5120 of title 49 allows the Secretary to prescribe a safety standard or requirement more stringent than the standard or requirement adopted by international authority if the Secretary decided the standard or requirement is necessary in the public interest.

When we considered the FAA bill, I intended to offer an amendment that would restrict the carriage of primary nonrechargeable lithium metal-based batteries and cells on cargo aircraft. It would have prohibited these dangerous materials on cargo aircraft until safe packaging materials were available and proven to contain a fire and the cargo aircraft itself was equipped with an effective fire suppression system.

It would also—my amendment would have required cargo aircraft be equipped with smoke suppression systems that maintain cockpit visibility sufficient to allow the pilots to see basic flight instruments and outside environments at all times during emergencies when dense, continuous smoke was in the cockpit.

Now, I withdrew my amendment, due to concerns that the language would prohibit the transportation of life-saving medical devices, but I think the problem of the safety still remains.

As you all know, I think there are two types of lithium batteries, the primary nonrechargeable and secondary or rechargeable. My amendment only affected primary, nonrechargeable metal-based batteries and cells, which constitute, at the most, 5 percent of batteries shipped. These batteries and cells use a different manufacturing process in which lithium metal is used versus lithium ions,

which are used in the secondary type battery. The metal used is much more volatile at low temperatures and easily catches fires.

While shipments containing primary lithium metal batteries have been banned on both foreign and domestic passenger aircraft since 2004, there is no such restriction on the Nation's all-cargo carriers. Lithium metal batteries are increasingly finding their way into our air transportation system. Airlines such as UPS and FedEx are flying hundreds of thousands of lithium metal batteries on a daily basis.

For years, cargo aircraft have safely carried hazardous materials, but lithium metal battery fires exceed the existing design specifications of commercial aircraft. Currently, there is no fire suppression system, as I understand it, that is capable of extinguishing a lithium metal battery fire in flight. In fact, on February 7, 2006, a fire caused by lithium metal batteries on board UPS Flight 1307 destroyed the aircraft. The pilots, fortunately, were able to land the flight and evacuate the plane before it became fully engulfed in flames. But the NTSB investigation raised serious questions about the safety of transporting these materials and the adequacy of fire suppression systems.

The report also showed that the pilots were unable to see their hands in front of them as they exited the plane. Now, thankfully, they were close enough to the airport before the smoke blinded them; and if the flight had been further out it could have crashed into a populated area.

Dense cockpit smoke caused by lithium battery fires has also resulted in other tragic crashes, including the fatal crash of UPS flight number 6 on September 3rd, 2010, in Dubai. According to the accident report issued by Dubai's government, the cargo of this UPS plane included lithium batteries that should have been declared as hazardous cargo. They were not, and there were no hazardous cargo declarations on the flight's manifest, but at least three of the shipments contained rechargeable lithium battery packs that should have been treated as hazardous cargo on an international shipping regulations. So we have a harrowing picture here of pilots struggling to land their plane while running low on emergency oxygen, fighting smoke so thick they couldn't see their flight instruments.

This report raises serious questions about shipment of lithium batteries which can short circuit and cause fires that burn hot enough to melt an airplane. Fires involving rechargeable lithium ion batteries can reach 1,100 degrees, close to the melting point of aluminum, a key material, of course, in airplane construction. Lithium metal batteries fires are far hotter, capable of reaching 4,000 degrees.

In light of these incidents, Mr. Chairman, I believe we have a responsibility to act to prevent future tragedies; and until adequate packaging and fire suppression systems are in place, we need to restrict the carriage of primary lithium metal batteries and cells aboard cargo aircraft.

I thank the chair for the time.

Mr. SHUSTER. I thank the gentleman.

Now, Mr. Bucshon, do you have an opening statement?

Dr. BUCSHON. Good afternoon. I am Congressman Bucshon from Indiana's 8th Congressional district and, in the past, a cardiothoracic surgeon; and I do want to comment just briefly on the lithium battery issue as it relates to airline safety.

I was not in support of the amendment that was proposed and then withdrawn based on the fact that what we have learned from medicine through the years is applicable to a lot of things. There are a lot of anecdotes in the world about what can happen, what has happened, and what could happen. But I think Congress should regulate based on factual information.

Some of the airline instances that have been mentioned, there is no definitive evidence that the lithium batteries is what caused the problem, in addition to the fact that hundreds and hundreds of thousands of these type of things have been transported on planes across the world with what we can find about two quoted instances of possible resulting airline damage.

My State, Indiana, is the second-largest producer of medical devices in the country; and adding this type of unnecessary regulation based on anecdote would significantly hurt the economy, putting possibly 20,000 jobs at risk, based on the increased costs.

Again, in my view, with some anecdotal evidence, I think this is one of the things that we need to avoid. One of the reasons I came to Congress is we need to avoid the Federal Government always stepping up when there is a very isolated incident and creating broad policy, again, based on anecdotal information.

So, again, in regards to this type of regulation in general, I think Congress needs to avoid that and go with statistical analysis, statistical fact, and have appropriate regulation to protect the American people and to protect the world.

Thank you.

Mr. SHUSTER. I thank the gentleman.

And, again, I want to thank all members for being here today. This is our fly-in day, so we typically don't have hearings on the first day back, but I am trying to change it up so that we can get our work done and not be interrupted by votes and things like that. So I appreciate all you members for being here.

With that, we will start with our witnesses.

TESTIMONY OF THE HONORABLE CYNTHIA QUARTERMAN, ADMINISTRATOR, PIPELINES AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION; DAVID W. BOSTON, PRESIDENT, OWEN COMPLIANCE SERVICES, INC., ON BEHALF OF THE INSTITUTE OF MAKERS OF EXPLOSIVES; LAMONT BYRD, DIRECTOR, SAFETY AND HEALTH, INTERNATIONAL BROTHERHOOD OF TEAMSTERS; SANDRA CHAPMAN, DIRECTOR OF TRANSPORTATION, CORPORATE REGULATORY AFFAIRS, SHERWIN-WILLIAMS COMPANY, ON BEHALF OF THE AMERICAN COATINGS ASSOCIATION; PAUL DERIG, ENVIRONMENTAL, HEALTH AND SAFETY MANAGER, J.R. SIMPLOT COMPANY, ON BEHALF OF THE AGRICULTURAL RETAILERS ASSOCIATION; AND BARBARA WINDSOR, CHAIRMAN, AMERICAN TRUCKING ASSOCIATIONS

Mr. SHUSTER. Our first witness, the Honorable Cynthia Quarterman, the Administrator of PHMSA. I understand you have

to leave here at 5:00. If we are still here at 5:00 ourselves, there is probably trouble, so I will make sure, one way or the other, that you are out and will be able to catch your plane.

So, with that, Administrator, proceed.

Ms. QUARTERMAN. I appreciate that.

Good afternoon, Chairman Shuster, Ranking Member Brown, and distinguished members of the subcommittee. On behalf of Secretary LaHood, I appreciate the opportunity to discuss the progress the Pipeline and Hazardous Materials Safety Administration is making in addressing current safety issues in the hazardous materials safety program.

Each year, more than \$1.4 trillion in hazardous materials shipments cross the United States by air, rail, highway, and water, totaling 2.2 billion tons and 320 billion ton-miles. These statistics show the enormity of not only PHMSA's mission but the mission of the other modal administrations within the Department of Transportation that share responsibility in overseeing and enforcing hazardous materials transportation safety.

In the past year, PHMSA has made groundbreaking progress in enhancing its hazardous materials safety program, including a major reorganization. Our objectives, from the outset, have been to protect and improve safety outcomes, improve employee relations, and to broaden perspectives across the agency.

In addition, PHMSA undertook an extensive requirement campaign, filling 90 percent of all hazardous materials vacancies. As a result, PHMSA had a banner year in 2010, including seeing the lowest number of hazardous material incidents with death or major incident in recorded history.

PHMSA has addressed 12 of the 22 National Transportation and Safety Board's open safety recommendations, including those related to lithium batteries, cargo tank motor vehicle wetlines and loading and unloading of hazardous materials. Meanwhile, PHMSA has successfully closed all 10 outstanding Office of the Inspector General audit recommendations related to the agency's special permits and approvals program.

In the past 12 months, PHMSA doubled its rulemaking output, issuing 33 separate Federal register notices to establish new hazardous material regulations, including rules incorporating into regulations 45 special permits that affected tens of thousands of applicants.

In addition, PHMSA commissioned an independent audit of our hazardous materials emergency preparedness grants program. The preliminary findings have already resulted in an action plan and improvements to the program, and we have released a sample application that provides State and territorial grantees with best practices demonstrating effective planning and training activities.

In summary, the Department and PHMSA are taking positive steps to address its regulatory priorities, decrease the incidents associated with hazardous materials operations, properly manage the special permits and approvals program, and closely examine the emergency preparedness grants program to ensure that all allocated funds are being accounted for.

We welcome any and all recommendations for making our safety program more effective and further ensuring the public safety. I

look forward to working with this subcommittee as we continue to implement measures to ensure our safety oversight.

Thank you.

Mr. SHUSTER. Thank you very much.

Next, Ms. Barbara Windsor, who is the chairwoman of the American Trucking Association by day, but by night she is the president also of Hahn Trucking, President and CEO.

So, with that, Ms. Windsor, please proceed.

Ms. WINDSOR. Thank you, Mr. Chairman.

Chairman Shuster, Ranking Member Brown, and members of the Subcommittee, thank you for this opportunity to testify. Once again, my name is Barbara Windsor, president and CEO of Hahn Transportation, a Maryland-based regional trucking firm that hauls petroleum and other bulk products. My family built and grew this business over 75 years, and today we operate more than 100 trucks and employ 150 individuals.

This afternoon I appear before you representing not just my company but also as the Chairman of the American Trucking Association.

The trucking industry delivers virtually all of the consumer goods in the U.S., including essential hazardous materials such as pharmaceuticals to treat the ill, chemicals to purify water, and fuel to power our cars. The safety and security record for HAZMAT transportation by truck is impressive. Serious incidents have decreased by 30 percent over the past decade.

Further, the annual number of highway fatalities caused by hazardous materials has declined from 16 to 4. While the existing regulations governing HAZMAT transportation have a proven track record, my written statement addresses six specific recommendations to further improve the safe, secure, and efficient transportation of HAZMAT. I will highlight three of these recommendations this afternoon.

Recommendation number one, ensuring equitable enforcement. Primary compliance with the HAZMAT regulations rests with the shipper, who must properly classify the material, select appropriate packaging, mark and label the package, and prepare a compliant HAZMAT shipping paper. Each of these pre-transportation activities occurs before the carrier arrives to load HAZMAT packages on the truck.

Since most HAZMAT enforcement occurs during roadside inspections, the responsible party may not be present. A carrier should not be cited for transporting HAZMAT where a shipper neither labels the package nor presents a HAZMAT shipping paper. Similarly, where a shipper omits a certain required information on a shipping paper, it is not realistic to expect the truck driver to research the chemical and catch the shipper's mistake.

Carriers must remain responsible for the correct performance of HAZMAT functions under their control. However, Congress should ensure that the carriers are not responsible for violations of pre-transportation functions that are performed by the shipper unless the carrier has actual knowledge of the violation.

Recommendation number two, reform incident reporting requirements. ATA supports the current Federal reporting requirements when there is a release or an incident involving HAZMAT. How-

ever, today, there are dozens of telephonic reporting requirements at the State and local level that vary from jurisdiction to jurisdiction. Drivers have no way of knowing whether a particular incident triggers a local reporting requirement, and motor carriers are being fined if the local requirements are not met.

The universal 911 system, combined with the existing Federal incident reporting requirements, eliminates the need for separate State and local reporting requirements. It should be sufficient that the carrier calls the national response center, when required, or calls 911 to ensure the local emergency response teams are mobilized.

And recommendation number three, wetlines. The wetlines issue is not new to the veteran members of this subcommittee. Wetlines refer to the product piping underneath cargo tank trucks that transport gasoline and other flammable liquids and are used for both loading and unloading of tank trucks.

Incidents involving wetlines are extremely rare. In fact, an individual is more likely to be struck by lightning than to be injured by a wetline incident. Notwithstanding this incredibly low incident rate, PHMSA has proposed a new restriction restricting the transport of flammable liquids in wetlines.

My written testimony goes into additional detail on the costs and benefits of PHMSA's proposed wetlines ban. We recognize that wetlines are the subject of an open NTSB recommendation, and we therefore urge Congress to have the National Academy of Sciences objectively study the issue and hold PHMSA rulemaking in abeyance until the analysis is complete.

Thank you for allowing me to testify today, and I would be very pleased to answer any questions.

Mr. SHUSTER. Thank you very much, Ms. Windsor.

Next is Mr. David Boston, who is President of Owen Compliance Services, Incorporated.

Mr. Boston, please proceed.

Mr. BOSTON. Chairman Shuster, Ranking Member Brown, and members of the subcommittee, I am testifying on behalf of the Institute of Makers of Explosives, whose members have been adversely affected by changes to the procedures and requirements of PHMSA's approvals and permits program.

Mr. SHUSTER. Could you speak into the mike a little more? Pull it towards you.

Mr. BOSTON. My written statement provides background on the purpose of special permits and approvals, the exceptional years' long safety record achieved by industry while using these regulatory authorities, and the importance of these agency authorities to the economy. During my remaining time, I will highlight the serious problems that have resulted from PHMSA's management of the program over the last 18 months.

The investigations of this program in the last Congress revealed procedural inadequacies, none that contributed to a death or serious injury. Instead of asking holders of special permits and approvals to resubmit missing documents, PHMSA implemented standard operating procedures governing the issuance, revocation, and termination of these authorizations without providing for public notice and comment as required by statute. These new procedures set up

a complex system of application reviews, including costly site visits based on unpublished and unknown standards that have the potential to shut businesses down. These burdensome procedures render no commensurate safety benefit but affect every applicant for and holder of special permits and approvals.

Adding to the complexity, PHMSA expedited new rules that radically increased the types of data applicants must submit. How this information would enhance safety was never explained by the agency. The new requirements imposed on industry and the agency significant additional burdens and costs.

Without notice and comment, PHMSA has used the approvals process to establish unpublished requirements, undoing longstanding practices used to classify explosives without any record of incidents of fatality or serious injury, including issuing classification approvals with expiration dates, second-guessing the results of classification tests performed by laboratories approved by PHMSA, and relooking at the merit of so-called family approvals, as well as asking some applicants to break up family groups.

Without notice and opportunity for public comment, and in spite of the regulated community's longstanding safety records, PHMSA has redefined the historic use of the agency's fitness authority and established a three-tier fitness determination scheme.

PHMSA asserts that it is not obligated to establish fitness criteria through rulemaking because this is something that relates to internal processes within PHMSA. We respectfully disagree. Every decision has an outside effect. Industry must understand the performance standard against which it will be measured.

Despite promised improvement, an unprecedented backlog of special permit and approval applications has developed as a result of the agency's new paperwork and processing requirements. Industry has been told that the application processing procedures, like fitness criteria, are internal agency procedures with no external effect. However, any delay in processing applications due to the agency's new multi-layered clearance procedure results in lost business opportunities. American industries are now disadvantaged in the global race to market by our own government.

PHMSA's now using this backlog and its inflated application processing procedures to justify imposing a user fee on special permit and approval applicants. A portion of the fee would cover PHMSA's general operating budget, even though only a small percentage of the regulated community are holders of these authorities and the Federal Government is the program's largest user. PHMSA's user fee proposal is a hidden tax on companies whose innovation and goods are needed for economic recovery.

While approvals, as other regulatory standards, may safely remain unchanged for years, Congress never intended that special permits be a long-term solution for the innovations they authorize. Rather, proven special permits were to be incorporated into regulation. Regrettably, PHMSA's failure to incorporate such permits into its regulations now exposes the affected industries to current whims of agency action.

Last week, this subcommittee heard testimony from an explosives company about PHMSA's use of the special permit process to force the installation of untested technology on trucks used to haul

bulk explosives and consequences that followed. Despite best efforts to comply, the retrofitted systems failed, causing total system shut-down while loaded vehicles were operating at speed. Instead of using scarce resources to incorporate these decades-old, proven special permits into regulation, as Congress intended, PHMSA has created a perverse, upside down regulatory environment, where it is more difficult to move a truckload of significantly less risky explosive precursors than to move a truckload of dynamite.

In closing, special permits and approvals are necessary regulatory tools. The approvals and permits program which provides safety benefits to the public has been successfully run for decades without serious incident and without user fee.

Industry wants the certainty of regulations and believes that changes to how PHMSA implements these regulatory authorities should be subject to notice and comment rulemaking. PHMSA's extensive bureaucratic changes would not have saved one life. They have created wasteful delays and expenditures of resources.

This subcommittee should ensure that PHMSA promptly addresses these issues through rulemaking and without imposing user fees or demands for untested technology.

Thank you.

Mr. SHUSTER. Thank you, Mr. Boston.

Next we will hear from Mr. Paul Derig—did I pronounce that right?

Mr. DERIG. That is correct.

Mr. SHUSTER [continuing]. Who is the environmental, health and safety manager for J.R. Simplot Company.

Mr. Derig, please proceed.

Mr. DERIG. Thank you, Chairman Shuster, Ranking Member Brown, esteemed members. I appreciate the opportunity to appear here before this subcommittee.

I am here to testify on behalf of the Ag Retailers Association, a trade association which represents America's agriculture retailers and distributors of crop inputs, equipment, and services.

As stated, I am the environmental, health and safety manager for the J.R. Simplot Company, directly responsible for support and oversight of regulatory programs, including transportation in Simplot's agribusiness retail operations.

Simplot retailer operations are comprised of retail farm supply distribution systems, with over 100 facilities in 16 western states that provide products, technical, and field services to local farmers, horticulturists, and landscapers.

Over the past 30 years, I have been involved with many aspects of hazardous material handling and transportation, both through industry experience and as a public responder in the States of Idaho and Oregon. This hearing is important to ARA, as the ability to safely and effectively transport crop input products is vital to our industry and food production.

ARA supports the Federal Government's principal role in HAZMAT transportation, regulation, and enforcement but is concerned about the administration of several portions of the Hazardous Material Transportation Act.

First, the hazardous material safety permit program needs improvement. Every 2 years, carriers must renew their hazardous

material safety permit; and the eligibility criteria for that renewal cycle is on a floating scale. So the bottom 30 percent in each category are disqualified for permit renewal. This results in greater than 50 percent of the applicants being deemed ineligible for the hazardous material safety permit.

Furthermore, the system is biased against carriers that operate in rural areas. Carriers in rural areas receive far fewer inspections than carriers operating on Federal highways and busy areas.

The safety level should not float from permitting cycle to permitting cycle. A level of safety should be defined and not fluctuate 2 years later. This disqualifying category data should be aggregated so that a company's entire record is taken into account. Additionally, Congress should conduct oversight of this program.

To illustrate, I would like to share a personal experience. In January, 2010, Simplot's hazardous material safety permit renewal was denied based on eligibility. In other words, Simplot was in the top 30 percent of the national average for out-of-service violations in that permitting cycle. After lengthy review, I found that half of the out-of-service inspections were performed by the Minnesota Department of Transportation on ammonia nurse wagons that were not currently in use. The Minnesota Department of Transportation referred to a State Department of Agriculture rule stating that cargo tanks with more than 10 percent liquid level are deemed to be in service.

After a long process of disputing the violations with State and Federal authorities, all of the Minnesota inspections were overturned and the out-of-service violations were removed from the system, leaving Simplot with 14 inspections for the year, with one hazardous material out-of-service violation.

Simplot still did not qualify for the hazardous material safety permit. The denial of the permit resulted in losing the ability to deliver two products that amount to \$12.5 million in annual revenues for our company.

Secondly, I would like to further explain the importance of the DOT federally preempting State and local regulations that impose an unreasonable burden on commerce.

The safe and secure transportation of hazardous material is best achieved through the uniform regulatory requirements. In the previous example, the State Department of Agriculture Regulation had Federal regulatory consequences that reached far beyond Minnesota. For a business to move forward, it is very important to have consistency in the rules. We suggest that Congress strengthen DOT's preemptive authority, authorize DOT to preempt State and local regulations that impose an unreasonable burden on commerce, also remove the 2005 hazardous material amendment which put a limitation on the preemptive effect of the law. These amendments create a loophole through which States can use enforcement authority to impose inconsistent requirements on the regulated community.

Lastly, I would like to talk you about preempting State hazardous materials registration and permitting programs. States are free to institute their own hazardous material registration programs, resulting in varying registration requirements from State to State. To date, only six States participate in the Alliance of Uni-

form Hazardous Materials Procedures State HAZMAT registration and permitting programs. Since the inception of the test program, we have not seen any type of safety review in our operations, and this has increased paperwork and costs with no added value. Congress should preempt these hazardous materials State regulation programs that are ineffectual to safety and security concerns.

We look forward to working with the committee and DOT in the future.

Mr. SHUSTER. Thank you, Mr. Derig.

Next, Sandra Chapman, who is the Director of Transportation, Corporate Regulatory Affairs, for the Sherwin-Williams Company; and she is testifying on behalf of the American Coatings Association.

Ms. Chapman, please proceed.

Ms. CHAPMAN. Thank you, Mr. Chairman and members of the subcommittee.

I want to address two issues to the committee today, the enhanced enforcement authority of PHMSA and the authority of the agency in the international arena.

Historically, PHMSA has been a leader in the U.N. Subcommittee of Experts, serving as chair and, more recently, as vice chair. This very important multi-modal organization makes decisions that have significant repercussions throughout the hazardous materials transportation industry.

Likewise, PHMSA is a multi-modal agency that has broad authority to oversee and coordinate the requirements for all modes. This broad, multi-modal vision is essential to PHMSA; and the agency must be permitted to continue to serve in this capacity in the international arena.

The coordinating of the domestic and international standards for limited quantities over all modes of transport is a great example of PHMSA's valuable work. For almost 2 years, PHMSA worked with industry stakeholders and through the U.N. subcommittee to develop standards that would provide as much multi-modal uniformity as possible. PHMSA worked closely with the Coast Guard to address standards for vessel mode and with the FAA to address standards for the air mode. The results of PHMSA's efforts are limited quantity requirements that are clear, reasonable, and appropriate, given the limited risk presented by these materials in transport.

Since 1967, the Secretary of Transportation has delegated responsibility to lead and coordinate DOT's activities in these international forums to PHMSA. More recently, however, it is no longer clear that PHMSA is the lead agency for this work. In the most recent reorganization of the Office of Hazardous Materials, the International Standards Division appears to have been minimized in staff resources, and the current international standards coordinator is also serving as an acting director for another office within PHMSA. This situation is unacceptable, and Congress should send a strong message to PHMSA that this international work is paramount to the safety of transporting dangerous goods and by specifying that PHMSA should be the lead agency for this important work.

Turning to the enforcement issue, as a shipper, my industry understands that PHMSA is an enforcement agency; and there is no doubt that PHMSA needs the tools to enforce the HMR aggressively. But these enforcement tools must be based on safety and accountability.

PHMSA's partners in HAZMAT safety and enforcement are the State agencies. Safety demands uniformity in the regulatory requirements applied to industry and in their enforcement. We highly recommend that DOT work closely with State enforcement personnel to provide consistent training in HAZMAT enforcement, because businesses must have uniformity in enforcement standards and procedures in order to operate efficiently.

PHMSA's enforcement teams have always had the authority to open and inspect a package under very limited circumstances. Following the Value Jet tragedy in 1996, this authority was broadened to address the serious concern of undeclared hazardous materials. Those would be materials that are hazardous but are not packaged, marked, and labeled accordingly and were not presented to the carrier as hazardous.

However, in a very recent final rulemaking PHMSA has interpreted this amendment language very broadly and is applying the enhanced authority to open and inspect packages to more than just those packages that are undeclared. PHMSA intends to apply this authority to packages that are declared but may be out of compliance with some other aspect of the regulations.

For the paint industry, this has the potential to be very disruptive, as a regulated can of paint looks exactly like a nonregulated can of paint, except for the labels and markings. Open-and-inspect authority should be applied as Congress intended to undeclared packages. PHMSA already has an enforcement process to address noncompliant packages, and this process should be employed.

Congress also must consider the broader safety and accountability concerns in this situation. Package-opening activities should only take place at properly equipped facilities in order to protect public health and safety.

In addition, there should be notification to the offerer that a package is being removed from transport for inspection and testing. We urge Congress to consider the impact to the shipper, carrier, and consignee when a package is removed from transport for inspection. If a worst-case scenario occurs and there is a release, who is liable?

This is an extremely difficult situation, and we ask Congress to include indemnification language intended to hold harmless persons who are injured, including economic injury, by a release from a package that is opened or otherwise handled under this section.

With these additional safety and accountability norms, we believe that PHMSA will have the appropriate tools to aggressively enforce the HMR.

Mr. Chairman, we are happy to answer any questions at an appropriate time. Thank you very much for this opportunity to address the committee.

Mr. SHUSTER. Thank you very much, Ms. Chapman.

Next, we will hear from Mr. LaMont Byrd, who is the Director of Safety and Health for the International Brotherhood of Teamsters.

Mr. Byrd, please proceed.

Mr. BYRD. Good afternoon. My name is LaMont Byrd; and, again, I am the Director of Safety and Health at the International Brotherhood of Teamsters. I would like to thank Chairman Shuster, Ranking Member Brown, and members of the subcommittee for the opportunity to testify here today.

The Teamster's Union represents approximately 300,000 workers in the U.S. who handle and transport hazardous materials. These workers include truck drivers, dock workers, warehouse workers, airline pilots, and law enforcement officers and emergency response—or medical personnel who respond to traffic accidents that may involve the release of hazardous materials.

We recognize the need for comprehensive hazardous materials legislation that ensure the strong enforcement of the rules, clearly defines regulatory jurisdiction, and provides for safety and security training of workers who are involved in HAZMAT transportation activities.

We are particularly concerned with strengthening hazardous materials transportation safety in the tank haul industry and support the notice of proposed rulemaking to protect workers who load and unload cargo tanks.

We also support the proposed rule concerning safety requirements for external product piping on cargo tanks transporting flammable liquids.

Today, I will briefly comment on training for hazardous materials workers and emergency responders, OSHA jurisdiction, and transporting lithium batteries on aircraft.

It is critical that HAZMAT workers be provided with comprehensive worker safety and security training to enable these workers to protect themselves from the hazards associated with transporting HAZMAT. Likewise, it is essential that emergency responders receive a level of training that allows them to protect themselves, nearby persons, property, and the environment. Therefore, the Teamsters Union supports operations level training for emergency responders.

The Union developed a comprehensive HAZMAT/HAZWASTE training program for our members and other transportation workers, and the Union receives a training grant from DOT PHMSA to conduct instructor training for HAZMAT workers. To successfully complete our train the trainer course, aspiring trainers must complete 56 hours of classroom, lecture, and small group activities and teach at least one HAZMAT awareness level course while being evaluated by a Teamster master trainer.

Our students who completed our program reported that they had their HAZMAT-related job responsibilities increase as a result of receiving the training. They joined the Safety and Health Committee, answered HAZMAT-related questions asked by their co-workers, responded to HAZMAT releases, helped to prevent workplace accidents, and conducted HAZMAT-awareness-level training.

We believe that the HAZMAT training program adds value in the workplace, as trained workers have greater safety and health awareness and can therefore work more safely.

The Union is aware of efforts to eliminate OSHA authority to protect HAZMAT transportation workers. This is an extremely important issue to the Union, and we recommend that any attempts to eliminate or weaken OSHA's authority be rejected.

The Union has had many experiences working with OSHA on HAZMAT transportation issues. We feel that the agency has appropriately addressed the issues. Hazards were abated. Employees have been protected. We think that OSHA is doing a good job, and we would like to see the agency retain its jurisdiction.

There is much concern about hazards associated with transporting lithium batteries on aircraft. The IBT is on record regarding our position, and I would like to reemphasize that we agree with the NTSB recommendations regarding transporting lithium batteries and would like to advise the subcommittee that we do not support the amendment to the Federal aviation authorization bill that essentially prohibits the FAA from promulgating or enforcing regulations regarding the transportation of lithium batteries by aircraft if the regs are more stringent than ICAO standards.

The Teamsters Union believes that the current regulations that are more stringent than ICAO standards should be retained and enforced. In addition, there should be no obstructions to promulgating and enforcing any future rules that are more stringent than ICAO standards.

The Teamsters Union commends the committee's concern about the safety and security of the traveling public and hazardous materials workers. We urge the committee to use great care as you consider streamlining regulations as the lives, health, and safety of workers is dependent on strong, well-enforced regulations.

Again, thank you for the opportunity to appear here today. I am pleased to answer any questions you may have.

Mr. SHUSTER. Thank you very much, Mr. Byrd. Appreciate your testimony.

I am going to start questioning, and I am going to focus on Ms. Quarterman so we can try to get her out of here on time.

We heard from the industry. There is great concern being expressed over the backlog and some of the criteria that PHMSA has. Moving forward, I understand that there is 1,000 special permits and maybe as many as over 4,000 approvals that are backlogged. So how are you proceeding to correct the backlog and address the backlog that you have out there?

Ms. QUARTERMAN. With respect to approvals, there is no backlog.

Let me say, to give you a matter of perspective, if you look in my testimony, there are several charts that show the number of applications for approvals with respect to fireworks and explosives that were received in the past 3 years and the number that have been processed through the first quarter of 2011. In summary, in fiscal year 2009, we processed 2,100 special permits, as compared to 3,800 in 2010. At this point, there is no backlog above 180 days with respect to explosive approvals. There are three that are over 90 days.

With respect to firework approvals, we have seen an exponential growth in the number of applications and in our processing of those. In fiscal year 2009, we processed only 1,460 firework applications. In 2010, we received 12,000. That was almost three times as many as we had received the prior year, and yet we managed to process a full 13,562 of those.

In the first quarter of this fiscal year, we have already received 7,500 applications, which suggests that we are seeing another doubling in the number of applications for fireworks; and we have processed 6,900 of those. We have 24 of those that are more than 180 days old, and those are all subject to fitness holds because of issues that we are looking into with those particular applicants. So there is no backlog with respect to approvals.

With respect to special permits, as you will recall, we had a very laborious effort with responding to concerns with that program. We put in place special operating procedures, and last year we managed to reduce the backlog in special permits in August of 2010. So it disappeared altogether.

When we looked closer at the backlog, we discovered that the files for those special permits were missing a key ingredient, and that is the safety equivalency determination that is required. We found that more than half of those were not in place. So we had to go back and essentially recreate safety equivalencies in the files that appeared to be missing that document. We have hired outside contractors, including Volpe, who have been working with us to put those safety equivalencies in place.

We fully expect that the backlog will be over with by August of this year. So there is a backlog in special permits, but there is a good reason for it, and we have a plan to get on course with that.

Mr. SHUSTER. OK. Mr. Boston, I have got information—I guess submitted by your folks—that say there is a backlog of 4,000. Is that accurate? I mean, the numbers aren't jibing here.

Mr. BOSTON. The numbers that you have are taken from PHMSA's approvals database that they provide on-line. If that information is not up to date, then that data would be inaccurate, but we have no way of knowing that. And it is the only source of information we have regarding the number of approvals that are outstanding.

Mr. SHUSTER. I have here on this document that it is from April 5 of 2011. Is the database incorrect?

Ms. QUARTERMAN. Unfortunately, our Web site is not updated as often as it should be. We will update that with more current information. It doesn't get updated on a daily basis. The information that I have is as of April 11, and I am not sure where the 4,000 number is coming from, unless he is considering every application that we have as being in backlog status. We calculate backlog based on whether it has been in our coffers for more than 180 days, and there are none in the approvals program, or very few that fit into that category.

Mr. SHUSTER. It is based on your Web site so—it says submitted and pending, and it totals 4,000. So that is something we need to get—Mr. Boston, are there people from your industry you are hearing from crying out that there are pending? I mean, again, we need

to—we would like to get to the bottom and see what is the right number—0 or 4,000 or 40 or whatever the number is. Mr. Boston.

Mr. BOSTON. I don't have any immediate information from other members, but I would be happy to research that and provide that information to the subcommittee for the record at a later date.

Mr. SHUSTER. That would be important that we get that.
[The information follows:]



The safety and security institute of the commercial explosives industry since 1913

April 25, 2011

The Honorable Bill Shuster
Chairman
Subcommittee on Railroads, Pipelines
& Hazardous Materials
Washington, DC 20515

The Honorable Corrine Brown
Ranking Member
Subcommittee on Railroads, Pipeline
& Hazardous Materials
Washington, DC 20515

Dear Chairman Shuster and Ranking Member Brown:

I am writing to follow up on the question posed by Chairman Shuster as to why the data industry reported about the backlog of special permit and approval applications so drastically-varied from those reported by Cynthia Quarterman, Administrator, Pipelines and Hazardous Materials Safety Administration, at the April 12, 2011, hearing of the Subcommittee. My response is on behalf of many within the regulated community, though we do not claim to represent every affected holder of or applicant for a special permit or approval.

Let me begin by restating that we understood Ms. Quarterman to say that there is no backlog of applications for approvals and that agency expects to resolve the backlog of special permit applications in the next couple of months. She also said that the agency's on-line database for approvals applications, which is the only information source that the public has to track the status of these applications, cannot be relied on. There is no similar publicly accessible database to track the status of all pending special permit applications. The status of special permits may only be tracked on-line individually, permit by permit. With this background, let me respond to the Chairman's question.

(1) The data provided in my testimony was obtained from the agency's on-line database for tracking the status of approval applications. The Administrator's statement that the public may not rely on this data begs the question of whether any of the data provided by the agency can be validated.

(2) As noted, there is no publicly accessible database for tracking the status of special permit applications. Periodically, PHMSA publishes in the Federal Register notices of new applications for special permits or modifications to special permits.¹ Traditionally, these notices are published

¹ 49 CFR 5117(b). Though covered, we have no knowledge of PHMSA ever publishing notice of applications for renewal of special permits. Publication would provide for public participation in the renewal process based on knowledge of special permit performance, and provide a more complete picture of the agency's workload.

monthly.² By law, PHMSA is required to publish notice of special permit applications pending longer than 180 days.³ This reporting used to be monthly, but the frequency of reporting has been inconsistent in the last 18 months, and never during this period has the agency published all applications pending over 180 days.⁴ The last notice of such pending applications was published April 21, 2011.⁵ PHMSA used to publish periodically notice of final decisions on special permit applications. Such notice has not been published in over a year.

(3) When PHMSA issued its standard operating procedures for processing special permits and approvals, it established a 120-day paper-processing schedule. Applications not processed (issued or denied) within the 120-day window are deemed “backlogged.” When PHMSA uses the term “backlog” to describe the status of special permit and approval applications, we assume that the agency is using the 120-day threshold, not the 180-day statutory threshold for publishing still pending special permit applications.

(4) While explosives classification approvals are the largest segment of approvals, they are not the only type of approval processed by PHMSA. PHMSA groups approvals into six categories:

- Registration Approval
- Classification Approval
- Cylinders Approval
- Certification Agencies Approval
- General Approvals Approval
- Radioactive Material Certificates of Competent Authority Approval

The only source of publicly available data on all pending approvals applications is the PHMSA on-line database. However, the parameters for selecting data do not allow for the capture of all pending applications.⁶ Explosives classification approvals are one of the few that can be tracked as a category by entering “1” in the “hazard class” parameter. Following is an update to the pending explosives classification applications data that was provided in my testimony:

² During 2010, this reporting frequency was not consistent. However, the agency seems to be back on track in 2011. The most recent report was issued 4/21/2011.

³ 49 U.S.C. 5117(c). There is no similar disclosure requirement for approvals pending longer than 180 days.

⁴ Anecdotally, we know of applications pending over 180 days that have not been reported by the agency as required by law. To this point, the published April 21, 2011 notice reports 26 applications for a new special permit and 29 applications for a modification to an existing special permit pending over 180 days. In testimony submitted at the Subcommittee’s April 12, 2011 hearing, PHMSA reported, in just these two categories alone, 90 pending applications.

⁵ During 2010, notices were published February 1, August 25, and December 16. In addition to the April 21, 2011 notice, a notice was published February 28, 2011.

⁶ See the URL provided under “Source” in the table, page 3.

Submitted in:	# Pending
2007	9
2008	18
2009	148
10-Jan	25
10-Feb	11
10-Mar	51
10-Apr	26
10-May	0
10-Jun	2
10-Jul	0
10-Aug	0
10-Sep	2
10-Oct	30
10-Nov	136
10-Dec	140
> 120 days	598

Submitted in:	# Pending
11-Jan	238
11-Feb	585
11-Mar	1,185
11-Apr	525
< 120 days	2,533

Total	3,131
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Data compiled: 4/15/11 5:07 PM

Source: PHMSA Approvals Search

<http://prod-web1.phmsa.dot.gov/hazmat/regs/sp-a/approvals/search>

According to the database, in the ten days between April 5 and April 15 when each of these data queries was made, the number of backlogged applications has been reduced by half, from 1,165 to 598 applications. While the agency's productivity is remarkable, a more important statistic would reveal how many applications were granted and how many were denied. As of April 15, the database shows that PHMSA has denied 1,667 explosives classification applications this year alone. Whatever the answer to these questions, bottom line, the data still shows a backlog of approval applications where three days before the Administrator testified there was none.

(5) In addition to these numbers of classification approvals, the Subcommittee should add those with expiration dates that PHMSA has not yet reissued without such dates. As noted in my testimony, without notice and comment, PHMSA began to issue classification approvals with five-year expiration dates in 2005. The pointless paperwork burden created by this policy and the disruption to the global commerce of U.S. classified products caused the agency to withdraw the policy in September 2010.⁷ In November 2010, the Institute of Makers of Explosives (IME), wrote the agency for clarification about the process that the agency planned to follow to reissue those

⁷ 75 FR 54419 (September 7, 2010).

classification approvals that had been assigned expiration dates without those dates.⁸ Four months later, PHMSA responded that it “has replaced classification approvals set to expire in 2010 and 2011.”⁹ However, days later, the IME learned that the American Pyrotechnics Association (APA) had submitted documentation to PHMSA that over 1,800 classification approvals that had either expired or were due to expire by June 30, 2011 had not been reissued.¹⁰ Still, PHMSA has not announced the procedure it will follow to recall and reissue affected approvals.

(6) As noted, there is no similar database for special permits. The status of special permit applications must be researched individually. Therefore, only PHMSA can provide this information. The only and latest agency accounting we are aware of was provided to Rep. Sam Graves, who has been vigilant in pressing for responsible reform to PHMSA’s current application processing procedures and standards. On May 12, 2010, PHMSA responded to a request for such information submitted by Rep. Graves on April 26, 2010. At that time, PHMSA reported that the following types of special permit applications were pending “over 180 days”:

Special Permit Type	Count
Modification	45
New	45
Party To	106
Renewal	421
Grand Total	617

Subsequently, Rep. Graves requested monthly updates of the progress PHMSA was making to address the special permit and the approval backlogs.¹¹ PHMSA failed to provide these requested updates.

(7) The real answers to the questions about how many special permit and approval applications are pending and, of those, how many have been pending over 120 days can only be answered by PHMSA. However, the data reported in the Administrator’s testimony about the number of applications “received” and the number “processed” does not reveal the true state of the application fiasco. The Subcommittee should consider asking the agency to provide the following information for the last 12 months:

- How many applications have been issued? Breakdown by special permit and approval type.
- How many applications have been denied? Breakdown by special permit and approval type.
- How many applications have been rejected as incomplete? Breakdown by special permit and approval type.
- Who can issue or deny special permit and/or approval applications?
- How many applications has each agency staff issued and denied by name?

⁸ November 8, 2010 letter from IME to PHMSA.

⁹ March 21, 2011 letter from PHMSA to IME.

¹⁰ March 25, 2011 letter from APA to PHMSA.

¹¹ Letter from Rep. Graves to PHMSA, June 23, 2010.

- How many applications have been submitted? Breakdown by special permit and approval type.
- How many of the applications are resubmittals? Breakdown by special permit and approval type.
- How many applications have been submitted once, twice, three times or more? Breakdown by special permit and approval type.
- Why is the resubmittal rate so high?
- How does this compare to the resubmittal rate before the new SOPs were established?
- What is the agency's procedure to reissue classification approvals with expiration dates?
- How many classification approvals are still in the system with expiration dates? Breakdown by the month that the approvals will expire.

We have anecdotal examples of applications which have been denied for trivial reasons, applications that have been denied based on agency error, applications that have been issued with agency errors thus rendering them useless, and applications that have languished for months for no apparent reason. If it would help the Subcommittee understand the depth of the regulated communities' concerns, we will submit such examples.

Conclusion

Thank you again for the opportunity to provide testimony on PHMSA's Approvals and Permits program. This letter attempts to highlight issues associated with the agency's application processing backlog. Whether the special permit and approval backlog is 617, or 598, or one, any application that is not timely processed is business opportunity lost. PHMSA has created a bureaucratic, paper-driven processing scheme that adds no commensurate safety benefit. Holders of special permits and approvals have over years established an exceptional safety record. None of the new procedures, with the attendant delays, would have saved one life.

The backlog is one of many concerns the regulated community has with the way PHMSA is managing this critical program. We welcome the Subcommittee's attention to our concerns and believe that, at minimum, PHMSA should be directed to submit all of the procedural changes it has made, including the establishment of unknown fitness criteria, since 2009 to notice and comment rulemaking.

Respectfully,



David W. Boston
President
Owen Compliance Services, Inc.
On behalf of the
Institute of Makers of Explosives

Mr. SHUSTER. My time has expired.

We are going to do a second round. But I will go to the ranking member, Ms. Brown, for 5 minutes; and, again, we can go another round.

Ms. BROWN. Thank you.

Ms. Quarterman, recently, PHMSA was replaced as the lead U.S. representative at the United Nations Committee of Experts on the Transportation of Dangerous Goods, an International Civil Aviation Organization, by FAA. Do you support this change and why did it occur?

Ms. QUARTERMAN. PHMSA has not changed its status with respect to the U.N. Committee that you cited.

With respect to the ICAO Committee, PHMSA is the person who determines who the representative is; and we, as a department, made a determination that the person who—that FAA should be the representative during this round because there are several operational issues related to aviation that are on the table.

The authorities still rest with PHMSA in terms of who will be appointed to that committee, and we have the alternate position. So we work hand in hand with the FAA person, and we have created internal operating procedures about how things proceed forward.

Ms. BROWN. So you have not been replaced?

Ms. QUARTERMAN. No.

Ms. BROWN. The Institute of Makers of Explosives claim that the change of the special permits and approvals over the past 18 months have not enhanced safety. What is your response to that?

Ms. QUARTERMAN. Well, as I mentioned in my testimony, this has been a record year in terms of safety with respect to the hazardous materials safety program.

In addition to that, as the committee is well aware, in past years the special permit and approvals program had not been enforcing or following a number of items within its regulatory requirements, including doing a fitness determination, finding a safety equivalency. Or, if it had, it was old, and we didn't know where it was. The agency didn't know where it was.

We now have that information and have verified the fitness of all the operators who have those special permits as they come forward and approvals. I think that enhances safety markedly.

Ms. BROWN. We had testimony last week in this area, and it was indicated by DuPont that it has been slowing down and it is taking a longer time. And we tried to find out that information, and we could not.

Ms. QUARTERMAN. Well, as the statistics show in my testimony, we are working at a record pace. You can see that we have been issuing approvals, you know, multiples of prior years.

Ms. BROWN. And I guess my last question for you, what do you think Congress should do to help prevent cargo truck rollovers?

Ms. QUARTERMAN. Well, cargo truck rollovers are a large cause of incidents for hazardous material safety. This past year, the NTSB held a hearing where PHMSA, the FMCSA, and NHTSA were all represented, and we began to have a conversation about some things that needed to be done. I think we are at the beginning stages of that.

We did put out a video with FMCSA that essentially tells a driver what to do to prevent a rollover. A large cause of these incidents appears to be human error, not knowing what to do when something happens in the truck.

I think NHTSA is also looking at the possibility of electronic stability controls for some of these trucks. So we have a number of initiatives under way.

Ms. BROWN. It seems to me that that was more of a problem when we had the hearing as opposed to the wetlines.

Ms. QUARTERMAN. Are you asking if that is a higher risk?

Ms. BROWN. It seemed to be in the testimony that we had. I want your response to that.

Ms. QUARTERMAN. I agree it is a higher risk.

One of the things that we did very recently that has never been done before historically is to look at what are the top 10, for example, commodities that cause incidents, what are the top 10 causes of the incidents and that kind of data. We are just at the beginning stages. In fact, it is hot off the presses in terms of being able to work that into our regulatory process and determine what rule-making should follow on.

But, importantly, flammable liquids are the number one cause of incident, and the wetlines rule does address potential issues with flammable liquid transportation.

Ms. BROWN. Can Ms. Windsor respond to that?

Mr. SHUSTER. Yes.

Ms. WINDSOR. I would have to agree that a rollover is a much more potential issue than wetlines. There are very few cases of accidents involving wetlines as was stated before, when you consider that we have over 50,000 cargo shipments on a daily basis. And we as an industry would rather see roll stability worked on versus the wetlines.

Ms. BROWN. Thank you. I will save my additional questions.

Mr. SHUSTER. Thank you.

Mr. Fincher.

Mr. FINCHER. Thank you so much; and thank you, panel, for coming today to give us your comments.

It is very frustrating to me. It seems like the right hand doesn't know what the left hand is doing. And we just—keep on regulating and have more oversight, and we are not getting to the root of the problem.

Industry, you know, it is just not from one company or one individual, but it is from multiple, about how overregulation and too much oversight is not the answer. We all want to make sure that we are doing things by the book and the safest way possible. But, at the same time, if we don't stop breaking the back of our businesses by overregulation, then we are not going to be able to sustain this path.

Just a couple of questions, just I guess one.

Of the most recent rules and regulations that have been made related to transporting hazardous materials, in your opinion, what is the one rule or regulation that has the most negative effect on your industry? And this is to Ms. Windsor. Where should we focus first to help relieve the regulatory burdens?

Ms. WINDSOR. That is difficult. As I said, we have six recommendations. Among the issues I didn't discuss are background checks, which are very onerous for our drivers, and they spend a lot of money on them. The Safe Trucker Act, which has been proposed on a number of years, would allow one fingerprinting. That would help alleviate a lot of regulatory issues on our drivers. In fact, we have a number of drivers that just won't get a HAZMAT endorsement because of the current process, so we are losing out.

Uniform permitting is another thing. If we just needed to go to one State, versus having to hire someone to contact each State individually every time we want to do a special permit it would help a lot. It wouldn't change the dollar amount. It is just the way the processes take place. Obviously, this issue is near and dear to my heart, because I am a cargo tank carrier hauling petroleum products.

There is also the wetlines issue. Instead of spending money on retrofitting our trailers, we there are other issues that we could deal with before that.

And reforming the way we do our incident reporting. These are all things—the six things I brought out are a way that we could stay safe in transporting hazardous materials and yet be a safer industry without as much—not changing regulations, making it a little more efficient.

Mr. FINCHER. It seems to me that if we could just talk to the experts in their fields before we start making rules and regulations that we know nothing about, it would make a lot more sense.

Ms. WINDSOR. We would like to be partners and work together. We only want safe shipments out there on the highway. We want our drivers to come home safely to their families every night. We want the public that we are traveling with to be safe, also.

Mr. FINCHER. Absolutely. And I think we always want to make sure that we get to the bottom line, and the bottom line here is the consumer ends up paying.

Ms. WINDSOR. Yes.

Mr. FINCHER. The trickle-down effect is the consumer pays. Again, nobody wants to be any more safe than I do, but you can carry it too far, and we are carrying it too far. There are too many people saying the same thing over and over, whether it is in the trucking industry, the ag industry, the fertilizer industry.

And, Mr. Boston, any comments from you? I have got just a little more time left.

Mr. BOSTON. Well, I guess, first of all, I would support that we want whatever regulations that we have to comply with to be clear and concise. We want to be measured against known standards and not vague, uncommunicated, unpublished standards. I think that the primary issue for us is that. So thank you.

Mr. FINCHER. Thank you. I yield back.

Mr. SHUSTER. I thank the gentleman.

And I don't know if he heard the statistic that was cited here with this wetlines issue. You have a greater likelihood of getting struck by lightning than you do—so maybe you ought to drop a bill to outlaw lightning to strike people.

And everybody kind of chuckles, but that is the point. I mean, we should be focusing on the issues that really have a significant

impact. I certainly don't want anybody to die out there. But, at the end of the day, the only way I can make sure of that is if we just stop the 50,000 shipments of hazardous—the wetline shipments that are out there. That is the only way to make sure it is 100 percent. There is risk involved. We got to make sure we focus on what the risk is.

And, with that, Mr. Filner.

Mr. FILNER. Thank you, Mr. Chairman.

I was just wondering where in the 20th century or 19th century you would like to take us back to, my friend? I mean, what do you want, child labor laws taken away? I mean, what do you want to—this onerousness on your small businesses. Come on, we are talking about the health and safety of our people.

And I will be happy to talk to the experts anytime you want. Truck drivers represented by the Teamsters here today, I will talk to them. I will talk to the pilots. I mean, you are talking to the guys who own the places, but I want to talk to the drivers, I want to talk to the pilots, I want to talk to the bus drivers, I want to talk to the people who make it safe, and I want to talk to the parents of those people who would like their—So, you know, tell me how far you want to go back, whether it is 1910, 1880, I don't know where you are taking us back to, but—and I was shocked, Mr. Chairman, by the cavalier and flippant dismissal of so-called anecdotal evidence that the gentleman from Indiana talked about, Dr. Bucshon. I mean, he was a doctor. Would he dismiss 52 anecdotes from his colleagues that a certain medicine produced a heart attack and, therefore, he says he dismissed it? It is just anecdotal. So I am going to give that pill to my patients.

I mean, come on. In the incidents that both of us were talking about, which is lithium batteries, the FAA reported 52 incidents in the last 16 years or so involving lithium and/or lithium ion batteries, many in the cargo departments of airlines. And, in fact, FAA's tech center found that the only FAA-certified fire extinguisher could not extinguish fires from those batteries. So I take those anecdotes pretty seriously. I take the experts, the pilots, very seriously who want some regulation of these batteries.

Yes, we have got to balance that with what we think are the so-called lifesaving devices that we all want for ourselves and our family, but we just can't dismiss these anecdotes as just unworthy of us and somehow too onerous for the consumer. I am a consumer, too, and I want the pilots, I want the truck drivers, I want everybody to be safe. And I have to pay more for it? Hey, I am willing to do that. And let's get that stupid thing about the consumers paying off the table.

Ms. Quarterman, thank you for your testimony. I mean, do you take this stuff on the lithium battery seriously? Do you believe that the ICAO should restrict our ability to have regulations? And where is your agency in regard to any regulations that you would be suggesting?

Ms. QUARTERMAN. My agency put out an NPRM earlier last year to regulate lithium batteries in conjunction with FAA. We are sister agencies, and we worked together to come up with a notice of proposed rulemaking. We received I think a record number of comments on that. We have worked together to put together a final

rule which is now at the Office of Management and Budget, which means we are waiting for the next steps; and there is not too much more I can say about it as a result.

Mr. FILNER. You would not support the amendment that restricted us from having a more stringent regulation than ICAO would?

Ms. QUARTERMAN. I believe the Department is in the process of putting together a statement in response to that, so I don't want to jump in front of them.

Mr. FILNER. Oh, come on, just say you are against it.

Thank you, Mr. Chairman.

Again, I think this Congress and this Nation deserves a little bit more than these—I don't know—these flippant comments about too much regulation. I mean, yeah, we want to do this intelligently, we want to do it cost effectively, and we want to, you know, take science into account. But to say that, by definition, it is bad—although I doubt if those same people would want to eat a steak that didn't go through USDA regulatory procedures or fly on a plane where there is no Federal traffic controllers or even be on a street without red lights. It sounds like that is the kind of society they want and only—you know, only the bottom line of small business is going to count.

Well, it costs more money to stop at a red light, I am sure, but we accept them because they are an interest of all of us, as we accept meat inspections and air traffic controllers. And a lot of middle-class inspections somehow are OK, but when they hit businesses they are not OK.

So I think we have to get away from these simplistic kinds of discussions and move on to a more science-based kind of application of this stuff.

Thank you, Mr. Chairman.

Mr. SHUSTER. That is what we are all for, moving towards a science-based and risk-based. Well, where is the greatest risk involved and let's focus on that and let's spend our efforts there to save as many lives and avoid as much damage to property. So that is what we want to do.

Ms. Beutler.

Ms. HERRERA BEUTLER. Thank you, Mr. Chairman.

And I guess I would want to reiterate—I didn't hear Ms. Windsor's—in fact, I think she came to us with some solutions for regulations. And though it seems like, quote, let's stop—I think what the gentleman said was let's take this stupid thing about consumers paying more off the table. I think that encapsulates the problem over the last couple of years and why we are going after some of these regulations that cost consumers more money when they don't have it and, more importantly, cost them jobs. I have 13, 14, 15 percent unemployment in my neck of the woods, and I want people to work.

And what I heard from Ms. Windsor—and please correct me if I am wrong—was, with regard to regulations, wasn't to erase or wipe them out. No one is saying that. In fact, she had some really good solutions on the table. Eliminating duplicate and redundant security background checks seems like a good idea to me. Ensuring equitable enforcement of hazardous materials regulations, OK, that

seems fair. Reforming hazardous materials incident reporting requirements, and so on.

So I guess I missed the part where we said let's get rid of all regulations required to transporting hazardous materials. I want safety on our roads. I want our trucks safe. I want our families safe, and I want them to have jobs. I want them to be able to work.

So it is not about protecting businesses. It is about protecting those people in Clark County and southwest Washington who are trying to transport materials and get paid so that they can pay for their kid's education, their food, their clothing.

So I guess, unless I am wrong—and this is kind of where the question is—you all aren't up here advocating that we get rid of regulations, especially as it relates to your industry, right? You are advocating that we do this in a science-based, risk-assessed, solution-oriented manner, which to me seems like the adult conversation we need to have, especially after the last couple of years where there hasn't been a big check on these regulations.

And if you would care to comment, please feel free.

Ms. WINDSOR. No, I totally agree. We are not talking about reducing regulations. We are streamlining or consolidating instead of so many variables out here.

I want the workforce—I have a workforce that 50 percent of my drivers now don't want to get a HAZMAT endorsement because of the cost of the HAZMAT endorsement from their State and then the TWIC card, also. It is identical fingerprinting, so it is a duplication.

Ms. HERRERA BEUTLER. So with that then people are not earning as much as they could be, right?

Ms. WINDSOR. Correct.

Ms. HERRERA BEUTLER. Which means those are dollars for our economy left on the table—

Ms. WINDSOR. Correct.

Ms. HERRERA BEUTLER [continuing]. At a time when we have the worst economy that we have seen in decades?

Ms. WINDSOR. Correct. Because it becomes very onerous on them to have all this duplicated credentialing.

Mr. SHUSTER. I thank the gentlelady from Washington.

With that, Ms. Richardson for questions, 5 minutes.

Ms. RICHARDSON. Thank you, Mr. Chairman.

Ms. Quarterman, I believe it was Mr. Derig said that there is a bias in the system against rural agricultural folks. Are you aware of that or are you committed to looking into that for us?

Ms. QUARTERMAN. It was specifically on page 3 of his testimony: Further, the system is biased against carriers like agricultural retailers that operate in rural areas. Carriers in rural areas receive far fewer inspections than carriers operating on Federal highways and busy areas. Therefore, you know, they don't have enough to be able to statistically overcome the violation.

Ms. RICHARDSON. So are you aware of his concern?

Ms. QUARTERMAN. I am not aware of his concern. I have to say that some of the things that have been raised here today are beyond PHMSA's jurisdiction with respect to, for example, licensing. That is the Federal Motor Carrier Safety Administration. I would be happy to take back those comments on those issues to them.

Ms. RICHARDSON. But I think there is a direct correlation of what he is saying, that if ultimately you are determining his permit and if he is saying that—and it would seem to make sense to me in a rural community—I come from California. Occasionally, I drive to Sacramento. I can see that they wouldn't have as many inspections because it is, you know, wide-open highways.

And so I am saying, would you commit to at least looking at the statistics to see if that is the case and if it is inhibiting their ability to statistically overcome their violations, which is what their concern is, which would ultimately impact their permit?

Ms. QUARTERMAN. Absolutely.

Ms. RICHARDSON. The second question I wanted to ask Mr. Derig. You said that in 2005 HMTA amendments removed all preemptive limitations to State enforcement authorities, and you talked a little bit about this. You also said this creates a loophole through which States can use enforcement authority to impose inconsistent requirements. Could you give us a specific example of what you mean?

Mr. DERIG. I think one of the examples is in my testimony where, actually, the Minnesota transportation folks came in and did a terminal inspection, which—that is OK. You know, we invite them in. But what they were looking at was ammonia nurse trailers, which after the season come back and sit in the yard and are not introduced back into the transportation system until the next application season, and if there is not demand they won't even go out then.

So the Minnesota Department of Transportation justified their terminal inspection based on a Minnesota Department of Agriculture rule that was a State rule that said, for agricultural inspections, all nurse tanks that are used out on the farm are deemed to be in service if they have 10 percent on the liquid level gauge.

So that is what the transportation folks did. They came in and said, oh, all these trailers are in service, should be ready to be transported, even though they weren't intended to be transported, and the Federal Motor Carrier is very specific in the rules about what is in transportation or is planned to be in transportation.

Ms. RICHARDSON. OK. I have got to cut you off there, because I have only got a minute and 30 seconds.

Would you mind asking your association to give to the committee specific examples of where you feel the States are using a loophole and where a more national perspective would be more helpful?

Mr. DERIG. Yes, certainly.

[The information follows:]

**ARA's Response to Rep. Laura Richardson's Request
for
Examples of Conflicting State Regulations**

Paul Derig, of the JR Simplot Company, testified on behalf of the Agricultural Retailers Association on the importance of US DOT federally preempting state and local regulations that impose an unreasonable burden on commerce (49 CFR §5125). The safe and secure transportation of hazardous materials is best achieved through uniform regulatory requirements.

To illustrate this point, Paul explained that the JR Simplot Company was unexpectedly faced with the dilemma of losing the ability to move certain products from our facilities to the local farms because the company's Hazardous Materials Safety Permit (HMSP) renewal was denied based on ineligibility.

After Paul reviewed of the out of service (OOS) violations that caused the ineligibility determination, he discovered that half of the OOS inspections were performed by the Minnesota Department of Agriculture on anhydrous ammonia nurse tanks that were not currently in use by Simplot.

The Minnesota Department of Transportation referred to a Minnesota Department of Transportation rule that a cargo tank with more than 10 percent pressure is deemed to be in service. Thus, the Minnesota Department of Transportation was essentially using the Minnesota Department of Agriculture authority to incorrectly enforce state standards as if they were federal rules. Simplot has facilities in 16 states with farmer customers located beyond. Simplot's ability to move product in the entire Western part of the US was threatened by a unique state law, which was enforced by the state's department of agriculture.

In this example, Simplot was cited by a state enforcement official on a state regulation that had federal regulatory consequences that reached far beyond Minnesota. Although a number of the inspections were eventually overturned and removed from the record, it took a great deal of time and uncertainty regarding the company's federal eligibility. Even though the Federal Motor Carrier Safety Administration (FMCSA) agreed that the violations were not properly issued, the state seemed to have the final say.

Also, the federal regulations set out rules for marking hazardous materials in transit. Many states promulgate their own rules for marking hazardous materials. At best, it is confusing to carriers operating in one state. Those carriers must decipher who has the authority- should they follow what the state highway patrol officer tells them or what the FMCA officer tells them. For carriers operating in multiple states, keeping track of the differences in state markings is nearly impossible; it is also confusing to emergency responders.

For example, a Simplot employee was carrying an anhydrous ammonia fertilizer nurse tanks on a trailer in Idaho. The trailer had proper UN identification markings on two sides of the tank, which is mandated by US DOT. The Simplot employee was pulled over by a state enforcement officer for not having UN identification on four sides of the tank. The state enforcement officer

did not know the regulations, but deemed that it “would be safer if the tank was marked on all four sides”, so the state officer attempted to write the driver a citation. Luckily, the Simplot employee knew the Federal regulations and was able to get the citations to prove his case, so he eventually talked the officer out of citing him.

Another ARA member, Coastal Agribusiness, in North Carolina cited a current example of the state legislating different hazmat transportation laws than the US DOT. North Carolina House Bill 261 calls for vehicles with a gross weight rating of 10,000 pounds or more and used in intrastate transportation to have their motor carrier DOT number printed on both sides of the vehicle in letters, not less than three inches in height, preceded by the letters "USDOT" and followed by the letters "NC".

This would be difficult for companies that have both interstate and intrastate vehicles. Coastal Ag has approximately 100 vehicles that meet this standard with some of them licensed and based in Virginia or South Carolina. These vehicles already meet the federal hazardous materials transportation regulations and are marked with the company name, the address of the facility the vehicle works out of, and the USDOT number, as well as the facility's phone number. This proposal would require us to remark our vehicles at a cost of \$55 per vehicle or \$5,500.

The requirement to make the USDOT number at least three inches and to add the State at the end of the number does not enhance safety.

States' ability to promulgate their own laws often times leaves industry and the state enforcement officials confused. Oklahoma is another state that has unique regulations that differ from the federal standards for anhydrous ammonia nurse tanks. The Oklahoma State Department of Agriculture was inspecting these tanks and telling agricultural retailers that they were in compliance. Then, when FMCSA officers conducted inspections on these tanks, the agricultural retailers who believed they were in compliance were cited for non-compliance. In this case, Oklahoma had its own standards, and they created confusion for the industry who was trying to comply with safety regulations.

These are just a few examples of a problem that occurs frequently- differing state rules are enforced by state officials who have the power to also enforce federal regulations. The state violations have an effect of the carrier's US DOT record. It is confusing to state enforcement officials and the regulated community in commerce to have two sets of rules to comply with and to enforce. For business to move forward, it is very important to have consistency in the rules and enforcement.

Thus, we suggest that Congress strengthen DOT's preemptive authority in the following ways:

- DOT would be authorized to preempt state/local regulations that impose an unreasonable burden on commerce. Currently, DOT refuses to apply this standard and leaves this analysis to the courts.
- The 2005 HMTA amendments removed all preemptive limitations to state enforcement authority. This creates a loophole through which states could use enforcement authority

to impose inconsistent requirements on the regulated community. This limitation on the preemptive effect of the law should be deleted.

Ms. RICHARDSON. Mr. Byrd, in your testimony you talked about the fact of eliminating the shared jurisdiction between DOT and OSHA. And, Ms. Windsor, it is my understanding in your testimony you said that the American Trucking Association supports eliminating this jurisdiction, shared jurisdiction. Could you share with us why?

Ms. WINDSOR. With the overlapping jurisdiction, we feel it erodes uniformity. So we support having DOT as the agency in charge versus the overlapping of the DOT and OSHA.

Ms. RICHARDSON. OK. Mr. Byrd, could you share why you think that that is not correct? Because I think this is a really important issue.

Mr. BYRD. Well, thank you for the question.

We believe that both regulatory agencies bring important things to the table when it comes to protecting worker health and safety. The Department of Transportation has expertise in terms of testing containers to ensure that they are durable enough to transport HAZMAT or placarding or labeling. But the Department of Transportation is not the agency that has the staffing or the expertise to deal with worker health and safety issues that may relate to personal protective equipment, worker training, worker exposure levels to certain chemicals. So we think they bring very distinct expertise to the table, but they are not easily interchangeable. So we don't think that DOT could take on the OSHA responsibilities.

Ms. RICHARDSON. Mr. Chairman, could I just ask one quick follow-up question?

Mr. SHUSTER. Sure.

Ms. RICHARDSON. So, Ms. Windsor, if in fact what Mr. Byrd is saying, if there were consistent national standards, would you be opposed to the involvement of OSHA beyond training?

Ms. WINDSOR. OSHA has always been involved to a certain point. It is when we are getting overlap instead of uniformity. It is the overlapping of the two different agencies. Because OSHA has always been involved on certain, obviously, protective equipment.

Ms. RICHARDSON. But what Mr. Byrd is saying is that there is two totally different skill sets that they bring.

Ms. WINDSOR. I don't see that at all.

Ms. RICHARDSON. You don't see a difference?

Ms. WINDSOR. No.

Ms. RICHARDSON. OK. If you could supply to the committee what you see those differences are in writing.

[The information follows:]

**Witness Questions for the Record from
The Honorable Corrine Brown
Hearing on
“Reducing Regulatory Burdens and Ensuring Safe Transportation of Hazardous
Materials”
April 12, 2011**

Mr. Byrd, in their testimony, the American Trucking Association expressed support for eliminating the shared jurisdiction between DOT and OSHA over hazmat employees while you strong support for maintaining the shared jurisdiction. Can you please explain how the jurisdiction of DOT and OSHA over hazmat employees is different? Can you also explain why this is so important to maintain and what the result would be if OSHA loses jurisdiction over hazmat employees?

Response

As hazardous materials are transported on our roads and interstates, hazmat workers are responsible for packaging, loading, transporting, and unloading the products. OSHA standards and regulations focus on ensuring that workers who handle, load, unload, and respond to emergency releases of hazardous materials are protected. This protection is provided through regulatory standards concerning worker training, proper selection and use of personal protective equipment; permissible chemical exposure limits; safe operation of powered industrial trucks used to load and unload hazmat transport vehicles; and reporting requirements for all work-related illnesses or injuries that may occur. OSHA has the staff and expertise to effectively enforce rules and requirements concerning these aspects of hazardous materials transportation.

The DOT regulations are designed to ensure that hazardous materials that are to be transported are packaged in the appropriate type of containers or tanks; hazardous materials in transport are properly labeled, marked, and placarded; and that the hazmat loads have the appropriate shipping documents accompanying them. The DOT regulations also govern the credentialing requirements for drivers who transport hazardous materials.

Therefore, the agencies have different, but equally important responsibilities regarding transporting hazardous materials. With respect to shared responsibilities, both OSHA and DOT have training requirements for hazardous materials workers. However, although there is some overlap, the DOT training requirements are different than those required by OSHA. For example, the DOT requires that workers be trained to recognize the proper labels, markings, and placards on hazardous materials packages and shipments. The DOT also requires that workers receive training to familiarize them with the emergency response procedures that must be employed to notify authorities of a release and to protect themselves from exposures to hazardous materials. The OSHA training requirements focus more on awareness of hazards posed by hazardous materials, routes of exposure, selection, use, and care of personal protective equipment (respirator,

gloves, eye protection, skin protection). Please note that the training requirements as established in the DOT regulations may be satisfied if the employer conducts OSHA and/or EPA training on hazard communication and emergency response. Employers may meet the DOT training requirements for hazardous materials security by conducting training required by other Federal or international agencies.

We believe that industry would prefer to eliminate OSHA's shared jurisdiction simply because DOT does not have the staffing, budget, or organizational focus to promulgate and enforce the rules governing occupational health and safety. In our opinion, if OSHA's jurisdiction was eliminated or reduced, there would be a significant decrease in the safety of hazardous materials workers.

Ms. RICHARDSON. Thank you, sir. I yield back.

Mr. SHUSTER. I thank the gentlelady.

A question to Ms. Quarterman again on the current status of the 2010 petition for rulemaking which was made by a number of industry groups regarding procedures and fitness criteria that should be used for processing special permits and approvals. Could you let us know what the status of that is?

Ms. QUARTERMAN. I believe it may still be under consideration. I don't have the specifics on where that stands.

Mr. SHUSTER. Is that something you could get back to us and let us know where it stands, where we are in the process?

Ms. QUARTERMAN. Absolutely.

[The information follows:]

**Witness Questions for the Record from
The Honorable Bill Shuster
Hearing on
“Reducing Regulatory Burdens and Ensuring Safe Transportation of Hazardous
Materials”
April 12, 2011**

1. There were some questions at the hearing regarding the number of backlogged special permit and approval applications for explosives.

- (a) How do you define a “backlogged” application for both a special permit application and an approval application?

PHMSA considers the “backlog” to include those applications that exceed 180 days in processing.

- (b) Using that definition, could you please update the record on how many explosive approval applications are “backlogged”? How many explosive approval applications are pending before the agency, i.e., those not defined in the “backlog” category?

As of April 22, PHMSA has no explosive approvals applications that are backlogged. A total of 307 explosive approval applications are pending before the agency.

- (c) Using that definition, could you please update the record on how many bulk explosive special permit applications are “backlogged”? How many bulk explosive special permit applications are pending before the agency, i.e., those not defined in the “backlog” category?

As of April 22, PHMSA has a backlog of 12 special permit applications for transport of bulk explosives. A total of 23 special permit applications for transport of bulk explosives are pending before the agency.

2. At the hearing, there was a request for the status of the December 2010 petition for rulemaking by a number of industry groups to determine what procedures and fitness criteria should be used for processing special permits and approvals. As requested at the hearing, please provide the status of that petition, including any documents or official responses from PHMSA in relation to that petition for rulemaking.

On December 14, 2010, PHMSA received a petition for rulemaking from the Interested Parties for Hazardous Materials Transportation requesting an amendment to § 107.113 of the Hazardous Materials Regulations (HMR), “Application processing and evaluation” of Special Permits. Specifically, the petitioners request that PHMSA initiate a rulemaking to allow for public notice and comment on the Standard Operating Procedures developed last year for the

special permits and approvals Programs and Approval Program Standard Operating Procedures. In a December 22, 2010 letter, PHMSA acknowledged receipt of the petition and indicated that the petition had been assigned Petition Number P-1573. We are currently reviewing the petition and will notify the Interested Parties in writing of our action decision in accordance with 49 C.F.R. § 106.105.

3. At the hearing, Representative Filner asked for the agency's position on the lithium battery amendment included in "The FAA Reauthorization and Reform Act of 2011" (H.R. 658). As promised at the hearing, please provide the Department's position on that provision.

At this time, the agency is still finalizing its position on "The FAA Reauthorization and Reform Act of 2011" (H.R. 658), including the lithium battery amendment. As soon as DOT has concluded its review and taken a position, we will supplement our response.

4. Could you please list which special permits you are currently working to incorporate in the HMR.

On February 1, 2011, PHMSA issued a final rule incorporating six (6) special permits into the HMR, which address over 10,000 special permit grantees:

*DOT-SP 10950
DOT-SP 11209
DOT-SP 12284
DOT-SP 13113
DOT-SP 13341
DOT-SP 13554*

The special permits under consideration for incorporation into the HMR include, which address over 500 special permit grantees:

*DOT-SP 11263
DOT-SP 11836
DOT-SP 12134
DOT-SP 12825
DOT-SP 13124
DOT-SP 14479
DOT-SP 14802
DOT-SP 12095
DOT-SP 11850
DOT-SP 12332
DOT-SP 13996
DOT-SP 7616
DOT-SP 9346
DOT-SP 10795
DOT-SP 12290*

*DOT-SP 14333
DOT-SP 14622
DOT-SP 11184
DOT-SP 9388*

5. Are there any special permits you are considering incorporating into the HMR, but have yet to begin the process of doing so?

Yes, PHMSA is continuing to identify special permits that may be candidates for regulatory incorporation. These special permits would generally be those that have a proven safety record and by incorporating them into the HMR; PHMSA can continue to ensure safety while providing some regulation relief to the industry.

Specifically, we are considering regulatory incorporation of special permits pertaining to small quantities of cosmetics, fire extinguishers, and seat belt pretensioners.

6. With regard to state hazardous material permits, would PHMSA support the adoption of a mandatory uniform permit program, modeled on the voluntary program set forth in 49 U.S.C. § 5119?

PHMSA believes that adoption of a mandatory uniform permit program, modeled on a voluntary program set forth in 49 U.S.C. 5119 is an issue best addressed by FMCSA. FMCSA has been involved with the pilot program for a number of years. This uniformity issue potentially involves all motor carriers, whether or not they transport hazardous materials. PHMSA stands ready to assist FMCSA should a mandatory uniform registration program be required.

**Witness Questions for the Record from
The Honorable Corrine Brown
Hearing on
“Reducing Regulatory Burdens and Ensuring Safe Transportation of Hazardous
Materials”
April 12, 2011**

Ms. Quarterman, in their testimony, the Institute of Makers of Explosives (IME) claimed that there is “an unprecedented backlog of special permits and approval applications” as a result of your new procedures. Is this true?

PHMSA considers the “backlog” to include those applications that exceed 180 days in processing.

As of April 22, PHMSA has a backlog of 24 firework approval applications (excluding those subject to ongoing investigation), 611 special permit applications, and 0 explosive approval applications.

Ms. Quarterman, the House recently passed H.R. 658, the FAA reauthorization bill. This bill contains a provision that would prohibit the FAA from issuing or enforcing any regulation or other requirement pertaining to the transportation of lithium batteries onboard aircraft if that regulation or requirement is more stringent than international standards. Do you support this language? If not, what concerns does this raise for you? Do you have concerns with the fact that this would prevent you from moving forward with your ongoing rulemaking and any future initiatives?

At this time, the agency is still finalizing its position on “The FAA Reauthorization and Reform Act of 2011” (H.R. 658), including the lithium battery amendment. As soon as DOT has concluded its review and taken a position, we will supplement our response.

Ms. Quarterman, in his testimony, Mr. Boston (IME) claimed there is no safety benefit to PHMSA knowing the physical locations of where a special permit would be used. Can you please explain why it is important for DOT to know where special permits are used?

PHMSA has the safety responsibility to provide oversight and ensure compliance with special permits. Companies that utilize special permits from multiple locations pose a greater safety risk due to the limited oversight. In the recent final rule (HM-233B), PHMSA requires company location information to ensure adequate oversight and access to where the permits are actually used. This requirement increases transparency, reduces risk, and enhances safety by identifying all users of special permits in the transportation system.

Ms. Quarterman, the Institute of Makers of Explosives (IME) claimed that the changes to the “fitness” determination made prior to granting a special permit “have had detrimental consequences to the regulated community.” Since PHMSA has adopted these new requirements,

how many special permits have been issued? Second, how many applications have been denied, and on what basis were they denied? (i.e. fitness)

Since October 2009, 5,102 special permit applications have been processed. Of those, 380 special permits applications have been denied. Of the 380 denials, approximately 25 special permit applications have been denied because the applicant was determined to be unfit. The remaining application denials were based on applicant failures to meet technical and safety requirements or because the special permit was incorporated into the regulations.

Mr. SHUSTER. And the second, what has changed at the agency? In 2004, the analysis was that, based on the cost-benefit analysis, they withdrew a rulemaking on the wetlines and—given the low risk of it. I understand there is a rulemaking about to be made, a proposed rulemaking. What has changed at PHMSA for you to take, again, what I perceive and what I think the statistics bear out and the cost-benefit analysis bears out, that it is below risk and the cost-benefit analysis isn't there, and it is going to be very expensive when we could be focusing on rollovers.

Ms. QUARTERMAN. The agency is not just focused on the highest-risk incidents. We have to also be aware of those incidents that are low risk but could result in high consequence. We have to be thinking about emerging issues, for example, the explosion of the number of lithium batteries being transported by aircraft. And in this instance, whereas the statistics are not great in terms of the number of incidents, there have been incidents.

And if a school bus full of children were to hit a wetline and burn, the analysis would be compelling, I think; and we don't want to have that happen if we can avoid it at the beginning.

Now, the Department has, as you said, in the past done an analysis, has put this rule out for comment. We have obviously updated the rule and tried to consider everything that has happened in the intervening years, tried to revise the rules and tried to take the current costs into effect.

We are in the middle of a comment period. The comments are open. So everything that is being said here will be obviously fed into that process and put into consideration as we go forward with the next step in the rulemaking. We are at the beginning of this process.

Mr. SHUSTER. And it certainly would be a terrible, terrible tragedy if that were to happen to a school bus. But from my understanding of what happens with a wetline accident is that a school bus couldn't get underneath a truck, and that would be highly unlikely to happen.

But you know those are the kinds of things that my concern is that we think of these scenarios that could happen. You know, one in 300 million, I think, was the number I read before, but, you know, very unlikely happening. And we are basing a rulemaking that is going to cost an industry millions of dollars.

And the other side of that coin is we have seen her testimony and studies that when you go to retrofit some of these things you could have a spark and kill people in the shop that is retrofitting them. So I think you really need to be focused on—And you yourself said that rollovers are a big problem and human error, and that is why I look at your numbers here. You have rollovers, and you have human error. How do you separate those out? Maybe I don't understand how exactly you weighted them and things like that, but it seems to me we have got a much bigger problem and something we can focus on to spend our time, our effort, and our money correcting those problems and trying to address those problems.

So, again, I would urge you to focus on those issues that are of the greatest danger out there on the highways and around this country.

I continue to hear from different members of the panel—I turn to Ms. Chapman. Training, you mentioned inconsistency of training between States and PHMSA.

Let me back up. I continue to hear there is a problem with the States and with PHMSA, the Federal DOT, and State DOTs and other agencies, and there is no consistency on training between the States and PHMSA. What are some of the problems that your membership has had with inconsistency of training? Because that goes a long way in solving the human error problems that we see out there.

Ms. CHAPMAN. Right. Obviously, the regulations are the same for everyone, and we want them to be enforced uniformly. But what we see is a pretty large variance from State to State on how they prioritize the enforcement; and what might seem to be a minor problem with, say, load securement in one State is going to be seen as a huge problem with a large fine and points against the company in another State. We want to be uniform in our compliance with the regulations, but when it is sort of a moving target as far as what is going to be considered an issue or how an inspector is going to interpret the regulations where they are not real clear, it makes it hard for the industry.

Mr. SHUSTER. The member is recognized.

Ms. BROWN. First of all, I didn't get the memo about regulations, because we don't have any increase in regulations in the last 18 months. We have got enforcement. You know, and I try to work balance. I think safety is the most important thing. But an example of when we look at the industry with the wetlands and the response to it, that is an example that I think we need to take a serious look at.

Rollovers is clearly more serious. And what if the truck rolled over onto a school bus? I mean, we can go to the extreme. So I think it needs to be balanced as we move forward, and it should be based on science.

But, Ms. Quarterman, we have voiced some concerns about you all moving forward with the wetlines and the benefits. We actually—I don't know whether you went. I went to a shop where they were retrofitting. Baltimore? Yeah, we had a hearing in Baltimore. And we went to the different shops where they was fixing it, and the fix was more dangerous than the problem. So I mean I think it should be some balance.

But let me go to Mr. Byrd. There was a discussion about OSHA and DOT. I mean, they have had separate things that they do all the time, but OSHA has been primarily responsible for worker safety. So now, if we want to get rid of somebody, maybe we should get rid of DOT and just have OSHA to handle the whole thing. I mean, is that what we are asking for?

Mr. BYRD. No. No, ma'am, I would not recommend that.

As I mentioned earlier, I think each agency plays a very important role in providing worker safety for those workers who deal with HAZMAT. And as I had mentioned earlier, what they bring to the table is not easily interchangeable. You know, DOT has their area of expertise, OSHA has their area of expertise, and there are no people that I am familiar with that are in the middle that have a great deal of expertise in dealing with both issues. I would see

it would be extremely difficult for DOT to enforce OSHA-type regulations. I think it would cost DOT a ton of money to promulgate regulations and to train and hire inspectors to do that type of work.

Ms. BROWN. I am not supporting that, but I don't think we should start over.

But you all administer the grants program.

Mr. BYRD. Yes.

Ms. BROWN. We have a unique problem in Florida in that I think we receive about \$6 million—and our Governor turned it back—for training of the firefighters. As we move forward with the real ugly politics, should we come up with a different way to get that training? Not necessarily going through the States, maybe the local communities or maybe it should be a different kind of way. Because one Governor says, yes, we want the training; and then the new Governor comes in and says, well, we don't want to do the training of the firefighters and the workers.

Mr. BYRD. Well, I know in the case of truck drivers our employers provide some training, but the union provides what I think is a higher quality training overall, and we provide that directly to the rank-and-file truck driver and dock worker.

Now, what we have had some success in is working with our employers to provide some training, and that has been accomplished through cents-per-hour contributions. But the funding that we get from the Federal Government I think is extremely important, enabling us to have a further reach in terms of providing high-quality training.

Ms. BROWN. Ms. Quarterman, can you respond to that question as to how we are going to provide that training when we have this ugly negative politics that is going on in Washington?

Ms. QUARTERMAN. Whenever anything political is happening, we just do the best we can.

As I mentioned in my opening statement, we are in the process of auditing our training program, our grant program, and reassessing the priorities and how it will work going forward in the future.

If I can just respond to the OSHA issue as well.

Ms. BROWN. Yes.

Ms. QUARTERMAN. Let me say that I agree with Mr. Byrd on this issue. DOT PHMSA has absolutely no interest in becoming occupational safety and health regulators. Our expertise is in the HAZMAT area.

One of the reasons we are very interested in the loading and unloading issue is, for example, the first quarter of this year there were five fatalities, four of which were related to loading and unloading. It is one where we think we can bring expertise in loading and unloading of hazardous materials commodities and focus on that portion of the operations and try to get people to assess their risks and do a better job. But we have no desire really to be in charge of occupational safety and health.

Ms. BROWN. And the last question—and I know my time is up, but I want to ask this question. In the last 18 months I have heard a lot of rhetoric about additional regulations, but it hasn't been a lot of additional regulations in the last 18 months. We may have

additional enforcement that did not go on for a period of time. Can anyone speak to that additional regulations?

Ms. QUARTERMAN. Well, I can say that, as a part of the President's initiative to streamline regulations, we have, within the HAZMAT portion of the Pipeline Hazardous Materials Safety Administration, I don't know, maybe 20 some-odd pages of ideas of things that could be streamlined. We had a big meeting at the Department asking questions of constituents what places where they thought we could streamline the regulations. I am all in favor of that. The regulations are about this thick. I think if we could—obviously, we haven't gone through them with a fine-tooth comb recently. We need to do that. We need ideas for streamlining the regs.

Ms. BROWN. I am not disagreeing with that. But one of the reasons why we had other hearings and we have had additional enforcement was because the response from the audit general said that you needed to because of the safety aspects of it and how it was impacting the community. I mean, we are not just doing it for any other reasons other than safety.

Ms. QUARTERMAN. Correct.

Ms. BROWN. I yield back the balance of my time.

Mr. SHUSTER. Ms. Quarterman, the time—I am going to just ask you one more question and then get you off to your airplane.

How many different rulemakings are out there that PHMSA is looking at? I asked about two of them, I guess. Are there more out there that you are looking at?

Ms. QUARTERMAN. I don't know how many current rulemakings are pending. In terms of major rules, there is the lithium battery rule, the loading and unloading rule, and the wetlines rule. Those are the ones that I think of as being significant. You know, there are always rules in adopting international harmonization, you know, things around the edges. But, to me, those are the biggest rules we have pending.

Mr. SHUSTER. Well, I appreciate you coming today, Ms. Quarterman. We will let you head out the door.

And as you are getting ready to head out the door I will just reiterate that I hope we can figure out something on this wetlines issue. Because, contrary to what my esteemed colleague from Florida said, you know, that is not an enforcement, that is going to be a change in regulatory burden. And also a reminder that across the government, maybe not PHMSA so much but the EPA, and again across the spectrum of the government, there has been tremendous increase in regulatory burden on business. And much of it, in my view, is not based on science. It is based on somebody's response to it, either emotional or being something they want to see not based on sound science. So I think the economy is getting overheated with that type of regulatory burden.

So thank you, Ms. Quarterman. I hope you make that plane.

Does the gentleman from Pennsylvania wish to be recognized for questions?

Mr. MEEHAN. Yes, thank you, Mr. Chairman. I just want to take a moment.

I am very appreciative of the testimony, and, unfortunately, we get drawn in numerous directions. So I try to take the time to read

your testimony so that I am educating myself on a lot of the issues you are bringing forward. So I want to thank you for the effort that you put in to helping us understand the problems that you are facing and particularly where we are looking at regulations that impact the industry.

Ms. Windsor, you may be the person to answer this, because this is a situation in which I simultaneously sit on Homeland Security and deal with a number of issues there; and having a background previously in law enforcement, we dealt with a lot of the credentialing problems that are associated.

Can you explain to me just briefly the concern you have with the uniformity and duplication in that process? I know that is the kind of a thing to an individual trucker or otherwise that can just be another cost or inefficiency; and, obviously, we want to look to find ways to streamline this process so that the ends are met, but we are not having unrealistic expectations.

Ms. WINDSOR. And definitely we want our drivers that are hauling HAZMAT to be credentialed properly. But, currently, a truck driver will go to their local or State DMV and they are fingerprinted there and will apply for a hazardous materials endorsement on their license. Then if they are hauling HAZMAT products to a port, they have to get the TWIC card, Transportation Worker Identification Credential. In fact, I have one. Even though I don't transport product, when I go to visit our trucks I have to have my own.

And that we are talking where it can be anywhere from the initial HAZMAT endorsement, maybe \$100 to \$115. Then it is \$130 for the TWIC card. Then many shippers then also want additional credentialing. When in fact we are fingerprinting our drivers over and over again doing credentialing and background checks.

We believe there should be one database. That if the TWIC card is going to be our Transportation Worker Identification Credential, then that should be our card for our credentialing. Right now, it becomes so onerous on a truck driver they can spend as much as \$270 just to be credentialed to be able to even haul product.

Mr. MEEHAN. Is there a time associated from time to time when a trucker is trying to ship materials that they are delayed and held up while somebody inspects or checks the identification that they have for compliance?

Ms. WINDSOR. Well, it has been, of course, difficult picking up the different cards. Because they can go in and be fingerprinted, and maybe they make an appointment. It can be 2 or 3 weeks before the background check returns.

I have drivers that are HAZMAT and nonHAZMAT. During the winter months, those that haul dry bog during the summer, when that slows down I can move them into home heating fuels or something of that nature. They have elected not to go through the fingerprinting because of the cost and the time it would take for them to get their credentialing. They lose the possibility of additional earnings; and, of course, they have made the decision not to go through the difficulty of being fingerprinted or the background checks.

Mr. MEEHAN. What are you seeing with respect to States having different standards or whether there is any kind of concern about nonuniformity?

Ms. WINDSOR. There is major nonconformity in the States. A disqualifier in one State can be anything from child support to domestic disputes in one State. In another State, it may not even be listed. So it is not even uniformity with the States. That is why we feel like it would be better to remove that from the States, because you are not having uniformity on who is being fingerprinted.

Mr. MEEHAN. Is there somebody else from the panel that has a perspective on this unique issue?

OK, Mr. Chairman, thank you.

Ms. Windsor, if you have other commentary or other evidence from the field that would help me understand that issue better I would enjoy working with the chairman and seeing if there is some way to—

Ms. WINDSOR. There was a Safe Trucker Act that was proposed back in 2009 which would help to work with this; and, yes, we would love to. Thank you.

Mr. MEEHAN. Thank you.

Mr. SHUSTER. Does the gentleman yield back?

Mr. MEEHAN. Yes. My time is up, Mr. Chairman. I thought you were going to cut me off anyway.

Mr. SHUSTER. I would have been happy to yield you more time.

Mr. Boston, how did the explosive industry become so dependent on special permits? I mean, I guess we heard the Administrator say there has been a huge increase in the request for special permits, and I believe when I had a meeting with her she said it was mainly due to the explosives industry.

Mr. BOSTON. Yes, Chairman Shuster. Special permits are the only way that the explosives industry can transport bulk explosives such as blasting agents and oxidizers. These types of materials are much safer, lower sensitivity and that sort of thing, than packaged explosives, high explosives.

However, the hazardous materials regulations don't currently provide for transportation of these materials by truckload. Special permits are a way, as you pointed out, that the hazardous materials regulations can catch up with technology or keep up with technology. And, actually, they serve as sort of an ad hoc R&D program whereby industry develops new technology and methods to properly and safely handle it and then test it via the special permit process and, once completed, look for incorporation into regulations.

Now, how is—30 years ago, when we began using these trucks to transport blasting agents and oxidizers, that was cutting-edge technology. As I have said, there are no provisions in the hazardous materials regulations to allow that, so industry had to petition for and receive special permits to do that.

They have been transporting now under these special permits for 30 years, and during that 30 years the record of safety has been phenomenal. There have been no injuries or fatalities that have resulted from the use of those special permits. Yet those special permits still exist, rather than having been incorporated into the regulations.

Mr. SHUSTER. And that is bulk explosives versus package.

Mr. BOSTON. Yes, sir.

Mr. SHUSTER. The package has much—or they are much more highly explosive, and that is something you believe needs to be continued under this process. But maybe we need to figure out a way to, as I think you are saying, to incorporate in the regulations where bulk explosives are much safer, in fact, no fatalities in 30 years. We need to change the way we have oversight and regulation on bulk.

Mr. BOSTON. Yes, sir, that is correct. Understand that the packaged explosives, high explosives, there are provisions already in the hazardous material regulations that allow for their transportation. Therefore, special permits generally aren't necessary for that. The shortcoming or the weak point is how 95 percent of our explosives are transported now, still aren't covered by the regulations, and so we have to use special permits.

Mr. SHUSTER. Right. So in answer to your question, Mr. Filner, I am going for less regulation here because it appears to me that the industry has figured out how to ship bulk explosives.

What is a bulk explosive? Give me a material.

Mr. BOSTON. An ammonium nitrate emulsion is one. That would be a material that has got some ammonium nitrate. Fuel oil, that is another. So those are the—

Mr. SHUSTER. And package would be dynamite?

Mr. BOSTON. A package would be dynamite. It might be the perforators that my company offers. Detonators, detonating cord, all of those things are high explosives, and they are currently already covered by regulation.

Mr. SHUSTER. And so the bulk explosives we could streamline, reduce the red tape you have to go through to ship. And, again, we figured out in the last 30 years how to do it very, very safely.

Mr. BOSTON. Yes, sir, that is correct.

Mr. SHUSTER. I appreciate that.

But they don't necessarily need one anymore because they figured it out. I mean—no, it is because technology—that is the beauty of technology. You change it, and then all of a sudden things are much safer, and you can do without as much regulation and oversight. And that is a good thing.

Anybody have any questions?

Mr. FILNER. Thank you, Mr. Chairman, for the courtesy.

The gentleman from Pennsylvania is very eager to compliment the representatives to prevent us from onerous regulation. I would just like to compliment that Mr. Byrd is protecting the safety and health of our working people. Thank you very much.

Mr. SHUSTER. And I want to thank all the witnesses and again thank the members. This is a fly-in day for us. I appreciate Mr. Meehan, Mr. Filner, and others for being here at the hearing today. And I appreciate the witnesses for taking the time and help to enter into discussion as we move forward on this transportation bill. We want to make sure we are doing the right things when it comes to HAZMAT and making sure to take into consideration both safety and the economic benefits that you provide to the economy and the jobs you provide to the economy. So thank you very much.

And, with that, this hearing is adjourned.

[Whereupon, at 4:51 p.m., the subcommittee was adjourned.]

Congressman Sam Graves
Hearing Testimony
April 12, 2011



"Reducing Regulatory Burdens and Ensuring Safe Transportation of Hazardous Materials"

[WHEN RECOGNIZED]

Thank you, Chairman Shuster and Ranking Member Brown, for holding this important hearing. I would also like to welcome our witnesses and thank all of them for appearing before this committee today.

My remarks are focused on the Pipeline and Hazardous Materials Safety Administration (PHMSA) special permits and approvals program.

As my colleagues know, last Congress PHMSA changed its procedures for conducting fitness determinations for special permits and approvals. The Agency bypassed the normal rulemaking process, and thus the opportunity for public comment, and instead chose to issue standard operating procedures. I believe any potential safety benefits of such action is negligible, but I know the cost and uncertainty to the regulated industry is enormous.

In 2009 and 2010 there were record numbers of unprocessed special permits and approvals applications. Businesses depend on this program to work efficiently and the Agency's backlog is unacceptable. I am pleased that PHMSA has been working to address the backlog but I also remain concerned about new requirements imposed on businesses in the application process.

Finally, the President's Fiscal Year 2012 budget proposes to impose new taxes on businesses for the administration of

the special permits and approvals program. These taxes include \$3,000 per new special permit application, \$3,000 per modification of a special permit, and \$1,000 per renewal. This is a bad idea now and in the future. The Federal government and Congress should not excessively regulate an industry and expect businesses to pay for the associated costs.

Again, I want to thank Chairman Shuster and Ranking Member Brown for holding this hearing. I look forward to working

with this committee and the hazardous materials transportation industry to examine ways Congress can provide greater certainty and reduce senseless regulatory burdens while maintaining a strong level of safety.

I yield back.

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TESTIMONY

Before

The United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Railroads, Pipelines, and Hazardous Materials

Hearing on

“Reducing Regulatory Burdens and Ensuring Safe Transportation of Hazardous Materials”

Presented By

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On behalf of

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April 12, 2011

Chairman Shuster, Ranking Member Brown, and members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials, I greatly appreciate the opportunity to appear before you at this hearing. I am David Boston, President of Owen Compliance Services, Inc., the regulatory compliance division of Owen Oil Tools LP. Owen Oil Tools is a manufacturer, distributor, and exporter of specialty explosive devices without which the exploration, production, and maintenance of oil and gas wells would cease. We are a small business with the majority of our 350 employees at our manufacturing plant in TX, but we also distribute from other locations in TX as well as AR, LA, MS, OK, CO, WV, PA, and ND as well as several locations in Europe, Asia, and South America.

I am also the chairman of the Institute of Makers of Explosives' (IME) Approvals and Special Permits Subcommittee. The IME is the safety and security institute of the commercial explosives industry. IME represents U.S. manufacturers, distributors and motor carriers of commercial explosive materials and oxidizers as well as other companies that provide related services. I will be presenting testimony on behalf of IME members who have been adversely affected by recent changes to procedures and requirements within the Approvals and Permits Program administered by the U.S. Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA).

Background of PHMSA's Approvals and Permits Program

PHMSA regulates the transportation of hazardous materials so closely that they may not be moved any distance, via any transport mode unless a DOT regulation, permit or approval authorizes the movement of those materials. This blanket prohibition, requiring a specific DOT authorization for transportation, makes efficient consideration of such authorizations critical to the hazmat industry.

When Congress passed the Hazardous Materials Transportation Act (HMTA) in 1975, it authorized DOT to issue regulations, including approvals, for the safe transportation in commerce of hazardous materials, and provided authority to allow exemptions, now called "special permits", from such regulations for persons transporting these materials if equivalent or a greater level of safety would be achieved, or if the exemption was in the public interest in the event no existing level of safety was established. Thus, special permits and approvals are regulatory tools and are not authorizations that allow someone to do something unsafe. According to DOT, no deaths and fewer than two serious injuries per year have been attributed to packages shipped under special permits or approvals for over ten years.¹

The process of applying for and maintaining such authorizations involves more paperwork and accountability than is required to petition for rule changes. In both instances, the authorizations are issued to specifically identified individuals, in response to detailed applications (that are incorporated by reference in the authorizations), under criteria that are at least as stringent as the otherwise applicable regulations. Moreover, holders of these particular authorizations face the constant risk of having them revoked, suspended, or modified without warning and with limited rights for affected parties to petition redress. All special permits, and many approvals, also have expiration dates, requiring timely filing of applications for renewal. All require reporting of the holder's experience with the authorization so that PHMSA can properly evaluate the appropriateness of the authorization. The biggest difference between a special permit and an approval is that a special permit is an alternative means to comply with the

¹ Hazardous Materials Information System. This safety record for special permit and approval shipments should not be that surprising given that the safety record for all hazardous materials shipments, estimated to be 438 million movements a year, averaged over the last decade only 12.7 fatalities per year, less than the average 18 fatalities that occur annually on the Capital Beltway.

regulations in domestic commerce, while an approval may apply to domestic or international transportation and can only be issued if the application meets specific criteria in PHMSA's regulations. By providing alternate, yet safe, means to conduct hazardous materials operations in ways not yet envisioned in the regulations, special permits provide a means for the regulations to stay abreast of technological advances. On the other hand, approvals are affirmations by PHMSA that the applicant has met regulatory requirements and is authorized to engage in closely controlled activities allowed by the regulations. Currently, there are thousands of special permits and approvals within the PHMSA program; many have been renewed or have remained unchanged for decades.

PHMSA Regulates the Commercial Explosives Industry Through Special Permits and Approvals

Just over 100 years ago, the first federal hazardous materials law was enacted to regulate the transportation of explosives by rail. At that time, the nation consumed about 500 million pounds of explosives annually – half of it black powder and the other half dynamite – and hundreds of people died every year in explosives incidents. Now, through technological advances, insensitive ammonium nitrate-based explosives and explosive devices have largely replaced those more dangerous explosives. Billions of pounds of these products and millions of these devices are now consumed each year, and no death in the United States has been attributed to the transportation of these products since the early 1970s. The industrial explosives industry today is many times safer than it was 100 years ago. In spite of this safety record, the commercial explosives industry is effectively regulated through special permits and approvals, rather than solely through the Code of Federal Regulations.

Among PHMSA's various approval authorities is the authority to approve the classification of explosives. PHMSA's Hazardous Materials Regulations (HMR) require that new explosives be approved before they are offered for transport. Once an explosive has been approved, that approval remains valid unless explosive properties are altered or a change is made in an underlying regulation. Prior to approval, the HMR require that explosives be examined and tested by a laboratory approved by PHMSA. The testing criteria are based on standards recognized worldwide, and typically cost tens of thousands of dollars. The expense of this rigorous testing, both in terms of product sacrificed as well as the costs of the tests, is borne by the applicant. Given that the testing is difficult and time consuming, explosive products are often grouped into "families" when the size of the products, not design characteristics or explosive specifications, differs. Testing is performed on the largest product within the family and all other products in the family receive the classification of that largest product. Before classification approvals can be issued, administrative and technical reviews must be completed by PHMSA. When the process, as outlined in the HMR is followed, there is no evidence of misclassification of explosive products.

One type of special permit in use since the late 1970s allows for the bulk transport of the billions of pounds of Division 1.5 and 5.1 materials that are essential for blasting. This innovation has enabled a shift from the industrial use of piece-count high explosive products like dynamite to ammonium nitrate-based products and decades of zero-fatality transportation. The explosives industry now transports virtually all bulk explosives and blasting agents in vehicles operating under special permit. Without these permits, the commercial explosives industry would be crippled, and with it key industries – energy production, mining, construction – that underpin the U.S. economy.

Regulatory Shortcomings of PHMSA's Approvals and Permits Program

In the 111th Congress, the majority of the House Transportation & Infrastructure Committee initiated an intense and limited review of PHMSA's Approvals and Permits program. As a result, PHMSA developed

standard operating procedures (SOP) for the Approvals and Permits program without providing for public notice and comment. The HMTA provides specifically that “procedures” used to “issue, modify, or terminate a special permit” must be established by notice and comment rulemaking.² Approvals are authorized under the general rulemaking authority of the HMTA.³ In 2007, Executive Order 13422 modified Executive Order 12866 stipulating that guidance documents having “a significant impact on society” should be “subject to an appropriate level of review ... by the public.”⁴ In support of this directive, the Administrative Conference of the United States has recommended that,

[A]gencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.⁵

The Conference defined agency programs as including licenses and permits. In the spirit of these directives and recommendations, IME has repeatedly urged the agency to submit these substantive procedures to notice and comment rulemaking, but to no avail.

Absent the due process protections of public review, these new procedures have resulted in new burdensome paperwork requirements that deliver no commensurate safety benefit. They also rely on unknown fitness criteria that have the potential to shut businesses down. These requirements affect every applicant for a special permit or approval, every applicant for renewal, and every applicant seeking “party to” status on special permits. The new SOPs have saddled companies endeavoring to expand into new areas of operation with unexpected and unnecessary layers of confusion, delay and frustration. PHMSA’s new procedures and lack of industry input have turned the agency’s program from one that safely facilitated commerce to one that frustrates commerce.

- *Paperwork Burden*

The investigations of the Approvals and Permits Program in the last Congress revealed paperwork retention gaps; none attributable to a death or serious injury. In fact, the Inspector General testified before Congress that none of his recommendations took these transportation safety outcomes into account.⁶ Instead, his focus was on procedural inadequacies, primarily involving agency loss of documents that had been submitted properly by applicants. Rather than simply asking holders of those special permits and approvals, whose paperwork PHMSA had misplaced, lost, or discarded, to resubmit documents, PHMSA proceeded in the fall of 2009, without notice and comment, to restructure the program. A complex tiered system of application reviews, including costly site visits, based on unpublished and unknown standards, was established.⁷

² 49 U.S.C. 5117(a).

³ 49 U.S.C. 5103(b)(1)(B) & (2).

⁴ “Implementation of Executive Order 13422 (amending Executive Order 12866) and the OMB Bulletin on Good Guidance Practices,” OMB, M-07-13, April 25, 2007.

⁵ Recommendation 305.92-1, Administrative Conference of the United States.

⁶ Testimony of Calvin Scovel, IG, DOT, responding to a question of Rep. Bill Shuster, “Have you identified any fatalities, injuries, or property damage from [identified special permit and approvals program] weaknesses?”, Mr. Scovel responds, “We have not, sir. Those were not included in the scope of our reviews of the Special Permits and Approvals Program.” Hearing record, “The Department of Transportation’s Oversight and Management of Hazardous Materials Special Permits and Approvals,” House Transportation and Infrastructure Committee, April 22, 2010, page 21.

⁷ Special Permits Program Standard Operating Procedures, Version 1.0 (October 2009) and Approvals Program Standard Operating Procedures, Version 1.0 (August 2010).

Further escalating the complexity and time needed to file and process special permit applications, PHMSA proposed and expedited the finalization of rules that radically increased the types of data applicants for special permits are required to submit.⁸ This rulemaking allowed only a 30-day comment period, and requests for extension were denied by PHMSA. Among other things, the new rules require applicants to submit the name, address, physical address(es) of all known locations where the special permit would be used. These data sets could include thousands and thousands of customers in a company's distribution chain along with estimates of the number and amount of shipments. Even if accurate when provided, this commercial information would quickly be outdated. How PHMSA could possibly make use of this information to enhance safety was never explained by the agency. It has the hallmark of an enforcement-driven fishing expedition that imposes on the regulated industry, and the agency itself, significant additional costs and time required to process applications. This rule should be withdrawn.

Without notice and comment, PHMSA has used the approvals process to establish by administrative fiat unpublished requirements covering the classification of and allowable packaging for explosives, terminating long-standing practices without any record of incident fatality or serious injury. First, PHMSA began to issue classification approvals with expiration dates. The pointless paperwork burden created by this policy and the disruption to the global commerce of U.S. classified products caused the agency to withdraw the policy.⁹ Still, classification approvals with expiration dates remain in use as the agency has not announced a policy to recall and reissue affected approvals.¹⁰ Next, PHMSA staff appear to be "second guessing" the results of tests for the classification of explosives that are required by regulation to be performed by a laboratory approved by PHMSA.¹¹ Since the work is done by laboratories that PHMSA has audited and approved, the agency should not second guess the results of these tests. Applications must include detailed documentation about product specifications, packaging requirements, and any transport limitations for PHMSA's technical review. Family approvals provide a safe, efficient means for industry to comply with the costly and time-consuming explosives approval requirements and have been used safely for more than two decades. Yet, without any evidence of abuse or risk to public safety, PHMSA has announced that it is relooking at the merit of family approvals, and has asked some applicants to break up long-standing family groups. This only adds to the costs and burdens on both the applicant and the agency to prepare and process additional applications.

PHMSA's actions lack transparency and predictability, and have increased costs with no corresponding safety benefit. The misuse of the Approvals and Permits program to justify bureaucratic empire building must stop. It is harming U.S. competitive interests and causing companies that can't take business off-shore.

⁸ Proposed 75 FR 43898 (July 27, 2010). Finalized 76 FR 454 (January 5, 2011).

⁹ 75 FR 54419 (September 7, 2010).

¹⁰ On March 21, 2011, JME received a letter from PHMSA addressing questions we asked in November 2010. Question 9 dealt with the protocol the agency planned to follow in reissuing classification approvals without expiration dates. While not explaining the protocol, PHMSA stated that it "has replaced classification approvals set to expire in 2010 and 2011." However, on March 25, 2011, the American Pyrotechnics Association submitted documentation to PHMSA that over 1,800 classification approvals had not been reissued.

¹¹ 49 CFR 173.56(b).

- *Fitness Criteria*

In 1996, the HMR were amended to allow PHMSA to make a determination of “fitness” of special permit and approval applicants based on information available to the agency. At the time the rule was promulgated, the agency requested this authority to retrospectively address egregious violations of the terms of these authorizations; the fitness process was never intended to be applied prospectively.

In 2009, without notice and an opportunity for public comment and in spite of the regulated community’s long-standing safety record, PHMSA redefined the historic use of the agency’s fitness authority and established a 3-tier “fitness” determination scheme. Tier 1 is a desk audit, tiers 2 and 3 are detailed to PHMSA’s enforcement staff, and at tier 3, a site visit is required. These fitness procedures have had detrimental consequences to the regulated community with no commensurate safety benefit:

- In various documents and forums, PHMSA has disclosed the criteria that it uses under tier 1 to determine whether an applicant is “fit.” However, the criteria differ.
- PHMSA has not disclosed criteria that constitute “unfit” at any tier. Thus, every adverse determination is arguably arbitrary and capricious, and industry is afforded no opportunity for prior compliance. This uncertainty has a chilling effect on business decision-making, whether to hire new workers or advance new lines of business. At the same time, foreign competitors are not subject to this level of scrutiny.
- All applicants transporting “table 1”¹² materials automatically incur a tier 3 review, even if the desk audit indicates a flawless safety record. These applications are often put on hold and significantly delayed because PHMSA lacks the resources to conduct timely site visits. The discriminatory practice is not justified based on risk.
- According to the SOPs, these extensive fitness reviews must be performed each and every time an applicant files for a special permit or approval. This process represents an enormous logistical and staff burden on the agency for no apparent safety benefit.
- An internal audit of the new fitness scheme resulted in a recommendation to toughen fitness criteria, not because of a history of incidents, but simply because too many applications are being approved at the tier 1 level of scrutiny. No safety justification was offered for the stricter standard.

PHMSA has suggested that the agency is not obligated to establish fitness criteria through rulemaking because “this is something that relates to the internal processes within PHMSA.”¹³ We respectfully disagree. The problem is that the standards and criteria used to determine an applicant’s fitness are unknown. This lack of objective standards introduces an unacceptable degree of uncertainty in the

¹² Table 1 materials, including division 1.1, 1.2, and 1.3 explosives, are those described in the HMR as requiring placards regardless of quantity or mode of transportation.

¹³ Testimony of Cynthia Quarterman, Administrator, PHMSA, responding to a question of Rep. Jim Oberstar. Hearing record, “The Department of Transportation’s Oversight and Management of Hazardous Materials Special Permits and Approvals,” House Transportation and Infrastructure Committee, April 22, 2010, page 29.

regulatory process that denies business the opportunity to comply and thus to plan for future commercial activities.

Industry must understand the performance standard against which it will be measured. Last year, 30 industry associations, including IME, petitioned PHMSA for rulemaking to establish objective fitness standards and criteria similar to many other DOT fitness-based programs. Without measurable, definitive standards the current procedures are inherently arbitrary. We can easily envision situations where the outcome of fitness evaluations may differ based on the agency personnel involved in the review. It is this type of unpredictability that worries our members. While the SOPs include steps for administrative appeals, these procedures are little consolation if a company has no meaningful opportunity to avoid being declared unfit in the first instance.

The new fitness procedures were drafted, approved and implemented without any consideration of the costs imposed on industry or any increased safety benefits. In addition, PHMSA has yet to consider, through rulemaking, alternative approaches that may have reduced regulatory uncertainty. The agency's actions contravene the spirit and intent of the President's recent Executive Order 13563 which directs "Federal agencies to design cost-effective, evidence-based regulations that are compatible with economic growth, job creation, and competitiveness."¹⁴ PHMSA's revised fitness determination protocols and criteria are the type of over-regulation that President Obama wants his administration to fix.

- Processing Backlog

Despite promised improvements, an unprecedented backlog of special permit and approval applications has developed as a result of the agency's new paperwork and processing requirements. Some applications that have languished for years remain unaddressed. Other applications that typically took weeks to process, now take months. Some have been denied for trivial matters in order to bring down backlog statistics, only to have them recycle back into the system for processing. Some applications are in the queue because PHMSA made errors in the authorization documents issued, rendering the proof of the authorization worthless, and applicants are having to petition for corrections.

According to data from the PHMSA database, there are in excess of 4,000 explosives approval applications that are pending and of those a significant proportion have been pending longer than the PHMSA-quoted 120 day target (many have been pending for more than 1 year):

¹⁴ 76 FR 8940 (February 16, 2011). Executive Order 13563 affirming and builds on former President Clinton's Executive Order 12866.

Submitted in:	# Pending
2007	15
2008	68
2009	645
10-Jan	28
10-Feb	19
10-Mar	81
10-Apr	29
10-May	12
10-Jun	8
10-Jul	2
10-Aug	2
10-Sep	16
10-Oct	53
10-Nov	187
> 120 days	1,165

Submitted in:	# Pending
10-Dec	197
11-Jan	406
11-Feb	689
11-Mar	1,445
11-Apr	111
< 120 days	2,848

Total	4,013
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Data compiled: 4/5/11 9:30 AM CST
Source: PHMSA Approvals Search at:
<http://prod-web1.phmsa.dot.gov/hazmat/regs/sp-a/approvals/search>

Industry has been told that the application processing procedures in the SOPs, like the fitness criteria, are internal agency procedures with no external effect. However, any delay in the processing of applications due to the agency's new multi-layered clearance procedures results in lost business opportunities. Many of the companies that are adversely impacted are involved in the development of new technologies intended for worldwide distribution. These competitive American industries are now subjected to additional and unnecessary challenges in the global race to market – challenges imposed by our own government.

PHMSA is now using this backlog and its inflated application processing procedures to justify imposing a user fee on special permit and approval applicants. The fee would cover the costs of the special permit and approvals program as well as a portion of PHMSA's general operating budget even though only a small percentage of the regulated community are actually holders of these permits and approvals and the Federal Government is the largest user of the program. PHMSA's user fee proposal is not fair or equitable. It is a hidden tax on companies that innovate and produce goods needed in the US economy which is struggling to recover. This initiative should be summarily rejected by the Subcommittee.

- *Incorporation by Reference*

While approvals, as other regulatory standards, may safely remain unchanged for years, Congress never intended that special permits be a long-term solution for the transportation innovations they authorize. The expectation is that proven special permits that have future, long-term use would be incorporated into the HMR. Regrettably, PHMSA's failure to incorporate proven special permits into its regulations now exposes the commercial explosives and other industries to the current whims of agency action.

Despite the flawless fatality and injury record associated with the bulk trucks used for decades by the explosives industry, traffic accidents have occurred. One such traffic accident in 2007 prompted a PHMSA inspector with no technical experience in the chemistry of explosives or the use of these bulk trucks to find, among other things, that the trucks are “prone to rollover” and to recommend that rollover protection be installed on all such trucks.¹⁵ IME responded with data showing that the center of gravity on these vehicles was no greater and in general lower than comparable vehicles carrying other types of hazardous materials. Furthermore, the off-road terrain where these vehicles have to operate necessitates engineering features to ensure stability. Although PHMSA never officially responded to industry’s technical challenge of the agency’s finding, PHMSA felt compelled to impose some technology enhancement on these vehicles. In October 2009, the agency rescinded, by administrative fiat, four special permits under which bulk explosives vehicles operate and reissued the permits with several new conditions.¹⁶ Among these was a requirement for three battery disconnect switches. This standard prompted a request for a meeting with the agency after company engineers expressed concern about fire hazards from the redundant wiring, which would create more exposure of explosives cargos to sources of electrical ignition. At this November 2009 meeting with the agency, PHMSA’s acting deputy administrator dismissed industry’s concerns and stated that three disconnect switches were necessary because they were “safer.” Nevertheless, in December 2009, in the face of growing industry concern, PHMSA, again by administrative fiat, rescinded and rewrote the October 2009 special permits to require “a redundant system capable of shutting off all mechanical and electrical systems in the event of a rollover incident or incident when truck *[sic]* is in upright position.”

By this time, IME members had scoured the world looking for technologies that would meet the conditions of the December 2009 special permits for battery disconnect. At that time, the only technology identified was manufactured in Australia. Estimates of the cost of the device and vehicle installation and downtime ran as high as \$5,000 per truck. Thus, at the height of the economic downturn, industry was faced with procuring a costly, single-source, untested product, manufactured by a foreign source as the only option available to meet the PHMSA standard. While IME continued appeals to PHMSA about the interpretation of the standard,¹⁷ which ultimately resulted in yet another revision of the affected four special permits in December 2010,¹⁸ one IME member company decided to

¹⁵ Action Memo to PHMSA headquarters from Kevin Boehne, Chief Central Region, OHME, concerning an incident investigated by Fred Simmons, ER-07-01, June 1, 2007.

¹⁶ SP 8554, SP 10751, SP 11579, and SP 12677.

¹⁷ Did the requirement include the shutdown of emergency communications equipment, cab dome lights, and other low amperage devices? Did the agency understand that serious damage to vehicle electronics would result from the mandated monthly hard shutdown test?)

¹⁸ The December 2010 revisions again were made by administrative fiat. This time even ignoring recommendations of FMCSA, whom we asked to get involved given this agency’s vehicle expertise. Moreover, it is unconscionable that the agency did not respond to industry’s concerns, which were made on the record in January 2010, until 10 days before the December 2009 standard would have gone into effect. As explained above, the explosives industry operates by virtue of these permits. If the conditions cannot be met, the agency has effectively shut the industry down. In the meantime, this latest revision affirmed our worst fears that the agency did not intend “redundant” to mean a system and a backup, but rather two of the same devices. Also, the revision did not address the issue of emergency communications equipment and low amperage devices, or concerns about destructive shutdown tests. Industry requested a meeting with PHMSA in January 2011 to address these concerns. At the meeting held on March 1, 2011, PHMSA verbally announced another standard, “to eliminate as practicable, all ignition sources in the event of an incident, including electrical current [and] mechanical operation.” When PHMSA engineers were asked how they would retrofit a vehicle to meet this standard, they did not have a solution.

purchase and install the single-source technology. Last week, the Subcommittee heard testimony about what happened in the ensuing 12 months, including two incidents of uncontrolled shutdown of loaded vehicles traveling at speed when the disconnect system malfunctioned.

PHMSA's use of the special permit program to demand the retrofit of vehicles carrying explosives with untested technology in order to operate bulk equipment despite the industry's stellar safety record is a clarion call for more accountability and transparency. Instead of using scarce resources to incorporate these decades old, proven special permits into the HMRs as Congress intended, PHMSA has created a perverse upside-down regulatory environment where it is more difficult to move a truckload of significantly less risky explosive precursors, such as Division 5.1 oxidizers, than to move a truckload of Division 1.1 explosives, such as dynamite.

Conclusion

Special permits and approvals are necessary regulatory tools. The Approvals and Permits Program, which provides safety benefits to the public, has been successfully run for decades without serious incident and without user fees. Industry wants the certainty of regulations and believes that changes to how PHMSA implements these regulatory authorities should be subject to notice and comment rulemaking. PHMSA should be guided by the principles recently espoused by DOT that "there should be no more regulations than necessary and those that are issued should be simple, comprehensible, and impose as little burden as necessary."¹⁹ We are at a loss to understand how PHMSA's current interpretation of its prerogatives under the Approvals and Permits Program has been allowed to deviate from this mark. PHMSA's extensive bureaucratic changes would not have saved one life or prevented one death. They have created wasteful delays and expenditures of resources. This Subcommittee should ensure that the damage done to the Approvals and Permits Program be fixed.

Finally, PHMSA has been woefully delinquent in the timely adoption of proven special permits into the HMR. The special permits that allow for the bulk delivery of blasting agents and oxidizers are proven, have general applicability, and future effect. They are the very type of permit PHMSA's own rules envision being incorporated into the HMR.²⁰ The Subcommittee should restrain PHMSA from investing its scarce resources toward imposing on the regulated community special permit conditions that include untested technologies that are not based on incident data.

The changes we have seen to the Approvals and Permits Program in the last 18 months have not enhanced safety, but have created a cloud of business uncertainty that has stifled growth and made it more difficult to preserve or protect U.S. jobs. As citizens, we collectively share responsibility to help get our economy back on track. As an industry, our businesses touch every major segment of the economy. To help us do our job, we need transparency and accountability from those who regulate us. Notice and comment rulemaking protects the interests of all stakeholders. We appreciate your attention to these concerns.

Thank you.

¹⁹ 76 FR 8941 (February 16, 2011).

²⁰ 49 CFR 107.113(i).



The International Brotherhood of Teamsters
Testimony before the
Committee on Transportation and Infrastructure's
Subcommittee on Railroads, Pipelines, and Hazardous Materials
On
"Reducing Regulatory Burdens and Ensuring Safe Transportation of
Hazardous Materials"

April 12, 2011

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Mr. Chairman, Ranking Member Brown, and Members of the Subcommittee:

My name is LaMont Byrd, Director of Safety and Health for the International Brotherhood of Teamsters (IBT). We welcome the opportunity to comment before the Committee on Transportation and Infrastructure's Subcommittee on Railroads, Pipelines, and Hazardous Materials concerning the "Reducing Regulatory Burdens and Ensuring Transportation of Hazardous Materials". We recognize the need for comprehensive hazardous materials regulations that include language that ensures the strong enforcement of the rules, clearly defines regulatory jurisdiction, and provides for safety and security training of workers who are involved in hazardous materials transportation activities. We are particularly concerned with strengthening hazardous material transportation safety in the tank haul industry, and support the Notice of Proposed Rulemaking to protect workers who load and unload cargo tanks. We also support the proposed rule concerning Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids.

The IBT represents approximately 300,000 workers in the United States who are involved in the transportation of hazardous materials including: tank truck drivers who transport bulk shipments of hazardous materials in quantities of up to 10,000 gallons; drivers and dock workers in the freight industry; drivers and warehouse workers in the hazardous waste transport industry; solid waste drivers; drivers and workers in the building and construction materials industry; airline pilots; and members who are employed in the public sector, including law enforcement and emergency medical personnel, who are responsible for responding to traffic accidents that could involve the release of a hazardous substance.

This International Union is very concerned about the health, safety, and security of our membership and that of the general public that shares the roads and highways with our members.

Our comments will focus on the following areas:

- Training for Hazardous Materials Workers and Emergency Responders
- OSHA Jurisdiction
- Transportation of Lithium Batteries on Aircraft
- Requirements for Special Permits

Training for Hazardous Materials Employees and Emergency Responders

It is critical that hazardous materials workers be provided with comprehensive worker safety and security training to enable these workers to protect themselves from the hazards that are inherent in handling, loading, and unloading hazardous materials. Likewise, it is essential that emergency responders, who may be called to the scene of a hazardous substance release, should receive a level of training that allows them to protect themselves, nearby persons, property, and the environment. Therefore, the Teamsters Union supports Operations Level Training for emergency responders. The Union with the assistance of our training centers, and funding from several sources, developed a comprehensive hazardous materials / hazardous waste training program for our members and other transportation workers. This program is discussed in greater detail below. As we have worked with many of our members who are regularly involved in loading, unloading, handling, and transporting hazardous materials as part of their normal work responsibilities, it is clear that many employers are providing training that may technically comply with the minimal training requirements as set forth by the DOT. However, the training does not provide the workers with the necessary information and understanding to enable them to protect themselves, their coworkers, and the environment from the hazards

associated with working with hazardous materials. Our members report that the training provided by their employers may consist simply of providing the workers with handout materials or a short video that they must review on their own time with no opportunity for questions and answers. In addition, the training may be generic so as to not address the site-specific needs of workers to avoid hazards in a particular workplace. We think that many employers, faced with a severe economic crisis are opting to either eliminate training programs or do the absolute minimum with respect to providing hazardous materials safety training. Often times, management's position is that the workers should feel fortunate to have a job.

The IBT provides hazardous materials training to our members and other workers through the Safety and Health Department's Worker Training Program in conjunction with Teamster Training centers that are located throughout the United States. The target audience for training provided through this program includes truck drivers in tank haul and freight operations, dock workers, construction workers, and warehouse workers. We also occasionally train airport workers, rail workers, and management representatives. The training is funded by training grants that the IBT receives from the DOT Pipeline and Hazardous Materials Safety Administration (PHMSA), National Institute of Environmental Health Sciences (NIEHS), and from cent-per-hour contributions that are obtained through collective bargaining with employers that are signatory to joint labor – management training trusts.

The DOT PHMSA awarded the IBT \$750,000 to conduct a Hazardous Materials Instructor Training (train-the-trainer) program for hazardous materials employees. This training is conducted by IBT Master Trainers (Mentors) who were familiarized with the program's goals and objectives, curricula, and administrative procedures prior to commencing the train-the-

trainer sessions. To successfully complete the train-the-trainer course, aspiring trainers must complete a pre-requisite 8-hour course to familiarize the participants with the hazardous materials regulations and requirements. The trainers must then successfully complete a 48-hour Train-the-Trainer course that is classroom based and subsequently teach at least one 8-hour basic course while being monitored and evaluated by Mentors and IBT Worker Training Program staff. The target audience for the 8-hour basic course is typically rank-and-file co-workers of the new instructor, supervisors, or other management personnel, and the course is normally held at either a local union hall or at a site provided by a hazardous materials employer. For the current grant year that commenced on October 1, 2010, the DOT HMIT program trained 21 trainers, 60 rank-and-file hazardous materials employees; and 28 instructors from the previous grant year have received refresher training. It should be noted that the rank-and-file employees who receive training in the program will do so as students of the new instructors who are completing their practical training prior to becoming a fully certified instructor.

The response that the program has received from the new instructors and from employers who have either participated in the program or allowed their hourly hazmat employees to be trained in the program has been very positive. Individuals who received training through our program report the following:

- Secured a job that involved workplace safety and health
- Had their job responsibilities increase as a result of receiving the training
- Joined a workplace safety and health committee
- Answered questions that co-workers had relative to hazardous materials
- Responded to hazardous materials releases
- Helped to prevent a workplace accident

Based on our experience providing this training, the program is successful in that it provides workers with additional safety and health knowledge, and it adds value in the workplace as trained workers have greater safety and health awareness and can consequently, work more safely.

The NIEHS funded program is primarily focused on training workers who are responsible for remediating hazardous waste sites, transporting hazardous waste and hazardous materials to disposal sites, and responding to emergency releases of hazardous materials. This program includes a 4-hour hazardous materials transportation course that is conducted as a module in a comprehensive 40-hour course that complies with the training requirements for the OSHA HAZWOPER Standard and DOT hazardous materials regulations and an 8-hour safety and security course for drivers who transport hazardous materials and other products to and from ports. During the current grant year that commenced on September 1, 2010, the program trained 115 workers in the 4-hour awareness level course and 207 workers in the 8-hour safety and security course.

The Teamsters Union provides Operations level training for emergency responders. Our training course is 16 hours rather than the 8 hours required by regulation. The primary training audience for this course includes hospital staff (nurses, house-keepers, drivers, physicians); fire fighters; police officers; and public health officers. Workers in these professions are likely to encounter hazardous materials releases or will provide care to individuals who were exposed to hazardous materials and may have contamination on their bodies or clothing. The IBT Worker

Training Safety Program also provided 552 workers with forklift safety training and 370 workers with training on load securement (blocking and bracing).

OSHA Jurisdiction

The IBT is aware of previous industry efforts to eliminate OSHA authority to protect workers who load, unload, and handle hazardous materials as part of their job responsibilities. This is an extremely critical issue for the Union as we recommend that any such attempts by industry during this reauthorization process be rejected. OSHA is clearly best suited to protect the health and safety of workers who perform the previously mentioned work activities.

It should be noted that in 1994, Yellow Freight Systems (now Yellow-Roadway), our largest LTL carrier, which employed up to 40,000 Teamster members before the economic downturn, was involved in a case that went to the Occupational Safety and Health Review Commission regarding hazardous materials related citations, that OSHA issued to the carrier. In that case, OSHA concluded that the carrier did not comply with the standards concerning emergency response procedures for emergency releases of hazardous materials, including those related to providing personal protective equipment and training to employees who were involved in the response to such incidents. The carrier argued that OSHA did not have jurisdiction due to 4(b)(1) provisions pursuant to the Occupational Safety and Health Act of 1970, concerning preemption. However, the Commission ruled that OSHA did, in fact, have the authority to enforce its regulations and standards to regulate safety and health in the trucking industry.

This decision provided the Union with leverage and the carrier with the impetus to incorporate comprehensive language into the National Master Freight Agreement (NMFA), and

other carriers that were signatory to the agreement concurred. Consequently, the IBT and the carriers that are signatory to the NMFA are bound by both regulatory requirements and contractual requirements to comply with the safety and health provisions regarding hazardous materials, as promulgated by both OSHA and the Department of Transportation.

A similar situation occurred involving our members who are employed at United Parcel Service (UPS). There were several incidents involving drivers and package handlers who encountered unlabeled or improperly labeled packages containing hazardous materials and consequently experienced serious injuries. Although the quantities of hazardous materials being transported through the UPS system did not require placarding per DOT regulations, there was sufficient materials present to cause injuries to workers and in some instances, evacuation of work areas and facilities. OSHA cited the company for failure to comply with the hazardous materials handling and spill response requirements. The parties were able to resolve the citations by signing a settlement agreement that required UPS to implement a comprehensive hazardous materials handling and hazardous materials spill response procedures in their facilities. Again, the IBT worked with the employer to incorporate provisions within the settlement agreement into the National Master UPS Agreement that currently covers approximately 240,000 members. This language, in addition to rules enforced by OSHA, provides our members with needed protection during their hazardous materials loading, unloading, and transporting activities.

Last year, OSHA cited one of our employers for failure to provide training and personal protective equipment to transportation workers who were involved in the handling and shipping of packages that contained mercury. During the transport process, packages were damaged and mercury spilled in the facility. Although OSHA determined that the hazardous materials workers

involved experienced minimal exposures, and likely had no adverse health consequences, the incident could have been much worse and resulted in injuries or occupational illnesses to those exposed workers. Consequently, OSHA penalized the carrier for failure to comply with applicable rules governing training, personal protective equipment, and spill response.

Therefore, based on our experience working with OSHA concerning hazardous materials related issues, the agency has the experience, commitment, and track record to effectively protect transportation workers who are involved in the movement of hazardous materials. We would unequivocally recommend to the Subcommittee that OSHA retain its jurisdiction to protect these workers, our members.

Lithium Batteries

There is much concern about the hazards associated with transporting lithium batteries on aircraft. In 2005, the Department of Transportation promulgated a rule that prohibits the bulk shipment of lithium batteries in the cargo hold of passenger aircraft. The National Transportation Safety Board, in 2007 and 2008, issued a total of eight safety recommendations subsequent to a hazardous materials incident involving a cargo aircraft that was transporting bulk lithium batteries. The IBT agreed with the NTSB recommendations to address the dangers associated with the transport of lithium cells and batteries in aircraft. The Teamsters Union currently represents 2550 air cargo pilots at 15 different cargo airlines throughout the United States and is particularly concerned about the stowage of lithium cells and batteries aboard aircraft. Limiting stowage to crew-accessible locations is essential to protecting the crewmembers from certain disaster should a fire occur onboard the aircraft. With no way to access an area where an explosion and/or fire could erupt, and no certainty that the crew could

land the airplane quickly, we think it is absolutely necessary that short of a fire suppression system or storage in fire resistant containers, lithium batteries be stored in crew-accessible locations. It is equally important to establish load limits on board the aircraft. The proper identification, labeling and packaging requirements for lithium cells and batteries are also very important in protecting transportation workers, airline crews and the traveling public from these potential dangers.

We would also like to take this opportunity to advise the Subcommittee that we do not support the amendment to the Federal Aviation Authorization bill that essentially prohibits the Federal Aviation Administration (FAA) from promulgating or enforcing regulations regarding transportation of lithium batteries by aircraft, if the regulation(s) are more stringent than the International Civil Aviation Organization (ICAO) standards. The IBT believes that the current regulations that are more stringent than ICAO standards should be retained and enforced. It should be noted that there is a proposed regulation that is currently under review at the Office of Management and Budget (OMB) concerning the air transport of lithium batteries that is more stringent than the ICAO standards. The IBT supports this proposed rule. We believe that this regulation is necessary to ensure the protection of airline workers from recognized and documented hazards associated with transporting lithium batteries. Therefore, there should be no obstructions to promulgating and enforcing these rules.

Special Permits

The Teamsters Union has always been concerned about the issuance of special permits, especially relating to the transport of hazardous materials. In many cases, special permits are routinely renewed or modified without adequate review. In some cases, these permits have been

granted to umbrella groups for an entire specialized industry (party status), without examination of specific carriers involved. It is only common sense that the safety history of a carrier should be examined and a determination made that there is not a history of accidents or incidents that would preclude the carrier from initially receiving a permit or obtaining a renewal or modification. For these reasons, we strongly support the recommendations made by the Department of Transportation's Office of Inspector General concerning revisions to the permitting process.

The IBT commends this Committee's concern about the safety and security of the travelling public and hazardous materials workers. As the amount of hazardous materials being transported in our Nation's transportation supply chain increases, so does the risk to our safety and security. Enhancing the federal hazardous materials laws and reauthorizing the DOT's Hazardous Materials Safety Program are important steps that this Congress can take to protect hazardous materials workers, the general public, and the environment. We look forward to working with you on this important endeavor, and I am pleased to answer any questions you may have.



Testimony
Before the US House of Representatives
Transportation and Infrastructure Committee
April 12, 2011

Mr. Chairman and members of the Committee,

My name is Sandra Chapman. I am the Director of Transportation – Corporate Regulatory Affairs for The Sherwin Williams Company. The Sherwin Williams Company was founded in 1866 and is the largest producer of paints and coatings products in the United States. I am also the Chair of the American Coatings Association’s Transportation and Distribution Committee. ACA’s Transportation and Distribution Committee actively participates and has “NGO” status at the United Nations Subcommittee of Experts on the Transport of Dangerous Goods under the umbrella of our international trade association, the International Paint and Printing Ink Council (IPPIC).

The American Coatings Association (ACA) is a voluntary, nonprofit trade association for the coatings industry, which includes paint, coatings of all types, and adhesives. In addition, we represent the raw materials suppliers, distributors, and technical professionals who serve the coatings industry.

Overall, the paint and coatings industry is comprised of approximately 900 manufacturing facilities in the United States which collectively produce more than one billion gallons annually. In 2007, the paint and coatings industry employed almost 350,000 people in this country in over 55,000 different establishments coast to coast, including Alaska and Hawaii. Because the paint industry is largely a “domestic industry” -- meaning that our industry continues to conduct all primary manufacturing inside the United States, we use all transportation modes to distribute products throughout the nation. Although the bulk of the industry’s products are shipped by motor and rail vehicles.

Paint, coating, and adhesive products consist of a wide range of products, including Class 2 aerosols, Class 3 Flammables, Class 8 Corrosives and Class 9 Environmentally Hazardous. While certain coatings products are regulated hazardous products, a significant portion of these products are not regulated because they do not meet the criteria for dangerous goods classification -- yet they look the same and are filled into containers that look almost identical to the containers for flammable, corrosive or environmentally hazardous paint.

I would like to address two issues for the Committee: the enhanced enforcement authority of the agency, recently published in a final rule; and the authority of PHMSA in the international arena which establish the standards and requirements for the transport of dangerous goods.

International Representation

In the international arena, there are several bodies that establish the standards and requirements for the transport of dangerous goods. This includes the United Nations Subcommittee of Experts on the Transport of Dangerous Goods, the International Maritime Organization, the International Civil Aeronautics Administration and several other organizations that work to ensure international hazmat safety and facilitate commerce through harmonization of hazmat regulations and standards.

PHMSA's work in these international forum over the years has been outstanding and has provided the United States a leadership role in establishing these standards. As recently as two years ago, a PHMSA principal was the Chair of the UN Subcommittee of Experts and even last year, PHMSA's International Standards Coordinator stepped up to serve in the Vice Chair capacity when the Chair became unavailable to complete his term. The UN Subcommittee of Experts is a multi-modal organization where deliberations and decisions made will have significant repercussions throughout the hazardous materials transportation industry in the highway, rail, vessel and air modes. Likewise, PHMSA is a multi-modal agency that has broad authority to oversee and coordinate the requirements for all modes. This broad, multi-modal vision is essential to the UN work and PHMSA must authorized and permitted to continue to serve in this capacity in the international arena.

Since 1967, the Secretary of Transportation has delegated the responsibility to lead and coordinate DOT's activities in these international forums to PHMSA. Recently, this delegation has been altered and it is no longer clear that PHMSA is the lead agency for this work. Indeed, in the most recent reorganization of the Office of Hazardous Materials, the International Standards Division appears to have been minimized as it has shrunk in staff resources and the current ISC is also serving as an Acting Director for another office within PHMSA. This situation is unacceptable and Congress should send a strong message to PHMSA that this work is paramount to the safety of transporting dangerous goods and by specifying that PHMSA should be the lead agency for this important work.

Enhanced Enforcement Authority

As a shipper, my industry understands that PHMSA is an enforcement agency and that its role is to ensure that shippers, carriers and others are complying with the hazardous materials regulations. In fact, we count on PHMSA to their job aggressively so that hazardous materials coming into our facilities are packaged, marked and labeled appropriately and we strive to do the same with finished goods that we send out of our facilities to distribution centers and retail stores. There is no doubt that PHMSA needs the tools to enforce the HMR aggressively but these enforcement tools must provide necessary protections predicated on safety and accountability.

PHMSA's partner in hazardous materials safety and enforcement are the state agencies and we highly recommend that DOT work closely with state enforcement personnel to provide consistent training on hazmat enforcement. Safety demands uniformity in the regulatory requirements and businesses must have uniformity in enforcement standards and procedures in

order to operate efficiently. In addition, in order to track more closely the transportation statistics for dangerous goods, we ask that Congress direct DOT to issue a report on hazardous materials shipments, deliveries, and movements on a periodic basis.

Historically, PHMSA's enforcement teams have had the authority to open and inspect a package under very limited circumstances. Following the ValuJet tragedy in 1996, amendments providing enhanced enforcement authority to the federal hazmat law were adopted to address the serious concern of "undeclared" hazardous materials -- materials that meet the hazardous criteria but are not packaged, marked and labeled accordingly and consequently it is unknown to the carrier that they are hazardous. However, in a very recent final rulemaking, PHMSA has interpreted this amendment language very broadly and is applying the enhanced authority to open and inspect packages to more than just those packages that are "undeclared". PHMSA intends to apply this authority to packages that are declared but may be in non-compliance with some aspects of the regulations. "Open and inspect" authority should be applied as Congress intended -- to undeclared packages. Applying this authority more broadly is dangerous to inspectors, carriers and members of the general public who may be in the vicinity.

Congress also must consider the broader safety and accountability concerns in this situation -- package opening activity should only take place "at a properly equipped facility designated by the Secretary for this purpose" in order to protect public health and safety. In addition, there should be notification to the shipper and offeror that a package is being removed from transportation for inspection and testing. There is no need to inform the package manufacturer. We urge Congress to include consider the impact to the shipper, carrier and consignee when a package is removed from transportation for inspection. Under a worst-case scenario, who is liable for an unintended release? This is a difficult situation and we ask Congress to include indemnification language intended to indemnify and hold harmless persons who are injured, including economic injury, by a release from a package that is opened or otherwise handled under this section.

With these additional safety and accountability norms, we believe that PHMSA will have the appropriate tools to aggressively enforce the HMR.

Mr. Chairman, we have provided specific language for your consideration and are happy to answer any questions at the appropriate time. Thank you very much for this opportunity to address the Committee.



Statement of

Paul Derig
Environment, Health & Safety Manager
J.R. Simplot Company

On behalf of the Agricultural Retailers Association

before the

U.S. House of Representatives
Committee on Transportation & Infrastructure
Subcommittee on Railroads, Pipelines & Hazardous Materials

“Reducing Regulatory Burdens & Ensuring Safe
Transportation of Hazardous Materials”

April 12, 2011

Thank you, Chairman Shuster and Ranking Member Brown; I appreciate the opportunity to appear before this Subcommittee. My name is Paul Derig, and I am here to testify on behalf of the Agricultural Retailers Association (ARA), a trade association which represents America's agricultural retailers and distributors of crop inputs, equipment and services. ARA members are scattered throughout all 50 states and range in size from small family-held businesses or farmer cooperatives to large companies with multiple outlets.

I am the Environmental, Safety and Health Manager for the J.R. Simplot Company. I am directly responsible for the regulatory support and oversight of regulatory programs for the J.R. Simplot AgriBusiness Retail operations, including transportation. Over the past 30 years, I have been involved with many aspects of hazardous materials handling and transportation, both through industry experience and as a public responder. I served as a firefighter and member of the State of Oregon Regional Hazardous Materials Response team, State and National Fire Academy Instructor, and as a Departmental and Regional Training Officer for the public sector. In my Simplot career, I also work with hazardous materials, including leading Hazardous Waste Operations and Emergency Response Standard (HAZWOPER). Because of the dual roles that I have been able to play, I understand the importance of hazardous materials safety in the public and private sectors.

The J.R. Simplot Company is headquartered in Boise, Idaho and is one of the largest privately held firms in the country. In more than 70 years, the company has grown into a global food and agribusiness conglomerate with products that are sold in every state and many foreign countries. Simplot's AgriBusiness Group includes phosphate mining and fertilizer manufacturing operations. Simplot Agribusiness also has a retail farm supply distribution system, Simplot Grower Solutions, and Simplot Partners, comprised of over 100 facilities in 16 western states that provide products, technical and field services to local farmers, horticulturists and landscapers. This hearing is important to the company as the ability to safely and efficiently transport crop input products during planting season is vital to our industry and food production.

I would like to explain the important role that agricultural retailers play in feeding the world. Agricultural retailers provide farmers with crop input products like seed, fertilizer, crop protection products and equipment. Agricultural retailers also provide their farmer customers with crop consulting and custom application services. Agricultural retailers can perform soil sampling so that the right kind and amount of fertilizer is applied in the right place; thus, preventing leaching. Also, agricultural retailers perform approximately 45 percent of crop pesticide application. Agricultural retailers are trained and certified to perform these activities.

Some crop input products like anhydrous ammonia and ammonium nitrate fertilizer and pesticide fumigants are classified as hazardous materials. It is important for these chemicals to be handled at the retail facility, as they become significantly less regulated once they are on the farm.

Agricultural retailers primarily rely on trucks to deliver crop input products to the farm. Retailers usually employ their own drivers and the work is generally seasonal as the business is busiest during planting and harvest seasons.

ARA plays an important role in educating agricultural retailers and distributors on regulatory compliance issues. ARA, with the U.S. Department of Transportation (DOT) and state

agribusiness associations, has hosted several workshops on anhydrous ammonia nurse tank testing. ARA also supported The Fertilizer Institute's December 2009 petition for rulemaking, which asked DOT to promulgate rules to require testing of all anhydrous ammonia nurse tanks.

In 1975, Congress established the Hazardous Materials Transportation Act (HMTA), "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against risks to life and property which are inherent in the transportation of hazardous materials in commerce."

We understand that Congress will soon consider legislation to reauthorize the HMTA. ARA believes that it is essential for the federal government to be principal in hazardous materials transportation regulation and enforcement. ARA supports this national hazardous material regulatory program because it ensures safety, security and efficiency by instituting uniform standards in training, emergency preparedness, transportation equipment and other aspects of hazardous materials transportation are consistent.

ARA is concerned about the administration of several portions of the HMTA- 1) the Hazardous Materials Safety Permit (HMSP) program, 2) federal DOT preemptive authority of state laws and enforcement and 3) state hazardous materials registration and permitting programs.

Hazardous Materials Safety Permit Program

I would like to share an example from my experience at Simplot. In January 2010, my company was unexpectedly faced with the dilemma of losing the ability to move certain products from our facilities to the local farms because our HMSP renewal was denied based on ineligibility. In other words, Simplot was in the top 30 percent of the national average for Out of Service (OOS) violations in the most current permitting cycle. This determination was derived from a total of 28 hazardous materials inspections with eight OOS inspections (28.57 percent OOS), which is much higher than the 4.76 percent needed in that permitting cycle to qualify for the HMSP.

None of the inspections that affected our permit were on drivers or equipment that transport the two products for which we are required to maintain the HMSP. These two products are seasonal and account for \$12.5 million of annual revenue in my company.

After a lengthy review of the violations, I discovered that half of the OOS inspections were performed by the Minnesota Department of Agriculture on anhydrous ammonia nurse tanks that were not currently in use by Simplot.

The Minnesota Department of Transportation referred to a Minnesota Department of Transportation rule that a cargo tank with more than 10 percent pressure is deemed to be in service. Thus, the Minnesota Department of Transportation was essentially using the Minnesota Department of Agriculture authority to incorrectly enforce state standards as if they were federal rules. Simplot has facilities in 16 states with farmer customers located beyond. Simplot's ability to move product in the entire Western part of the US was threatened by a unique state law, which was enforced by the state's department of agriculture.

After a long and arduous process of disputing the violations with the state and the federal authorities, 14 (50 percent) of the inspections were overturned and the OOS violations were

removed from the system. This left Simplot with only 14 inspections for the year, with only one OOS violation (7.14 percent OOS), which is still not good enough to qualify for the HMSP. It is distressing that one OOS inspection in a year will prohibit approval for the HMSP when the target level moves every permitting cycle and there are barely enough inspections to be statistically valid.

First, I would like to talk about the HMSP. Since its inception in 2005, the HMSP (authorized by 49 CFR §5109) has been fraught with complaints and poor management. Program data is missing. Still records show that there have been thousands of denials, the vast majority of which are administrative because DOT databases are not linked. Every two years, carriers must renew their HMSP permits. The eligibility criteria float each permitting cycle, so that the bottom 30 percent in each category (OOS, crash rate, hazmat) are disqualified for permit renewal. This results in greater than 50 percent of applicants being deemed ineligible for the HMSP.

In Simplot's case, the only violations that the company had were in the OOS category, causing the company to be ineligible for HMSP renewal. The three categories should be aggregated in calculating the eligibility instead of using statistically meaningless information to disqualify carriers from receiving the permit.

Also, the safety level should not float from permitting cycle to permitting cycle. What is determined to be a safe level of compliance in one year should not change two years later.

Furthermore, the system is biased against carriers like agricultural retailers that operate in rural areas. Carriers in rural areas receive far fewer inspections than carriers operating on federal highways in busy areas. In each two-year permitting cycle, DOT does not count the first year of data toward calculating the company's eligibility, so in our case, it was statistically impossible to overcome even one violation.

Unpreventable crashes should not be factored into the carrier's crash rate. If an accident is caused by another's negligence, then the company seeking the HMSP should not be penalized.

We ask that Congress conduct oversight of this program, eliminate the 30 percent floating disqualifier, aggregate the disqualifying categories and consider driver preventability when calculating crash rates.

Federal Preemption of State / Local Regulations & Enforcement

Next, I would like to further explain the importance of US DOT federally preempting state and local regulations that impose an unreasonable burden on commerce (49 CFR §5125). The safe and secure transportation of hazardous materials is best achieved through uniform regulatory requirements.

In the previous example, Simplot was cited by a state enforcement official on a state regulation that had federal regulatory consequences that reached far beyond Minnesota. Although a number of the inspections were eventually overturned and removed from the record, it took a great deal of time and uncertainty regarding the company's federal eligibility. Even though the Federal

Motor Carrier Safety Administration (FMCSA) agreed that the violations were not properly issued, the state seemed to have the final say. For business to move forward, it is very important to have consistency in the rules.

Thus, we suggest that Congress strengthen DOT's preemptive authority in the following ways:

- DOT would be authorized to preempt state/local regulations that impose an unreasonable burden on commerce. Currently, DOT refuses to apply this standard and leaves this analysis to the courts.
- Verbal incident reporting requirements should be federally preempted. Currently, state/local written incident reporting requirements are preempted if they are different than DOT's written incident reports; however, states have been free to impose unique verbal incident reporting requirements. Persons that operate in multiple jurisdictions have difficulty recognizing whether a particular locality has a specific immediate verbal hazmat incident reporting requirement.
- The 2005 HMTA amendments removed all preemptive limitations to state enforcement authority. This creates a loophole through which states could use enforcement authority to impose inconsistent requirements on the regulated community. This limitation on the preemptive effect of the law should be deleted.

State Registration Programs

Lastly, I would like to talk about state registration programs (49 CFR §5119 and §5125). States have been free to institute their own hazardous materials registration programs, resulting in varying registration requirements from state to state. More than 15 years have been spent trying to implement the Alliance for Uniform Hazmat Procedures for state hazardous materials registration and permitting as a compromise to eliminate the administrative burden and duplication from having separate state hazardous materials transportation permits.

To date, only six states participate in the program and the burden on motor carriers that operate in multiple states is significant. At the same time the incremental safety benefit is questionable, especially in light of the Pipeline and Hazardous Material Safety Administration's (PHMSA) federal registration requirements and the ability of states to inspect hazardous materials carriers at roadside.

Simplot has operations in two of the test states that have participated in the Uniform Program; Minnesota no longer participates in the Alliance. Since the inception of this test program, we have not seen any type of safety review in our operations. Simplot also has operations in other states requiring state registration and are not a member of the Alliance. These state registration schemes seem to be a redundant system that has increased paperwork and cost with no added value. These state registration programs simply enable participating states to raise revenue from interstate motor carriers that are based outside of the jurisdiction of these states.

Congress should preempt all of these burdensome hazardous materials state registration programs that are ineffectual to safety and security concerns. If Congress is unwilling to

preempt these state registration programs, Congress should consider making membership to the Alliance for Uniform Hazmat Procedures necessary for state hazardous materials registration programs.

Conclusion

In summary, ARA asks Congress to implement improvements to the HMSP program so that the uncertainty and biases are eliminated, strengthen DOT's preemptive authority on state and local regulations that impose a burden on commerce and eliminate the Uniform Program and other state registration programs that amount to a costly and inconsistent paperwork exercise.

We look forward to working with the Committee, Congress and DOT to further improve the HMTA so that agricultural retailers and distributors are able to continue safely and securely transporting these important crop inputs.



**UNITED STATES DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION**

**Hearing on
Reauthorization of the USDOT
Pipeline and Hazardous Materials Safety Administration's
Hazardous Materials Safety Program**

**Before the
Subcommittee on Railroads, Pipelines, and Hazardous Materials
Committee on Transportation and Infrastructure
United States House of Representatives**

**Written Statement of Cynthia L. Quarterman
Administrator
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation**

**Expected Delivery 3:00 p.m.
April 12, 2011**

WRITTEN STATEMENT
OF
CYNTHIA L. QUARTERMAN
ADMINISTRATOR
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON RAILROADS, PIPELINES AND HAZARDOUS MATERIALS
UNITED STATES HOUSE OF REPRESENTATIVES

April 12, 2011

Introduction

Chairman Shuster, Ranking Member Brown, and distinguished Members of the Committee, on behalf of Secretary of Transportation Ray LaHood, I appreciate the opportunity to discuss the progress the Pipeline and Hazardous Materials Safety Administration (PHMSA) is making with addressing current safety issues in the hazardous materials safety program.

With more than \$1.4 trillion in hazardous materials shipments each year across the United States by air, rail, highway, and water totaling 2.2 billion tons¹, PHMSA is the agency responsible for overseeing a hazardous materials safety program that minimizes the risks to life and property inherent in commercial transportation. PHMSA shares enforcement of the Hazardous Materials Regulations with its modal partners, the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Railroad Administration (FRA) and the U.S. Coast Guard (USCG).

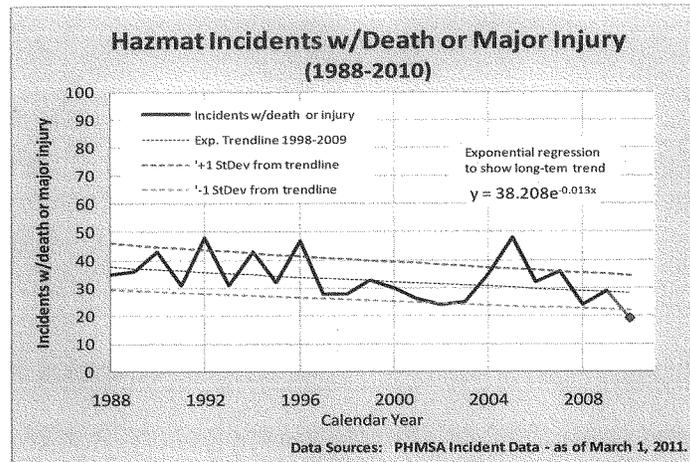
I. Overview

Mr. Chairman, we have made groundbreaking progress over the past year in the hazardous materials program. Beginning in September 2009, a major re-organization was initiated and fully implemented in 2010 to improve program oversight, efficiency, and safety initiatives. We also undertook an extensive recruitment campaign, filling 90 percent of all vacancies.

As a result of our actions, we had a banner year in fiscal year 2010, with the lowest number of hazardous materials incidents (hazmat) in recorded history as indicated in Figure 1 below.

¹ 2007 Commodity Flow Survey, Research and Innovative Technology Administration, Bureau of Transportation Statistics.

Figure 1²



In March 2011, we published a brief report, which for the first time identified the top 10 hazardous materials and other transportation commodities causing casualties and the top 10 failure modes based on the previous five years of incident data.

Top 10 Commodities 2005-09 Ranked by Weighted High-Impact Casualties (High Impact Casualties = Fatalities + [Major Injuries or Hospitalizations * VSL³weight])

Rank	Commodity Name	High-Impact Casualties (Weighted)	Fatalities	Major Injuries	Incidents
1.	Gasoline	35.94	32	21	1,386
2.	Chlorine	24.56	9	83	48
3.	Diesel fuel	15.69	14	9	2,714
4.	Propylene	4.94	1	21	15
5.	Fireworks	4.19	4	1	2
6.	Liquefied petroleum gas (LPG)	4.00	1	16	471
7.	Carbon dioxide, refrigerated liquid	3.56	3	3	51
8.	Sulfuric acid	3.31	2	7	1,270
9.	Propane	3.00	3	0	31
10.	Argon, refrigerated liquid	3.00	3	0	42

² The formula shows how the number of incidents with death or major injury (y) varies over time (x), with x measured in the number of years from the starting point (1988 is the 1st year, 1989 is the 2nd year, etc.). The regression shows the long term trend is downward at the rate of 1.3 percent (0.013x) per year.

³ VSL = Value of a Statistical Life.

**Top 10 Failure Modes (across all Transportation Phases) Ranked by Weighted High Impact Casualties
(High Impact Casualties = Fatalities + [Major Injuries or Hospitalizations * VSLweight])**

Rank	Failure Mode	High-Impact Casualties (Weighted)	Casualties (Unweighted)	Fatalities	Major Injuries	Incidents with Fatalities or Major Injuries	Primary Transportation Phase(s) (with corresponding weighted casualties)
1.	Derailment	133.19	133	24	109	3	Enroute - 133.19
2.	Rollover Accident	25.19	39	22	17	27	Enroute - 25.19
3.	Cause Not Reported	22.00	48	16	32	35	Enroute - 15.63 Unloading - .94 Loading - 5.44
4.	Human Error	10.38	25	7	18	19	Enroute - 2.19 Temporary Storage - 4.38 Unloading - 3.44 Loading - .38
5.	Component or Device ⁴	11.06	46	3	43	20	Enroute - 7.44 Unloading - 3.25 Loading - .38
6	Vehicular Crash or Accident Damage	9.31	15	8	7	11	Enroute - 9.31
7. ⁵	Multiple Causes	8.44	19	6	13	16	Unloading - .38 Loading - .19 Enroute - 7.88
8.	Fire, Temperature, or Heat	2.50	9	1	8	5	Enroute - 2.31 Unloading - .19
9.	Impact with Sharp or Protruding Object (e.g., nails)	1.94	6	1	5	3	Enroute - 1.56 Temporary Storage - .38
10.	Inadequate/Improper Preparation for Transportation ⁶	1.50	8	0	8	6	Enroute - 1.13 Loading - .19 Unloading - .19

This report outlines the various risks in the hazmat transportation system that caused fatalities and major injuries. This effort is part of a series of steps that are designed to allow PHMSA to better identify areas of concern, to target hazmat risks for further attention, and to develop data-driven regulatory and compliance strategies. A quick sample of some key findings from this report includes the following:

⁴ This failure mode is an aggregate of five failure modes: 1) Broken Component or Device; 2) Loose Closure, Component or Device; 3) Defective Component or Device; 4) Missing Component or Device; and 5) Misaligned Material, Component or Device. The values provided have been adjusted to assure that there is no double counting as a result of this aggregation.

⁵ A previous version of this table included "Dropped" as #7 due to misrecorded data; it will hereforth be removed.

⁶ This failure mode is an aggregate of two failure modes: 1) Improper Preparation for Transportation; and 2) Inadequate Preparation for Transportation. The values provided have been adjusted to assure that there is no double counting as a result of this aggregation.

- Some hazardous materials had higher consequences due to their more frequent level of transport providing for greater exposure, such as gasoline and diesel fuel;
- The majority of the deaths and injuries arising from hazmat transportation were linked to a relatively small sub-set of all hazardous materials;
- In other cases it was the sheer volatility or danger of the substance that led to significant consequences;
- The majority of the hazmat fatalities and injuries during the last five years occurred during highway or rail transport; and
- Highway rollovers and derailment while in transit were the two principal failure causes recorded.

II. Accomplishments

In the past year, we have addressed 12 of the 22 National Transportation Safety Board's (NTSB) recommendations. These initiatives for improving the safe transportation of hazardous materials, include lithium batteries aboard aircraft, cargo tank motor vehicle wetlines, and loading and unloading of hazardous materials.

We recently began to take a closer look at the Hazardous Materials Emergency Preparedness (HMEP) Grants program to ensure that the funds allocated to States, territories and Native American Tribes are being accounted for and used for their intended purpose.

Since the last hearing in April 2010, PHMSA has more than doubled its rulemaking output activities by publishing 33 separate Federal Register publications.

PHMSA has also been very active in incorporating 45 Special Permits into the Hazardous Material Regulations. The conversion of these 45 Special Permits has provided the appropriate regulatory relief to hundreds of permit holders.

Also, in 2010, and through employment of non-compliance strategies, PHMSA has completed a major Systems Integrity Safety Program agreement with one of the largest retail operations in the world. This effort alone affected numerous battery, pharmaceutical, and transportation industries, comprised of more than 50,000 operators and 1.4 million employees. The completion of this agreement resulted in a 90-percent compliance rate improvement in all of these industries.

Finally, I am pleased to inform you that PHMSA has successfully closed all outstanding Office of the Inspector General audit recommendations with respect to its Special Permits and Approvals Program, and has made great progress in eliminating previous significant backlog in those programs.

A. Hazardous Materials Special Permit and Approval Application Processing

Mr. Chairman, I would like to share with you several further accomplishments made over the past year that deserve notice.

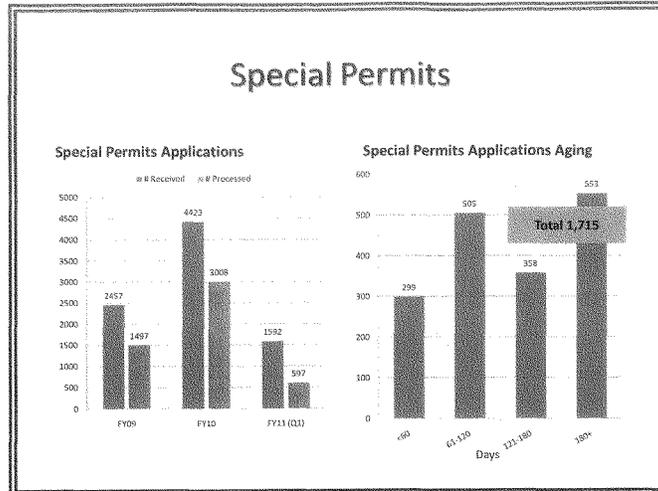
I would like to start with our progress with the special permits and approval programs. As background, our regulations are performance-oriented in a way that provides the industry with ample flexibility in meeting our safety standards. Not every transportation situation can be anticipated or timely incorporated into the regulations; therefore the hazardous materials statute (49 U.S.C. ch.51) gives PHMSA the authority to issue special permits, allowing for the safe transport of such items. These special permits may be issued only if they provide an equivalent level of safety or overriding public interest that does not compromise safety.

Our regulations also require that we provide written authorization or “approval” for the classification of certain materials or the performance of certain hazardous materials transportation functions. For example, PHMSA issues approvals covering the classification and transportation of explosives, certain lithium batteries, fuel cells, chemical oxygen generators, and radioactive materials. In addition, PHMSA issues approvals authorizing companies to manufacture certain types of packaging, such as cylinders, and to perform the tests and inspections required to ensure that the packaging may continue to be used safely for transporting hazardous materials. PHMSA also issues competent authority approvals for the transportation of select hazardous materials in accordance with international transportation standards and regulations.

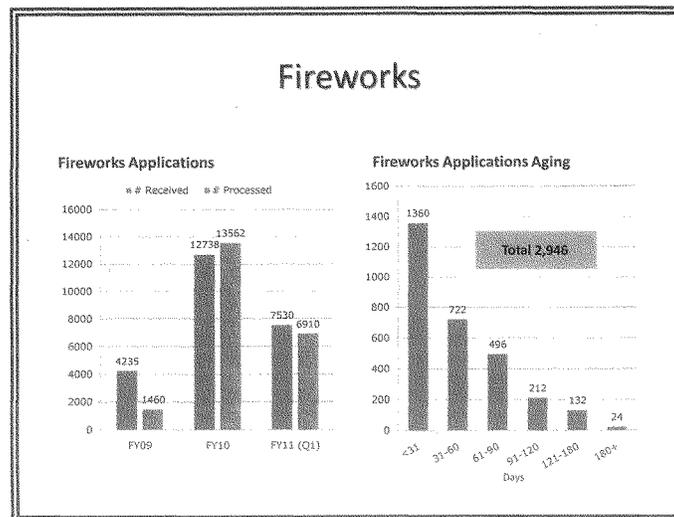
Given the criticality of these programs to the industry, I am happy to share with you some of our recent accomplishments. PHMSA has:

- Eliminated all backlogs in the fireworks and explosive approvals despite the marked growth in the number of applications received. For example, in 2010, we received close to four times as many fireworks applications as we had the year before. And in 2011, we are on pace to receive more than double last year’s number of applications;
- Implemented and nearly completed a recovery plan to ensure all safety equivalency documentation is in place prior to the issuance of any new special permits or renewal of existing special permits, as required by our regulations;
- Developed and published standard operating procedures for all our approvals and special permits business processes;
- Published safety fitness procedures and held a public meeting to solicit further industry input on such processes;
- Audited all of our independent Explosive Test Laboratories, and implemented new procedures for qualifying such laboratories;
- Introduced for the first time an on-line application capability to better streamline processes and to help industry applicants; and
- Discontinued issuing special permits to Trade Associations and implemented plans to eliminate all Association permits.

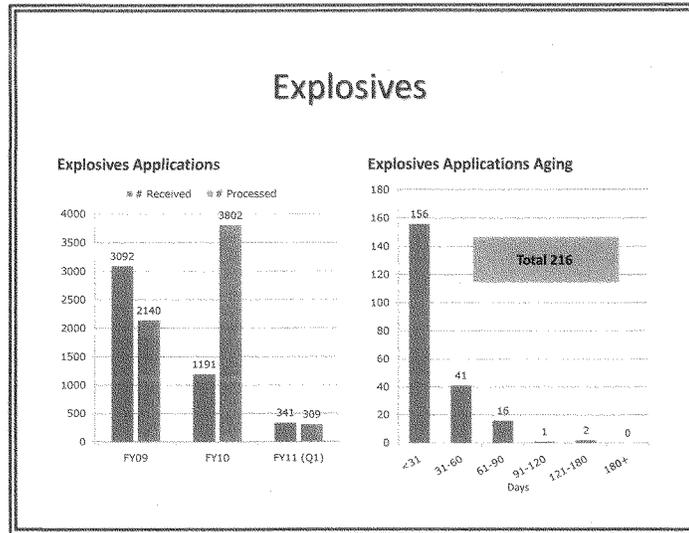
The following chart highlights the significant increase in the number of special permits applications received and processed.



For fireworks, PHMSA saw a significant increase in the number of applications received in 2010 versus 2009, as shown in the following chart. A large percentage of fireworks applications are from foreign manufacturers. In order to improve the quality of applications we have further expanded our international relationships. For example, in August 2010, PHMSA safety investigators visited China to help better train fireworks professionals and Chinese Government officials on U.S. and International requirements to ensure better transportation safety. The same chart also shows that in 2010, PHMSA processed nearly 10 times the number of applications compared to 2009.



As to explosive applications, PHMSA received and processed nearly twice as many applications in 2010 as 2009.



B. Field Operations Update

To ensure that all the requirements of special permits and approvals issued are followed, and all related hazardous materials movements are safe, PHMSA employs a number of enforcement and compliance strategies, including frequent field inspections. Keeping hazardous materials contained in approved packages is often the most basic safety management practice. PHMSA understands that low-probability hazardous materials accidents can lead to high consequence incidents, so we leverage our staff of 57 fully trained hazardous materials enforcement professionals. Our field inspectors are technical experts in multimodal packaging, special permits, approvals, explosives, radioactive materials, cylinders, shippers, and transporters.

PHMSA utilizes several tools to maximize the outcomes of its resources and activities. We leverage our resources by conducting joint activities with other Federal, State, and local law enforcement personnel. In 2010, we conducted 13 Multi-Agency Strike Force Operations that brought a number of regulatory and law enforcement agencies together from across the United States to include the first-ever international operation with Interpol. These efforts focused on risk-based inspections of containerized and portable tank cargoes, and risks posed by trucks, trailers, and chassis that may have not been fully in compliance with safety standards. The joint efforts last year resulted in the safety inspection of 3,753 hazardous materials containers.

Over the past year, PHMSA conducted over 2,000 inspections of regulated companies and provided hazardous materials outreach to over 3,500 stakeholders. We hired 12 new inspectors in FY 2010, which gives PHMSA the potential to increase our productivity by 20 percent.

III. PHMSA's Regulatory Program Is Addressing Several Long Term Safety Issues

In terms of our progress in regulatory action, PHMSA published 33 separate Federal Register publications in the last 12 months to establish new hazardous materials rulemakings that are in the process of being finalized. Current regulatory priorities include considering and addressing several open NTSB recommendations related to the transportation of lithium batteries, wetlines and the loading and unloading of cargo tank motor vehicles; harmonization efforts for international and domestic regulations; departmental safety and security risks; regulatory review; and petitions for rulemaking.

A. Lithium Battery Transportation

A final rule related to the transportation of lithium batteries is in the Office of Management and Budget for review under the procedures of Executive Orders 12866 and 13563.

B. Cargo Tank Truck Wetlines Rulemaking

In January of this year, PHMSA published a Notice of Proposed Rulemaking (NPRM) that would amend the Hazardous Materials Regulations to prohibit flammable liquids from being transported in unprotected product piping on existing and newly manufactured cargo tank motor vehicles.

As outlined in PHMSA's NPRM, incident analysis and our assessment of the technologies currently available to remove cargo from product lines after loading demonstrates that rulemaking to prohibit the transportation of flammable liquids in wetlines may reduce the safety risks associated with one of the highest risk commodities transported without imposing undue cost burdens on the regulated community. PHMSA extended the comment period for this NPRM to April 27, 2011.

C. Loading/Unloading Rulemaking

PHMSA data show that the most dangerous part of cargo tank motor vehicle transportation occurs when a hazardous material is being transferred by hose or pipe between the holding facility and the cargo tank. The data also show that human error and equipment failure cause the greatest number of incidents during loading and unloading operations, sometimes with tragic consequences.

We have proposed a rule that would require additional training for employees and establish new safety requirements for motor carriers and facilities that transfer hazardous materials to and from cargo tank motor vehicles.

D. Harmonization

Our harmonization efforts include both international and domestic regulations. Uniform standards and regulations promote compliance with safety regulations. PHMSA is focused on evaluating standards to promote regulatory consistency where appropriate. Rules related to harmonization include the following:

- The Air Packaging Final Rule, a joint effort between PHMSA and FAA, to propose enhanced packaging requirements. The final rule includes test protocols and secondary closures to ensure that combination packagings fully account for conditions normally incident to air transportation.
- The Combustible Liquids NPRM which considers whether current Hazardous Materials Regulations requirements applicable to combustible liquids should be revised to accommodate differences between those regulations and international standards.

E. Departmental Safety and Security Risks Identified by PHMSA, the Regulated Community, or Others

PHMSA receives feedback from our stakeholders, including State, local, modal, and other PHMSA Divisions on a daily basis. We focus on comments, requests for change and concerns to identify areas where HMR are inconsistent or could be improved. Examples of these rules include:

- The Explosives Safe Havens Final Rule which proposes to strengthen requirements for the storage of explosives during transportation to provide explosives carriers with safe parking for high-explosives.
- The Distracted Driving - - Mobile Phones NPRM which would improve health and safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of commercial motor vehicles.

F. Regulatory Review

PHMSA has undertaken an initiative to identify areas where an in-depth regulatory review could have significant beneficial impacts on the public and industry. This initiative focuses on reviewing existing requirements, letters of interpretation, special permits, enforcement actions, approvals, and telephone logs to identify obstacles and take action to promote hazardous materials safety. Examples of rules related to regulatory review include:

- The Miscellaneous Clarifications Final Rule, which proposes to update the HMR to account for improved technologies and new ways of doing business. In addition, the rule will eliminate outdated or obsolete requirements and clarify confusing regulatory requirements; and
- The Rail Special Permits NPRM which proposes to incorporate a number of special permits for rail operations into the Hazardous Materials Regulations.

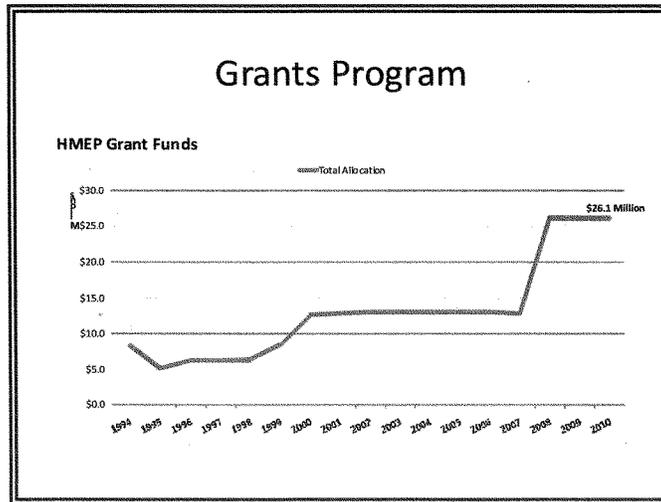
G. Petitions for Rulemaking

In response to petitions from the public, we are also proposing revisions to the requirements in the Hazardous Materials Regulations to reference the applicable requirements in the American Society of Mechanical Engineers Boiler and Pressure Vessel Code.

IV. PHMSA's Hazardous Materials Emergency Preparedness (HMEP) Grants Program

In addition to the regulatory actions we use to improve the safety of the transportation of hazardous materials, Congress created a HMEP grants program almost 20 years ago. The program helps States, local governments and Native American Tribes develop, improve, and implement emergency plans, train fire fighters and other emergency response personnel to respond to accidents and incidents involving hazardous materials. In addition, HMEP grants help recipients determine flow patterns of hazardous materials within a State or between States, and determine the need within a State for equipment and regional hazardous materials emergency response teams. More than 2.5 million emergency responders have been trained using HMEP grants program funds since the program's inception in 1992.

Over that time, funding increased dramatically recently from an initial award level of \$8.4 million in 1993 to \$26.8 million in 2010. We are in the process of tightening our controls over the larger grant program. Funds are allocated using an established formula to the States, Native American Tribes, and territories that apply. The formula is based on criteria established in the Hazardous Materials Regulations. Grantees are reimbursed for programs that meet those criteria.



In 2010, PHMSA commissioned an independent audit of our HMEP grants program to identify gaps and institute improvements. Program gaps that have been identified in the HMEP program include issues with appropriateness of grant activities and lack of documentation for reimbursement claims. The preliminary findings have already resulted in improvements to the program. For example, PHMSA has released a sample application that provide state and territorial grantees with best practices demonstrating effective planning and training activities for the upcoming grant cycle.

The audit team is currently conducting on-site reviews of four State grantees and desk or phone reviews for up to four additional States and territories. In the interim, PHMSA initiated an Action Plan to address grant program deficiencies already identified. Also, PHMSA is reaching out to other DOT operating administrations and external Federal granting agencies to share grants program knowledge and best practices.

In addition to the HMEP Grants Program, there is also the Hazardous Materials Instructor Training (HMIT) Grants Program, which was created three years ago and is currently funded with \$2.6 million. HMIT grants provide non-profit hazmat employee organizations with the funding to develop and institute a train-the-trainer curriculum. This fiscal year four unions applied and are receiving grants.

Conclusion

In summary, DOT and PHMSA are taking positive steps to address its regulatory priorities by improving the safe transportation of lithium batteries aboard aircrafts, lowering the risks associated with cargo tank motor vehicle wetlines, decreasing the incidents associated with loading and unloading operations as well as the proper management of the Special Permits and Approvals Program.

We are aware of our role as the stewards of public grant funding and are taking a close look at the HMEP Grants Program to ensure that the funds allocated to States, territories and Native American Tribes are being accounted for and used for their intended purpose.

We welcome any and all recommendations for making our safety programs more effective and further ensuring the public's safety. I look forward to working with the Committee as we continue to implement measures to enhance our safety oversight and any actions related to the reauthorization of DOT's Hazardous Materials Safety Program.

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Before the

United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Railroads, Pipelines and
Hazardous Materials

Statement of Barbara Windsor

on behalf of the

American Trucking Associations

On

Reducing Regulatory Burdens and
Ensuring Safe Transportation of Hazardous Materials

April 12, 2011



Chairman Shuster, Ranking Member Brown, and Members of the Subcommittee:

Thank you for the opportunity to testify on the reauthorization of the Department of Transportation's (DOT) hazardous materials safety program.

My name is Barbara Windsor. I am president and CEO of Hahn Transportation in New Market, Maryland. Hahn is a specialized regional trucking firm that hauls petroleum products, biofuels, cement, and other bulk products throughout the Mid-Atlantic corridor. My family built and grew this business over the past 75 years and today we operate more than 100 trucks and employ over 150 individuals.

Today, I appear before you representing not just my company, but also the American Trucking Associations (ATA). ATA is the national trade association of the trucking industry and I am proud to serve as its Chairman of the Board. Through its affiliated state trucking associations, affiliated conferences and other organizations, ATA represents every type and class of motor carrier throughout the United States.

The trucking industry is the backbone of this nation's economy - accounting for more than 80% of the nation's freight bill and employing nearly 7 million Americans in trucking-related jobs. We are an extremely competitive industry comprised largely of small businesses. Roughly 97% of all interstate motor carriers operate 20 or fewer trucks.¹

The trucking industry delivers virtually all of the consumer goods in the United States and most of the Nation's essential hazardous materials, such as pharmaceuticals to treat the ill, chemicals to purify water, fuel to power our cars and heat our homes, pesticides and fertilizers for growing crops that feed the world, and military supplies to protect our troops.² These hazardous materials are necessary to support our quality of life and their safe and efficient transportation is critical to this Nation's economic well being.

The safety and security record for the transportation of hazardous materials is impressive. Each day there are over 800,000³ shipments of hazardous materials in the United States. In terms of product value, tonnage, and number of shipments, trucks move more hazardous materials than all other transportation modes combined.⁴ In 2009, there were 273 serious hazardous materials transportation incidents on the nation's highways, a

¹ American Trucking Associations, *American Trucking Trends 2011* (March 2011).

² See Bureau of Transportation Statistics, *2007 Commodity Flow Survey* (January 2011).

³ See Federal Motor Carrier Safety Administration, *Crashes Involving Trucks Carrying Hazardous Materials*, May 2004, <http://www.fmcsa.dot.gov/facts-research/research-technology/analysis/fmcsa-ri-04-024.htm>.

⁴ See Bureau of Transportation Statistics, *2007 Commodity Flow Survey* (January 2011).

30% decrease from 2000.⁵ The annual number of highway fatalities over the period declined from 16 to 4.⁶

While the existing statutory framework and regulations governing hazardous materials transportation have proven effective, I appear before you today to highlight specific recommendations to improve the safe transportation of hazardous materials and reduce unnecessary regulatory burdens.

The remainder of my testimony highlights six key issues for Congress to address as it considers the reauthorization of the federal hazardous materials transportation law:

- Eliminating duplicative and redundant security background checks;
- Ensuring equitable enforcement of the hazardous materials regulations;
- Reforming hazardous materials incident reporting requirements;
- Implementing a single uniform state-based hazardous materials permitting system; and
- Resolving jurisdictional issues concerning the Occupational Safety and Health Administration (OSHA) and DOT's regulation of hazardous materials handling.

There is also one matter, one that directly affects my business, that we believe does not warrant new regulations: the transportation of flammable materials in cargo tank wetlines.

I. Redundant Background Checks

Duplicative background checks and redundant credentials have caused a dramatic reduction in the number of qualified drivers that are available to transport hazardous materials. Prior to the initiation of the Transportation Security Administration's (TSA) background check program in 2005, the Hazardous Materials Endorsement (HME) served as an endorsement on a driver's Commercial Drivers License that the driver was approved to handle hazardous materials. More than 2.7 million drivers held an HME.⁷ Based on TSA data, we estimate the current number of HME holders is closer to 1.5 million. This 41% reduction in qualified drivers is not the result of individuals failing the background check – less than 1% fail the check – but rather is a result of the onerous process associated with obtaining this credential and the fact that drivers often must obtain multiple credentials that entail expensive, duplicative background checks.

⁵ See U.S. Department of Transportation, Hazardous Materials Information System http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/tenvr_orig_serious.pdf. Note many "serious incidents" do not involve injuries, as highway closures and certain releases of hazardous materials are classified as "serious incidents" even though no one is injured.

⁶ *Id.*

⁷ See Testimony of Asst. Director Justin Oberman, TSA Threat Detection and Credentialing Office, before the House Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity (November 5, 2005).

Drivers that transport hazardous materials must submit to a fingerprint-based background check to obtain an HME. This credential costs approximately \$100, requires multiple visits to the licensing agency to complete the process, and takes several weeks to be issued. Many of these drivers also access port facilities and therefore must also obtain a Transportation Worker Identification Credential (TWIC) – these drivers receive a discount if they have already been through an HME check, but still must pay an additional \$105.25 for the second credential.⁸ A small business like mine must pay over \$8,000 just to credential our drivers to transport hazardous materials. That amount is before the costs of other credentials are added, such as TWIC. ATA estimates that the cost of obtaining federal credentials for the largest fleets can exceed a quarter-million dollars. This is a recurring expense, not a one-time investment, since the HME and TWIC must be renewed every five years.

Moving beyond *federal* credentialing issues, the city of Doraville, Georgia has imposed a security background check for individuals that access local petroleum loading facilities. Under this program, Doraville collects fingerprints, transmits the prints to the federal government, receives a criminal history report, and then issues a local credential at a cost of \$100. The background check performed is identical to the check performed by TSA under the HME and TWIC programs. Unfortunately, Doraville has refused to recognize the HME or the TWIC as an acceptable credential. The ability of states and municipalities to subject hazardous materials drivers to redundant criminal history background checks could easily become an unbearable financial burden to hazardous materials drivers that operate in hundreds of cities throughout the country. The Doraville credential is a revenue raiser for the City, but provides no additional security.

To address the problem of redundant security background checks for drivers transporting hazardous materials, we encourage Congress to enact the Safe Truckers Act, which has three elements.

1. Acknowledging that not all hazardous materials are security sensitive. Paint, food coloring, and pharmaceuticals are not weapons of mass destruction. Congress should require the Department of Homeland Security (DHS) to work with DOT to identify a list of security sensitive hazardous materials that are truly weaponizable. PHMSA and TSA have already created lists of Security Sensitive Materials that provide an excellent starting place for these discussions.
2. Requiring individuals that transport security sensitive materials to undergo a fingerprint-based background check and obtain a TWIC as evidence of their fitness to transport these hazardous materials of concern and return the HME to a safety-based license endorsement.

⁸ Additional background checks and credentials are required for drivers that access airports, drivers that deliver freight to Canada and Mexico, and drivers that haul freight for the Department of Defense. See Exhibit 1 for a chart depicting the various background checks and credentials that should be harmonized.

3. Ensuring that the TWIC is the only security credential required for transportation workers and preempting other state and local background checks and credentials when applied to drivers transporting hazardous materials.

In the last Congress, the Transportation and Infrastructure Committee and the Committee on Homeland Security worked together to approve the Safe Truckers Act, and the legislation was passed by the full House. We hope the legislation can move quickly this year. The background check reforms envisioned under the Safe Truckers Act will put money back in the pockets of America's truck drivers, conserve scarce government resources, and maintain the highest standards of security.

II. Equitable Enforcement

The hazardous materials regulations (HMRs) consist of more than 500 pages of regulatory text. Regulatory requirements vary depending upon the types and quantities of materials being transported. The complexity of these regulations makes it difficult to train drivers who are called upon to transport many different types of hazardous materials. ATA members have implemented robust driver training programs and view safety and compliance as their primary responsibility. However, primary compliance with the HMRs rests with the shipper of the materials, who must properly classify the material, select appropriate packaging, mark and label the package and prepare a compliant hazardous materials shipping paper. Each of these "pre-transportation" activities occurs before the carrier arrives to load hazardous materials packages on the truck. Because most violations of the HMRs are discovered during roadside inspections, drivers and motor carriers frequently receive citations for violations of the HMRs that they did not cause and cannot reasonably be expected to discover.

For example, a carrier should not be held responsible for transporting undeclared hazardous materials, where a shipper neither labels the package nor presents a hazardous materials shipping paper to the carrier prior to transportation. A driver cannot be expected to catch shippers that intentionally conceal the transportation of hazardous materials. Similarly, where a shipper tenders a package of *boron trifluoride diethyl etherate* and indicates on the shipping paper that the chemical is corrosive, but fails to denote that the chemical also has a subsidiary hazard of flammable, it is not realistic to expect the driver picking up the package to research the chemical and catch the shipper's mistake in failing to also list the subsidiary hazard. Yet we estimate that each year motor carriers are cited for more than 10,000 violations that are caused by shippers before the carrier begins transportation.⁹

To address this inequity, Congress should distinguish between functions that are normally performed by a shipper and functions that are the responsibility of the carrier, and clarify that a carrier is not responsible for violations that result from pre-transportation functions performed by another person, unless the carrier has actual

⁹ Source: ATA and CVSA analysis of 2005 Roadside Inspection Hazardous Materials Violations. See also, <http://www.ai.volpe.dot.gov/SafetyProgram/sp/Violation.aspx?rpt=RDHV>

knowledge of the violation. While carriers must remain responsible for the correct performance of hazardous materials functions under their control (*e.g.*, blocking and bracing, placarding, segregation of incompatible hazard classes), they should not be held accountable for pre-transportation functions that are the responsibility of the shipper. The issuance of violations to carriers for activities that are performed by others does nothing to address the compliance and safety problems created by the responsible party. This results in continuing behavior that is not in accordance with the regulations and the failure to correct unsafe hazardous materials transportation conditions.

III. Wetlines

Wetlines refer to the product piping underneath cargo tank trucks that transport gasoline and other flammable liquids. These wetlines are used for both loading and unloading tank trucks.¹⁰ In 1998, following a fatal accident, the National Transportation Safety Board (NTSB) issued a recommendation to DOT to prohibit the transport of flammable materials in wetlines to reduce the risk of serious injuries from the release of product in the event that a car crashes into a tank truck. Since then, wetlines incidents have become a high profile although very rare event.

In connection with a recently proposed rule on wetlines, PHMSA analyzed ten years of incident data. According to DOT's hazardous materials incident database, from 1999 to 2008 there have been 8 incidents that have resulted in a fatality or injury that are attributable to wetlines releases.¹¹ By contrast, PHMSA estimates that more than 100,000 cargo tank shipments of flammable liquids occur each day.¹² These government statistics further indicate that the risk of being injured in or killed in a wetlines incident is approximately 1 in 45,600,000.¹³ In fact, an individual is more likely to be struck by lightning than be injured in a wetlines incident. Notwithstanding this incredibly low incident rate, PHMSA has proposed a regulation restricting the transport of flammable liquids in wetlines.¹⁴

This is the third time DOT has considered wetlines restrictions. In 2004, the Research and Special Programs Administration (RSPA), the predecessor agency to PHMSA,

¹⁰ Petroleum terminals have indicated that they cannot drain the loading lines at their facilities. As a result, product remains in the on-board loading lines from the shipper's terminal until delivery at the customer's facility (*e.g.*, gas station).

¹¹ 76 *Federal Register* 4847, 4849 (January 27, 2011).

¹² U.S. Pipeline and Hazardous Materials Safety Administration, *Regulatory Assessment and Regulatory Flexibility Analysis – Hazardous Materials: safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids*, p. 9 (January 2011).

¹³ Using PHMSA's data, there are approximately 365 million shipments of flammable liquids in cargo tanks each year and over the ten year study period there have been eight wetlines incidents that have resulted in injury or a fatality. See documents cited in footnotes 11 and 12, *supra*.

¹⁴ See 76 *Federal Register* 4847 (January 27, 2011).

proposed a similar rule to regulate flammable liquids in wetlines. After analyzing the data from incidents attributable to wetlines and the costs associated with requiring equipment to evacuate product from wetlines, the agency concluded that the costs of the proposed regulation exceeded its benefits and properly withdrew the proposed rule.¹⁵

Nothing has changed – the hazardous materials incident data reports continue to support the conclusion that the risk of a wetlines incident is infinitesimally small. The data underlying the most recent wetlines proposal similarly indicate that its costs exceed its benefits. In fact, PHMSA itself concluded that the costs of the proposal exceed its benefits and only after applying a so-called “sensitivity analysis” with unrealistic assumptions (including that passenger vehicle occupancy of cars involved in wetlines incidents would increase due to a future increase in carpooling caused by the high price of fuel) does PHMSA conclude that the benefits of the rule exceed its costs.

ATA and the National Tank Truck Carriers (NTTC) analyzed PHMSA’s summary of the wetlines incidents and note that the agency significantly overstates the potential benefits of the rule. Our analysis, which will be included in our formal comments to the agency, reveals that 17% of the incidents PHMSA believes would be avoided involved combustible materials that are exempt from PHMSA’s proposal; 26% of the incidents involved a release of product from the cargo tank itself which would have occurred even if the wetlines underneath the tank had been purged. Incredibly, one incident involved a truck equipped with a purging system, raising the question of whether the proposed technology is 100% effective.

PHMSA’s analysis of the costs underlying the proposed rule contains additional mistakes. PHMSA has chosen to use the costs of a manual purging system, which is not yet commercially available, to support its estimates on the costs of the rule. The costs ignore the downtime of the cargo tank during the retrofit procedure, employee training costs, loss of productivity as a result purging failure, and time spent waiting for the purging system to operate. Other costs are underestimated, such as system maintenance costs of only \$3 per year and the lost productivity as a result of the system’s weight. From an operations standpoint, carrier efficiency would decrease as a result of delays at loading facilities waiting for wetlines to be purged.

To resolve this high profile issue and close the open NTSB recommendation, we urge Congress to have the Transportation Research Board of the National Academy of Sciences quantify the risk and cost of wetlines incidents and hold the PHMSA rulemaking in abeyance until that analysis is completed.

¹⁵ RSPA responded to an NTSB recommendation, proposed a solution to a perceived problem, accepted comments, analyzed the data, and then properly concluded that the costs of the proposed solution far exceeded its benefits. See 71 *Federal Register* 32909 (June 7, 2006).

IV. Incident Reporting

The federal regulations establish requirements for carriers to file both written hazardous materials incident reports and telephonic reports for certain hazardous materials incidents. ATA supports the federal written incident reporting requirements, as a means for PHMSA to obtain data upon which to base future regulatory decisions. ATA also understands the need for immediate notification for certain types of hazardous materials releases.

Unfortunately, the logistics of navigating multiple immediate federal and local notification requirements are impracticable and set motor carriers up to fail. While the federal hazardous materials law preempts state and local *written* incident reporting requirements (they can simply obtain the information they require from PHMSA's written reports), it does not preempt state and local requirements to provide immediate telephonic notice.

There are dozens of individual telephonic reporting requirements that vary from jurisdiction-to-jurisdiction. As a result, drivers have no way of knowing whether a particular incident triggers a local reporting requirement. For example, following a recent spill in Louisiana, a motor carrier telephoned 911 and emergency response teams were dispatched to the scene. Several weeks later, the motor carrier received a large fine for failure to provide immediate notice of the incident to the appropriate officials. It is unrealistic to expect a driver to know whether a particular hazardous material incident triggers a local immediate reporting requirement. Drivers operate in literally thousands of local jurisdictions and cannot predict when a hazardous materials release will occur or be expected to know whether a particular release triggers a local reporting requirement and the contact information of the official to be notified. It should be sufficient for the carrier to call the national response center, when required, or call 911 to ensure that local emergency response teams are mobilized. Additional local reporting requirements should be preempted. An existing, universal 911 system, combined with existing federal incident reporting requirements, obviates the need for separate state and local reporting requirements that are virtually impossible to comply with. Congress should preempt state-based incident reporting requirements.

V. State-Based Hazardous Materials Permits

Individual states have imposed more than 40 separate hazardous materials permitting programs.¹⁶ These motor carrier permitting requirements are triggered based upon the type of hazardous material being transported through the state. Some states have more than one permit, depending upon the types of hazardous materials being transported. Compliance with these separate programs is an enormous administrative burden for trucking companies that operate in multiple states, as it is extremely difficult

¹⁶ See Exhibit 2, a map depicting the states with individual permit programs applicable to the transportation of hazardous materials.

to identify and monitor changes to these different permitting programs. For some smaller trucking companies, it is difficult to predict which states they may travel through and whether they will transport particular types of hazardous materials through that state in a given year.

There is a solution. ATA supports the implementation of the “Uniform Program,” which is currently administered by six states (*i.e.*, IL, MI, NV, OH, OK, and WV). The Uniform Program is a “base state” permitting program that ensures participating states will continue to receive the revenue they have come to rely upon under their individual permitting programs. Moreover, the program ensures that the fees states assess are fairly apportioned and are dedicated to improving hazardous materials transportation safety.

The implementation of the Uniform Program would reduce state expenses, as the inspection and administrative functions would be shared by all participating states. The implementation of the program also would reduce the administrative burden on the regulated industry.

To transition from the current individual permits to the Uniform Program, Congress should enact a carrot and stick approach. Initially, Congress should provide a grace period for states to make their programs compatible with the Uniform Program. Congress should then select a date certain whereby separate state permitting programs would be preempted.

VI. Uniform Regulations OSHA’s Concurrent Jurisdiction

ATA supports a modification to the joint regulatory authority that OSHA and DOT exercise with respect to the transportation of hazardous materials. This overlapping jurisdiction erodes the regulatory uniformity necessary for the safe and efficient transportation of hazardous materials and makes it difficult to train drivers that must perform their duties in multiple jurisdictions.

Unlike DOT, OSHA does not have the authority to ensure uniform regulations. In fact, states are encouraged to enact more stringent worker protection regulations than the federal baseline established by OSHA, which leads to a myriad of differing regulatory requirements across jurisdictional lines. This type of regulatory framework may work well for employees at fixed facilities, but is problematic for transportation companies, whose employees work in multiple states.

The potential problems associated with OSHA’s overlapping jurisdiction became obvious in 2007 when OSHA proposed revisions to its explosives standard. If promulgated as proposed, this standard would have been inconsistent with DOT’s regulations. Some of these inconsistencies included: truck trailer modifications, fire extinguisher standards, hazardous materials segregation requirements, and requirements to move centralized refueling facilities.

ATA is concerned about employee safety and supports a jurisdictional compromise that would ensure uniform regulations, while preserving OSHA's role in training and addressing potential unsafe conditions for employees that respond to releases of hazardous materials. DOT's hazardous materials transportation regulations have proven effective in protecting transportation workers that handle hazardous materials in transportation.

* * * * *

In closing we would like to recognize that while the existing federal hazardous materials law and its accompanying regulations go a long way towards ensuring the safe, secure and efficient movement of hazardous materials, there is room for improvement. As Congress moves to reauthorize the federal hazardous materials transportation law it is critically important to ensure uniformity across jurisdictional lines. This is the theme that runs through the priority issues highlighted in this testimony.

ATA and I greatly appreciate this opportunity to offer our insight into measures to improve the safe, secure and efficient transportation of hazardous materials. Thank you for allowing me to testify. I am pleased to answer any questions you and the other members of the Subcommittee may have.

Exhibit 1: Redundant Background Checks

Program	Cost to Driver	Purpose
Hazardous Materials Endorsement (HME)	\$89.25 ¹⁷	Federal Security Credential for Transportation of Hazardous Materials (TSA)
Transportation Worker Identification Credential (TWIC)	\$132.50 ¹⁸	Federal Security Credential for Access to Port Facilities (TSA)
Secure Identification Display Area (SIDA)	\$30 ¹⁹	Federal Security Credential for Access to Airport Facilities (TSA)
Air Cargo Security Threat Assessment	\$28 ²⁰	Federal Security Credential for Access to Air Cargo (TSA)
Free and Secure Trade (FAST)	\$50 ²¹	Federal Security Credential for Border Crossing (CBP)
Doraville Petroleum Facility Access Credential	\$100 ²²	Local Security Credential for Access to Local Petroleum Loading Facilities (Doraville City Council)

¹⁷ Includes \$17.25 FBI database search fee, \$34 TSA threat assessment fee, and \$38 information collection fee (TSA contractor). States that manage their own information/fingerprint collection are authorized by TSA to establish separate fees, which range from \$70 to \$140.25.

¹⁸ Includes \$43.25 enrollment fee, \$72 for card production/security threat assessment fees, and \$17.25 (discounted amount) for the FBI fee. Applicants with an HME or FAST card will not be charged the \$17.25 FBI fee and will receive a \$10 discount for the card production/STA.

¹⁹ Includes \$17.25 FBI database search fee, \$12.75 clearinghouse fee, and \$3 recurrent vetting fee charged on a rolling basis.

²⁰ Fee to include collection, clearinghouse facilitation costs, OPM and FBI fees.

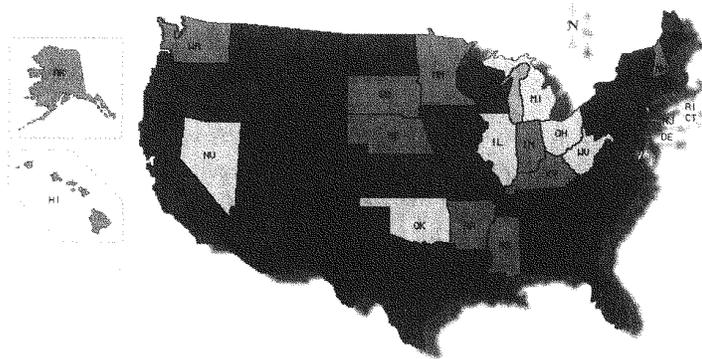
²¹ Includes check against criminal and immigrant databases in U.S. and Canada and issuance of RFID tag.

²² Two-year credential required to access petroleum terminals located in Doraville. City refuses to accept HME or TWIC.

Exhibit 2: State-Based Hazardous Materials Permit Requirements

State Hazardous Materials Permits

- - No State HM Permit
- ◐ - Uniform Permit State
- ◑ - Separate HM Permits



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