INTERESTED PARTIES FOR HAZARDOUS MATERIALS TRANSPORTATION

December 14, 2010

Dr. Magdy El-Sibaie
Associate Administrator for Hazardous Materials Safety
Pipeline and Hazardous Materials Safety Administration
US Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

Re: Petition for Rulemaking to Subject Special Permit and Approval Standard Operating Procedures to Notice and Comment

Dear Dr. El-Sibaie:

The undersigned organizations represent industries engaged in the transportation of hazardous materials. Our member companies have operations in every state, have combined business revenues in excess of $1 trillion, employ millions of workers, and have an enviable record of hazardous materials transportation safety and security. The Interested Parties for Hazardous Materials Transportation (Interested Parties) exists to share information, to identify issues and to advocate for policies relating to the safe, secure and efficient transportation of hazardous materials.

Pursuant to 49 CFR 106.95 of the hazardous materials regulations (HMR), we submit this petition for rulemaking to amend 49 CFR 107.113, the regulations under which PHMSA processes and evaluates an applicant's "fitness" to conduct business under a Special Permit (SP) or Approval. The undersigned organizations specifically request that, to the extent PHMSA is considering subjecting applicants to the Special Permits Program Standard Operating Procedures (SP SOP)[1] and Approval Program SOPs (Approval SOP)[2],such procedures should be included in the above cited regulations as an amendment, and, therefore must be subject to prior notice and comment as required under the Administrative Procedure Act, 5 U.S.C. 553.

Historical Regulatory Structure

In 1975, Congress enacted the Hazardous Materials Transportation Act (HMTA). The Act provides that the Department of Transportation (DOT) must establish "procedures prescribed by regulation" to issue, modify or terminate "exemptions" (subsequently re designated as "special permits"). (49 U.S.C. 5117(a).) SPs allow holders to perform a function that is not otherwise permitted under the HMTA or the HMR. Approvals allow holders to perform a function that requires prior consent under the HMR. (49 CFR 107.1). It is significant that Congress requires that *procedures* for granting a SP to be promulgated by rulemaking, and that approvals are derived from rules that have been promulgated by rulemaking.

[1] October 2009, Version 1.0.
[2] August 2010, Version 1.0.

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On May 9, 1996 PHMSA (formerly designated the Research and Special Programs Administration), in accordance with the HMTA, promulgated rules amending procedures to issue, modify or terminate SPs and approvals. The rule indicated that, if "the applicant is fit to conduct the activity" a SP may be authorized. (49 CFR 107.113(f)(5) and 49 CFR 107.701(c)(5).) In order to determine an applicant's "fitness," PHMSA is authorized under the rule to conduct an assessment based on "information in the application, prior compliance history of the applicant, and other information available to [the agency]."

Since 1996, the regulations at 49 CFR 107.113(f)(5) and .701(c)(5) have governed fitness determinations. When applying for a SP, to modify an SP or to become party to an existing SP, or to obtain an approval, members of the regulated community fully expect that PHMSA will determine their fitness to conduct the transportation activity based, in part, on information included in the SP or approval application. Accordingly, applicants need to ensure that applications for SPs and approvals are complete, accurate, and include current descriptions of transportation activity that is to be conducted and the methods by which it will be accomplished. Notice of each SP application also is published in the Federal Register, allowing the public an opportunity to comment on the activity proposed in the application. In addition, PHMSA has complete compliance history information on SP and approval applicants already in its possession, and we have always expected and assumed that a review of that information is a part of PHMSA's fitness evaluation. We have naturally assumed that any "other information" that might be reviewed in the fitness determination is information that is accessible to PHMSA, e.g., testing data associated with the materials to be transported under the SP or approval, carrier safety ratings if relevant, and the like.

The New Regulatory Structure

On October 5, 2009, PHMSA issued a 96-page document, the SP SOP, and on August 26, 2010, a 43-page document, the Approvals SOP, describing a new, complex procedural scheme that completely alters the SP and approvals application and evaluation process, and, in particular, fundamentally changes the procedures the agency intends to follow in conducting a fitness determination without providing opportunity for public notice and comment as the agency had done in 1996.

The new procedures for evaluating an applicant's fitness are set forth in the SP SOP at Section 6.2 "Fitness Review Sub-Process" and in the Approvals SOP at Section 8 "Minimum Level of Fitness Review." The new procedures include an "Initial Fitness Evaluation/Review" for SP applicants and a "Tier One Minimum Level of Fitness Review" for approval applicants that contain specific criteria which, if met, will automatically subject the SP applicant to a three-phased "Advanced Fitness Evaluation/Review and Recommendations" and the Approvals applicant to a "Tier Two and possibly a Tier Three Minimum Level of Fitness Review", hereinafter "Advanced Reviews." (See SP SOP Section 6.2.5 and Approval SOP Sections 8 "Introduction" and 10 "Fitness Evaluation Form").

The Advanced Reviews require PHMSA to conduct an in-depth review of the applicant's safety history. Both Phase 1 and 2 and Tier 2 require evaluation by Field Operations, PHMSA's enforcement arm, of the "nature, circumstances, extent, and gravity of the matters that triggered the Advance Evaluation." Based on this subjective review, Field Operations may require a Phase 3 and Tier 3 review. The Phase 3 and Tier 3 reviews trigger the requirement for "on-site fitness reviews" of the applicants' facilities. Field Operations conduct these fitness compliance reviews in accordance with the OHME "Standard Operating Procedures Chapter 19 – FITNESS COMPLIANCE REVIEWS AND ENFORCEMENT RECOMMENDATIONS". Chapter 19 defines a "Fitness Inspection" as "a type of inspection or **pre-approval** review conducted by … assigned **investigators** and each applicable mode to ensure that entities are complying with the provisions of an existing approval or permit, or that **a requested new permit or approval will meet the intent and adequate level of safety to that afforded by the regulatory requirement concerned**." (Emphasis added.)

PHMSA Public Meeting on Special Permits and Approvals – Minimum Level of Fitness Determinations

On August 19, 2010, PHMSA conducted a public meeting to provide an opportunity for all interested parties to comment on the aspects of the Minimum Level of Fitness Determination Criteria, including the use of HIP and SAFER data, applicability of the data, criteria used in determining an applicant's minimum level of fitness, potential alternative sources of fitness data and other appropriate matters.

Many members of the regulated community attended this public meeting, including many members of the Interested Parties. While there was discussion about criteria that should be included in the minimum level of fitness determinations, there was even more discussion about the problems with, and objections to, several elements of the newly imposed SOPs, including the fact that certain standards are unknown to the applicants. In addition, many organizations also submitted comments on the criteria to determine the minimum level of fitness to the docket devoted to HM-233B, PHMSA-2009-0410-0001: Hazardous Materials Transportation: Revisions of Special Permits Procedures. Interested Parties members that submitted such comments include the following:

American Coatings Association, Inc.
American Trucking Association
Association of American Railroads
The Chlorine Institute
Council on the Safe Transport of Articles
Dangerous Goods Advisory Council
Gases and Welding Distributors Association
Industrial Packaging Alliance of NA
Institute of Makers of Explosives
National Propane Gas Association
Radiopharmaceutical Shippers and Carriers Conference

The oral testimony and discussion at this August 19 meeting reflect the individual positions and arguments of the commenters. There has been no organized effort by the regulated community to develop any consensus criteria for determining the minimum level of fitness. A formal rulemaking process, complete with prior public notice and an opportunity for public comment, is the appropriate environment to discuss this issue and provide the agency with the benefit of the regulated community's collective experience. There is no substitute for such a process.

Request for Rulemaking

President Obama has made open government a priority of his administration. He has advocated for transparency, public participation and collaboration.[3] These objectives are best achieved through public notice and opportunity for comment rulemaking. As it currently stands, the agency is making fitness determinations based on criteria that are completely unknown to the regulated community. The ability for any one company to continue operating is wholly dependent upon conformity with new, invisible standards.

The SP and Approval SOPs should be subject to notice and comment under the rulemaking procedures in the Administrative Procedure Act and as outlined in Part 106 of the HMR for the following reasons: these new processes and procedures differ dramatically from the historical implementation of "fitness review" for SP and approvals; both SOPs serve to broaden the scope of fitness reviews well beyond that contemplated in the original 1996 rulemaking and, in effect, serves to amend the existing regulation; and the SP SOPs contain mis-statements and inaccuracies. In

[3] See President Barack Obama's Memorandum for the Heads of Executive Departments and Agencies, Subject: Transparency and Open Government, January 21, 2009

addition, the public meeting conducted by PHMSA on August 19 to discuss the new "fitness standards" does not constitute "notice and comment" as contemplated by Part 106.

The Standard Operating Procedures Have Fundamentally Changed the Existing Regulatory Process by Adding New Criteria

As can be seen, the new SOP procedures are completely different from the process adopted by rulemaking in 1996 and include the review of new criteria that remains unknown to the regulated community. This inclusion of new criteria is a substantive amendment to the current, existing regulations. These new procedures and criteria have never been published in the Federal Register as an Interim Final Rule, a Direct Final Rule or any other rulemaking document that PHMSA is permitted to issue under 49 CFR 106.10. Consequently, applicants for SP or approvals that find themselves in an Advanced Review have no idea what criteria are being evaluated by PHMSA personnel to grant or deny SP applications.

The Standard Operating Procedures Have Created New Authority

PHMSA has indicated that on-site inspections and reviews will be included in the fitness reviews for both SP and approval applications. This authority is not granted in the regulation at 49 CFR 107.113(f)(5) nor at 107.709(c) (5). The regulated community is currently unaware of what further standards applicants will be expected to meet as part of the on-site inspection. A closely regulated industry should expect periodic inspections to ensure compliance. In fact, such inspections would not have to be linked to an application renewal. However, without notice and comment rulemaking, PHMSA has devised a "pre-approval" licensing power and delegated it to field staff. Moreover, the field staff are no longer tasked to look at an applicant's capability and integrity, but field staff is being asked to render judgment as to whether the requested permit or approval will afford an "adequate level of safety," a determination heretofore rendered by PHMSA's technical staff. The exercise of these extraordinary powers can mean the difference between a business' ability to operate or not.

Conclusion

PHMSA's insistence on conducting fitness determinations according to newly changed criteria absent public notice and opportunity to comment on the fitness criteria is untenable, and flies in the face of Congress' original intent in enacting the HMTA. As noted by Congress, in a report preceding the first HMTA reauthorization:

> When a regulation requires prior approval of something, but does not set a standard for giving approval, it is the subsequent approval of the specific matter which actually sets the standard of conduct. Far from being innocuous, this regulation sets the stage for perversions of regulatory authority and evasions of the administrative procedures which Congress established to guard the integrity of the regulatory processes . . .
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> When regulations require prior approval but do not set standards for giving approval, the agency may publish in-house instructions to employees. The agency usually develops these instructions in consultation with industry, but without public participation. *To the extent that these instructions set standards for giving approval, they have the effect of a regulation, so they should be adopted only after notice and opportunity for public comment*.[4]

[4] *Hazardous Materials Transportation: A Review and Analysis of the [DOT] Regulatory Program*; Senate Committee on Commerce, Science, and Transportation, Appendix 1 – Problems of Regulating By Special Permit, (Apr. 1979). (Emphasis added).

Further, notice and opportunity for comment is consistent with Recommendation 305.92-1 of the recently revived Administrative Conference of the United States[5]: " . . .[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."

For the forgoing reasons, the undersigned organizations respectfully request that PHMSA initiate a rulemaking immediately to subject the Special Permits Program Standard Operating Procedures (October 2009, Version 1.0) and Approval Program SOPs (August 2010, Version 1.0) to public notice and an opportunity to comment.

Respectfully submitted,

Agricultural Retailers Association
American Chemistry Council
American Coatings Association
American Pyrotechnics Association
American Trucking Associations
Association of Hazmat Shippers
The Chlorine Institute, Inc.
Council on Safe Transportation of Hazardous Articles
Dangerous Goods Advisory Council
The Fertilizer Institute
Gases and Welding Distributors Association
Industrial Packaging Alliance of North America
Institute of Makers of Explosives
International Vessel Operators Dangerous Goods Association, Inc.
Lighter Association, Inc.
National Association of Chemical Distributors
National Tank Truck Carriers, Inc.
National Association of Truckstop Operators
The National Industrial Transportation League
National Private Truck Council
National Propane Gas Association
PRBA-The Rechargeable Battery Association
Radiopharmaceutical Shippers & Carriers Conference
Railway Supply Institute
Reusable Industrial Packaging Association
Sporting Arms & Ammunition Manufacturers' Institute
Steel Shipping Container Institute
The Sulphur Institute
Truckload Carriers Association
Utility Solid Waste Activities Group

[5] The Administrative Conference of the United States (ACUS) was established by statute in 1964 as an independent agency of the United States government. The Conference's purpose is to promote improvements in the efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions. Administrative Conference Act of 1964, Pub. L. No. 88-499, 5 USC 591-596.