



December 21, 2010

The Honorable Anne Ferro
Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, S.E.
Washington, DC 20590-0001

RE: Petition for Rulemaking – Hazardous Materials Safety Permit

Dear Administrator Ferro:

Pursuant to 49 C.F.R. § 389.31, the Agricultural Retailers Association, the American Pyrotechnics Association, the Institute of Makers of Explosives, the National Association of Chemical Distributors, and the National Tank Truck Carriers, Inc., (hereinafter collectively the Petitioners) submit this petition for rulemaking to modify the regulations governing the hazardous materials safety permit (HMSP). As discussed in more detail herein, the proposed modifications are necessary to ensure that qualified carriers are able to continue transporting permitted hazardous materials and to eliminate certain biases currently present in the program.

A. Identification of Petitioners

Pursuant to 49 CFR § 389.31(b)(3), the Petitioners describe their interest in the proposed amendments to the HMSP program set forth at 49 CFR Part 385.

The Agricultural Retailers Association (ARA) affirms that it is a national trade association representing the interests of crop input retailers and distributors.¹ ARA backs transportation regulations that improve the safety and efficiency of agribusiness operations. ARA members who carry fertilizer from distribution point to the farm are adversely impacted by the HMSP program and have an interest in improving its implementation in a manner that enhances the safe transportation of permitted materials.

¹ ARA is a not-for-profit trade association that advocates on behalf of America's agricultural retailers and distributors. ARA members provide goods and services to farmers and ranchers, which include fertilizer, crop protection chemicals, seed, crop scouting, soil testing, custom application of pesticides and fertilizers, and development of comprehensive nutrient management plans. Retail and distribution facilities are located throughout all 50 states and range in size from small family-held businesses and farmer cooperatives to large companies with multiple outlets.

The American Pyrotechnics Association (APA) is the principle trade association representing manufacturers, importers, and distributors of fireworks in the United States. The APA has over 240 member companies. Along with their subsidiaries, APA's member companies are responsible for 90 percent of the fireworks displayed in the U.S. Each fireworks display produced in the U.S. is transported at some point by motor vehicle. Fireworks are classified as explosives for transportation purposes and as such, the industry is heavily regulated. Among these regulations, APA members are subject to the HMSP.

All members of the Institute of Makers of Explosives (IME) engaged in the transportation of explosives are subject to the HMSP.² Explosives are one of the most regulated industries in the United States and IME members' highest priority is the safety and security of their operations. Carriers of explosives are the largest subset of HMSP holders. All explosives are transported at some point by motor vehicle. The majority of these truck movements are short-haul and are performed by private motor carriers because specialized equipment is needed for the movement of bulk explosives. As a result, intermodal or interline transfers of HMSP-regulated explosives are rare. The ability to qualify for and to hold an HMSP is critical to these companies, who are not in a position to fall back on the movement of other types of cargo if disqualification issues arise. If they forfeit their HMSP, their transportation operations shut down, which could force these companies out of business.

The National Association of Chemical Distributors (NACD) and its over 380 member companies are vital to the chemical supply chain, providing products to over 750,000 end users. NACD members are leaders in health, safety, security, and environmental performance through implementation of Responsible Distribution, a third-party verified management practice established in 1991 as a condition of membership.³

The National Tank Truck Carriers, Inc. (NTTC) affirms that it is the national trade association representing the interests of the segment of the trucking industry that transports bulk commodities in tank trailers. NTTC has safety as its primary mission and has long worked cooperatively with the U. S. Department of Transportation. NTTC members transport hazardous materials that require a safety permit and are adversely impacted by the aspects of the HMSP program. NTTC is interested in continuous improvement in the HMSP program and the safe transportation of hazardous materials subject to the HMSP.

B. Text of the Rule and Proposed Amendments

Pursuant to 49 CFR § 389.31(b)(2), the Petitioners identify 49 CFR § 385.407 as the regulation that is the subject of this Petition. Petitioners are urging FMCSA to amend 49 CFR § 385.407 to: (1) eliminate the dramatic fluctuations in the eligibility standards that are caused by periodic adjustments in the motor carrier out-of-service rates; and (2) average the various eligibility criteria to ensure that the original goal of the program that 70 percent of hazardous materials motor carriers would be able to

² The IME is a nonprofit association founded in 1913 to provide accurate information and comprehensive recommendations concerning the safety and security of commercial explosive materials. IME represents U.S. manufacturers and distributors, including private and for-hire motor carriers, of commercial explosive materials and oxidizers, as well as other companies that provide related services. The majority of IME members are "small businesses" as determined by the U.S. Small Business Administration.

³ Additional information on NACD and its members is available at www.nacd.com.

qualify for the HMSP and to eliminate the current bias against certain types of hazardous materials carriers. Suggestions to achieve these proposed changes are indicated in the regulatory text below:

§385.407 What conditions must a motor carrier satisfy for FMCSA to issue a safety permit?

* * * *

(a)(2) FMCSA will not issue a safety permit to a motor carrier that:

* * * *

(a)(2)(ii) Has a preventable crash rate in the top 30 percent of the national average as indicated in the FMCSA Motor Carrier Management Information System (MCMIS); or

(a)(2)(iii) Has a an driver, vehicle, and hazardous materials, or total out-of-service rate that is above 8.64 percent for driver, 33.33 percent for vehicle, and 5.04 percent for hazardous materials in the top 30 percent of the national average of the six prior years as indicated in the MCMIS.

Or alternatively:

(a)(2)(ii) Has a preventable crash rate in the top 30 percent of the national average as indicated in the FMCSA Motor Carrier Management Information System (MCMIS); ~~or~~

(a)(2)(iii) Has a an aggregated driver, vehicle, and hazardous materials, or total out-of-service rate in the top 30 percent of the national average of the six prior years as indicated in the MCMIS; or⁴

(a)(2)(iv) Has a driver, vehicle, or hazardous materials out-of-service rate in the top 10 percent of the national average.

Petitioners also have identified several other improvements to the HMSP program that do not require formal rulemaking. These improvements are discussed in Appendix A to this Petition.

C. Information in Support of the Proposed Amendments

Pursuant to 49 CFR § 389.31(b)(4), this section sets forth information and arguments in support of the proposed amendments set forth in Section B, *supra*.

1. Biennial Revision of Disqualification Criteria

Petitioners' members are harmed by the periodic adjustment of the disqualification criteria (*i.e.*, carriers that fall within the top 30% of out-of-service rates for driver, vehicle or hazardous materials).

⁴ Note we propose deleting the word "total" as it is used to modify the phrase "out-of-service," since FMCSA does not compute a "total out-of-service" rate for motor carriers.

Under the current HMSP program, a carrier that is deemed qualified to possess the permit one year may continue to perform safely and have no change in its out-of-service rates, but due to changes in the performance of the carrier's peers or in enforcement patterns, the carrier could be disqualified in a subsequent permitting cycle if one or more of the out-of-service threshold rates is revised downward. This moving target of eligibility makes it difficult to ensure business continuity.

Some of the materials that trigger the obligation to obtain a permit require a large capital investment in specialized equipment (*e.g.*, stainless steel cargo tanks or multipurpose bulk trucks). Companies that are eligible to obtain the HMSP and then, due to improvement in the industry as a whole and with no change in their own safety performance, are subsequently disqualified from obtaining the permit could suffer a significant loss as they are forced to withdraw from transporting these specialized materials.

Given the years of experience FMCSA has administering this program, the agency could eliminate the fluctuating eligibility criteria problem by promulgating a rule that fixes the out-of-service rates at a certain level without biennial adjustments. We suggest fixing the rates at the average of each out-of-service rate set since 2005. By fixing the out-of-service disqualification rates, carriers will be judged on their own performance. It will still demand vigilant attention to safety in order to maintain these scores. It will eliminate the cloud of uncertainty that is an anathema to business. Alternatively, FMCSA could ameliorate the impact of a sudden change in one or more of the out-of-service rates that serve as HMSP eligibility criteria by combining and averaging these rates over a rolling period of time, such as six years. While a six-year average of out-of-service rates would still result in a periodic change in the eligibility criteria, the impact of a significant change in any one cycle would be lessened. In no case should more than 30 percent of the hazardous materials motor carriers be deemed ineligible to hold an HMSP.

2. Averaging Eligibility Criteria

When originally promulgated, FMCSA indicated that 3,131 motor carriers would be impacted by the HMSP program (*i.e.*, were engaged in transporting one or more of the covered hazardous materials).⁵ Unfortunately, this estimate proved wrong, as many of these motor carriers were deemed ineligible under the promulgated standards. In fact, less than 1,400 motor carriers have obtained an HMSP.⁶ One of the reasons for this shortfall in permitted carriers is related to the manner in which the out-of-service eligibility criteria are applied.

a. The Eligibility Criteria Disqualifies More than Thirty Percent of Registered Hazardous Materials Motor Carriers.

The regulatory text set forth in the supplemental notice of proposed rulemaking as well as the preamble to the HMSP final rule describes the Agency's intent to disqualify motor carriers from obtaining an HMSP where they do not have a "Satisfactory" safety rating.⁷ The preamble goes on to say that for those carriers that have not undergone a complete compliance review, no safety permit will

⁵ See 69 *Federal Register* 39350, 39362 (June 30, 2004).

⁶ On October 4, 2010, FMCSA reported that the total number of HMSPs issued was 1,386. See electronic mail from Roxane Greene, FMCSA, to Richard Moskowitz, ATA (October 4, 2010, 11:34 a.m.).

⁷ See 68 *Federal Register* 49737, 49752 (August 19, 2003).

issue if they have a crash rate in the top 30 percent of the national average, or a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average.

Motor carriers must have a “Satisfactory” safety rating in order to obtain a safety permit. In addition, *until we complete a compliance review*, FMCSA will not issue a safety permit to a motor carrier that has, as indicated in the agency’s Motor Carrier Management Information System (MCMIS), a crash rate in the top 30 percent of the national average, or a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average.⁸

The agency’s stated intent was to apply the 30 percent out-of-service criteria to motor carriers that have not undergone a compliance review, yet the final regulatory text applied the 30 percent out-of-service criteria to all motor carriers – even those that have undergone a compliance review and have achieved a satisfactory safety rating. Petitioners believe that FMCSA should revise the regulation to apply out-of-service disqualification rates only to those motor carriers that do not have a satisfactory safety rating, as originally proposed.

Notwithstanding this change in the application of out-of-service criteria to all motor carriers – including those that have a satisfactory safety rating – FMCSA’s intent to render 30 percent of the hazardous materials motor carriers ineligible to hold an HMSP has not occurred and instead a much greater percentage of hazardous materials motor carriers have been deemed ineligible. The application of separate out-of-service rates in the vehicle, driver and hazardous materials categories disqualifies more than 30 percent of the hazardous materials motor carriers.⁹

b. LTL Bias from Hazardous Materials Out-of-Service

The hazardous materials out-of-service criterion operates as a bias against less-than-truckload (LTL) carriers given the nature of their operations. Many of the large LTLs perform at a level that is far below the disqualification thresholds for the driver and vehicle out-of-service criteria, but above the disqualification threshold for the hazardous materials out-of-service criterion. As a result, many companies in this segment of the trucking industry cannot qualify for the HMSP.

Most of hazardous materials out-of-service violations for LTL carriers are for load securement and placarding. Blocking and bracing is a particular challenge for LTL carriers that make multiple pickups and deliveries and are often dealing with small hazmat packages (2-3 lbs). In addition, blocking and bracing may be subjectively enforced as some inspectors will find a violation for any package movement, while most exercise discretion and issue out-of-service orders for movement that may adversely affect package integrity.

⁸ *Id.* (emphasis added).

⁹ Since the carriers at the top of each out-of-service category and the crash rate category are not the same, the disqualification rate among all carriers is higher than 30%. To illustrate, for every 100 hazardous materials carriers, 30 will be disqualified based on the hazardous materials out-of-service rate. The remaining 70 hazardous materials carriers are then subjected to evaluation under vehicle and driver out-of-service criteria and the crash rate criteria. Some of these remaining 70 carriers will fall within the top 30% of these additional disqualification categories and will be deemed ineligible for the HMSP. Additional information on the effect of the multiple disqualification criteria is set forth in Appendix B.

Recognizing that for most LTLs hazmat is a small percentage of the freight they haul, it is difficult to train drivers on the placarding rules when the types, quantities and classes of hazmat they transport day-to-day varies. The placarding rules are complex - not so much because the general rules are too complex to teach, but more as a result of the nuances and exceptions, which are overly complicated and difficult to remember especially in an environment where the freight varies so much from day-to-day.¹⁰ As a result, many large LTL carriers do not qualify for the HMSP.

c. Vocational Bias

The hazardous materials out-of-service criterion also presents a bias against vocational carriers needing an HMSP. Hazardous materials out-of-service violations are issued when any hazardous material is found outside of a packaging. The explosives industry's specialized bulk delivery trucks are operated as mobile manufacturing units. The material manufactured for blasting is viscous. It will not pour out of transfer hoses or evaporate; instead, it dries and cakes on the exterior of the packaging and unloading conveyances. While efforts are made to close and cap transfer hoses, during transportation vibration incident to transportation sometimes will result in de minimis seepage of this viscous material. There is no inherent safety risk, but the presence of this residue outside of the hazmat packaging results in a disproportionate amount of hazardous materials out-of-service violations stemming from the transportation of these materials in this type of transport unit.

Although specialized bulk explosives delivery trucks spend a relatively small percentage of their time on major interstates where the majority of roadside inspections are conducted, they are predisposed to inspection when they encounter roadside stops because of the class of materials transported. Similarly, the agriculture industry relies on the delivery of fertilizer and crop protection chemicals to rural areas where few inspections occur. Additionally, the majority of the work performed by these types of specialized carriers is seasonable, further limiting opportunities for inspections. Applying FMCSA's statistically significant standard, if two of at least three inspections result in an out-of-service violation in a 12-month period, the carrier will have to obtain at least 56 "clean" inspections using current hazardous materials out-of-service rates to qualify for a HMSP, and for each additional out-of-service violation the number of "clean" inspections that must be obtained goes up by 28. In the rural and local delivery areas where these seasonal carriers operate, it is virtually impossible to obtain enough clean inspections to offset the impact of an out-of-service order, especially when the statistically significant standard is reached well into the 12-month period.

d. Averaging Out-of-Service Rates

One way to ameliorate the impact of applying each out-of-service criteria (*i.e.*, driver, vehicle and hazardous materials) separately and reducing the bias against LTL and rural or local delivery carriers would be to aggregate and average the out-of-service rates. By averaging the three criteria, a motor carrier with exceptionally low out-of-service rates in two categories and an out-of-service rate slightly above the disqualification threshold in the third category could still qualify for the HMSP. To

¹⁰ Another factor that potentially impacts this bias stems from the Inspection Selection System. Good carriers that have a low Inspection Selection System rate are being passed over for many inspections that they would ordinarily pass. These carriers are being pulled in for inspections when there is an observable problem as they pass through the scales (such as a missing placard). As such, the inspections are not truly random and they are not receiving credit for inspections that they would pass, since many of these inspections are not recorded.

ensure that a motor carrier with an exceptionally high out-of-service rate in one or more categories remains ineligible to obtain an HMSP, FMCSA could continue to disqualify carriers with driver, vehicle or hazardous materials out-of-service rates in the top 10 percent.¹¹

FMCSA also should consider eliminating the first year “free-pass” by harmonizing the calculation of disqualification rates with the policy to be used in CSA. Under CSA two years of inspection data will be used and newer data will be more heavily weighted.

Another reform worthy of FMCSA’s consideration involves the integration of a carriers Inspection Selection System (ISS) methodology into the disqualification criteria. Because carriers with low ISS scores are experiencing a reduced number of hazardous materials inspections and are being inspected only when an observable defect is present at a weigh station (e.g., missing placard), the number of failed inspections may over represent the carrier’s true performance. To address this situation, FMCSA should consider using the ISS score as part of the formula to evaluate carrier hazardous materials out-of-service rate.

e. Crash Rates

To be eligible for an HMSP, a motor carrier may not have a crash rate in the top 30 percent of the national average.¹²

i) Using VMT as a Normalizing Factor

In calculating crash rates, FMCSA divides the total number of crashes over the prior twelve month time period by the total number of power units for each motor carrier. The use of power units alone as a normalizing factor is an inappropriate measure of exposure, as many trucks can be idled due to downturns in the economy, slowdown in individual motor carrier operations, or other reasons. Moreover, the use of power units does not recognize exposure differences for those motor carriers that utilize team drivers and have greater asset utilization and therefore greater exposure for each power unit in operation.

Exposure on the nation’s highways is more accurately reflected by trucks being on the road (*i.e.*, miles that are traveled by trucks that can result in crash potential). Vehicle miles traveled (VMT) should be combined with power units as a normalizing factor used to calculate crash rates under the HMSP program. Indeed, FMCSA has made this same correction in the context of the CSA2010 program.

ii) Preventability

In September 2008, FMCSA adopted a policy to consider “preventability” when a motor carrier contests the denial of a safety permit based upon its crash rate and presents compelling evidence

¹¹ The “10 percent” threshold is a placeholder. Obviously, the threshold would need to be below 30%. While industry has experience with the impacts of the 30% OOS threshold, until FMCSA runs real performance numbers against the 10% standard, the implications will not be fully understood. In determining this threshold consideration should be given to the differences between long-haul and short-haul operations. Reliance on OOS criteria as the sole determinate for fitness has limitations.

¹² See 49 CFR § 385.407(a)(2)(ii).

that one or more of the crashes listed in the Motor Carrier Management Information system (“MCMIS”) was not preventable.¹³ This modification should be reflected in the regulatory text. We further believe that FMCSA should exclude non-preventable accidents in its initial calculation of a carrier’s crash rate, rather than forcing the carrier to come forward to challenge the inclusion of each accident on a case-by-case basis.

iii) Geographic Bias

We also have concerns over the data used to support FMCSA’s crash rate calculation, as many states underreport crashes to the MCMIS database, which can result in a geographical bias against certain carriers. Attached as Appendix C is a map depicting state crash rate underreporting. While we are reticent to point out a problem for which we do not have a solution, we believe that FMCSA should begin researching the practices utilized by those states with the highest reporting rates and compile a list of best practices. FMCSA should then use its leverage over the states to encourage them to embrace these crash reporting practices.

CONCLUSION

For the reasons set forth above, Petitioners ask FMCSA to modify the regulations governing the HMSP program to provide for the use of a six-year average when establishing the disqualification thresholds to reduce the impact of having carriers comply with a moving eligibility target, to smooth the differences that may occur from cycle-to-cycle, and to eliminate the impact of a single period with either abnormally high or abnormally low out-of-service rates. Petitioners also request that FMCSA begin averaging the vehicle, driver and hazardous materials out-of-service rates to create a blended disqualification threshold to avoid applying the disqualification criteria in a manner that renders more than 30 percent of the hazardous materials carriers ineligible to receive the HMSP and to reduce the bias against certain industry segments, such as the LTL, rural and local delivery carriers.

Respectfully submitted,

AGRICULTURAL RETAILERS ASSOCIATION
AMERICAN PYROTECHNICS ASSOCIATION
INSTITUTE OF MAKERS OF EXPLOSIVES
NATIONAL ASSOCIATION OF CHEMICAL DISTRIBUTORS
NATIONAL TANK TRUCK CARRIERS, INC.

Attachments

Appendix A
Appendix B
Appendix C

¹³ See 73 *Federal Register* 53383 (September 16, 2008).

Appendix A

Administrative Improvements to the HMSP are Warranted

On January 1, 2011, the HMSP program will enter its fourth permitting cycle. In the intervening years, both the agency and the regulated community have gained valuable experience in what has worked and what has not worked in this program. Petitioners have identified several improvements to the HMSP program that do not require formal rulemaking. Petitioners have met with FMCSA on multiple occasions to discuss each of the following concerns:

- Improve FMCSA's ability to verify a motor carrier's compliance with the financial responsibility regulations;
- Eliminate the double-counting of hazardous materials out-of-service violations with vehicle out-of-service violations;
- Identify and remove non-preventable accidents from a motor carrier's crash rate calculation;
- Add vehicle miles traveled as a normalizing factor for the calculation of motor carrier crash rates;
- Extend the period of time carriers have to renew applications from 30 to 60 days;
- Ensure that existing HMSPs are not shown as invalid upon submission of a renewal application;¹⁴
- Establish a simplified on-line option for shippers and carriers to ascertain the HMSP status of carriers; and
- Provide the HMSP community advance notice of disqualification rates.

FMCSA has taken steps to address the last two issues. FMCSA has added an on-line feature to a carrier's SAFSTAT profile which indicates whether a carrier holds a valid HMSP. This feature facilitates compliance with 49 CFR 173.22(b).¹⁵

On September 22, 2010, FMCSA, publish a notice in the *Federal Register* announcing its policy to publish HMSP disqualification rates three months in advance of the January 1st effective date of the next permitting cycle. Still, implementation of the two initiatives mentioned above has been marred as a result of inadequate agency information technologies resources.¹⁶ Moreover, the other listed administrative changes will also require information technologies resources to implement.

¹⁴ The on-line HMSP status feature defaults to "no" when a carrier's application is being processed. The correct status would report "pending." IT resources are needed to fix this problem.

¹⁵ See http://mcmis.volpe.dot.gov/mcs150t/pkg_shipper.prc_shipper_request. The functionality of this on-line database should be bolstered to allow motor carriers to identify other carriers with HMSPs to facilitate interlining between regional carriers.

¹⁶ As stated above, the on-line HMSP status feature defaults to "no" when a carrier's application is being processed. The dissemination of this erroneous data could negatively impact the commercial operations of any affected HMSP qualified carriers. FMCSA also missed the promised October 1st release date of new HMSP disqualification rates. The rates were subsequently released November 2, 2010.

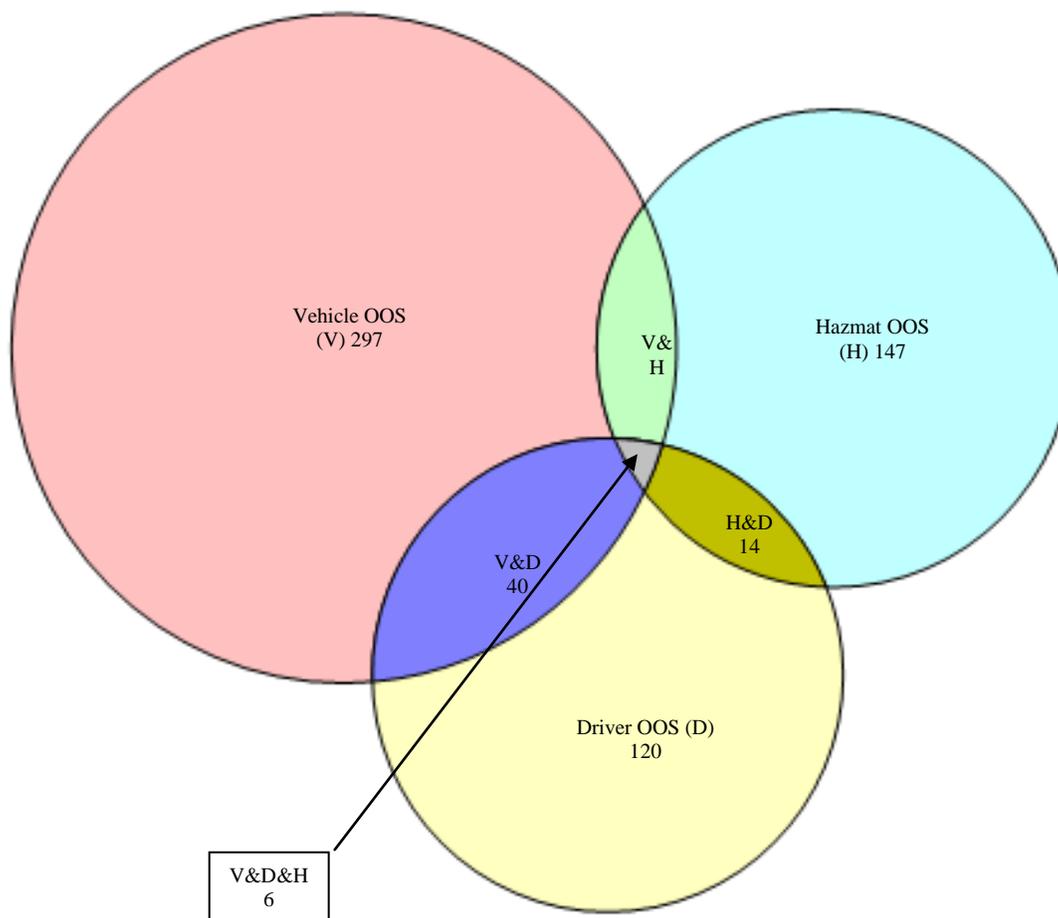
We have been told that these information technology programming requests are in a queue with over a dozen other administrative requests that have been made by HMSP program staff. Furthermore, we had been told not to expect any change to the pending status of these requests until FMCSA has implemented the Comprehensive Safety Analysis program (CSA).

As central as CSA is to FMCSA's mission, it is not appropriate that other FMCSA programs be left to languish. CSA is still a work in process. Meanwhile, FMCSA's safety mission is being carried out today by existing programs that should not be allowed to falter from inattention. This is especially true if those programs are expected to continue to be a part of the agency's safety infrastructure after CSA implementation. The HMSP is one such program. The failure to address the IT needs of the HMSP puts more burden on staff to manually process and correct system errors and omissions, and it creates uncertainty for motor carriers whose applications are denied because of administrative glitches.

Appendix B

Illustration of the Impact of Multiple Disqualification Criteria

Venn Diagram of Denials of an HMSP application for exceeding the out-of-service criteria from 2005 - 2008.



The diagram does not include Crash Rate, another criteria for HMSP denial set at the 30th percentile of all motor carriers. Adding this data set would further emphasize the effect of multiple disqualifying criteria all set at the 30th percentile. The 55 denials issued for exceeding the Crash rate (some also were over the OUT-OF-SERVICE criteria) are not included in this analysis.

1. FMCSA issued a total of 640 denials of an HMSP for out-of-service and 1,869 first-time HMSPs. But since renewals and reissues of HMSPs are combined in the data provided by FMCSA, it is impossible to ascertain any reliable information about out-of-service denial rates.
2. The analysis strongly indicates that over 30 percent of motor carriers are disqualified for the HMSP for out-of-service alone. Only the same analysis of all motor carriers would tell the full

story. Surely however, the result would show that well over 30 percent of motor carriers cannot satisfy the HMSP eligibility criteria.

3. The hazardous materials out-of-service criteria is applied to less than 6% of motor carriers since only about 40,000 of the over 700,000 motor carriers in the U.S. hold a PHMSA registration and thus carry hazmat. About 13,000 of PHMSA registrants (~30%) would be disqualified for an HMSP under the hazardous materials out-of-service criteria leaving about 27,000 motor carriers. FMCSA has not published data quantifying the number of additional motor carriers that would be disqualified by the driver out-of-service, vehicle out-of-service, and Crash Rates, but as the diagram above shows, some of the remaining 27,000 would be. If only 10% of these 27,000 were disqualified for each criterion, then less than 20,000 motor carriers remain.

Conclusion: More than 50 percent of the PHMSA-registered hazardous materials motor carriers are ineligible for an HMSP.

