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Record Type: Record

To: John F. Morrall III/OMB/EOP@EOP

cc:

Subject: Draft Report to Congress on the Costs and Benefits of Federal Regulation

The attached document provides the Institute of Makers of Explosives comments as requested in the March **28**, 2002 Federal Register. In the section on "guidance documents," we provide the Internet address of the guidance document we reference. If this is not an acceptable format to provide you with referenced guidance documents, please let me know. I will be happy to mail you a hard copy.

Thank you for your attention to these issues.

Cynthia Hilton

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- OMB-Reform of Fed Rules.doc



The safety association of the commercial explosives industry.

May 24, 2002

John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Rm. 10235
725 Seventeenth St., NW
Washington, DC 20503

VIA: jmorrall@omb.eop.gov

RE: Draft Report on the Costs and Benefits of Federal Regulations'

Dear Sir:

On behalf of the Institute of Makers of Explosives (IME), I am submitting comments, as requested, on recommendations for the reform of Federal rules and guidance for inclusion in the report to Congress on Costs and Benefits of Federal Regulations authorized by Section 624, Treasury and General Government Appropriations Act of FY 2001.

Interest of the Respondent

The IME is the safety association of the commercial explosives industry. Our mission is to promote safety and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules **and** regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations. Last year, over 2.5 million metric tons of explosives were consumed in the United States of which IME member companies produced over 95 percent. These products are used in every state in the Union and are distributed worldwide. In the explosives industry alone, the value of our shipments is estimated in excess of \$1 billion annually.* The ability to manufacture, transport and distribute these products safely and securely is critical to this industry.

¹ 67 FR 15014 (March 28, 2002).

² Explosives Manufacturing, 1997 Economic Census, US Department of Commerce, August 1999, EC97M-32598.

Draft Report to Congress

Chapter IV of OMB's annual report to Congress on regulatory policy requires, among other things, recommendations for regulatory reform. OMB invited recommendations for reforms to specific existing regulations and problematic agency "guidance" documents that should be reformed through notice and comment rulemaking or other means.³ IME welcomes this opportunity to draw OMB attention to rules and are ripe for reform and guidance that has inflicted significant regulatory impact on aspects of our industry without benefit of Administrative Procedure Act (APA) notice-and-comment review.

Regulatory Reform

Following the format in OMB's request for comment, IME would like to bring three rules to your attention:

- Regulatory Agency: US Department of Transportation (DOT), Research and Special Programs Administration (RSPA)

Citation: 49 CFR 107.612

Authority: **49** U.S.C. 5108(g)(2)(B)

Description of the Problem: There is an unexpended balance in the Emergency Preparedness Grants (EPG) account established under **49** U.S.C. 5116(i). The unexpended balance results from the over-collection of registration fees from shippers and carriers of hazardous materials pursuant to 49 U.S.C. 5108. RSPA admits that the "law requires DOT to adjust the amount of the annual registration fee 'to reflect any unexpended balance in the EPG account established under \$5116(i)'."⁴

Beginning with the Clinton Administration's FY 2000 budget request, a proposal was made to divert the unexpended balance in the EPG account to support the DOT federal hazmat regulatory program. Not only was such use of the unexpended balance unauthorized by law, but the proposal led the Administration to ignore the statutory requirement at 49 U.S.C. 5108(g)(2)(B) that DOT adjust the amount of fees being collected to reflect any unexpended balance in the EPG account. Despite bipartisan rejection of this "user fee" proposal by Congress, the Clinton Administration re-proposed the reprogramming of the unexpended balance with its FY 2001 budget request, only to be rejected again. With the arrival of the Bush Administration, we had hoped that this unauthorized and unlawful proposed use of the unexpended balance in the EPG would cease. But, the release of the FY 2002 budget request proved otherwise. Nevertheless, we attributed this first Bush Administration request to the fact that the new Administration had insufficient time to become acquainted with the facts underlying the legality of the proposal. And again, Congress rejected this proposal.⁵ The release of the

³ 67 FR 15015 (March 28, 2002).

⁴ 65 FR 76890 (December 7, 2000).

⁵ P.L. 107-87.

President's FY 2003 proposal removes any doubt about the resolve of this Administration to unlawfully divert the unexpended balance in the EPG account.⁶ As of the end of FY 2001, the unexpended balance in the EPG account has grown in excess of \$18 million, by the end of FY 2002, the unexpended balance is expected to rise above \$26 million.

Proposed Solution: In December 2000, RSPA initiated a rulemaking – HM-208D (RSPA-00-8439) – that acknowledged that agency's statutory obligation to reduce the §5 108 fees.⁷ Subsequently, DOT suspended, on two occasions, the rulemaking in order to pursue its efforts to divert these funds to unauthorized purposes.⁸ The first notice of suspension of the rulemaking followed the February 2, 2001 close of the public comment period on HM-208D.⁹ Because opportunity for notice and comment has been afforded the public, OMB should simply direct RSPA to finalize the rulemaking without delay.

Estimate of Economic Impacts: RSPA has no credible means to enforce the fee requirements of the registration problem. RSPA's dockets on the fee program – HM-208 series – contain proof of this assertion. As contrasted to DOT, those paying the hazmat fees are complying with the law. By the end of FY 2002, each of RSPA's roughly 40,000 registrants will have overpaid on average \$650.

- Regulatory Agency: US Department of Transportation, Research and Special Programs Administration (RSPA)

Citation: 49 CFR 110

Authority: Section 610 of the Regulatory Flexibility Act (P.L. 96-354), as amended by the Small Business Regulatory Enforcement Fairness Act (P.L. 104-121).

Description of the Problem: RSPA is charged by law to periodically review its rules and to seek out the comments of small businesses." Fully 70 percent of IME's explosives manufacturers are "small businesses."¹¹ We are concerned that RSPA has not scheduled a Section 610 review of 49 CFR 110.¹²

Part 110 establishes administrative and operational rules for the EPG program. The purpose of the EPG is to cover the "unfunded" federal mandate that states develop emergency response plans and to contribute toward the training of emergency responders. The EPG is supported by fees from the hazardous materials transportation industry. Industry has contributed approximately \$115 million over the life of the grants

⁶ RSPA FY 2003 Budget Submission to Congress, page 38.

⁷ 65 FR 76890 (December 7, 2000).

⁸ 66 FR 22079 (May 2, 2001); 67 FR 11456 (March 14, 2002).

⁹ 65 FR 76890 (December 7, 2000).

¹⁰ Section 610 requires agencies to conduct periodic reviews of rules that have a significant economic impact on a substantial number of small business entities.

¹¹ Explosives manufacturers with no more than 750 employees are "small businesses" under criteria of the Small Business Administration.

¹² 67 FR 3673 (January 25, 2002), RSPA Section 610 Review Plan, 1999-2009.

program.¹³ In addition, states collect directly from industry upwards of \$20 million annually in hazmat fees. Nevertheless, the events of September 11th have greatly exacerbated the training and planning needs of emergency responders.

We are not adverse to paying our fair share to ensure that emergency responders are prepared to respond to emergencies safely and effectively, but we believe there must be more accountability in the EPG and more evidence of coordination among all federal initiatives to ensure that all resources are used as efficiently and effectively as possible. A number of enforcement, administrative, and equity shortcomings continue to plague the program. Our efforts to address these shortcomings directly with RSPA have not been satisfactory.

Additionally, as noted above, the needs of first responders significantly eclipse the amount available from the EPG, which when fully funded only offers a grant package of \$12.8 million and, of that, only a 75 percent pass through to localities.¹⁴ It begs the question of whether the EPG is still relevant in its current form and whether or not the excessive administrative costs – 10 percent – of the amount collected is the most efficient way to deliver hazmat training to the response community especially in light of other viable alternatives to address these needs.

Proposed Solution: In view of the thousands of small businesses that contribute millions in fees to support the EPG, clearly ~~Part~~ 110 meets the threshold for Section 610 consideration. We urge OMB to insist that RSPA to revise its Section 610 schedule and provide an opportunity for public review of ~~Part~~ 110.

Estimate of Economic Impacts: Fees from the hazardous materials transportation industry support the EPG program at a level of \$12.8 million plus administrative expenses. These funds are generated from fees imposed on approximately 40,000 shippers and/or carriers of certain hazardous material that range in amount up to \$2,000 annually per registrant.

- Regulatory Agency: US Department of Labor, Mine Safety & Health Administration

Citation: 30 CFR 56.6000

Authority: 30 U.S.C. 811

Description of the Problem: In 30 CFR 56.6000, MSHA gives definitions of terms relating to its regulations for the use of explosives in mines. The definitions of the terms “blasting agent,” “explosive,” and “detonator” defer to DOT rules at 49 CFR 173.114(a), 173.53, 173.88, and 173.100. Except for 49 CFR 173.53, these paragraphs do not exist in the current 49 CFR. Even the current § 173.53 has different scope than what MSHA intended. The 556.6000 definitions in MSHA’s 1991 final rule contain specific

¹³ Registration Years 1992-2000, HMRP, DOT.

¹⁴ \$7.8 million for training and \$5 million for planning. 49 U.S.C. 5127(d).

references to the “1989 compilation” of 49 CFR.¹⁵ The explicit reference to the 1989 DOT regulations has been inadvertently deleted in subsequent printings of 30 CFR.

The 1991 preamble to the final rule says that MSHA is aware that DOT, “a lead agency in [explosive classification]”, is developing a “satisfactory” revision of the 1989 standard and “may well be adopted by MSHA at some point after completion of the DOT rulemaking.”¹⁶ It has been 10 years since DOT finalized its revised regulations¹⁷ and MSHA has not adopted the updates. Of course, current DOT requirements are superior to the 1989 requirements. To its credit, MSHA has administratively voided violations based on these obsolete terms. However, MSHA has expressed no interest in simply updating its rules to reflect current DOT standards.

Proposed Solution: Other federal agencies periodically review their rules to determine which rules are unnecessary, obsolete, or duplicative. MSHA should issue a rulemaking to incorporate by reference the appropriate, most recent version of 49 CFR.

Estimate of Economic Impacts: While failure to update these rules will not adversely affect the entire industry, it will arbitrarily impose on those members of the regulated community who are charged under these obsolete rules undue burdens to appeal the violation to MSHA.

- Regulating Agency: Department of Labor; Occupational Safety and Health Administration

Citation: 29 CFR 1910.109

Authority: Occupational Safety and Health Act, 29 U.S.C. 653, 655.

Description of Problem: The existing regulations at 29 CFR 1910.109 are outdated.

Proposed Solution: The IME has drafted a proposed revised section 1910.109 that it intends to present to OSHA. Among other things, the revised safety standard would accomplish the following.

- combines all OSHA provisions applicable to explosives including, Process Safety Management (PSM) requirements, into one regulatory section; includes PSM requirements that meet the general PSM guidelines, and provides for the unique operating requirements associated with explosives manufacturing and component assembly;
- replaces outdated references to DOT explosives classifications with the revised DOT classifications;
- corrects regulations that overlap/conflict with requirements in the jurisdiction of other federal agencies, e.g., the proposed rule would remove requirements

¹⁵ 56 FR 2097 (1991).

¹⁶ 56 FR 2072 (1990).

¹⁷ 55 FR 52402 (December 21, 1990).

governing magazine construction and storage which are governed by the Bureau of Alcohol Tobacco and Firearms. In addition, the IME proposal would eliminate provisions applicable to transportation of explosives on public highways. Such transportation is regulated by DOT;

- o incorporates the American Table of Distances (ATD) in its entirety. Current OSHA regulations include only an incomplete version of the ATD. This inclusion of only a partial Table directly infringes on IME's copyright in the ATD;
- o includes more precise precautions for guarding against accidental initiation by sources of extraneous electricity. The proposal references IME Safety Library Publications that address this issue;
- o includes specific restrictions regarding the types of explosive materials that may be used in congested areas, near highways open to traffic, or in areas where extraneous electricity is present above certain levels;
- o includes provisions governing intra-plant transportation of explosive materials;;
- o includes specific, detailed provisions regulating the use of nonelectric detonation systems. No similar provision is included in the current rule;
- o provides that cap crimpers recommended by the manufacturer of the safety fuse be used to attach detonators to safety fuse. The current regulation requires that "standard-ring type cap crimpers" be used. Such crimpers may not be appropriate for use with all products;
- o includes more detailed requirements for clearing the blasting area of unauthorized personnel;
- o sets out more detailed requirements for the design of bulk delivery and mixing vehicles, e.g., IME would require pressure relief valves to be installed on containers that may produce pressure under confinement. Liquid tanks would have to be constructed to dampen movement of contents during transport;
- o prescribes more detailed design criteria for mixing equipment, e.g., all bearings and drive assemblies would be required to be mounted outside the mixer and protected against the accumulation of dust. The proposal also would require that means be provided to prevent the flow of fuel to the mixer in case of fire. An automatic spring-loaded shut-off valve with a fusible link would be required for gravity flow systems;
- o includes a section on incident investigation that would require preparation of a report, evaluation of the report's findings, and resolution of the report's recommendations either by implementation or justified rejection.

Estimate of Economic Impacts: The estimated economic impact of the proposed revisions would be negligible. All of the proposed changes (except administrative changes) are specifically intended to ensure that promulgated regulatory safety standards are consistent with best practices currently recommended and used by industry.

Guidance Documents

Regulating Agency: US Department of Transportation, United States Coast Guard (USCG)

Citation: Marine Safety Manual, Chapter 1, section L. <http://www.uscg.mil/hq/g-m/nmc/pubs/msm/vol6.htm>

Authority: 33 U.S.C. Section 1225

Description of Problem: The USCG adheres to policies that increase the risk inherent in the movement of Class 1 materials. These policies increase risk by frustrating the movement of commercial explosives by sea, thus shifting the risk to other transport modes. These policies raise concern about the ability of American firms to meet demand at home and abroad. The current policies do not serve the public interest for safety, security or efficiency in the transportation of dangerous goods. We are currently trying to resolve our concerns with the USCG but no immediate relief is in sight.

The USCG shares rulemaking authority over hazardous materials transportation with RSPA for movements by vessel and through waterfront facilities.¹⁸ Marine movements, by their nature, require intermodal handling. USCG rules specifically require the “prompt transshipment” of Class 1 (explosives) cargo to and from waterfront facilities.”

Despite rigorous regulation of Class 1 materials under RSPA’s Hazardous Materials Regulations (HMR) and the fact that the USCG enforces the HMR in its area of jurisdiction, the USCG has issued a “Marine Safety Manual” (MSM) that sets quantity-distance (Q/D) standards for establishing limits on the size of Class 1 shipments that may be handled at one time in a port.²⁰ The MSM is not a regulatory document that has been subject to the requirements of the APA or Executive Orders affecting regulatory documents. The MSM states that, in issuing permits to handle explosives, the Captain of the Port (COTP) should consider a number of factors, not just Q/D tables. However, USCG guidance to the COTPs for the handling of explosives in ports generally focuses solely on separation distances.

No other DOT operating administration applies a Q/D approach to the transport of explosives, or any other hazardous material. Rather, the other DOT operating administrations endorse a risk-based approach to the transportation of hazardous materials that focuses on preventing incidents and preparing for and responding to incidents in order to minimize the consequences. The USCG view, articulated in the

¹⁸ 33 CFR and 49 CFR.

¹⁹ 33 CFR 126.21(c), precludes Class 1 cargo from a “waterfront facility except when laden within a railroad car or highway vehicle and shall remain in such railroad car or highway vehicle except when removed as an incident of its prompt transshipment. [Likewise, Class 1 cargo] shall not be brought onto [a] waterfront facility from a vessel except as an incident of its prompt transshipment by railroad car or highway vehicle.”

²⁰ Marine Safety Manual, Chapter 1, Section L.

application of the MSM Q/D limitation, is that each explosive shipment must be treated as if it will spontaneously explode with no warning. The USCG does not apply this “worst case” approach to the movement of any other hazard class through port facilities although the same type of immediate consequences could occur from catastrophic releases of other hazardous materials, including chlorine, propane, or radioactive materials.

It is understood that the USCG needs to obtain information regarding explosives being handled at ports and must properly weigh the risk of accidental detonation of these materials. In this regard, it should be noted that there has not been a single explosion or incident involving commercial explosive materials in transportation at a port in the United States in nearly 90 years. Furthermore, the circumstances surrounding that last event in 1913 could not legally be replicated today.²¹ As noted above, USCG policy does not consider the probability of an accidental detonation; yet, traditional risk assessment calls for factoring the probability of an event with the consequences of that event.

Straight application of the MSM Q/D policy to the transportation of commercial explosives effectively closes all U.S. ports to the dockside loading or unloading of shipload, break-bulk quantities (**up** to 900 MT) of Class 1 materials. The policy also severely limits the number of containers of Class 1 freight load/unloaded by crane.²² At this time, there are only about a dozen US ports accepting one to three containers of Class 1 freight.

As mentioned above, local COTPs can modify the Q/D policy at their discretion. Only a few are willing to expose their careers to the possibility that a discretionary act would be the reason persons were harmed if an Class 1 incident occurred. Currently, only one COTP has used his discretion to open one US port facility – Morgan City, LA – to significant, though still less-than shipload, quantities of Class 1 materials.²³ While this accommodation is welcome, the absence of an established regulatory standard that is clear, predictable, and fair, unreasonably frustrates commerce and should not be tolerated.

The application of Q/D principles in transportation has contributed to unfortunate and avoidable situations and continues to thwart the safe and expedient movement **of** explosives. The lack of ports north of Norfolk, VA that accept a container or more **of** Class 1 material resulted in the truck transport of a 1999 shipment of black powder destined for Vermont which overturned on the Capitol Beltway. While the black powder was safely removed, the incident inconvenienced thousands in the metropolitan region.

²¹ An explosion destroyed the British steamer “Alum Chine” in the Patapsco River about six miles southeast of Baltimore, MD. The ship was loaded with bulk coal and was having 600,000 pounds of dynamite loaded on top of the coal when fire broke out. The cause of the fire was never determined.

²² USCG regulations (33 CFR **126.17**) do provide an exemption from permit requirements and hence the MSM quantity-distance standard for Class 1 materials that are rolled on and off vessels in containers. However, this is not an option because higher value goods are the freight of choice for commercial ports with roll-on/roll-off capability.

²³ Shipments **up** to 800 MT of containerized Class 1 freight or 400 MT of break bulk material may be loaded/unloaded dockside at the Morgan City, LA port.

In Louisiana, Class 1 cargo was accidentally lost overboard while adhering to USCG requirements for nighttime lightering.²⁴ Last summer, the intermodal movement of portable tank cars filled with explosives, which eventually were shipped from LaConner, WA to Alaska, was frustrated by the application of Q/D. Most recently, shipments of Class I materials in the intercoastal waterways of southeast Alaska have been complicated by Q/D.

If opportunities to use one mode of transportation are denied or unreasonably restricted, other modes will be used. To the extent that the USCG's Q/D policy has closed or limited access to US ports, domestic transportation distances have increased as shippers turn to foreign ports and trucks to deliver explosives. The USCG's Q/D policy has created an intermodal issue that demands a systemwide perspective to remedy. It is incumbent that the safety and security trade-offs between truck and vessel transportation be understood so that impediments unilaterally imposed by one modal administration to the safest most secure routing of Class 1 materials can be removed or appropriately modified.

Proposed Solution:

IME has been raising these concerns with the USCG for a number of years. Just last month, USCG headquarters agreed to commit time and funds to complete a version of the Department of Defense's Explosive Study Board's (DDESB) risk assessment model, "SAFER for Ports" that will be usable in commercial ports as an alternative to the MSM Q/D policy.²⁵ The SAFER models follow accepted risk assessment protocols that evaluate **risk** based on the probability of an event in relation to the event's consequences. IME's own risk assessment methodology is based on the DDESB's SAFER work. As a final solution to our quest to replace the USCG's inappropriate quantity-distance (Q/D) policy, the SAFER project has merit.

Unfortunately, DDESB's work on SAFER is far from over. At this time, it is unknown how long it will take to complete SAFER for Ports. The DDESB estimates that it will be several years. Consequently, we have asked USCG headquarters to issue guidance to be used in the interim to void reliance by COTPs on the current Q/D policy. While the USCG's support of the SAFER tool acknowledges the deficiency of the current Q/D policy, we have been told that USCG headquarters is not contemplating any action in the interim to address problems created by the current Q/D policy because such guidance is unnecessary.²⁶ This conclusion is based on USCG deference to the unfettered authority vested in COTPs such that headquarters would never "second guess" what COTPs felt was necessary in their ports. However, IME's discussions with COTPs about problems created by the Q/D policy suggest that the COTPs would welcome better informed

²⁴ With the recent change of COTP, nighttime unloading is no longer a requirement at the Morgan City, LA port. Nevertheless, for roughly the four previous years, the USCG imposed this requirement in direct contravention of OSHA rules that prohibit the delivery of explosives to or from "any railway station, truck terminal, pier, wharf, harbor facility, or airport terminal between the hours of sunset and sunrise." [29 CFR 1910.109(f)(5).]

²⁵ Telephone call to Cynthia Hilton, IME, from Capt. Michael Brown, USCG, April 18, 2002.

²⁶ Telephone call to Cynthia Hilton, IME, from Capt. Michael Brown, USCG, April 23, 2002.

guidance from USCG headquarters. They recognize the flaws with the current policy. (For example, a 1999 modification to the Q/D policy reduces “consequences” of an event – the “K” factor – when industry’s safety record, DOT rules, and product improvements are justification to reduce the “probability” of an event.)

As a result, we request that OMB instruct USCG headquarters to issue interim guidance that (1) acknowledges the flaws in the current Q/D policy; (2) informs COTPs of industry’s best practices, product improvements, and applicable DOT safety rules; (3) recognizes that concern for “public safety” extends beyond port facilities and advises COTPs to consider the impacts of their decisions on alternative forms of transportation; and (4) gives a timeframe and reference to the DDESB SAFER for (Commercial) Ports project.²⁷ Otherwise, the USCG must be required to cease the enforcement of the MSM Q/D policy until it is subject to review and comment pursuant to the APA.

Estimate of Economic Impacts:

After four years of increasing commercial movements of explosives through ports, exports and imports of explosives declined over 40 percent for some categories during 1998.²⁸ This is the year that the Port of Morgan City, LA was closed to shipload movements of Class 1 materials by the COTP based on the quantity-distance criteria of the MSM. Morgan City is the preferred port for these movements because of its depth of draft, seclusion, and proximity to Camden, AR – the location of the Nation’s principal commercial storage terminal, a facility that can handle, at one time, shipload quantities of Class 1 materials. Like the black powder incident previously described, the closing of Morgan City shifts risks to other nodes.²⁹ For example, imports through Canada have risen 45 percent since 1998.

To prevent a reoccurrence of the dilemma created by the frustration of the WA/AK shipment, Senator Ted Stevens included a provision in the FY 2002 Defense Authorization Act to open the naval port at Indian Island, WA for this purpose.²⁹ Recently, the arbitrary rotation of the COTP over Morgan City, LA, has, for the time being, lifted the restriction on dockside unloading of up to 800 MT of explosives pending more information. Congressman Don Young has been asked to intervene in the Q/D driven disputes Class 1 shippers and users are having with the USCG in southeast Alaska.

These piecemeal approaches to resolving the Q/D issue for commercial explosives shipments, as is evidenced by the WA/AK and LA situations, are not good public policy, nor can industry conduct business under a cloud of uncertainty. Better guidance is needed and, we believe, would be welcome by COTPs that are faced with decisions about the movement of commercial explosives through their ports.

²⁷ Email memorandum to Capt. Michael Brown, USCG, from Cynthia Hilton, IME, April 24, 2002.

²⁸ Source: U.S. Census Bureau, Foreign Trade Division. Imports and **exports** have remained depressed during 1999 and 2000 but are recovering as other transportation routing is used.

²⁹ PL 107-107, Section 1070.

Conclusion

The issues raised above are long-standing concerns of IME, our industry peers, and those who depend on our products. They have been raised to the affected agencies with little effect. We are hopeful that this exercise and attendant congressional oversight will move these important issues forward.

Sincerely,

signature

Cynthia Hilton
Executive Vice President

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