

U.S. DEPARTMENT OF TRANSPORTATION
Pipeline and Hazardous Materials Safety Administration

**PUBLIC MEETING ON SPECIAL PERMITS AND APPROVALS -
APPLICANT FITNESS DETERMINATIONS**

U.S. Department of Transportation
Washington, D.C.

1:00 p.m.
Wednesday, February 29, 2012

EXECUTIVE COURT REPORTERS, INC.
(301) 565-0064

A G E N D A

<u>ITEM:</u>	<u>PAGE:</u>
Welcome William Schoonover Deputy Associate Administrator For Field Operations Hazardous Materials Safety Office PHMSA	3
Overview Ryan Paquet Director of Approvals and Permits Division PHMSA	9
Open for Comments	12
Closing Remarks	102

1 P R O C E E D I N G S

2 (1:00 p.m.)

3 Welcome

4 MR. SCHOONOVER: Thank you. Good afternoon
5 and welcome to the Pipeline and Hazardous Materials
6 Safety Administration Public Meeting on the Fitness
7 Determination Process for Special Permits and
8 Approvals, as published in the Federal Register on
9 February 2nd, 2012.

10 As outlined in the Notice, this meeting
11 follows on the August 19th, 2010, meeting on the same
12 issue.

13 I'm William Schoonover, Deputy Associate
14 Administrator for Field Ops, in PHMSA's Hazardous
15 Materials Safety Office. I'll be serving as chair of
16 today's meeting.

17 For the record, the date is Wednesday,
18 February 29th, 2012.

19 Our intent with today's meeting is to share
20 our findings to date and to seek public input on ways
21 to improve the process.

22 We'll keep this meeting relatively informal
23 but in order to ensure that we proceed in an orderly
24 and efficient manner, we ask that you abide by a few
25 rules of procedures.

1 First, I'd like to provide some safety
2 information for those attending in person. The
3 building is equipped with a fire alarm system. If
4 there's an emergency, the lights on the wall will
5 flash, the alarm will sound, and a voice will advise us
6 of what action to take.

7 If we need to shelter in place, this room is
8 an acceptable location and we'll remain here. If we
9 need to evacuate, emergency exits are accessed by
10 exiting the conference room, turning right, and
11 following the corridor to the Atrium, proceed out the
12 building by the nearest exit, or simply follow a DOT
13 employee to the appropriate exit. Our meeting location
14 is over near the river and you'll see signs for us.

15 Restrooms are located outside the conference
16 room. You'll need to turn left and then turn left
17 again at the end of the hall, proceed to the end of the
18 corridor. They're located on the right.

19 Also to our visitors, please keep your
20 security badges visible at all times when you're
21 outside of this room. If you leave the building, you
22 must surrender your badge. If you return, you have to
23 go back through Security. So my strong recommendation
24 is not to leave for the duration of this meeting.

25 Out of respect for everyone, I ask that you

1 please silence your cell phone or turn it to vibrate
2 for the duration of the meeting.

3 All right. We're circulating a sign-in
4 sheet. Please be sure to sign in so that we can
5 capture an accurate record of today's attendees.

6 In the Federal Register Notice announcing
7 this public meeting, we asked persons wishing to
8 present oral statements to let us know beforehand. No
9 one indicated prior to the meeting that they had a
10 desire to speak today. However, I know there are a
11 number of people that would like to speak. So if you
12 do want to speak, we ask that you place a checkmark
13 next to your name on the sign-in sheet and we'll also
14 offer an opportunity for our attendees via the
15 teleconference to speak, as well.

16 When you introduce yourselves, I would ask
17 that those on the conference line indicate the desire
18 to speak when they announce themselves.

19 These proceedings are being recorded. To
20 assist the court reporter, please use the microphones
21 provided and initially state and spell your name and
22 affiliation.

23 If you have prepared a written copy of your
24 oral comments, please provide copies to me as well as
25 the court reporter prior to making your statement.

1 A copy of this transcript will be placed in
2 the Docket Number PHMSA-2011-0283 which will be
3 available on the Internet at www.regulations.gov.

4 Stakeholders may continue to submit comments
5 after this meeting, either electronically to the
6 Docket, via fax to 202-493-2251, or by mail or hand
7 delivery. For details on submitting comments to the
8 Docket, please refer to the Federal Register Notice.

9 If you have any questions regarding accessing
10 the Docket, please let me know, and copies of the
11 Notice and Agenda are located on the easel as you enter
12 the meeting room.

13 We're asking that those that want to speak
14 limit their remarks to 10 minutes in the interest of
15 time, so that everyone who wants to speak will have
16 that opportunity.

17 This meeting is not intended as a forum for
18 debate and there will be no cross examination of
19 speakers. I or other members of the department may ask
20 questions of the speakers. However, speakers are not
21 obliged to answer those questions. Our questions will
22 be for the purpose of clarification or to solicit
23 additional relevant information. Please don't
24 interpret these questions as either support for or
25 opposition against anything said. They're purely

1 intended to elicit information.

2 Our failure to question a speaker, however,
3 does not mean that we agree or disagree with that
4 speaker's statement, whether it's a legal proposition
5 or a factual statement.

6 If anyone else in the meeting room wishes to
7 ask questions, provided that the speaker's willing to
8 take questions, you're free to do so.

9 At the end of the meeting, time permitting,
10 we would like to give people an opportunity to expand
11 on their remarks or to respond to things others have
12 said. If you intend to do so, please let myself or
13 Ryan or another DOT member here know.

14 There may be additional issues relevant to
15 fitness that parties may wish to address and these
16 meetings are intended to provide an opportunity to
17 explore those issues, as well.

18 Stakeholders should feel free to discuss
19 issues not specifically raised by the agency in the
20 underlying Notice and Agenda but relevant to
21 consideration of the impact and feasibility of any
22 potential alternatives to our existing process.

23 Now's the time to put those issues on the
24 table, providing as much information as possible.
25 However, in the interest of time, I may ask that we

1 table discussions on an issue and seek written comments
2 or hold another meeting, if needed, if we find that
3 issues require more careful consideration.

4 Are there any questions about the procedures?

5 (No response.)

6 MR. SCHOONOVER: If not, we'll start the
7 meeting.

8 For the past two years, PHMSA and our modal
9 partners have invested extensive resources to conduct
10 fitness oversight. While the story is good, the
11 gathered data suggests that the time may be right to
12 consider revisions to the current Fitness Determination
13 approach where responsive and appropriate, given these
14 findings.

15 The Federal Register Notice, published on
16 February 2nd, and the Agenda, published on our web page
17 on February 15th, sets forth in some detail the subject
18 matter that the agency would like to explore in this
19 meeting.

20 Particularly, the agency is seeking comment
21 on three specific aspects of the Fitness Determination
22 process. These are, first, what constitutes fit to
23 conduct the activity authorized by the special permit
24 or approval, how can this be captured in a quantitative
25 and consistent manner that can be applied equitably to

1 we focus on is somebody fit to conduct the activity
2 authorized under that special permit or approval?

3 Well, that's what we've looked at over the
4 last two years. As the Agenda said, we've taken over
5 45,000 actions related to special permits and approvals
6 and each one of those actions has had at least, at
7 least an initial fitness review. That initial fitness
8 review was a review of data, either in PHMSA's HIP
9 Program or FMCSA's Safer Program. Thank you.

10 We looked at indicators. We looked at
11 criteria. If there were any concerns, then that
12 application was sent on to either one of our trained
13 investigators for further data review or one of our
14 modal partners, especially if they're operational and
15 special permits requests.

16 We rely on our modal partners to give us a
17 recommendation on whether or not they believe that that
18 company is fit to conduct the activity authorized in
19 that special permit, which I think most people in the
20 room would agree is pretty important. If we're
21 allowing somebody to do something that's outside of the
22 regs, we want to ensure that they have the ability to
23 do that and do that safely.

24 As I said, we conducted over 45,000
25 activities related to special permits and approvals and

1 when you scale down or look down at how many we found
2 unfit, it's actually less than one percent of them. I
3 mean, the overall majority of people are doing the
4 right thing, are in compliance with our regulations and
5 are fit to conduct the activity authorized in the
6 special permit or approval that they're applying for or
7 that they hold, which is great news, but also indicates
8 that is it time for us to look and see is there a
9 better way of doing business?

10 Now when we first started, the initial
11 fitness reviews would take anywhere between 20 and 30
12 minutes per application. Well, now in Special Permits,
13 they're automated, so there's not really a manual -- at
14 least the initial fitness review, there isn't a manual
15 procedure that's being done. It's instant.

16 For approvals, we're still doing it manually
17 but we have it down to about five minutes per
18 application, and, of course, let's take fireworks, for
19 example, we'll get 300 applications for fireworks from
20 one manufacturer. Well, we don't have to keep on doing
21 it, we've already done it, we have it on file, and then
22 we just place it in the folder.

23 So we've streamlined our efforts incredibly.
24 Even our second tier and third tier, we found ways to
25 make them more efficient and turn these applications

1 around in a much more efficient manner.

2 I hope that we get a lot of constructive
3 comments today and I look forward to hearing how we can
4 make our program more efficient for everyone.

5 Thank you.

6 MR. SCHOONOVER: My, it's quiet in here. All
7 right. Let's see if we can change that a little bit.

8 I think it's time we have quite a few people
9 who've indicated they'd like to speak, so we'll begin
10 with C.L. Pettit. Oh, okay. All right. It said your
11 name was on the list next. Cynthia Hilton.

12 Open for Comments

13 MS. HILTON: Anyway, I know that you know how
14 impacted the explosives industry is by both special
15 permits and approvals. So I'm not going to spend time
16 describing that. It's in our comments.

17 But I am going to say that I'm really
18 encouraged by this meeting that you're trying to go
19 forward. I'm somewhat disappointed that it doesn't
20 look like much progress has been made since the last
21 meeting. It would have been helpful to have a strawman
22 for us to respond to, even if we didn't like it, you
23 know, that we could have bounced off, but --

24 MR. SCHOONOVER: Cynthia, can I interrupt you
25 for one question? Ask you to state your name, spell it

1 for the court reporter.

2 MS. HILTON: This is not on my time. Cynthia
3 Hilton, C-Y-N-T-H-I-A H-I-L-T-O-N, Institute of Makers
4 of Explosives.

5 MR. SCHOONOVER: Thank you.

6 MS. HILTON: Anyway, the premise for which
7 special permits and approvals are provided are
8 different, so our recommendations are different on how
9 to deal with these things.

10 First, with regard to approvals, we get
11 explosive classification approvals which I'm going to
12 call ECAs, and as explained in our comments in 2010,
13 we're questioning the relevance of going through a
14 fitness determination for these kinds of approvals.

15 Applicants are required to have their
16 products tested to, you know, UN-developed standards by
17 your approved labs. Basically, all we do is provide
18 the sacrificed product and pay the bills and, you know,
19 the classification comes back.

20 So I cannot begin without establishing the
21 fact that we are an incredibly safe industry. If you
22 look at your own data, I mean, the measure, the PHMSA
23 measure in your budget is deaths and serious injuries
24 and there's no deaths either under special permits or
25 approvals or anything else. So if we're risk-based,

1 this is really not a place to be devoting our
2 resources.

3 Okay. So, again, I'm just trying to
4 summarize. We had this history, and I want to
5 emphasize this history of safety prior to 1996 when
6 this concept of fitness was entered into the
7 regulations. So this is not something that when this
8 concept of a fitness standard was provided by
9 regulation, all of a sudden our industry, you know,
10 improved, you know, its performance improved.

11 Yet, we, you know, cannot self-classify as
12 many can and I'm sorry everyone here in the room, where
13 other classes of hazardous materials might not have
14 such a safety record, yet, you know, we are subject to
15 this differential treatment.

16 The second thing is the safety fitness that
17 you perform is only on the initial shipper. We have
18 downstream shippers. They're not subject to a fitness
19 determination. So it just seems very odd that you
20 would subject these classification approvals to a
21 fitness determination.

22 We think, however, that it is very
23 appropriate that you focus on the approval labs because
24 you are entrusting them to make these classification
25 decisions.

1 So we strongly encourage you to whatever you
2 need to do to have that trust and confidence since
3 you're directing us to go to them that you will then
4 trust their decisions and you won't bring them back
5 here and try to second-guess it. So that's one
6 recommendation.

7 And then the other one is to reciprocally
8 recognize the classifications that come from other
9 competent authorities that you trust and foremost in
10 our mind is Canada and you know that just recently they
11 kicked off this U.S.-Canadian -- what do they call it?
12 The Regulatory Cooperation Council, and one of the
13 directives to their Dangerous Goods Working Group was
14 to develop mechanisms for mutual recognition of
15 approvals between countries providing an equivalent
16 level of safety. You know all that.

17 So we believe that equivalent safety is
18 maintained because, you know, you follow the UN
19 protocols. So those are our recommendations with
20 regard to approvals.

21 We shouldn't be subject to fitness
22 determinations. We should focus on labs. We should
23 reciprocally recognize those competent authorities that
24 you trust and I have to believe that one of those would
25 be Canada.

1 Okay. On special permits, several principles
2 underlie how PHMSA established standards of fitness for
3 those seeking special permits.

4 First, fitness reviews should be based on the
5 ability of the applicant to perform a function which
6 will be authorized by the special permit and what I
7 mean by that is don't judge me as a carrier if I'm
8 seeking to perform a shipper function and, you know,
9 vice-versa.

10 Second, no single criteria should trigger a
11 denial, revocation, or suspension, unless the holder is
12 presenting an imminent hazard.

13 Third, no applicant should be automatically
14 selected for additional scrutiny solely because they're
15 moving Table 1 material.

16 Fourth, modal partners should not be allowed
17 to use PHMSA's fitness procedure to impose a more
18 stringent fitness requirement than they already have
19 under their own regulations and likewise PHMSA
20 shouldn't be trying to use this process to superimpose
21 on other agencies what's a fit carrier.

22 But moving forward, we would like to suggest
23 five procedural and five kind of fitness criteria
24 recommendations. These are in no order of priority.

25 Under procedural recommendations, current

1 policies provide several look-back periods to establish
2 a baseline to assess an applicant's performance running
3 from two to 10 years. We recommend that PHMSA adopt a
4 standardized look-back period of four years inasmuch as
5 four years is the typical duration of a special permit.

6 Second, under current policy, a new fitness
7 determination is triggered every time an applicant
8 files for special permit. We think this is a waste of
9 agency resources. We recommend that fitness reviews
10 not be triggered by the filing of an application but be
11 periodically performed. There are many precedents for
12 allowing fitness determinations to carry over for a
13 certain number of years. We recommend that fitness
14 determinations expire after four years, unless revoked
15 or suspended due to subsequent findings of imminent
16 hazard or a pattern of knowing or willful
17 noncompliance. We think this approach would save time
18 and resources for both the agency and the regulated
19 community without diminishing safety.

20 Third, PHMSA has established an elaborate
21 labor-intensive scheme for processing fitness
22 determinations. It was interesting to hear what you
23 said about the first level but in writing, all we know
24 we got this three tier level process which, if you
25 count it, there's 30 odd decisional steps. There's a

1 paper trail that cross-walks between a minimum of five
2 reviewing officials.

3 Clearly, these procedures are ripe for
4 streamlining. At minimum, no applicant should be
5 automatically referred to an onsite review. Queuing up
6 for onsite reviews is one of the reasons that some
7 applications became backlogged.

8 Given the established safety record of
9 special permit holders, we would recommend that the
10 agency start with a presumption of applicant fitness
11 rather than from a position that an applicant must
12 establish fitness and we believe that Tiers 1 and 2 can
13 be combined and that site visits by Field Operations
14 only be undertaken where fitness cannot be demonstrated
15 by some other means.

16 Fourth, PHMSA should put in place a process
17 where applicants are given an opportunity to show cause
18 why the agency should not revoke, suspend, or deny the
19 application, again except if there's an imminent
20 hazard.

21 And fifth, we recommend that applicants be
22 given opportunity to file a corrective action plan with
23 PHMSA prior to denying an application for a special
24 permit, except in cases of imminent hazard. The
25 corrective action plan can outline management controls

1 and measurable steps that the applicant would take to
2 remedy past deficiencies.

3 On fitness criteria recommendations,
4 currently PHMSA uses a mix of absolute incident and
5 enforcement markers to establish minimum levels of
6 fitness but not what performance would render an
7 applicant unfit. So we still are in this foggy, you
8 know, area.

9 This current process is deficient because
10 applicants have no certainty as to the standard they
11 have to meet. The use of incident data for "licensing"
12 may be at cross purposes with the agency's need for
13 complete or rigorous reporting. The data is not
14 weighted and there is no fault analysis or prior
15 opportunity to correct errors in the applicant's
16 record. Each of these deficiencies should be
17 addressed.

18 So, one, PHMSA asks for comment about the
19 agency's use of data from the HIP and when PHMSA
20 launched the HIP, the regulated community was promised
21 access to its own data. If PHMSA's going to use this
22 data source or any other, the applicant needs to have
23 access to it so they can assure that it's accurate and
24 supplement the record with evidence that the applicant
25 was not at fault.

1 Second, we believe it reasonable that PHMSA
2 should use the fitness determination process to ensure
3 that the applicant was appropriately registered under
4 the Hazardous Materials Registration Program.

5 Third, PHMSA should only rely on serious
6 incidents as a fitness determination factor and only
7 where death and serious injury have resulted and fault
8 has been established. Death and serious injury again
9 are the metrics used to justify your regulatory
10 program.

11 Weighting. PHMSA's current incident-based
12 fitness criteria is not normalized to some level of
13 applicant activity nor is it weighted in terms of
14 severity or time lapse between events. These are all
15 things that have been learned through the CSA process
16 and I'd just encourage you to, you know, learn from
17 them as you're going ahead here.

18 And last, on enforcement data, frankly,
19 compliance history seems to be a better indicator of
20 fitness than accident or incident history. However, in
21 our 2010 comments, we expressed the same concerns about
22 the non-weighted use of this data and, you know, in
23 civil enforcement cases and warning letters, the
24 difference between them, and also recommended at that
25 time looking at what CSA is doing and find a way to

1 normalize this data.

2 Finally, we continue to encourage PHMSA to
3 finalize through a rulemaking process your procedures
4 and your criteria. We believe that, if you read the
5 statute the way we read it, that Congress directed that
6 you do that, that this would lead to more transparency
7 and accountability. I mean, there may be I don't know
8 how many people on the phone and 50 people here in the
9 room, but clearly thousands of people are affected by
10 what you do and this would provide a better opportunity
11 for them to comment.

12 And given the safety record of transportation
13 activities conducted under safety permits and
14 approvals, PHMSA should leverage the fitness
15 determination process to encourage compliance and not
16 use it as a tool of intimidation -- I'm sorry if that's
17 a strong word -- that might discourage innovation and,
18 you know, outcomes that were the reason for special
19 permits and approvals in the first place.

20 We hope the record of this meeting prompts
21 PHMSA to continue to work with us to establish
22 reasonable standards and thank you very much.

23 MR. SCHOONOVER: Thank you. Do you have any
24 questions?

25 MR. PAQUET: No.

1 MR. SCHOONOVER: Okay. What I'd like to do,
2 if we can, is get through some of the -- I noticed that
3 a lot of people would like to speak. So I'd like to
4 get through some of those, if we can, to start and keep
5 going.

6 Cynthia, for the record, I hope you noticed
7 that I gave you more time because I did stop you.

8 Next, if we could, Heidi McAuliffe. Thank
9 you.

10 MS. McAULIFFE: Thanks, Bill. Heidi
11 McAuliffe and McAuliffe is M-C-A-U-L-I-F-F-E, American
12 Coatings Association.

13 I will be brief. I will submit some written
14 comments which flesh out the Coatings Association's
15 concerns with the fitness review but just very briefly,
16 to kind of highlight the three points that I want to
17 make and will submit comments on, there are four basic
18 pillars apparently that the fitness review is based
19 upon and incident reports are one of those.

20 That's information in the HIP portal and
21 enforcement activity. Those are two of the, I guess,
22 four pillars of data that's used in the fitness review
23 and I want to hit on the incident reporting because I
24 think the incident reporting is a very difficult issue
25 for my industry particularly and you may recall that we

1 have a Petition for Rulemaking focused on the incident
2 reporting under the 5800 Report and everything else.

3 We have a lot of concerns about the accuracy
4 of that data, whether or not that data is actually very
5 meaningful. The review that we've done over the years
6 on 5800 reports that are filed for incidents involving
7 Class 3 flammables and Class 8 corrosives and anything
8 under the proper shipping name paint indicates that the
9 data is all over the map. It's not very accurate and
10 there's a lot of incidents reported for material that's
11 not even regulated.

12 So we're very concerned that that's one of
13 the elements that you're basing a fitness review on,
14 data that we don't believe is meaningful and that we
15 don't believe is very reliable. So I would encourage
16 you to look again at my Petition for Rulemaking and see
17 if we could make some progress on that and to be very
18 circumspect, when you're using incident data to
19 determine fitness for a special permit.

20 I didn't even hit on the sort of risk factor
21 involved, but, as you know, the song I always sing for
22 the paint industry is this is just paint most of the
23 time and not that it's not regulated and not that it's
24 not hazardous and not that certain requirements don't
25 need to be met, but the risk level is very low. So for

1 my members to be complaining of long delays in getting
2 special permits, it seems very counterproductive and
3 not warranted by the risk.

4 Secondly, as the enforcement activities and
5 warning letters, as it's written in your standard
6 operating procedures, it doesn't even indicate that
7 those are cases that have been adjudicated or come to a
8 final resolution. It just says -- and I'm looking at
9 it right now -- enforcement cases and/or warning
10 letters.

11 It's not relevant data if that case hasn't
12 gone to a resolution. So I urge you again to be very
13 circumspect in considering those types of things when
14 considering fitness, and I would reiterate Cynthia's
15 point about urging you to bring this to a rulemaking
16 and to put this criteria under Notice and Comment.

17 I think the agency has a lot at stake here
18 and the regulated community will have a lot more faith
19 or a lot more -- what's the word -- confidence in this
20 program if you do this rulemaking and subject these
21 standards to notice and comment and I think the agency
22 deserves that type of confidence and respect from the
23 regulated community. So I would reiterate that
24 request, as well.

25 Thank you.

1 MR. SCHOONOVER: Thank you. Any questions?

2 MR. PAQUET: I'll interrupt you if I do.

3 MR. SCHOONOVER: Okay. Let's move through
4 several of these. I've got some questions that we'll
5 come back to, if that's all right.

6 Let's see. Mr. Bierlein, Larry Bierlein.

7 MR. BIERLEIN: Thanks, Bill. My name is
8 Larry Bierlein, B-I-E-R-L-E-I-N. I'm General Counsel
9 to the Association of Hazmat Shippers, and we
10 appreciate the chance to come back. We did participate
11 in the August proceedings and realize how much work has
12 been done since that time.

13 AHS is a group of large companies shipping
14 globally, shipping smaller packages globally. Many of
15 them are dependent upon special permits, sometimes
16 approvals, competent authority approvals. An example
17 would be the Ethyl Alcohol Special Permit 9275.

18 We have the sense from discussions with
19 people in the agency with comments from the agency that
20 the concept of fitness has become not only a factor in
21 the consideration but it has become a primary factor in
22 the consideration of an application.

23 We think the emphasis is a misallocation of
24 what are acknowledged to be or limited resources. It
25 results in a delay in the process, although I was

1 pleased to hear, Ryan, that you've gotten the time
2 down, but that delay not only is a delay in the
3 process, it's a delay in the implementation of what
4 usually is an improvement in technology, an improvement
5 in packaging, without any lessening of safety.

6 We're stuck with the fact that unless
7 somebody years ago wrote something into the
8 regulations, if you want to do something new, you have
9 to ask for an approval or a special permit. Many of
10 these ideas benefit the public at large, not just the
11 applicant, not just the customers of the applicant, and
12 I think that what we view as the excessive focus on
13 fitness is really impeding the growth of these ideas,
14 implementation of this technology, and is harmful to
15 the economy.

16 The fact that the Administration's bill to
17 Congress asks for user fees to pay for 20+ people to do
18 more fitness reviews is alarming to us. We're
19 concerned that that's going to make things worse rather
20 than better.

21 We think it's essential to note that if you
22 follow the regulations, in other words, you don't need
23 a special permit or approval, there's no one assessing
24 your fitness, there's no one aware of it, other than
25 the standard enforcement programs.

1 If you petition for rulemaking, which is much
2 the same as an application for a special permit, just
3 slower, petition for rulemaking, no one's asking about
4 your fitness to ask for that, we think that you've
5 always examined fitness.

6 Back when the Special Permits Program was run
7 by Ryan Post, there were people who were not getting
8 their special permits because the agency was aware that
9 they were unable to do what they were proposing to do.
10 We believe the formalization of this process is
11 unnecessary. I think the fact that you have reviewed
12 so many applications and found so few, I think you said
13 less than one percent, I think reinforces the idea that
14 Cynthia put forward, that you should have the
15 assumption that someone is fit and only look for those
16 who may be unfit.

17 We look at the number of applications when
18 you consider parties to, when you consider renewals,
19 and many of these have been in place for years. With
20 respect to 9275, it was issued in 1986. Especially
21 with the special permit, there's a double reporting
22 requirement for incidents. You have the usual incident
23 reporting in 171. You also have in the special permit
24 itself an obligation to report incidents.

25 We believe on these older issues, older

1 special permits in particular for long period of time,
2 if they were unfit, you would know that and don't need
3 to go through this process. We think there should be a
4 cutoff period for examinations.

5 We think if you look at the public files, in
6 other words, those accessible to those outside the
7 agency, and you find a flagrant pattern of repeated
8 violations affecting transportation safety, fine, that
9 you can find them unfit, I think everyone else would be
10 considered fit, and that the degree of formality to the
11 process is unnecessary.

12 When we were speaking here in August with a
13 number of other industry people, we said rulemaking on
14 this concept should be done. We still think the idea
15 is good. We think it could be very simple, could say
16 much as it does today, that an applicant could be
17 considered unfit on the basis of flagrant pattern of
18 actions reflecting inadequate consideration of public
19 safety, and you could provide examples so that people
20 would know what you mean by a flagrant pattern.

21 We do not believe that non-payment of a civil
22 penalty is a basis for denying fitness. We also don't
23 support the request to Congress for the authority to
24 close companies if they don't pay a civil penalty. The
25 debt collection capabilities of the Government are well

1 known and we don't think any of these relate to safety
2 or fitness to function under the regulations or special
3 permits.

4 We also don't think that technical errors on
5 shipping papers, minor leaks in packaging, inadequacies
6 in test reports, these kinds of things that will turn
7 up on especially incident reports, violation reports,
8 we don't think these are the kinds of things that ought
9 to result in a finding of unfitness. We think a
10 flagrant pattern of serious violations affecting safety
11 could.

12 We realize the meeting here is hosted by
13 PHMSA. We also realize from the information that it's
14 being coordinated with the modes. I hope that what
15 comes of this is in fact as uniform as possible across
16 the modes. We think that was the point of the HMTA,
17 take as much of a uniform program as possible.

18 I won't speak from current knowledge but I
19 did have one incident involving an FAA practice which
20 was any applicant for any renewal of any authorization
21 got a site inspection and any violation found of any
22 sort during the site inspection resulted in a
23 recommendation of unfitness.

24 As I say, this was a couple of years ago when
25 this was happening and I would hope it's not the

1 current practice but it illustrates how the practices
2 across the multiple operating administrations should be
3 consistent in terms of severity and complexity.

4 In short, we think you should spend less time
5 on fitness, more on the technical merit, and consider
6 each application when it's appropriate for an approval
7 or a special permit, consider it to be petition for
8 rulemaking, send it over to Standards, have them look
9 at that idea, so that if it appears that this is going
10 to be something that's good, you don't have to wait two
11 or six years before you get to that point, and we
12 encourage more active rulemaking.

13 I understand all the headaches that it
14 involves to go through the clearances of OMB and the
15 Office of The Secretary, but more rulemaking to take
16 out existing special permits, including 9275, and
17 batches of others that have multiple parties to and
18 have been in place for years would simplify the
19 process.

20 Thank you very much for the opportunity to
21 speak to you today.

22 MR. SCHOONOVER: Thank you, Larry. All
23 right. We'll do one more and then we'll ask some
24 questions.

25 Rick Schweitzer.

1 MR. SCHWEITZER: Good afternoon. I'm Richard
2 Schweitzer. That's S-C-H-W-E-I-T-Z-E-R. I'm here on
3 behalf of two organizations, the National Private Truck
4 Council, which is an association that represents about
5 500 companies that operate truck fleets in furtherance
6 of manufacturing or other businesses and many of them
7 ship and transport hazardous materials under special
8 permit, and the other association is the Gases and Weld
9 and Distributors Association. This is a group of
10 companies that distribute compressed, medical, and
11 industrial gases, and they often transport their
12 products under special permits, as well.

13 I actually want to reiterate a number of
14 comments that I made at the August 2010 public meeting
15 and I want to talk more about the process that we have
16 here rather than the substance of the review that
17 you're doing, actually.

18 I note in the Background that you have on the
19 Agenda it says, "In the last two years, PHMSA's
20 invested extensive resources to meet the increased
21 process review and accountability within the program."

22 The question I really have is why? I mean,
23 it seems like we're trying to fix something that really
24 wasn't broken before and I think we all understand the
25 political pressure that the agency was under several

1 years ago when the standard operating procedures were
2 published but that sense of urgency doesn't exist
3 anymore and I think it's time to take a deep breath and
4 to take a step back and to look at what you really need
5 to do in this area.

6 I mean, I think we all understand that
7 hazardous materials transportation, particularly by
8 special permit, is extremely safe. You know, we just
9 don't have a compelling reason to address all of these
10 limited resources to this area. But I think if you're
11 going to do that, then I think there's an approach to
12 this that makes more sense than what we're doing now.

13 I really have a question as to why now we're
14 asking the question of what's an appropriate fitness
15 standard or what should an appropriate fitness standard
16 be. It seems to me that that decision should have been
17 made before the standard operating procedures were
18 published and, you know, this kind of cart before the
19 horse policymaking, in my mind, with all due respect,
20 is inappropriate, both as a matter of law and as a
21 matter of public policy.

22 I really don't have any problem with the
23 coordination between PHMSA and the modal
24 administrations. I also am fine with streamlining the
25 process and, frankly, I think the online application

1 process has been a tremendous improvement and I applaud
2 you for undertaking that.

3 But I feel very, very strongly that the
4 actual fitness standards should be the result of notice
5 and comment rulemaking, both under the Administrative
6 Procedure Act and also just as a matter of good
7 government.

8 If you go through rulemaking, you're going to
9 get the benefit of public input and you can say, well,
10 wait a minute, we're getting the benefit of public
11 input right here and that's true, but if you go through
12 rulemaking, you also have to come up with a standard
13 that has to be justifiable to a court under the
14 standards of judicial review and that imposes a certain
15 discipline on the agency that you just don't have right
16 now.

17 It also affords those regulated industries
18 certain rights that we feel like we're not being able
19 to exercise at this point. We have an opportunity to
20 talk with you but we don't have the same rights that we
21 would have in notice and comment rulemaking that's
22 subject to judicial review and, frankly, as others have
23 mentioned, I think it would behoove PHMSA to look to
24 the FMCSA's approach that they took in putting together
25 the CSA Program in developing their safety fitness

1 evaluation.

2 You know, this is the same fitness evaluation
3 for motor carriers that PHMSA's basically using as
4 input into your fitness evaluation for hazmat
5 transportation by trucks. So I think it makes even
6 more sense to look at how FMCSA went about their
7 process.

8 I'm not saying that CSA is a perfect system
9 but basically the FMCSA got the process right. They
10 spent several years reviewing crash causation and
11 violation history. They set up categories for ratings
12 and a process for weighing certain violations based on
13 the relative risk of those violations and their
14 supposed correlation to the possibility of crash
15 involvement. Then they field tested it. They went to,
16 I think it was, six states over the period of a couple
17 of years. They used volunteer motor carriers and they
18 tried to figure out does this really work in practice?
19 Are we improving what we have now?

20 Then they asked the University of Michigan
21 Transportation Research Institute to review it and to
22 look at the correlation between the basic categories
23 that they set up and the crash risk and UMTRI came back
24 and said that in a couple of instances the basics
25 didn't correlate adequately. So that the agency went

1 back and they tweaked the system.

2 They had public hearings. They took input
3 from carriers on how this was going to affect them and
4 how they thought the process should work. They went
5 back and reweighted a number of the categories and
6 then, finally, they're in the process of going through
7 a rulemaking on the safety fitness ratings that are
8 going to come out of this system.

9 I think if you're going to do this with
10 special permits and approvals, that you should use a
11 similar kind of approach, and, you know, I would simply
12 say that if you don't go through that kind of a
13 justifiable notice and comment rulemaking approach, I
14 think eventually you're going to end up in court anyway
15 and I don't say that as a threat, I simply say it as a
16 prediction, that I believe that this is required under
17 the APA, and I also think it makes sense from a public
18 policy standpoint.

19 I'll say that our mission is exactly the same
20 as yours that you described, Ryan. You know, we're all
21 here for the safe transportation of hazardous
22 materials. Fortunately, it's very safe as is, but I
23 appreciate the opportunity to speak and look forward to
24 working with you on this.

25 Thanks.

1 MR. SCHOONOVER: Thank you. I noticed that
2 our FMCSA colleagues were very happy up until the point
3 you said it was not the total solution.

4 I have three more people that have indicated
5 that they wanted to speak and what I'd like to do, in
6 talking with Ryan, we want to go through those final
7 three. If anybody else would like to say something or
8 anyone on the phone, and then we'd like to get into the
9 questions and approach the questions.

10 So if we can go to Robyn Heald.

11 MS. HEALD: Hi. My name is Robyn Heald,
12 R-O-B-Y-N H-E-A-L-D, and I'm Director of Transportation
13 with the Chlorine Institute.

14 And those that aren't aware, Chlorine
15 Institute is a not-for-profit association with
16 approximately 200 members, including chlor-alkali
17 producers worldwide, as well as packagers,
18 distributors, users, and suppliers.

19 The Institute's North American producer
20 members account for more than 93 percent of the total
21 chlorine production capacity of the U.S., Canada, and
22 Mexico.

23 The Chlorine Institute fully supports DOT's
24 goal of assuring that shippers of hazardous materials
25 are fit to handle these materials safely under the

1 regulations or special permits.

2 DOT has a responsibility to apply sound
3 science to verify that equivalent level of safety to
4 that specified in the regulations will be achieved
5 before a special permit can be issued.

6 Although this effort is crucial for the safe
7 transportation of hazardous materials, CI's members are
8 uncertain of what criteria will be used to determine
9 fitness. Therefore, CI requests that PHMSA in its role
10 as the guardian of public safety issue a public notice
11 defining its review process and fitness criteria to all
12 stakeholders so that potential applicants may better be
13 prepared for the review process.

14 Chlorine and related chemicals are used
15 throughout the U.S. economy and are key to the
16 protection of public health. Often, as a path towards
17 safety improvements, special permits are used. Special
18 permits are currently used by many CI members in ways,
19 such as enhanced packaging design and inspection
20 procedures.

21 Recently, one significant potential
22 transportation enhancement was identified, a new
23 chlorine rail tank car design, which received a special
24 permit approval last year.

25 CI supports the review of special permits,

1 such as this, that achieve potential advancements in
2 safety utilizing a process based on sound science and
3 engineering.

4 To help create a more effective and efficient
5 process, PHMSA should consider differentiating between
6 packaging designs and operations in its review process.
7 Applications for enhanced packaging design should stand
8 on the merits of the design itself and their approval
9 should not rely on applicant's history of compliance
10 and safety performance. A safer design is a safer
11 design, whether an applicant has had zero incidents or
12 multiple incidents. The benefits of using the enhanced
13 design will be the same in either case: improved
14 safety to the public.

15 PHMSA should do a thorough engineering review
16 of new packaging designs and approve special permit
17 applications based on whether or not the design itself
18 provides an equivalent level of safety to or beyond
19 current regulatory requirements. This may be
20 particularly useful for applications requesting party-
21 to status for certain already-approved special permits
22 relevant to package design.

23 Applications for new or alternative
24 operations would have to be reviewed for fitness
25 because the execution of the operation would be heavily

1 dependent on the applicant's capability of performing
2 the function. An applicant's capability can best be
3 judged by its past and current performance and
4 compliance with the current regulations.

5 PHMSA should continue to review an
6 applicant's level of fitness in cases of new or
7 alternative operations prior to considering approval.

8 Based on the Background PHMSA provided to
9 stakeholders prior to this meeting, it appears that
10 when all is said and done, the majority of applicants
11 are determined to be fit. If PHMSA seeks to develop a
12 more effective and efficient process, there should be
13 focus on those aspects which change applicant status
14 from unfit to fit and revise the process and criteria
15 accordingly.

16 It is difficult to provide comment on what
17 should or should not be considered in the fitness
18 evaluation process when stakeholders are not privy to
19 the criteria PHMSA has been using over the last couple
20 years which stakeholders could use for baseline
21 assessment.

22 Because many CI members use permits to
23 transport chlorine and other mission-critical products,
24 understanding the process for determining fitness of
25 applicants is important to our members. In the initial

1 implementation of fitness evaluations, PHMSA did not
2 make the criteria to be evaluated publicly available to
3 stakeholders. Upon completion of this next phase in
4 the development of the fitness evaluation program, CI
5 requests that PHMSA issue a public notice in the
6 Federal Register making the fitness evaluation process
7 and criteria available to all stakeholders.

8 If PHMSA publishes this detailed information,
9 it would help expedite an already burdensome
10 application review process and help guide an objective
11 and consistent process. A defined fitness evaluation
12 process would also ensure that applicants are better
13 prepared by understanding what is required of them and
14 the length of time the review process may take, which
15 will allow for a more efficient process.

16 Thank you.

17 MR. SCHOONOVER: Thank you, Robyn. Okay.
18 J.P., J.P. Givens.

19 MR. GIVENS: Thank you very much. J.P.
20 Givens, North American Transportation Consultants, and
21 unlike everyone else who's spoken so far, our firm does
22 not deal with one particular type of hazardous
23 material, one sector of the industry. We deal with
24 shippers, we deal with carriers, we deal with law
25 enforcement people, we deal with small companies, we

1 deal with very large multinational corporations. So we
2 see it all the way across. So we probably see it a lot
3 better than most with respect towards how special
4 permits and approvals are operating. Okay?

5 So based on that historical side and
6 explanation of our company and what we function on, I'd
7 like to reiterate the historical why we're here and
8 what caused the problem.

9 Several years ago, some congressional
10 staffers in the last Congress decided that because you
11 people could not tell exactly who the hell was moving
12 things under a permit, that you couldn't control it and
13 therefore you were not following the law. They
14 chastised you, they yelled at you. There was a big
15 over-reaction, in my personal opinion. Bookoo bucks
16 were spent on it, resources were spent on it, and the
17 end result was less than one percent of the people
18 under the new criteria, according to what you just
19 said, were found to be not fit.

20 If we went to Congress in a tight budget era,
21 like we have, and said it's going to cost you X amount
22 of dollars and this is the end result you're going to
23 get, I would hope a bridge to nowhere would not be the
24 result. Okay?

25 Having said that, I believe that we need to

1 establish some type of criteria unlike the CSA Program
2 over at Motor Carriers. That's an internal tracking
3 program. It does not establish a safety fitness
4 determination. This does. This determines who's fit
5 in order to be qualified to get a safety permit; in
6 this particular case, a special permit or an approval.

7 That's the major difference, gentlemen. So
8 based on that, that's why people are calling for a
9 rulemaking. When FMCSA goes to get their safety
10 fitness determination passed under Part 385, they're
11 going to have a fight themselves and they're going to
12 have to do a rulemaking. Okay?

13 So Item Number 1 is we need to establish some
14 ground rules here. First one, should there be an
15 annual or biannual evaluation of every single holder?
16 It is ludicrous right now that a person or an entity
17 that has 12 special permits applies to renew or a party
18 to an extra one or two of the ones they currently have
19 is found to be unfit but can continue to operate with
20 the 10 that they still have because they haven't come
21 up yet. Either you're safe or you're not safe.

22 Fitness determination should apply across the
23 board and if we do this on a biannual basis or some
24 other determining factor, then people will know it's
25 coming up and that's a critical thing for us.

1 The next thing is, as a couple of the other
2 speakers have said, the movement of a number of the
3 special permits over to the regulations of the HMR
4 themselves will eliminate a lot of problems. We've had
5 a lot of them out there for decades and if we haven't
6 determined under the special permit protocol whether or
7 not that is comparable level of safety that we can
8 incorporate it in, we're not doing our job right as
9 regulators and as industry people.

10 The Special Permit Program, which started out
11 as the Exemption Program by Congress, was simply to
12 allow for technology to be incorporated into the
13 industry and transportation. It said we're going to
14 allow you two years, now we're going to allow you up to
15 four years to allow people to prove this one way or the
16 other, and we've got them for decades out there which
17 makes absolutely no sense.

18 A lot of them in the last year or so have
19 been incorporated in and I applaud you for looking at
20 that, but we need to put some type of a level on there
21 and say if we can't make that determination in five
22 years, 10 years, whatever the number is, we're doing
23 something wrong, and let's go back and look at the
24 technology.

25 The third item on my list is should

1 individual locations be evaluated or will a single
2 location determine an entire company? If I have a
3 chemical distribution operation and I have 14
4 distribution locations and there was a problem at one
5 of the distribution locations, does that mean that all
6 of my company now falls under an unfit determination?

7 We issue the permits now on the basis of
8 individual locations but we do the evaluation on the
9 basis of the company, from what I'm seeing. Okay?

10 Next one is the use of agency databases for
11 fitness determination. I really believe we need to go
12 back to the drawing board and ask three simple
13 questions when we use somebody else's database.

14 Number 1. What the heck was the database
15 intended for? The forms. What was the process that
16 this data is coming from intended to do?

17 Number 2. Who's filling it out? The village
18 idiot or an expert who knows what they're doing?

19 FMCSA will tell you one of their biggest
20 problems is continuity on roadside inspections. When
21 you allow a trooper on the side of the highway, which
22 happened in one of the cases here in Virginia, the
23 trooper was kind enough to put a driver out of service
24 for not having a shipping paper and it turned out he
25 had a shipping paper but the shipping paper just didn't

1 have the words "residue last contained" on it. That
2 because the numbers are so tight translated itself into
3 a rejection from your office because his hazmat level
4 was too high.

5 Once we were able to prove that that, through
6 a data Q challenge, through Motor Carriers, that that
7 was erroneous in the court papers, it was removed.
8 Once it was removed, then they were safe, but during
9 the interim period, they're not approved. They're
10 economically impacted which is extremely important.

11 And the third thing is what will the benefit
12 of that database be to your program? How does it melt
13 into your program? Not the fact that you have a
14 database, a lot of information, I can pull it together.
15 Is it valuable and does it have substance when it comes
16 to your program? Very critical issues for you.

17 Should fitness standards be associated with
18 the level of risk? Cynthia mentioned that earlier.
19 That's a great idea. If you have people that are
20 dealing with high-level risk items, they should be at
21 higher standards.

22 Congress dictated that when they established
23 the safety permit requirement for motor carriers.
24 These particular types of commodities and these levels
25 must in point of fact go under additional scrutiny. We

1 should do the same thing here. Okay?

2 The next item that I mention is continued use
3 by downstream people. Once again, we're back where
4 Congress was upset. Do we know every one of these
5 special permits that sits back and says continued use
6 of the next shipper or transporter is authorized? Who
7 the hell they are? How safe are they to touch this?
8 Are they the type of people we want handling the
9 hazardous material? We have to make that
10 determination. We need to look at that from the
11 practical sense.

12 The next one is why is an applicant rejected
13 for fitness? As I said before, allowed to continue
14 with other applications. If it is a fitness
15 determination based on safety, then it should be
16 applicable immediately. If we put a standard in place
17 that people know about, it'll work great. The problem
18 with your program was one day people were operating at
19 this level, the next day you throw in the switch and
20 now all the databases that were there before become
21 applicable. So people in corporations that were
22 filling out 5800.1 reports by the plant manager or by
23 the HSE person at the plant who has no idea about Motor
24 Carrier or about PHMSA regulations is filling this out.
25 Now you've got 5800.1 being evaluated by your people,

1 rightfully so, that say he just admitted that they
2 didn't handle it properly.

3 Well, sure, they didn't handle it properly.
4 That's how the incident occurred. I'm right there with
5 you, but because they weren't sophisticated enough to
6 know the right language, they now get dinged for a
7 major hazardous material incident when, in point of
8 fact, it was not a major hazardous material incident
9 caused by them.

10 I have never investigated in 30+ years as a
11 federal agent and as a consultant any hazmat incident
12 or fatality that hasn't been a chain reaction of
13 multiple-caused problems. Not one guy causes the
14 problem. He did it wrong, that did it wrong, the
15 container wasn't correct. It's a chain, and as a
16 result, what we need to do is focus back on what our
17 goal here is. Our goal is to identify those people who
18 are not safe to continue to handle this. I'm right
19 there with you. But I think the process, because it
20 definitely impacts the economic ability of companies to
21 survive and function, we need to, in point of fact,
22 have a rulemaking process because we have to formalize
23 it, so people know what they're dealing with and people
24 can talk intelligently about the databases you're
25 proposing to use because when motor carriers set theirs

1 up in the listening sessions because I attended them
2 for the CSA 2010, that was the discussions that we were
3 having.

4 The database is wrong. The accident data is
5 wrong. How do we go about correcting it before we turn
6 it loose? There's a reason that the accident data is
7 not released to the public on the accident basic for
8 motor carriers and it's a data quality issue, in my
9 opinion. So we need to look. It's a program. It's a
10 process.

11 I thank you for your time.

12 MR. SCHOONOVER: Thanks, J.P. Okay. The
13 last is Frits Wybenga. Frits?

14 MR. WYBENGA: Good afternoon. My name is
15 Frits Wybenga. That's F-R-I-T-S W-Y-B-E-N-G-A. I'm
16 with the Dangerous Goods Advisory Council, and I
17 appreciate the opportunity to speak to you today.

18 As I was trying to solicit comments in
19 preparation for my comments today, not surprisingly, a
20 certain Mr. Roberts volunteered some comments and, of
21 course, I think you understand but for those in the
22 audience who don't, he was the former Administrator for
23 Hazardous Materials Safety or Associate Administrator
24 for Hazardous Materials Safety in RPSA, as we knew it
25 back in the good old days.

1 And a particular thing that he brought up
2 that I think is very noteworthy is that the current
3 provisions for fitness in Part 107 were introduced in
4 1996 and the rationale for including that provision in
5 the regulations was to revoke or withhold a permit from
6 somebody who had committed some egregious violation of
7 the regulations.

8 Just some of the examples that he cited at
9 that time that were a basis for withholding or
10 revoking, one was a special permit holder forged my
11 signature on to a false permit for carriage of
12 hazardous materials in portable tanks to offshore
13 platforms. He was tried and convicted in a criminal
14 proceeding and served a prison term. The permit was
15 revoked.

16 Another was a special permit holder moving
17 military explosives in an aircraft under DOT contract
18 landed at an airport without permission from the
19 airport operator as required by the permit and again
20 the permit was revoked.

21 And, finally, a special permit holder who was
22 authorized to transport a very reactive chemical in an
23 exclusive use executive jet from Houston to an oil
24 company in Australia, parked his aircraft in Oakland.
25 He checked the shipment for carriage on a Qantas

1 Airlines passenger flight leaving from San Francisco,
2 again a prison term followed and the permit was
3 revoked.

4 I think you get the understanding that the
5 original intent of the rule was for very egregious
6 violations of the regulations and, unfortunately, with
7 the pressure from the Hill and the Inspector General,
8 we really believe that PHMSA went too far in the other
9 direction with this system.

10 We think the system has proven costly for
11 both PHMSA, particularly in view of your requesting 22
12 additional staff personnel for the next budget, and
13 it's been very costly to industry.

14 We think the current process is complex and
15 it's really not justified on a safety basis. We think
16 we're concerned about the absence of criteria,
17 particularly in the second two tiers. What do your
18 inspectors look for when you do a fitness evaluation
19 onsite? No criteria are available. In some cases, you
20 know, I personally have been involved in fitness
21 examinations onsite for people who are basically
22 unknown to PHMSA.

23 You know, the inspectors basically had to be
24 led around the facility to understand the operation and
25 really were not very well-informed inspectors. So we

1 really question what is the benefit of that kind of an
2 inspection for purposes of fitness?

3 We also believe that the system is not fair,
4 considering the wide diversity of special permit
5 holders. There are both large and small operators with
6 many -- you know, a wide range of exposure to causing
7 an incident in transportation and one size fits all,
8 given the level of detail that you're drilling down to,
9 is not appropriate here and it's unfair.

10 We basically look at the current system as
11 another essentially a penalty system. It's a system
12 that penalizes those who are applying for a special
13 permit or an approval but it's discriminatory in that
14 you have other people within the same industry that are
15 moving that product in compliance with the regulations
16 and they're not subject to any kind of fitness
17 evaluation. So you're basically precluding somebody
18 who needs that special permit or approval to safely
19 carry their product in a manner that provides an
20 equivalent level of safety to what's in the
21 regulations. You're precluding that person from
22 transporting his product. So we think it's
23 discriminatory in that respect.

24 When you look at safety, does it really
25 enhance safety? And when you look at special permits,

1 special permits are only issued when there is a
2 demonstrated equivalent level of safety provided and I
3 would suggest that in special permits, you're actually
4 providing a greater level of safety in many cases than
5 you're actually providing in conformance with the
6 regulations because in order to obtain a special
7 permit, the applicant basically includes more safety
8 details in that application than is necessary to
9 provide exactly the equivalence level.

10 So, in fact, special permits actually provide
11 a greater level of safety in many cases than the
12 regulation itself and so the question is why would you
13 withhold a special permit, given that that special
14 permit is actually providing a greater level of safety
15 than the regulations?

16 We have also found that in many cases, the
17 criteria that are used in evaluating fitness do not
18 relate to the special permit itself. For example,
19 we've seen motor carriers or carriers log book
20 violations, failing to make a log entry of a driver for
21 his hours of service purposes be a condition for
22 judging whether a packaging special permit should be
23 issued. The two have no relation to one another and we
24 think it's inappropriate to be judging, you know, a
25 driver violation, using a driver violation for

1 determining whether a packaging is safe or not, and
2 these packagings typically would provide a greater
3 level of safety than what's in the regulations.

4 We very much support the rulemaking process.
5 We think it's inappropriate to do this in just a policy
6 manner. We would very much encourage PHMSA revert back
7 to only looking at very serious violations of the
8 regulations in terms of evaluating the fitness of
9 applicants, and we believe that the current system
10 really defies inclusion in the regulations.

11 I think it would be a nightmare to include
12 this in the regulations, to really provide criteria
13 along the lines of what you're using currently as a
14 basis for evaluating the fitness for this wide range of
15 applicants that do come in for special permits.

16 In response to your questions, again we would
17 not advocate an elaborate system. We would like to go
18 back to just very limited withholding of special
19 permits based on egregious violations or willful
20 negligence.

21 We do not believe, in response to your second
22 question, we do not believe that applicants for
23 approvals involving classifications should be subject
24 to fitness evaluation. We don't see how the
25 applicant's fitness has a role in terms of producing

1 the chemical and making it safe for transportation.

2 So I thank you for your time.

3 MR. SCHOONOVER: All right. Thank you,
4 Frits.

5 Are there any other speakers or people here
6 that would like to present? Dave Sonnemann.

7 MR. SONNEMANN: My name's David Sonnemann,
8 spelled S-O-N-N-E-M-A-N-N. I'm from Praxair,
9 Incorporated, and I represent an industrial company
10 obviously that is both a shipper and a carrier of
11 hazardous materials.

12 I didn't come with prepared remarks but
13 having listened to the presentations and the
14 discussion, I think there's some points that need to be
15 made and my conclusion, based on the discussions, is
16 the focus really should be the focus on fitness should
17 be for new applications for special permits rather than
18 existing.

19 Fitness, as I listened, really is an
20 evaluation of the capability of a hazmat shipper or a
21 packager, manufacturer, or the demonstrated ability to
22 comply with regulations and with the conditions of a
23 special permit.

24 So how do we measure compliance? I think
25 many of the elements are already in place. To measure

1 compliance, we have the capability to measure
2 incidents. We have reports that are required for some
3 special permits. We have reports and approvals from
4 independent inspection agencies for some types of
5 manufacturing operations. We have the CSA results from
6 roadside inspections and, of course, all of us fear the
7 enforcement actions that may result from those.

8 One point that I did want to make, as I list
9 those, accountability for the infraction is not
10 mentioned. One of the things that I read in preparing
11 for this meeting was what about explosive material
12 that's left on the outside of a package? How do you
13 determine whether that is the accountability of the
14 person who put the material into the package or the
15 result of an inadvertent spill at a warehouse where a
16 forklift punctures a drum and it drips and then dries?

17 So one concern that I have is that
18 accountability is a linchpin of the data that were used
19 for fitness. It's unfair to punish someone for an
20 activity they didn't perform but the evidence is there
21 and remember we're talking about intermodal shipments.

22 The Chlorine Institute made the point that
23 manufacturing and operational special permits are
24 different and truly they are. Putting a material into
25 a packaging, labeling it, marking it, and preparing it

1 for shipment is very different than manufacturing the
2 packaging itself and stamp-marking that, if it happens
3 to be a cylinder, and I would recommend that we focus
4 again on what procedures and programs do we already
5 have in place to monitor that.

6 Certainly for manufacturing of packagings, we
7 have a number of programs in place. I'm most familiar
8 with cylinders where we have independent inspection
9 agencies and, boy, those reports are pretty detailed
10 and certainly are an indicator of the competency of the
11 packaging manufacturer.

12 Finally, for new permits, I heard mentioned
13 risk evaluation. It seems to me that PHMSA, for many
14 years, has been focused on risk assessment or risk-
15 based programs and here's an opportunity, especially
16 with new special permits, to focus on the risk
17 evaluation.

18 We might use similar special permits that
19 have been issued or the equivalent level of safety
20 justification requires a risk evaluation, so we have,
21 we meaning so PHMSA has some data upon which to make a
22 decision.

23 And the final comment I wanted to make was
24 there was a comment earlier about incorporating special
25 permits into the regulations. I fully support that,

1 but I would caution PHMSA that time may not be the
2 appropriate measure. It may be the number of shipments
3 because, over a 10-year period, if I only ship two
4 cylinders a year, well, I'm going to ship eight or 10
5 cylinders over the life of that special permit, whereas
6 another special permit, I may ship a 100,000 cylinders
7 in a year and the data showing that the incident rate
8 is very low is much more significant for that group of
9 cylinders than time would be.

10 Thank you.

11 MR. SCHOONOVER: Thank you, Dave. Any other
12 speakers that are present?

13 (No response.)

14 MR. SCHOONOVER: Okay. If not, we're going
15 to go to our attendees via the call.

16 MR. PAQUET: So, Ryan, we're going to hand
17 this over to you, if you can organize any people on the
18 phone that would like to give a presentation.

19 MODERATOR: Thank you. Ladies and gentlemen,
20 if you wish to ask a question, please press Star, then
21 1 on your touch tone phone. You will hear a tone
22 indicating you're being placed in the queue. A voice
23 prompt on your phone line will indicate when your line
24 has been opened. You may remove yourself from the
25 queue at any time by pressing the Star key, followed by

1 the digit 2. If you're using a speaker phone, please
2 pick up the handset before pressing the corresponding
3 digits. Once again, please press Star 1 at this time.

4 MR. PAQUET: I'm glad I'm on this side
5 because I have no idea.

6 MODERATOR: We do have a question on the
7 phone.

8 MR. SCHOONOVER: Great. We're ready.

9 MS. D'ARRIGO: Hi. This is Diane D'Arrigo
10 with Nuclear Information and Resource Service. Is this
11 working?

12 MR. SCHOONOVER: Yes.

13 MR. PAQUET: Yes.

14 MR. SCHOONOVER: Diane, could you spell your
15 name?

16 MS. D'ARRIGO: Diane, D-I-A-N-E, D'Arrigo,
17 D-'-A-R-R-I-G-O, and my organization is Nuclear
18 Information and Resource Service, and I have a few
19 comments.

20 It's not fully clear how much these fitness
21 for duty changes would affect international shipments
22 of radioactive materials. The specific concern, and
23 then also a general concern, my organization and
24 numerous others have requested and petitioned the DOT
25 PHMSA to carry out an environmental impact statement on

1 all radioactive waste shipments that would be Class 7
2 shipments in the United States and through
3 international waters. We continue to ask that that be
4 carried out.

5 Regarding the proposed shipment of
6 radioactive steam generators from Canada through U.S.
7 waters and the Great Lakes, the reason that DOT and
8 PHMSA is considering that, my understanding would need
9 to consider that, is due to the size of the container
10 and it's not clear to me whether changes that are being
11 considered today would affect whether or not there
12 would be a public process, whether or not PHMSA would
13 need to -- whether these changes today would streamline
14 the procedures necessary for DOT PHMSA to approve the
15 steam generator shipments from Canada through the Great
16 Lakes and U.S. waters.

17 We are on record asking for a public hearing
18 on those shipments and don't know whether the changes
19 -- well, to the extent that the changes today would
20 take away any public opportunity for hearings and
21 further public information on these shipments, we
22 oppose them. As organizations and members of the
23 public, we want the opportunity to look for public
24 hearings on radioactive shipments, especially large
25 shipments and those with long-lasting and/or

1 potentially radioactive radio-nucleotide materials
2 and/or wastes.

3 We oppose streamlining any aspects of the
4 PHMSA regulations for radioactive and Class 7
5 shipments, support stringent regulations for fitness to
6 conduct activities authorized by the special permits or
7 approval, and oppose weakening of those regulations,
8 especially for radioactive and/or Class 7 shipments.

9 Obviously the steam generators should not be
10 in the same category as firecrackers, as the example
11 was given at the beginning of this meeting today.

12 We also need a draft proposed rule change to
13 make specific comments. It's not clear what changes
14 PHMSA is proposing and considering and how it will
15 affect any approval process and opportunity for public
16 comment on domestic and international radioactive
17 materials and waste shipments.

18 That's it for today.

19 MR. PAQUET: Thank you.

20 MR. SCHOONOVER: Thank you. Ryan?

21 MODERATOR: And we'll take our next question.

22 MS. COMBYLA: My name is Kay Combyla, and I'm
23 a member of the Citizens for All Transit Chemical
24 Contamination, and I have some concerns about shipping
25 radioactive waste, as well, and I realize that this

1 meeting is to streamline the permit process and this
2 meeting is especially on the fitness of special
3 permits, the fitness of applicants for special permits.

4 However, it also is to streamline the permit
5 process and so my concern is that if a company or a
6 party is approved as fit that that is not the only
7 criteria looked at for approving special permits, and I
8 do have a special concern for shipments of large radio-
9 active reactor waste or components on the Great Lakes
10 or in other U.S. waters.

11 This kind of shipment would put the Great
12 Lakes drinking water and fisheries which affect
13 millions of people at immense risk and Canada Nuclear
14 Safety Commission has already given an indication that
15 they are wanting to ship these and that they see
16 nothing wrong with them and I realize that there have
17 been shipments of radioactive steam generators in the
18 Great Lakes in the past but, frankly, they were done
19 without public input or knowledge and this really needs
20 to be -- this sets precedent for many, many shipments
21 and it belongs to be made by the public.

22 So I guess my concern is that, first of all,
23 what Diane D'Arrigo said about a draft statement that
24 we have access to what any planned changes are so that
25 we can make direct comments on those, but also concern

1 that there would be public hearings before these kind
2 of reactor wastes or like components that are
3 radioactive be shipped through the Great Lakes or in
4 U.S. waters.

5 MR. SCHOONOVER: Okay. Thank you. Ryan?

6 MODERATOR: And we'll take our next question.

7 MS. TURRIE: Hi. This is Lara Turrie from
8 the COSTHA, Council on Safe Transportation of Hazardous
9 Articles. First name L-A-R-A, last name T-U-R-R-I-E.

10 First, we'd like to thank you for holding the
11 public meeting. Second, apologize for not being able
12 to travel down there today. The airlines just didn't
13 want to cooperate with us.

14 COSTHA represents over a 180 companies that
15 are carriers, shippers, consultants, manufacturers, and
16 others all involved in the safe and efficient
17 transportation of hazardous materials.

18 To support some of the comments that have
19 been made, we are very concerned that all activities be
20 risk-based as much as possible. I think the finding
21 that less than one percent of the applicants were
22 deemed unfit goes a lot to say how safe the industry is
23 and that perhaps resources might be better utilized.

24 We agree that the fitness criteria and
25 standard should be the product of rulemaking and

1 comment. We are very interested in having as many
2 special permits and approvals as prudent be
3 incorporated into the regulations and also would like
4 to have further consideration of reciprocity with other
5 trusted competent authorities.

6 We do also agree that the length of time it
7 takes sometimes to go through the process adversely
8 impacts the competitiveness of U.S. industry,
9 especially those involved in these technologies.

10 We appreciate the enhancements that have been
11 made today in the online approval process and we think
12 that they were much needed and most welcome.

13 Thank you.

14 MR. SCHOONOVER: Thank you. Thanks, Lara.
15 Ryan?

16 MODERATOR: We have no further questions in
17 the queue at this time.

18 MR. SCHOONOVER: Okay. What I'd like to do,
19 given that we've been at this for an hour and a half,
20 I'd like to take just a 10-minute break to give
21 everybody a chance to stretch and, you know, take a
22 break. We'll begin in 10 minutes promptly.

23 (Recess.)

24 MR. SCHOONOVER: One of the first questions
25 that I had that came to mind from several of the

1 presenters was that there seems to be a thought that is
2 being put forward, some concepts that there be a
3 separation between package design and operational
4 differences; that is, permits that would apply to
5 package design versus permits that apply to operational
6 conditions.

7 The question that I would ask is, is there a
8 way or is there a feeling that a package manufacturer
9 shouldn't have to demonstrate the ability to comply
10 with a permit on a new and untested packaging?

11 If package design is taken out, if those
12 would not be subjected to a fitness review, how would
13 we as the department evaluate and determine if a
14 manufacturer who's applying for a permit for a new and
15 untested design on a package, how would we go about
16 determining their fitness?

17 Feel free to stand up, please. I acknowledge
18 you.

19 MR. GIVENS: J.P. Givens. Bill, my position
20 is I think you misunderstood what we were saying.

21 Anyone who's applying for an original permit
22 should go through a fitness determination, whether
23 they're a manufacturer or they're a shipper, it doesn't
24 matter, the original one. It's the issue of going
25 forward that a manufacturer would have to go through a

1 fitness determination on their transportation side or
2 their modal agency side that has nothing to do with the
3 manufacturer of that cylinder but the cylinder itself
4 is a safety issue.

5 Their ability to manufacture that container
6 properly is definitely the scope and the subject matter
7 of your determination in the first place. You have to
8 determine them to be fit, as far as I read the rules,
9 that they are safe to do that, and if they don't know
10 what they're doing, you have every right to deny that
11 one.

12 I don't think anyone here is saying that.
13 What we're saying is once manufacturers have proven
14 themselves, when they come in for a second or a third
15 round, we don't think that maybe a full fitness
16 determination is required on them, but I've got a
17 manufacturer client that you guys went in and did a
18 full -- one of the first manufacturing safety fitness
19 determination audits and I didn't have any problem with
20 that. I thought it was good. There was some technical
21 issues we needed to address and I think that keeps them
22 honest. I don't have a problem with that.

23 But I don't think we're saying they shouldn't
24 be. On the first go-around, everyone needs to be
25 determined.

1 MR. SCHOONOVER: Bob?

2 MR. RICHARD: Bob Richard. Do I need to
3 spell my last name? I work for Label Master Services.

4 So one thing I wanted to point out is, you
5 know, if you have this criteria that you have to have a
6 fitness inspection, I'm not sure it makes sense in
7 every case. There's some things that are so simple.
8 For instance, someone comes in because they have a
9 packaging design, it's a non-bulk packaging, and it's
10 not clearly defined in the regulations. So the
11 regulations have an approval provision. It's a W Mark
12 packaging.

13 So maybe you can't determine whether it's a
14 4G or it's a jerry can. It's some kind of something in
15 between. I know Don's dealt with these in the past.
16 So what are you going to do to determine the person's
17 fitness? I mean, they're a manufacturing of packaging.
18 They know what they're doing. They've come in to you
19 and they've said, hey, look, we're not sure what type
20 of packaging this is. We're looking for something.
21 The regulations really don't cover it. You need to
22 change the regulations to clarify this. But in the
23 interim, we would like to offer these to the public.

24 Now why does someone have to come in and
25 determine whether they can make it or not? In some

1 cases, it's so obvious, there's just really nothing, no
2 value-added to that determination.

3 One other thing that I'd like to say is, you
4 know, it seems to be somewhat unfair. If you have a
5 company that's an upstart company and let's say they're
6 developing a medical device and this medical device has
7 the potential for saving hundreds of thousands of
8 lives. Now they come in for an approval and you're
9 going to do a fitness evaluation. Now are you going to
10 look at their record because they've never shipped
11 anything before? I would say maybe you'll look to see
12 are their employees trained, are they capable of
13 following the regulations, do they have the regulations
14 in their plant, do they understand what they need to
15 do, do they have quality assurance program? Sure.
16 Maybe that's necessary. But what data can you use?

17 So, you know, if you make this so specific,
18 it's not going to apply in every case and I'll tell you
19 one thing now that I'm on this side of the fence that I
20 see a lot is, for instance, these air dusters. You
21 have this special permit for canned air. You can't
22 imagine how many people ship canned air and how many
23 hundreds, millions of shipments there are.

24 Does everyone who ships that need to be fit?
25 How are you ever going to make that determination? Now

1 I would have to say that some people out there don't
2 keep those special permits at the place where they ship
3 them but, really, it's canned air, for God's sakes, and
4 if there's anything that should be incorporated into
5 the regulations, that one should be.

6 That's all I have to say.

7 MR. SCHOONOVER: Bob, I just wanted to ask a
8 question before you sit down.

9 You mentioned the differences between
10 somewhere fitness or the ability to perform a function
11 under permits should be obvious. That really lends to
12 the second question that we asked. Are there certain
13 approvals of permits where we can't use traditional
14 data to determine fitness, and how do we go about --
15 you know, what should we consider and how do we go
16 about looking at that? I mean, do we just take on some
17 of these -- are there areas where -- is there a line
18 where we can say, you know, below these types of
19 activities we just take the word that they can do it?

20 MR. RICHARD: I mean, you have to use
21 discretion in some of these cases. For instance, I
22 think you could use a questionnaire but, you know, if
23 you look at every one of your special permits, it talks
24 about, you know, having hazmat training and the way he
25 has to be trained. It's already built into the special

1 permit.

2 So, you know, there has to be a level of
3 trust. I think someone, a previous speaker said, you
4 know, now you're assuming that the applicant is unfit.
5 Why do you assume that? There's millions of shipments.
6 What is it? A million shipments a day. Look at the
7 safety record.

8 So are all these people really unfit? I
9 mean, you could use some discretion and that's the way
10 it worked in the past, is, okay, someone's coming in,
11 it's a high-risk operation, we probably ought to send
12 an inspector out, let's look at the data and see what's
13 involved. Do they have a lot of incidents? Are they
14 really serious incidents? Use some discretion on
15 whether you need to do it. I think you're doing that
16 now but I think you're relying too much on data, like
17 as other speakers said, that may be flawed, I mean,
18 because, you know, who's really responsible for that?

19 The carrier's reporting it. It's not always
20 an educated person who's making those reports. You
21 look through all of that incident data and it's really
22 hard, even for the agency, to use it to drive the
23 regulations and my point is I think it's great when
24 PHMSA says we're data-driven, risk-based, but in some
25 cases, you're not going to have the data.

1 So are you going to have someone have to wait
2 months and months and months until they need a 20-page
3 risk analysis to come in with something that's so
4 simple? I remember when I was working in the agency
5 and was involved in some decision-making, we had to
6 make a decision on whether IBCs could be tested with
7 water or whether you needed to use something that
8 represented the chemical. People were like, well, we
9 gotta have data to make this decision.

10 Well, sometimes it's just common sense and,
11 you know, with that decision, I was proud that we made
12 that decision because it makes sense, it protects the
13 environment because now you're not using something that
14 has to be disposed of properly or handled that could
15 be, you know, put into a water system, but, you know,
16 it doesn't always have to have reams of data to make
17 the decision. You know, in some cases it's obvious
18 that the person is capable of doing a simple task and
19 you don't need to send an inspector out there. You
20 don't have to have reams of data to make that
21 determination.

22 MR. SCHOONOVER: If anybody else would like
23 to comment, I might as well start with the second
24 question about this discussion about certain types of
25 approvals or permits where we don't necessarily have

1 data.

2 MODERATOR: We do have a question over the
3 phone.

4 MR. SCHOONOVER: Yes, go ahead. Thank you.

5 MODERATOR: Caller, your line is open.

6 MR. SCHICK: Bill, hi. This is Tom Schick,
7 S-C-H-I-C-K, from the American Chemistry Council.

8 I, Lara, am sorry I cannot be there today but
9 I've been listening in since the meeting began.

10 I think this point about -- there actually
11 were two points I wanted to comment on but I wanted to
12 reinforce what others, including Rick Schweitzer, said
13 about the benefits of proceeding with the rulemaking,
14 to kind of get this thing out, you know, in a more
15 formal process, although I do appreciate the public
16 meetings that you've been holding and your willingness
17 to discuss it with people.

18 But back to the question that's pending right
19 now, which was the other comment I was going to make
20 earlier, and that is that it does seem that not all the
21 situations for which a party applies are the same. The
22 one that's been discussed might be the difference
23 between the new application and a renewal or the
24 difference between an operating activity versus, in
25 particular, the kind of packaging.

1 I think those are highly-relevant differences
2 to define, particularly if you want to concentrate on
3 the areas where there may be some greater risk to
4 safety and not be stretched as much as perhaps the
5 agency has been over the past several years in the
6 special permits and approvals and fitness area.

7 I wanted to pass along, as I have on a couple
8 of other occasions, that it is puzzling to some ACC
9 member companies that a party requesting party-to
10 status to a particular kind of container would --
11 particular kind of packaging for hazmat would be
12 subjected to a fitness evaluation when it's exactly the
13 same package that everybody else has been using that's
14 already a party to that one.

15 So that's a difficult one, I think, for folks
16 to get their heads around and I think there are a
17 number of differences that may not be all that subtle,
18 that I think if you worked through them, I think you
19 might be able to reduce the amount of scrutiny you have
20 to put people through and still maintain the same level
21 of safety or perhaps even be able to concentrate on
22 those more focused areas where you need to do that
23 rather than kind of doing everything by the same one
24 size fits all.

25 So that's the comment I have, Bill.

1 MR. SCHOONOVER: Okay. Thank you. I think
2 one of the things I hear a lot is this breaking down
3 the different manufacturing versus the operational and
4 new applications versus old.

5 MR. PAQUET: As well as classification-type
6 approvals versus operational approvals.

7 MR. SCHOONOVER: Yes, and I would say, and I
8 think, you know, Ryan pointed out and the Agenda
9 pointed out, you know, if you look at the number of
10 actions we've processed in two years, with 45,000
11 actions, less than 2,000 of those were -- right at four
12 percent, only four percent went to a second level
13 action. So, you know, 96 percent of those we took a
14 look at and said they're fit.

15 I would at least proffer the suggestion that
16 we do, as the department, look at fitness from the
17 start and say you are fit. Now you may take that as we
18 say you're not fit from the start and we have to prove
19 otherwise. I would look at that and perhaps say we're
20 not sure, so we take a quick look, and in 96 percent of
21 the case, we're quickly satisfied that the industry is
22 fit.

23 From that, you know, when you look at the
24 numbers further down, only 75 actually received a
25 visit. Now one of the things I might be good to put in

1 there is those 75 applications, I don't know how many
2 of those were the same company for different things and
3 we've had to go back and look at that data, but that's
4 a very small number that we actually went out there and
5 visited the entity.

6 So, you know, I would say that, you know, in
7 looking at it, you know, you'd almost say it's
8 judicious but I see Cynthia wanted to make a point. So
9 go ahead.

10 MS. McAULIFFE: Thank you very much. Cynthia
11 Hilton with Institute of Makers of Explosives.

12 Thank you very much for kind of acknowledging
13 this thing that we should start from a premise that
14 we're all safe, but I just wanted to use this example,
15 whether it's one, two, or 75, you know, however many it
16 was that were unsafe, we still --

17 MR. SCHOONOVER: I would say 75 that we
18 visited.

19 MS. McAULIFFE: Okay. Well, actually, the
20 way I did the math it's something like 219 was an
21 initial decision of unsafe, but none of us here in the
22 room know why and that's the big tripping point that
23 we're just all falling over.

24 You know, we all want to be able to have the
25 certainty, business wants certainty. They thrive on

1 certainty. So thank you and then you're hitting on the
2 big questions.

3 MR. SCHOONOVER: Ryan, go ahead.

4 MR. PAQUET: Well, if you have more
5 questions. I'll wrap it up after you.

6 MS. McAULIFFE: Actually, since you made that
7 decision, I mean, help us out here. You found 200 and
8 whatever unsafe. Help us out. What made them unsafe?

9 MR. PAQUET: You mean unfit?

10 MS. McAULIFFE: Unfit.

11 MR. PAQUET: Yes.

12 MS. McAULIFFE: Please correct the record.

13 MR. PAQUET: I don't know. I mean, I don't
14 have a list of the 219. At some point there was a
15 decision made that they were unfit to conduct the
16 activity authorized under the special permit and
17 whether that be because of safety management controls
18 throughout the company or specific to that special
19 permit, I know that both have happened. It's
20 recommendations from our modal partners after their
21 reviews as well as recommendations from our Field
22 Operations.

23 I mean, to say why were they unfit, it's hard
24 to say. I don't have them in front of me.

25 MS. McAULIFFE: Yes, you understand.

1 MR. PAQUET: I understand, and I think that
2 the point that I want to get across at the end of this
3 is that we heard a lot of great information and I
4 appreciate you coming here with constructive
5 information and constructive comments because I believe
6 that we can take these and take the next step and we'll
7 work, my decision and PHMSA will work with our modal
8 partners and we hope to lend some clarity to this
9 program, this process, and that's where we're going to
10 go from here.

11 MR. SCHOONOVER: If you would step up to the
12 microphone, please?

13 MR. BURGER: Don Burger. That's Burger,
14 B-U-R-G-E-R, and I'm from the Approvals and Permits
15 Branch.

16 I guess I just wanted to ask Cynthia a little
17 follow-up there. Is that an indication that you would
18 want reasons why we potentially denied applications to
19 be public information or not, so that way people can
20 see what the reasons are?

21 MS. McAULIFFE: Cynthia Hilton, IME. I would
22 invite any lawyer in the room to respond to this. I do
23 not want it to be seen that I'm trying to Joe Blow was
24 denied because but to have the reasons why you reached
25 a decision of unfitness.

1 MR. SCHOONOVER: J.P., if you could stand up
2 to the microphone?

3 MR. GIVENS: J.P. Givens, ATC. The only
4 reason I'm mentioning it is we had two clients with 10
5 denial letters. Okay? Happy to say that they were all
6 the result of roadside inspection information, all of
7 which were vetted through Paul's group over there. It
8 was corrected through Data Q challenges. As a result
9 of the Data Q challenges, the record was corrected, the
10 percentages went back into your standard process, and
11 they were finally approved, and I'm still waiting for
12 my letters back saying that the denials have been
13 removed, but the permits have been issued. So,
14 therefore, we're happy about that one.

15 But the point that we're making, I think what
16 we're saying is a general concept of 50 of these 76
17 were denied for motor carrier issues dealing with
18 percentages for out-of-service, three were FAA issues.
19 A general synopsis like we do on other reporting areas
20 without identifying the individuals would help so
21 people can go back and say that's very important to the
22 denial process or the fitness process and then we could
23 zero right in, like we always say, on the highest
24 violations for shipment papers or for placards. You
25 could do that so we could just do it here.

1 But I'm just letting you know that ultimate
2 75 can't include those 10, I would seriously doubt it.
3 It might be the 200 something that Cynthia was
4 mentioning earlier, but your ultimate goal is probably
5 75 companies. It was a great process. It worked in
6 the end, but the question we haven't asked is twofold.

7 What does it cost sister agencies to do your
8 processing with you because they're backing you up on
9 the modal side, and then the second question to ask is
10 why don't we just simply have you go through Permits,
11 which I know is a pain for you, one time, categorize
12 them, A, B, C, D, or 1-2-3-4, and say that's a risk
13 factor of 1. Whoever deals with that permit, whether
14 you're a party to or a manufacturer, whatever, you have
15 to have that level of fitness evaluation.

16 If you're a 2, if you're a 3, if you're
17 moving air, like Bob said, you're a 5, all you gotta do
18 is put the paperwork in. Okay?

19 MR. SCHOONOVER: Thank you, J.P. Yes, sir?

20 MR. McQUAID: Bill, John McQuaid,
21 M-C-Q-U-A-I-D, with the Industrial Packaging Alliance.

22 If you'll indulge me, I'm going to go a
23 little bit off point, too. When I saw the Notice for
24 this meeting, I felt a little bit like the last time I
25 got an invitation to attend my mother-in-law's

1 birthday. It's not necessarily something that you want
2 to do but, in effect, you have to do in the sense of
3 what you're involved in and who you represent, and I
4 don't mean that totally with the kind of hilarity that
5 it implies.

6 My concern is that us being here twice in
7 August 2010 and here today kind of in effect gives
8 legitimacy to what we all in the regulated side of the
9 business still believe is an illegitimate way of doing
10 what you're doing.

11 I know after the original opinion was issued
12 by your counsel to the agency about what they can do
13 and industry then asked to have that shared and, of
14 course, we were denied because of client-attorney
15 privilege, but I'm wondering now, when we're down the
16 road, as someone earlier mentioned, in the course of
17 doing things here, whether or not we could stop and
18 kind of take a deep breath, have another look at it
19 from the legal standpoint and see whether or not
20 changed circumstances add any perspective to what's
21 going on here because, in my view, supporting
22 everything else that was said by my colleagues in here,
23 this thing begs for a rulemaking that gives you
24 standards that answers the questions that you've been
25 asking about how do I do this and what do I measure and

1 how do I do?

2 If we have the game plan, the field's
3 striped, the referees with the whistles are there, we
4 all know what we're playing by, and we can go forward
5 from there.

6 Thank you.

7 MR. SCHOONOVER: Thank you, John. Larry
8 Bierlein?

9 MR. BIERLEIN: Well, Cynthia asked for a
10 lawyer to talk and I assume that means she's accepting
11 the bill. It's Larry Bierlein, B-I-E-R-L-E-I-N.

12 In terms of the 219 or whatever the number
13 was, we don't need to know who that was but I think
14 it's worth an analysis on your part. Did this boil
15 down to three types, six types, whatever it was the
16 nature of the problem, how egregious was the problem,
17 and put that into the regulations? That's why we
18 persistently asked for a rulemaking. It would help us
19 to know what you're thinking, what those criteria are,
20 and we might want to offer comment for or against.

21 Thank you.

22 MR. SCHOONOVER: Thank you. Larry, that
23 brings up a very good question and that, you know, one
24 of our intentions with this was to, you know, we've
25 certainly heard everybody. We heard everybody at the

1 first meeting. We've heard everybody today, that your
2 preference is a rulemaking. I can't say which way,
3 what we're going to do. I'm not going to, you know,
4 try to even suppose that.

5 But, you know, I think when you look at the
6 data and clearly, you know, we're talking about,
7 Cynthia, you mentioned 219, when you further break that
8 data down, you know, out of those 219 that we sent a
9 letter saying we think you're unfit to hold this
10 permit, 74 or so came back and said, well, we think
11 you're wrong and we looked at those.

12 So that tells me right away that, you know,
13 there was a 140 of them or so that either agreed with
14 us or were so unsure of the process for some reason
15 that they decided not to further question it and so we
16 have to ask what do we do to have better dialogue
17 because maybe on those we are not looking at the data
18 right or maybe there's other data we can use to help
19 drive a better decision.

20 But then out of those 74 that came back,
21 there was roughly, my estimation, 55, I think,
22 somewhere in that neighborhood, that we agreed with and
23 we said, yes, the data shows we agree with you, you're
24 right. You are fit to hold this.

25 So, you know, at the end of the day, you

1 know, there's 20 or so that were really out of -- you
2 know, in addition to the 174, that were, you know,
3 after the process were unfit. Is there something we
4 can do to use better data to get us there much quicker?
5 You know, is there a better -- are there process
6 improvements we can have?

7 Stepping away from how we go about figuring
8 these process improvements out, we want to hear how we
9 fix it.

10 MR. BIERLEIN: Well, just my own commentary
11 earlier with respect to rulemaking, I said you could do
12 it simply, you could do it by examples of things where
13 you did in fact find after the back and forth that the
14 person was unfit, give those kinds of examples.

15 I don't think you need any elaborate Tier
16 1/Tier 2 process into the regulations. I think several
17 people questioned the data in terms of the accuracy of
18 the data, the validity of the data. Certainly the
19 incident reports are suspect always and consequently I
20 think the use of the data and heavy reliance on the
21 data should be done very gingerly because the data is
22 not always accurate and doesn't reflect on the
23 seriousness of whatever might have been the issue.

24 MS. McAULIFFE: I'm so sorry. Cynthia Hilton
25 again. I don't want to beat a dead horse, but I really

1 do think -- it just does occur to me that now you have
2 some experience. You have these 219 that you thought
3 for whatever reason were unfit. So I really think this
4 analysis that Larry's talking about, that's the thing
5 to put forward, so that then we can comment to that and
6 we can say, yes, this is on target or, no, you know,
7 that should not be the way you're going. So I think
8 that'd be a really helpful thing.

9 MR. PAQUET: Thank you.

10 MR. SCHOONOVER: Was there anyone on the line
11 that wanted to comment, as well?

12 MODERATOR: Press Star 1 if you'd like to ask
13 a question or make a comment at this time.

14 (No response.)

15 MR. SCHOONOVER: Okay. I wanted to follow up
16 on another comment that I believe Dave Sonnemann made
17 and, Dave, you made a comment that the companies should
18 keep that fitness when they're a holder, so when they
19 reapply, we wouldn't necessarily do a fitness
20 determination.

21 You know, my question is, you know, how do
22 you feel the company would lose the ability to comply?
23 I mean, if we're going to use something to determine
24 that they're unfit, you know, do violations of the
25 special permit or any of the regs affected, is that our

1 only source to determine and, if so, how does the delay
2 in adjudicating a civil penalty action because
3 certainly I don't think you would want us to use just a
4 finding? How does that delay impact delays of
5 processing permits?

6 MR. SONNEMANN: David Sonnemann,
7 S-O-N-N-E-M-A-N-N, from Praxair, Incorporated.

8 The measure of compliance really or the
9 measure of fitness which is the evaluation that results
10 from compliance would look at incidents, reports, in
11 some cases approvals, independent inspection agencies,
12 as well as the CSA data.

13 The CSA data now represent a six-month window
14 which is a real time window, if you will, about
15 roadside inspection performance. If you only have one
16 truck, probably you may not be inspected all that often
17 but if you run a large fleet of trucks, you're
18 certainly going to have statistically significant data
19 upon which to evaluate the culture of the holder
20 towards compliance and it's really the culture that
21 you're looking for, and, you know, there are certain
22 things, certain, I guess, examples that are egregious
23 that warrant immediate action.

24 But under the FMCSA, the Motor Carrier CSA
25 Program, you know, there are, I think, 11 interventions

1 that they can take and, boy, along the way you ought to
2 have access to that for the carrier portion. For the
3 shipper, it may or may not reflect that the shipper is
4 involved which is why I think accountability is so
5 important because if it's a shipper error, the carrier
6 should not be penalized for that. If the shipper
7 punctured a hole in it with a forklift and it leaked on
8 to another container, then the carrier shouldn't be
9 penalized because there's hazardous material on the
10 outside of a container in the back of the truck.

11 I guess this discussion, at least in my mind,
12 I was looking at it from a management of change
13 standpoint where you have a list of parameters and when
14 one of those changes, you know, then you go ahead and
15 you look indepth and in this case, I was thinking about
16 the party-to status.

17 You've already got a special permit out
18 there. The only thing that's changing is company B
19 instead of company A is going to be the holder. So the
20 container is the same, the material is the same. What
21 are the parameters that are going to change? The
22 company that now holds the permit can fill it to a
23 different level or they can fail to market or placard
24 or label it properly or they can fail to prepare
25 shipping papers, but those latter examples are all

1 covered under the existing regulations and so I don't
2 think you need to evaluate an individual fitness based
3 upon compliance with the general regulations.

4 Thank you.

5 MR. SCHOONOVER: Okay. Thanks.

6 MS. McAULIFFE: I'm sorry. I don't want to
7 monopolize things. Cynthia Hilton. I'd invite Dave,
8 because this is a conversation here. I'm somewhat
9 concerned. I don't know that you meant to suggest this
10 but just to get on the table that CSA is not a fitness
11 standard yet.

12 So I'm somewhat concerned that you would look
13 to that as a fitness standard and I'm just going to go
14 back to I think the modes have their own fitness
15 standards and when it's -- because you really need to
16 separate your safety equivalency from your fitness
17 thing.

18 I think fitness is looking at something --

19 MR. PAQUET: They are separate.

20 MS. McAULIFFE: -- different. Okay. So that
21 for a carrier thing, the carrier, the modes need to say
22 this person is fit based on whatever their thing is and
23 you need to just accept that and, you know what I mean?

24 MR. PAQUET: Anything we get from our modal
25 partners are recommendations.

1 MS. McAULIFFE: Yes.

2 MR. PAQUET: The ultimate decision of the
3 Associate Administrator for Hazardous Materials Safety.

4 MS. McAULIFFE: Yes. So I just think it's
5 too early to use CSA as a measure of fitness.

6 MR. SONNEMANN: David Sonnemann from Praxair,
7 Incorporated.

8 I just wanted to answer Cynthia's question,
9 and I realize that CSA is not an evaluation but it is a
10 data generator and those data can be used by many
11 organizations to reach conclusions on different
12 subjects.

13 Thank you.

14 MR. SCHOONOVER: Are there any comments from
15 anyone on the teleconference?

16 MODERATOR: We have no questions in the queue
17 but if you're like to ask a question or make a
18 comment, please press Star 1 at this time.

19 (No response.)

20 MODERATOR: We have nobody signaling at this
21 time.

22 MR. SCHOONOVER: Okay. If anyone has any
23 other comments here that they'd like to make or
24 questions? J.P. All right. We're going to let Dale
25 make a comment.

1 MR. BILLINGS: Dale Billings,
2 B-I-L-L-I-N-G-S, Standards and Rulemaking here at
3 PHMSA.

4 Today, I heard almost all commenters say that
5 they would certainly support and encourage
6 incorporation of special permits and various approvals
7 into the hazardous materials regulations and certainly
8 since 2005, if you take a look at the record, we've
9 adopted and incorporated over a hundred special permits
10 with literally thousands of party-to status affected by
11 those permits.

12 That to say, what we looked at initially were
13 those that are kind of old, that's a good thing, those
14 that had a number of party-to status, certainly those
15 that were issued to members of trade associations, and
16 we still have a few of those permits that are still in
17 the queue that's going to resolve some of those, that's
18 going to propose incorporation of some of those.

19 But now we're getting down to some that maybe
20 have been around awhile and I think Dave Sonnemann
21 mentioned just because it's been around awhile doesn't
22 necessarily equal the fact that we ought to incorporate
23 it. Maybe some are so unique that we won't be able to
24 incorporate them.

25 But I guess what I'm asking out of all of

1 this preface is what kind of criteria would you all
2 look for to say that something should or should not be
3 incorporated into the hazardous materials regulations.

4 So as we start looking at these other 1,500
5 or so active permits, what kind of priority
6 classification ranking that we've heard of that these
7 are the ones that we really ought to look at first,
8 second, third, fourth kind of must do, should do and
9 would be nice to do criteria?

10 So, you know, anything like that would also
11 help us, especially me since this is one of my charges
12 to kind of oversee this program, to try to help us
13 identify those that fit that type of criteria.

14 Thank you.

15 MS. McAULIFFE: You should not. I mean, I
16 think the regulations right now are pretty clear on
17 that. I mean, you know, it's been proven -- you know,
18 I can't cite it. You know, it's right there in your
19 regulations about the standards that you would look for
20 and I think they're pretty good. So if you find
21 there's some -- you know what I'm talking about? The
22 proven long -- you know what I'm talking about.

23 And if there's a place -- Magdie, I'm so glad
24 you're still here -- that is serving of resources, I
25 mean, it's your rulemaking folks and -- but, you know,

1 because this is a really valuable thing you could do
2 for those, you know, proven safety, wide effect, future
3 effect, I guess that's what it says.

4 MR. SCHOONOVER: Well, Cynthia, and I would
5 put out the question that, you know, incorporating
6 permits into the regulations is in fact our desire. In
7 that vein, if we're going to really set to do this on a
8 lot of permits, we need to put in place some
9 requirements that give us clear data so that we can
10 demonstrate that it is in fact performed because, as
11 you know, many of our permits we look back and maybe
12 the absence of an accident is not necessarily the
13 indication that it's safe enough to incorporate.

14 My question would be how much of -- you know,
15 any time we try to develop some criteria, it's going to
16 delay a permit and my question is, in a very thoughtful
17 way, and I understand the answer's probably going to be
18 not much, but, you know, how much of a delay is the
19 industry willing to accept so that we can put in place
20 the appropriate measures into the permit upfront to
21 enable us to incorporate that in a more timely manner?

22 MR. EL-SABAIC: Magdie El-Sabaic from PHMSA.
23 I would just want to say that there is no one in
24 PHMSA, maybe outside of PHMSA there are, but there's no
25 one in PHMSA that is more committed than me in as quick

1 as possible conversion of mature permits, what I would
2 refer to as mature permits into regulations and by
3 mature, I mean permits that have a proven level of
4 safety and I think we've seen some suggestions time
5 should be used as an indication, not in all cases but
6 essentially in many cases it is, the nature of the
7 process itself, the nature of the permit, the
8 conditions that are laid out in the permits. Some
9 permits are written so well that they look like
10 regulations.

11 So why are they a permit? So we have to have
12 a good reason at PHMSA to justify to ourselves why
13 something needs to remain as a permit or for it to
14 remain as a permit. So I'm committed philosophically,
15 intellectually. The question is not that. The
16 question is how can we translate that with the
17 resources we have into a manageable process and, of
18 course, you know better than us with the process of
19 rulemaking and various stages and steps that we have to
20 go through, which are necessary steps to get there.

21 You know, I think the staff is angry with me
22 because every time they turn around, they say why is
23 this permit, why can't we convert that? So we are
24 committed to as rapid as we can conversion of permits
25 into rules and actually it's the respect of the HMR.

1 It's a higher level of respect and it's putting the
2 special back into special permit.

3 I think you heard Cynthia Hilton say that
4 multiple times. So I think that we will continue to
5 do. If we're not doing it quickly enough or if we're
6 not doing it aggressively enough, please talk to us and
7 provide some advice and comments and we always welcome
8 your comments, but I have limited staff and limited
9 resources. We all do. I'm trying to push them as hard
10 as I can and making adjustments all the time to get
11 that process moving.

12 If I can just quickly say something on
13 fitness, because some of the comments I heard today are
14 actually -- I happen to agree. I heard someone talk
15 about packaging permits. If it's a package design, why
16 should we look at the fitness of the applicant? It has
17 to do with the package.

18 We agree. Philosophically, I agree. As a
19 matter of fact, we did already say a number of
20 classification approvals need new fitness because we're
21 classifying the article or the object and we've taken
22 some steps in that direction already. We may not have
23 taken enough steps and maybe we need to extend our
24 thinking to other types of applications where it
25 doesn't make sense for us to even look at the applicant

1 record as a basis for fitness.

2 Of course, we've heard a number of comments
3 on the historical context of where the fitness is and
4 how it came into the regulations and whoever put it in
5 there, what they intended with it, and what did
6 Congress do with it, and what did the IG and how were
7 they enacted and all of that, and I'm not denying any
8 of this, and in many cases we may have indeed over-
9 reacted and in some cases we may not have reacted
10 aggressively enough. It's just the nature of the
11 process. Welcome to Washington.

12 What we are trying to do connectively and
13 what I'm committing myself to and hopefully committing
14 all of my staff is, is re-examining all of these
15 issues. It is relevant what was the intent of fitness
16 and the person who put it there spoke to me on the
17 phone a couple of times, so I know exactly the context
18 in which he put it in there.

19 How relevant that is versus the context of
20 what now many members of Congress and certainly many
21 members of DOT understand what fitness is or isn't, it
22 is an issue for us to discuss and, you know, debate and
23 provide further insights and hopefully get to the
24 reason we are here today and my staff is here today,
25 hopefully a good sign. We want to hear from you. We

1 certainly want to adjust the fitness process to the
2 appropriate level and we don't want it to be too
3 permissive that many holders of permits and approvals
4 are operating under unfit conditions and that's not the
5 case today, thank God, and I suspect will never be the
6 case, and nor possibly too bureaucratic and too, you
7 know, repetitive and becomes a bureaucratic nightmare
8 in its own right.

9 So we are committed, whether we are there or
10 not, and I give you that we are not there, but we are
11 committed to getting there and we are committed to
12 getting there as quickly as we can humanly and possibly
13 be and that's where you come in. You tell us you're
14 not doing your job, you're too slow, you're not.

15 So, I mean, I love it. I thank you for all
16 the comments and I've heard so many very thoughtful
17 comments.

18 Thank you.

19 MR. SCHOONOVER: J.P., you had a comment?

20 MR. GIVENS: J.P. Givens, NATC, G-I-V-E-N-S.
21 Before Cynthia and Dave get started on this, the
22 comment/question was with respect towards the process,
23 and I think one of the big problems is the perception
24 that you are arbitrarily stopping people from doing
25 business that didn't deserve to be put out of business.

1 Now that hundred and whatever number it was
2 that never bothered to respond to the reject letters,
3 maybe they didn't understand it, maybe they didn't have
4 a good consultant, maybe they didn't in point of fact
5 deserve. I don't know what it was. You're not going
6 to know it either. Okay? And that's fine.

7 But what I can say is that those that did
8 receive it, like the clients that contacted us that we
9 did pursue it, were able to correct it through your
10 process. I would suggest three changes, if I could.

11 The first change is don't send out a reject
12 letter, say you were found to be unfit. Send out a
13 letter to start with that basically says our initial
14 review indicates problems in the following areas. You
15 have 30 or 60 days to correct it, okay, or to satisfy
16 us. That doesn't scare people. That says you're
17 working with them. It shows due process which is
18 extremely important for people not to be scared of
19 their government. Okay?

20 Then Item Number 2, if they have a problem
21 and the data is predicated on older incidents, like the
22 FMCSA data goes 24 months, your data on the hazmat
23 incidents goes back further, all these little -- we
24 don't have a fit period of time fixed that we say 18
25 months, six months, whatever it was. Fix the time so

1 you can all look at the same period and say I don't
2 care what they did three years ago, I'm interested in
3 what they are now because under the safety fitness
4 determination in the regulations for FMCSA, which is
5 the only one we can use, they are required to go onsite
6 and conduct an audit or compliance review in order to
7 change your rating and establish it.

8 Congress mandates it and the rulemaking sets
9 it, so that you can in point of fact say I don't care
10 what the roadside inspection said for the last two
11 years, this is the way I look today, and if you're
12 going to call someone unfit, you should know that they
13 are unfit. That's the issue. Okay?

14 So my third issue with it or recommendation
15 is that you establish some latitude, that as we have
16 safety action plans with motor carrier, okay, we have
17 something that's acceptable to you people so that their
18 fitness determination could be, instead of a two-year
19 or four-year, Ryan, why don't you just give them a six-
20 month extension or a party-to for six months? You're
21 on probation. Let's see how you act for the next six
22 months.

23 The rule says you can do it up for four
24 years. It doesn't say you can't do it for six months.
25 Let's think outside the box. Let's expand the box and

1 let's say, you know what, you're telling me you're
2 going to do all these things, I'm going to believe you.
3 Why? Because she says let's look at it from a positive
4 standpoint. I trust you. Here's six months. Prove
5 it. If you don't justification, shoot them. I don't
6 care.

7 But I'm basically saying take them out of the
8 ballpark. Okay? You now have justification for it. I
9 say it humorously but, I mean, you are shooting some
10 people when you pull their permits. That is their
11 economic ability.

12 One of our clients that got hit with your
13 letters was looking at an \$18 million impact on their
14 company. They're a waste hauler and if they can't mix
15 and match these in lead-pack permits, they're out of
16 business with that business. So you are talking
17 sometimes about critical.

18 You know, we have an economic impact for
19 emergency exemptions. We should have an economic
20 impact issue for considering, you know, extraordinary
21 appeal and, you know, let them come up with it, let
22 them come up with consent order. Give them that. If
23 you do, then people are going to say all the rest of it
24 is fluff. If 96 percent or 94 percent of everybody
25 that you look at makes it over the first hurdle without

1 a problem, people don't care what you're checking
2 against. It's the six percent that didn't make it that
3 now go to the four percent that aren't going to make
4 it.

5 What do we do with them and is it just? If
6 the answer is yes, good goal, okay, but give us due
7 process and give us some options, the latitude,
8 flexibility. If you put it in there, I think it'll be
9 a great program. Okay?

10 MR. SCHOONOVER: Thanks, J.P. All right.
11 Any comments from the conference call?

12 MODERATOR: We do have two questions in the
13 queue. We'll take our first one. Caller, your line is
14 open. Please check your button.

15 MR. CURRY: This is Jack Curry with Costa
16 and, first of all, I want to apologize. I made it
17 partway down there. I made it to the airport this
18 morning and waited two hours for them to cancel my
19 flight. We're having a big snowstorm here.

20 But I just wanted to make a comment on Dale's
21 question regarding the criteria for the incorporation
22 of special permits into the regulations and we've
23 brought a perfect example of that to the attention of
24 PHMSA just recently with the SP-9275 which has
25 represented many, many shipments per year with 30 years

1 of experience and no adverse events on record to show
2 that it was an unsafe practice to allow that special
3 provision for alcohol.

4 We feel the regulatory inclusion would then
5 eliminate the need to dedicate resources to fitness
6 determination for the large group of users of that
7 special permit.

8 So I thank you for your time.

9 MR. SCHOONOVER: Okay. Thanks, Jack. Ryan?

10 MODERATOR: We'll take our next question.

11 MR. KIND: This is Sam L. Kind with UPS, and
12 I, too, want to make a response to Dale Billings'
13 question.

14 It seems to me that we know that special
15 permits have a number of operational applications and
16 we have special permits that are technical in nature
17 but sometimes by virtue of the way the regulations are
18 structured, there are procedural special permits and
19 then it seems to me that those should be looked at
20 because, quite often, the permit itself sort of has a
21 common sense dimension to it.

22 I'm thinking right now about the need to have
23 a special permit to substitute trucking service for
24 moving dangerous good shipments that comply with the
25 ICAHO Technical Instructions.

1 It seems to me that if a package is safe
2 enough to travel by air in the United States, it
3 certainly ought to be safe enough to travel by truck
4 and the need to engage a special permit to substitute
5 train service where it may be economically beneficial
6 to do that is -- well, it just doesn't make much sense
7 to me. It seems to me that there's a host of reasons
8 why that would be desirable from a safety and economic
9 and environmental consideration and so I would think
10 that that kind of procedural special permit should
11 certainly get queued up for early review to be included
12 in the regulations.

13 I appreciate the opportunity to comment.
14 Thank you.

15 MR. SCHOONOVER: Thanks, Sam. Ryan, anything
16 further?

17 MODERATOR: We have one other question in the
18 queue or comment.

19 MR. PRICHARD: Yes. Ed Prichard with
20 Teledyne Consulting Group. I had two questions, and I
21 was dropped several times, so you may have already
22 discussed this earlier, but the question I had is, is
23 the U.S. Government also covered by the special permits
24 which you're looking at?

25 MR. PAQUET: I'm sorry. Can you ask that

1 question again?

2 MR. PRICHARD: The question I had was does
3 this criteria apply to the United States Government,
4 which is one of the largest holders of permits and
5 approvals?

6 MR. PAQUET: No, we do not check, no.

7 MR. PRICHARD: Okay. Why?

8 MR. PAQUET: The United States Government, we
9 do not check the fitness --

10 MR. PRICHARD: You exempt the United States
11 Government is what you're saying.

12 MR. PAQUET: We do not check the fitness of
13 the United States Government special permit or approval
14 holders.

15 MR. PRICHARD: All right. What about the
16 criteria applied to foreign shippers?

17 MR. PAQUET: Yes.

18 MR. PRICHARD: And who will be -- will you be
19 auditing those companies that are overseas?

20 MR. PAQUET: We do now.

21 MR. PRICHARD: You do now. Okay. That's all
22 I had.

23 Thanks for the opportunity to ask those
24 questions.

25 MR. PAQUET: Great.

1 MODERATOR: And we do have another question
2 in the queue.

3 MR. SCHOONOVER: Go ahead.

4 MR. CASSIDY: Hi. This is Joe Cassidy with
5 Arrowhead Industrial Services.

6 Of the 75 companies that were physically
7 investigated, could they be categorized either by
8 manufacturers or shipping categories?

9 MR. SCHOONOVER: We don't have that data
10 right here but if that's something that would help
11 further discussion, we can certainly see about
12 providing some of that and that's helpful to know if
13 that data would help you provide input to us.

14 MR. CASSIDY: Absolutely.

15 MR. SCHOONOVER: Okay.

16 MR. CASSIDY: All right. Thank you very
17 much.

18 MODERATOR: And we have no further questions
19 in the queue at this time.

20 MR. SCHOONOVER: Okay. Are there any other
21 questions here from the attendees or comments?

22 (No response.)

23 Closing Remarks

24 MR. SCHOONOVER: All right. Well, with that,
25 I think we're going to close.

1 On behalf of PHMSA, I'd like to thank
2 everyone for coming.

3 Janet, if you'd like to, please.

4 MS. McLACHLAN: I'm Janet McLachlan from the
5 Federal Aviation Administration, and I just want to say
6 that -- and I know most of the discussion here, I mean
7 a lot of it really wasn't about the modal fitness
8 reviews but I just want to say something that I've
9 noticed over the last several years since we've started
10 really, you know, engaging in this activity more over
11 the last, I'd say, three years or four years.

12 But one of the things that we have found is
13 that number that you're looking at of the permits that
14 were not issued, it's a little deceiving, I think,
15 because one of the things that -- and I'm just only
16 talking about air transport here, nothing else -- is
17 for us, what we find a lot of times is that when we go
18 out and work with the applicant is that we find that
19 really what they've applied for and what the permit or
20 approval says really isn't what they're looking for and
21 really isn't what they're trying to do.

22 So we try and help work through that before
23 we ever get to the point where we go back and issue it
24 and there's a lot of things that we come across as far
25 as issues that we see when we go out that we work

1 through with the applicant, so there is not a denial or
2 a determination that they shouldn't have the approval
3 or the special permit.

4 We try and work through all those things and
5 only in very extreme circumstances would we not issue
6 it at all, but I think that segment isn't really
7 identified when you look at, well, this percentage has
8 been denied or determined unfit.

9 I think there's a big percentage in between
10 that the reason that we were able to work through the
11 whole process was because of part of the relationship
12 during the fitness review and I know, you know, I'm
13 sure that everyone can raise their own horror story,
14 but really in the last year, we've actually started
15 getting e-mails from a lot of the applicants thanking
16 us for working through this process with them and
17 telling us that it was very helpful and that, you know,
18 they really appreciated the assistance that they got
19 and I gotta tell you two years ago or three years ago,
20 that wasn't the e-mails I was getting.

21 But, I mean, the tone has really started to
22 change somewhat and I know it's not perfect and I'm
23 sure you have your own stories about what's happened,
24 but we really have had a lot of positive feedback and I
25 would say it's been in the last year from a lot of the

1 applicants saying that it was beneficial for them to
2 have this interaction and this relationship and that
3 they really appreciated the effort that we put forward.

4 So I just want to add that as when we're
5 saying, well, there's only these very few, yeah,
6 there's only a very few that we can't work through to
7 the end and have to, you know, deny or whatever
8 terminology you're using but there is a very big
9 segment in between that these actual relationships and
10 reviews have resolved a lot of things and they actually
11 get the permits and approvals that they really can use
12 and that fit the need of what they're trying to do
13 because there are a lot of times we go out and ask, you
14 know, when we start to talk to them and they look at
15 the permit and they say, well, oh, this really isn't
16 what we were doing and this isn't really what I want to
17 do and whoever filled out the online application didn't
18 really talk to the person in the company who was
19 actually going to do the function or the work, so it
20 didn't come out exactly the way they needed it to.

21 So just, you know, a little bit of a
22 different perspective and, as I said, I'm only speaking
23 to the very small universe I'm involved with with it.

24 MR. SCHOONOVER: Thank you. All right.
25 Well, again, on behalf of PHMSA, I'd like to thank

1 everyone for coming. We heard a great deal of useful
2 and interesting information. I will say I heard a lot
3 of good suggestions.

4 Please know that we'll consider all your
5 comments and try to address all your concerns as we
6 move forward with the next step in this fitness
7 determination process.

8 We appreciate the very clear commitment to
9 safety that all of you have expressed and want you to
10 know that we share that with you.

11 This concludes today's meeting. Thank you
12 very much.

13 (Applause.)

14 (Whereupon, at 3:40 p.m., the meeting was
15 concluded.)

16

17

18

19

20

21

22

23

24

25