



**WRITTEN STATEMENT OF
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BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES**

The Department of Transportation's Oversight and Management of Hazardous Materials Special Permits and Approvals

April 22, 2010

Chairman Oberstar, Ranking Member Mica, and distinguished Members of the Committee, on behalf of Secretary of Transportation Ray LaHood, I appreciate the opportunity to discuss the progress the Pipeline and Hazardous Materials Safety Administration (PHMSA) has made in addressing concerns identified by your Committee and the Department's Office of the Inspector General (OIG) relating to its Special Permits and Approvals Program.

Mr. Chairman, as you know, we inherited a program that suffered from almost a decade of neglect and was seriously adrift. We have set a new course. Our progress will be steady and the actions we are taking will improve the DOT's hazardous materials program, and more specifically, the Special Permits and Approvals Program, as well as ensure that they both meet the highest safety standards.

PHMSA Has Completed Implementation of All the Deliverables With Specific Target Dates In Its Special Permits Program Action Plan.

The Hazardous Materials Regulations (49 CFR Parts 171-180) generally are performance oriented regulations, and provide the regulated community with standards to meet safety requirements. Even so, not every transportation situation can be anticipated and incorporated into the regulations. Special permits are a necessary part of our regulatory framework. New products or packagings become available everyday and, often, the regulations do not adequately address these items. The hazardous materials statute recognizes this reality by authorizing PHMSA to issue a "special permit" allowing for transportation of such items so long as the terms of the permit provide a level of safety equivalent to the regulations or, if a required safety level does not exist, so long as a finding is made that the permit is consistent with the public interest and Federal hazardous materials law.

The regulations controlling special permits call for a thorough and documented application review prior to issuance of a special permit. The process for obtaining a special permit requires: (1) technical review and documentation; (2) evaluation of the safety fitness of the applicant; (3) establishment of written requirements to assure an equivalent level of safety; (4) public notice and comment; (5) final review; and (6) issuance of a special permit. Historically, this has taken an average of 90 days from application to issuance, sometimes longer or shorter, depending on the hazardous material/package and the circumstances. Special permits are also available on an emergency basis to facilitate emergency transportation of hazardous materials, such as the transportation of supplies to areas affected by natural or man-made disasters to support clean-up and rebuilding operations.

In recent years, on average DOT annually issued 150 new special permit applications, 100 modifications to existing special permits, and issued approximately 1,650 renewals and related actions. New special permits may be authorized for up to two years, at which time they may be renewed for up to four years. We currently have approximately 350 special permit applications pending.

In late July 2009, the OIG issued a Management Advisory relating to PHMSA's oversight of the Special Permits Program and recommended immediate action to prevent unsafe operations involving the transportation of explosives under four special permits. DOT responded immediately by developing an aggressive action plan that included the following 21 deliverables:

- Developing and publishing a policy on special permits issued to associations;
- Completing a top-to-bottom program review;
- Reassessing "equivalent level of safety" evaluation process and policies;
- Reviewing and enhancing inter-agency coordination process;
- Developing enhanced enforcement for special permits;
- Reviewing applicant "fitness" policies and procedures;
- Reviewing and revising renewal procedures;
- Reviewing and updating standard operating procedures;
- Developing stakeholder special permit brochure;
- Developing an action plan for enhancing data collection and analysis;
- Contracting to modernize the information technology system;
- Identifying special permits for further assessment;
- Developing a plan to incorporate special permits into regulation;
- Updating our website on special permits policies;
- Notifying special use truck special permit holders of intent to evaluate fitness and modify permits;
- Scheduling fitness reviews of those permits holders;
- Reviewing documentation supporting those permits;
- Assessing risk of those permits;
- Modifying or rescinding those Special permits as appropriate;
- Working long-term on a pilot project on stability control; and
- Working long-term to develop best practices for emergency response to rollovers of special use trucks.

All the deliverables in that action plan with specific deadlines were completed by February 5, 2010. Certain commitments are longer term, but we have developed plans for staffing and resources that will enable PHMSA to progressively improve the program.

PHMSA Is On Course To Implement Fully Its Approvals Action Program.

The hazardous materials statute also requires PHMSA to provide written authorization or “approval” for a person to perform a function that requires prior consent under the regulations. For example, PHMSA issues approvals covering the classification and transportation of explosives, certain lithium batteries, fuel cells, chemical oxygen generators, and radioactive materials. In addition, PHMSA issues approvals authorizing companies to manufacture certain types of packagings, such as cylinders, and to perform the tests and inspections required to ensure that the packaging may continue to be used for transporting hazardous materials. PHMSA also issues competent authority approvals for the transportation of hazardous materials in accordance with international transportation standards and regulations.

Although the OIG’s July 2009 Management Advisory primarily focused on the Special Permit Program, PHMSA also addressed the policies and processes for issuing approvals and finalized an action plan to improve management and oversight of the approvals program on December 4, 2009. The Approvals Action Plan identified the following 17 deliverables:

- Conducting a top-to bottom review of the approvals program;
- Developing and publishing a policy on approvals issued to associations;
- Reassessing “equivalent level of safety” process and policies;
- Reviewing and enhancing inter-agency coordination process;
- Developing enhanced enforcement for approvals;
- Reviewing applicant “fitness” policies & procedures;
- Reviewing and updating standard operating procedures;
- Developing policies for publishing approvals in the Federal Register;
- Developing and implementing a plan to reduce the approval and special permit back log;
- Developing a plan for incorporating expiration date when appropriate into approvals;
- Developing an action plan for enhancing data collection and analysis;
- Developing a plan to address the inspection, management and oversight of third party certification agencies;
- Establishing a Safety Review Board;
- Contracting to modernize the information technology system;
- Identifying approvals for further assessment;
- Developing a plan to incorporate approvals into regulations; and
- Updating our Websites on approvals policies.

Again, PHMSA has met all the deliverables to date and is on target to meet all planned deliverables in the approvals action plan with the exception of eliminating the approvals backlog by April 15. In spite of our inability to clear the backlog of approvals by April 15, we have made steady progress towards significantly reducing that number and have worked with industry to prioritize approvals in need of action. PHMSA has worked diligently to address all concerns related to special permits and approvals. We began addressing these issues with our 2010 budget. We have added staff to the program and detailed staff from other areas of the department (with training) to assist us. Our FY 2010 appropriation has enabled us to hire 16 new positions to include permit review and approval staff, enforcement inspectors, and data analysis staff. In addition, we were able to acquire contractor support services for review of existing special permits and approval of new special permit requests using revised criteria, policies, and procedures. Because we are now conducting more in depth reviews of permits and approvals and of holders of permits, the processing of applications takes longer. Backlogs developed in both special permits and approvals. We have eliminated the backlog in special permits except for those applicants whose permit has been flagged for further safety fitness review. The approvals backlog remains but we have dedicated every possible resource to resolve that backlog. The 2011 Budget request includes funding to continue evaluating special permits and approvals, conducting thorough fitness reviews, improving hazardous materials data preservation and research methods, and supporting the implementation of two action plans that will improve operational efficiency within PHMSA's Office of Special Permits and Approvals.

PHMSA Has Successfully Addressed Half of the Recommendations Identified By the Inspector General In Its Report On Special Permits and Approvals.

On March 4, 2010, the OIG issued its Final Report on PHMSA's Special Permits and Approvals Program and made ten recommendations for improving the program. PHMSA's response to the OIG's recommendations is included in the OIG Report and summarized below. As a result of PHMSA's efforts to date, the OIG closed half of those recommendations. The remaining five recommendations relate to items whose implementation is ongoing.

Following is a brief description of the OIG's ten Recommendations and the current status of PHMSA's actions organized as presented in the Final Report on Special Permits and Approvals.

1. PHMSA has finalized and is in the process of fully implementing the action plans to improve the effectiveness of processing special permits and approvals.

PHMSA has finalized its August 6, 2009, Special Permits Action Plan, its November 4, 2009 Data Collection and Analysis Action Plan and its December 4, 2009, Approvals Action Plan. We are fully and timely implementing all of these Actions Plans. As PHMSA works to continuously improve the special permits and approvals programs it may identify additional measures that require changes to these plans.

2. PHMSA has finalized and fully implemented formal standard operating procedures (SOPs) and policies for special permit and approval processes (i.e., application, evaluation, authorization; agency coordination; and oversight).

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

Between December, 2009, and March 2010, we completed and implemented numerous action items for the approval program, including enhanced procedures for safety assessment, fitness evaluations, and internal and intermodal coordination which resulted in a similarly rigorous process for that program. As a result of these actions, the OIG considers this recommendation closed.

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

We agree that it is important to prioritize our efforts to ensure that the concerns identified by the OIG are fully addressed. The initiatives in the action plans are prioritized according to a combination of criteria based on due dates, timeframes for completion, logical order for progression and their anticipated safety impact, overall urgency, staffing and budget resources.

A major component of the solution to the problems identified in OIG Final Report on Special Permits and Approvals Program involves enhancing PHMSA's utilization of data and information to facilitate determinations as to whether the operations meet an established safety standard and the applicants are capable of conducting those operations safely. Enhanced safety data and information will also improve monitoring the performance of companies who utilize special permits and approvals and increase identification of potential safety problems that need to be addressed. The system must be upgraded to enable the agency to more effectively process applications and synthesize safety information about companies applying for special permits and approvals, as well as the safety performance of special permit and approval holders. Addressing data issues associated with the special permits program must be accomplished as part of a broader effort to identify and use data to make better informed safety decisions.

PHMSA's multi-year Data Management and IT Modernization Roadmap identifies resource, process, and technology initiatives that will enhance our ability to manage data and IT in support of our safety mission. Immediate benefits will be realized in 120–180 day

increments, allowing us to constantly re-evaluate strategies based on current and future business needs. As a result of these actions, the OIG considers this recommendation closed.

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

On August 17, 2009, PHMSA issued a written policy to clarify that special permits are only granted to members of associations, not to associations. Authority to perform a transportation activity under the terms of a special permit must be exercised by the individual business entity that bears responsibility for compliance under the terms of the special permit. Further, as an interim measure, on September 4, 2009, PHMSA re-issued all special permits granted to associations to specifically indicate that it is the members of the association who are individually responsible for compliance with the terms of the special permit.

PHMSA plans to re-issue individual special permits to all companies that were previously granted special permits as members of trade associations as quickly as resources permit. We estimate that at least 20,000-30,000 entities will be affected. When re-issuing special permits to the individual entities, PHMSA will evaluate each company's safety fitness before re-issuing the special permits. The timeframe for completing this process will depend on the number of entities that elect to reapply and the available resources. After a new application system for Special Permits becomes available online in May 2010, PHMSA will develop a specific plan to address the monumental task of re-issuing these special permits to individual entities.

Concurrently, and as a part of the broader plan discussed later, to respond PHMSA is reviewing the active special permits issued to members of associations to identify those that should be incorporated into the regulations. Where appropriate, conversion of such special permits to regulations of general applicability is a major priority. PHMSA has already initiated two rulemakings to address association membership special permits related to cargo tank and rail tank car operations. The cargo tank rulemaking applies to a significant number of special permit holders. PHMSA expects to issue notices of proposed rulemakings for these two categories this spring and final rules as quickly thereafter as possible, while fully considering public comments. Rules currently in progress will eliminate approximately 50% of the special permits formerly held by Associations. Additional rulemakings to incorporate other special permits issued to members of associations into the Hazardous Materials Regulations (HMR) will be completed by January 2012.

5. PHMSA is in the process of developing a more precise definition of what constitutes an applicant's "fitness" to conduct the activity authorized by the special permit or approval. This definition should include reviewing an applicant's safety history—incidents and enforcement actions—prior to granting a special permit or approval.

Working with our safety partners in the Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), Federal Aviation Administration (FAA),

and the United States Coast Guard (USCG), PHMSA completed a comprehensive review of existing fitness determination processes and developed a refined process for evaluating fitness, based on identified metrics related to a company's safety history. Utilizing safety data from several existing sources, the agencies can now use performance-based measures to evaluate an applicant's past safety history and ability to operate under the terms of the special permit as indicated in its application.

PHMSA now conducts fitness reviews of all entities applying for a special permit or approval using historical records of incidents and violations. Where the record appears to be questionable, the company will be asked to explain its record and the actions it has taken to resolve any safety problems, such as additional training or revisions to operating practices, as a condition of receiving the special permit or approval. If we determine that the company is unable to operate safely, we will deny the application.

Additionally, we plan to more clearly define the process and criteria used to determine the fitness of applicants for special permits or approvals. It is important to note that the determination of fitness in a complex and variable transportation operating environment requires the expert application of specific criteria concerning a company's safety performance together with an overall assessment of the risks inherent in the operations under consideration, including such factors as hazardous material type, quantity, and form; the transport mode and routes of operation; and the frequency and location of the operation. Therefore, "fitness" may never be subject to one precise definition.

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

PHMSA developed a new safety evaluation form to document pertinent information regarding whether a special permit will provide a level of safety that is at least equivalent to that provided under the regulations and a similar process for consistent and uniform documentation of activities authorized under an approval. The safety evaluation considers the risks of the materials to be transported, the type of packaging to be utilized, the mode of transport to be utilized, the conditions likely to be encountered during transportation, and pertinent special handling measures or operational requirements. These factors are all documented on the form and include accompanying applicant documents, data, or information. To ensure that the Agency has sufficient information to complete the safety evaluation, we are amending our procedural regulations to require applicants to provide additional data and information concerning the risks of the proposed operations and the measures to be utilized to address the risks. We expect to finalize the new procedures, which must be approved by the Office of Management and Budget, by the end of this year.

7. PHMSA has established a partner safety interagency working group to develop a uniform process for coordinating special permits, including new, renewal, "party-to," and emergency permits as well as new and renewed approvals.

PHMSA established a working group with our partner safety agencies in DOT, specifically FAA, FMCA, and FRA, as well as the USCG on September 4, 2009. The working group established specific interagency coordination and concurrence guidelines for special permit applications. FAA, FMCSA and FRA now share PHMSA's electronic docket management system to ensure more effective and efficient coordination. The guidelines specify that PHMSA will approve or deny applications only after coordination with the operating administrations and the USCG, and provide for each to notify PHMSA of any violations of a special permit by the grantee that would call its fitness into question. The special permits SOPs, implemented October 5, 2009, incorporate detailed procedures for coordinating special permit applications with the operating administrations. On February 2, 2010, PHMSA finalized and implemented a similar process for interagency coordination of approval applications. As a result of these actions, the OIG considers this recommendation closed.

8. PHMSA now includes “holders of special permits and approvals” as a priority factor in its risk-based oversight approach in targeting companies for compliance reviews.

PHMSA's Office of Hazardous Materials Enforcement has implemented a national business strategy to prioritize its activities. Activities authorized under special permits and approvals are targeted as high priorities for inspection and oversight by the Office. In addition, on September 4, 2009, PHMSA in concert with its partner operating administrations issued a plan for enhanced enforcement of the terms of special permits and approvals, utilizing the resources of all the operating administrations with enforcement responsibility and available data to identify potential safety problems and target resources. The plan includes inspection procedures specific to special permit and approval grantees and inspection target goals. As a result of these actions, the OIG considers this recommendation closed.

9. PHMSA established timeframes for resolving and implementing long-standing safety concerns and periodically measures performance against the timeframes.

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

We are also taking action to address lithium battery safety. On January 11, 2010, PHMSA published a notice of proposed rulemaking (NPRM), attempting to address comprehensively the safe transport of lithium cells and batteries. The NPRM represents another step in the Department's continuing process to ensure the transport of lithium batteries remains safe. The rulemaking proposals are intended to strengthen the current regulatory framework by

imposing more effective safeguards, including design testing, packaging, and hazard communication measures for various types and sizes of lithium batteries in specific transportation contexts. Several of the proposals are based on recommendations issued by the National Transportation Safety Board. PHMSA is in the process of reviewing public comments on the proposed rule and hopes to publish a final rule by December 2010.

More broadly, our improved oversight of the special permits and approvals programs, along with an enhanced working relationship with our partner agencies, will enable us to quickly identify potential safety issues and resolve them within reasonable time frames.

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

On February 5, 2010, we finalized a plan to establish a systematic process for reviewing outstanding special permits and incorporating them, where appropriate, into the regulations. As part of this plan, we have created a team to review all currently active special permits – about 1,250 – and identify those that should be incorporated into the regulations. As already discussed, this process was prioritized for special permits issued to associations. Once the review of all currently active special permits is completed, expected by mid 2013, we will routinely review recently granted special permits each year and will initiate a rulemaking to propose incorporating them into the regulations as warranted. We are developing a similar plan for incorporating the terms of certain approvals into the HMR. As a result of these actions, the OIG considers this recommendation closed.

PHMSA Has Given Immediate Attention to the OIG Management Advisory Related to the Classification of Explosives Approvals.

On April 7, 2010, the OIG issued a Management Advisory relating to PHMSA's oversight of the Explosives Classification Approvals Program. The report focused on: (1) the process for reviewing and authorizing explosives classification approvals; and (2) the oversight of explosives testing agencies. PHMSA's December 2009 Approval Action Plan addressed both of these issues. The plan contemplated PHMSA issuing standard operating procedures for each category of approvals by February 2010. Standard operating procedures were issued for the Evaluation and Issuance of Explosive Classification Approvals in early January 2010. Those procedures address the process for reviewing and authorizing explosives classification approvals. The Approval Action Plan also required PHMSA to issue specific requirements for inspection, management, and oversight of approved explosives testing agencies. Those specific requirements were established March 2010. In addition, PHMSA established a strike force of inspectors and scientists who created a detailed protocol to visit and review each explosives testing agency. Those reviews have been completed and PHMSA is using the information gathered to determine whether a testing agency is in compliance with its requirements and may continue to serve as a PHMSA-authorized testing agency. PHMSA is also reviewing any other third-party agencies it may have relationships with to ensure that our oversight of those relationships is adequate.

Conclusion

In summary, PHMSA has taken swift and aggressive action to address each of the concerns identified by the OIG. Actions have been completed, or are underway to address the issues raised by the OIG with respect to both the special permits program and the approvals program. We have worked closely with the Department's leadership and appreciate your Committee's leadership and the Appropriations Committees support in securing additional staff and budget to continue addressing these commitments over the long term and to further improve an already strong safety record.

We welcome any and all recommendations for making our safety programs more effective and further ensuring the public's safety. I look forward to working with the Committee as we continue to implement measures to enhance our safety oversight of the hazardous materials special permits and approvals programs. Let me conclude by saying that it took many years for the program to arrive where it is today and the changes we have proposed to make will not happen overnight, but successful implementation of the special permits and approvals actions plans as well as ensuring that our hazardous materials regulation are met, are my highest priorities.

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