

PLAN FOR CONVERTING SPECIAL PERMITS INTO REGULATIONS OF GENERAL APPLICABILITY

Background

Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) authorizes the Department of Transportation to issue variances – termed special permits – from the Hazardous Materials Regulations (HMR) in a way that achieves a safety level at least equal to the safety level required under Federal hazmat law or consistent with the public interest and Federal hazmat law, if a required safety level does not exist. That authority is delegated to the Pipeline and Hazardous Materials Safety Administration (PHMSA).

The HMR generally are performance oriented regulations, which provides the regulated community with a certain amount of flexibility in meeting safety requirements. Even so, however, not every transportation situation can be anticipated and built into the regulations. Innovation is a strength of our economy and the hazardous materials community is particularly strong at developing new materials and technologies and innovative ways of moving materials. Special permits enable the hazardous materials industry to quickly and safely integrate new products and technologies into the production and transportation stream. Thus, special permits provide a mechanism for testing new technologies, promoting increased transportation efficiency and productivity, and ensuring global competitiveness. A special permit must achieve at least an equivalent level of safety to that specified in the HMR. Implementation of new technologies and operational techniques may enhance safety because the approved operations or activities achieve a greater level of safety than currently required under the regulations. Special permits also reduce the volume and complexity of the HMR by addressing unique or infrequent transportation situations that would be difficult to accommodate in regulations intended for use by a wide range of shippers and carriers.

Conversion of Special Permits into Regulations of General Applicability

PHMSA conducts ongoing reviews of special permits to identify widely used and longstanding special permits with an established safety record for conversion into regulations of broader applicability. Converting these special permits into regulations reduces paperwork burdens and facilitates commerce while maintaining an acceptable level of safety. Additionally, adoption of special permits as rules of general applicability provides wider access to the benefits and regulatory flexibility of the provisions granted in the special permits. Factors that influence whether or not a specific special permit is a candidate for regulatory action include the safety record for hazardous materials transported under a special permit; broad application of a special permit; suitability of provisions in the special permit for incorporation into the HMR; rulemaking activity in related areas; and agency priorities.

It is important to note that not all special permits are appropriate for incorporation into regulations of general applicability. Special permits that address narrow and specialized

transportation situations or operations, for example, may not be likely candidates for adoption into the HMR. There may also be circumstances for which it is preferable to provide more control and oversight over the activities being allowed than PHMSA would have if such authority were provided in the HMR and generally available. However, PHMSA anticipates that many of the special permits currently in use can be converted to regulations of general applicability. This plan establishes a systematic process for reviewing outstanding special permits and incorporating them, where appropriate, into the HMR.

Under this plan, teams of specialists from the PHMSA Offices of Hazardous Materials Standards (PHH-10), Technology (PHH-20), and Special Permits and Approvals (PHH-30) will review all currently active special permits – about 1,250 – and identify those that should be incorporated into the HMR. The plan contemplates the initiation of at least one rulemaking project each year to propose the incorporation of a group or category of special permits into regulations of general applicability. The reviews will proceed in the following order:

- (1) Special permits issued to members of associations (20 active special permits)
- (2) Special permits in effect for at least 10 years (about 650 active special permits)
- (3) Special permits with more than 10 party-status holders (about 80 active special permits)
- (4) Manufacture, mark, and sell special permits (about 400 active special permits)
- (5) All remaining special permits not included in categories 1-4

(NOTE: There is some overlap among categories 1-4 – for example, there are probably some MMS special permits that have been in effect for at least 10 years.)

PHH-10 will establish and implement a program unit that focuses on special permit and approval regulatory issues and particularly on the regulatory codification and special permit elimination functions of this action plan. Once the review of all currently active special permits is completed, PHH-10, PHH-20, and PHH-30, under leadership of the new unit, will routinely review recently granted special permits each year and will initiate a rulemaking to propose to incorporate special permits into the HMR where such incorporation is warranted.

Staffing

For each project, PHH-10 will assign a manager to “mentor” the project, a senior regulations specialist as team leader, and at least one additional staff member. PHH-20 will assign at least one subject matter expert to each project. PHH-30 will assign at least one special permits specialist to each project. PHMSA’s Office of the Chief Counsel will assign at least one attorney-advisor to each project. As necessary, each project will also include staff from the Federal Aviation Administration, Federal Railroad Administration, and Federal Motor Carrier Safety Administration. Additional staffing will be determined as projects progress.

Special Permits Issued to Members of Associations

PHMSA may issue a special permit to members of an association when many of its members are small businesses with a common interest in obtaining authority to perform a specific transportation activity and there is no large business entity to take the lead in seeking such authority and the association has the resources to gather the necessary information and perform any necessary research.

A special permit issued to the members of an association may be one of the most suitable types of special permit for later adoption into the HMR. Such special permits have broad applicability; moreover, many of them have been in effect for a number of years and have demonstrated safety records. Therefore, conversion of such special permits to regulations of general applicability is the first priority tasking for this initiative. There are 20 currently active special permits that were granted to members of associations.

Schedule

Task	Due Date	Status
Identify all special permits issued to members of associations	11/01/09	Completed
Prioritize special permits for incorporation into the HMR *	4/26/10	Ongoing. Of 20 special permits issued to association members, 6 will be addressed in HM-245 (cargo tanks) and one in HM-216B (rail). Evaluation of the remaining special permits continues.
Initiate rulemaking to incorporate special permits related to rail and cargo tank operations	NPRMs – April/May 2010 Final rules – April/May 2011	Ongoing
Initiate rulemaking to incorporate remaining special permits into the HMR	NPRM – Jan 2011 Final rule – Jan 2012	

- * Note that this tasking will include identification of special permits where the prior safety justification requires further analysis and review; based on this assessment, special permits issued to association members that are not incorporated into the HMR may be modified or rescinded, as necessary.

“Old” Special Permits

New special permits are issued for a period of two years. After two years, a special permit holder may apply for a renewal of the special permit for a four-year period. There is no statutory or regulatory limitation on the number of times a special permit may be renewed. Thus, there are a number of active special permits that have been in effect for five or more years.

Long-standing special permits are good candidates for incorporation into the HMR because they involve proven technologies or operational methods with documented safety records. The team will identify and review all special permits that have been in effect for at least 10 years to identify those that should be incorporated into the HMR. The team will then group the special permits by subject area and will establish a priority ranking for incorporating them into the HMR, considering the nature of the authorized operations and the length of time the special permits have been in effect. There are about 650 special permits that have been in effect for at least 10 years.

Schedule

Task	Due Date	Status
Identify all special permits that have been in effect for at least 10 years	5/1/10	Ongoing
Identify special permits that should be incorporated into the HMR	10/1/10	
Prioritize identified special permits for incorporation into the HMR *	1/1/2011	
Initiate rulemaking to incorporate identified special permits into the HMR (depending on the number and subject matter, we may initiate two or more targeted rulemakings)	NPRM – Jan 2012 Final rule – Jan 2013	

- * Note that this tasking will include identification of special permits where the prior safety justification requires further analysis and review; based on this assessment, special permits that are not incorporated into the HMR may be modified or rescinded, as necessary.

Special Permits held by a Number of Entities

A “party to” a special permit is a company or individual who is issued grantee status to an existing special permit. Party status allows the company or individual to utilize the special permit in the same manner as the original grantee.¹ A party to a special permit is granted based on a review the original special permit and information provided by the applicant for party status and a determination that the applicant is fit to conduct the activity authorized under the special permit based on prior compliance history or other available information. Party status to a specific special permit may be granted to any number of applicants.

Special permits held by a large number of parties are obvious candidates for incorporation into the HMR because they generally apply to a broad segment of the regulated community. The team will identify and review all special permits with at least 10 party-status holders to identify those that should be incorporated into the HMR. The team will then group the special permits by subject area and will establish a priority ranking for incorporating them into the HMR, considering both the number of party-status holders and the time the special permits have been in effect. There are about 80 special permits that have at least 10 party-status holders.

Schedule

Task	Due Date	Status
Identify all special permits with at least 10 party-status holders	5/1/10	Ongoing
Identify special permits that should be incorporated into the HMR	5/1/11	
Prioritize identified special permits for incorporation into the HMR, considering both the number of party-status holders and the time the special permits have been in effect. *	1/1/12	
Initiate rulemaking to incorporate identified special permits into the HMR (depending on the number and subject matter, we may initiate two or more targeted rulemakings)	NPRM – Jan 2013 Final rule – Jan 2014	

* Note that this tasking will include identification of special permits where the prior safety justification requires further analysis and review; based on this assessment, special permits that are not incorporated into the HMR may be modified or rescinded, as necessary.

¹ PHMSA does not grant party status to special permits authorizing the manufacture of hazardous materials packagings; these special permits are unique to each manufacturer.

Manufacture, Mark, and Sell Special Permits

Manufacture, mark and sell (MMS) special permits are granted to package manufacturers who want to make and market packagings for the transportation of hazardous materials that differ from the packagings authorized for such transportation under the HMR. An MMS special permit is issued to a single packaging manufacturer. PHMSA does not grant party status to MMS special permits.

An MMS special permit provides packaging manufacturers with a degree of flexibility in the design, construction, and testing of hazardous materials packagings. Such flexibility generally results in reduced transportation costs, based on lower packaging costs and increases in the number of available packaging alternatives for shippers. Therefore, MMS special permits are excellent candidates for incorporation into the HMR.

Currently, there are about 400 active MMS special permits. Of these, about half address cylinders. The team will evaluate the special permits for each type of packaging and make a determination as to those that should be adopted as regulations of general applicability.

Schedule

Task	Due Date	Status
Identify all MMS special permits	5/1/10	Ongoing
Group MMS special permits by packaging type for review; identify MMS special permits that should be incorporated into the HMR	1/1/12	
Prioritize identified special permits for incorporation into the HMR *	5/1/12	
Initiate rulemaking to incorporate identified special permits into the HMR (depending on the number of different packagings involved, we may initiate two or more targeted rulemakings)	NPRM – Jan 2014 Final rule – Jan 2015	

- * Note that this tasking will include identification of special permits where the prior safety justification requires further analysis and review; based on this assessment, special permits that are not incorporated into the HMR may be modified or rescinded, as necessary.

Special Permits Not Covered by Earlier Reviews

Schedule

Task	Due Date	Status
Review special permits not covered by previous reviews and group by type or category	1/1/13	
Identify special permits that should be incorporated into the HMR	5/1/13	
Prioritize identified special permits for incorporation into the HMR *	1/1/14	
Initiate rulemaking to incorporate identified special permits into the HMR (depending on the number and subject matter, we may initiate two or more targeted rulemakings)	NPRM – Jan 2015 Final rule – Jan 2016	

- * Note that this tasking will include identification of special permits where the prior safety justification requires further analysis and review; based on this assessment, special permits that are not incorporated into the HMR may be modified or rescinded, as necessary.

Ongoing Special Permits Reviews

Once the comprehensive reviews outlined above are completed, PHMSA will continue to conduct annual reviews of active special permits to identify those that should be incorporated into the HMR. PHMSA expects to initiate at least one rulemaking each year to propose to adopt the provisions of identified special permits as regulations of general applicability.

MILESTONES

Review and Evaluation

Task	Due Date	Status
Identify special permits issued to members of associations	11/1/09	Completed
Prioritize association special permits for incorporation into the HMR	4/26/10	Ongoing. Of 20 special permits issued to association members, 6 will be addressed in HM-245 (cargo tanks) and one in HM-216B (rail). Evaluation of the remaining special permits continues..
Identify all special permits that have been in effect for at least 10 years; special permits with at least 10 party-status holders; and MMS special permits	5/1/10	Ongoing
Identify "old" special permits that should be incorporated into the HMR	10/1/10	
Prioritize "old" special permits for incorporation into the HMR	1/1/11	
Identify party-status special permits that should be incorporated into the HMR	5/1/11	
Prioritize party-status special permits for incorporation into the HMR	1/1/12	
Group MMS special permits by packaging type for review; identify MMS special permits that should be incorporated into the HMR	1/1/12	
Prioritize MMS special permits for incorporation into the HMR	5/1/12	
Review special permits not covered by previous reviews and group by type or category	1/1/13	
Identify remaining special permits that should be incorporated into the HMR	5/1/13	
Prioritize remaining special permits for incorporation into the HMR	1/1/14	
Ongoing annual reviews of outstanding special permits	2015 and beyond	

Rulemaking

Task	Due Date	Status
Initiate rulemaking to incorporate association special permits related to rail and cargo tank operations	NPRMs – April/May 2010 Final rules – April/May 2011	Ongoing
Initiate rulemaking to incorporate remaining association special permits	NPRM – Jan 2011 Final rule – Jan 2012	
Initiate rulemaking to incorporate “old” special permits (depending on the number and subject matter, we may initiate two or more targeted rulemakings)	NPRM – Jan 2012 Final rule – Jan 2013	
Initiate rulemaking to incorporate party-status special permits (depending on the number and subject matter, we may initiate two or more targeted rulemakings)	NPRM – Jan 2013 Final rule – Jan 2014	
Initiate rulemaking to incorporate MMS special permits (depending on the number of different packagings involved, we may initiate two or more targeted rulemakings)	NPRM – Jan 2014 Final rule – Jan 2015	
Initiate rulemaking to incorporate remaining special permits into the HMR (depending on the number and subject matter, we may initiate two or more targeted rulemakings)	NPRM – Jan 2015 Final rule – Jan 2016	
Initiate rulemaking to incorporate special permits identified in annual reviews	One rulemaking project each year beginning in 2016	