

## CHAPTER 19

### FITNESS INSPECTIONS

#### SECTION 19.1 - PURPOSE

The purpose of this chapter is to provide procedures to be used by Field Operations when conducting fitness inspections regarding entities that have requested an approval or permit to authorize them to perform certain functions.

#### SECTION 19.2 - DEFINITIONS

- *Administrator* - is defined as the head official of each operating administration within DOT to whom the Secretary has delegated authority under 49 CFR part 1 and any person employed by an operating administration to whom the Administrator has delegated authority to carry out this rule.
- *Agent of the Secretary or agent* - means a Federal officer or employee, including an inspector, investigator, or specialist authorized by the Secretary or Administrator to conduct inspections or investigations under the Hazmat Law and HMR. For the purpose of conducting fitness inspections domestic and foreign, an “*Authorized Agent*” means PHMSA OHMS Field Operation assigned investigators and each applicable mode are the Agents of the Department who perform onsite fitness inspections of applicants.
- *Approval* – means a written authorization, including a competent authority approval, from the Associate Administrator or other designated Department official, to perform a function for which prior authorization by the Associate Administrator is required under Subchapter C of the chapter (49 CFR Parts 171 through 180).
- *Associate Administrator* – means the Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.
- *Chief Safety Officer (CSO)* - refers to the Assistant Administrator for PHMSA who is appointed in competitive service by the Secretary. See 49 U.S.C. 108(e).
- *Director of Field Operations* – manages all foreign and domestic fitness inspection and investigation activities. This position also serves as the Enforcement Liaison for OHMS Divisions and each applicable mode.
- *Fitness Inspection* – a type of inspection or pre-approval review conducted by PHMSA OHMS Field Operations assigned Investigators and each applicable mode to ensure that entities are complying with the provisions of an existing approval or

permit, or that a requested new permit or approval will meet the intent and adequate level of safety to that afforded by the regulatory requirement concerned.

- *Permit* - means a document issued by the Associate Administrator under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under Subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. et seq. (e.g., Federal Motor Carrier Safety routing requirements). The terms “permit, special permit” and “exemption” have the same meaning for purposes of Subchapter A or C of this chapter or other regulations issued under 49 U.S.C. 5101 through 5127. An exemption issued prior to October 1, 2005 remains valid until it is past its expiration date, terminated by the Associate Administrator, or issued as a special permit, whichever occurs first.

### SECTION 19.3 - BACKGROUND

The Pipeline and Hazardous Materials Safety Administration has the primary responsibility for the issuance of DOT Special Permits and Approvals to the Hazardous Materials Regulations (HMR). Also, in many instances, the Regulations require approvals and/or registrations prior to transportation in commerce.

PHMSA has implemented a 3-tier system for fitness determination of approval or permit applicant.

1<sup>st</sup> Tier – The Approval and Permits Division will conduct the 1<sup>st</sup> Tier review. The minimum level of fitness (MLF) baseline is a review of data from the Hazardous Materials Information Portal (HIP) including incident and inspection data accumulated by all operating administrations (PHMSA, FAA, FMCSA, FRA & USCG), as well as a review of FMCSA’s SAFER database.

The Tier One Minimum Level of Fitness Review Process for General Approvals includes using HIP and SAFER criteria to evaluate the Applicant’s fitness. If the Applicant does not meet the minimum level of fitness, the Applicant and application materials are sent to Field Operations for further review/action.

The following criteria should be utilized for determining minimum level of fitness. Applicants that fall below the following criteria are considered fit. Applicants that meet one or more of the following criteria require further review by Field Operations. Note: These Applicants are not considered unfit until a fitness determination has been made by the Associate Administrator.

- HIP:
  - Incidents Criteria
    - § More than 20 total hazardous materials incidents, or
    - § More than one serious hazardous materials incident.
  - Civil Cases Criteria
    - § Four civil enforcement cases

§ Four warning letters

§ A combination totaling four civil enforcement cases and/or warning letters, or

§ Any open cases.

· SAFER:

- Motor Carrier Safety Rating other than “none” or “satisfactory”
- HazMat out-of-service percentage greater than the national average
- Driver out-of-service percentage greater than the national average
- Vehicle out-of-service percentage greater than the national average

Should an applicant’s incidents and inspection data fall within the set MLF criteria, then the applicant is recommended to be “*fit to conduct the activity authorized by the special permit or approval*”. Should the applicant’s incidents and/or inspection data exceed the set MLF criteria, then PHMSA initiates the 2<sup>nd</sup> Tier of fitness determination and the applicant is put on “Fitness Hold”.

2<sup>nd</sup> Tier – The applicant is referred to PHMSA’s Field Operations or the appropriate operating administration for further data review. The applicant’s incidents and inspections are thoroughly evaluated to determine their role in the events. This action could also include an information request to the applicant.

Should it be determined that either the applicant was not at fault, played no role (applicant was shipper and incident was caused by carrier) or the incident’s/inspections are completely irrelevant to the request, then the applicant may be recommended to be “*fit to conduct the activity authorized by the special permit or approval*”, at which time the applicant is removed from “Fitness Hold” and workflow of the special permit or approval continues. Note: The application continues simultaneously through the evaluation process while fitness determination is being completed.

Should this data review uncover more concerns or show a pattern of unsafe operations then PHMSA initiates the 3<sup>rd</sup> Tier of fitness determination.

3<sup>rd</sup> Tier – PHMSA’s Field Operations assigned investigators and each applicable mode are the only Agent’s of the Department who perform an onsite fitness inspection foreign and domestic on the applicant or conduct review of a recent onsite inspection. An onsite technical staff review can be conducted during an inspection. The result of this fitness inspection will be a recommendation on whether the applicant should be recommended “*Fit*” or “*Unfit*” to “*conduct the activity authorized by the special permit or approval*”.

**Note:** During 2<sup>nd</sup> and 3<sup>rd</sup> Tier reviews, if necessary consult the Office of Hazardous Materials Technology (PHH-20).

SECTION 19.4 – FITNESS INVESTIGATION PROCEDURES

- Step 1: Review company's documentation that requests a new, renewal of, an approval or permit, to include:
  - Regulatory systems affected
  - Regulations from which would be exempted
  - Schematics/technical analysis
  - Adequate level of safety to that afforded by the existing regulatory requirement
  - Safety control measures (Internal/external safety policies and procedures)
  - Operational/quality controls
  - Modes of transportation that would be affected
  - Modal requirements affected (including any international regulations)
    - **Note: Modal representatives will be engaged if needed.**
- Step 2: Conduct company's incident/accident and inspection history, including any past or open complaints.
  - History checks will be conducted at a minimum in the following databases:
    - Hazardous Materials Information System (HMIS)
    - Hazardous Materials Intelligence Portal (HIP)
  - Additional databases (optional)
    - National Response Center (NRC) reports
    - National Transportation Safety Board reports/recommendations (NTSB)
    - Occupational and Safety Health Administration (OSHA)
    - National Cargo Bureau reports
- Step 3: Target the site locations to conduct the fitness inspection, including company's customers and carriers if warranted. **Note: Investigators will conduct site visits unannounced to ensure that the entities normal day to day operations are observed during the review.**
- Step 4: Conduct site visit
  - Conduct a review of company's overall operations, including practices and procedures that would be authorized under the requested special permit or approval.
  - Determine applicability and level of safety regarding operations under the requested special permit or approval including:
    - Risk assessment – worst case to best case scenarios
    - Internal quality control measures
    - Security policies/procedures
    - Employee training and certifications

- Determine if alternative options/practices that would enable company to operate under the existing regulatory requirement instead of issuance of a permit or approval.

**Note:** If during the course of the fitness compliance review a non-compliance issue is discovered of such magnitude to constitute an imminent hazard, the investigator must immediately discontinue the review, notify the respective supervisor.

#### SECTION 19.5 – FITNESS INSPECTION REPORT AND RECOMMENDATIONS

- Step 1: Investigators must complete and submit to their respective Region Director a fitness inspection report within five business days from completion of the site visit, including any enforcement recommendations. The report should address the following issues:
  - Brief synopsis of the Company’s overall operations
  - Regulations from which would be exempted
  - Applicability of the special permit or approval vs. the existing regulatory requirement
  - Level of safety that would be afforded under the special permit or approval vs. the regulatory requirements.
  - Site specific recommendations
  - Enforcement recommendations
  - Fitness recommendation/rating (satisfactory/unsatisfactory)
- Step 2: The Region Director will review and approve the fitness inspection report and approve the company’s recommended fitness rating, including any enforcement recommendations.
- Step 3: The Region Director will submit the fitness inspection report to the Director of Field Operations (PHH-40) or designee for review and approval.
- Step 4: Director, PHH-40 will forward the final fitness inspection report to the Director, Approvals and Permits Division (PHH-30) with the final enforcement fitness recommendation.

The acquired information and recommendations from all review activities will be sent to the Associate Administrator for Hazardous Materials Safety (or delegate) for review and determination of fitness. It is important to note that a recommendation of “*Unfit*” should only be issued following an onsite inspection.

If a determination of “*Unfit*” is made, PHMSA will determine whether the applicant holds any other permit or approval to decide if additional actions need to be taken. Current approvals and permits will be reviewed and compared to the factors that were the basis for the decision of “*Unfit*” PHMSA will may steps to suspend or terminate current permits or approvals as appropriate.

Procedures for conducting Fitness/Compliance Reviews and Enforcement Recommendations

