THE DEPARTMENT OF TRANSPORTATION'S OVERSIGHT AND MANAGEMENT OF HAZARDOUS MATERIALS SPECIAL PERMITS AND APPROVALS

(111–105)

HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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U.S. House of Representatives
Committee on Transportation and Infrastructure
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SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Committee on Transportation and Infrastructure Staff

SUBJECT: Hearing on "The Department of Transportation's Oversight and Management of Hazardous Materials Special Permits and Approvals"

PURPOSE OF HEARING

The Committee on Transportation and Infrastructure (Committee) will meet on Thursday, April 22, 2010, at 10:30 a.m., in room 2167 of the Rayburn House Office Building to receive testimony on concerns with the Pipeline and Hazardous Materials Safety Administration's (PHMSA) oversight and management of its special permits and approvals program. This hearing is a follow-up to a Committee hearing held on September 10, 2009.[1] It also is being conducted as one of several hearings under the requirements of clauses 2(n), (o), and (p) of Rule XI of the Rules of the House of Representatives.

BACKGROUND

PHMSA is the lead agency responsible for regulating the safe transport of hazardous materials, including explosive, poisonous, corrosive, flammable, and radioactive substances. PHMSA regulates up to one million daily movements of hazardous materials. Many hazardous materials are transported under the terms and conditions of special permits and approvals, which provide relief or exceptions to the hazardous materials regulations.[2]

A special permit allows an entity to perform a function that is not authorized under the hazardous materials regulations. It is essentially an exemption. In fact, special permits were called exemptions prior to the 2005 enactment of the Safe, Accountable, Flexible, and Efficient

[1] *Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?*, Before the H. Comm. on Transportation and Infrastructure, 111th Cong. (2009).
[2] 49 C.F.R. § 171-180 (2009).

Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (P.L. 109-59), which replaced the term "exemption" with the term "special permit".

Under current law, the Secretary may exempt an entity from any requirement prescribed pursuant to 49 U.S.C. §§ 5103(b) (General regulatory authority), 5104 (Representation and tampering), 5110 (Shipping papers and disclosure), and 5112 (Highway routing of hazardous material) as long as the activity achieves a safety level at least equal to the safety level required by the law or regulation or, if a required safety level does not exist, is consistent with the public interest.[3] For example, entities can obtain exemptions from regulations relating to the transportation of hazardous material in commerce; the offering of hazardous materials for transportation in commerce; the design, manufacture, fabrication, inspection, marking or labeling (including placarding), reconditioning, repair, or testing of a package for use in transporting hazardous material in commerce; preparation or acceptance of hazardous material for transportation in commerce; shipping papers, which contain information regarding the hazardous material being transported; and highway routing designations over which hazardous material may or may not be transported by motor vehicle. An exemption, or special permit, may be issued for an initial period of not more than two years and subsequent periods of not more than four years (with the exception of highway routing exemptions, which may be renewed for additional periods of not more than two years).

"Approvals" are somewhat different from special permits. Approvals are not addressed in current law; they are only addressed in the regulations. An approval can only be issued if there is a specific provision in the regulations that allows the Office of Hazardous Materials Safety to provide relief from a relevant regulation(s). If there is no specific provision allowing for an approval, the relief sought must be in the form of a special permit.[4] PHMSA's database contains more than 4,500 special permits and 125,000 approvals.

On June 30, 2008, the Department of Transportation's (DOT) Office of Inspector General (IG) launched an audit of PHMSA's special permits and approvals program to assess the effectiveness of (1) policies and processes for reviewing and authorizing special permits, approvals, and limited quantity or consumer commodity exceptions; and (2) coordination with the affected operating administrations before issuing any of these special authorizations. In addition, the IG reviewed PHMSA, Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), and Federal Railroad Administration (FRA) oversight and enforcement of approved parties' compliance with the terms and conditions of special permits and approvals.

In the course of the IG audit, Committee Majority staff launched its own investigation of PHMSA as part of the Committee's oversight responsibility. On September 10, 2009, the Committee held an oversight hearing on PHMSA's special permits and approvals program. The IG released the initial findings of its audit at the hearing; Committee Majority staff released the initial findings of their investigation prior to the hearing.[5] *See attachment September 9, 2009 Summary of Subject Matter for further information.*

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[3] 49 U.S.C. § 5117 (2009).

[4] 49 C.F.R. § 107.401 (2009).

[5] *Concerns with Hazardous Materials Safety in the U.S.: Is PHMSA Performing its Mission?*, Before the H. Comm. on Transportation and Infrastructure, 111th Cong. (2009).

The Committee's investigation, coupled with the IG's findings, strongly suggests that PHMSA's performance of its primary safety mission is less than diligent in far too many instances, and that there is little focus within the individual programs on how that program is driving the agency's safety mission. The details of the Committee's preliminary findings can be found at http://transportation.house.gov/hearings/hearing.aspx.

On March 4, 2010, the IG issued its final report, which identified safety issues that call into question the effectiveness of PHMSA's process for granting special permits and approvals for transporting hazardous materials.[6] Specifically, the IG stated that PHMSA does not: (1) adequately review applicants' safety histories; (2) ensure applicants will provide an acceptable level of safety; (3) coordinate with the affected operating administrations; and (4) conduct regular compliance reviews of individuals and companies that have been granted special permits and approvals. The IG found:

- **PHMSA does not look at applicants' safety history when assessing their fitness for a special permit or approval.** For all of the 99 permits and 56 approvals that the IG examined, PHMSA did not consider the applicants' incident and compliance records when granting, renewing, or allowing "party-to" permits. The IG found this to be the case even when applicants had multiple incidents and enforcement violations for years prior to receiving their permit.

  Of particular concern to the IG was PHMSA's practice of granting special permits to trade associations – effectively giving a "blanket authorization" to thousands of member companies without any assessment of their safety histories or need for the permit. This was also raised as a concern in the Committee Majority staff oversight investigation.

  At the September 10, 2009 Committee oversight hearing, DOT stated that PHMSA would no longer issue special permits and approvals to trade associations; that the agency would take immediate action on those that were already issued, which would include safety fitness reviews of the individual association members. However, since the hearing, PHMSA has issued 10 special permits and two competent authority approvals to trade associations. When Committee Majority staff questioned PHMSA about the issuance of the special permits and approvals to the trade associations, agency staff apologized for the actions taken and stated that, as a result, the agency had established a reporting process to ensure that such actions are not taken in the future. A week later, PHMSA stated that it was all part of the agency's plan to clarify that the special permits and approvals were for the individual members, not the trade associations. Nevertheless, the language in three of the special permits states that they are for the associations; and all of them have expiration dates ranging from late 2010 to early 2015, indicating that it was not a short-term fix. Further, no safety fitness reviews of the individual members of the associations were conducted by PHMSA.

- **PHMSA has granted special permits and approvals without sufficient data or analyses to confirm that applicants' proposed level of safety is at least equal to what is called for in the hazardous materials regulations.** PHMSA's reviews of 65 percent of the 99 permits and all 56 approvals that the IG examined were either incomplete, lacked evidence of an equal level of safety, or were simply nonexistent. PHMSA also lacks

[6] DOT IG, *New Approaches Needed in Managing PHMSA's Special Permits and Approvals Program*, AV-2010-045 (March 4, 2010).

sufficient supporting documentation for renewal and party-to permits because they are based on evaluations that PHMSA may have performed several years earlier when assessing the original special permit application.

- **PHMSA did not coordinate with the FAA, FMCSA, or FRA on 90 percent of the new and party-to permits or any of the renewals that the IG reviewed, although these agencies may have critical safety data on applicants seeking a permit.** Further, PHMSA did not coordinate most of the emergency permits that the IG reviewed, even though the law specifically requires coordination with the modal agencies.

- **PHMSA's risk-based oversight program omits a key rating factor that should drive compliance reviews – that is, whether a company holds a special permit or approval.** However, the IG's visits to 27 companies found that more than one-half did not comply with the terms of their special permits. Some officials did not know which permits applied to their location, and some were unaware that they even had a permit to abide by.

The IG issued 10 recommendations to PHMSA, which are attached to this memorandum. PHMSA has been working to improve its processes in these areas since August 2009, by producing action plans to address the special permits and approvals processes. A key element of these action plans was to complete updated standard procedures for each area. PHMSA's action plans are attached to this memorandum.

IG Cites New Concerns With Explosives Approvals

Under current regulations, no person can offer for transportation or transport an explosive unless it has been tested and classed and approved by the Associate Administrator for Hazardous Materials Safety.[7][8] New explosives must be examined and assigned a recommended shipping description, division, and compatibility group, based on certain tests and other criteria established in the regulations.[9] These tests determine how the explosive will be classified (by code). The classification identifies the controls for transportation and storage of the materials and prevents an increase in hazard that might result if certain types of explosives were stored or transported together.[10]

Such testing must be performed by a person who is approved by the Associate Administrator (consistent with certain regulations) and who (1) has at least 10 years of experience in the examination, testing, and evaluation of explosives; (2) does not manufacture or market explosives, is not controlled by or financially dependent on any entity that manufactures or markets explosives, and whose work with respect to explosives is limited to examination, testing, and evaluation; and (3) is a resident of the United States.[11]

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[7] Certain fireworks may be classed and approved by the Associate Administrator without prior examination and offered for transportation if certain conditions are met.
[8] 49 C.F.R. §§ 173.50 – 173.58 (2009).
[9] *Id.*
[10] *Id.*
[11] *Id.*

Following a September 10, 2009 Committee oversight hearing focused on PHMSA's safety performance, several whistleblower complaints were brought to the attention of Committee Majority staff who, after an initial review, asked the IG to determine whether PHMSA was abiding by its own regulations in testing and classifying explosives. As a result, on April 7, 2010, the IG issued a management advisory to PHMSA to inform the agency of weaknesses that the IG identified in the processing of explosives approvals. The IG found:

- PHMSA has no formalized guidance for classifying and approving explosives;
- PHMSA did not adhere to regulatory requirements for reclassifying an explosive;
- PHMSA lacks a formal process and controls for appropriately resolving internally contested safety decisions; and
- Of utmost concern, over the last 10 years, PHMSA has not conducted fitness inspections or safety reviews at any of its four approved explosives testing labs.

I. PHMSA Has No Formalized Guidance for Classifying and Approving Explosives

Explosive substances have a wide range of hazards from mass detonation found in a military bomb to pyrotechnics found in common fireworks. Before any "new explosive" can be transported, it must be classified into one of the following categories in accordance with Federal regulations and/or the United Nations (UN) Model Regulations.[12] Explosives are assigned to UN Class Code 1 and are subdivided into the following six divisions:

- Division 1.1 consists of explosives with a mass explosion hazard in which the entire explosive load is detonated instantaneously;
- Division 1.2 consists of explosives which present a projection or fragmentation hazard but no mass explosion hazard;
- Division 1.3 consists of explosives which present both a fire hazard and a minor blast or projection hazard (or both) but not a mass explosion hazard;
- Division 1.4 consists of explosives that present a minor explosion or pyrotechnic hazard. These explosives are largely confined to the package, with no projection of fragments of appreciable size or range to be expected;
- Division 1.5 consists of very insensitive substances with a mass explosion hazard. These explosives are so insensitive that there is little probability of initiation, or of transition from burning to detonation, under normal conditions of transport; and
- Division 1.6 consists of extremely insensitive articles with no mass explosion hazard. The division is comprised of articles which contain only extremely insensitive detonating substances and which demonstrate a negligible probability of accidental initiation or propagation.[13]

[12] 49 C.F.R. § 173.58 (2009).
[13] *Id.*

PHMSA classifies and approves a "new explosive" for transport using a four-step process – testing, application, submission, and approval – as follows:

1. Explosives must be tested by one of four PHMSA-approved laboratories (at the expense of the company requesting approval) in order to transport explosives.[14]
2. The testing laboratory must provide a test report to the company applying for the approval recommending a hazard class/division, according to the agreed-upon international ranking system.
3. The company requesting the explosive classification must apply to PHMSA for the explosive approval and include the test report and/or other supporting documentation.
4. PHMSA's Associate Administrator for Hazardous Materials Safety must approve or disapprove the request in writing. If the request is approved, the product receives an explosives approval number.[15]

While the regulations clearly state that the above criteria must be met before a "new explosive" can be transported, they are less clear on what constitutes a "new explosive" and when testing is required. To address this issue, in 1998, the predecessor of PHMSA, the Research and Special Programs Administration, contracted with Booz Allen Hamilton, Inc. to develop a guidance manual to: (1) clarify existing regulations on classifying new explosives, substances, and articles; (2) document PHMSA and testing lab employees' explosive classification knowledge; and (3) provide a reference/training document for PHMSA and the testing labs. More than 11 years later, this guidance has not been finalized, although the agency expended $97,000 to develop it. Instead, PHMSA and the four testing labs have relied on a draft version of the guidance published in 2002 to interpret the hazardous materials regulations on explosives classifications. As a result, PHMSA employees are left to interpret the hazardous materials regulations on their own, which has led to varying definitions of what constitutes a "new explosive" and how the regulations apply.

For example, one approval investigated by the IG involved a company that wanted to use an existing explosive approval to manufacture the same product at another location without having the relocated product retested. A specialist in PHMSA's Office of Hazardous Materials Technology believed that the product would have to be retested and a chemist in the same office concurred as both staff specialists believed that the manufacturing process at the different location could be different and could potentially alter the explosive's properties. The chemist relied on the guidance manual which was current practice. It states: "[a]n explosive substance developed, produced and classed by a specific manufacturer and relocated or co-located to a different manufacturing should be examined and re-classified."

[14] There are presently only three approved laboratories. The IG found that one approval is no longer valid since the testing lab was sold to another company in May 2008. According to PHMSA, approvals are not assets that can be sold or otherwise transferred from the holder to another person.
[15] 49 C.F.R. § 173.56 (2009).

According to the chemist, a supervisor within the Office of Hazardous Materials Technology stated that the explosive had been previously approved and that the company's request should be granted. Had it not been for the Committee Majority staff's involvement and the subsequent IG review, PHMSA would have approved the company's request without having the product retested and without examining the company's safety record. According to the IG:

> This is a significant concern since this company has a 6-year history of poor explosives safety compliance. Most recently in September 2009, the company involved was cited for six probable violations including transporting explosives under a special permit with other unauthorized explosives on the same vehicle.

As a result of the Committee staff and IG investigations, PHMSA has instructed the company to follow the hazardous materials regulations and obtain a test report on the explosive. In the meantime, the guidance manual still is not finalized. Currently, all four PHMSA-authorized testing labs state that they use PHMSA's draft guidance manual when testing explosive products submitted for classification and training employees. However, PHMSA could not confirm whether each authorized testing lab is consistently implementing the guidance. The IG recommended that PHMSA update and formalize the 2002 draft guidance, ensuring that it specifies steps for classifying explosives and clarifies the hazardous materials regulations where needed, and require all PHMSA offices and authorized testing labs to comply. PHMSA has stated that they plan to formalize the guidance.

II. PHMSA Did Not Adhere To Regulatory Requirements for Re-classifying an Explosive

When a request is made by a company to re-classify an explosive, PHMSA's Office of Hazardous Materials Technology is responsible for performing a technical review of the explosive. A chemist is assigned to review the application, including all diagrams and test reports from a PHMSA-authorized testing lab. After reviewing the information, the chemist recommends the shipping method, hazard class/division, and compatibility group. A supervisory chemist then reviews the documentation and recommendation made and decides whether the chemist's determination is correct. If the supervisory chemist agrees, the documentation is forwarded to the Office of Special Permits and Approvals, which is responsible for ensuring that the approvals are properly supported and documented before submitting them for authorization by the Associate Administrator for Hazardous Materials Safety.

Recently, the IG found that PHMSA approved some reclassifications without the required authorized testing lab reports. In January 2008, a company sought to have a Division 1.4 explosive re-classified as a Division 4.1 flammable solid. This change would reclassify an explosive as a non-explosive, allowing the company to ship the substance under less stringent requirements on both cargo and commercial aircraft. When the company applied for the re-classification it submitted its own data and a video of its product testing. The company did not have the substance tested by any of the four PHMSA-approved laboratories as required under the regulations.[16] The chemist reviewing the approval application reviewed the video noting that the effects of the explosive were not completely confined within the device as required by regulations and concluded that this could

[16] *Id.*

impact the safety of packaging and shipping.[17] As a result of the chemist's observations, he disapproved the company's petition for re-classification.

Despite the chemist's disapproval and the failure of the company to supply the data and testing required by regulation, the chemist's supervisor overturned the recommendation and forwarded the re-classification to the Office of Special Permits and Approvals for approval. The Office of Special Permits and Approvals never questioned the lack of a test report from a PHMSA-approved lab and authorized the reclassification and shipping method by air – without consulting with and coordinating the approval with FAA, the modal administration primarily responsible for hazardous material shipments by air. Although there is no statutory requirement for PHMSA to coordinate with the modal agencies when re-classifying dangerous substances, both the IG and the Committee have recommended that PHMSA coordinate with the modal administrations to ensure safe transportation.

As a result, the chemist who initially disapproved the re-classification filed a complaint with the IG Complaint Center, indicating his supervisor "wrongfully" changed the classification of the device against his strong recommendation that it remain in the explosive materials class. The complaint was subsequently reviewed by the IG's Complaint Center Operations staff who conducted an initial review of the situation. PHMSA told the Complaint Center that the company submitted a test report from New Mexico Tech (a PHMSA-authorized testing lab), which tested and evaluated the fire suppressant device. PHMSA stated that New Mexico Tech recommended the device be re-classified as a non-explosive. The Complaint Center found no evidence of fraud, waste, abuse, or criminal activity and decided to forward the complaint back to PHMSA for resolution. PHMSA forwarded it to the chemist's supervisor for further handling – the same supervisor who was the focus of the chemist's whistleblower complaint. The supervisor closed the complaint with no further action.

However, upon further review, the IG determined that the test report did not exist, and a New Mexico Tech official confirmed that testing for the product was not performed at its facility. PHMSA's internal investigative memorandum states that it had thoroughly reviewed all information and followed all established procedures. Despite PHMSA's claims, it could not have conducted a thorough review if it did not even detect that the required test report did not exist. In fact, officials from the company who requested the re-classification informed the IG that it did not submit an examination report to PHMSA for the device from New Mexico Tech. Rather, they had submitted a copy of another company's examination report for a different product tested by New Mexico Tech. The company officials said they believed that product was similar to their fire suppressant device, which New Mexico Tech had classified as a Division 4.1 non-explosive. However, any similarity in the product does not change the fact that a test report from a PHMSA-approved testing lab on the actual product is required by regulation. In addition, after examining the test report for the "similar" product that had been re-classified, the IG found (and PHMSA confirmed) it was not even similar to the product involved in the IG Complaint.

In late 2009, the issue was brought to the attention of Committee Majority staff who, after an initial review, asked the IG to follow up to determine whether the request had been approved and whether doing so was in compliance with the hazardous materials safety regulations. The IG

[17] According to the hazardous materials regulations, a substance is not in the explosive class if the effects of the explosion are completely confined within the article.

determined that PHMSA did not adhere to the regulations. While PHMSA agreed, the agency is now having the substance tested at its own expense, spending $19,000 to do what is required of the company requesting the re-classification by regulation. The IG does not believe that Federal dollars should be used to conduct the testing, and that the company should pay for the tests because it failed to obtain them as required when submitting the original re-classification request. An even greater concern to the IG and Committee Majority staff is that, in the interim, the company is still allowed to ship the device by cargo and commercial aircraft as a non-explosive.

The IG recommended, in light of the potential safety issues, PHMSA should reinstate the device to its original classification of explosive until the testing lab's results are published and provide the IG's office with a supportable decision on the re-classified explosive.

III. PHMSA Lacks a Formal Process and Controls for Appropriately Resolving Internally Contested Safety Decisions

PHMSA's internal review of the complaints described above is illustrative of the problem: PHMSA's review of the complaint was not conducted independently and its results were not supportable. First, PHMSA assigned the Director of the Office of Hazardous Materials Technology (the complainant's manager) and the Director of the Office of Special Permits and Approvals (the person who concurred with the reclassification) to investigate the complaint. There were no internal controls to prevent a conflict of interest during the investigation or ensure the complainant remained anonymous as requested. Management knew the complainant's identity because there were only three chemists in the Office of Hazardous Materials Technology, and generally only one chemist reviews applications for approvals of explosives. According to the IG, those individuals should have recused themselves, and an impartial investigation should have been conducted by other PHMSA staff to avoid a conflict of interest.

Second, PHMSA's response to the IG's Complaint Center contained unsupported statements. As stated above, the IG found that the test report did not exist, and New Mexico Tech officials confirmed that testing for the product was not performed at their facility. PHMSA's internal investigative memorandum states that it had thoroughly reviewed all information and followed all established procedures. This obviously was not the case since PHMSA did not detect that the required test report did not exist. In fact, officials from the company who requested the re-classification informed the IG that they did not submit an examination report to PHMSA for the device from New Mexico Tech. Rather, they had submitted a copy of another company's examination report for a different product tested by New Mexico Tech. The company officials said they believed that the product was similar to their fire suppressant device, which New Mexico Tech had classified as a Division 4.1 non-explosive. However, any similarity in the product does not change the fact that a test report from a PHMSA-approved testing lab on the actual product is required by regulation. In addition, after examining the test report for the "similar" product that had been reclassified, the IG found (and PHMSA confirmed) it was not even similar to the product involved in the IG Complaint. PHMSA failed to acknowledge these issues in its internal review, which further underscores the need for impartial investigations and a revised approach for conducting them.

In response to the IG's findings, PHMSA has developed a Safety Review Board to resolve internally contested safety decisions. It also established a PHMSA online suggestion box, including an option to anonymously lodge a complaint.

IV. Over the Last 10 Years, PHMSA Has Not Conducted Fitness Inspections or Safety Reviews at Any of its Four Approved Explosives Testing Labs

Under current regulations, no person can offer for transportation or transport an explosive unless it has been tested, classed, and approved by the Associate Administrator.[18] New explosives must be examined and assigned a recommended shipping description, division, and compatibility group, based on certain tests and other criteria established in the regulations.[19] These tests determine how the explosive will be classified (by code). The classification identifies the controls for transportation and storage of the materials and prevents an increase in hazard that might result if certain types of explosives were stored or transported together.[20]

Prior to April 5, 2010, PHMSA had issued approvals to four laboratories to conduct explosives testing: (1) Safety Management Systems, Inc.; (2) Safety Consulting Engineers, Inc.; (3) Energetic Materials Research and Testing Center; and (4) the Explosives Bureau.[21] These four labs (now three) are authorized by PHMSA to examine and test explosives and assign a recommended shipping description, division, and compatability group, based on such tests and criteria. Their authorizations require them to:

1. Provide an annual report of activity to PHMSA listing the number of samples which have been shipped and the name of the shipper;
2. Submit a certification of compliance to PHMSA by February 1 of each year stating that the lab conducting the testing has at least 10 years of experience in the examination, testing, and evaluation of explosives; does not manufacture or market explosives, and is not controlled by or financially dependent on any entity that manufactures or markets explosives, and whose work with respect to explosives is limited to examination, testing, and evaluation; and is a resident of the United States;
3. Ensure that all facilities where testing of explosives is conducted have valid licenses from the Bureau of Alcohol, Tobacco and Firearms at the time testing is performed; and
4. Ensure that any single identifiable revenue source does not provide more than 20 percent of the lab's gross income during the reporting period.

If PHMSA determines – either through safety reviews or the annual reports – that a testing lab is not meeting its approval conditions, PHMSA has the authority to modify, suspend, or terminate any explosives approvals issued to companies and to revoke the lab's authority to conduct testing. Committee Majority staff reviewed annual reports submitted to PHMSA by the four authorized labs and it is not clear how PHMSA would verify that any of these conditions are met or that someone from the lab was present during testing, as required under the regulations. The annual reports only contain the shippers' name, DOT number, a brief description of the materials, and a brief description of the final action. They do not show who conducted the testing, where the testing took place, whether the lab was present during the testing, and the actual test date versus the approval date. It is equally unclear how PHMSA ensures that no single identifiable revenue source

[18] 49 C.F.R. §§ 173.50 – 173.58 (2009).
[19] *Id.*
[20] *Id.*
[21] On April 5, 2010, PHMSA sent a letter to Safety Consulting Engineers, Inc. stating that their status as a PHMSA-authorized lab was no longer valid since the company was sold to Chilworth Technologies in June 2008. According to PHMSA, approvals are not assets that can be sold or transferred from the holder to another person.

provides more than 20 percent of the lab's gross income and that the labs are not directly or indirectly controlled by a person or firm that manufactures or markets explosives. PHMSA does not currently require the labs to provide business or financial information to the agency in their annual reports or certifications.

Of utmost concern, the IG found that over the last 10 years, PHMSA has not conducted any fitness inspections or safety reviews of its four approved explosives testing labs.[22] Specifically, the IG found:

- Two testing labs are subcontracting their PHMSA approval authority to examine and test explosives to two companies that are not PHMSA-authorized testing labs, and both companies manufacture high explosives. PHMSA, however, claims that it has not authorized any of the approved testing labs to subcontract examination responsibilities; rather, the labs are leasing or contracting facilities and personnel support from other entities for conducting tests on the explosives. The IG disagrees.

- One testing lab has not submitted to PHMSA its annual activity report or certificate of compliance for any of the last five years. When the IG requested the required reports, test lab personnel told the IG that they were not aware of the requirements and did not have a copy of the approval because it had been misplaced. Although the approval conditions had not been met, PHMSA never took action to correct these deficiencies. It was only when the IG pointed out the deficiencies that PHMSA asked the testing lab to submit the required reports.

- For three testing labs, PHMSA could not provide the IG with either their annual report of activity or certificate of compliance or confirm whether the reports had actually been submitted.

- One of the labs notified PHMSA that it had been sold to another company on October 28, 2008. PHMSA continued to allow the lab to test explosives even though the sale revoked the labs authorization to conduct such tests. In an April 5, 2010 letter to the lab, PHMSA states: "[a]n approval is not an asset that can be sold or otherwise transferred from the holder to another person." PHMSA finally revoked the lab's authorization but permitted it to apply for a new approval.

[22] As a result of the IG's review, PHMSA established a testing agency audit team and developed new detailed inspection protocol. The team inspected and audited each PHMSA-authorized testing agency.

Conclusion

The IG concluded:

> Our previous work identified safety concerns that call into question the effectiveness of PHMSA's process for granting special permits and approvals to transport hazardous materials. While PHMSA has actions underway to address our concerns, we have continually found emerging problems with PHMSA's special permits and approvals program. Therefore, PHMSA must ensure that these weaknesses are not indicative of more systemic issues.

On April 5, 2010, PHMSA Administrator Cynthia Quarterman sent a memo to Deputy Inspector General Ann Calvaresi Barr responding to a draft of the Management Advisory, which PHMSA was permitted to review. The letter states:

> PHMSA has taken immediate action to assure that the explosives classification approvals program is operating as fully intended under the hazardous materials regulations. The Office of Inspector General's draft Management Advisory on explosives classification approvals focuses on two areas: (1) the process for reviewing and authorizing explosives classification approvals; and (2) oversight of approved explosives testing agencies. PHMSA has substantive efforts in place that address each of these areas.
>
> PHMSA has been working to improve its processes in these areas since August 2009, by producing action plans to address first the special permits process then the approvals process (December 2009). A key element of these action plans was to complete updated standard procedures for each area. Early this January, PHMSA published Standard Operating Procedures (SOP) for the Evaluation and Issuance of Explosive Classification Approvals. These SOPs include the process for reviewing and authorizing explosives classification approvals.
>
> The Approvals Action Plan also includes elements to improve oversight of approved explosives testing agencies by identifying specific requirements for the inspection, management, and oversight of Third Party Certification Agencies. Those requirements were established in early March. Shortly thereafter, PHMSA created a strike force to audit all of PHMSA's testing agencies, and will complete audits on all four of these agencies by the end of this week.

LEGISLATIVE ACTIVITIES

On May 14, 2009, the Subcommittee on Railroads, Pipelines, and Hazardous Materials held a hearing on Reauthorization of the DOT's Hazardous Materials Safety Program.

On June 18, 2009, the Chairman James L. Oberstar unveiled H.R. ____, the "Surface Transportation Authorization Act". The bill includes a proposal to reauthorize the hazardous material safety program, ensure the safe transport of hazardous material in all modes of transportation, and reduce the risks to life and property inherent in the commercial transportation of hazardous material. On June 22, 2009, the Subcommittee on Highways and Transit met in open session to consider H.R. ____, the "Surface Transportation Authorization Act", and order the bill reported favorably to the Committee without amendment.

On September 10, 2009, the Committee on Transportation and Infrastructure held an oversight hearing on PHMSA's special permits and approvals program.

On November 4, 2009, Chairman Oberstar introduced H.R. 4016, the "Hazardous Material Transportation Safety Act of 2009". Section 401 of the bill addresses special permits and approvals. Section 401:

- Maintains PHMSA's ability to issue special permits if the authorized activity is carried out in a way that achieves a safety level at least equal to the safety level required under chapter 51 of title 49, United States Code; or is consistent with the public interest and chapter 51, if a required safety level does not exist.

- Requires PHMSA to determine that an applicant for a special permit or approval is fit, willing, and able to conduct the activity authorized by the special permit or approval in a safe manner. In making the determination, the Secretary shall consider the applicant's safety history (including prior compliance history), accident and incident history, and any other information the Secretary considers appropriate to make such a determination.

- Requires PHMSA to consult and coordinate with the FAA, FMCSA, and FRA prior to issuing a special permit or approval.

- Requires PHMSA to publish all special permits, including emergency special permits, and approvals in the *Federal Register* for public review and comment.

- Authorizes PHMSA to establish a reasonable fee for processing applications for special permits and approvals.

On November 16, 2009, the Subcommittee on Railroads, Pipelines, and Hazardous Materials held a field hearing in Baltimore, Maryland, focused on Reauthorization of DOT's Hazardous Materials Safety Program.

On November 19, 2009, the Committee on Transportation and Infrastructure met in open session to consider H.R. 4016, and ordered the bill reported favorably to the House.

WITNESSES

The Honorable Calvin L. Scovel, III
Inspector General
U.S. Department of Transportation

The Honorable Cynthia Quarterman
Administrator
Pipeline and Hazardous Materials Safety Administration

Mr. William Weimer
Vice President and General Counsel
Phantom Fireworks
Warfordsburg, PA

HEARING ON THE DEPARTMENT OF TRANSPORTATION'S OVERSIGHT AND MANAGEMENT OF HAZARDOUS MATERIALS SPECIAL PERMITS AND APPROVALS

Thursday, April 22, 2010

HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
WASHINGTON, DC.

The Committee met, pursuant to call, at 10:30 a.m., in room 2167 Rayburn House Office Building, the Honorable James Oberstar [Chairman of the Full Committee] presiding.

Mr. OBERSTAR. The Committee on Transportation and Infrastructure will come to order. Apology from the Chair for our late beginning here; I had unexpected, unanticipated meetings, events intervene.

Mr. Shuster is concerned that the witness from the Fireworks Association be heard, and we will move as quickly as we can or, in the procedure that we have customarily held, to have the Government witnesses first and then the industry response, so we will do our best to get to the industry witness.

The role of oversight in the House of Representatives took a very new and significant turn in 1959, when then Speaker Sam Rayburn designated my predecessor, John Blatnik, to chair a special investigating committee on the Federal Aid Highway Program to oversee the early going of that program to ensure that the money was well and wisely spent, that States had internal audit and review procedures to preempt against fraud, corruption in the program.

And it was a wise decision, well timed, and Mr. Blatnik and the staff of former ex-FBI personnel from the Senate Rackets Investigating Committee did a superb job. Thirty-six people went to Federal and State prison, and every State since then has had internal audit and review procedures and the highway program is held in the highest repute.

Our hearing today continues the long history of in-depth investigations and oversight of the responsibilities of our Committee in the transportation arena. It was last September that I held a hearing on an investigation conducted by Committee staff by the Department of Transportation's Inspector General of the Pipeline and Hazardous Materials Safety Administration which revealed a startling number of failures to PHMSA to follow Federal law, as well as outright neglect in regulating the transportation of hazardous materials.

Complacency and neglect permeated the culture of PHMSA, which is also something that I found nearly 20 years earlier with the pipeline explosion in Mounds View, Minnesota, and the subsequent inquiry that I conducted as chair of the Investigations and Oversight Subcommittee of the Pipeline Safety Administration. They were anything but safe. They were poorly administered and their administrator did not have a culture of safety nor an understanding of safety. Much remained the same. PHMSA was plagued by a belief that the agency should make things as easy as possible for the industry that it was charged with regulating.

Fortunately, Deputy Secretary of Transportation John Porcari took action, addressing our concerns, directed PHMSA to develop a comprehensive action plan for handling special permits and approvals, directed PHMSA to begin implementing the plans, invited our staff and the Inspector General to his office for regular briefings on PHMSA's progress.

There is a new administrator of PHMSA, Ms. Quarterman, unfortunately, she was not sworn in until November 16 of 2009, but she has been actively engaged with the changes in their procedures and moving it ahead. The purpose of this hearing is to see how far ahead we have moved.

The Inspector General has released the final report, and that will be the first subject of today's hearing. It reiterates the concerns I had then, that PHMSA was not reviewing applicant safety history; was granting special permits and approvals without sufficient data or analysis; failed to consult and coordinate with FAA, with Federal Motor Carrier Safety Administration prior to granting permits; that PHMSA was granting permits to entire trade associations, giving blanket authorization to thousands of member companies without assessment of their individual safety histories.

On August 14, PHMSA issued a policy statement clarifying that special permits and approvals are issued to individual members, not to associations. Yet, since that time, ten special permits and two approvals have been made to trade associations with no safety fitness reviews of the individual members of the association. PHMSA claims it was a short-term fix, but many of those permits and approvals were not set to expire until 2015. That doesn't seem like a short-term fix to me.

So we will proceed with the hearing this morning and the Chair now recognizes the gentleman from Pennsylvania, Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman.

Welcome our witnesses here today to the hearing for PHMSA, and we are looking forward to getting an update on the work that is happening there.

Ms. Quarterman, it is good to see you again.

Also, as mentioned, we have a second panel. I will just take a brief opportunity to introduce them. Mr. William Weimer, who is the Vice President and General Counsel of Phantom Fireworks, which is headquarters in Youngstown, Ohio. He also serves as the President of the American Pyrotechnics Association, the principle safety and trade association for the fireworks industry.

Phantom Fireworks also has retail locations nationwide, including a consumer fireworks showroom in my home State of Pennsylvania, Warfordsburg, Pennsylvania, which I pass on my way. I

keep saying I am going to stop in there one day, although I don't think I am allowed to buy fireworks, being a resident of Pennsylvania. So I will come in and, I guess, just look around the showroom.

So welcome, Mr. Weimer. I know you have extensive knowledge and I know you all have some things you want to say today on how PHMSA's processing of special permits is going to affect your industry, and it will be valuable testimony for us.

Clearly, our Committee majority staff has uncovered some shortcomings with PHMSA, processing of special permits and approvals. Fortunately, none of these problems with PHMSA's paperwork has contributed to an accident. Hazardous materials make up nearly a third of freight time miles in this Country and accidents are incredibly rare. A person is four times more likely to get struck by lightning than to be killed by a hazmat transportation accident.

I do believe these paperwork issues deserve attention, but I am becoming increasingly concerned about the effect of the congressional spotlight on PHMSA's ability to quickly process special permits and approvals. Industry needs these permits and approvals in order to do business, and it is apparent that PHMSA is becoming so knotted up in red tape that it is not keeping pace with the needs of industries that it regulates.

Hazmat transportation is remarkably safe considering the intrinsic danger in moving volatile products, but I understand and appreciate the desire to make things even safer. However, we absolutely cannot afford to disrupt commerce by over-regulating these businesses. The paperwork problems identified by the Department of Transportation IG are occurring within PHMSA. This is not a case where industry has done anything questionable. And considering that we are in the early stages of a long overdue economic recovery, jeopardizing these companies' ability to get back to business and create jobs, I believe, is a huge mistake.

Mr. Weimer has told us that the slow-down in PHMSA is already having a significant impact in his business and on the entire fireworks industry. The disruption means that new types of fireworks will probably not be available for the 4th of July celebrations this year. The Chinese fireworks manufacturers are stuck in the record backlog of approvals of PHMSA and, as a result, the fireworks industry may not be able to offer a single new product for sale this year.

Additionally, because in many cases U.S. companies are forced to pay for products sitting in Chinese warehouses that cannot be imported, many of the small family companies that represent the vast majority of the fireworks business in the U.S. are not expected to survive.

And it is not just the fireworks supply that PHMSA is impacting. Special permits and approvals are needed for thousands of goods and activities. The explosives industry that we rely on for construction and mining is being disrupted. Our agriculture industry may be harmed because fertilizer requires special permit approvals. So what I am most interested in hearing about today from PHMSA is what they are doing to get through the backlog of these special permits and approvals, and how can we ensure these delays will not continue.

I would also like to hear from PHMSA what PHMSA is doing to reduce the number of special permits that are needed. Many of these activities that require a special permit, are decades old, and should be moved under hazmat regulations so permits are no longer required. The fewer special permits that are needed to be processed, the more streamlined the system will become.

Finally, I want to take a moment to recognize my colleague, Mr. Graves, from Missouri, who has taken a special interest in this issue and proposed an amendment to the special permits provision in the hazmat bill we had before the Committee last year, so I know he has a few words to say about it.

Again, thank you, witnesses, for being here today, and thank you, Mr. Chairman.

Mr. OBERSTAR. The gentleman from Missouri is recognized.

Mr. GRAVES. Thank you, Mr. Chairman. I appreciate very much you and Ranking Member Mica holding this important hearing today, and I want to welcome both of our panelists here, particularly Mr. Weimer, who is the Vice President and General Counsel of Phantom Fireworks. He is going to give us some extensive knowledge on this issue.

I also appreciate the efforts of you, Mr. Chairman, and Ranking Member Mica and your staffs for continuing to work with me on the issues related to the special permits.

Back in November of last year, if you remember, I offered an amendment during the markup of the Hazardous Materials Safety Act to require that PHMSA initiate a formal rulemaking process to establish the standards for determining the fitness of applicants for special permits or approvals, rather than the regulatory guidance process called for in the bill.

We were unable to find a solution at the time, and I remain confident that we are eventually going to find that. Due to last year's———

Mr. OBERSTAR. Would the gentleman yield?

Mr. GRAVES. Yes.

Mr. OBERSTAR. I have asked the Administration to respond to those issues and give us an update at this point, and I look forward to hearing what they have to say. We will continue to work with the gentleman on this matter.

Mr. GRAVES. And for that, Mr. Chairman, I truly am appreciative, again, of you working with us on this and trying to work it out.

Due to last year's debate, I find this hearing to be completely timely and necessary, absolutely necessary. The concerns that prompted my amendment haven't abated. The standards appear to be unevenly applied; they create unreasonable processing delays, contributing to job and business opportunity loss; and, most importantly, the performance thresholds embedded in these new invisible standards are completely unknown to the industry, whose ability to continue operating is wholly dependent upon conformity with the standards.

When I spoke with PHMSA officials, I was surprised to hear about the large number of backlog of unprocessed fireworks approvals, which was mentioned—5,700 which were pending in December 2009. I was encouraged to learn that PHMSA has taken an all-

hands-on-deck approach and dedicated personnel and resources to eliminate the backlog, and I am interested to hear today from PHMSA on how much progress has been made and how many unprocessed approvals and permits there are.

It is my understanding that the backlog has its roots in the audit that was performed by the Inspector General, and prior to the audit approvals were usually processed within 90 to 100 days, and there were only slightly over about 500 unprocessed fireworks approvals. Now we have heard reports of approval times which have grown exponentially, and this is an industry that is completely dependent on those authorizations. I want to know what happened.

This year, due to the backlog, the fireworks industry will certainly not be able to sell any new products, as was pointed out, and this is a huge, huge problem.

But having said all this, I hope we can find answers and solutions to these concerns. We shouldn't lose sight of the fact that the commerce of hazardous materials has been carried out with a remarkable level of safety and PHMSA deserves the credit for its role in that achievement. If there is anything I can do and this Committee can do to help PHMSA perform this vital function, please let me know.

But I would, real quick, so we can move forward, I would like to submit for the record a letter from Mr. Eric Garrett, who is President of Garrett's Worldwide Enterprises. It is a letter he wrote to PHMSA; it lays things out in a very real live manner and is very straight and to the point. And I also would like to submit for the record, get unanimous consent for questions that I have, some public questions for PHMSA if we don't get a chance due to time. But I would like to submit those questions for the record to them for response.

Those are two unanimous requests.

Mr. OBERSTAR. Without objection, so ordered.

[The information follows:]

U.S. Department of Transportation
Attn: Harpreet Singh
Pipeline and Hazardous Materials Safety Administration
East Building, 2nd Floor
Mail Stop: E27-300
1200 New Jersey Ave. SE
Washington, DC 20590

Dear Harpreet,

I am writing to follow up with you on the progress of our pending EX Numbers. I am continuing to send more applications for approvals with the hope that we will get our fair chance to have our applications approved.

I am dedicated to writing you a letter each week until 75% or more of our EX number applications have been processed. I estimate that we have about 250 approvals submitted, which is practically my entire product line for the next 2-3 years. I urge your office to process our applications as soon as possible. For this year, I have almost no products I can import due to this problem; this is a major setback for us.

I am aware that there have been internal conflicts and a lack of organization in the offices of the DOT over the past two years. However, this shouldn't be my problem. I have organized and streamlined my company and have worked hard to submit my applications.

I am asking is that my company receives the opportunity to have its pending applications reviewed.

Thank you and have a great week.

Sincerely,
Eric J. Garrett
President
Garrett's Worldwide Enterprises, LLC
PO Box 418
Eudora, KS 66025-0418
785-760-4220 (Cell)
www.grandpatriot.com
Grand Patriot: "America's Brand of Fireworks."

Mr. GRAVES. Thank you, Mr. Chairman. I yield back.

Mr. OBERSTAR. I want to limit the number of statements. I know everybody has something to say, but during the questioning period we will have plenty of time.

Ms. Brown, you have been engaged in this, and I yield to you.

Ms. BROWN. Thank you, Mr. Chairman. First of all, let me thank you for your strong commitment and oversight for our Committee. The regular hearing this Committee has held on the Recovery Act has ensured that the infrastructure spending has been done on schedule is and creating jobs, and I want to thank you, Mr. Chairman, for that.

It is crucial that the Pipeline and Hazardous Materials Safety Administration perform its due diligence in the oversight of all the programs under its jurisdiction, and safety must be the top priority. It is important for the agencies to have clearly defined guidance for classifying and approving explosives, and they must conduct proper and timely safety review of both permit holders and the organizations the agency certify.

In reviewing the material that was prepared for this hearing, I have become fearful for my constituents and for the American public. This is entirely unacceptable for the agency that is tasked with testing and permitting dangerous materials. It is clearly time to make major changes at the agency both with regard to policy and personnel.

I often say and believe that the strengthen of the wolf is in the pack, and I would encourage PHMSA to work more closely with the other agencies to root out the bad apples and ensure that they properly follow the regulations. If not, they should no longer transport dangerous materials. The agency must crack down on its own employees and contractors who fail to follow regulations and override science-based decisions.

I think that the Administrator, who I met with, is sincere in her efforts to ensure that the Pipeline and Hazardous Materials Safety Administration is operating with clear guidelines and proper oversight. I believe that if the agency is running properly, it can protect the safety of the American public without endangering commerce.

I want to welcome our distinguished guests and thank them for joining us today. It has been six months since our last oversight hearing, and I am anxious to hear what improvements the agencies have made in permitting process.

I yield back the balance of my time.

Mr. OBERSTAR. I thank the gentlelady.

Mr. Sires, you are recognized briefly.

Mr. Sires. Thank you, Mr. Chairman, for giving me the opportunity and thank you for holding this hearing.

I represent a district in New Jersey that is very, very densely populated. What has happened now is that the tracks run along residential areas. Two summers ago we had a problem; we had, at the fifth largest city in New Jersey, Woodbridge, New Jersey, we had a derailment. As the emergency responders went, they had a problem with what was in the train. The mayor called me up; he did not want to send the firemen, he did not want to send anybody in there for the concerns that we have for what was in the train.

So one of the suggestions that I would suggest—I know you have made a number of them—since we have such rails close to residential areas, there has to be a way that, when there is a derailment, the substance in the train is known right away to the communities. You don't want somebody responding when they are going to put their lives in peril. So I don't know how you do that, but that would be a suggestion, because the mayor called me up; he was very concerned and they could not determine what was in that train for a long time.

For the most part, everything gets through perfectly fine, but this one derailment brought that issue.

Thank you very much, Mr. Chairman. I don't want to take too much of your time.

Mr. OBERSTAR. Thank you very much for that personal witness and testify.

Mr. Scovel, we will begin with you. Your report is very thorough, very timely, very important for us, and you are now recognized.

TESTIMONY OF THE HONORABLE CALVIN L. SCOVEL, III, INSPECTOR GENERAL, U.S. DEPARTMENT OF TRANSPORTATION; AND THE HONORABLE CYNTHIA L. QUARTERMAN, ADMINISTRATOR, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

Mr. SCOVEL. Mr. Chairman, Ranking Member Graves, Members of the Committee, thank you for inviting me here today to discuss PHMSA's Special Permits and Approvals Program.

We have evaluated this program over the past two years and reported weaknesses with how PHMSA authorizes and oversees these exemptions to the hazardous materials regulations. In response, PHMSA has developed commendable action plans to address our safety concerns and we have ongoing work to monitor its progress. Today I will discuss PHMSA's execution of the new safety measures and emerging safety issues that may indicate critical operational gaps.

First, PHMSA's action plans included new policies and procedures to better assess applicant fitness and level of safety, avoid blanket authorizations to trade associations, and improve interagency coordination. While PHMSA has begun several of these steps, they are not yet being executed properly or consistently.

We looked at 20 special permits issued since January and found that PHMSA's evaluations of applicants fell short in several instances. For example, 4 did not have well founded or well supported fitness determinations, and all 20 lacked support for an equal level of safety. This is despite the fact that most were renewals based on evaluations PHMSA had done years ago. Even when poor fitness was noted, the permits were still issued. For example, for one renewal, PHMSA's specialist determined that the applicant was unfit based on safety history. The fitness problems he cited went uncorrected, by PHMSA still renewed the permit.

We also looked at 22 approvals and found applicant fitness determinations were similarly lacking or overlooked for nearly half of them. In addition, PHMSA granted three special permits and four approvals to trade associations without any fitness checks of their member companies, several of which had poor safety histories.

We also found cause to question the reliability of safety history information PHMSA uses to assess applicants. For example, we examined again the safety of a company we first reviewed in 2008. In 2008, we found 53 incidents, but this year we found only 15 incidents listed in PHMSA's recently deployed database. Given these discrepancies, PHMSA should conduct a data quality check.

PHMSA's continued lack of coordination with other agencies exacerbates these weaknesses. These agencies may have critical safety data on applicants seeking a permit. Yet, for 18 of the 20 special permits and 18 of the 22 approvals we examined, there was no coordination. One approval allowed shipment of prototype lithium batteries aboard cargo aircraft, a longstanding safety concern of FAA and NTSB.

I will now address emerging safety issues we identified earlier this month regarding PHMSA's process for explosive classification approvals.

Specifically, PHMSA has not formalized its guidance manual for examining and classifying explosive hazardous materials. This has led to varying definitions within PHMSA and industry of what constitutes a new explosive, how the regulations apply, and when testing is required. We also found that PHMSA did not follow regulations when it reclassified a device from explosive to non-explosive, allowing it to be transported on passenger and cargo aircraft. PHMSA did so without a report from one of its authorized testing labs, which is required by law. Instead, PHMSA accepted a copy of a different company's lab report for a different product.

PHMSA chemists had disagreed, at the start of this case, on whether the product should be reclassified, and our review of the matter determined that PHMSA did not have a formal or objective process for resolving such internal safety conflicts. In response to our findings, PHMSA has established a separate safety review board to better oversee internal complaints and reviews.

Finally, our advisory noted that PHMSA had not conducted safety inspections at any of its explosives testing labs over the past 10 years. PHMSA did not question labs that failed to submit annual activity reports and compliance certificates required by regulation. For example, we found that two labs had subcontracted their responsibilities to other companies that manufacture explosives, which is a direct conflict of interest. In response, PHMSA has developed new guidelines and a review team to strengthen its oversight of testing labs.

In closing, we recognize that PHMSA's safety procedures are new and it will take time to fully and effectively implement them. We are encouraged by PHMSA's response to our concerns and its recent effort to establish a quality assurance team to assess whether agency personnel comply with all steps in the special permit and approval process. We will continue to monitor PHMSA's progress and its means to measure effectiveness.

Mr. Chairman, this concludes my statement. I would be happy to address any questions you or Members of the Committee may have.

Mr. OBERSTAR. Thank you very much, Mr. Scovel. Your entire statement, of course, will appear in the record in full.

Ms. Quarterman, welcome and congratulations on your appointment and your taking office. We look forward to your statement.

Ms. QUARTERMAN. Thank you. Good morning. Chairman Oberstar and distinguished Members of the Committee, on behalf of Secretary LaHood, I appreciate the opportunity to discuss the progress the Pipeline and Hazardous Materials Safety Administration has made in addressing concerns identified by this Committee and the Department's Inspector General relating to the Special Permits and Approvals Program.

Safety is the Department's number one priority and it is my number one priority as well. I can assure you that PHMSA's new leadership team and staff are committed to that priority and are working hard to improve the program. PHMSA is in the process of implementing comprehensive action plans to improve the Special Permits and Approvals Program. We have already begun to see some progress, but the issues that have been raised by this Committee and the IG were created over nearly a decade and will take some time to correct. However, we have set a new course for PHMSA that focuses on safety.

As the Committee is aware, in late July 2009, the IG issued a Management Advisory relating to PHMSA's oversight of the Special Permits Program and recommended immediate action to prevent unsafe operators involving the transportation of explosives under four special permits. DOT responded immediately by developing an aggressive action plan that included 21 deliverables. PHMSA completed implementation of all the deliverables with specific target dates in that plan by February 5th of this year. Some commitments were longer term and we are developing plans for staffing and resources that will enable PHMSA to progressively improve those programs.

Although the Management Advisory primarily focused on the Special Permits Program, PHMSA also addressed the policies and processes for issuing approvals and finalized an internal action plan to improve that program on December 4th, 2009. The approvals action plan identified 17 deliverables. PHMSA has delivered on all the deliverables to date and is on target to deliver all planned deliverables, with the exception of eliminating the approvals backlog by April 15th.

In spite of our inability to clear the backlog of approvals, we have made steady progress toward significantly reducing that number. Indeed, we have eliminated the backlog in special permits except for those applicants whose permit has been flagged for further safety fitness review.

The IG issued its final report on Special Permits and Approvals Program this March. PHMSA has successfully addressed half of the ten recommendations identified there. With respect to the other five recommendations:

First, PHMSA has finalized and is in the process of fully implementing three different action plans.

Second, PHMSA is in the process of devising a plan to address the issue of special permits formerly issued to associations. As you know, last year a stop gap measure was implemented to reissue those special permits to association members. The next step is to require the individual companies affected to reapply under the new

policy guidelines that require evaluating a company's fitness and level of safety.

An online application will become available on May 1st. We expect to begin the reapplication process for individual business entities then. We anticipate tens of thousands of applicants from this process, which has the potential to dwarf the current backlog.

Third, PHMSA is also in the process of continuing to refine its definition of what constitutes an applicant's fitness.

Fourth, PHMSA is conducting and preparing complete evaluations that document that the level of safety being proposed in a special permit is as safe as or safer than the regulatory requirements.

And finally, fifth, PHMSA has established time frames for resolving and implementing longstanding safety concerns, such as those related to lithium batteries and wet lines.

On April 7th of this year, the IG issued a second Management Advisory relating to PHMSA's oversight over the Explosives Classification Approvals Program. That report focused on the process for reviewing and authorizing those approvals and the oversight of explosive testing agencies.

PHMSA has already given immediate attention to those issues by issuing standard operating procedures for those approvals in January; establishing special requirements for inspection, management, and oversight of approved explosive testing agencies in March; and establishing a strike force of inspectors and scientists who created a detailed protocol and visited and reviewed each explosives testing lab.

In summary, PHMSA has taken swift and aggressive action to address all the concerns identified by the IG and this Committee. It took many years of neglect for the program to arrive where it is today, and the changes we have proposed to make will not happen overnight and we expect continual challenges along the way. But successful implementation of these action plans is one of my highest priorities.

In closing, I want to thank this Committee and its staff for the detailed work it has done to highlight the problems with these programs and its assistance in securing additional resources to fix the problems. Thank you. I look forward to answering any questions you might have.

Mr. OBERSTAR. Thank you very much for a very detailed response, a very thorough presentation and for your rigorous work on following through on the various deliverables. It is the first time we have had this complete a presentation from PHMSA. You mentioned backlog and the fireworks industry—well, I don't think he is speaking for the association, he is speaking for himself, but the witness said that there is a backlog of up to two years.

What is the backlog that you inherited when you took office, of all of the requests submitted? We have a listing of approvals going back ten years, but what is the backlog?

Ms. QUARTERMAN. Well, I don't know exactly how many we inherited, but I can tell you that we haven't been there for two years, so we inherited at least a year and a half of that, and we have been processing approvals in record time.

If I can address the question of the backlog. In December, several associations asked for a meeting with me with respect to the backlog, specifically, those related to fireworks and the coming 4th of July, and we made a commitment then that we would do our very best to process those things as soon as possible, and that is how the April 15th internal target date came about. We immediately increased the staff there by 50 percent and trained a number of new people on the new processes. But you have to understand that there are new processes that have added additional time to examining approvals. Despite that, we have been able to significantly decrease the backlog.

There was a backlog when we started; it increased during the time of responding to the IG and this Committee's concerns and putting in place new standard operating procedures, but when we started in January and added more staff, there was about 5600 approvals waiting to be processed. Today there are 2600, approximately. And of those about 40 percent have actually been completely processed.

We have found a bit of a bottleneck in our own process. We require a signature of a higher authority once they have been reviewed, just to make sure that everything is appropriate. About 40 percent of those are in that bottleneck and we are working to identify additional resources to try to clear that bottleneck up.

Sixteen percent of those are in the middle of fitness review, something that we think is absolutely important and we don't want to short-circuit that. Another 13 percent are pending additional information. Only about 30 percent of that current backlog is still in the process of being reviewed. We have been processing about 1,000 approvals a month with our additional resources, and we are having 12 new people start on Monday.

Mr. OBERSTAR. By new resources you mean more people.

Ms. QUARTERMAN. Yes.

Mr. OBERSTAR. The term resources is sort of a euphemism. When we mean people, I think that is important to state.

Ms. QUARTERMAN. People.

Mr. OBERSTAR. I understand from the documents that your agency submitted to Committee staff, which I have reviewed, that there are 1,100 fireworks approvals already completed, but 5,000 submitted. Is that a number above previous years, the submissions? Is that about in line?

Ms. QUARTERMAN. I know that the trend has been going up. I can ask the staff to look at that and give you an absolute response.

[The information follows:]

Insert pg. 32—line 614

The average volume of fireworks applications for 2010 is expected to exceed 7000. The number of fireworks applications since 2005 is listed below:

2005	2006	2007	2008	2009	2010 (YTD)
5069	3342	5407	3990	4179	2449

Mr. OBERSTAR. The witness from the Phantom Fireworks Company writes in his submission to the Committee they, "like hundreds of consumer fireworks retailers and professional fireworks display companies will not have one new fireworks product to offer in the professional displays or in our retail facilities because our EX applications have been pending review and approval for an unforeseen and seemingly excessive amount of time, ranging from months to two years." Do you have a comment on that?

Ms. QUARTERMAN. My comment goes to what I said initially, which is that we are trying to process these as thoroughly and quickly as is humanly possible. It takes a great deal of time to do this and we are committed to getting them—with respect to the ones that are in the midst of a more thorough safety fitness review, I think the Committee wants to make sure that we do all of our due diligence there, and we are not going to rush those. We are not going to rush anything.

Mr. OBERSTAR. Well, there are also press reports that I have followed from China—I follow events from China rather carefully—that ports have been closed over the last two years because of labor problems and that there are labor problems at the site of Chinese fireworks manufacturers because workers are unwilling to do this kind of work, and only one shipping company that we have received information on is willing to transport fireworks to the U.S. Does that have an effect on the ability of the industry to———

Ms. QUARTERMAN. I would certainly think so.

Mr. OBERSTAR. Mr. Graves offered an amendment at our Committee markup last December that would require PHMSA to develop and implement a rulemaking to specify the factors and criteria for the conduct of safety fitness reviews. We have talked with the Department previous to your service and since your swearing in on this matter. Are you making progress on and can you report to us on responding to that issue raised?

Ms. QUARTERMAN. Yes. As a general matter, the Department issues a rulemaking in the instance that there is a substantive change to the law or proceedings. In this instance, the fitness review standards that we are putting in place are really internal interpretive documents. These are how we will interpret and process a fitness review application. They did not qualify what ordinarily goes through a rulemaking process.

However, having said that, when I met with representatives from the associations, I informed them that we have an open door and we truly believe in the notion of open government. Therefore, all the standards that we have put in place will be put up on the Web and we welcome their review of those standards and their comments, and we will incorporate them as we see appropriate.

Mr. OBERSTAR. Thank you.

Mr. Scovel, you have specified in your completed report and in your presented testimony that PHMSA continues to grant "blanket authorizations" for special permits and approvals to trade associations without verifying individual member companies' fitness to carry out the terms and conditions of the permit. This is after the Department testified last year that no permits will be issued to associations. Why is this practice continuing?

Mr. SCOVEL. Well, Mr. Chairman, we heard from the Administrator this morning that the agency views the practice of continuing to issue blanket authorizations to trade associations as an interim measure in order to essentially buy time, it sounds like, for the agency to complete its backlog, get its application process online and be prepared to accept and process what appeared to be literally tens of thousands of individual applications from members of trade associations who formerly had received these blanket authorizations.

You are correct, sir, back at the last hearing, Deputy Secretary Porcari very forthrightly stated—and I am referring to page 36 of the hearing record—"Mr. Chairman, no permits will be issued to associations. We are in the process, as part of the action plan, of making it clear that permits are not issued to associations. After appropriate review, they are issued to companies." And at that time PHMSA had reissued special permits to associations, plus members, in an effort to make clear that members, not just associations, were in receipt of those special permits.

Our work has shown, sir, however, that between the period of January 1st, 2010, and March 31st of this year the agency granted seven more such permits and authorizations to trade associations. Uncertain why again, sir, unless it is as an interim measure, but in light of the Deputy Secretary's statement to the Committee that the practice was to cease, it is puzzling, frankly.

The bottom line, sir, is that the agency owes the American public, in fulfilling its safety responsibility, an individual determination of member fitness to carry out the activity that is authorized in the special permit. By continuing to grant special permits to trade associations, the Department and the agency, unfortunately, is not fulfilling that responsibility.

Mr. OBERSTAR. Thank you for that objective assessment and analysis. There is no other arena of safety that I know where an association conducts safety reviews for its members.

Ms. Quarterman, can you assure us that you will not be issuing more association permits?

Ms. QUARTERMAN. Well, let me begin, Mr. Chairman, by saying that I think it is absolutely unconscionable that associations have been granted special permits and approvals in this manner. It is completely inappropriate; it should have never happened. Given that it has happened, we have to determine how to deal with that.

In September, the determination was made that, in the short-term, those permits that had been granted to associations would be revised to say the members of associations. To my knowledge, no additional permits have been granted that only deal with associations; I believe all the ones that have been issued relate to members of associations.

But that is not enough and we recognize that. The plan has been that, beginning on May 1, when we finally have an online application process, applications by which all of these association members can individually put in their application—and they can't do it without completely filling in the form and giving us all the information that we need—that we will then begin to try to process those.

Hopefully most of the backlog will be gone by then. As we know, there is still some, but most of the backlog will be gone and we can

begin to process what we expect to be a huge number of applications.

In addition to that, we are looking, as you know, very, very closely at the notion of incorporating these special permits into the existing regulations. In my view, we should make special permits special again; there should not have come to the point in time where there were so many special permits being issued. Many of these issues have been outstanding for years and they should have been incorporated into regulations.

We are in the process of looking at the special permits that have been formerly issued to associations to ensure that those special permits—to determine whether they can be put into the regulations. We think between 66 and 75 percent of those permits that were given to associations can be incorporated into the regs, hopefully very, very soon, so that we can scale back the number of special permits that are necessary in general.

But, Mr. Chairman, I give you my commitment that in April we will begin the long process of going through all of these association-related special permits, regardless of what the face of those documents may say about their term. That is our plan.

Mr. OBERSTAR. Thank you very much. I see the beginning of an agency culture of safety taking shape under your leadership and a huge backlog of work to be accomplished. The advocates for industry, no matter what industry it is, always tell this Committee, well, you know, we haven't had an accident, this is very safe, we haven't had a fatality, until a fatality occurs.

And the way we assure that there are no fatalities or injuries, or get them down as close to zero as possible, is to have a corporate culture of safety—safety begins in the corporate boardroom—and an agency oversight culture of safety, so that we put in place the procedures, the processes that assure that all the responsibilities are begin carried out in the public interest for the safety of the public.

Now I yield to Mr. Graves.

Mr. GRAVES. Thank you, Mr. Chairman. I appreciate it.

Ms. Quarterman, once the backlog is addressed, can we expect a backlog of this magnitude to happen again?

Ms. QUARTERMAN. I should certainly hope not. Our plan, as I mentioned, is to incorporate as many of the special permits that are currently out there into regulations as possible. We have identified about 80 special permits already that can go into the regs. We have, thanks to the work of this Committee, also obtained additional people and dollar resources to help going forward in the future. We expect 12 new people to start on Monday. In the fiscal year 2010 budget, we were given 16 and 12 of those are starting.

In addition to that, I think we need to, once we have resolved the current backlog issue, look very closely at some of the current practices and provisions, and begin to figure out how we can do these things better. We are automating as much of our process as possible, but that is a long-term plan.

Mr. GRAVES. I worry a little bit about—and I know part of what you have is you inherited. Before the audit you had about 500 in the backlog. Then you got up to 5600 you said. Now you are down

to about 2400, which is still a tremendous backlog. And this is an industry that is extremely dependent on timely approval.

Now, you made the statement just a little bit ago I am not going to rush these applications. Nobody is asking you to be less—and I think it is fantastic that we are going to be more safe. As the Chairman pointed out, you can always be safety conscious. But we shouldn't lose sight of the fact that the Government still has an obligation to do this stuff in a timely manner. Nobody is asking you to sidestep the process.

But when you say I am certainly not going to rush, it almost takes the tone that I am going to do it in my own sweet time, and that is the wrong—and I am not criticizing you, I am just saying don't bleed over into that, because you have an obligation to the American people, yes, but you also have an obligation to your customer, and that is an industry that is highly dependent on a timely approval process.

And it is not just in fireworks. I have the ATK manufacturing facility in my district. They are extremely concerned about this. We have anhydrous. We are right in the middle of putting on anhydrous right now, ammonia, in agriculture; and I am hearing complaint after complaint after complaint about this process, which creates even bigger problems. If we can't get enough approvals out there, then we bleed over into hours of service because we have less drivers out there being able to move material. It is just a big problem.

But I encourage you, please think about the incredible problems you can create if you don't get those applications taken care of in a timely manner. We have already heard and we know that the fireworks industry, at least, are going to be working with old product, and it is an industry that is constantly changing its themes, constantly changing its marketing, and you have to get approvals for new product, and it creates a whole lot of problem.

It is also an industry that comes and goes very quickly. What I mean by that is we are moving right in the process of trying to move product around the Country, and after July 4th it just quits. It absolutely just quits. So there is a limited amount of time or money to be made in a very short period of time, and it is dependent heavily, again, on the Government, and the Government needs to be responsive to the folks that depend on it.

So I encourage you. I like what you are saying about being safety conscious and moving in that direction, but we have to do this quicker. And that doesn't mean you have to sidestep it; you just have to do it quicker.

Ms. QUARTERMAN. Can I respond?

Mr. GRAVES. Yes.

Ms. QUARTERMAN. I agree with you, and I didn't mean to suggest that we don't think it is important to process those applications. That is why we put in the additional 12 staff people at the beginning of the year. And in terms of being able to do all of the steps that have been required, I would just point to the fact that we are doing those now, when they haven't been done in the past.

For example, since the beginning of the year, we have done close to 7,000 computer fitness reviews, we have done 400 second-level fitness reviews, and about 70 onsite inspections. And this compares

to about, I would say, less than 100 in 2008. So we are doing these things.

Mr. GRAVES. Well, I look forward to working with you and look forward to resolving a lot of these issues.

Thank you, Mr. Chairman. I appreciate it.

Mr. OBERSTAR. Mr. Graves mentioned movement of anhydrous ammonia, and all of us from farm districts would be concerned about that. What are the factors involved in a review of a permit for anhydrous ammonia and how much time does it take to process such a permit request?

Ms. QUARTERMAN. I would have to get the details on that for you and respond in writing, Mr. Chairman.

Mr. OBERSTAR. It would be important to do that within a week.

Ms. QUARTERMAN. Absolutely.

Mr. OBERSTAR. Get that to us and we will share it with Mr. Graves and with all Members of the Committee.

[The information follows:]

Insert pg. 42—line 865 How long does it take to process a permit?

DOT regulations call for a thorough and documented application review prior to the issuance of a special permit or approval. PHMSA has multiple efforts underway to manage the application cycle to a 120-day processing timeframe. Average processing times currently range from 70 to 140 days, depending on the type of application.

PHMSA has made steady progress towards significantly reducing the processing time for applications and has worked with industry to prioritize applications in need of action. The 2011 budget request includes funding to continue evaluating special permits and approvals, conduct thorough fitness reviews, improve hazardous materials data preservation and research methods, and support the implementation of three action plans that will improve operational efficiency within PHMSA's Office of Special Permits and Approvals.

On May 4, 2010, PHMSA released an on-line application process that streamlines the approval process time by improving the quality and integrity of the data. Future enhancements of this tool will include automated processes, auto-population of fields and the ability to pull the company profile. As the information technology (IT) modernization efforts progress to automate and streamline the new processes derived from the special permits and approvals action plans, PHMSA expects to incrementally improve and increase efficiencies of application processing.

Ms. Brown.

Ms. BROWN. Mr. Chairman, I am just going to follow up on your question that you asked.

As late as April 2010, you issued blanket approvals, and I am more than concerned about the associations, I am more concerned about the history and disqualifying people that don't have good safety records. Can you explain what procedures are you all putting in place? It is not just saying if an association has an A rating and their participants have an A rating, that is one thing. But if you have people that have poor histories, then, to me, those are the ones that need to be flagged.

Ms. QUARTERMAN. I share your concern. And with respect to the permits that had formerly been issued to associations, in the interim period they were reissued to the members of the associations so that, at least from a legal perspective, we had the appropriate chain who was responsible legally for those things. Going forward, beginning in May, they will go through the entire process, which includes the safety analysis and the safety fitness checks, and everything that anybody who asks for an approval might be required to do.

Ms. BROWN. Would you please respond, sir?

Mr. SCOVEL. Thank you, Ms. Brown. I have some information that may shed further light on your question, as well as Mr. Graves' and Mr. Oberstar's concern. In reviewing the issuance of special permits, since the hearing last September, when the Deputy Secretary said that that practice would stop, my staff uncovered that, on March 10th of 2010, the agency issued a special permit authorizing the transport of drums containing ammonia solutions, a poisonous and flammable substance, to an association upon the association's request. Nineteen members were included in that issuance and they are now authorized to do this.

We reviewed the paperwork behind that application and found that an association representative stated that 35,000 shipments had taken place in the preceding four years with no incidents. We ran some checks on some of the member companies of the association and identified one member company who had had 17 incidents, 7 of which were serious, and 11 violations, all within the last four years.

I think this illustrates the very pernicious influence aspects of what Administrator Quarterman has properly called an unconscionable practice of issuing special permits and approvals upon request by associations.

Ms. BROWN. Mr. Chairman, I think that is the crux of our problem there.

Mr. OBERSTAR. It certainly is, and you have been on this right from the very beginning, and I appreciate your continued persistence, and that of the IG and our new Administrator to address this issue, and eventually, with continued work, they will work their way through this and we are not going to have these associations self-regulating.

Ms. BROWN. Well, I am going to yield back my time because I know other Members have questions, but I will submit my additional questions for the record.

Mr. OBERSTAR. I thank the gentlewoman.

Before I recognize Mr. Shuster, I would just like to announce that I have invited Mr. Wilson, a colleague from Ohio, to join us during the hearing. A Member from another Committee is interested in the work of our Committee and to sit with Members, but not to participate or to ask questions.

Mr. Shuster.

Mr. SHUSTER. Thank you, Mr. Chairman. I appreciate what is happening at PHMSA with improvements to the process, or attempting to make those improvements to create a culture of safety is important, but many of these companies already have cultures of safety, and that is why there are so few—so rare, I should say, accidents with the movement of many, many of these products.

My question, though, is to Mr. Scovel. On July 28th, 2009, and then April 7th, 2010, a Management Advisory was issued by the Office of Inspector General that identifies weaknesses in PHMSA's process for its Special Permits and Approvals Program. Have you identified any fatalities, injuries, or property damage from those weaknesses?

Mr. SCOVEL. We have not, sir. Those were not included in the scope of our reviews of the Special Permits and Approvals Program.

Mr. SHUSTER. Not in your scope. Is that something in the future that you will look at?

Mr. SCOVEL. We could, upon request of the Committee, most certainly.

Mr. SHUSTER. It would seem to me—again, as I continue to make the point that we need to improve what PHMSA does, but to date these companies, these corporations, these industries are very safe in what they are doing, which I appreciate.

Ms. Quarterman, in your testimony you mentioned that PHMSA has met or is on target to meet all planned deliverables in the approvals action plan with the exception of eliminating the approvals backlog by April 15th. When do you expect to resolve that? I think you started to answer that; I don't know if we got a date out of you when you believe that you are going to resolve that heavy backlog.

Ms. QUARTERMAN. We have not set a date on that as of yet. I would estimate that with about 2,600 approvals and we are processing about 1,000 a month, that it should be done within the next three or four months. I have to say, when we started this, my staff thought that we might be done in December, and we suggested that April was the better target date. So we are working as hard as we can.

Mr. SHUSTER. Are you giving any priority to the fireworks industry, seeing as though they have, pretty much we know, date certain that July 4th is when all their products are sold to meet that time line?

Ms. QUARTERMAN. Yes, we are well aware of that and we have talked with members of the association about sending us information about high priority approvals, and have been processing those as soon as we can. Some of them may be stuck in the fitness review, and that is something that we just have to do.

Mr. SHUSTER. Again, I think Mr. Graves made the point there are going to be jobs out there that are going to be lost if we don't get these things moving. Some of these companies, again, as we have pointed out, are not going to survive.

It is also my understanding that the consumer fireworks are subject to very detailed construction performance chemical composition limits, labeling requirements by the Consumer Products Safety Commission, and recently mandated to undergo third-party testing to ensure compliance. Given all of these requirements, what does PHMSA's testing requirements classifying these products for transportation add in terms of safety?

Ms. QUARTERMAN. Well, I think they add a great deal. We have existing requirements under the regs that companies have to meet in order to transport these materials. I am not familiar with the standards that are required by the Consumer agency. We would be happy to take a look at those to ensure that there is no overlap. We certainly don't believe that two agencies should be doing exactly the same thing. Our focus is on transportation, and we look very closely at the safety record of people who are transporting these goods, the number of incidents, how they have complied with enforcement measures. But I would be happy to take that as an action item.

[The information follows:]

Insert pg. 48—line 1006 What value does the PHMSA fireworks Approvals add? Is there an overlap with Consumer Safety Products Commission (CSPC) with regards to fitness reviews for fireworks? How do PHMSA standards compare with AFSL? Do states regulate Interstate fireworks shippers/carriers?

The PHMSA fireworks approval process specifically addresses the classification of explosives (fireworks) devices prior to transportation within the United States. The value of the fireworks Approvals Program is that it provides an important review and classification process of the many fireworks devices that are imported into and transported through the United States.

Regulatory oversight by states is helpful in controlling the safe interstate transportation of fireworks. However, since state firework laws can vary greatly from state to state and within local jurisdictions, federal regulations are important in providing uniformity and safety for interstate transportation.

The Hazardous Materials Regulations (HMR) are significantly different from those of the CPSC. The CSPC regulations cover only those fireworks devices intended for use by consumers or in and around a household. Fireworks that are intended for commercial use, such as those used in theatrical settings and public displays, are not covered by CSPC regulations. In contrast, the 49 CFR regulations address both Consumer and Display fireworks.

As part of the PHMSA approval process, a fitness review of the applicant is required. Depending on the fitness evaluation additional correctional steps may be required by the applicant prior to issuance of the approval. CSPC does not perform a fitness review of the company during its inspection.

Fireworks classed by PHMSA must be in accordance with the American Pyrotechnics Association (APA) Standard 87-1 for manufacturing, testing and compliance with weight limits and chemical compositions that are applicable to the device. PHMSA requires all fireworks to meet the APA Standard 87-1 criteria or go through an approved test lab for UN Model fire and blast testing. This process leaves room for innovation through laboratory examination.

AFSL is a member-based association that conducts testing for its members. AFSL contracts with an independent laboratory to perform the testing for consumer firework products only. AFSL tests approximately 75-80 percent of the fireworks coming into the United States. CPSC randomly tests AFSL tested products and approximately 75 percent of the AFSL tested material pass the secondary CPSC testing.

Coordination between regulatory agencies is presently limited, but PHMSA believes it would be worthwhile to increase interagency communication between DOT, CPSC, BATFE and Customs

regarding the classification, testing and importation of fireworks and the fitness of companies to operate.

Mr. SHUSTER. And a final question quickly. I think you have answered it, but changing the regs to include some of these special permits into the regs to make it easier, to make it a little quicker, is that something that I hear you saying you are doing, you are changing the regs to try to take into consideration the different things that are happening in these industries that make it safer and easier?

Ms. QUARTERMAN. Absolutely. We are in the process of doing that.

Mr. SHUSTER. Thank you very much.

Mr. OBERSTAR. The Chair now recognizes Mrs. Napolitano.

I would note that the bells rang for a vote; we have 13 minutes remaining. We can go for several more witnesses.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

I cannot agree more that this is a very, very critical issue for a lot of us, and I connect myself with the remarks of Mr. Sires, that we are in LA. There is no open land, so we are very critically impacted if there are derailments, and in the past I have made it quite clear that there have been issues of placarding, that there have been issues of the safety training of the employees, all of that.

Mr. Shuster was referring to the economy and the jobs that could be lost and the imports, I am concerned as well about the imbalance of trade with China. We are getting more goods in here and not really getting the right tariffs form, which has nothing to do with this.

However, when you have employees who actually bypass a system, are you going back and retraining the employees or putting in their record somewhere so that you know the next time something happens, that you are able to go back and charge those employees with something in the record, if nothing else? Because they are not doing the general public any good if they continue on the same track based on the last Administration's way of doing business.

Ms. QUARTERMAN. Absolutely. I think if you look at PHMSA now, you will see an entirely new cast of characters. We are in the process of implementing these new standards of operating procedures; they are less than six months old. My personal standard is zero errors. We are not at zero yet and, because of that, we have put in place a quality assurance program where we are going back behind ourselves, in terms of the things that have been issues, to determine whether or not there were mistakes made where safety fitness reviews were not done, coordination was not done when it should have been, and that kind of thing. So far we have seen about a 3 percent error rate. We are going to correct that. And it is pretty clear who is responsible———

Mrs. NAPOLITANO. So you are taking those steps?

Ms. QUARTERMAN. It is pretty clear in the process who is responsible for what, so if we see somebody who doesn't get it, they will.

Mrs. NAPOLITANO. Mr. Scovel, the young lady has testified that they have moved out on those actions to address those recommendations. It probably has been asked in a different way and work on the five has been completed. But are these actions enough to be able to address your recommendations? And of those five re-

maining, what do you consider to be most critical that PHMSA should focus on?

Mr. SCOVEL. Thank you, Mrs. Napolitano. PHMSA has made admirable progress on five of our ten recommendations that were issued in our March report. Five do remain open. I would identify three as the most significant in my mind. The first has to do with resolving the situation regarding issuance of special permits and approvals to trade associations. Ms. Quarterman has addressed that question several times this morning.

Number two would be fitness determinations. The point has been made this morning that PHMSA is in the process of refining its definition of what constitutes an applicant's fitness to conduct the activity authorized by the special permit or approval. That needs to be finalized and brought to bear.

We have found, however, that fitness determinations have not been consistently and properly implemented in the three month period that we evaluated. We commend the agency, however, for its recent adoption of the quality assurance team that Administrator Quarterman mentioned just a minute ago, following behind on themselves to make sure that they drive their error rate to zero.

We would also commend the agency's attention their database. The Hazardous Material Intelligence Portal, which was recently rolled out, it is a tremendous start, however, we have found data inconsistencies and inaccuracies between that database and others maintained in other operating administrations within the Department, and those inaccuracies cause us to question the utility of PHMSA's HIP database in making the fitness determinations. So that certainly requires the agency's continued attention.

Mrs. NAPOLITANO. PHMSA?

Ms. QUARTERMAN. With respect to those three items, I think there is associations I have addressed a couple of times, and we don't have much time on that. With respect to the last item, which is IT resources, we have come a long, long ways from where we were, which was nowhere, basically, on the data front. We have a five-year program for improving our data resources. The Hazardous Materials Intelligence Portal, HIP, which Mr. Scovel referred to, is something that is very, very impressive. It is not perfect. We actually have data from 20 different Federal agencies on all of their inspection and enforcement activities that we can view.

Mrs. NAPOLITANO. OK, but do you communicate with them? Do you share information? Do you ask for information?

Ms. QUARTERMAN. Oh, absolutely. They are using it as well. All of 20 agencies have input their data; they are keeping it up to date. They are using it for their own operations, and it is, in fact, a finalist for a Government-wide award.

Mrs. NAPOLITANO. I think my time is done.

Thank you, Mr. Chair.

Mr. OBERSTAR. The gentlewoman's time has expired.

The Chair recognizes Ms. Edwards of Maryland.

Ms. EDWARDS. Thank you, Mr. Chairman, and I will try to go quickly.

Thank you for your testimony. We have heard from PHMSA in this process several times even since my service on the Committee, and it is actually really positive to hear that there is a real commit-

ment to safety and to evaluating safety, and that was certainly a promise that was made to us by Deputy Secretary Porcari the last time he was here.

I have a question. I am trying to get to whether the special permitting process is really special, because it has seemed that it is the rule and there is not anything special. So I wonder if you could tell me that in the backlog that you are processing, especially with respect to trade associations, if I am a trade association and I have been operating and have had a mixed kind of safety record or an unknown safety record, what is it that, in the current process, keeps me from hiding behind the trade association to continue operating unsafely?

Ms. QUARTERMAN. Beginning on May 1, we will require that every individual entity that has previously been operating under an association or a members of association permit would apply individually, and part of that process is to go through each individual company's record of safety and incidents and compliance. So that is what would prevent that from happening.

And in terms of making special permits special, that is something that I share with you completely, and that is why we are in the process of trying to turn as many of the special permits that have become just regular operating procedures for the Government over the past several years into regulations and remove them out of that special permit column, where they shouldn't be.

Ms. EDWARDS. So in the ones that were renewed where the trade association had the permit and then the renewal process was issuing to members, if I were to go through each one of the files of those members, is there some sort of common documentation currently that tells me about their safety so that I could compare apples to apples even within a sector?

Ms. QUARTERMAN. Not currently. That is what we are doing beginning in May.

Ms. EDWARDS. Then I would just like to ask you on the permits that you have reviewed, there is still a highlight in the Inspector General's report regarding the coordination with the impacted mode of transportation. What is it in your action plan that changes that so that the authority for the mode of transportation has some point of contact that is documented with respect to the issuance of a permit?

Ms. QUARTERMAN. One of the items in the first and the second action plan was to create a coordination vehicle and document about how coordination should happen in the future with respect to reviews of special permits and approvals. We have met with all the modes who are impacted and have come up with guidelines about when it is appropriate to coordinate with those agencies and when it is not.

Many of the agencies are not interested in coordinating on certain issues, for example, when there is a party to special permit or approval, and many of the instances that Mr. Scovel cites in his testimony as being instances where we failed to coordinate when we were supposed to—and I think perhaps all of them—relate to those instances where the mode itself has not asked for coordination to occur.

Ms. EDWARDS. But shouldn't there be something affirmative in the file, in the record where the mode of transportation actually signs off on whether or why it is decided that there is no need to coordinate?

Ms. QUARTERMAN. Yes, and there is. And we are actually in the process of developing memorandums of understanding with each of the modes, and we will ask them again do you really not want to coordinate on these issues, since the Inspector General believes that we should. We certainly can't force them to coordinate with us on these particular kinds of special permits or approvals, but we can raise it with them and say the Inspector General believes that it is important that you take a second look at these; perhaps you should consider coordination on those as well.

Ms. EDWARDS. But where there is a safety impact, whether the agency wants to coordinate or not, why would that matter?

Ms. QUARTERMAN. I can't speak———

Ms. EDWARDS. My time has run out and I know we have to vote.

Ms. QUARTERMAN. Yes, I can't speak for the other agencies on that, sorry.

Ms. EDWARDS. Thank you.

Mr. OBERSTAR. I thank the gentlewoman.

We have one minute remaining on the vote ordering the previous question on a motion to instruct, so the Committee will stand in recess until after this vote and come back as soon as possible. We have this vote on the motion and we have three other votes, so this could be about a half hour recess of the Committee. We stand in recess.

[Recess.]

Mr. OBERSTAR. The Committee will resume its sitting. Unfortunately, we had some additional votes unexpected when the Committee recessed, so it took us longer than announced at the moment of recess.

I want to come back, Ms. Quarterman, to the amendment proposed by Mr. Graves, but withdrawn at our Committee markup in December, to require PHMSA to develop and implement a rulemaking to state specific factors and criteria to be used in safety fitness reviews for special permits and for approvals. You started responding to that, but I think you got sidetracked with something else.

But come back to, now, you are revamping the whole agency. You brought in 12 new people. That brings your total to what, 36 or so personnel to conduct permit reviews, to expedite the process. I am sure it took a period of time for training those personnel to understand the job they must do and bring them up to speed.

But so that there is continuity and reliability in measurement, do you believe it is necessary, as Mr. Graves proposed, and have you undertaken to establish criteria for these fitness reviews?

Ms. QUARTERMAN. Yes.

Mr. OBERSTAR. And has it been done in the form of a rulemaking within the agency?

Ms. QUARTERMAN. Yes, we have established criteria. As I mentioned earlier, the question of whether something should or should not be a rulemaking is one of whether it is something that affects our internal processes or one that is really regulating the industry

or the constituents outside. In this instance, it is our view that this is something that relates to the internal processes within PHMSA and is not appropriate for rulemaking.

But having said that, we have established criteria, many of them, and we are happy to share those. In fact, we will put them on the website so that people can look at them and comment on them and we can improve them going forward. I don't believe it is necessary to have a rulemaking about how we do our business inside.

Mr. OBERSTAR. Well, I think that is something that we will want to pursue. The criteria that you now have that are obviously in some, I would imagine, in some written form for guidance members, I think it would be useful for us to have, not in a hearing setting, but at a meeting, conference type meeting with Mr. Graves and others who are interested so that they can see and we can determine whether anything additional is needed.

Ms. QUARTERMAN. I think that is a fantastic idea. We would love to do that.

Mr. OBERSTAR. And I will convene such a meeting with participation of Mr. Graves, Mr. Shuster, and Members on our side.

In the testimony of the witness on behalf of fireworks, Mr. Weimer, their general counsel says—I am trying to find the specific location—a single factory may make a particular specific product, wrap it with different labels or half dozen different U.S. importers. They are importing the exact same product by the exact same factory, but since each importing company's product has a different name and different packaging, each importing company must apply to PHMSA for a separate and unique EX number for each of these functional identical products. This results in time, effort, money wasted, expense by Government and industry.

Is that exact? That is, I think what he is getting at here is a request that PHMSA somehow make a determination that a particular factory makes a particular product for a number of U.S. Companies, wraps it in different labels, so all of those should be considered as one product.

Ms. QUARTERMAN. Well, I was struck by that testimony as well and took it as an action item on ourselves to further investigate exactly what he is talking about. If it is in fact the same company, the same product, and all there is is a label change and we are requiring five or six different processes because of that, maybe we should look at that closely to see whether there could be some streamlining.

But, as with anything, the devil is always in the details, but we really have to look and see exactly what he has expressed there. If there are different companies at different locations doing this, then absolutely I think they need to be applying for different permits.

Mr. OBERSTAR. Well, that validation would require sending inspectors to China, I would think, to the manufacturing facilities there.

Ms. QUARTERMAN. Yes. That is not something that we haven't gotten into yet today, but it is certainly a huge issue that we want to address going forward, because the question of doing foreign fitness checks is one that, in my mind, is absolutely something that

needs to be done on a very thorough basis, that requires resources additional to what we have, and given the number of fireworks that are entering this Country from China, a lot more can and should be done.

Mr. OBERSTAR. That could be a very difficult problem. We have a similar issue in aviation, where—and Mr. Scovel knows this well—with foreign repair stations. U.S. rules require inspection of those facilities, periodic inspections, and also action to validate the criminal background checks of airline mechanics, drug and alcohol testing, and procedures that are used to certify the site certified by the foreign host government of the site of that repair station, and to validate that it is in compliance with U.S. standards.

Well, to do all those things requires permission of the host country to come in and do that inspection, and in the aviation sector we just simply say, if you don't let our people in, then those aircraft can't be maintained there or admitted into the U.S. airspace. You want aircraft to fly in U.S. airspace, you comply with our rules.

Well, China is a little different. They don't particularly warm to ideas of foreign inspectors on their soil, so give me your reaction to that.

Ms. QUARTERMAN. Well, I agree with you 100 percent. I think it is an extremely thorny question. We are trying to work with it on a country-to-country basis. We do have a relationship with China and we are working with them to explain to them what our rules and regulations say, and hope that they will begin to adopt some of that. But, again, I think this is an area where we need to spend a lot more time examining how things should be done in the future.

Mr. OBERSTAR. From the website of one of the industry's members, fireworks association members, is the following very instructive report: "A number of factors in China"—quoting from their website—"have accumulated over recent years to pose big challenges for our industry, said Pyrotechnical President Steven Vitale. Exchange rates, taxes, fireworks classification, shipping costs affect all of us in the fireworks business."

It goes on to say "The fireworks supply chain depends heavily on China and its economy. These changes were all foreseeable, but the timing and cumulative effect are creating a perfect storm."

So then he goes on to list a number of items: shipping costs, materials and labor, exchange rate, China's tax rebates, fireworks classification changes, and warehouse fires. Chinese news reported a series of explosions in the shipping port of Sanshui caused by a fire that spread through 20 fireworks warehouses.

I won't go on reading; I will include the whole document for the Committee record. There were other reports of explosions in Chinese factories. It shows that there are some serious safety concerns at the point of manufacture just on these at least three major reports since the beginning of this year, including this one from an industry member website.

Are you following those items?

Ms. QUARTERMAN. I have not personally been following them; hopefully, someone within PHMSA has been. If they haven't, I will ensure that they do in the future.

Mr. OBERSTAR. Well, I invite your staff to do that, to check on this, because this is in the chain of the manufacture of the product that finds its way into the U.S. marketplace, and you may be simply—your agency may simply be reviewing the end product of this chain, but if you aren't reviewing the beginning of the process, then your inspection and validation and permitting may be lacking.

[The information follows:]

Insert pg. 62—line 1361 -- Fitness Questions Posed by Congress: Disclosure of definition and process? Foreign Fitness Inspections of China?

In support of the US-China Strategic & Economic Dialogue Transportation Forum, PHMSA is working actively with its counterparts within China's Ministry of Transportation (MOT) within the Forum's Working Group on Hazardous Materials Safety. PHMSA is utilizing this relationship and working group to evaluate methods in which to approximate fitness of Chinese companies as well as focusing outreach and training activities for Chinese manufacturers of fireworks and other hazardous materials. PHMSA is also working in concert with the Consumer Product Safety Commission on firework safety and oversight.

Fitness is the demonstrated and documented knowledge and capability resulting in the assurance of a level of safety and performance necessary to ensure compliance with the applicable provisions and requirements of the Hazardous Materials Regulations (HMR) or a special permit or approval issued under the regulations.

As set forth in 49 CFR 107.113(f)(5), before issuing a special permit, PHMSA makes a determination that the applicant *"is fit to conduct the activity authorized by the exemption or special permit."* An applicant will be selected for a more extensive fitness determination whenever:

1. The applicant is requesting authorization to transport a § 172.504 Table 1 material.
2. In the four year period prior to the application, the applicant has been involved, directly or indirectly in the type and number of hazardous materials incidents below:
    a) More than 1 "serious incident," as defined by § 171.8, involving any hazardous material;
    b) More than 1 hazardous materials incident involving any § 172.504 Table 1 material;
    c) More than 1 hazardous materials incident involving a cargo tank motor vehicle, railroad tank car or other bulk packaging; or
    d) More than 2 hazardous materials incidents involving any § 172.504 Table 2 materials in intermediate bulk or portable tank packaging; or
    e) More than 30 hazardous materials incidents involving any § 172.504 Table 2 materials in non-bulk packagings
3. In the four-year period prior to the application, the applicant has received any order or recommendation for a safety recall of a DOT specification, UN standard, or DOT special permit packaging.
4. In the four year period prior to the application, the applicant has received four civil enforcement cases and/or warning letters; or
5. A motor carrier applicants has:
    a) A Motor Carrier Safety Rating of less than satisfactory according to the Federal Motor Carrier Safety Administration's Safety and Fitness Electronic Records System (SAFER);

    b) A HAZMAT Out of Service percentage of greater than the national average according to SAFER; or

    c) A Driver or Vehicle Out-of-Service percentage of twice the national average or greater according to SAFER

6. Adverse trends are noted based on data analysis of accidents and/or investigations.

During a second and third level fitness evaluation, PHMSA fully assesses the level of compliance for special permit and approval holders by evaluating the company's approach to safety, which includes a review of the company's policies, processes and justifications that address safety. PHMSA ensures that the company has clear procedures and policies to identify the proper use of the special permit or approval. A determination is made regarding the company's ability to ensure not only compliance but is receptive and adjusts to safety factors. PHMSA also determines that a company goes beyond basic hazmat knowledge to ensure that the company's overall operations, including practices and procedures extend to the operation of a special permit or approval.

A fitness review of the company's record including compliance history, safety posture, incidents as it relates to hazardous materials, the special permit or approval reported to PHMSA, other modes, the renewal application, and identified in internal company documents is conducted.

Factors taken into account regarding a company's fitness include the company's filing of false statements and/or misleading statements on documents and/or application, the failure to train in accordance with the special permit/approval, the safety risk posed and an assessment of the level of safety that would be afforded under the special permit or approval, and a company's ability to comply with the regulations, special permit or approval. PHMSA also takes into account the company's corrective action during the fitness review process.

Additionally, each applicant requesting a new or renewal of a special permit or approval has been receiving a thorough check of the company's incident/accident and inspection history and any past or open complaints. PHMSA is requiring the identification of locations specific to the usage of the special permit or approval to conduct the onsite fitness and routine inspections (this may include multiple locations, the company's customers, and/or carriers).

Mr. Scovel, do you have any comments on that?

Mr. SCOVEL. I would agree with you and with the Administrator that that does seem to be certainly within the manufacturing chain something for the shipper and the importer to account for. We recognize the resource limitations that the agency is operating under if they are now to be expected to inspect multiple distant manufacturing points overseas.

Mr. OBERSTAR. Thank you. I will withhold at this point and yield to Mr. Garamendi. Thank you for being here and for your patience.

Mr. GARAMENDI. Mr. Chairman, thank you very much for the opportunity.

Ms. Quarterman, how is it that you always seem to wind up in a most difficult job? In the mid-1990's, as I recall, at the Department of Interior, you wound up in an equally difficult job trying to straighten out some difficulties that were occurring there. It is good to see you back taking care of a very important task, and I wish you well at it. And to be able to work with you once again, although on the other side of the table, is going to be a pleasure for me.

My question has to go to the association issues which were raised so many times in the early part of this hearing. Who are these associations? There must be more than one. Who are they and are these members of the association under State regulation in any way?

Ms. QUARTERMAN. I don't have a complete list of all the associations; I know one, for example, is COSHTA. And whether they are subject to any State regulations, not as relates to hazardous materials transportation, the issues that we are dealing with here I can provide you with a list, if you would like.

Mr. GARAMENDI. Perhaps the IG has some information.

Mr. SCOVEL. I do have a list. I can read them for you in the record, sir, or the agency could respond to you for the record. Whatever is most convenient for you.

Mr. GARAMENDI. Just put it in the record; I don't need it right now.

But my point here is that my recollection, for example, in California is that some of these associations are regulated at the State level, in the transportation, specifically. And then the question is, is it therefore not possible that some of the regulatory and oversight work done at the Federal level could be handled by the State, and then you could review the State. In other words, shift some of those individual business reviews off to the State and share this responsibility.

Ms. QUARTERMAN. Well, I think there certainly is a role that the State can play, and one that they have done to a certain extent, but not as much as we would like to see going forward, and that is on the front end, on the enforcement end, working with us to extend our current resources, inspection team on enforcement. We also work with them on what I consider the last end of the process, which is emergency response. We want to get it before we get into an emergency situation. But I think we can do more in that interim level.

Mr. GARAMENDI. I am thinking specifically about transportation here, but I think it is also true in the agricultural sector, certainly

for California, that those members of the association that are in those States that have a high level of review and criteria may be possible to shift to those States or accept from those States the review that currently you are doing and probably with limited staff to get that job done. I was thinking about the very large numbers in the earlier testimony that it may be possible. Could you look into that and if it makes any sense? I will certainly try to help you with California, with which I am somewhat familiar.

Ms. QUARTERMAN. Absolutely I will look into that. One thing we mentioned earlier, the IT, the HIP, where we have 20 Federal agencies putting in their enforcement data and all that. It would be great if we were to get State data in there as well, so we know even more to leverage the resources that exist. But, yes, I will look into that for you. And thank you for your kind comments.

[The information follows:]

Insert pg. 65—line 1436 -- Which associations are effected and are they regulated by the state?

The majority of states do not regulate shippers and manufacturers of materials and packaging. Many states do adopt the federal Hazmat Regulations, but primarily focus on regulation of carriers. The overlap between federal and state hazmat regulation and oversight impacting the associations is minimal.

PHMSA has identified 24 special permits and 10 approvals that have been granted to an association. PHMSA is in the process of modifying (or terminating when appropriate) special permits and approvals granted to association members collectively. For any special permit issued to association members collectively, PHMSA has started the process of providing notice of modification or termination to the association and each individual member whose name and address is on file with PHMSA. This notice provides information for the individual members to determine whether the activity authorized by the special permit or approval will eventually be incorporated into the regulations or will continue to need a special permit or approval. We expect that incorporation of special permits and approvals into the regulations will significantly reduce the number of applications PHMSA receives in the future. .

PHMSA estimates that these special permits and approvals are in use by up to 30,000 separate entities.

There are 19 special permits and 12 Approvals shown below that were issued to the members of industry associations.

SPECIAL PERMITS ISSUED TO MEMBERS OF ASSOCIATIONS

SP Number	Holder(s)
10950	Fertilizer Institute FARWEST Montana Ag Business Assoc.
11209	National Propane Gas Assoc.
12284	American Traffic Services Safety Assoc.
13113	Several farm cooperatives
13341	National Propane Gas Assoc.
13554	Many farm cooperatives Fertilizer Institute
11263	American Coke and Coal Chemicals Institute

11836	National Association of Chemical Distributors
12134	Institute of Shortening and Edible Oils
12825	US Marine Safety Assoc.
13124	National Association of Chemical Distributors
14479	Medical Waste Institute
12095	Fertilizer Institute
11850	Air Transport Association
12332	Institute of Scrap Recycling Industries
11136	American Pyrotechnics Association
12412	Southern States Cooperative
11503	American Waterways Operators
10656	Shippers and carriers of scrap metal or other related metal recycle materials with low levels of external radiation who are approved by state radioactive material control officials

APPROVALS ISSUED TO MEMBERS OF ASSOCIATIONS

CA Number	Holder(s)
CA1995090017	NORA, An Association of Responsible Recyclers
CA1997010012	Plastic Drum Institute
CA1999030022	Reusable Industrial Packaging Association (RIPA)
CA2003030003	Portable Rechargeable Battery Association (PRBA)
CA2003070001	National Electrical Manufacturers Association
CA2005120010	Fibre Box Association
CA2006010012	Association of Independent Corrugated Converters (AICC)
CA2006020030	International Fibre Drum Institute
CA2006060005	The Paper Shipping Sack Manufacturer Association (PSSMA)
CA2006060006	Fibre Box Association
CA2008020018	The Rigid Intermediate Bulk Container Association (RIBCA)
CA2008120009	Council on Safe Transportation of Hazardous Articles (COSTHA)

Mr. GARAMENDI. Well, it has been a pleasure working with you in the 1990's, and it will be today also. Thank you very much.

Mr. Chairman, I yield back my time. And my apologies for having to leave; there is another matter I must attend to.

Mr. OBERSTAR. Quite all right. I had to absent myself to greet a friend, a constituent, and a State legislator.

Ms. Quarterman, I want to understand better. When you send investigative staff out to do compliance reviews, what is the composition of the staff? How much time do they spend? What information are they looking for? How much hands-on time do they spend?

Ms. QUARTERMAN. The composition of the current staff is about—we started out with about 35 inspectors and now we have several more added to that team, and they are very well experienced in hazardous material issues, and I think the amount of time that they stay depends on the size of the company that they are asked to review.

Mr. OBERSTAR. And do they make site visits? What do they look for? What is the nature of the site visit?

Ms. QUARTERMAN. Yes, they do make site visits. Sometimes, before they go, they get information about what the policies are with respect to hazardous materials by an individual company, but once they are there they dig further into that information onsite.

If you would like for us to put together, as part of the fitness review conference, a sort of 101 about inspection, we would be happy to do that.

Mr. OBERSTAR. I think that would be very important.

[The information follows:]

Insert pg. 66 – line 1465-- What are the policies in place for site visits by our inspectors and the duration of the inspection?

PHMSA's Hazmat Enforcement Operations Manual is available on the PHMSA website and contains the purpose, process, and procedures for the execution of its field activities, including compliance and fitness inspections. The link to the website is:
http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=97c41907b073d110VgnVCM1000009ed07898RCRD&vgnextchannel=3ab4fb649a2dc110VgnVCM1000009ed07898RCRD&vgnextfmt=print
The duration of a typical inspection ranges from 4 hours to 5 days (or longer as necessary) to conduct a thorough on-site evaluation. This may include, as part of the initial site visit, additional visits to other locations to assemble a complete evaluation of the entity targeted.

Mr. Graves, in your absence, I asked Ms. Quarterman to document the issues that you raised and that were raised in your proposed amendment about factors and criteria, and that I would then convene a Committee meeting with you, Mr. Shuster, and whomever else, and Members on our side, and have an open and frank discussion about it and assess the status of their progress on this matter.

Mr. Graves.

Mr. GRAVES. Just thank you, Mr. Chairman. I appreciate that and I look forward to it.

Mr. OBERSTAR. I have a number of other questions, but I don't think that I will pursue those at this moment.

I would like, Mr. Scovel and Ms. Quarterman, for you to remain through the next panel; we may want to ask you to respond to any questions that they might raise. So we hold you dismissed at this point.

Now Mr. Weimer, Vice President and General Counsel, Phantom Fireworks, Buck Valley Road in Warfordsburg, Pennsylvania. Your full testimony will be included in the record, and you may take such time as you require to make your presentation.

TESTIMONY OF WILLIAM A. WEIMER, VICE PRESIDENT AND GENERAL COUNSEL, PHANTOM FIREWORKS

Mr. WEIMER. Thank you, Mr. Chairman, Mr. Graves. I appreciate the opportunity to be here today. My name is William Weimer. I am vice president of Phantom Fireworks, headquartered in Youngstown, Ohio. I also happen to be serving as President of the American Pyrotechnics Association.

Phantom is the largest retailer of consumer fireworks in the United States, operating more than 1200 permanent and temporary fireworks sales facilities nationwide, including permanent facilities in 14 congressional districts represented by Members of this Committee. We employ over 400 full-time employees, and that number swells to about 2,400 during our 4th of July season.

I am a private businessman. I came to Washington to testify today to convey our concerns regarding the unusual and significant delays in the issuance of the approvals. The delays have already substantially impacted the upcoming Independence Day holiday for my company and the entire industry.

In order to ensure transport safety, all fireworks are required to have an approval issued by DOT, PHMSA. Ninety-eight percent of the firework approvals issued by PHMSA are done in accordance with procedures set forth in the APA Standard 87–1, which details manufacturing and performance requirements and is adopted by reference in Title 49 of the Code of Federal Regulations.

Over the years, PHMSA has approved and assigned thousands of approvals for individual firework devices, and the safety record of firework products in transportation is excellent. The chemical formulations and manufacturing techniques for fireworks have changed very little in the past century. A company must apply for a separate and unique approval for each functionally identical product. Even a simple label change or name change now requires a new EX approval.

This year, Phantom Fireworks and hundreds of consumer and professional display companies will not have new products to offer our customers due to the backlog approvals process. Many warehouses in China are full of products awaiting export to the United States. In many instances, American importers are required to pay for the product in advance, which means that not only are the products tied up, but significant capital of American companies is tied up. The severe approval delays have put a significant burden on these small companies.

The backlog in fireworks approvals reached an all-time high of approximately 5,700 in December of 2009, compared to only 508 in December of 2008, a thousand percent difference. According to a recent review by my staff of the approvals database, there remained approximately 4,600 applications pending for fireworks. I was gratified today to hear Administrator Quarterman indicate that that number is down to 2,600. That is indeed good news. And in that context, we certainly applaud the efforts of Administrator Quarterman and the PHMSA personnel to create new policies to address these concerns that have been raised in the OIG audit.

However, it may be, with respect to approvals, that too much emphasis was placed on creating plans and policies responsive to the Inspector General and not continuing to process approvals and keeping commerce alive. We are encouraged by the recent announcement of the new online approvals process. Without approvals, our products simply cannot be imported and transported. Many smaller companies have been forced to reduce their workforces because of this situation with the approvals.

Now, in addition to the issues regarding the pending approvals, we respectfully urge PHMSA to revisit its new policy regarding expiration of the approvals. The expiration policy was initiated by administrative fiat, not pursuant to any law or regulation. While some reasonable expiration policy may be appropriate, a five-year expiration date is not. There are no safety reasons to have these approvals expire in five years, an arbitrary time period. We hope PHMSA will grant an immediate extension on all expiring approvals until this expiration policy is revisited.

Finally, Mr. Chairman, we are very concerned about the criteria that will be utilized in making the fitness determinations now included as part of the approvals process. We would expect an appropriate and open process that includes notice of a rulemaking and an opportunity for stakeholders to be heard. We are especially concerned about the effect of the fitness determinations on the foreign entities.

We are absolutely committed to ensuring safety in the manufacture and transport of our products. We actively promote fireworks safety in the use of the products to the millions of families across America who buy fireworks to celebrate the cherished tradition of freedom on Independence Day. Our industry is anxious to work in a cooperative fashion with PHMSA to streamline the process and to reduce the backlog of approvals without in any way compromising safety. We remain hopeful that the approvals process will improve rapidly so that the fireworks industry can continue to delight American families and retain the important tradition of celebrating with fireworks on the 4th of July.

I thank you for the opportunity to address the Committee and I am happy to respond to any questions.

Mr. OBERSTAR. Thank you for your testimony and for spending all this time to come here and be with us on this very important subject matter. As you heard and as you noted in your testimony, PHMSA is making substantial changes in the way it proceeds. They are a much more compliant agency than any time in my—let me see, 1985—25 years experience with this agency. At one time we had an administrator who had no idea how to define safety, no idea how to practice safety. That person left and then was brought back by a subsequent administration and continued to administer the agency in a haphazard manner, I would say.

I think Ms. Quarterman is right at the agency. I think the work of the Inspector General has found shortcomings and failings in the previous operation of the agency and some shortcomings in the current functioning of the agency. As they add staff, as they work on their backlog and draw this down, this agency will be much more responsive in carrying out its duties and carrying out the safety fitness reviews.

Have you had a safety fitness review at your facility?

Mr. WEIMER. I am sorry, I have no knowledge of that. We have never had PHMSA visit our facility to do any type of inspection.

Mr. OBERSTAR. Do you know of members of your association who have been flagged for safety violations?

Mr. WEIMER. Oh, I am sure there are members of our industry who, from time to time, have had safety regulations. Whether that is in the context of this fitness review, I don't think.

Mr. OBERSTAR. Now, I raised with Ms. Quarterman the issue that you cited about the manufacture—here it is—a specific product made by one company in China for several customers in the U.S. packaged differently, and I think her response was quite—showed understanding of your concerns and of the problems you have faced or might face with this. But would you agree that if the product is made at different companies in China, that each one of those, even though it is the same product made by other companies, should be individually reviewed?

Mr. WEIMER. I do. If they are made by different manufacturers, I absolutely agree with that.

Mr. OBERSTAR. Do you have a suggestion as to how the agency could help, as Ms. Quarterman was suggesting they could, verify that in any given factory in China, PHMSA could validate the production of a particular product with different labels? Do you see any difficulty in accomplishing that objective?

Mr. WEIMER. I think it is a matter of visiting the factories. We have done that before with other Federal agencies. Consumer Product Safety Commission has been to China and visited factories, and I am sure that the factories would be happy to receive PHMSA representatives.

Mr. OBERSTAR. And you don't see any problem with your producer companies in China providing access to———

Mr. WEIMER. Mr. Chairman, to use your analogy regarding the airline industry, if we tell the factories we can't buy your products unless you allow the representatives to tour your factory, they will allow them to tour.

Mr. OBERSTAR. Thank you. We will proceed with that.

Mr. Graves?

Mr. GRAVES. Thank you, Mr. Chairman. You actually asked one of my questions. I was going to go down that line and see just what it would take to be able to get some sort of—you know, a Roman candle is a Roman candle. If we can just figure out how to do that. And I hope that the factories are going to be open to that. I am assuming the United States has to be the biggest customer out there of fireworks in China, and they have to have our business. Is that the case?

Mr. WEIMER. It is one of the biggest consumers. Actually, China itself has become a consumer recently, but the United States, I believe, remains the largest consumer of fireworks.

Mr. GRAVES. I would expect that we could use that as a little bit of a lever to gain access.

Another question. You mentioned in your testimony that you are concerned about the new approvals expiration policy. Can you tell me what the average shelf life of fireworks are? Do they expire? And that has obviously been a concern with using. We keep talking about how much of a problem we are going to have this year as a result. Can you kind of go into that a little bit more detail?

Mr. WEIMER. Yes, sir. The shelf life of the product is 10, 12 years, easy. As long as the product is kept dry and doesn't get wet, it can be used 10, 12 years, easy. So my problem with a five-year expiration policy is that redlines the shelf life of the product. We actually are purchasing products with longer shelf lives.

There is another aspect of DOT regarding boxes. Boxes, when you have boxes tested every two years, any boxes manufactured during that two-year period under that approval have a cradle to grave useful life and are permitted to be used beyond the two-year expiration.

So, in our case, with the expirations, we have products in our warehouse now that had EX numbers approved more than five years ago that—if what I understand from the agency is correct and there is just a blanket expiration now of every EX number five years or older, which is what I was told last week—we have products in our warehouse that will have to sit there this 4th of July, and, to compound the problem, we have no new products in our catalog this year. And then we are going to have a lot of old products that we can't move until the EX numbers are reissued, reapproved, or extended.

Mr. GRAVES. I appreciate that, Mr. Weimer. I assume that—obviously, your industry is very interested in safety also, as is everyone.

Mr. WEIMER. We spend a lot of time on safety. And, if you think about it, if somebody uses our products with bad experiences, they are not going to come back and buy more. So of course we do everything we can to promote safety with the trade organization. We have a special organization that gets the safety message out, the National Council on Fireworks Safety. Most fireworks companies hand out safety tips with the sales. So we are very concerned about safety.

Mr. GRAVES. I appreciate that. This industry is extraordinarily important to my State of Missouri, as it is to many, many other

States. There are a lot of jobs involved. And I think the Government should be responsive to the public's needs and also to the industry's needs, because it is having an effect on your ability to operate, and I am going to be working real hard with the Chairman and the Ranking Member to try to solve this problem that is out there and cleaning this up so we can get back to business.

But I do appreciate your being here and, to echo the Chairman's words too, obviously, a vote was in the middle, and I apologize for you having to sit there and wait on us.

Mr. WEIMER. Thank you, Congressman Graves.

Mr. OBERSTAR. The issue you raised is a very important one; I made note of it. At an appropriate time, after all Members have had questions asked and responded, I will ask Ms. Quarterman to respond.

Mr. Altmire.

Mr. ALTMIRE. Thank you, Mr. Chairman. Similar to my friend, Mr. Graves, this is a large industry in my district as well, and, as I am sure Mr. Weimer knows, we like to refer to ourselves as the fireworks capital of America, and with good reason, because it has such an economic impact on the district that I represent. I appreciate your being here to offer the insight of the industry and your own personal experiences to add that to the debate that we are having here in this Committee and in the Congress.

I was particularly concerned about issues affecting China. We deal with the Chinese on a variety of issues with currency manipulation and trade issues and manufacturing and the steel industry in Western Pennsylvania, but in the industry that we are talking about today, the fireworks industry, since most fireworks are manufactured in China, I was wondering if Mr. Weimer could talk about what level of quality control or oversight does your company have to ensure the products are manufactured to specification, compliant with U.S. regulations and, most important, are safe to use?

Mr. WEIMER. Congressman Altmire, we spend a lot of time on safety in China before the products leave China. Our company has two offices in China; we have four full-time employees who deal with logistics. But, more important, in Hunan, the province that makes probably 65 to 75 percent of the world's fireworks, we have people who go into the factories and work on quality control with the factories.

But, moreover, once the product is finished, there is an organization called the American Fireworks Standards Laboratory, AFSL, headquartered in Bethesda. AFSL is essentially the underwriters laboratory of the fireworks industry, and the exact same rules that PHMSA is concerned about when they issue EX numbers, the APA Standard 87–1, those are the standards that are actually tested at the factory level in China. Each factory has a room that is given to the testing agency; they do functional tests, shoot the product.

There are, I think, 18 different points that are tested. They slice the products open; they weigh the content, the pyrotechnic composition; and it is all a matter of making sure that the products comply with the standards set forth in the Code of Federal Regulations, both Title 49 and 16, which is the CPSC section. And if the products, if one product out of the case lot that is tested—and there

are 15 items tested in a case lot—if one item fails, the case lot cannot be exported.

And then our company goes one step further. Once the products are received in the United States, we test ourselves. And I have to admit to you that human frailty as it is, every once in a while a product gets through that doesn't meet the standards, and over the past years—it hasn't happened in a couple of years, but we have failed items and we have instituted product recalls on our own to the CPSC when we have found, in our own testing, that the products fail for whatever reason.

Mr. ALTMIRE. Thank you.

Lastly, Mr. Chairman, I wanted to ask—and I apologize if, in the interval, when we were running for the vote, if you addressed this, but I had a particular concern about expiration dates and I wondered if you could talk about what has been the impact of PHMSA's policy to add expirations to approvals.

Mr. WEIMER. We are not 100 percent sure what that policy is. We know that some of the new approvals have specific expiration dates, but the old products that have no expiration dates, those are the ones that are at issue. And if what I was told last week is accurate and that arbitrarily any product, any approval five years or older has expired, it is going to be a major problem until those are renewed. We will definitely have transportation issues this 4th of July.

Mr. ALTMIRE. Great. Thank you very much for your testimony.

Mr. OBERSTAR. Mr. Weimer, you talked about the similar or identical product being produced at different sources, but it is commonly known that there are different chemical compositions in the manufacture of fireworks, and if one plant manufactures a Roman candle with one chemical composition and another one manufactures it with a different chemical composition, shouldn't those two be treated separately?

Mr. WEIMER. They absolutely should, and that is really not what we are talking about, because you can get a Roman candle that is green and one that is red, and those are obviously different chemical compositions. But prior administration changed the rule. It used to be that when a factory made a particular product, that it wrapped with different packaging for five or six different companies and sold them the exact same product, those were all shipped under the same EX number; and several years ago PHMSA took a posture where each item that had a different name had to have its own unique number, and that is the issue that I spoke to.

Mr. OBERSTAR. All right, I will ask Ms. Quarterman to make note of that and invite her back to respond.

You also state in your testimony, "innovation is being stymied by the cumbersome process." And you also say that family recipes have changed little in the past century. I was fascinated about a year or so ago with a program on the Science Channel that traced the history of fireworks and had a splendid presentation by an Italian family that had a recipe for their fireworks.

My mother was Italian, so my ears perked up not only because of the subject matter, because Italians are very good at making fireworks. John Adams would be very proud of them. And I hope your industry somewhere erects a monument to John Adams, who,

on the signing of the Declaration of Independence, wrote to wife Abigail saying that this day should be celebrated from coast to coast with manifestations, illuminations, and fireworks, giving birth, I think, to your industry.

At any rate, family recipes are closely held; they are closely guarded secrets, according to this program. They change little from generation to generation. And when they change, they are also closely guarded changes. So I wonder. Explain to me how this review of the procedures can stifle innovation.

Mr. WEIMER. Mr. Chairman, I appreciate your acknowledgment of John Adams; I quote him annually around the 4th of July. This is a unique industry. There really are two parts to our industry. My company is in the consumer firework business. We sell backyard fireworks that are regulated by the Consumer Product Safety Commission. The show you saw talked about professional fireworks regulated by ATF. It is a whole different animal.

And those family recipes are closely guarded secrets until they need an EX number for the product, and then part of the requirement to get the approval at PHMSA is to submit to PHMSA not only a diagram of the product, but a breakdown of each composition used in the product, down to chemicals and percentages of each chemical in the composition.

There are also ways that you can take those chemicals within a product and arrange them differently that give you different types of displays. And I think probably, because of the PHMSA requirement, the closely guarded secret was the methodology of putting it together, not necessarily the composition itself.

Mr. OBERSTAR. But the innovation, if any, is being done in China, unless your members are providing specifications for the manufacturer of the fireworks to their particular interest or needs. Is that correct?

Mr. WEIMER. Well, what we do, Mr. Chairman, when we visit China on our buying trips, we actually have the products demoed; we review the products with the manufacturers; we tell them we need more crackle in this one, we need more blue in this one, and the products are made to our specifications. My comment about stifling innovation at this point is that we have no new products this year. Because of the approvals hangup, we are not able—and our catalog goes out, for instance, the first week of May. The catalog obviously had to be put to press a month ago, and there are no new products in the catalog. We will have no new products in our line this year, as will most of the firework companies.

Mr. OBERSTAR. On June 25th last year PHMSA investigated your facility superstore in New Freedom, Pennsylvania, and from their cite, their documentation, reported that Phantom was transporting fireworks without an approval and, therefore, without appropriate testing of fireworks by a PHMSA-approved laboratory. Do you think that is unreasonable?

Mr. WEIMER. In this particular case, violently unreasonable. What happened in that case, an investigator came in to that particular facility looking for a specific product, found the product. The product was not defective, as he thought it was. But as inspectors are wont to do, he looked around the place, and what he found was green safety fuse, a product that is used in every single firework

item manufactured, and we sell a 10-foot length of green safety fuse. There was an expired EX number.

We never got notification that it was expired. The PHMSA database had the EX number live. Yet, we were written up for transporting the product without a valid EX number. The remedy that we were told that would solve the problem was to file for a new EX number, which we did on October 8th.

Mr. OBERSTAR. Has that been processed?

Mr. WEIMER. It has not.

Mr. OBERSTAR. All right, I am going to invite Ms. Quarterman and Mr. Scovel back.

Ms. Quarterman, there are a number of issues raised. You have made note of them, you and your staff. I want to hear your response, and we may have an exchange with Mr. Weimer. This is your opportunity on both sides to address these issues.

Ms. QUARTERMAN. Well, Mr. Chairman, I just want to go back to my opening statement. The first thing I said is safety is the Department's number one priority, and for me it is job one. That is so, so important to understand when we are talking about the backlog with respect to special permits and approvals. I know we are probably talking about special approvals here, but with respect to special permits, just to remind everyone, these are instances when companies are coming in to ask for an exception to a rule. We are doing our best, as I have told you, to add resources to review those special permits, but it is, in effect, a request to deviate from the rule.

Now, with respect to approvals, over the break I had an opportunity to talk to some of my staff about the current statistics, and it turns out that I erred in the wrong direction for us about the current backlog with respect to approvals. We are actually at about 1,700 approvals pending. And how does that compare to years past? We, on average, have about 2,000 approvals pending at any one time before we took over, so we are actually doing better than in past periods under much more lax circumstances in terms of reviews. And we are moving forward very, very quickly, I believe.

In addition to that, as a part of our review of the current approvals over this year, we have gone from a denial or rejection rate of 8 percent in the prior year to 29 percent today. So I want you to know that we are taking this very seriously. We are looking very closely at these approvals. So even though the backlog is moving, it may not be moving in the direction that people would want because of that.

Finally, I would add all the conversation about China, the information that you brought to bear about some of the problems that are happening in the plants back in China are really of great concern to me, and I think we need to take a second look at how we handle our foreign fitness determinations. And I am so happy to hear that Mr. Weimer had opened up his plant to us. I would hope that the members of APA, the association, would ask their other members for a similar offer to come and visit them and do some onsite fitness determinations there.

I guess finally the question of expiration dates.

Mr. OBERSTAR. Shelf life.

Ms. QUARTERMAN. The shelf life and the expiration date on approvals. This is something that our staff has been talking to members of the explosives industry about and they are in the process of trying to figure out what exactly the issues from their standpoint and assist to the extent that we can.

But from our standpoint, again, safety is job one. I cited to you the statistics about the safety fitness reviews that had been done in the past period, less than 100 compared with over 7,000 now. All of these things that are expiring have not been subject to those safety fitness reviews, so we need to take that into account and make sure that we do do that going forward.

Thank you.

Mr. OBERSTAR. Thank you. As I read the PHMSA regulations on shelf life, the five year expiration of the approval limits the shelf life, which Mr. Weimer says could be longer than that, that a product could last much longer than that, but you are actually limiting the—or the rule limits the marketability of the product. And the industry can apply or the company can apply for an extension or for a new approval, but PHMSA would then have to review the site again, is that correct? And would have to conduct an onsite test of the stability of the product?

Ms. QUARTERMAN. I don't believe an onsite review is necessary. Certainly a complete fitness review would be required, and there are several———

Mr. OBERSTAR. That would not necessarily require an onsite?

Ms. QUARTERMAN. There are three stages. The initial stage is checking the records that we have, of course, looking at the application that is there, looking at incidents and violations. And if those things rise to a level that we believe requires more information—and we do have specific criteria about it jumps over a certain level, we go into a second phase where we ask for more thorough information. Once we have seen that, it could in fact go into yet a third level, where we go onsite to visit.

Mr. OBERSTAR. Mr. Weimer, do you have a question about that process?

Mr. WEIMER. No. No. We are not—to the best of my knowledge, the fitness determination criteria has not been published yet. So we are anxiously awaiting the opportunity to review it.

Mr. OBERSTAR. How does fitness criteria play into extension of the expiration date?

Ms. QUARTERMAN. It is a jumping off point. We have the criteria available, and if it is not public, then we can certainly do that. I think we are continuing to massage it, but there are certain things that we look at in terms of whether it is a table 1, class 1 item or if, in the past four years, for example, there have been more than one serious incident; and there are 15 different items we look at that sort of takes you from the initial review into that second level review. And once we see what data we get from the second level, it may elevate it yet again to the onsite requirement.

Mr. OBERSTAR. But the initial stage of review is the performance of the company in the period of time that has elapsed since the approval was given. If there have been no violations, that is a point in their favor.

Ms. QUARTERMAN. Oh, absolutely. If there have been no violations. We actually are looking back at a four year period, so———

Mr. OBERSTAR. Right.

Mr. Scovel, do you think this process is fair and sound, or does it need further adjustment?

Mr. SCOVEL. Mr. Chairman, we think it does need further adjustment. However, we are greatly encouraged by the fact that, as Administrator Quarterman has pointed out today, they are in the process of intensely scrutinizing and dialing that down.

If I could respond to three points by Mr. Weimer, sir.

Mr. OBERSTAR. Yes.

Mr. SCOVEL. And to paraphrase number one, too much attention has been paid by PHMSA in developing plans and policies in response to the IG and not enough to acting on applications. He is concerned about the adverse effect on commerce.

Again, I am greatly encouraged by Ms. Quarterman's response that, for her and her agency, safety is job one. I think it has been universally acknowledged by the Committee today, by me in my testimony, by Ms. Quarterman that fitness and level of safety determinations have been sidestepped, to use a term that one of the Committee coined today. To the extent that PHMSA has deemed it necessary to respond to points made in our several reviews and Management Advisories in order to tighten up on fitness and level of safety determinations, we think that is a good thing.

Point number two—again, I am paraphrasing—an automatic extension for expiring approvals when the product has a longer shelf life than the term of the approval itself. We would urge caution upon the part of the agency and the Committee if it were to go down that route. To the extent that an expiring approval was based on a sidestepped fitness or level of safety determination, we would view that essentially as a defective approval in the first place, and it should not be subject to an automatic extension.

My third point, sir, Mr. Weimer's concern about criteria used to determine fitness. I will return to a point that we discussed on the record at the September hearing, and that had to do with the proper place of enforcement actions as a criterion for determining fitness. And I pointed out then, in a history lesson, that RSPA, PHMSA's predecessor, had argued in the face of industry opposition that enforcement actions may be—I am quoting—"may be indicative of an applicant's ability or willingness to comply with applicable regulations." Because the Associate Administrator is considering whether to authorize compliance with specific alternatives to the HMR, the likelihood of an applicant's compliance with those alternatives is relevant to public safety.

We think it is relevant not only to the fitness determination, but also as a criterion for determining whether compliance reviews should be conducted, so again we urge caution in sidestepping or shortcutting any of those factors, sir.

Mr. OBERSTAR. I also raised the issue of point of production in China. What are your thoughts about site inspection in China and how much effort should go into that, and at what stage in this process should that occur given the seasonality, the unique seasonality of fireworks? They have to get their product on the

market and sold and delivered in time for one set of maybe two or three days.

Mr. SCOVEL. Yes, sir. It is a troubling point. If PHMSA is to do its job comprehensively, it would seem logical to conclude that it needed to follow the supply chain all the way back. Otherwise, at some point the agency is going to have to rely on a certification from an importer or a shipper that the product that came out of the factory overseas is indeed safe and matches up to whatever criteria or factors the agency itself has set. Resources always being a problem, I know PHMSA would have to calibrate very carefully its effort in that area.

However, I will note that in Mr. Weimer's testimony to the Committee, he said that the Consumer Product Safety Commission has had inspectors on the ground in China with regard to fireworks specifically, and if it seems important and feasible for that Commission to do it, perhaps the agencies can seek proper authorization and appropriations in order to carry out what we would think is an important aspect of their duties too.

Mr. OBERSTAR. Shouldn't they coordinate their efforts? Ms. Quarterman, couldn't you and the CPSC get together, have a joint inspection of production sites, and not do it separately; time-consuming, more cost?

Ms. QUARTERMAN. I believe this came up earlier, and I committed then to talk with that agency and find out exactly what they are doing and see how we can work together.

Mr. OBERSTAR. Mr. Weimer, do you have some observations or responses to the comments preceding?

Mr. WEIMER. One comment, Mr. Chairman, on the fitness determination.

Mr. OBERSTAR. Yes.

Mr. WEIMER. All we are looking for is the criteria. From my point of view, if there is an unfit importer or exporter out there, we are going to be the first ones to vote to deny them any approvals. We want this industry safe. This is not my job, Mr. Chairman; this is what I do, this is what I live. So my mission is to make sure that the products we sell and the way we handle them are done in a safe manner. So I am not questioning a fitness determination. We would just like to understand the criteria.

Mr. OBERSTAR. You cited earlier in your testimony the association's underwriter laboratories type of facility for fireworks. Has that facility set forth a set of criteria for the conduct of safety reviews of the products?

Mr. WEIMER. Yes, Mr. Chairman. The American Fireworks Standards Laboratory has its own standards committee and, in actuality, the AFSL standards, in three or four different instances, are a little more extreme, little more demanding than the CPSC standards. So when we do the testing in China, it is done to the AFSL standards, as opposed to the CPSC standards, which are a little more rigid.

Mr. OBERSTAR. So that laboratory, then, has established criteria that you are asking PHMSA, in effect, to set forth, right?

Mr. WEIMER. No. The criteria that has been established started with the Consumer Product Safety Commission criteria and then it expanded a little beyond that. The AFSL has contracted with an

international testing agency, SGS, internationally recognized. Fireworks is one of the smallest consumer goods they test; they test food and different things like that. They employ agents on the ground in China. The U.S. AFSL personnel go to China three or four times a year, conduct seminars and the training of the inspectors, and then the inspectors are turned loose and go to the different factories and test to the AFSL standards, which, as I said, in three or four different instances go further than the CPSC standards.

Mr. OBERSTAR. So this laboratory has a great deal of technical expertise. Let me invite you to ask them to submit to the Committee their version of what factors and criteria for the conduct of safety fitness reviews, and we will look at and then we will invite PHMSA and the Inspector General to come and visit with us about their reaction to it.

Mr. WEIMER. We are happy to do that, Mr. Chairman.

Mr. OBERSTAR. I have taken that approach to other work of the Committee in the safety arena; it has often proven to be very useful. In most cases it has; in some cases there are obstinate people who don't want to comply, and then they comply in a different way. So let's approach it from that standpoint.

I will say that the fireworks industry is a great deal safer, for the home fireworks industry a great deal safer than when I was growing up. Many of the classmates of mine who had damaged fingers, numb hands, an injured eye, and other accidents resulting from fireworks that didn't react properly or weren't used properly, but caused a great deal of personal injury. I think the industry is much safer than it was.

My experience over 25 years of pursuing safety in a wide range of the areas under jurisdiction of this Committee is that there has to be a culture of safety in the corporate boardroom and there has to be also a culture of safety in the oversight agency that represents the public interest.

The corporate interest is served by a product that does not fail and does not cause injury, and Toyota learned that to their great dismay. We have seen that in the aviation sector. They have learned to do a lot better job in maintenance and production of after-market parts. So we are pursing the same objectives here.

Mr. Shuster said, at the outset of his remarks, this is a safe industry and inquired why we are making things difficult for it. Well, I don't think this is—he didn't put it quite that way, but that is what he meant. It is not making things difficult. I know that every industry is safe until there is an accident. The next fatality is just waiting around the corner, and it may be for a human failure; it may be like those pilots for Northwest Airlines, who are doing something they should never have been doing in the cockpit, and they overflew their destination, and they paid the price for it.

But there are other times when material fails, equipment fails, process fails. And if we set in place the proper procedures and standards and have oversight from various viewpoints, we can make safety a reality. You want that to be able to sell products; the agency wants that to be able to protect the public.

Committee staff, do you have any questions you would like to ask?

Ms. QUARTERMAN. Mr. Chairman, may I ask one final thing? And that is, looking back at your statement on the record at the end of the last hearing, about the fact that there are many good employees with good intentions within PHMSA working hard. I just want to say here that that is in fact the case. We have been working hard to develop a very, very strong safety culture and say to employees if there is a safety question, you should come directly to the top, if necessary, and you don't have to go outside of the agency; we have put together a safety review board.

But I think that, by and large, the employees within PHMSA are dedicated and committed to their mission, and I want to make sure that they understand that I know that going forward, and that we have been asking them to work very hard, and we are going to ask them to continue to work very hard. I just wanted to say that for the record.

Mr. OBERSTAR. That is very encouraging to hear. I appreciate that very much and I know that from the Office of the Secretary on through this Department there is a whole new culture of safety. Secretary LaHood has, as he put it, been on a tear for safety, and he has communicated that to every agency within the Department, and you certainly got that message. And Mr. Scovel is there to make sure that you and all your sister agencies hear and keep that message, and the industry is getting it as well.

We look forward to receiving that information that I requested from your AFS laboratory; further information from you, Ms. Quarterman; and, Inspector General Scovel, thank you for your continued review.

Committee stands adjourned.

[Whereupon, at 2:02 p.m., the Committee was adjourned.]

OPENING STATEMENT OF
THE HONORABLE RUSS CARNAHAN (MO-03)
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE

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

April 22, 2010
2167 Rayburn House Office Building

I want to thank Chairman Oberstar and Ranking Member Mica for holding this hearing on the Department of Transportation's Oversight and Management of Hazardous Materials Special Permits.

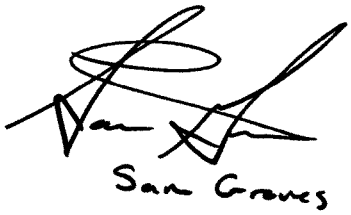
The core mission of the Pipeline and Hazardous Materials Safety Administration (PHMSA) is the maintenance of safety. For this reason, it was truly troubling to me that the Committee's oversight and investigation of PHMSA last year revealed neglect on the part of the agency of this mission. Instead, the Committee's findings as well as those of the Department of Transportation's Inspector General made clear PHMSA has tried to make things as easy as possible for the industry it is regulating and often blatantly does not enforce the regulations they have set in place to ensure the safe transport of hazardous materials.

I was pleased to see Deputy Secretary Porcari recognize the severity of the situation and taken steps to address the concerns raised by the Committee's investigation as well as the finding of the Inspector General's audit. However, I do believe there are still areas of concern that must be addressed.

Specifically, the Inspector General's complete audit raised concerns with PHMSA's processing of explosives approvals and whether in fact PHMSA was following its own regulations in testing and classifying explosives. Under current regulations nobody can transport an explosive unless it has been tested, classed, and approved by the Associate Administrator for Hazardous Materials. However, the Inspector General identified PHMSA does not have formalized guidance for classifying and approving explosives, does not follow the regulatory requirements for reclassifying explosives, does not have a formal process in place for resolving internally contested safety decisions, and of the gravest concern they have not conducted over the last ten years fitness inspections or safety reviews at its four approved explosives testing labs.

Additionally, during the hearing last year there was discussion of trade associations receiving special permits approvals which result in a blanket approval to their member organizations. Steps must be taken by PHMSA to stop this from happening and it is of grave concern that after this was raised during our last hearing PHMSA has issued ten special permits and two approvals to trade associations, where there was not a safety fitness review of each individual members of the associations.

In closing, I want to thank our witnesses for joining us today and I look forward to their testimony.



Congressman Sam Graves
Opening Statement
T&I Full Committee Hearing
April 22, 2010

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

[WHEN RECOGNIZED]

I would like to thank Chairman Oberstar and Ranking Member Mica for holding this important hearing today. I would also like to welcome our panelists and give a special thanks to our lone industry panelist, Mr. William Weimer (why-mer). Mr. Weimer is the Vice President and General Counsel of Phantom Fireworks and has extensive knowledge of the regulations governing the transportation of fireworks and I believe his expertise and testimony will be helpful to this committee in the development of

legislation and to the agency for regulations as these issues move forward.

I also appreciate the efforts of Chairman Oberstar and Ranking Member Mica, along with your staff, for continuing to work with me on issues related to fitness determinations for special permits and approvals for specific hazardous materials.

Back in November of last year, I offered an amendment during the markup of the Hazardous Materials Transportation Safety Act to require that the Pipelines and Hazardous Materials Safety Administration (PHMSA) initiate a formal rulemaking process to establish standards for

determining the fitness of applicants for special permits or approvals, rather than a sub-regulatory guidance process called for in the bill. While we were unable to find a solution at that time I remain confident we eventually will.

Due to last year's committee debate, I find this hearing to be timely and necessary. The concerns that prompted my amendment have not abated. The standards appear to be unevenly applied. They create unreasonable processing delays contributing to job and business opportunity loss. Most importantly, the performance thresholds embedded in these new invisible standards are completely unknown to an industry

whose ability to continue operating is wholly dependent upon conformity with the standards.

When I last spoke with PHMSA officials, I was surprised to hear about the large backlog of unprocessed fireworks approvals – approximately 5,700 pending in December 2009. However, I was encouraged to learn that PHMSA has since taken an all-hands-on-deck approach and dedicated personnel and resources to expressly eliminate the backlog. I am interested to hear today from PHMSA how much progress has been made and how many unprocessed approvals and special permits remain.

It is also my understanding that this unprecedented backlog has its roots in the audit performed last year by the Department of Transportation (DOT) Office of the Inspector General (IG). Prior to the audit, approvals were typically processed within 90-120 days and there were only slightly more than 500 unprocessed fireworks approvals at the end of 2008. Now, I have heard reports that approvals process times have grown almost exponentially for the fireworks industry and others dependent on these agency authorizations. Simply put, what happened?

This year, due to the backlog at PHMSA, the fireworks industry will almost certainly not

be able to sell any new products. This is an industry that relies heavily on marketing – such as new themes and packaging schemes – to sell their product. However, retailers and consumers will largely be forced to sell and buy last year's products. While the recent backlog of unprocessed approvals has already taken its toll on the fireworks industry this season, and other industries dependent on classification approvals, it is critically important we don't let it happen again.

With that said, as we work to find answers and solutions to these concerns, we should not lose sight of the fact that commerce of hazardous materials has been carried out

with a remarkable level of safety, and that PHMSA deserves credit for its role in that achievement. If there is anything this committee can do to help PHMSA perform this vital function, please let us know. I think I speak for most members of this committee when I say we are committed to working with government and industry stakeholders to ensure that the transportation of hazardous materials is conducted in a safe and efficient manner.

Again, welcome and I look forward to hearing your testimony.

I yield back.

SENIOR DEMOCRATIC WHIP

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
CHAIRWOMAN, SUBCOMMITTEE ON WATER RESOURCES & ENVIRONMENT
SUBCOMMITTEE ON AVIATION
SUBCOMMITTEE ON RAILROADS

COMMITTEE ON SCIENCE AND TECHNOLOGY
SUBCOMMITTEE ON RESEARCH AND SCIENCE EDUCATION
SUBCOMMITTEE ON ENERGY AND ENVIRONMENT

DEMOCRATIC STEERING AND POLICY COMMITTEE

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CHAIR, 107TH CONGRESS

Eddie Bernice Johnson
Congress of the United States
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STATEMENT OF CONGRESSWOMAN
EDDIE BERNICE JOHNSON
Committee on Transportation & Infrastructure
Hearing on: The Department of Transportation's
Oversight and Management of Hazardous Materials
Special Permits and Approvals
April 22, 2010

Mr. Chairman, thank you for holding this hearing today.

I applaud your and Chairwoman Brown's ongoing oversight of this critical safety issue.

I was disappointed and surprised to learn of the continued lack of oversight in procedures for approving the transportation of explosives, as evidenced by the recent Inspector General's Report.

I am particularly concerned about the Inspector General's two primary findings with the Pipeline and Hazardous Materials Safety Administration's safety oversight.

First, the lack of an effective evaluation process for reviewing and authorizing explosive classification approvals.

And, secondly, the ineffective oversight of the four laboratories that are authorized by the Pipeline and Hazardous Materials Safety Administration to examine and test explosives.

I am also aware that previous Inspector General Reports have identified weaknesses that leave questions as to the effectiveness of the Pipeline and Hazardous Materials Safety Administration's process for granting special permits for the transport of hazardous materials. And, I share the Inspector General's concerns that these weaknesses could be indicative of more systematic problems.

I look forward to hearing from the witnesses on their recommendations as to what can be done to improve permitting and the other safety oversight responsibilities of the Pipeline and Hazardous Materials Safety Administration.

Thank you, Mr. Chairman.

Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
4/22/10

--Thank you, Mr. Chairman,

--And thank you for your commitment to the safe transportation of hazardous materials.

-- The Department of Transportation Inspector General (IG) has shown that the Pipeline and Hazardous Materials Safety Administration (PHMSA) has not consistently followed newly established procedures for granting special permits and approvals or adequately overseeing explosive classification approvals.

--According to the IG, PHMSA granted permits and approvals without full knowledge of applicants' safety histories and without coordinating with other Operating Administrations when needed.

--PHMSA has formulated two action plans to better manage the Special Permits and Approvals Program, and today we will hear from the IG about them.

--I look forward to today's testimony.

--At this time, I yield back.

Congresswoman Laura Richardson

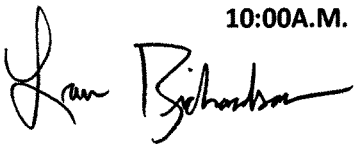
Statement at Committee on Transportation and Infrastructure

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

2167 Rayburn House Office Building

Thursday, April 22, 2010

10:00A.M.



M. Chairman, I want to thank you for convening this hearing to look into the Department of Transportation's Management of Hazardous Materials Special Permits and Approvals. I want to commend you and your staff for undergoing such a rigorous investigation and brining several important issues to light for further review.

Regulating the movement of hazardous materials is particularly important to my district. With 40% of the nation's cargo going through my district we need to both ensure the efficient movement of goods and ensure that these goods are moved safely. The work of the Department of Transportation and the Pipeline and Hazardous

Materials Safety Administration (PHMSA) is crucial to the safety of my constituents.

Reading the committee and the Inspector General's report leads me to believe that PHMSA has a long way to go in reviewing their policies and ensuring the safety of our citizens as hazardous materials move through our communities. I appreciate the committee calling this hearing today to follow up on the hearing we conducted in September and ensure that PHMSA is held accountable for their promises of reform.

Those living along the goods movement corridors, in my district and across the country, are already subject to emissions and pollution from the trains and trucks that go by their house. They suffer for asthma and cancer rates that are tragically far above the national average. On top of the health risks they bear living near the freight corridor, we must do everything in our power to keep them safe from hazardous materials that travel near their homes and schools.

There are several issues that came to light in the IG and Committee's report and I would like to address just a few here. It is concerning that PHMSA would grant special permits, essentially exemptions from following regulations, with such minimal investigation into the worthiness of the recipient. The recipients safety record must

be a factor in obtaining a special permit, and issuing special permits to overly broad groups of people, such as a trade association, is completely unacceptable. The records and competence of members of an association vary widely and special permits must be issues on a case by case basis.

To hear that this practice has continued even after PHMSA gave this committee assurances that it would cease this practice during the September hearing is very troubling. If necessary this committee is ready to do our part to ensure this practice is curtailed.

I am sure that the Inspector General and this Committee will continue our oversight activities and I hope that PHSMA will work to correct all of the outstanding issues unearthed in the Committee and IG report as quickly as possible.

I'd like to thank the witnesses for appearing before us today and I look forward to hearing their statements.

Thank you, Mr. Chairman

WRITTEN STATEMENT

CYNTHIA L. QUARTERMAN
ADMINISTRATOR
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

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

Introduction

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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Questions from Chairman James L. Oberstar

Hearing on

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

April 22, 2010

The Honorable Cynthia Quarterman, PHMSA Administrator

1. According to the testimony of the Inspector General, PHMSA's risk-based oversight program does not consider whether a company holds a special permit or approval as a factor to drive compliance reviews. Can you please respond to this statement?

PHMSA agrees with the Inspector General's statement. PHMSA's oversight program does not consider whether a company holds a special permit or approval as a factor in its compliance reviews. PHMSA evaluates and prioritizes the risk of an activity authorized, whether authorized by regulation or by a special permit or approval. Factors PHMSA considers to drive its performance reviews include hazardous material type, quantity, mode, frequency, exposure, safety and compliance history of the authorization and the entities themselves. That said, PHMSA has historically performed more than 200 inspections per year of entities holding a special permit or approval. In 2009, PHMSA conducted more than 240 inspections of special permit and approval holders.

2. In August 2009, PHMSA issued a Policy Statement that clarified the procedures and requirements for issuing special permits and approvals. In that statement, PHMSA said that special permits and approvals are issued to the members of associations and not the association itself. Yet, we understand that PHMSA continues to issue special permits and approvals to trade associations – some which have been issued as recently as April 2010 – without review of the safety history of the applicants. Can you please explain why this continues to happen? If it was a "short-term fix" why are some of these permits set to expire as late as 2014 or 2015? Finally, please tell us in detail how PHMSA plans to address association special permits. Please include details on how PHMSA plans to address the association special permits that have already been issued, and then include details on how PHMSA plans to address association special permit requests in the future.

PHMSA's long-term plan is to eliminate association-related authorizations. PHMSA identified 24 special permits and 10 approvals that were originally granted to trade associations.

Initially, as a "short-term fix," PHMSA clarified that each of the 34 permit and approvals were issued to "the members" of the association and not to the association. As such, PHMSA reissued the 34 permits and approvals with this clarification. 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. Thus, 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. Any special permits issued in April 2010 or with expiration dates in 2014 or later will follow the same plan set forth here.

PHMSA estimates that these 34 active authorizations may affect an approximate 30,000 individual companies.

In May 2010, PHMSA began notifying the association members permit holders that their authorization for use under their permit or approval would terminate within 60 days. PHMSA informed the individual companies to reapply individually if they sought the special permit's continued use. PHMSA will process each individual company's application including a determination of fitness. PHMSA has created a priority listing of association members permits based on the risk of the activity and the likelihood that the permit may be incorporated in rulemaking. It will notify association member permit holders of the need to reapply on the basis of the priority listing. PHMSA estimates the timeframe for completing this process may take up to two years but it greatly depends on the number of entities that reapply. On May 1, 2010, PHMSA released a new online filing form that streamlines the processing of the estimated 30,000 applicants by ensuring that applications cannot be filed incompletely and eliminating data entry tasks.

PHMSA is also engaging in a parallel effort to convert appropriate special permits and approvals into the Hazardous Materials Regulations. On Friday, May 14, 2010, PHMSA published a Final Rule under Docket PHMSA-2009-0289 (HM-233A) entitled "Hazardous Materials: Incorporation of Special Permits into Regulations." In this final rule, we amended the Hazardous Materials Regulations by incorporating provisions contained in 44 special permits that were widely used or had a longstanding established safety record. We are undertaking more rulemakings to incorporate certain special permits issued to members of associations into the regulations and expect to complete all by 2011.

As for future association permit requests, PHMSA issued a policy statement on May 2, 2010, clearly indicating that it will not grant any special permit or approval requests to associations on behalf of their members and requiring individual companies to apply for special permits and approvals in their individual capacities.

3. According to the IG's testimony, applicant fitness determinations are not always well-founded or supported. In one example they reported that the PHMSA project officer made a determination that the applicant applying for a special permit was not fit based on an evaluation of the applicant's safety history, but that the special permits was still renewed. Can you please explain why that would happen?

PHMSA believes its current fitness determination process is well supported. To ensure consistency in making these determinations, PHMSA recently developed a management and review process for determining fitness, which it documented in recently promulgated standard operating procedures.

PHMSA implemented a 3-tier system for determining an applicant's fitness. The first tier is the minimum level of fitness baseline review. This review uses a criteria to analyze the available incident and inspection data sources in the Hazardous Materials Information Portal (HIP)

including the data accumulated by all relevant operating administrations (PHMSA, FAA, FMCSA, FRA & USCG). This initial baseline review gives PHMSA a snapshot of the applicant's safety and compliance history. The review criteria establishes a performance threshold, that if exceeded, indicates potential a fitness problem. If an applicant's safety and compliance history fall below the criteria, the applicant is recommended "*fit to conduct the activity authorized by the special permit or approval.*" If the applicant's safety and compliance history exceed the criteria, then PHMSA initiates the second tier of fitness determination process, and the applicant is put on "*Fitness Hold.*"

In the second tier, the applicant is referred to PHMSA's Division of Field Operations and Enforcement or the appropriate modal operating administration for further review. The applicant's safety and compliance history is thoroughly evaluated to determine its role in the events. This action could also include requests for more information from the applicant. If PHMSA determines that the applicant was not at fault, played no role (applicant was shipper and incident was caused by carrier), or the incidents/inspections are irrelevant to the request, then the applicant may be recommended "*fit to conduct the activity authorized by the special permit or approval.*" At such time the applicant is removed from "*Fitness Hold*", and the process advances. Should this review uncover more concerns (e.g., show a pattern of unsafe behavior), then PHMSA initiates the third tier of fitness determination.

In the third tier, PHMSA or the appropriate operating administration deploys resources to conduct an onsite fitness inspection of the applicant. The result of this fitness inspection will be a recommendation on whether the applicant should be determined "*Fit*" or "*Unfit*" to "*conduct the activity authorized by the special permit or approval.*"

In the case referenced by the Inspector General, the applicant's safety data exceeded the minimum level of fitness criteria during the baseline review, but upon further review at the second tier level, the incidents were determined not to have been caused by any action of the applicant. As a result, a determination was made after the second tier review that the applicant was "*fit to conduct the activity authorized by the special permit or approval.*"

Notwithstanding this process, as a result of the Inspector General's findings, PHMSA has improved the documentation and procedures for fitness determinations to ensure more clarity and consistency. PHMSA is currently evaluating refinements to its procedures in which minimum level of fitness criteria are based upon the type of special permit or approval application being reviewed. This refinement would only affect the first tier review and reduce unnecessary steps.

4. The IG claims that PHMSA has ineffective oversight over the authorized explosives testing labs. Specifically, that over the past 10 years, PHMSA has not conducted a single fitness inspection or safety review of any of these labs. Since the IG's finding, what has PHMSA done to this end? For the record, have there been any fitness inspections or safety reviews over the last 10 years of PHMSA's other third-party laboratories? If so, please provide us details on those inspections. If not, why not and how does PHMSA plan to address this?

PHMSA agrees with the Inspector General that its past oversight of explosive labs was inadequate. However, in March and April 2010, PHMSA conducted fitness inspections at all

four approved explosive examination laboratories. The inspection team found all four laboratories fit to perform the examination and shipping classification recommendation functions authorized under their approvals. Some minor violations related to training, marking, labeling, and reporting were noted.

Since the Inspector General's findings in the winter of 2009, PHMSA has included the testing labs in its maximum priority category of our risk-based oversight program. This translates into inspections of the testing labs on an annual basis or sooner if conditions warrant.

In the last 10 years, PHMSA has conducted 74 inspections of other approved third-party laboratories. In no case did a PHMSA inspection reveal an approved lab to be unfit. Of the 74 inspections, 31 were of the 12 approved Independent Inspection Agencies (IIAs) for manufacturers and requalifiers of DOT compressed gas cylinders. The inspections resulted in six separate enforcement actions and four letters of warning against IIAs. Three of the 74 inspections were of the 20 approved designated approval agencies for the design approval of DOT and intermodal portable tank manufacturers and repair facilities. No compliance problems were noted from these inspections. The remaining 40 inspections of the 74 were of the 42 approved DOT third-party testing laboratories for UN performance-oriented package testing and certification. The inspections resulted in 20 separate enforcement actions and seven letters of warning against approved labs for varying violations. PHMSA intends to ensure that its oversight of third-party laboratories become a top priority relating to inspections on an annual basis or sooner.

5. The testimony from Phantom fireworks (who will testify on the second panel) claims that they hold 800 Approvals from PHMSA and that in 33 years they have not had one single transportation related fireworks incident. Can you provide for the record specific information on their safety record as a transporter and as a company, in general?

Phantom is a subsidiary of B.J. Alan Company. BJ Alan Company (B.J.) was founded in 1977 as an importer of fireworks from China. B.J. markets its products under the Phantom Fireworks, wholesaling products to 42 states and operates a chain of retail fireworks stores in 14 states. In reporting incidents or inspections, the two trade names can be used interchangeably.

On June 25, 2009, PHMSA conducted an unannounced compliance inspection at Phantom Fireworks. During the inspection, two probable violations of 49 CFR were noted and have been referred to the Office of Chief Counsel for adjudication. The violations included "offering for transportation an unapproved explosive" and "marking an incorrect proper shipping name and identification number" on a package containing hazardous materials. An exit briefing explaining the probable violations was emailed to Mr. William Weimer, Vice President & General Counsel of B.J. Alan Company on August 4, 2009.

Phantom Fireworks also reported one incident in 2009 that involved an undeclared shipment of fireworks aboard a FedEx truck, which was discovered leaking during the unloading process.

6. Since January 2010 our investigation shows that at least four fireworks companies in China have had accidents involving loss of life due to explosions. In determining the fitness of foreign companies, such as those manufacturing fireworks in China, how would PHMSA determine, with a reasonable degree of certainty that the fitness standards are met before Approvals and Special Permits are issued?

PHMSA collects some data on foreign companies but it has been difficult to secure all pertinent data, especially from China. However, PHMSA continues to participate in the US/China Strategic & Economic Dialogue, Transportation Forum and collaborate with the Consumer Product Safety Commission (CPSC) to increase and improve data captured on Chinese companies. PHMSA does not have sufficient information that ties the fixed facility incidents to transportation. PHMSA is planning a collaborative visit to fireworks manufacturers in China and a meeting with CPSC's Chinese counterpart in late summer 2010.

PHMSA is enhancing its process on reviewing foreign applicants' fitness and safety culture before issuing an initial approval. This process will include PHMSA inspection personnel conducting an initial fitness inspection in the country of origin and prior to renewal of any approval. Investigators are presently being provided passports and discussing the most efficient method of implementation. PHMSA is investigating many alternative and evolving mechanisms to increase its ability to capture fully safety information on all applicants for special permits and approvals.

Before the Committee on Transportation and Infrastructure
United States House of Representatives

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Actions Taken and Needed To Improve Management and Oversight of PHMSA's Hazardous Materials Special Permits and Approvals Program

Statement of
The Honorable Calvin L. Scovel III
Inspector General
U.S. Department of Transportation

Mr. Chairman, Ranking Member Mica, and Members of the Committee:

We appreciate the opportunity to testify on the Pipeline and Hazardous Materials Safety Administration's (PHMSA) management and oversight of the Special Permits and Approvals Program. PHMSA regulates up to 1 million daily movements of hazardous materials, many of which are transported under special permits and approvals that allow relief from the Hazardous Materials Regulations under certain conditions.[1] We have evaluated this program over the past 2 years and identified shortcomings in how PHMSA authorizes and oversees special permits and approvals. My testimony today is based on our body of work and will focus on three key areas: (1) the status of PHMSA's action plans to address our concerns, (2) PHMSA's execution of its new safety measures, and (3) emerging safety issues requiring management attention.

IN SUMMARY

Regulating and monitoring the movement of hazardous materials is a critical part of ensuring the safety of the Nation's transportation system, and it is PHMSA's role to properly assess risks before allowing applicants to transport hazardous materials under special permits and approvals. PHMSA has established action plans to address safety concerns we have identified, but success will be measured through effective execution. In addition, PHMSA must fully assess and address emerging issues that raise questions about fundamental operating procedures needed to promote safety. For example, our recent work shows that PHMSA personnel are not consistently following newly established procedures for granting special permits and approvals or adequately overseeing explosive classification approvals. As PHMSA continues to address these areas, it must refocus its approach to proactively identify safety risks, work with partner safety agencies to resolve safety and coordination matters, and set targeted oversight priorities.

BACKGROUND

PHMSA is the lead agency responsible for regulating the safe transport of hazardous materials, including explosive, poisonous, corrosive, flammable, and radioactive substances. The Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration (FMCSA), and the Federal Railroad Administration (FRA) also oversee and enforce regulations for their respective industries.

Currently, there are about 5,500 special permit holders and 118,000 approvals.[2] Special permits and approvals allow a company or individual to transport, package, or

[1] *Special permits* authorize a holder to vary from specific provisions of the Hazardous Materials Regulations; identify the section(s) from which relief is provided; and include provisions, conditions, and terms that must be followed in order for the special permit to be valid. An *approval* means written consent from PHMSA's Associate Administrator to perform a function that requires prior consent under the Hazardous Materials Regulations.

[2] There are now about 1,250 active special permits. The 5,500 referenced above include these plus all party-to permits.

ship hazardous materials in a manner that varies from the regulations, provided the company or individual is (1) fit to conduct the activity authorized by the special permit or approval and (2) proposing a level of safety as safe as or safer than requirements from which the applicant seeks relief.

Our work has consistently shown that strong oversight of these authorizations is needed. Last month, we issued our report on PHMSA's management of the Special Permits and Approvals Program after testifying on our findings before this Committee in September 2009.[3] Our review disclosed serious deficiencies in how PHMSA processes and oversees special permits and approvals. Most recently, on April 7, 2010, we issued a management advisory to PHMSA detailing concerns with how it authorizes explosive classification approvals and oversees labs authorized to test explosives.

WHILE PHMSA'S ACTION PLANS SHOW PROMISE, IT WILL TAKE TIME, RESOURCES, AND SUSTAINED COMMITMENT TO ADDRESS LONGSTANDING SAFETY ISSUES

We recently reported fundamental weaknesses with how PHMSA authorizes and oversees special permits and approvals. Specifically, PHMSA granted permits and approvals without full knowledge of applicants' safety histories and without coordinating with other Operating Administrations when needed. In response to our work, the Office of the Secretary and PHMSA took swift action to formulate two action plans to better manage the Special Permits and Approvals Program. PHMSA's plans show promise, but it will take sustained management commitment to fully address longstanding and emerging issues.

Weaknesses Identified in PHMSA's Special Permits and Approvals Process

In March 2010, we reported that PHMSA's reviews of all 99 permits and 56 approvals we examined did not consider applicants' incident or regulatory compliance histories.[4] We found this to be the case even when applicants had multiple incidents and enforcement violations for years prior to receiving their permit. For example, PHMSA granted a special permit to a company to operate bulk

[3] OIG Report Number AV-2010-045, "New Approaches Needed in Managing PHMSA's Special Permits and Approvals Program," March 4, 2010. OIG Testimony Number CC-2009-096, "PHMSA's Process for Granting Special Permits and Approvals for Transporting Hazardous Materials Raises Safety Concerns," September 10, 2009. OIG reports and testimonies are available on our website: www.oig.dot.gov.

[4] The Hazardous Materials Regulations [49 C.F.R. § 107.113f (5) (2010)] provide PHMSA with the authority to examine applicant fitness and compliance histories.

explosives[5] vehicles—even though the company had 53 prior incidents, 9 of which were serious vehicle rollovers.

Of particular concern is PHMSA's practice of granting special permits to trade associations—effectively giving a "blanket authorization" to thousands of member companies without any assessment of their safety histories or need for the permit. PHMSA also did not conduct regular compliance reviews of individuals and companies who had been granted special permits and approvals. Our visits to 27 companies found that more than half did not comply with the terms of their permits. Some officials did not know which permits applied to their location, and some were unaware that they even had a permit to abide by. Yet, PHMSA's risk-based oversight program does not consider whether a company holds a special permit or approval as a factor to drive compliance reviews.

PHMSA's lack of coordination with FAA, FMCSA, and FRA exacerbates these weaknesses. These agencies may have critical safety data on applicants seeking a permit. Yet, we found PHMSA did not coordinate 90 percent of the special permits we reviewed. PHMSA also did not coordinate most of the emergency permits we reviewed—even though the Hazardous Materials Regulations specifically require their coordination.

PHMSA Has Completed Several Action Plan Items, but Full Execution Remains To Be Seen

PHMSA has developed action plans for both the special permit and approval processes in response to our findings and has completed several items to date. As shown at right, a number of these were included in both action plans, as we found the two processes shared many of the same weaknesses (e.g., granting special permits and approvals without documenting applicants' proposed level of safety or considering their prior safety incidents and regulatory violations). Exhibits A and B list all action plan items.

PHMSA's Completed Action Plan Items for Special Permits and Approvals

- ✓ Developing and publishing written policy to clarify that special permits and approvals are issued to member companies only, not to the association or organization.
- ✓ Revising policy and procedures to ensure that an "equivalent level of safety" determination is met and fully supported with safety documentation evaluations.
- ✓ Revising policy and procedures to ensure that applicant fitness determinations are well-founded and fully supported.
- ✓ Establishing formal standard operating policies and procedures for the Special Permits and Approvals Program and providing training to program employees on the new procedures.

In addition, PHMSA has developed action items specific to each program.

[5] This permit holder is authorized to transport certain explosives, oxidizers, corrosive and combustible liquids, and blasting caps on the same truck. We first advised PHMSA of this company's safety record in July 2009, and PHMSA has since taken action to address it. In February 2010, PHMSA issued a notice of intent to terminate the company's special permits.

For special permits, these include more compliance audits of permit holders and a plan to modernize the information technology system that supports the program. For approvals, these include developing a policy for publishing them in the Federal Register to allow for greater transparency. Currently, only special permits are required to be published.

However, at least two action items remain outstanding for both special permits and approvals, and full implementation is not likely to occur for several years:

- PHMSA has an open timeframe for addressing special permits and approvals issued to trade associations. We recommended in March 2010 that PHMSA require companies to apply under its new policy, which would include an evaluation of fitness and level of safety. PHMSA states that this process depends on the number of companies that elect to apply and available resources.

- PHMSA estimates it will take 5 years and $25 million to improve its hazardous materials safety data collection and analysis. This system is part of PHMSA's plan to modernize its information technology and is an important step to develop a risk-based, data-driven oversight strategy. At this time, it is uncertain whether funding will be available, and PHMSA has not developed a funding contingency plan.

We are encouraged by PHMSA's response to our concerns, and its action plans represent progress toward its mission of safety. However, more work remains to ensure they are executed as intended. We will continue to monitor PHMSA's progress and its means to measure effectiveness.

PHMSA'S NEWLY IMPROVED SAFETY PROCEDURES ARE NOT BEING CONSISTENTLY FOLLOWED

PHMSA has taken commendable action to establish formal standard operating policies and procedures for the Special Permits and Approvals Program. However, our ongoing work shows that personnel are not consistently complying with PHMSA's new safety measures for reviewing and authorizing special permits and approvals. We examined 20 new, renewed, and "party-to" special permits[6] and 22 new and renewed approvals issued since January 1, 2010, and found problems with procedures for assessing applicants' fitness and level of safety—both for individuals and trade associations—and coordinating with other agencies.

[6] A party-to application applies only to special permits and is a request to "piggy-back" on a new or existing permit.

Special Permit and Approval Applicants' Fitness and Level of Safety Are Still Overlooked

We continue to find instances where PHMSA's evaluations of applicants fall short in verifying that the applicant is fit to carry out the terms and conditions of the special permit or approval and will provide a level of safety that meets or exceeds what is specified in the Hazardous Materials Regulations. Specifically, with regard to applicant fitness, we found:

- For 4 of the 20 special permits, applicant fitness determinations were not well-founded or fully supported. For example, in one renewal application the PHMSA transportation specialist (project officer) determined that the applicant was not fit based on an evaluation of the applicant's safety history. However, the special permit was still renewed even though the fitness problems cited in the evaluation form were not addressed.

- For 9 of the 22 approvals, applicant fitness determinations were similarly overlooked. For example, in one explosive classification approval request the transportation specialist determined the company was not fit based on FMCSA inspection data. The data showed that drivers were put out of service 22 percent of the time based on roadside inspections, which was more than three times the national average.[7] The company was still approved without explanation even though PHMSA's new procedures require further investigation when company inspection data exceeds the national average.

In addition, we question the reliability of safety history information PHMSA used to determine companies' fitness in all 20 permit and 22 approval applications. Special Permits and Approvals Program personnel rely on information from PHMSA's recently deployed Hazardous Intelligence Portal (HIP).[8] However, we compared safety history information for companies we reviewed in 2008 to the HIP data and found that the HIP contained fewer incidents and serious incidents.[9] For example, for 1 company in our 2008 review, safety history information disclosed 53 incidents, 12 of which were serious. Yet, the HIP only disclosed 15 incidents, 6 of which were serious. We brought this discrepancy to PHMSA's attention and suggested that it perform a data quality check of the HIP.

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[7] The out-of-service status reflects one or more out-of-service violations in a single inspection, such as the driver of the vehicle exceeded the hours of service rule.

[8] The Hazardous Intelligence Portal provides access to incidents/accidents, inspection, registration, permits and approvals, and other hazardous materials information about companies that interact with the U.S. Department of Transportation.

[9] We compared data in the HIP to data in PHMSA's Hazardous Materials Incident Reports Database. This database is a search tool that contains 10 years of incident information on shippers and carriers of hazardous materials. Information is submitted by any individual or company involved in a hazardous materials incident.

With regard to applicants' proposed level of safety, we found:

- For all 20 special permits, PHMSA's application evaluations did not fully support or document safety determinations. These were mostly renewal or party-to permits (one new), which were based on evaluations PHMSA did several years ago when assessing the original permit. We cited this concern before this Committee in September 2009. Yet, it does not appear that PHMSA has addressed this issue even though its action plan states that PHMSA "will review all special permits to identify those that should be reevaluated because of safety concerns and those for which the prior safety justification requires further analysis and review."

- For 4 of the 22 approvals, PHMSA's application evaluations similarly lacked safety documentation. For example, PHMSA processed an approval that allows transport of vehicles installed with prototype lithium ion battery assemblies. Normally (without an approval), transportation of these vehicles with such batteries would be prohibited because the batteries are still undergoing testing to determine their safety. Yet, PHMSA's evaluation of the approval application did not include an assessment of the risks involved during transport or the applicant's ability to provide an equal level of safety.

We also found that PHMSA continued to grant "blanket authorizations" for special permits and approvals to trade association member companies without verifying their fitness to carry out the terms and conditions. This is occurring despite PHMSA's policy statement of August 14, 2009, in which it stated, "Prior to issuing a special permit to the members of the association, PHMSA will assess the fitness of the individual members in accordance with established policies and procedures."

However, between January 1, 2010, and March 31, 2010, we found that PHMSA granted:

- Three special permits to trade associations without any fitness checks of their member companies. Instead, PHMSA performed fitness checks on an association, which does not transport hazardous materials as specified in the permit. Our review of several companies from two of the trade associations found they had poor safety histories. For example, 1 member company had 14 incidents (4 serious) and 11 violations, all within the last 4 years.[10] This company is allowed to operate under a special permit that authorizes transportation of ammonia solution containers—a poisonous and flammable material—that does not meet certain requirements of the Hazardous Materials Regulations. Also, in the permit renewal application, the trade association representative stated there had

[10] For the period November 2001 to April 2008, this member company had a total of 43 violations.

been more than 35,000 shipments with no incidents. Since this was not the case, the situation warrants closer scrutiny from PHMSA.

- Four approvals to trade associations without any fitness checks of their member companies. We checked the fitness of three member companies of one trade association and found that one company had four violations and the other two each had three violations, all within the last 4 years.

Coordination Still Lacking for Special Permits and Approvals

In its action plans, PHMSA committed to review and enhance procedures for coordinating the issuance of special permits and approvals with other Operating Administrations. PHMSA subsequently established mode-specific coordination requirements within its standard operating procedures. Interagency coordination is key to safety, as other agencies may have critical safety data on applicants seeking a permit or approval and share responsibility for hazardous materials transported within their respective modes (e.g., FAA for transport via aircraft and FMCSA for transport via highways). However, we found that coordination was still lacking in several instances. Specifically:

- For 18 of the 20 special permits we examined, PHMSA did not coordinate with Operating Administrations before authorization.[11] One of these was a renewed special permit authorizing the holder to transport hazardous materials on bulk explosives vehicles. In July 2009, we issued a management advisory to PHMSA citing concerns with its ineffective coordination and oversight of these approvals in light of the number of serious rollover incidents and violations.

- For 18 of the 22 approvals we examined, PHMSA did not coordinate with Operating Administrations before authorization. One such approval allows the holder to ship prototype lithium ion cells and batteries aboard cargo aircraft. Contrary to its standard operating procedures, we found no evidence that PHMSA coordinated with FAA. Both FAA and the National Transportation Safety Board have long-standing safety concerns with the shipment of lithium batteries. In addition, representatives from the Air Line Pilots Association state that shipment of lithium batteries by air should be strictly prohibited until new regulations are in place to ensure the safe transport of hazardous materials. However, this is not expected to occur until December 2010.

We recognize that many of the safety procedures are new and that it will take time to fully and effectively implement them. However, many of the procedures that are being overlooked—such as determination of applicants' fitness—can significantly impact safety. PHMSA recently began enhancing its controls by establishing a

[11] One renewal application did not require coordination with the modal administration.

Quality Assurance Team to assess whether personnel are fully and consistently complying with each step in special permits and approvals process.

EMERGING ISSUES RAISE QUESTIONS ABOUT FUNDAMENTAL OPERATING PROCEDURES NEEDED TO PROMOTE SAFETY

We have identified a number of emerging issues with safety implications that reinforce the need for PHMSA to conduct a baseline assessment of its operations. Earlier this month, we issued a management advisory to PHMSA, identifying ineffective processes for reviewing and authorizing explosive classification approvals and overseeing explosives testing labs.[12] PHMSA has taken actions in response to our advisory but must be more proactive in continually identifying and addressing safety issues.

Shortcomings in the Process for Reviewing and Authorizing Explosive Classification Approvals

We identified three shortcomings in the explosive classification approvals process that raise questions as to whether explosive approvals are based on correct classifications or appropriately authorized.

First, PHMSA lacks uniform, formalized guidance for classifying and approving new explosives.[13] PHMSA has not formalized its guidance manual for examining and classifying explosive hazardous materials, which has led to varying definitions within PHMSA and industry of what constitutes a "new explosive" and how the regulations apply. The Hazardous Materials Regulations define a new explosive as produced by a person who has never produced that explosive or is producing it with changes to the formulation, design, or process that could alter its properties. However, the regulations do not specify what would constitute such a change and when testing would be required, and this can lead to conflicting classification decisions.[14]

For example, one approval we reviewed involved a company that wanted to use an existing explosives approval to manufacture the same product at another location without having the relocated product retested. A specialist in PHMSA's Office of Special Permits and Approvals (SPA) and a chemist in the Office of Hazardous Materials Technology (HMT) believed that the company would have to retest the product because the manufacturing process at the new location could be different and

[12] PHMSA has authorized four testing labs (examining agencies) that provide independent third-party analysis in recommending a hazard class (PHMSA has since revoked one lab's authorization).

[13] In discussion over this issue, PHMSA stated it has published Standard Operating Procedures (SOP) for the Evaluation and Issuance of Explosive Classification Approvals. However, unlike the draft guidance manual, the SOP is strictly internal. The draft guidance manual was intended to assist manufacturers, shippers (clients), and examining laboratories in ensuring that uniform explosive hazard classification procedures, data gathering techniques, and reporting methods are employed.

[14] 49 C.F.R. § 173.56 (2010).

may alter the product's explosive properties. However, according to the HMT chemist, his supervisor stated the explosive had been previously approved and that the company's request should be granted. Had it not been for our review, PHMSA would have approved the request without having the product retested or examining the company's safety record, which indicated a 6-year history of poor explosives safety compliance. PHMSA has a draft guidance manual published in 2002 (commissioned by the former Associate Administrator in 1998), which does address this and other issues for PHMSA employees, testing lab staff, and manufacturers. The draft guidance states that "An explosive substance developed, produced, and classed by a specific manufacturer and relocated or co-located to a different manufacturing plant or facility should be examined and reclassed." However, the guidance was not finalized because PHMSA's former Director for the Office of Hazardous Materials Technology deemed the Hazardous Materials Regulations to be sufficient guidance.

Second, PHMSA did not adhere to regulatory requirements for reclassifying an explosive. PHMSA did not follow Hazardous Material Regulations when it approved a company's request to reclassify an explosive device to a non-explosive class.[15] Both HMT and SPA offices approved the reclassification without a report from an authorized testing lab, which is required by regulations, and despite conflicting chemist conclusions.[16] Specifically, the company requested that its product (a fire suppression device) be reclassified as a non-explosive, which would allow the product to be shipped in the same quantity under less stringent packaging requirements on both passenger and cargo aircraft. The company included data and video on its own product tests and subsequent written justification in January 2008—but never submitted any external test reports from PHMSA-authorized testing labs. The HMT chemist who performed the technical review disapproved the reclassification request because the company's video showed that the effects of an explosion were not completely confined within the device as required by regulations for non-explosive classifications; this could also impact the safety of packaging and shipping.[17]

Despite the chemist's disapproval and the company's failure to meet regulatory requirements, the HMT supervisory chemist overturned the chemist's recommendation and forwarded the reclassification request to SPA. SPA did not question the lack of a required test report and authorized the reclassification and shipping method by air—without coordinating the approval with FAA.[18] As a result,

[15] PHMSA approved reclassification of the explosive device from explosive class 1.4S (articles, pyrotechnic) to a 4.1 flammable solid class (non-explosive).

[16] Under 49 C.F.R .173.56(i), PHMSA could reclassify an explosive based on "experience and other data," but this authority was not invoked when the reclassification was granted.

[17] According to the Hazardous Materials Regulations, a substance is not in the explosive class if the effects of the explosion are completely confined within the article. This is consistent with UN Recommendations on the Transport of Dangerous Goods Model Regulation 15th Revised Edition, which states that explosive articles—except devices containing explosives substances—in such a quantity or of such a character that their inadvertent or accidental ignition or initiation during transport shall not cause any effect external to the device either by projection, fire, smoke, heat or loud noise.

[18] Although not required, we have previously recommended better coordination with the appropriate Operating Administration, and this is an example of why coordination is important for safety reasons.

the chemist who initially disapproved the reclassification filed a complaint with our office.

Finally, PHMSA lacks a formal process for effectively resolving internally contested safety decisions. PHMSA's internal review of the complaint referenced above was not conducted independently, and its results were not supportable. Specifically, PHMSA assigned the Director of HMT (the complainant's manager) and the Director of SPA (the person who concurred with the reclassification) to investigate the complaint. There were no internal controls to prevent a conflict of interest during the investigation or ensure the complainant remained anonymous as requested. In response to our findings, PHMSA has stated that it will assign staff not involved in the complaint for future internal investigations and on April 5, 2010, issued an order establishing a Safety Review Board to resolve internally contested safety decisions.

In addition, PHMSA's internal review of the complaint noted that the company had submitted a test report, recommending a non-explosive classification, from a PHMSA-authorized testing lab. However, we found the test report did not exist, and a lab official confirmed that testing for this product was not performed at their facility. Company officials who requested the reclassification also stated that rather than submitting a report from the lab to PHMSA, they had submitted a copy of another company's examination report for a different product tested by that lab. The company officials said they believed that product, which the lab had classified as a non-explosive, was similar to their fire suppressant device. However, any "similarity" in the product does not change the fact that a test report from a PHMSA-authorized testing lab on the actual product is required by the Hazardous Materials Regulations. In addition, after examining the test report for the product that had been reclassified, a PHMSA chemist noted it was not even similar to the disputed product.[19] PHMSA did not acknowledge these issues in its internal review, which further underscores the need for impartial investigations and a revised approach for conducting them.

PHMSA has agreed to have the devices tested at its own expense by an authorized testing lab. However, in the interim, the company is still allowed to ship the device by air as a non-explosive. In light of the potential safety issues, we have advised that PHMSA should reinstate the device to its original classification of explosive until the testing lab's results are published and provide our office with a properly documented decision on the reclassified explosive.

[19] The tested product was only the main propellant substance, and not the entire device itself (i.e., the main propellant substance, confined in a steel case with an electrical igniter and a booster propellant to get it burning hot).

Ineffective Oversight of Authorized Explosives Testing Labs

Our recent advisory to PHMSA also noted ineffective safety oversight of its four authorized explosives testing labs.[20] Over the last 10 years, PHMSA has not conducted fitness inspections or safety reviews at any of these labs. As a result, there is limited assurance that the labs are operating under safe conditions or meeting the terms and restrictions of their approval to test explosives (see example).

Example of Testing Lab Approval Criteria

- ✓ Facilities where explosives testing is conducted must have a valid Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives license at time of testing.
- ✓ No single revenue source [companies submitting products for testing] may provide more than 20 percent of the lab's gross income during the reporting period.
- ✓ Testing labs must have at least 10 years of experience in the examination, testing, and evaluation of explosives *and must not be involved in manufacturing or marketing explosives.*

To maintain their approval to operate, testing labs must report annually to PHMSA on (1) how many explosives they tested and approved, (2) what companies requested testing, and (3) whether the lab complied with its approval criteria. If PHMSA determines—either through safety reviews or the annual reports—that a testing lab is not meeting its approval criteria, PHMSA has the authority to modify, suspend, or terminate any explosives approvals issued to companies. However, we found that PHMSA did not question labs that either violated their approval criteria or failed to submit the required annual activity reports. For example:

- Two testing labs are subcontracting their responsibilities to examine and test explosives to two companies that are not PHMSA-authorized testing labs, both of which manufacture explosives. This presents a conflict of interest that would prohibit those companies from directly obtaining a PHMSA approval to operate as a testing lab under the Hazardous Materials Regulations.

- At one testing lab, annual activity reports and certificates of compliance were at least 5 years overdue. For three other labs, PHMSA could not confirm whether the reports or certificates had actually been submitted. PHMSA is now working with the testing labs to collect the required information.

In response to our findings, PHMSA has developed new guidelines to strengthen oversight of explosives testing labs. These include new processes for how labs review applications and new renewal requirements for their approvals. PHMSA has also established a team to inspect testing labs. The team has inspected all four labs over the last month, and its reviews thus far indicate the need for enhanced oversight. For

[20] To become a PHMSA-authorized testing agency, any organization or person seeking designation must apply in writing to the Associate Administrator for Hazardous Materials Safety. The application must include, among other things, documentation that supports the applicant's qualifications, knowledge, and ability to conduct explosives examination and testing. Upon receiving PHMSA's approval, the testing agency must abide by a series of conditions, such as not manufacturing or marketing explosives.

example, the team found that one lab had been sold and was under new ownership; yet, the new ownership never filed for a new approval. This was the same lab that had failed to submit annual activity reports for 5 years, and PHMSA has since revoked the lab's authorization to examine and test explosives.

CONCLUSION

While the transport of hazardous materials is a vital part of our Nation's economic and energy resources, it must be balanced with robust oversight to ensure safety. We are encouraged by PHMSA's commitment and prompt efforts to establish safety improvements in response to our work. However, given our past findings and emerging issues that appear fundamental to successfully achieving its mission, PHMSA would benefit from a baseline reassessment of its special permit and approval standard operating procedures and policies and oversight roles to ensure they are working as planned. We will continue to monitor PHMSA's progress as it continues these important efforts to strengthen the Special Permits and Approvals program and achieve its mission of safety.

Mr. Chairman, this concludes my statement. I would be happy to address any questions you or other Members of the Committee may have.

EXHIBIT A. STATUS OF PHMSA'S ACTION PLAN ITEMS FOR SPECIAL PERMITS

Action Item	Completed	Open	Notes
1. Rescind or reissue special permits issued to trade associations		✓	OIG takes exception. PHMSA still needs to rescind and reissue to actual member companies.
2. Conduct a broad-based top-to-bottom special permit program review	✓		
3. Evaluations of Safety Documentation	✓		
4. Fitness determinations of Interagency Coordination	✓		OIG takes exception. "Party-to" special permits are not coordinated with FAA and FRA
5. Develop/Implement inspection procedures for determining fitness of applicant	✓		
6. Develop Fitness Determination Criteria	✓		
7. Develop Procedures for Renewals	✓		
8. Develop Standard Operating Procedures for Special Permits	✓		
9. Develop Stakeholder Brochure	✓		
10. Develop plan to enhance data collection to support IT modernization	✓		
11. Develop IT modernization strategy		✓	Open. This item involves a 5-year implementation plan
12. Review special permits identified for further assessment		✓	
13. Incorporation of select special permits into the Hazardous Materials Regulations		✓	
14. Update website	✓		Ongoing action item
15. Issue letter of intent to all 83 grantees modifying the 4 special permits authorizing bulk explosive trucks	✓		
16. Fitness review of bulk explosive trucks	✓		
17. Documentation review of SP 8554, 10751, 11579 & 12677	✓		
18. Risk assessment on bulk explosive trucks	✓		
19. Rescind/modify bulk explosive truck special permits	✓		
20. Stability control		✓	Long-term action item
21. Emergency response		✓	Long-term action item
Total	**15**	**6**	

EXHIBIT B. STATUS OF PHMSA'S ACTION PLAN ITEMS FOR APPROVALS

Action Item	Completed	Open	Notes
1. Conduct a broad-based top-to-bottom review of Approvals program	✓		
2. Rescind or reissue approvals issued to trade associations		✓	OIG takes exception. PHMSA still needs to rescind and reissue to actual member companies
3. Evaluations of Safety Documentation to ensure equivalent level of safety	✓		
4. Fitness determinations of Interagency Coordination	✓		OIG takes exception. Explosive classification approval should be coordinated with modes—especially FAA if explosive is shipped by air
5. Develop/Implement inspection procedures for determining fitness of applicant	✓		
6. Develop Fitness Determination Criteria	✓		
7. Develop Standard Operating Procedures for Approvals	✓		
8. Develop policy for publishing approvals in Federal Register	✓		
9. Eliminate backlog of approval processing		✓	To be completed by May 2010
10. Review approvals for expiration dates		✓	
11. Develop plan to enhance data collection to support IT modernization	✓		
12. Develop Standard Operating Procedures for Certification Agency Approvals (including explosive testing labs)	✓		
13. PHMSA Safety Review Board	✓		
14. Develop IT modernization strategy		✓	
15. Approvals identified for further assessment	✓		May be a part of Action Item 10, so not counted as "open."
16. Incorporation of select approvals into the Hazardous Materials Regulations		✓	
17. Update website	✓		Ongoing action item
Total	**12**	**5**	

Questions for the Record
Submitted by Chairman James L. Oberstar
for April 22, 2010, Testimony

Question 1: Mr. Scovel, PHMSA has testified today that it has moved out on actions to address all ten recommendations in your March 2010 report and that work on five recommendations has been completed. Are PHMSA's actions adequate enough to address your recommendations? Of the five recommendations remaining, what do you consider to be the most critical ones that PHMSA should focus its efforts on?

Answer: Overall, we found that PHMSA's actions taken for the five recommendations are reasonable, and we consider them resolved and subject to follow up. Of the five open recommendations, three require focused management attention from PHMSA:

1. *Fully addressing company fitness and level of safety for existing special permits issued to trade associations representing over 5,000 companies.* We recommended that PHMSA require these companies to reapply under the new policy guidelines, which now require an evaluation of a company's fitness and level of safety.

   We first raised our concerns about this issue at a hearing before this Committee in September 2009. We stated that special permits issued to trade associations must be issued to member companies only, not to the associations. However, as part of our follow-up work before the April 22 hearing, we found PHMSA continued to grant special permits and approvals to trade associations, even though the Deputy Secretary explicitly stated during the September hearing that "No permits will be issued to associations. We are in the process, as part of the action plan, of making it clear that permits are not issued to associations. After appropriate review, they are issued to companies."

   PHMSA management stated that rescinding all the permits at once would create an administrative burden with estimates of at least 20,000 to 30,000 entities being affected. Therefore, PHMSA continued to issue the "blanket authorization" special permits but changed the grantee from the association to "members of the association." To address this issue, on May 4, 2010, PHMSA issued a Policy Statement stating that a special permit or approval is not issued to the association itself or collectively to the members of the association, and PHMSA is in the process of modifying (or terminating when appropriate) special permits and approvals granted to association members collectively. PHMSA intends to issue special permits and approvals only to individual companies and only upon determination that the entity is fit to operate under the terms and conditions of the special permit or approval. Although PHMSA expects over 20,000 companies to be affected, it needs to expedite the process of verifying individual companies are fit to carry out the terms and conditions of the permit.

2. *Developing a 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. PHMSA is working to more clearly define the process and criteria used to determine the fitness of applicants for special permits and approvals. This action is to be completed by the end of June 2010. In the interim, PHMSA conducts fitness reviews of all entities applying for a special permit or approval using historical data records of incidents and violations. However, we found this new process was not being consistently followed. Our recent review found that for 4 of the 20 special permits and 9 of the 22 approvals, applicant fitness determinations were not well-founded and fully supported.

3. *Conducting and preparing complete evaluations to document that 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's Office of Hazardous Materials Technology agreed to conduct and prepare complete evaluations, and in September 2009, PHMSA developed new evaluation forms for both special permits and approvals. However, our April 2010 review found that evaluations do not fully support or document safety determinations. Specifically, we found that all 20 of the special permits and 4 of the 22 approvals were not documented or fully supported.

Question 2: Mr. Scovel, PHMSA has testified today that it has completed implementation of all the deliverables with specific target dates in its special permits and approvals action plans. Would you agree with this statement?

Answer: PHMSA has made good progress since we issued our first management advisory last July, and we can confirm that all 38 deliverables outlined in the action plans have been implemented. These include establishing new standard operating procedures for special permits and approvals, reviewing and enhancing interagency coordination, and developing an action plan for enhancing data collection and analysis. However, Implementation is only in the initial stages; whether PHMSA will successfully execute them and correct longstanding problems with processes for transporting hazardous materials remains to be seen.

While we cannot confirm whether all the deliverables will achieve the desired improvements and outcomes, we can attest that some are not. For example, while PHMSA has taken action to establish formal standard operating policies and procedures for the Special Permits and Approvals Program, our recent work shows that Office of Special Permits arid Approvals personnel are not consistently complying with PHMSA's new safety measures for reviewing and authorizing special permits and approvals. We examined 20 new, renewed, and "party-to" special permits and 22 new and renewed approvals issued since January 1, 2010, and found problems with procedures for assessing applicants' fitness and level of safety—both for individuals and trade associations—and coordinating with other Operating Administrations. Therefore, continued management attention is needed.

Question 3: Mr. Scovel, in your testimony you state that PHMSA continues to grant "blanket authorization" for special permits and approvals to trade association member companies without verifying member companies' fitness to carry out the terms and conditions of the permit, and continues to do so today. This is after the Department testified before this Committee that "no permits will be issued to associations." Why is this practice continuing? How should PHMSA address this issue?

Answer: At the time of the September hearing, and when we first raised this concern, the practice of continuing to grant permits and approvals to trade associations was to be only an interim measure until the backlog of current applications was cleared and resources became available. However, PHMSA stated that rescinding all the permits at once would create an administrative burden with estimates of at least 20,000 to 30,000 entities being affected. So, PHMSA continued to issue the blanket authorization special permits but changed the grantee from the association to "members of the association."

PHMSA has moved out to resolve our concerns by issuing a Policy Statement subsequent to the April 2010 hearing, but it has not been fully executed. It states that for any special permit issued to association members collectively, PHMSA intends to provide notice of modification or termination to the association and each member whose name and address is on file with PHMSA. PHMSA intends to issue special permits and approvals only to individual companies and only upon determination that the entity is fit to operate under the terms and conditions of the special permit or approval. This remains an important issue to be resolved, and PHMSA should provide periodic updates to the Committee on how the backlog is being reduced.

Question 4: Mr. Scovel, in your testimony you state that PHSMA should conduct a baseline assessment of its operations. Based on its testimony, PHMSA has stated that a top to bottom review of its special permits and approvals program had been conducted. How would the baseline assessment you are recommending differ from PHMSA's top to bottom review?

Answer: Our previous work identified safety concerns and issues with PHMSA's process for granting special permits and approvals to transport hazardous materials. While PHMSA has conducted a top-to-bottom review to address our concerns, we have continued to find problems with PHMSA's Special Permits and Approvals Program that call for a baseline assessment beyond what PHMSA has already done to ensure that these weaknesses are not indicative of systemic issues or flaws in operations. Specifically, we found:

- The practice of issuing special permits and approvals to trade associations without verifying member companies' fitness to carry out the terms and conditions of the permit. As an interim measure, PHMSA is issuing special permits or approvals collectively to the members of the association and stating the responsibility for compliance falls directly on the individual member who is authorized to perform specific functions under the terms of the special permit. This interim practice, however, still overlooks individual company fitness.

- Shortcomings in the process for reviewing and authorizing explosive classification approvals. These include among other things the lack of uniform, formalized guidance for examining and classing explosives hazardous materials and adherence to regulatory requirements for reclassifying an explosive.

- Ineffective safety oversight of PHMSA-authorized test labs that examine and test explosives.

- Inconsistent execution of its new safety measures for granting special permits and approvals, including inadequate coordination of special permits and approvals with the affected Operating Administration.

Therefore, another baseline assessment is needed and should examine ways to reconfigure operations and procedures to ensure PHMSA has an effective process to evaluate explosive classification approvals and can provide effective oversight of authorized testing labs. While PHMSA has generally responded positively to our findings, PHMSA must take a more active approach overall to resolving safety issues.

Question 5: Mr. Scovel, in your testimony you state that PHMSA, in response to your advisory, implemented several action items to address your concerns related to oversight of explosives classification approvals. Are these action items adequate enough to improve the effectiveness of oversight of explosives classification approvals?

Answer: The action items PHMSA has committed to, if properly implemented, should improve the effectiveness of explosives classification approvals. The following provides a summary of PHMSA's actions and issues that still need resolution. Specifically, PHMSA has:

- developed Standard Operating Procedures (SOP) for the Evaluation and Issuance of Explosive Classification Approvals as part of its Approvals Action Plan. However, the SOP is no substitute for the draft Guidance Manual for Examining and Classing Explosive Hazardous Materials. Unlike the draft guidance manual, the SOP is strictly internal. The draft guidance manual was intended to assist manufacturers, shippers, and laboratories in ensuring that uniform explosive hazard classification procedures, data gathering techniques, and reporting methods are employed. PHMSA needs to update and formalize its guidance manual.

- required that both companies we identified in our advisory have their products retested by a PHMSA-authorized test lab. PHMSA agreed to pay to have one company's devices retested. However, we do not believe Federal dollars should have been used; the company should have paid for the tests because (1) it failed to obtain them as required when submitting the original reclassification request and (2) during re-testing, the company's product was determined to be an explosive. An even larger concern is that, in the interim, the company is still allowed to ship the device by air as a non-explosive. In light of the potential safety issues, PHMSA should immediately reinstate the device to its original classification of an explosive. However, PHMSA is awaiting a response to its letter to the company regarding why the devices should not be reclassified as explosives.

- issued an order establishing a Safety Review Board to resolve internally contested safety decisions. Had such a process been in place, the disagreement and problems referenced in our advisory and statement may have been avoided. However, internal review of the complaint was not conducted independently, and its results were not supportable.

- established a team to inspect testing labs. The team has inspected all four labs over the last month, and its reviews thus far indicate the need for enhanced oversight. For example, the team found that one lab had been sold and was under new ownership; yet, the new ownership never filed for a new approval. Furthermore, this lab had failed to submit annual activity reports for 5 years. Therefore, PHMSA revoked the lab's authorization to examine and test explosives.

Question 6: Mr. Scovel, going forward, what further actions should PHMSA take to improve the effectiveness of its Special Permits and Approvals Program?

Answer: We see several immediate-term actions that PHMSA must take over the next several months to improve the effectiveness of its Special Permits and Approvals Program.

- Apply New Safety Measures to Special Permits for Trade Associations: While PHMSA has a policy to prohibit the issuance of special permits and approvals to trade associations, it still has not been fully executed. In the interim, PHMSA still allows the associations' member-companies to operate under the associations' existing special permits or approvals. We believe additional measures are needed to include putting the burden on the industry associations to have each member company for the last 4 years certify the number of shipments made under the special permit or approval and the number of hazardous materials incidents and enforcement actions for the company in total. Also, PHMSA could reach out to the Federal Aviation Administration (FAA), the Federal Motor Carrier Administration (FMCSA), and the Federal Railroad Association (FRA), where possible, to perform the individual member company fitness determinations and verify industry certifications, and to other parts of the Office of Hazardous Materials Safety to assist with processing the anticipated large volume of applications expected from the individual members.

- Evaluate Applicant Level of Safety: PHMSA needs to follow through on its commitment to fully evaluate and document that 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. To do so, PHMSA must review all currently active special permits and approvals and identify those that should be reevaluated.

- Formalize Explosive Classification Guidance: PHMSA needs to follow through on its commitment to formalize and issue explosive classification guidance so industry has clarification on the Hazardous Material Regulations, particularly the definition of a new explosive.

- Clarify Standard Operating Procedures for Coordinating with the Modes: PHMSA has established formal coordination procedures with each of the modes; however, they do not specify whether certain types of Special Permits and Approvals require coordination. While the PHMSA Administrator stated in her testimony that all applications will be coordinated with the modes, the Special Permits Program SOP for example, states coordination with FAA will include new, modified, and renewal special permit applications but does not mention party-to permits. Likewise, the Approvals Program SOP states modes will be afforded the opportunity to comment on applications under review but also states the Special Permits and Approvals Program Office will evaluate and approve certain types of approvals such as classification of explosives and does not mention coordination with the modes.

- Follow Through on New Oversight Guidelines for Authorized Testing Labs: Based on our April 7, 2010, Advisory on Explosives Classifications, PHMSA committed to (1) revise the approvals issued to the four testing labs to include contractor names and test site locations used by the labs and (2) establish expiration dates for each of the lab approvals.

- Modernize IT Systems: PHMSA needs to include an upgrade to the HAZMAT Intelligence Portal (HIP) that includes assigning or using specific business identification numbers (such as a Dunn and Bradstreet Data Universal Numbering System)[1] to companies to alleviate confusion with similar company names when searching the system.

[1] The Data Universal Numbering System, abbreviated as DUNS, is a system developed and regulated by Dunn & Bradstreet, which assigns a unique numeric identifier to a single company.

Question 7: Mr. Scovel, according to your testimony, applicant fitness determinations were not well-founded or fully supported. In one example you reported that the PHMSA project officer made a determination that the application applying for a special permit was not fit based on an evaluation of the applicant's safety history, but the special was still renewed. Please provide us specifics on this example, including the application number of the special permit and the person requesting the special permit.

Answer: Applicant fitness determinations were not well-founded or fully supported. The following provides an assessment and chronology of this particular case. On February 23, 2010, Air Products and Chemicals, Inc. submitted to PHMSA an application for renewal of DOT-SP 12589 that authorizes the transportation in commerce of tungsten hexafluoride in certain cylinders that previously contained hydrogen fluoride. Tungsten hexafluoride is an extremely corrosive compound that attacks any tissue and prolonged exposure could be fatal.

In the Special Permit Safety Evaluation Form for Applications To Renew an Existing Special Permit (dated March 22, 2010), the Program Specialist, Office of Hazardous Materials Special Permits and Approvals, noted that the shipping history of Air Products and Chemicals, Inc. indicated safety issues that should be addressed. A check of the company's shipping history (HIP Tracking Number 2010020688) over the last 4 years disclosed multiple incidents, including three serious incidents and hundreds of enforcement violations for failure to comply with both Hazardous Materials Regulations and Federal Motor Carrier Safety Regulations. As required by PHMSA's Special Permits Program Standard Operating Procedures, based on its safety history, this company qualified as a candidate for the advanced evaluation—meaning that PHMSA would conduct an in-depth review of the applicant's safety history. We found no evidence of such an evaluation, and the company's request for renewal for was granted on March 24, 2010.

Question 8: Mr. Scovel, according to your testimony, in 90 percent of the special permits you reviewed PHMSA did not coordinate with the impacted mode of transportation—for example, the Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA) or Federal Railroad Administration (FRA). Please provide us specifics on these instances that you reviewed, including special permit application numbers.

Answer: We selected and reviewed the files for 20 special permits issued during the period January 1, 2010, to March 31, 2010, and found 18 special permits for which PHMSA had not coordinated with FAA, FMCSA, or FRA. See the table below for the specifics on each permit reviewed.

Special Permit Number	Special Permit Type	HIP Tracking Number	Company Name	PHMSA Coordinated with Modes
10751	Renewal	2010010395	Wampum Hardware	No
12589	Renewal	2010020688	Air Products & Chemicals, Inc.	No
10922	Renewal	2010010127	FIBA Technologies, Inc.	No
7616	Renewal	2010010942	Kinder Morgan	Yes
13124	Renewal	2010010145	Brenntag-Mid South	No
12920	Renewal	2010011080	Akzo Nobel Chemicals	No
9610	Party-To	2010020409	St. Marks Powder	No
8723	Renewal	2010010121	Alaska Pacific Powder Company	No
11579	Renewal	2010010140	Buckley Powder Company	No
8453	Renewal	2010010529	Midland Powder	No
14957	New	2010010295	Sika Corporation	No
5951	Renewal	2010020314	DPC Industries, Inc.	No
13124	Renewal	2010020826	Harcros Chemicals	No
11761	Renewal	2010010341	Dow Chemical Company	Not required
12995	Renewal	2010011000	Dow Chemical Company	No
13402	Renewal	2010010153	Linde Gas North America LLC	No
3004	Party-To	2010010173	Linde Gas Puerto Rico	No
12332	Renewal	2010010896	Institute of Scrap Recycling	No
11836	Renewal	2010020861	National Association of Chemical Distributors	No
12332	Renewal	2010010857	North American Automotive Hazmat Action Committee	No
		Totals		**No = 18** **Yes = 1** **Not Required = 1**

TESTIMONY
Before

The United States House of Representatives
Committee on Transportation and Infrastructure

Hearing on

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

Presented By

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April 22, 2010

Chairman Oberstar, Ranking Member Mica, and other members of the Committee, I sincerely appreciate the opportunity to appear before you this morning to discuss Hazardous Materials Approvals, a matter of vital importance to the U.S. fireworks industry.

I am William A. Weimer, Vice President and General Counsel of Phantom Fireworks headquartered in Youngstown, Ohio. I also currently serve as the President of the American Pyrotechnics Association (APA).[1]

Phantom Fireworks is operated by its parent company, B. J. Alan Company, founded over 30 years ago in Youngstown, Ohio. Phantom Fireworks is the largest retailer of consumer fireworks in the United States, operating more than 1,200 consumer fireworks retail sales locations nationwide. I am happy to report that we operate retail consumer fireworks sales or distribution facilities in 14 congressional districts represented by members of the Committee including Ranking Member Mica, as well as Representatives Altmire, Boccieri, Brown, Carnahan, Carney, Dent, Diaz-Balart, Latta, Hirono, Mack, Schmidt, Shuster, and Teague.

Phantom Fireworks employs over 400 full-time workers. During our busy Fourth of July season, our employment rolls swell to approximately 2,400 total workers. Phantom Fireworks currently holds approximately 800 Approvals issued by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA). On average, we import approximately 1,000 containers of fireworks annually. We transport our products in interstate commerce under the jurisdiction of the Department of Transportation (DOT). We are a very interested stakeholder in today's hearing.

I am here today to convey our concerns regarding the unusual and significant delays in the issuance of Approvals by PHMSA. The delays have already substantially impacted the upcoming 2010 Independence Day season for my company, and the entire fireworks industry.

Background

In order to ensure transport safety in our country, all fireworks are required to have an explosive (EX) Approval issued by the U.S. Department of Transportation's (DOT) Office of Hazardous Materials Safety, Special Permits and Approvals program administered by the Pipeline and Hazardous Materials Safety Administration (PHMSA). These fireworks classification Approvals are only one product class out of many for which PHMSA issues Approvals. Approvals may only be issued if there is a stated authorization within the regulatory code which specifically permits the agency to authorize the activity.

The vast majority of all fireworks devices are manufactured in China, and DOT must issue an Approval for each individual firework before it may be offered for transport to the United States.

[1] The APA is the principal safety and trade association of the fireworks industry representing manufacturers, importers, distributors, retailers, supplier and professional display companies. The APA has over 240 member companies. Along with their subsidiaries, APA member companies are responsible for approximately 90% of the fireworks manufactured, imported, distributed and displayed in the U.S.

Ninety-eight percent of the fireworks Approvals issued by DOT are done in accordance with the procedures set forth in the American Pyrotechnics Association's Standard 87-1, Standard for Construction and Approvals of Fireworks for Transportation. The APA Standard 87-1 is adopted by reference in Title 49 of the Code of Federal Regulations.

The Standard contains detailed manufacturing and performance requirements. Compliance with all of the requirements set forth in the Standard is necessary in order to obtain a classification Approval and an EX Number, including the completion of a thermal stability test, adherence to a strict list of chemical compositions that may be used, construction specifications, details and limits on each pyrotechnic composition used in the item, and labeling for consumer fireworks devices based upon the Federal requirements promulgated by the U.S. Consumer Product Safety Commission (CPSC).

Over the years, DOT has approved and assigned tens of thousands of EX Approvals for individual fireworks devices, many of which were initially tested and classified for transport by the U.S. Bureau of Explosives in the early 1980's. The chemical formulations, or "family recipes," and the manufacturing techniques for fireworks have changed very little in the past century. A roman candle is a roman candle is a roman candle.

These firework devices are fairly generic, yet each company must obtain a classification Approval and unique EX number for these devices to be imported. Moreover, a simple name change, very common in the fireworks industry as we like to market our products based upon current themes, requires a formal application and goes through a full process as a new Approval.

For example, a single factory may make a particular specific product and wrap it with different labels for a half dozen different U.S. importers. They are all importing the exact same product made by the exact same factory, but since each importing company's product has a different name and different packaging, each importing company must apply to PHMSA for a separate and unique EX number for each of these functionally identical products. This obviously results in wasted time, wasted effort, and wasted money expended by both government and industry in obtaining separate EX numbers for identical products. And sadly, innovation is being stymied by this cumbersome process.

Approvals Process Problem

This year, Phantom Fireworks, like the hundreds of consumer fireworks retailers and professional fireworks display companies across this country, will not have one new fireworks product to offer in the professional displays or in our retail facilities, because our EX applications have been pending review and approval at DOT for an unforeseen and seemingly excessive amount of time, ranging anywhere from several months to two years. Had the Approvals been processed on a timely basis, our product orders this year would have been different. The unpredictable and backlogged Approvals process has clearly and negatively affected commerce.

Phantom Fireworks purchases and imports fireworks from many well known fireworks manufacturers in China. A substantial number of these Chinese producers have manufactured and supplied the fireworks industry worldwide for decades. Phantom Fireworks has offices in Guangzhou, the old city of Canton, in Guangdong Province and in Liuyang City in Hunan Province, China. Our personnel work with the factories to monitor quality control and assist with logistics.

Our Chinese producers share our frustration with the U.S. EX number Approvals process. Many Chinese warehouses are full of fireworks products awaiting export to the United States, which is, of course, on hold pending Approvals. Many factories have stopped fireworks production altogether and laid off workers, because their storage warehouses are full. Until some of the fireworks merchandise moves, they cannot keep manufacturing.

In many instances, American importers are required to pay the Chinese factories for product that is sitting in the warehouses in China. Not only are the fireworks products tied up for approximately one year since most fireworks in the United States are sold only between June 20 and July 5th, but so is the money required to purchase this product. The severe delays in receiving EX Approvals has put a significant economic burden on the small family companies that represent the vast majority of fireworks importers, wholesalers, retailers and display companies in the United States at a time when financial institutions are placing severe credit restraints on all business loans. We are concerned that many fireworks companies will not be able to survive this additional economic burden.

At present, there are only two ports in China where fireworks are loaded and from which fireworks products can be shipped: Shanghai on China's eastern coast and Beihai in the south. It takes 4-7 days of internal travel from the manufacturing areas in Hunan to Shanghai or from Beihai to Hong Kong through which the products pass.

Once the products arrive at the U.S. port and are released by Customs, they are transferred to railroad transport and ultimately transported by truck from the rail terminals to our distribution centers. The journey from China to our distribution centers in the U.S. is not easy and typically takes 25-35 days.

Once at our distribution centers, the products are tested, inventoried and transported by truck to our sales locations nationwide. We work under a very narrow time frame to make July 4th come together, and without Approvals being secured well in advance, we risk not having any new products in our retail showrooms for Americans to celebrate the Fourth of July.

The Special Permits and Approvals Program worked quite well for us before the onset of the Office of Inspector General Audit in 2008. Approvals typically were processed within 90 – 120 days. Once the OIG inquiry began, the Approvals process ground to a halt. We used to be able to communicate and dialog with the Approvals reviewers, but that communication essentially stopped.

The backlog in fireworks Approvals reached an all time high of over 5,700 pending in December, 2009. At the end of 2008, there were, by contrast, only 508 pending fireworks Approvals. Based upon a recent review of the PHMSA Approvals database for fireworks, there remain over 4,600 applications pending action that the fireworks industry desperately needed for this Fourth of July. For our industry, it is virtually too late for this season to feature new fireworks.

We applaud the efforts of Administrator Quarterman and the PHMSA personnel to create new written policies and procedures such as the Standard Operating Procedures to process Approvals, and creating action plans to address concerns raised by the Inspector General during the audit. However, it may be that too much emphasis has been placed on satisfying the Inspector General in terms of creating paper and action plans, but not enough emphasis being placed on processing Approvals and keeping commerce alive.

Without Approvals, our products cannot be imported, transported, stored, or sold. Without the timely processing of Approval applications for new and renewal EX numbers, we cannot offer new products to our customers, nor are we able to offer many of the old favorites. Many smaller fireworks companies have not received the Approvals that they desperately need to fully stock their retail locations, and are consequently being forced to reduce their work force at a time when our country is struggling to recover from a deep recession.

Approvals Expiration Policy

We respectfully urge revisiting the new Approvals expiration policy.

The fireworks industry is the first regulated industry to face PHMSA's new five year expiration policy on all Approvals. It is most unfortunate, given the current extreme backlog in Approvals, that our industry faces expiration of over 1,400 Approvals between now and December 31, 2010. Based upon the current backlog with pending Approvals, we are not optimistic that the agency can process these renewals in a timely fashion.

It is confusing why PHMSA would adopt this rigid expiration policy, when DOT already uses a cradle-to-grave Approvals process with respect to 49 CFR Part 178 box testing. Despite the fact that shipping boxes must be retested every two years, any boxes manufactured under the approved box test standards during the two year period before the next testing are permitted to be used in commerce beyond the two year expiration until the supply is exhausted. The boxes are imprinted with the test date.

Although not familiar with every detail of the applicable regulations, I do not believe the expiration of Approvals is specifically addressed in the regulations. However, PHMSA's own guidance, posted on their website, explaining the similarities and differences between Special Permits and Approvals, recognizes that Special Permits have an expiration date, whereas the majority of Approvals do not expire unless they are terminated by the Associate Administrator for Hazardous Materials Safety, or if there is a change in the product or circumstances, or the

regulations. The five year expiration policy on Approvals appears to be an administrative or internal policy decision that can easily be addressed.

A very practical problem with EX Approvals expiring every five years is that the shelf life of the product is beyond five years. We have product in our warehouses right now that has been there five years or more. That means all EX numbers for the five year old product have now expired. We would be in violation of the law if we attempt to move this product, which is still safe even after five years, in commerce from our warehouses to our retail facilities.

Not only are we unable to use this product this year, but we must bear the additional expense of having to warehouse this product until a renewal is received. If we at least had the cradle-to-grave Approvals concept as with boxes, we could use this product this year.

While some reasonable expiration policy may be appropriate, a five year Approval period is insufficient. The length of the Approval period logically should not be shorter than the safe shelf life of the product.

There are no safety reasons to have the EX Approval numbers expire. In the 33 year history of our company, we have not had one single transportation-related fireworks incident. The safety record of these products in transportation is excellent, and I invite you to verify this through the DOT records. The products have been proven to be safe in transportation. There is no imperative to have the EX Approvals expire.

We hope PHMSA will grant the fireworks industry an immediate extension on all expiring Approvals until the expiration policy is revisited, or at least through this 2010 fireworks sales season.

Fitness Determination

We are also concerned about the criteria that will be utilized in making the "fitness determinations." There are varied parties applying for Approvals, including importers, foreign manufacturers and domestic agents. We would expect an appropriate and open process that includes issuance of a notice of proposed rulemaking on the fitness determination and an opportunity for all stakeholders to be heard. Given the fact that the majority of fireworks products are produced in China, we are especially concerned about what criteria will be used to evaluate whether a Chinese producer is fit to receive a product Approval.

Conclusion

Phantom Fireworks is committed to ensuring safety in the manufacturing, transport, sale and use of our products. We actively promote fireworks safety to the millions of families across America who buy our fireworks to celebrate our American traditions on Independence Day. Phantom

Fireworks supports industry groups like the American Pyrotechnics Association, the American Fireworks Standards Laboratory and the National Council on Fireworks Safety.

Our industry is anxious to work in a cooperative and constructive fashion with PHMSA and other key decision-makers to streamline the Approvals process and reduce the backlog of Approvals applications without in any way compromising safety. We remain hopeful that the EX Approvals process will begin to improve rapidly, that the EX Approvals expiration policy will be revisited, and that an appropriate process will be undertaken to develop criteria for the "fitness determination."

We will continue to work to delight America's families and retain the important American tradition of celebrating with fireworks this Fourth of July. I promise you that the shows will go on this coming Independence Day, but you may have to wait until next year to see the new products we have planned for America.

Thank you for this opportunity to testify and I would be happy to answer any questions you may have.

B.J. ALAN COMPANY
Distributors of Phantom® and Wolf Pack® Brand Fireworks

Corporate Office:
555 Martin Luther King, Jr. Blvd.
Youngstown, Ohio 44502-1102
William A. Weimer, Vice President & General Counsel

Phone: 330-746-1064
Fax: 330-746-4410
Web Site: www.fireworks.com
E-Mail: Waweimer@fireworks.com

April 30, 2010

JAMES L. OBERSTAR, Chairman
U.S. House of Representatives
Committee on Transportation & Infrastructure
2165 Rayburn House Office Building
Washington, DC 20515

Re: Transportation & Infrastructure Committee:
Supplement to testimony presented to the
Committee on April 22, 2010

Dear Chairman Oberstar:

Please accept my sincere appreciation to you and to the members of the committee for the cordiality and professionalism with which I was received at the hearing. It was daunting to appear before the Committee. I thank you for the opportunity to share my thoughts with you and the Committee.

Please accept the following information as a follow-up and supplement to the testimony I presented to the Committee on Thursday, April 22, 2010.

During the hearing, you questioned me regarding the visit of the PHMSA Investigator to our Phantom Fireworks retail showroom in New Freedom, Pennsylvania. I am enclosing herewith a copy of the relevant material regarding that issue.

The Investigator issued an "Exit Briefing" in which he described two (2) probable violations involving our safety fuse. I signed and returned the "Exit Briefing" in early November, but have never heard further from the Investigator or PHMSA.

The following salient points are important to the issues addressed in the "Exit Briefing:"

Active on the Approvals Data Base. As recently as April 7, 2010, EX number 1988090134 issued to B.J. Alan Company for the safety fuse was listed on the PHMSA approval's database as active. The April 7, 2010 print out from the Approvals Data Base is attached.

After the hearing, PHMSA obviously changed the Data Base, because the same entry now reads "expired." That printout dated 4-28-10 is also attached. No notification of the expiration has yet been received from PHMSA.

B.J. ALAN COMPANY
Youngstown, Ohio 44502-1102

Reclassification. The investigator notes in describing a probable violation that the safety fuse "Class C Explosive, EX-8809134, that *had not been reclassified under the United Nations Classification System*." (Emphasis added)

All formerly approved "Class C Fireworks Approvals" were administratively reclassified to 1.4G approvals. This occurred within 4 years of the original issuance of the Approval. Attached is a letter documenting same.

Safety Issues. No safety issues were compromised in the transport of this product and all applicable DOT regulations were followed.

The product was transported only with class 1.4G material, and, it was always shipped in compliance with DOT's Hazardous Materials Rules, as it should have been.

Marking. The second probable violation alleges the product was transported "in a package that was incorrectly marked: Fireworks UN0336, 1.4G ..."

"Fireworks UN0336, 1.4G" is the classification for consumer fireworks. This is a case of marking up, rather than down. UN0336, 1.4G products require at least the same level of compliance with the DOT Hazardous Materials Rules as the safety fuse product in question.

Approvals Application. As of this writing, the EX Approvals application filed on October 8, 2009, has not been issued, nor has there been any other communication received from PHMSA.

If there is anything further with which I can provide you to supplement my comments or to answer any further questions you, other members of the Committee, or your staff may have, please do not hesitate to contact me at your convenience.

Thanking you for your courtesies, I am

Very truly yours,

WILLIAM A. WEIMER
Vice President & General Counsel

WAW:ke
encl.
cc: Hon. Bill Shuster
Admin. Cynthia Quarterman, PHMSA
Julie Heckman, APA

ATTACHMENTS

1. New Freedom (Shrewsbury), PA Investigative Material
2. Approvals Data Base printout (4-7-10)
3. Approvals Data Base printout (4-28-10)
4. DOT letter dated 2-28-92 re: classifications

NEW FREEDOM (SHREWSBURY), PA INVESTIGATIVE MATERIAL

Lynch, Robert (PHMSA)

From: Lynch, Robert (PHMSA)
Sent: Tuesday, August 04, 2009 2:18 PM
To: 'Bill Weimer'
Subject: Exit Briefing
Attachments: CorrectiveActions49CFR.pdf; B.J.AlanExitBriefingdated4Aug2009.pdf

Mr. Weimer,
Attached you will find the Exit Briefing describing the 2 probable violations. Please read the Exit Briefing, sign and date the last page opposite my signature and date. On the first page please provide the company Tax ID number. Retain a copy of the Exit Briefing for your records. I direct your attention to the last page **Documentation of Corrective Actions.** Your corrective actions need to be submitted to me in writing within 30 days of receipt of the Exit Briefing. Be sure to include what corrective actions you have taken to correct the violations described in the Exit Briefing and what measures you have taken to prevent future occurrences. All this must be documented and sent to me to include all pages of the signed and dated Exit Briefing. Documentation is very important, rather than just saying the corrective actions were taken. By signing the Exit Briefing you are just signing for a copy and not necessarily in agreement with the probable violations. Please feel free to contact me if you have any questions. You may email me the Exit Briefing and documented corrective actions if you wish. You can send me the Exit Briefing anytime within the 30 days. For your convenience I have included in attachment 2, that part of 49 CFR that addresses Corrective Actions

Regards,

Bob Lynch
Senior Compliance Investigator
PHMSA/Office of Hazardous Materials Enforcement
Cell: (443) 474-0091
robert.lynch@dot.gov

B.J. ALAN COMPANY
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Web Site: www.fireworks.com
E-Mail: Waweimer@fireworks.com

November 3, 2009

MR. ROBERT LYNCH
U.S. Department of Transportation
Pipeline and Hazardous Material Safety Administration
East Bldg., 2rd Floor, PHH-40
1200 New Jersey Avenue, SE
Washington, DC 20590-0001

Re: B.J. Alan Company
United Pyrotechnics (HK), Ltd.
Report Control No. 09411YYY

Dear Mr. Lynch:

I am pleased to enclose herewith for your review and process the following items:

1. Executed Exit Briefing, and

2. A copy of the Z-071A Safety Fuse Ex-Number Application that has been submitted to the Approvals Section for processing.

These items are being submitted to you for consideration on behalf of both the B.J. Alan Company and the United Pyrotechnics (HK), Ltd.

As I previously noted to you, while this may have been a technical violation, there two mitigating factors that should be taken into considerations, in addition to the fact that we reacted by immediately attempting to remedy the matter.

First, there was never any danger presented to the public in connection with the shipment of the products in the past, as all shipments of the Z-071A Safety Fuse were in conjunction with and as part of shipments of 1.4G fireworks that were otherwise in full compliance with the Hazardous Materials Rules of the DOT.

Secondly, as you are aware, a proper EX number was issued by Research and Special Programs Administration on October 3, 1988. While we now understand that this older EX number has expired, the products is literally unchanged from 1988 and presents a

B.J. ALAN COMPANY
YOUNGSTOWN, OHIO 44502-1102

transportation danger on the low end of the 1.4G or 1.4S spectrum. Certainly any danger presented was less than all other products with which the Z-071A product was shipped in the past.

The issue has been fully addressed by the filing of a new EX number application with the Approvals Section and a cessation of the movement of any of the product until such application has been processed and approved.

Unfortunately, we are informed that the Approvals Section, for the present, is without authority to actually process and approve any EX number applications. This will present a hardship to the industry and this company if the approvals process is not resumed promptly.

If you have any further requirements in connection herewith, please don't hesitate to contact me at your convenience.

Very truly yours,

WILLIAM A. WEIMER
Vice President & General Counsel

WAW:ke
encl.
cc: Alan Zoldan
Inna Zaytseva
United Pyrotechnics (HK), Ltd.

US Department of Transportation
Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Enforcement
Special Investigations

1200 New Jersey Avenue
East Building, 2nd Floor, PHH-41
Tele: (202) 366-4700
Fax: (202) 366-7435

EXIT BRIEFING

(This document is not a final report)

Date: Aug 4, 2009 Report Control #: 094111YY

Company Name: B.J. Alan Company

Street Address: 555 Martin Luther King, Jr. Blvd P.O Box

City/State: Youngstown, OH Zip Code: 44502

Website: www.fireworks.com Tax ID # X

NAME OF INDIVIDUALS RECEIVING BRIEFING:

Name: William A. Weimer Title: Vice President email: waweimer@fireworks.com

Name: Title: email:

Name: Title: email:

This has been a compliance inspection conducted in accordance with Title 49 U.S.C. Section 5121(c). This exit briefing addresses only the areas noted, and it is not a finding of general compliance in any other areas covered by the Hazardous Materials Regulations that were subject to the inspection.

During the course of the inspection the following probable violations of 49 Code of Federal Regulations (CFR) and/or quality control items were noted:

PROBABLE VIOLATIONS: 49 Code of Federal Regulations (CFR)
Section: 173.51(a); 173.54(a); 173.56(a); 171.9. Federal
Explanation: Register, dated Dec 21, 1990; 172.320 (a)(b)(d) and 171.2(a)(f)

offering for transportation and transporting in commerce, fuse, safety (B.J Alan Safety fuse), Class C Explosive, Ex-88091284, that had not been reclassified under the United Nations Classification System.

Effective Dec. 31, 1998, approvals and authorizations issued by the Bureau of Explosives are no longer valid. Therefore the safety fuse is an unapproved explosive.

Report Control # 094118YY

PROBABLE VIOLATIONS:

Section: 172.301(a) and 171.2(c) & (f)

Explanation:

offering for transportation and transporting in commerce, Safety Fuse (B.J. alan Safety Fuse), Class C Explosives, EX-8509134, in a package that was incorrectly marked: FIREWORKS, UN0336, 1.4G.

Safety Fuse is not considered Fireworks

Section:

Explanation:

Section:

Explanation:

Section:

Explanation:

Section:

Explanation:

Report Control #: 09411444

This document is not a final report. The information gathered at this inspection and any probable violations noted will be reviewed prior to finalizing the report. Probable violation(s) may be removed or others may be added during this review. In addition, quality control items may be revised to become probable violations during this review.

Upon determination that a probable violation exists, the Associate Administrator for Hazardous Materials Safety is authorized to impose certain sanctions, including warning letters, compliance orders, and civil penalties. In addition, court actions, including injunctive or criminal proceedings, may be initiated. Title 49 U.S.C. Sections 5123 and 5124 provide for civil and criminal penalties for violation of the Hazardous Materials Regulations.

A civil penalty of not more than $50,000 but not less than $250, per violation may be imposed through administrative proceedings initiated by the Office of Chief Counsel of the Pipeline and Hazardous Materials Safety Administration. When a criminal violation has been determined by a court, a fine, or imprisonment for not more than 5 years, or both, may be imposed for each violation.

The inspector does not determine which sanction, if any, may be imposed and cannot provide information concerning what proceedings will be initiated or sanctions imposed.

Documentation of corrective action submitted in writing to the inspector within 30 days of the inspection may be considered for mitigation should the sanction imposed result in the issuance of a notice proposing a civil penalty. However, any documented corrective action would not eliminate or preclude the initiation of a civil penalty proceeding, a finding of violation, or assessment of a civil penalty.

Our objective is to ensure a fair regulatory enforcement environment. If you feel you have been treated unfairly or unprofessionally, you may contact Ray LaMagdelaine at 202-366-4700, or e-mail us at OHME-HQ@dot.gov. You also have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities by this agency. The Pipeline and Hazardous Material Safety Administration strictly forbids retaliatory acts by its employees. As such, you should feel confident that you will not be penalized for expressing your concerns about compliance and enforcement activities.

I certify that I received the above briefing as it appears on this form. I understand that by signing this form I am in no way expressing agreement with its contents. I am only acknowledging that I have reviewed it and have received a copy.

Robert Lynch Aug 11, 2009 — V.P. 11-3-09

Signature of Inspector(s) Date Signature of Representative(s) Date

Fireworks (EX) Approval Application - APA Standard 87-1

Note *PLEASE DO NOT STAPLE*

1. Item Name: Z-071A Safety Fuse

This is a series application (Y/N): N

2. Applicant:

Name/Title	Inna Zaytseva, Import Manager
Company Name	B J Alan Company
Address	555 Martin Luther King Jr Blvd Youngstown OH 44502
Phone	330-746-1064
Fax	330-743-2195
Email	inna@fireworks.co

3. DOT Class:

❑ Fireworks UN 0336 1 4G ❑ Fireworks UN 0335 1 3G

❑ Fireworks UN 0333 1 1G ❑ Article Pyrotechnic UN 0431 1 4G

☒Other Fuse Safety UN0105 1 4S

4. Manufacturer:

Company Name	United Pyrotechnics (HK) Ltd
Address	17/F Liuyang TV & Broadcasting Center Liuyang Hunan China
Phone	650-206-9261 (U S sales office)
Fax	650-244-9588 (U S sales office)
Email	herb@unitedpyrohk com

5. Category of Device: (*under APA 87-1*):

❑ Cylindrical Fountain ❑ Cone Fountain

❑ Rocket ❑ Mine/Shell (Multiple Tube)

❑ Roman Candle ❑ Wheel

❑ Reloadable Shell Kit ☒Other: **Safety Fuse**

❑ Aerial Shell (non-salute

❑ Aerial Shell (salute ❑ Other _____

Fireworks (EX) Approval Application - APA Standard 87-1

6. **Diagram of the Device:** **Attach as a separate file**

7. **Chemical Composition:** **See attachod chemical composition sheet**

8. **Description of Device:**

Number of tubes	N/A
Tube separation (over 200 gram device)	
Diameter of device (or range of diameters for a series)	2mm wide X 3m ong
Maximum powder weight per tube	10g
For 1 4G mine/shell Max propellant/tube	0g
Maximum effect/tube (including burst)	0g
Total powder weight in device	10g
Tubes are fused in sequence (*if UN0336 multiple-tube item*)	(*yes / no* n/a

Does item have a report? (yes/no) No
Number of reports per tube ___ _ ____ Number of tubes ___ _ _____
If yes max weight per individual report _____ mg
Total weight of report powder in item _____ grams

Effect produced (e.g . shoots red star in air) The safety fuse produces no specific effect but rather simply burns at the rate of approx 1 ft per 30 seconds

9. **For Reloadable Shell Kits.**
(**Note:** Reloadable shell kits are limited to 400 grams of pyrotechnic composition and must be packaged in a ratio not to exceed 12 shells to 1 tube)

Maximum number of shells per kit _____
Maximum weight of pyrotechnic composition per shell _____ grams
Maximum total weight of pyrotechnic composition per kit _____ grams
Each kit contains at least one launching tube (*yes/no*) _____

Fireworks (EX) Approval Application - APA Standard 87-1

10. Thermal stability test results:

A thermal stability test of this device was performed on

12/18/08 by the Fireworks and Firecrackers Inspection Center of Hunan Entry-Exit Inspection and Quarantine Bureau

The test was performed on ☒ finished item ☐ component chemical mixtures as present together in the device The device did not ignite explode or undergo any significant decomposition during heating at 75° C (167° F) for 48 hours

11. Certification

This is to certify that the device for which approval is requested conforms to APA Standard 87-1 and that the descriptions and technical information contained in this application are complete and accurate

10-09-2009 Inna Zaytseva

(date) (Signature of applicant named above) (typed name of applicant, in English)

Fireworks Chemical Composition Sheet For Use Under APA 87-1

Chemical Composition List for (Item Name) **Z-071A Safety Fuse**

Total weight of pyrotechnic composition in Item 10 grams

Effect and total weight for each composition (e g . red star 21 grams propellant 18 grams)

1 Fuse Powder 10 g
2 ____ ____ g
3 ____ ____ g
4 ____ ____ g
5 ____ ____ g
6 ____ ____ g
7 ____ ____ g
8 ____ ____ g
9 ____ ____ g
10 ____ ____ g

Weight%

Chemicals [1]		1	2	3	4	5	6	7	8	9	10
Potassium Nitrate	KNO_3										
Potassium Perchlorate	$KClO_4$	50									
Sodium oxalate	Na2CO4										
Barium Nitrate	$Ba(NO_3)_2$										
Strontium Nitrate	$Br(NO_3)_2$										
Sulfur	S										
Charcoal	C	5									
Aluminum (>270 Mesh)											
Magnalium (>270 Mesh)	Al/Mg alloy	45									
Dextrine											

Other Chemicals [2]		1	2	3		5	6	7	8	9	10
Copper Oxide	CuO										
Shellac											
Polyvinyl Chloride											
Phenolic resin											
Strontium carbonate	SrCO3										
Cryolite											

Restricted Chemicals		1	2	3	4	5	6	7	8	9	10
Potassium Chlorate	$KClO_3$										
Potassium Benzoate	$KO_2C_7H_5$										
Titanium (>100 mesh)											
Total Percentage		100	0	0	0	0	0	0	0	0	0

1 The above list is taken from Table 4 3-1 of APA Standard 87-1, "Standard of Fireworks Chemicals
2 Each chemical must be listed in Table 4 3-1 of APA Standard 87-1 "Standard of Fireworks Chemicals"
3 For specifics on the Restricted Chemicals see APA Standard 87-1

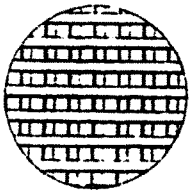
Fireworks (EX) Approval Application - APA Standard 87-1

DIAGRAM OF DEVICE

(Note :nclude and mark all dimensions, fusing sequence, external ignition fuse, empty tubes, effects)

Item Name Safety Fuse (Z-071A) This is a series application (Y/N) No

Picture Of Dissection



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Web Site: www.fireworks.com
E-Mail: Waweimer@fireworks.com

January 4, 2010

MR. ROBERT LYNCH
U.S. Department of Transportation
Pipeline and Hazardous Material Safety Administration
East Bldg., 2nd Floor, PHH-40
1200 New Jersey Avenue, SE
Washington, DC 20590-0001

Re: B.J. Alan Company
United Pyrotechnics (HK), Ltd.
Report Control No. 09411YYY

Dear Mr. Lynch:

Please accept this as a supplement my prior correspondence regarding the above-noted matter for purposes of bringing one additional material matter to your attention.

The fact is that neither B.J. Alan Company nor United Pyrotechnics (HK), Ltd. ever received any notification from DOT that the old EX number had expired or that it should be renewed. Since the EX number was in the DOT data base at the time of the issuance of your initial finding this past summer, we believe that, circumstantially, the EX number was valid.

As you know, and as I have reported to you previously, we have proceeded to apply to the PHMSA Approvals Section for approval of a new EX number for the fuse product. We are hopeful that the new application can move through the Approvals Section expeditiously, however, it should be noted on the record that there has been no official notification issued by DOT that the old EX number had expired.

Thanking you for your attention to this matter, I am

Very truly yours,

WILLIAM A. WEIMER
Vice President & General Counsel

WAW:ke

APPROVALS DATA BASE PRINTOUT (4-7-10)

Office of Hazardous Materials Safety

PHMSA Hazmat Home

Approval Number:	1988090134	(contains)
Tracking Number:		(contains)
Company Name:		(contains)
Expiration/Termination Date:	to	(mm/dd/yyyy)
Product Designation P/N:		(contains)
UN Number:		(contains)
Proper Shipping Name (PSN):		(contains)
Hazard Class:		(contains)
Packaging Note:		(contains)
Status:	All	
Number of Results	Display 50 results per page.	

Clear All SEARCH

1 Record(s) found

Export to Excel (only exports current page) (Please click on any column header to sort by ascending or descending)

APPROVAL NUMBER	TRACKING NUMBER	COMPANY NAME	EXPIRATION/ TERMINATION DATE	PRODUCT DESIGNATION P/N	UN NUMBER	PSN	HAZARD CLASS	PACKAGING NOTE / COMMENT	*STATUS
EX1988090134	1032003746	B.J. Alan Company		B.J. Alan Safety Fuze		Fuse, safety	C explosive		Approve

Approval data will be available in this system 24 hours after entered into HMIS application.

*The status (approved, pending, denied, etc.) listed in the Approvals Database Search does not necessarily indicate that an approval has been granted or that its final disposition has been determined. An approval is only valid when it has been signed and issued. No persons can operate under the terms of an approval until they have received an official copy of the document.

If there are any errors in the data that is displayed on this page, you may email your corrections to Approvals@dot.gov. To ensure prompt response to your request, ensure the Subject Title reads Data Corrections and the email must include Approval Number, Tracking Number. Company information, valid email, and phone number contacts.

APPROVALS DATA BASE PRINTOUT (4-28-10)

[redacted]

PHMSA Hazmat Home

Approval Number:	1988090134	(contains)
Tracking Number:		(contains)
Company Name:		(contains)
Expiration/Termination Date:	to	(mm/dd/yyyy)
Product Designation P/N:		(contains)
UN Number:		(contains)
Proper Shipping Name (PSN):		(contains)
Hazard Class:		(contains)
Packaging Note:		(contains)
Status:	All	
Number of Results	Display 50 results per page.	

Clear All SEARCH

1 Record(s) found

Export to Excel (only exports current page) (Please click on any column header to sort by ascending or descending)

APPROVAL NUMBER	TRACKING NUMBER	COMPANY NAME	EXPIRATION/ TERMINATION DATE	PRODUCT DESIGNATION P/N	UN NUMBER	PSN	HAZARD CLASS	PACKAGING NOTE / COMMENT	STATUS
EX1988090134	1032003746	B.J. Alan Company		B.J. Alan Safety Fuze		Fuse, safety	C explosive		Expired

Approval data will be available in this system 24 hours after entered into HMIS application

*The status (approved, pending, denied, etc.) listed in the Approvals Database Search does not necessarily indicate that an approval has been granted or that its final disposition has been determined. An approval is only valid when it has been signed and issued. No persons can operate under the terms of an approval until they have received an official copy of the document

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DOT LETTER DATED 2-28-92 RE: CLASSIFICATIONS

U.S. Department of Transportation
Research and Special Programs Administration

400 Seventh Street, S.W.
Washington, D.C. 20590

FEB 28 1992

To All Shippers and Manufacturers of Fireworks

This statement is being issued to clarify the position of the Department of Transportation and to facilitate the shipment of fireworks which have been previously approved as evidenced by the assignment of an EX-number.

The Department of Transportation, as Competent Authority of the United States, assigns the following classification in accordance with Title 49 CFR, International Civil Aviation Organization (ICAO) Technical Instructions and the International Maritime Dangerous Goods (IMDG) Code:

Old Classification	New Classification
Class C Fireworks	Fireworks, UN 0336, 1.4G
Class B Fireworks	Fireworks, UN 0335, 1.3G

Please attach a copy of this statement to any previously issued EX-approval letter.

Sincerely,

Alan I. Roberts
Associate Administrator
Office of Hazardous Materials Safety

May 6, 2010

The Honorable James L. Oberstar
Chairman, House Transportation and Infrastructure Committee
2165 Rayburn House Office Building
Washington, DC 20515-6256

Dear Mr. Chairman:

On behalf of the American Pyrotechnics Association (APA), I am writing to submit comments in conjunction with the April 22, 2010, House Transportation and Infrastructure Committee hearing on "The Department of Transportation's (DOT) Oversight and Management of Hazardous Materials Special Permits and Approvals. The APA would like to thank you and the Committee for the opportunity to submit comments for inclusion in the official hearing record. We also wish to thank you for allowing industry witness, Mr. William Weimer, Phantom Fireworks, to testify at the hearing, and we appreciate your ongoing interest in the DOT's Pipeline and Hazardous Materials Safety Administration's (PHMSA) Approvals program.

Background on the Fireworks Industry

By way of background, the APA is the principal safety and trade association of the fireworks industry representing manufacturers, importers, distributors, retailers, suppliers and professional display firms. The APA has over 240 member companies. Along with their subsidiaries, APA member companies are responsible for 90% of the fireworks manufactured, imported, distributed and displayed in the United States.

As you know from APA's September 24, 2009, comments to the Committee record and as Mr. Weimer stated in his testimony, all fireworks are required to have an explosive (EX) Approval, issued by the U.S. DOT's PHMSA's Approvals office before they may be transported from China or within the U.S. The vast majority of fireworks Approvals issued by DOT are done in accordance with the procedures set forth in APA Standard 87-1, Standard for the Construction and Approval of Fireworks for Transportation. [APA Standard 87-1 is adopted by reference in Title 49 Code of Federal Regulations.] APA's Standard contains detailed procedures for obtaining a fireworks Approval, including the completion of a thermal stability test, adherence to a strict list of chemical compositions that may be used, and labeling criteria for consumer devices based upon the Federal requirements promulgated by the U.S. Consumer Product Safety Commission (CPSC).

Approvals Process Concerns

The APA remains very concerned about the severe backlog in the processing of Approvals applications at PHMSA. We are also concerned about the new explosives expiration policy, as well as the unknown fitness determination criteria.

Based upon our review of Approvals just prior to the hearing, PHMSA's own on-line database indicated that over 4,600 fireworks Approvals applications were still pending. During her oral statement, Administrator Quarterman initially stated that there remained 2,600 backlogged Approvals; she later corrected that number downward to only 1,700. While this appears to be encouraging news, we have unfortunately seen little evidence of this progress in subsequent reviews of the PHMSA database or by way of feedback from our members. We were, however, encouraged to hear from Administrator Quarterman that Approvals are being processed at a rate of 1,000 per month, and we remain hopeful that the 1,700 Approvals that PHMSA contends are still pending will be fully processed, signed, and distributed within the next 6-8 weeks to eliminate the backlog in Approvals which has significantly harmed our industry for this year's Fourth of July season.

The APA hopes the current PHMSA Approval expiration policy will be revisited immediately, particularly because with over 1,400 fireworks Approvals set to expire by the end of the year the already backlogged Approvals process with be further stymied. Additionally, Administrator Quarterman's testimony with regard to Special Permits previously assigned to trade associations leads us to believe that the existing Approvals backlog will only be compounded as the need to process a record number of individual Special Permits materializes after May 1. We concur with Mr. Weimer that their exists no safety reason for establishing a five year expiration on fireworks EX Approvals and pledge to work with PHMSA to develop a reasonable solution.

With respect to the fitness criteria being used by PHMSA, we urge that the criteria utilized in making fitness determinations be made public and hope the agency will accept comments from interested stakeholders if that criteria seems unfair or unreasonable.

Industry Oversight and Efforts to Ensure China Fireworks are Safe

We were troubled by references made during the April 22, hearing that fireworks from China are unsafe. We wish to emphasize that the fireworks imported from China are the highest quality, safest products made to date. The fireworks industry works closely with manufacturers of pyrotechnic products in China, traveling overseas on a regular basis, to ensure that only the highest quality and compliant products enter the U.S. for sale to the general public and for use in public fireworks displays. These ongoing efforts have resulted in an outstanding safety record and a dramatic decline in injuries during the past decade. (see attachment #1)

The fireworks industry has invested millions of dollars to create trade organizations like the APA and its sister organization, the American Fireworks Standards Laboratory (AFSL), to assist fireworks companies and U.S. regulatory agencies in achieving the mutual goal of safe and reliable pyrotechnic products for the U.S. markets. We fully support cooperative efforts and representatives from the U.S. Consumer Product Safety Commission (CPSC) frequently travel to China with the APA and AFSL, to participate in training sessions for the China factories and conduct site visits.

The industry also works closely with relevant governing bodies in China and association leadership frequently meets with key China government counterparts of the DOT and CPSC respectively, including the Ministry of Transportation (MOT) and the General Administration of Quality, Supervision, Inspection and Quarantine of P.R.C. (AQSIQ). In past years, personnel from PHMSA have participated on these trips but since the onset of the Office of Inspector General Audit their participation has been curtailed. We are hopeful that DOT officials will once again be permitted to participate in these important overseas initiatives as we believe this type of government cooperation between the two countries will improve knowledge and further mutual economic and safety goals.

We urge that PHMSA remains engaged in fireworks transportation issues involving China including safety and proper declaration of hazardous materials. Important progress on these issues was made last year when a Memorandum of Understanding (MOU) was executed by U.S. Department of Transportation Secretary, Ray La Hood and Vice Minister Li Shenglin, Ministry of Transportation, Beijing, China. The MOU was designed to help ensure safe transport of materials across all modes of transportation between the two countries and the APA supported DOT's involvement in addressing these problematic transit and port challenges. Significant progress is being made, and we are appreciative of PHMSA's efforts to help us address the transportation challenges with China in a safe and secure manner.

The fireworks industry remains committed to efforts that promote safety in storage and transport, and encourage technological safety advancements. To that end, we continue to support entities such as the International Fireworks Association (IFA) in Liuyang China and the International Symposium on Fireworks (ISF) in order to broaden our knowledge of advancements that might further improve manufacturing, storage, and transport of fireworks

Clarification of China Factory Incidents

We wish to provide clarification on a reference that was made during the April 22 hearing to recent China factory accidents and the Sanshui warehouse explosions in 2008.

With respect to the three 2010 China factory incidents mentioned during the hearing, it should be noted that none of the factories involved in these incidents were licensed for export. These factories were **illegal factories**, not under regulation of the Ministry of Transportation or local provincial government. Specifically:

(1) Jan. 2., 2010, Explosion at China Fireworks Factory Kills 9, Xinhua Report: "plant manager fled after accident.... Xinping Firecrackers Company, Ltd., in Pucheng County..... central government has announced number of camplaints... at illegally run workshops" (see attachment #2);
(2) Jan. 27, 2010, Five Die in China Fireworks Factory Blast: "five workers died...in an explosion at a factory in China that was illegally making fireworks"..... (see attachment #3)
(3) March 3, 2010, Fireworks Explosion Kills 21 in Guangdong, China: "the accident occurred when a family set off a pile of fireworks in an open space.... China Central Television said local authorities had deemed the family's use of fireworks to be illegal" (see attachment #4).

These factories produced for China's growing domestic fireworks market and they did not operate under the same controls or regulations as factories that produce for export. The APA tracks fireworks factory explosions world-wide to assist us in anticipating potential safety issues and to help us develop preventative measures. Unfortunately, we cannot influence unregulated factories that do not export to the U.S. market. However, we can assure you and members of the Committee that the factories involved in the three incidents mentioned during the recent hearing were not licensed export factories or conducting business with U.S. importers.

With regard to the Sanshui warehouse explosion referenced during the hearing, this incident again was the unfortunate result of failure to adhere to and abide by local regulations.

Prior to February 2008, Sanshui Port was a very significant port for the fireworks industry. The Port had been closed for OSHA type safety violations but had been reopened by local officials because they had such significant fireworks trade. Because of mitigating circumstances, local inspectors agreed to warehouse professional display fireworks at the Sanshui warehouse facilities when they were only

authorized to store less explosive, consumer fireworks. Careless warehouse personnel violated common sense safety measures and were smoking in the area. Someone threw a lit cigarette which ignited the first warehouse of display fireworks and then, an unfortunate domino effect.... 20 warehouses were consumed. Had only consumer fireworks been warehoused, as legally authorized, there would not have been a domino effect or the resultant devastation. The first warehouse fire could have been contained and extinguished. Historically, this was the most devastating warehouse / storage incident for the fireworks trade; however, it was illegal activity that caused the series of explosions and we are extremely thankful that there was no loss of life.

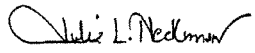
The APA and fireworks industry remain committed to educational efforts with our Chinese producers whom we rely upon to produce fireworks in accordance with all U.S. applicable regulations. We welcome PHMSA's participation and assistance in these efforts and encourage the agency to participate in factory visits and joint seminars that we conduct with the CPSC, ATF, MOT, IFA, and other relevant entities.

The fireworks industry has an outstanding transportation safety record. We are grateful that in over 40 years, we have not experienced a single transportation-related incident resulting in loss of life. We remain committed to working with China, ocean carriers, port authorities, local authorities and federal oversight agencies, including PHMSA to ensure that our products continue to move safely and that the general public is always protected. Safety has been, and will always be our number one priority.

If we can provide you with any further information or clarification, we stand ready to assist you, Mr. Chairman, the members of the Committee.

Respectfully submitted,

American Pyrotechnics Association



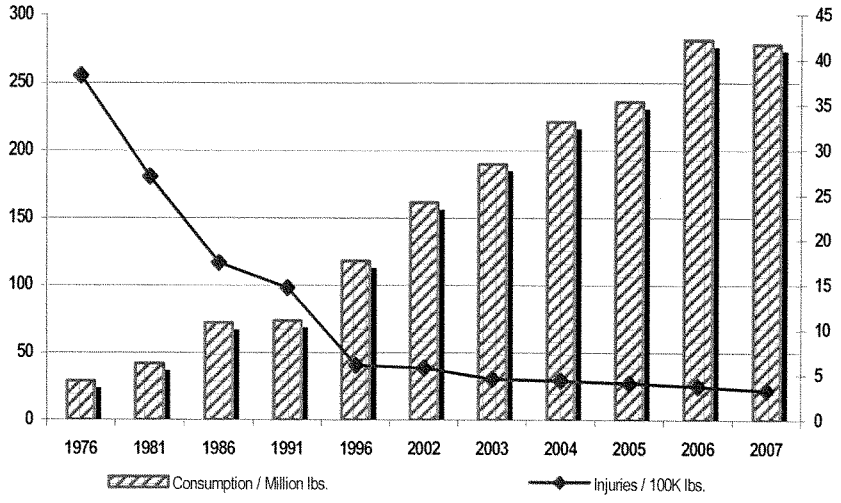
Julie L. Heckman
Executive Director

Attachment 1

AMERICAN PYROTECHNICS ASSOCIATION

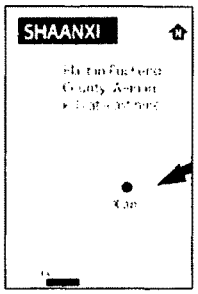
FIREWORKS-RELATED INJURY RATES, 1976-2007

Consumption of fireworks in the United States has risen dramatically over the past two and a half decades, from 29 million pounds in 1976 to over 265.5 million pounds in 2007. While the industry has seen an almost 920% **increase** in fireworks consumption per million pounds, there has been an over 90% **decrease**[1] in fireworks-related injuries per 100,000 pounds.



[1] 1976 fireworks-related injury rate was 38.3 per 100,000 pounds, compared to 2007 rate of 3.7 per 100,000 pounds.

Attachment 2



Map of China showing the location of Shaanxi province, where an explosion at a fireworks factory has killed at least nine workers, according to state-run news agency Xinhua.

The blast happened Friday at the Xinping Firecrackers Co Ltd in Pucheng County, Shaanxi province, destroying all of the seven workshops producing festive explosives, Xinhua news agency said, citing the local work safety bureau.

More than 100 people were in the factory at the time.

The eight injured workers were taken to hospital. Four were in serious condition.

The factory boss, Qu Pingxin, who fled after the blast, surrendered to police on Saturday, Xinhua said.

China has a huge fireworks industry notorious for its lax safety standards.

The central government has announced a number of campaigns in recent years to make the industry safer, but accidents, mostly at illegal or poorly run workshops, continue to occur in the drive for profits.

About the author

Writer: AFP News agency
Position: Agence France-Presse

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Attachment 3

Five die in China firework factory blast

January 27, 2010

AFP

At least five workers died and another 10 were injured on Wednesday in an explosion at a factory in China that was illegally making fireworks for the upcoming New Year holiday.

The blast happened early in the day in Hohhot, capital of the northern region of Inner Mongolia, the Xinhua news agency quoted Baoyin Batu, head of the city's work safety bureau, as saying.

The factory was operating without a licence and had been selling illegally manufactured fireworks for the Chinese New Year holiday, which kicks off on February 14, Baoyin said.

Rescue workers rushed to the scene but were still unable to enter the building as sporadic explosions continued on Wednesday, he added.

Police were searching for the owner of the factory, who had fled, the report said.

The area in Hohhot where the explosion happened has a 200-year history of firework production. At present, three factories are operating with a licence, but the others are all illegal, it added.

An explosion took place in 2005 at a factory there, killing two people and leaving five others missing.

China has a huge fireworks industry notorious for its lax safety standards, and as production increases for the New Year holiday - during which millions of the festive explosives are used - so does the number of accidents.

The central government has announced a number of campaigns in recent years to improve safety, but accidents, mostly at illegal or poorly run workshops, continue in the drive for profits.

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Attachment 4

Fireworks Explosion Kills 21 in Guangdong, China

Editor:fireworkstown.com Mar 3,2010

A fireworks explosion during New Year celebrations in southern China has killed 21 people and injured 48, accordi media.

The accident, in Puning, Guangdong Province, occurred when a family set off a pile of fireworks in an open space.

Some landed in a six-storey apartment block nearby, triggering a huge blast.

Thirteen people were killed on the spot while another eight died later in hospital.

Eight others were badly hurt - 40 suffered minor injuries.

China's state broadcaster China Central Television (CCTV) said the local authorities had deemed the family's use of be illegal.

An initial investigation found the fireworks had been lit 30 metres from a residential building.CCTV said some of th highly dangerous and only meant to be handled by professionals.

The explosion ripped through the block, blowing out windows and a ground floor wall.

Two people allegedly responsible for the blast have been detained by police

While ad hoc fireworks displays are a traditional part of Chinese New Year celebrations, cheaply produced firework and injuries every year.

On the final day of last year's celebrations, a hotel and arts complex attached to Beijing's newly built CCTV buildin destroyed by an illegal display.

IME
institute of makers of explosives
The safety and security institute of the commercial explosives industry since 1913

May 6, 2010

The Honorable James L. Oberstar
Chairman
Transportation & Infrastructure Committee
US House of Representatives
Washington, DC 20515

The Honorable John L. Mica
Ranking Member
Transportation & Infrastructure Committee
US House of Representatives
Washington, DC 20515

RE: Statement for the Record

Dear Mr. Chairman and Representative Mica:

On behalf of the members of the Institute of Makers of Explosives (IME), I am submitting this statement concerning the issues raised in conjunction with the House Transportation & Infrastructure Committee's (Committee) April 22, 2010 hearing entitled, "The Department of Transportation's Oversight and Management of Hazardous Materials Special Permits and Approvals," and request that it be included in the official record of the hearing.

Interest of the IME

The IME is a non-profit association founded in 1913 to provide accurate information and comprehensive recommendations concerning the safety and security of commercial explosive materials. The IME represents U.S. manufacturers and distributors of commercial explosive materials and oxidizers as well as companies providing related services. The majority of our members are small businesses.

Over 2.5 million metric tons of high explosives, blasting agents, and oxidizers are consumed annually in the United States. These products are used in every state of the Union and are distributed worldwide. There is not a segment of our economy that does not use these materials – from energy, manufacturing, construction, defense, transportation, to entertainment, medicine, and agriculture. Commercial explosives are the backbone of our industrial society.

The commercial explosives industry, more than any other, has been severely and unjustifiably impacted by the investigation into the management and oversight of the Pipeline and Hazardous Materials Safety Administration's (PHMSA) special permits and approvals program. Despite our culture of safety, evidenced by our exceptional safety record, the operations of our industry have been maligned, mis-characterized, and discredited by the US Department of Transportation's Office of Inspector General (OIG) during its investigation of PHMSA's management of its special permits and approvals program.

We appreciated the Committee's willingness to allow us to testify last year to address some of the OIG's charges stemming from reports issued July 31, 2009 and at the Committee's September 10, 2009 hearing on the special permits and approvals program. We intend for this statement to update the Committee on the immense and significant affect OIG's criticism of PHMSA has had on how, or whether, we can operate.

Background

As you know, PHMSA administers a comprehensive regulatory program. The practical effect of PHMSA's regulations is that hazardous materials, including explosives, may not be transported without permission. As an extension of its regulatory powers, Congress provided authority for PHMSA to issue special permits and approvals. Special permits are to be used in situations where "a one size fits all" regulatory scheme is not possible. The special permit provides an authorization to vary from the specific provisions of a particular regulation based on submission of supportive evidence that an equivalent level of safety can be maintained that meets or exceeds the level of safety provided by the original regulation. Ninety-five percent of the hazardous material used for blasting was delivered to the jobsite in bulk and a significant quantity of that material was transported under special permit at some point in time. PHMSA issues approvals to entities to perform a function for which prior authorization by the agency is required under the HMR. Approvals are issued by PHMSA under provisions governing international commerce, and are written to facilitate the safe transportation of hazardous materials worldwide. Within this globally-harmonized scheme, nation-state competent authorities are charged to classify explosive materials. PHMSA is the competent authority for the United States. These classifications are issued as approvals. No other class of hazardous material is subject to this level of close regulation. Without these approvals no explosives product may be transported. Thus PHMSA's ability to timely process special permits and approvals is most critical to all industries dependent on explosive materials.

As our mission statement asserts, the purpose of the IME is to provide a forum to promote the safety and security of commercial explosives. Our standards are frequently used as the basis of regulations pertaining to the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations. As we testified at the Committee's September 2009 hearing, we continually review and update our safety standards and recommended practices to ensure that we address any new potential vulnerability.

Our culture of safety has paid huge dividends. Despite the unprecedented scrutiny focused on the special permits and approvals without which our industry would shut down, the OIG found no fatalities, serious injuries or property damage from the transportation of explosives. At the same time, no human activity is without risk. If the goal of the Committee and the agency is zero risk, then commerce will cease.

Concerns and Comments

With this background, permit us to make some observations.

- Rubber-stamping for the Industry. Throughout these proceedings, catch phases including allegations of industry's "undue influence" and agency "rubber-stamping" industry requests have tarred our industry. As a result of the OIG investigation, we see anecdotal evidence of lapses in the agency's management and oversight of the special permits and approvals program. Much of this, we believe stems from the fact that the agency and especially the special permits and approvals program have been under-resourced. The OIG failed to discover any evidence of a pattern of pervasive industry influence or unlawful mischief regarding agency decisions to issue special permits and approvals for the explosives industry.

- Pending Backlog. The number of competing estimates of the extent of the pending application backlog offered by witnesses obfuscated rather than illuminated how dire the backlog has become

for certain companies and industries. These estimates were meaningless because they did not reveal how many were special permit applications, how many were approval applications, the age of each pending special permit/approval application, and how many were from which industries. For example, after the April 22 hearing, we queried the PHMSA approvals database[1] and learned that there were 5,765 pending explosives approvals, some of which have been in process for years.

Division	Not Fireworks	Oldest	Fireworks	Oldest
1.1	390	12/08	47	4/08
1.2	105	11/08	0	
1.3	142	3/09	1025	2/03
1.4	806	10/03	3218	3/02
1.5	22	12/08	0	
1.6	0		0	
5.1	10	12/08	0	
Total	**1475**		**4290**	

As a member of the regulated community (or a regulated industry), it is immaterial that 75% or 90% or 95% of the pending applications for special permits or approvals have been processed. If none or only a fraction of the applications filed by any given company or industry have been processed, these business interests suffer.

To address processing delays, PHMSA has made offers to the regulated community to identify application priorities. Although how the agency would judge the merits of competing "priorities" is unclear, no application should remain unaddressed longer than the agency's 120-day target for application processing.

- Future Backlog. At the April 2010 hearing, Administrator Quarterman was asked whether the agency anticipated another backlog of the magnitude it has been addressing. The response was "I should hope not." While we would like to share Administrator Quarterman's optimism, we remain concerned that the agency will be unable to keep pace. Administrator Quarterman estimated that it would take another 3 to 4 months to address the current backlog. Yet, on May 1st, "tens of thousands" of companies that have been covered by association special permits are supposed to apply for their own authorizations. Additionally, PHMSA has begun, without public notice and comment to assess the impacts, to issue approvals with expiration dates no longer than 5 years. It was suggested at the hearing that that the agency may apply this new expiration policy retroactively to current approvals. According to the Committee's own estimate there are 215,000 approvals. In short, for the foreseeable future, there will be backlogs. We remain very concerned about the impact of these sustained backlogs to businesses, jobs and the US economy. Backlogs do not enhance safety. To the contrary, backlogs may encourage desperate industries to move affected materials undeclared.

  We are hopeful that the addition of the 12 new employees mentioned in testimony will improve the timeliness of application processing. However, we have been led to understand that these individuals will be assigned to enforcement and thus will only to able to improve the timeliness of

[1] https://hazmatonline.phmsa.dot.gov/ApprovalsSearch/Search.aspx, April 26, 2010. The database does not allow a similar search of pending special permit applications.

fitness assessments of applicants that are referred for a "three-phased" review.[2] At the same time, we understand that the biggest bottleneck in the process is the handling of paperwork.[3] Additional enforcement staff will have little impact on this aspect of the backlog.

- Incorporation of Special Permits into the Hazardous Materials Regulations (HMR). We agree with Administrator Quarterman that, "we should make special permits special again." We believe that the best use of the agency's scarce resources is to move proven special permits into the HMR. Over the years, the explosives industry has become dependent on multipurpose bulk truck (MBT) special permits to transport commercial explosives and blasting agents. In the decades that these special permits have been in place, there has never been a fatality or injury from these explosives or precursors in transportation by MBT. It is not an overstatement that PHMSA regulates our industry by special permit. This should not be the case. The fewer special permits that must be processed, the more streamlined the system and the more attention the agency can give to new innovations in packaging or products that must rely on special permits to be transported. We are anxiously awaiting the agency's prioritization plan for special permit incorporation and ending the defacto regulation of our industry.

- 5-Year Approval Expiration Policy. On its Webpage, PHMSA describes the similarities and differences between special permits and approvals.[4] It states that a difference between special permits and approvals is that "special permits have an expiration date. The majority of approvals do not expire." This statement is no longer correct with regard to explosives classification approvals. In an attempt to respond to OIG criticism of PHMSA's oversight of the approvals program, the agency announced last fall that it was assigning 5-year expirations to commercial explosives classifications. While this policy may aid the agency in purging dormant approvals, it has created a host of other issues that threaten untold harm to the commerce of explosives. To obtain a classification, industry must obtain testing results from third-party approved labs.[5] A schematic of this UN-authorized testing protocol is attached. These testing results are recognized worldwide. This policy gives no consideration to the downstream consequences of approval expirations, let alone, as mentioned above, the paperwork burden the agency has saddled itself with for no safety benefit. Virtually all of the thousands of products issued explosives classification approvals by PHMSA are usable longer

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[2] Special Permits Program Standard Operating Procedures, October, 2009, page 38-9.

[3] At the April 22, 2010 hearing, Administrator Quarterman testified on this point that, "[w]e have found a bit of a bottleneck in our own process. We require a signature of a higher authority once they have been reviewed, just to make sure that everything is appropriate. About 40 percent of those are in that bottleneck and we are working to identify additional resources to try to clear that bottleneck up."

[4] http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.ebdc7a8a7e39f2e55cf2031050248a0c/?vgnextoid=641ad0dfb2e87110VgnVCM1000009ed07898RCRD&vgnextchannel=612328df28887110VgnVCM1000009ed07898RCRD&vgnextfmt=print.

[5] We are aware that the OIG has alleged in its April 7, 2010 management advisory on explosives classification testing labs, that some of these labs have subcontracted testing. (See page 7.) PHMSA has disputed this allegation and we support the agency's clarification that labs "may lease or contract facilities and personnel support from other entities so long as the facilities and personnel are controlled and supervised by officials of the testing [labs] that remain responsible for ensuring that the examinations and testing are performed correctly and for recommending the appropriate shipping description, division, and compatibility group for new explosives. PHMSA is also aware that all four testing agencies conduct testing and examinations at the applicant's company site because an explosives manufacturer's site may be a more appropriate and safer location for testing large explosives because it has specific equipment, handling capabilities, sufficient space, storage and necessary governmental permits." (PHMSA response to OIG, April 5, 2010, pages 2-3.)

than 5 years after manufacture. Downstream customers caught with expired but otherwise viable explosives would have no means of transporting these materials (even for disposal) simply because an arbitrary administrative renewal date has passed. Further, at the April hearing, it was suggested, for the first time, that any approval over 5-years old is deemed by PHMSA to have automatically expired. Should this prove true, the commerce of explosives will virtually cease. There is not enough lab testing capacity to handle the volume of requests for re-testing, should that be required. It will destroy US markets at home and abroad. Explosives classification approvals should remain valid unless terminated by the Associate Administrator for Hazardous Materials Safety for cause, or there is a change in the manufacture of the product, or the regulations pertaining to the classification are changed.

- New Explosives. The regulations state at 49 CFR 173.56(a)(2) that a "new explosive" includes a "previously produced ... explosive [where the manufacturer] has made a change in the formulation, design or process so as to alter any of the properties of the explosive." (Emphasis added.) PHMSA recently affirmed that, "[c]hanges to the location or factory where an explosive is made are not reasons for separate consideration for approval." However, the OIG cites from a 2002 Booz, Allen, Hamilton draft guidance document that, "[a]n explosives substance developed, produced, and classed by a specific manufacturer and relocated or co-located to a different manufacturing plant or facility should be examined and reclassed." The OIG told PHMSA to finalize this guidance. This guidance is contrary to the plain language of the rule. This issue came up at the hearing and PHMSA said that the agency would finalize the guidance. The agency cannot alter a rule without a rulemaking.

- Damage to the U.S. Competent Authority. The global transportation of hazardous materials is built on a foundation of trust among the competent authorities of nations. PHMSA is the U.S. competent authority for the classification of explosives. Heretofore, PHMSA's classifications have been recognized by governments worldwide. Such recognition allows U.S. manufactured products to be competitive in the world market – a market that contributes positively to the U.S. balance of trade. Over the last decade, commercial explosives accounted for a net gain of $3.8 billion.[6] As noted above, extensive testing is required to obtain classifications. The costs of testing together with sacrificed product can exceed $100,000, and is rarely below $20,000. It is irresponsible for the OIG to call into question "whether explosive approvals are based on correct classifications or appropriately authorized" based on, after the office's exhaustive review, the disputed evidence presented. [7] Should our trading partners begin to reject U.S. classifications, companies will be forced to repeat these expensive tests in other countries diminishing product marketability, and eventually leading to job loss in the United States.

- Multi-Purpose Bulk Truck (MBT) Special Permits. Based on a management advisory issued by the OIG on July 28, 2009 and reported at the Committee's September 2009 hearing, two concerns were alleged about the safety of MBTs authorized under special permits 8554, 10751, 11579, and 12677. One called into question the safety of transporting explosives and explosives precursors on the same vehicle and the second was that "the vehicle is prone to rollover."[8] It is important for the Committee to know that PHMSA considered and rejected the concern that the transportation of

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6 U.S. Department of Commerce/Foreign Trade Division.

7 OIG testimony, April 22, 2010, page 8.

8 OIG Management Advisory, July 28, 2009, pages 1 and 4.

explosives and explosives precursors on MBTs was unsafe.[9] Concerning the allegation that these vehicles are unstable, IME submitted documented evidence last year to PHMSA refuting the OIG's statements and assumptions. Despite repeated requests, PHMSA has yet to provide us with the data or documentation that the agency is relying upon to support its conclusions regarding the safety of bulk transport vehicles. If PHMSA cannot produce such substantiating information, we have asked the agency to take immediate action to correct the inaccuracies in the agency's records and in its publications. In the meantime, PHMSA has moved forward imposing new requirements and conditions on these special permit holders based on its flawed assessment. These new requirements are estimated to cost between $1,000 and $5,000 per vehicle to install. It is ironic that the same technical advancements that led to enormous improvements in blasting safety over the years are now being maligned by DOT.

- Lack of Rulemaking to Established Fitness Standards & Disqualifying Criteria. Administrator Quarterman was correct that the data sets of information, such as incident history, PHMSA has unilaterally established to determine fitness for special permit applicants can be discerned by a careful reading of the agency's new Special Permit Program Standard Operating Procedures (SOP).[10] PHMSA has not, however, established such data sets to assess the fitness of applicants for approvals. Instead, the reader of the agency's most current SOP for approvals will find "TBD" under the heading "Fitness Review Sub-Process."[11]

  Not only has PHMSA failed to solicit public comment on the appropriateness and sufficiency of the established data sets used to make a determination of fitness, the agency has not revealed the disqualifying thresholds it will use to determine compliance, how company size and activity will factor to ensure that all applicants will be evaluated on a level playing field, or the level of performance an applicant may have to attain in order to remediate a deficient fitness determination. As previously noted, these criteria are completely unknown to an industry whose ability to continue operating is wholly dependent upon conformity with the new, invisible standards.

  Rep. Sam Graves has an amendment pending to HR 4016, the Hazardous Material Transportation Safety Act (HMTA) of 2009, that would rectify this untenable situation. This amendment would require PHMSA to initiative a rulemaking to establish fitness standards and disqualifying criteria. Rep. Graves' amendment is not without precedent. Amendments to the HMTA in 1990 included a requirement that the Secretary of Transportation issue permits to motor carriers that are "fit, willing, and able" to transport certain high consequence hazardous materials. The Secretary was required to establish the application procedures, standards, and other programmatic requirements by regulation.[12] These rules, which include clearly defined fitness standards and disqualifying criteria, were subsequently issued and the Hazardous Materials Safety Permit program has been operational since 2005. The Secretary of Transportation has announced another significant

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[9] "When the special permit was granted the presence of these materials on one vehicle was evaluated and a determination was made that the combination of materials did not present an undue risk of uncontrolled chemical reaction, fire or explosion while in transportation if the terms of the special permit were met. We continue to believe that the initial and subsequent evaluations that supported our decisions to grant the special permits were appropriate." PHMSA letter to SP 8554, 10751, 11579, and 12677 grantees, August 14, 2009, page 2.

[10] http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Hazmat/Special%20Permits%20Standard%20Operating%20Procedures%20Version%201.0.pdf, October 5, 2009.

[11] http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Hazmat/Approvals%20Program%20Standard%20Operating%20Procedures%20version%201.0.pdf, December 2009, page 40.

[12] 49 U.S.C. 5109.

rulemaking to revise motor carrier procedures to establish safety fitness determinations based on safety data consisting of crashes, inspections, and violation history – the so-call "CSA 2010" initiative.[13] The later rulemaking was instituted at the Secretary's own initiative.

The original intent of the HMTA envisioned rulemaking for special permits standards. As noted by Congress, in a report preceding the first HMTA reauthorization,

> When a regulation requires prior approval of something, but does not set a standard for giving approval, it is the subsequent approval of the specific matter which actually sets the standard of conduct. Far from being innocuous, this regulation sets the stage for perversions of regulatory authority and evasions of the administrative procedures which Congress established to guard the integrity of the regulatory processes . . .
>
> When regulations require prior approval but do not set standards for giving approval, the agency may publish in-house instructions to employees. The agency usually develops these instructions in consultation with industry, but without public participation. *To the extent that these instructions set standards for giving approval, they have the effect of a regulation, so they should be adopted only after notice and opportunity for public comment.*[14] (Emphasis added).

Congress and the Secretary have clearly recognized the merit of public notice and comment to institute safety fitness procedures and standards. Yet, in the instant situation, neither the public nor the regulated industry has had the benefit of notice and opportunity for comment. The value of public comment cannot be measured when such comment may lead to perfecting the rules so that they are understandable and achievable thus aiding compliance. Compliance saves lives. Although HR 4016 has not been enacted, the Secretary has on his own initiative begun to implement several of the provisions in the bill. Likewise, the Secretary could without further congressional action initiate a rulemaking as envisioned by the Graves amendment.

- Affect on Industry. At the April 2010 hearing, Administrator Quarterman said, in answer to a question about whether rulemaking was needed to establish criteria to determine fitness, that,

> The question of whether something should or should not be a rulemaking is one of whether it is something that affects our internal processes or one that is really regulating industry or constituents outside. In our view this is something that relates to the internal processes within PHMSA and is not appropriate for rulemaking.

With all due respect, we reject the assertion that the standards or data sets and attendant disqualifying criteria or triggers that the agency will use to determine whether an applicant is fit to hold a special permit or approval have no regulatory affect on the regulated community. These standards and disqualifying criteria will be used to assess the fitness of an applicant to perform the activities to be authorized by the requested special permit or approval. In addition, where a determination of "not fit" is made, PHMSA will determine whether the applicant holds any other special permits or approvals to determine whether the agency needs to take steps to suspend or

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[13] http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201004&RIN=2126-AB11.

[14] *Hazardous Materials Transportation: A Review and Analysis of the [DOT] Regulatory Program*; Senate Committee on Commerce, Science, and Transportation, Appendix 1 – Problems of Regulating By Special Permit, (April 1979).

terminate the previously granted special permits or approvals. It is beyond our understanding how such impacts have only internal agency affect.

It is worth noting that, in the latest publication of the federal government's semi-annual regulatory agenda, PHMSA has opened a new rulemaking to "revise the special permits procedures in the HMR [to] consider whether the information currently required for the application is sufficient to enable PHSMA to evaluate the fitness of the applicant and the safety impact of the operations that would be authorized under the special permit."[15] So, PHMSA acknowledges an "affect" on the regulated community of requesting information to aid in the agency's determination of fitness, but refuses to acknowledge that there is any "affect" from the standards and disqualifying criteria the agency establishes to render such fitness determinations.

Consider the "affect" on industry of one of the new standards PHMSA is using to determine fitness. The agency now automatically requires a "three-phased" fitness determination of any applicant requesting authorization to transport so-called "Table 1" materials, which include any Division 1.1, 1.2, or 1.3 explosives, irrespective of the applicant's safety record. The three-phased fitness standards include on-site investigations. According to an email message received by one of IME's member companies, "[PHMSA's] enforcement group *does not have enough people to perform the inspections* . . . ."[16] (Emphasis added.) Thus, a reason that companies, which require agency classification approvals or special permits to transport explosives, are experiencing unprecedented delays in the processing of their applications is that PHMSA has instituted a standard that it is not capable of performing.

Administrator Quarterman's statement that the agency is not establishing the standards and thresholds by rulemaking because the standards are only "internal" guidance for staff that does not "affect our regulated community" is without merit. We are the regulated community and we are telling you that jobs and business opportunities are being lost because we cannot get the authorizations we need, and we have no idea what standards of "fitness" we are expected to achieve in order to secure those authorizations.

Recommendations

On behalf of our members, we would offer the following recommendations:

- Given all the responsibilities and the risks of death or injury from transportation-related activities, Congress should ask itself if the intense level of scrutiny recently focused on the special permit and approval programs is the best use of the U.S. Department of Transportation time and resources.

- If the intense level of scrutiny is appropriate, Congress should ensure that the special permit and approvals program has the resources it needs to process applications within established timeframes.

- The procedures, standards and disqualifying criteria used to determine the fitness of special permit and approval applicants should be established by public notice and comment rulemaking. No one should be afraid of public comment.

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15 http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201004&RIN=2137-AE57, April 26, 2010.

16 Email message from PHMSA Office of Hazardous Materials, Special Permits to IME member company, (Nov. 4, 2009).

- PHMSA should abandon its ill-advised policy of rendering "expired" explosives classification approvals every five years, and adopt a more streamlined policy that allows approval holders to certify that the conditions of the approval remain unchanged, and does not frustrate downstream commerce.

- Every effort should be made to incorporate proven special permits into the HMR.

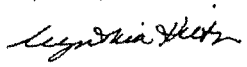
Finally, Congress should make clear that dialog between the agency and those affected by its policies is an important aspect of our democratic form of government. Not only can such input result in better rules, but once implemented, continued interchange provides the type of vital information to regulators that allows them to adjust or fine-tune existing edicts as they better understand the often complex and technical repercussions of their actions. Such interchanges should not be characterized as suspicious or improper.

Conclusion

The commercial explosives industry takes great pride in its exceptional safety record as measured by any metric. We agree that the management and oversight of transporting explosives must not be taken lightly. We agree that administrative lapses in PHMSA's oversight of the special permit and approvals program should be addressed. We agree that the staff at PHMSA are doing their best to move forward despite the crushing workload. We welcome the news about additional resources to aid in the accomplishment of this task. However, we are concerned about the imposition of new, untested and unvetted requirements on commercial explosives. Any such requirements, if needed and appropriate, would stand the test of a rulemaking procedure, and be consistent with President Obama's commitment to lead a government that is transparent and accountable to all its citizens.

Thank you for allowing us to submit this statement.

Respectfully,



Cynthia Hilton
Executive Vice President

Attachment

Figure 10.1: OVERALL SCHEME OF THE PROCEDURE FOR CLASSIFYING A SUBSTANCE OR ARTICLE IN CLASS 1

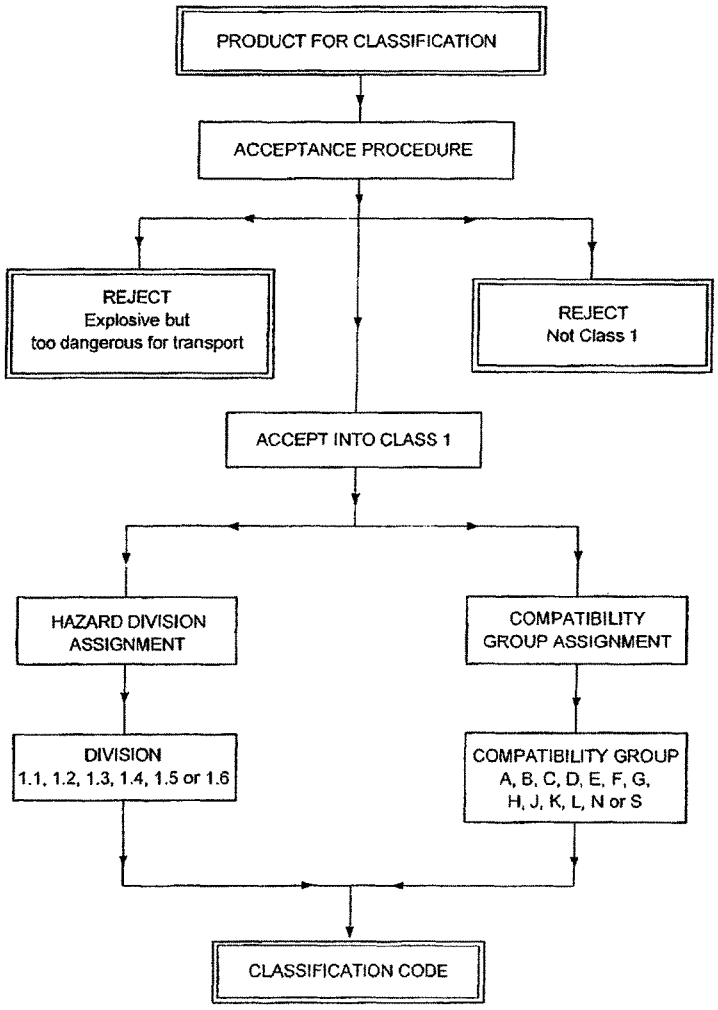
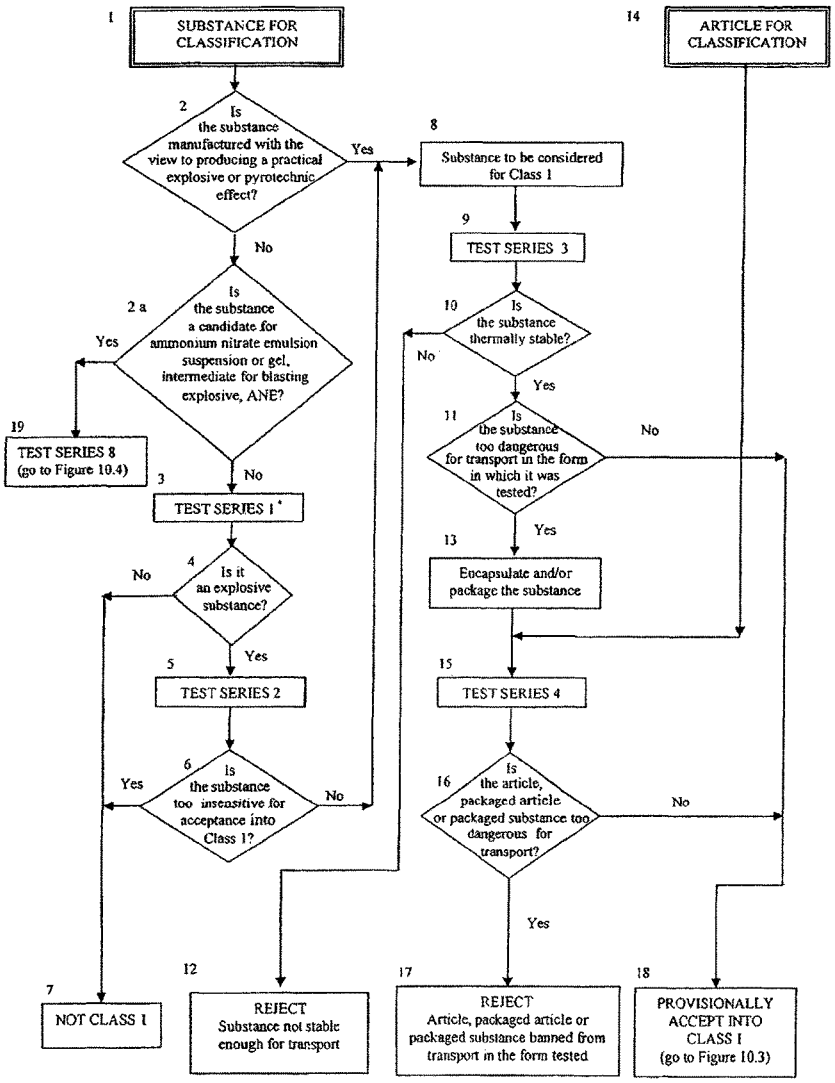


Figure 10.2: PROCEDURE FOR PROVISIONAL ACCEPTANCE OF A SUBSTANCE OR ARTICLE IN CLASS 1



For classification purposes, start with test series 2.

Figure 10.3: PROCEDURE FOR ASSIGNMENT TO A DIVISION OF CLASS 1