

May 14, 2009

**SUMMARY OF SUBJECT MATTER**

**TO:** Republican Members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials

**FROM:** Republican Transportation and Infrastructure Committee Staff

**SUBJECT:** Hearing on Reauthorization of the Department of Transportation's Hazardous Materials Safety Program

**PURPOSE OF HEARING**

The Subcommittee on Railroads, Pipelines, and Hazardous Materials is scheduled to meet at 2:00 p.m. on Thursday, May 14, 2009 in 2167 Rayburn House Office Building to receive testimony on reauthorization of the Department of Transportation's (DOT) hazardous materials safety program. The program was last reauthorized in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (P.L. 109-59); it expired on September 30, 2008. The purpose of the hearing is to review implementation of the SAFETEA-LU amendments and prepare for reauthorization of the program.

**BACKGROUND**

As one of 10 agencies within DOT, the Pipeline and Hazardous Materials Safety Administration (PHMSA) is responsible for developing and enforcing regulations to ensure the safe movement of nearly 1.2 million daily shipments of hazardous materials by all modes of transportation.

As of May 13, 2009, DOT estimates that over the last decade, there have been 170,484 incidents involving the transportation of hazardous materials, resulting in 138 fatalities, 2,823 injuries, and about \$633 million in property damage. However, the number of incidents involving the transportation of hazardous materials has been on the decline annually since 2006. Aviation incidents decreased from 1,555 in 2007 to 1,274 in 2008, (0 fatalities, 7 injuries). Highway incidents decreased from 16,900 in 2007 to 14,669 in 2008 (9 fatalities, 142 injuries). Rail incidents decreased from 749 in 2007 to 745 in 2008 (1 fatalities, 37 injuries). Water incidents are the only area that has not shown a consistent decline since 2006, with an increase from 61 in 2007 to 98 in 2008 (0 fatalities, 0 injuries).

PHMSA's regulations are applicable to any person who transports, ships, or causes to be transported or shipped, hazardous material, or who is involved with the manufacture or testing of hazardous materials packaging or containers. Under 49 CFR 171.2(b), each person who offers hazardous materials for transportation in commerce must comply with all applicable requirements of the U.S. Department of Transportation (DOT) regulations, or a special permit or approval or registration issued by DOT under the regulations. In short, unless a DOT regulation, permit or approval authorizes the movement of a hazardous material, it may not be moved.

While the certainty of a rule is generally preferred, the dynamic nature of the hazardous materials industry does not allow that in all cases all the time. To provide for package innovations, or unique circumstances, or simply because DOT prefers to exercise greater control over a shipment than is possible under a general regulation, the Secretary may issue special permits (limited to domestic transportation) or competent authority approvals (issued by PHMSA under the provisions of international codes governing global commerce) to facilitate commerce. These authorizations are issued to particularly identified individuals, in response to detailed applications (that are incorporated by reference in the authorizations), under conditions that are documented to be at least as safe, and often times far more stringent than the applicable regulations.

Concerns have been raised about the ability of PHMSA to oversee and enforce the terms of special permits and approvals. While PHMSA currently has about 35 inspectors (plus 15 new enforcement FTE authorized in the FY 2009 appropriation), enforcement of hazmat requirements including are the shared responsibility of all modes. Over 368 inspectors from PHMSA and other modes oversee more than 300,000 hazmat entities.

The DOT Inspector General is conducting an audit of PHMSA to assess the effectiveness of PHMSA's policies and processes for reviewing and coordinating with the affected operating administration before authorizing a special permit or approval. The Inspector General is also assessing PHMSA's and other operating administrations' oversight and enforcement of approved parties' compliance with the terms and conditions of special permits and approvals. The audit is not yet complete. While PHMSA is aware of the audit and is looking forward to reviewing the findings, the agency is already implementing improvements to enhance the efficiency of the special permit and approval program.

Any person who offers for transportation or transports certain hazardous materials in intrastate, interstate, or foreign commerce must register with the DOT and pay an annual registration fee, which ranges from \$250 to \$3,000. The fees fund the Hazardous Materials Emergency Preparedness (HMEP) grant program to help State, local, and tribal governments to develop, improve, and implement emergency plans; train public sector hazardous materials emergency response employees to respond to accidents and incidents involving hazardous materials; determine flow patterns of hazardous materials through communities; and determine the need within a state for regional hazardous materials emergency response teams.

On November 4, 2008, the Director of the Office of Hazardous Materials Planning and Analysis wrote a memo to the DOT Inspector General requesting an audit of the HMEP program, citing concerns about the management and oversight of the program. The DOT Inspector

General's office referred the issue back to PHMSA for handling. PHMSA is currently engaged in a comprehensive review of the program to ensure that it is effectively meeting emergency response planning and training needs and to identify ways to increase its effectiveness.

PHMSA estimates that the program provides more than two million emergency responders with initial training or periodic recertification training, including 250 paid firefighters, 850,000 volunteer firefighters, 725,000 law enforcement officers, and 500,000 emergency medical service providers.

In SAFETEA-LU, Congress doubled funding for the HMEP program from \$14.3 million to \$28.8 million. Concerns have been raised that the current amounts of the registration fees that finance the HMEP program are not sufficient to cover the authorized levels beyond this fiscal year. PHMSA is working on a rulemaking to increase these fees and plans to finalize the increase by the end of this fiscal year.

In addition to HMEP grants, registration fees on shippers fund the Hazardous Materials Instructor Training Grants Program. Grants for FY 2009 were awarded to the International Brotherhood of Teamsters, the National Labor College, and the International Association of Machinists and Aerospace Workers.

The hazardous materials regulations require all hazmat employers to provide training to their hazmat employees on the safe loading, unloading, handling, storage, and transportation of hazardous material and emergency preparedness in the event of an accident or incident. SAFETEA-LU clarified who was considered to be a hazmat employee and hazmat employer and required that maintenance-of-way employees and railroad signalmen be provided with general awareness and familiarization training.

SAFETEA-LU also addressed the issue of commercial motor carrier safety permits. With respect to Federal permits, current law requires commercial motor carriers that transport or cause to be transported in commerce certain quantities of high-hazard materials, such as radioactive material, explosives, compressed or refrigerated liquefied methane, liquefied natural gas, and poisonous-by-inhalation materials, to hold a safety permit the Secretary issues authorizing the transportation of those materials. There is no fee for the permit.

In the final rule implementing the Federal permitting requirements, the Federal Motor Carrier safety administration (FMCSA) stated that if a State had an equivalent program to the Federal program, FMCSA would accept the State permit and the carrier would not need to also obtain a Federal permit. To date, no State has applied to FMCSA to have their permitting programs deemed "equivalent." Some industry and safety groups have raised concerns about FMCSA's implementation of the Federal permitting program.

In addition to obtaining a Federal safety permit, 42 states require commercial motor carriers to register, obtain a safety permit, and/or submit a hazardous/radioactive waste disclosure (if applicable), for a fee, in order to transport various hazardous materials through the state. The permits and the procedures for obtaining and holding the permits differ from state-to-state, with the exception of Illinois, Michigan, Minnesota, Nevada, Ohio, Oklahoma, and West

Virginia. These seven states belong to the Alliance for Uniform Hazmat Transportation Procedures, which is essentially a base state system whereby each commercial motor carrier transporting hazardous materials obtain a permit in the state the carrier travels the most miles. These permits are recognized by all the other participating states.

At the Federal level, the FMCSA is charged with implementing the program if 26 states adopt it, but they have indicated a lower threshold of 18-20 states might be acceptable for moving ahead with a rule. Industry groups have recommended legislation to implement a uniform program similar to the Alliance for Uniform Hazmat Transportation Procedures.

With respect to background checks, SAFETEA-LU required the Transportation Security Administration (TSA) to develop and implement a process for notifying hazmat employers if an applicant fails a background records check and to eliminate redundant background checks. The law also set-forth a state appeals process, and required the TSA to submit two reports to the Committee: one on the implementation of fingerprint-based security threat assessments and the other on the TSA's plans to reduce or eliminate redundant background checks for holders of hazardous materials endorsements.

Drivers who haul hazardous materials in a commercial motor vehicle at quantities requiring vehicle placards under DOT regulations must have a hazardous materials endorsement (HME). The USA Patriot Act (P.L. 107-56), prohibits states from issuing a license to transport hazardous materials in commerce to any individual without a determination by the Secretary of Homeland Security that the individual does not pose a security risk. TSA meets this mandate by requiring drivers seeking to apply for, renew, or transfer a HME on their state-issued CDL to undergo a security threat assessment. The assessment includes a finger-print based Federal Bureau of Investigation criminal history records check, a check for ties to terrorism, and an immigration status check.

An individual may be disqualified from holding an HME based on being convicted of, or found not guilty by reason of insanity, a list of specific crimes, in the past seven years. An individual is entitled to appeal or seek a waiver of a TSA determination, except if the individual has been convicted of espionage, sedition, treason, or terrorism (which is defined as a crime under 18 U.S.C. Chapter 113B or a comparable state law). These are known as "permanently disqualifying" offenses. The disqualification standards under the HME program are identical to the standards TSA applies under the Transportation Worker Identification Credential (TWIC). Industry and some labor groups have raised concerns about the number of background checks that they are subject to, because some states and localities have started to conduct their own additional background checks of drivers.

With respect to background checks for commercial drivers registered to operate in Mexico or Canada, SAFETEA-LU required TSA to ensure that the drivers undergo a background records check similar to the background records check for U.S. drivers, but TSA failed to implement the requirement as Congress had intended. Following enactment, TSA determined that commercial drivers in Mexico and Canada would undergo checks of their criminal history in the United States, but not checks of their criminal history in Mexico or Canada. However, the Government of Canada shares the results of their own background records checks of commercial

drivers with U.S. enforcement officials. A similar arrangement does not exist between the U.S. and the Government of Mexico; as a result, the U.S. grants commercial drivers from Mexico authority to transport hazardous materials in the U.S. (currently limited to commercial zones) without receiving a check of their criminal history in Mexico.

SAFETEA-LU also conferred new inspection and investigative authority on PHMSA to discover hidden shipments of hazardous material. According to the Government Accountability Office (GAO), more than three billion tons of regulated hazardous materials are transported in the United States each year. Under DOT-mandated safety standards, nearly all of these shipments move through the system safely and without incident. When incidents do occur, DOT-mandated labels and other forms of hazard communication provide transportation employees and emergency responders the information necessary to mitigate the consequences. Yet their effectiveness depends largely on compliance by hazmat offerors and carriers. When a package containing hazardous materials is placed in transportation without regard to or in violation of hazardous materials requirements, the effectiveness of all other risk controls may be compromised. Accordingly, DOT has considered undeclared and improperly marked shipments of hazardous materials to be serious safety issues.

On October 2, 2008, PHMSA issued a Notice of Proposed Rulemaking (NPRM) to implement their new authority. In the NPRM, PHMSA makes clear that inspectors will not be permitted to open single packages, including boxes, cylinders, portable tanks, and cargo tanks. The new inspection procedures only apply to the opening of an overpack, outer packaging, freight container, or other packaging component not immediately adjacent to the hazardous material. Industry has raised concerns about how DOT intends to reclose inspected packages, the amount of time required to conduct the inspections, citing concerns with delaying business operations, and the costs of inspections.

While DOT is planning a rulemaking related to the transportation of lithium batteries, particularly in aviation, some labor organizations have requested legislative language directing this rulemaking. Other stakeholders have raised an array of concerns with regard to new regulations regarding battery transportation, in particular the need for balancing the risk to transportation safety posed by batteries, with the need to minimize disruption to commerce. Onerous restrictions on battery transportation pose a threat to the air cargo industry, the consumer electronics industry, as well as to passenger aviation. Because lithium batteries are now ubiquitous in our society and in industry, these stakeholders argue that any law and subsequent rulemaking on battery transportation should carefully weigh safety versus interference with the flow of commerce.

Concerns have been raised regarding wetlines, the product piping beneath the cargo tank in a tank truck. In rare accidents, these lines can shear off, causing the release of flammable material. Currently, regulations allow for product to remain in the line. In June 2006, PHMSA withdrew a rulemaking that would have prohibited fuel in wetlines because the agency found that the risk posed was exceptionally low, and did not justify a ban or retrofit of tank trucks to eliminate the residual fuel. Further supporting this finding, a recent analysis of DOT data shows that since 2002 wetlines have not resulted in a single injury or fatality. Additionally, the rule that was withdrawn by PHMSA would have required tank truck owners to retrofit their equipment

with costly purging systems. Industry groups have raised concerns that the installation of these purging systems may actually pose a greater danger than the wetlines themselves, due to the inherent risk of soldering new equipment to tank trucks that could contain residual vapors.

**EXPECTED WITNESSES**

Mr. LaMont Byrd  
Director of Safety and Health  
International Brotherhood of Teamsters

Mr. Gerald A. Donaldson, Ph.D.  
Senior Research Director  
Advocates for Highway and Auto Safety

Ms. Cynthia Douglass  
Acting Deputy Administrator  
Pipeline and Hazardous Materials Safety Administration  
U.S. Department of Transportation

Ms. Elizabeth Harman  
Director of Hazardous Materials  
International Association of Fire Fighters

Ms. Deborah Hersman  
Board Member  
National Transportation Safety Board

Ms. Cynthia Hilton  
Executive Vice President, Institute of Makers of Explosives and  
Co-Facilitator, Interested Parties for Hazardous Materials Transportation

Chief Jeffrey D. Johnson  
First Vice President, International Association of Fire Chiefs, and  
Chief, Tualatin Valley Fire and Rescue (Aloha, OR)

Mr. Robert Petrancosta  
Vice President - Safety  
Con-way Freight  
On behalf of the American Trucking Associations, Inc.

Mr. Mark Rogers  
Director, Dangerous Goods Program  
Air Line Pilots Association, International