



**U.S. House of Representatives**  
**Committee on Transportation and Infrastructure**

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April 8, 2011

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**SUMMARY OF SUBJECT MATTER**

To: Members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials

From: Subcommittee on Railroads, Pipelines, and Hazardous Materials Republican Staff

Subject: Hearing on "Reducing Regulatory Burdens and Ensuring Safe Transportation of Hazardous Materials."

**PURPOSE OF HEARING**

The Subcommittee on Railroads, Pipelines, and Hazardous Materials is scheduled to meet on Tuesday, April 12, 2011 at 3:00 p.m. in 2167 Rayburn House Office Building to receive testimony related to the reauthorization of the hazardous materials safety programs of the Pipeline and Hazardous Materials Safety Administration (PHMSA). This hearing is part of the Committee's effort to reauthorize the hazardous materials safety programs which was last authorized under the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (HMTSSRA), which expired September 30, 2008. The Subcommittee will receive testimony from the PHMSA and the industry on how best to reduce the regulatory burdens while ensuring hazardous materials are transported in a safe and efficient manner.

**BACKGROUND**

The HMTSSRA is found in Title VII of Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (P.L. 109-59) (SAFETEA-LU). The HMTSSRA made a number of additions and amendments to 49 U.S.C. §§ 5101-28, "Transportation of Hazardous Material" (Federal hazmat law). Federal hazmat law places certain responsibilities on the Secretary of the Department of Transportation (DOT) to protect against the risks inherent in transporting hazardous materials. PHMSA is the agency within DOT primarily responsible for implementing the Federal hazmat law.

Specifically, PHMSA administers nationwide safety programs designed to protect the public and the environment from the risks associated with the commercial transportation of hazardous materials by air, rail, vessel, highway, and pipeline. The agency's two roles are pipeline safety and hazardous material safety. Under its hazardous materials safety program, PHMSA oversees the safe and secure shipment of nearly 1.4 million daily movements of

hazardous materials, such as explosive, flammable, corrosive, and radioactive materials. These materials include such common products as paints, fuels, fertilizers, alcohols, chlorine, fireworks, and batteries that are essential to the general public and local economies due to their use in farming, medicine, manufacturing, mining, and other industrial processes. In total, about 3 billion tons of hazardous material moves each year in the United States.

PHMSA promulgates and enforces, among others, the hazardous materials regulations (HMR; 49 C.F.R. parts 171-180) to carry out its mission. By statute, a material or group or class of material is considered hazardous if the Secretary determines that transporting that material in commerce in a particular amount or form may pose an unreasonable risk to health and safety or property. 49 U.S.C. 5103(a). Unlike other DOT agencies whose regulations apply to a specific transportation mode, such as rail, motor carrier, and aviation, the HMR applies to the product itself. The HMR categorizes hazardous materials into nine classes, and sets forth transportation requirements for packaging, marking and labeling, shipping papers, loading, placarding, and segregation.

### **Recent PHMSA Regulations and the Need for Transparency**

#### **Special Permits and Approvals**

The Federal hazmat law and HMR prohibit the movement of hazardous materials unless a regulation, permit, or approval authorizes the movement. Special permits provide a means of varying from a specific provision of the HMR in a way that achieves a safety level at least equivalent to that required under the HMR or is otherwise consistent with the public interest. For example, if new, improved packaging for a certain hazardous material is developed, an individual may apply for a special permit to use that improved technology. Some special permits, if proven over time to be safe and are generally applicable, can and should be incorporated into the HMR. Similar to a special permit, an approval allows its holder to perform a particular function that requires prior consent under the HMR. For example, explosives and fireworks may only be transported with an approval. To be issued a special permit or approval, the applicant must have a fitness determination made by PHMSA.

In October 2009 and August 2010, PHMSA changed its procedures for conducting fitness determinations for special permits and approvals, respectively. Instead of going through usual notice and comment procedures, PHMSA made its changes by issuing standard operating procedures (SOP). Determining fitness procedures in this manner lacked transparency and stripped hazardous materials offerors and shippers of any opportunity to give their input on the procedures and criteria necessary for making fitness determinations. In response, a large industry group petitioned for a rulemaking in December 2010 explaining that the SOPs' processes and procedures differed dramatically from the historical fitness review, broadened the scope of the fitness review (essentially amending the existing HMR), and contained misstatements and inaccuracies. Moreover, the current criteria for judging fitness are not clear to the industry, which creates a climate of regulatory uncertainty.

During this same time period, PHMSA noticed a rulemaking that became final on January 5, 2011, requiring certain additional information be included in special permit applications. The additional information requires items like the name of the applicant's CEO

and a description of anywhere the permit may be used, which could entail thousands of locations, creating an unnecessary burden on business and increased costs, with little safety benefit. Hearing witnesses will describe the impact of these new requirements, and recommend ways to streamline the special permit and approval procedures; incorporate more special permits into the HMR; and establish fitness criteria in a manner that promotes consistency, predictability, and transparency. Increasing the transparency and predictability of the special permits and approvals process will allow businesses and the economy to grow, while enhancing safety.

### Cargo Tank Wetlines

The term wetline refers to the external piping on cargo tank trucks, such as gasoline tankers, used to load and unload the product, which may contain some of the product in it during transportation. According to DOT's hazardous material incidents database, for the years 1999-2009, there were 8 incidents of fatality or injury attributable to wetline releases. There are over 50,000 cargo tank shipments of flammable liquids each day, meaning the risk of a fatal wetline incident is 1 in 30,000,000.

Despite this low incident rate, on January 27, 2011, PHMSA issued a notice of proposed rulemaking that would prohibit transportation of certain hazardous materials, like gasoline, in wetlines unless (1) the cargo truck was equipped with a bottom damage protection meeting certain requirements, or (2) certain performance standards are met through draining or purging the wetline. The data PHMSA used to justify the rulemaking, however, is questionable, because over the same ten-year period noted above it found 172 incidents of damaged wetlines. PHMSA did not detail that of those 172 incidents, 30 involved combustible materials (not flammable materials) which are not subject to the rule; 45 incidents involved more than 50 gallons of product, which is more product than a wetline could hold, meaning the tanker was penetrated as well; 7 involved straight line, not wetline, trucks; and 1 involved a truck equipped with the type of purging system contemplated by the rule. Simply put, the rulemaking overstates its benefits and underestimates the significant costs to the industry to retrofit tank trucks and the inherent risks of retrofitting tank trucks. Hearing witnesses will describe the potential impact of the proposed rule, identifying and quantifying the real-world risks caused by wetlines and costs associated with wetline regulation.

### Package Opening

The HMTSSRA added new inspection and investigation authority to the Federal hazmat law. The intent of this new authority was, as the subsection title indicated, to help discover hidden shipments of hazardous material. On March 2, 2011, PHMSA issued final rules implementing that authority, including procedures for opening packages to identify undeclared hazardous materials, i.e., a package that is not marked, labeled, accompanied by shipping documentation, or otherwise identified as a hazardous material. The final rules, however, also allow for declared packages to be opened, inspected, and removed from transportation if the investigator has reasonable and articulable belief the package contains hazardous material and is not compliant with the HMR. Some concern has been raised that the final rule goes beyond the intended need to investigate undeclared packages. The opening of packages creates a potential unsafe situation for the inspectors, carriers, and the public. Furthermore, there is a concern with regard to indemnification of those involved in the transportation. Hearing witnesses will discuss

how to address the universal concerns about undeclared packages without creating undue regulatory overreach and unintended safety concerns.

## **Uniformity and Avoiding Duplication**

### **Background Checks**

Commercial motor vehicle drivers who haul hazardous materials at quantities requiring vehicle placards under DOT regulations must have a hazardous materials endorsement (HME) to their state-issued commercial driver's license (CDL). The USA Patriot Act (P.L. 107-56), prohibits states from issuing a license to operate a motor vehicle transporting in commerce a hazardous material 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 to undergo a security threat assessment, which includes a finger-print based Federal Bureau of Investigation criminal history records check, a check for ties to terrorism, and an immigration status check. 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 that they are subject to duplicative background checks or credentials because some states and localities have started to conduct their own additional background checks of drivers. These additional credentials can cost approximately \$100 (or more) and require time off from work to undergo the application process, including fingerprinting. In most instances, however, the same FBI database is being checked, and the process is the same regardless of whether the hazardous material is weaponizable. These redundant background checks increase costs on drivers, have a chilling effect on the number of drivers, and do little to increase security. Hearing witnesses will discuss the best means of eliminating duplicative background checks and the associated financial burdens on drivers, while enhancing efficiency and security within the regulated community.

### **Equitable Enforcement**

The HMR includes over 500 pages of regulatory text for transporting hazardous materials, and control over compliance with each regulation depends on where one is in the stream of transportation. The policy goal of enforcement is to encourage compliance with the HMR by the entity responsible. Much of the compliance rests with the offeror of the materials into commerce, who must properly classify the materials, select the packaging, mark and label the package, and prepare the shipping papers. Most of the violations of the HMR, however, are discovered during roadside, railyard, or terminal inspections and the carrier is often issued the citation, which may be for something over which the carrier had no control nor could have reasonably discovered. Violations can have consequences for a carrier's fitness to operate regardless of the fact that they did not have control over compliance with the regulations. The Committee will review the best means of addressing this inequity. Some industry stakeholders have recommended this could be accomplished through better distinguishing between functions normally performed by a shipper and those that are the responsibility of the carrier and clarifying that carriers are not responsible for violations from pre-transportation functions performed by another, unless the carrier has actual knowledge of the violation.

### International Representation

The transportation of hazardous materials is one that spans the globe. Therefore, several international forums exist to ensure international hazardous material transportation safety and facilitate commerce through the harmonization of hazardous materials regulations and standards. (Two such organizations are the United Nations Committee of Experts on the Transport of Dangerous Goods and the International Civil Aviation Organization.) Since the creation of DOT in 1967, PHMSA and its predecessor agencies have been designated the lead agency in this international work. Recently, PHMSA was replaced as the lead U.S. representative in these forums. The industry is concerned that replacing PHMSA, the nation's expert agency on hazardous materials transportation across all modes (e.g., rail, air, motor carrier, etc.) with an agency whose expertise is focused on one mode of transportation could undermine a uniform approach to hazardous materials policy. Hearing witnesses will discuss how best to ensure the nation's experts in hazardous materials transportation safety play a lead role in representing the country internationally.

### State Hazardous Material Permits

There are more than 40 separate state hazardous materials permitting programs. Complying with all of them creates a significant regulatory burden on the motor carrier industry. At the same time the safety benefit is questionable, as PHMSA has its own federal registration requirements and states may inspect hazardous materials carriers on the roadside. While some states may require a fitness review, for most it is an additional paperwork exercise for the industry. The Federal hazmat law provides for a voluntary uniform program for state hazardous material registration and permitting as a means of alleviating the burdens on the industry; however, only six states currently participate. The Committee will consider how to reduce these regulatory burdens and increase the effectiveness of the uniform program.

### Preemption Issues

State Enforcement: To achieve the safe and secure transportation of hazardous material uniform regulatory requirements are necessary, which is why explicit preemptive authority is provided for in the Federal hazmat law. The HMTSSRA, however, added a provision to the statute to remove preemptive limitations on state enforcement authority. This allows states to use the enforcement authority loophole to impose inconsistent requirements on the industry. Hearing witnesses will discuss the impacts of state enforcement authority on inter- and intrastate commerce and recommend changes to Federal hazmat law to ensure enforcement requirements are uniform.

Incident Reporting: Federal hazmat law sets forth five specific areas of state, local, or tribal law that are preempted if substantively different from federal law or regulations. Currently, written notification of unintentional releases of hazardous materials are included on that list. States have been free, however, to impose different verbal incident notification requirements on the industry, resulting in dozens of individual reporting requirements that vary from jurisdiction to jurisdiction. This creates confusion for individuals operating within multiple jurisdictions as to what, if any, verbal reporting requirement there may be for the location of the release. Hearing witnesses will discuss how federal notification requirements can ensure that the

appropriate local emergency response officials are notified in the event of a release without the need for a variety of state, local, and tribal requirements.

INVITED WITNESSES

The Honorable Cynthia Quarterman  
Administrator  
Pipelines and Hazardous Materials Safety Administration

David W. Boston  
President  
Owen Compliance Services, Inc.

Heidi K. McAuliffe, Esq. (or designee)  
Senior Counsel  
American Coatings Association, Inc.

Paul Derig  
Environmental, Health and Safety Manager  
J.R. Simplot Company

Barbara Windsor  
Chairman  
American Trucking Association

LaMont Byrd  
Director, Safety and Health  
The International Brotherhood of Teamsters