

TESTIMONY

Before

The United States House of Representatives  
Committee on Transportation and Infrastructure  
Subcommittee on Railroads, Pipelines, and Hazardous Materials

Hearing on

Reauthorization of the Department of Transportation's  
Hazardous Materials Safety Program

Presented By  
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Chairman Brown, Representative Shuster, and other members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials, I greatly appreciate the opportunity to appear before you at this hearing.

I am Cynthia Hilton, Executive Vice President of the Institute of Makers of Explosives (IME). IME represents companies that ship, receive and transport hazardous materials. IME and other hazmat-related associations participate in the Interested Parties for Hazardous Materials Transportation (Interested Parties), and I currently serve as a co-facilitator of this group. The mission of the Interested Parties is to promote nationally uniform requirements for the transportation of hazardous materials that support the safety, security, and efficiency of this vital economic activity. I have been asked to present a “shipper’s” view on the reauthorization of the Hazardous Materials Transportation Act (HMTA).

### Who We Are

Everyone in our society benefits from hazardous materials. From medicines to household cleaners and batteries to biofuels, we manufacture and distribute materials and products to make our lives better – healthier, more productive and enjoyable. Our products make possible the clothes we wear, the homes we live in, the food we eat, the arts we enjoy, and the means to travel to and from destinations near and far. Our industries provide jobs and we contribute positively to the U.S. balance of trade.

More than 3 billion tons of regulated hazardous materials—including explosive, toxic, corrosive, flammable, and radioactive materials—are transported in this country each year. Over 800,000 shipments of hazardous materials move daily by plane, train, truck, or vessel in packages with quantities ranging from several ounces to thousands of gallons. These shipments touch every community domestically and move worldwide, frequently through densely populated or sensitive areas where the consequences of an incident could be loss of life or serious environmental damage. Yet, even as the volumes of hazardous materials shipped have increased, the transportation of hazardous materials is accomplished with a remarkable record of safety.

Shipper participants within the Interested Parties represent companies engaged in the manufacture and distribution of hazardous materials in every hazard class and division, and into all manner of markets. However, it is important to recognize that the shipper community is extremely diverse. While it is more likely that carriers are capable of transporting freight of all kinds, the shipper community is much more specialized. For example, the nuclear industry is different from the compressed gas industry, is different from the chemical industry, is different from the petroleum industry, is different from the explosives industry. The companies we represent will also differ by the customers they serve. For example, some may manufacture for other shippers and some for the consumer market. Some may service a locality and others the world. We range from multi-national corporations to small businesses.

### Managing Risk

The historic purpose of the HMTA and implementing regulations has been to protect against harm when hazardous materials are transported. DOT, through PHMSA, administers a comprehensive regulatory program. Each person who offers hazardous materials for transportation in commerce must comply with all applicable requirements of DOT regulations, or a special permit, approval or registration issued under the regulations. The practical effect of these regulations is that hazardous materials may not be transported by any mode without permission. This blanket prohibition against transportation, unless

there is a specific DOT authorization for that transportation, necessitates a close, symbiotic relationship between the agency and the regulated community.

This relationship is anchored on the principles articulated by Congress that “the movement of hazardous materials in commerce is necessary to maintain economic vitality and meet consumer demands, and [that it] must be conducted in a safe, secure, an efficient manner.”<sup>1</sup> The HMTA exists to facilitate, not frustrate, the commerce of hazardous materials by balancing the demands of safety, security, and efficiency.

The success of this approach is measured by the relatively low number of serious hazmat incidents that occur annually. Accidental death from transporting hazardous materials is less than that from floods, tornados or lightening. Yet, some find any incident, or the possibility of any incident, unacceptable. Though some advocate it, the goal of the HMTA is not “zero risk.” Any activity, including the transportation of hazardous materials, involves risk. The only way to achieve zero risk is to not engage in the activity. While we seek to learn from incidents and strive to be more vigilant, the goal is to manage risk.

This risk-based approach relies on time-tested performance standards which can accommodate the innumerable variations in hazmat shipments. Not every quantity, form or characteristic of hazardous material warrants the highest level of regulatory control. Under its statutory authority, PHMSA considers what “amount and form may pose an unreasonable risk to health and safety or property.”<sup>2</sup>

Additionally, these materials are transported by all modes, and any one shipment often will travel by more than one mode. The intermodal nature of hazardous materials transportation demands a “One DOT” approach to hazmat regulation. If hazmat regulation is not modally harmonized, shipments will be frustrated. Such an intermodal approach also allows for a system-wide assessment of risk. Care must be taken to ensure that the tightening of regulation on one mode of transportation, ostensibly to reduce risk, does not just shift risk to other, potentially more, vulnerable modes.

Finally, the HMTA provides authority to manage risk of commercial shipments of hazardous materials throughout the transportation stream, including loading, unloading and storage incidental to the movement, by ensuring that shipments are not frustrated at jurisdictional boundaries, whether intrastate, interstate or foreign. From time to time, governments attempt to ban or otherwise limit hazardous materials shipments from their sphere of control. The NIMBY syndrome may appear to reduce risk, but it does nothing more than shift risk to other jurisdictions that may not be as prepared to handle the risk should an incident occur. The best way to share the risks and benefits of hazardous materials transportation is to ensure that the rules governing their movement are harmonized nationally and worldwide.

### Moving Forward

As the governing authority over hazardous materials transportation, the HMTA and its implementing regulations are of critical importance to the regulated industry and to the economy at large. The Interested Parties have historically submitted suggestions for improvements to the HMTA each time Congress considers its reauthorization. These improvements can be substantive or editorial. For the

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<sup>1</sup> P.L. 109-59, Sec. 7101(a)(2).

<sup>2</sup> 49 U.S.C. 5103(a).

record, I am submitting our recommendations in a red-line version of 49 U.S.C. Chapter 51 and a section-by-section description of changes the Interested Parties support. The remainder of my comments will discuss those provisions of particular interest to the shipper community.

### Strengthen Regulatory Uniformity to Preserve and Enhance Transportation Safety and Security

Given the safety and security issues surrounding the transportation of hazardous materials, a strong federal presence is required to ensure uniformity of regulations that protect the public, facilitate compliance, and provide for the efficient movement of these essential materials in intrastate, interstate, and foreign commerce. To this end, Congress explicitly provided preemptive authority to DOT. We recommend that these important purposes be articulated in a “purposes” subsection to §5125.

Congress should continue to strengthen DOT’s ability to ensure uniform regulations covering the transportation of hazardous materials by allowing DOT to use an “internal consistency test” in evaluating the burden on commerce. This standard was articulated by the Supreme Court in Healy v. Beer Institute, Inc.,<sup>3</sup> and would require DOT to evaluate “the practical effect of [a state] statute . . . not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other states, and what effect would arise if not one, but many or every, State adopted similar legislation.” This standard is already available to DOT when considering waivers for preemption. DOT’s authority should be clarified to ensure that DOT is authorized to consider such burdens on commerce when evaluating applications for preemption determinations.

The proliferation of non-federal requirements does not necessarily increase safety or security of hazardous materials shipments. Instead, non-uniform regulations often cause unnecessary delay, detention, and other consequences to these essential shipments that increase or shift risk. Regulatory confusion complicates worker training, may increase instances of non-compliance, or drive commerce underground. Safety and security benefits accrue to all citizens from the seamless movement of hazardous materials throughout the transportation system.

### Eliminate Regulatory Gaps and Overlaps

To work, the system of close regulation envisioned by the HMTA must be comprehensive. Regulatory gaps introduce potentially undue risk and overlaps impose unnecessary burden. The Interested Parties’ recommendations address both situations.

- Closing Gaps

The terms “load”, “unload” and “storage” are used 12 times in the HMTA. In §5107, Congress directs DOT to prescribe, by regulation, requirements for training that a hazmat employer must give its hazmat employees on, among other things, the safe loading, unloading, and handling of hazardous material during or incidental to transporting the materials. This requirement suggests that regulation exists in these areas so that hazmat employers would know to what requirements they must train. The definitions in §5102 explain that a “hazmat employee” includes individuals whose work may include loading or unloading hazardous materials, that a “hazmat employer” can be a person who transports or ships hazardous materials in commerce, and that “transport” or “transportation” is the movement of

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<sup>3</sup> 491 U.S. 324 (1989).

property and loading, unloading or storage incidental to the movement. Yet, the listing of persons that DOT is required to regulate does not include those who load, unload or handle shipments of hazardous materials. We believe that Congress should rectify this oversight by specifically including reference to these critical activities under DOT's general regulatory authority in §5103.

As noted, the definition of "transportation" includes loading, unloading and related incidental storage. However, the hazardous materials regulations do not address unloading or incidental storage that may take place in the absence of a carrier. These regulatory gaps are most apparent when bulk commodities are transported because the unloading and incidental storage of these transport packagings are typically accomplished by non-carrier personnel.

After a number of serious incidents, both the National Transportation Safety Board and the Chemical Safety Board brought concerns and recommendations to DOT for enhanced safety standards in these areas. These safety authorities recognized that individual voluntary attempts to fill the gaps in safety requirements, while commendable, are an inadequate solution. We agree. Despite various industry-recommended safety practices for these hazmat functions, the Interested Parties does not represent the universe of entities engaged in these operations and, even if we did, we have no authority to enforce compliance.

Subsequently, DOT analysis of its data has revealed that 27 percent of serious hazmat incidents occur during loading/unloading of bulk cargoes. Another 24 percent of serious incidents occur enroute, but are not accident-related, suggesting that some were caused, or might have been prevented, during loading. Since these unloading and incidental storage activities are currently unregulated, there may be under-reporting of incidents occurring at these times.

We recommend that DOT be directed to initiate a rulemaking to address the consequences that can result from human error and equipment failures related to loading, unloading, and storage of bulk packagings with capacities exceeding 3000 Liters when these activities are performed at fixed facilities. Not clarifying that PHMSA has authority to regulate loading, unloading and handling of hazardous materials in transportation, in the face of other statutory functional area clarifications to the contrary, runs the risk that other non-federal entities may feel that they are at liberty to regulate in these areas. Non-uniform regulations lead to increased incidents of non-compliance and associated fines for failure to comply with unique regulatory requirements that vary from state to state or even jurisdiction to jurisdiction.

- Addressing Overlaps

Congress granted authority to the Occupational Safety and Health Administration (OSHA) to regulate employee health and safety except in those instances when another federal agency exercised its authority over the same subject matter. This limitation on OSHA's authority is designed to ensure that important areas of federal regulatory authority are exercised, while avoiding duplicative or conflicting regulatory requirements. The so-called "reverse preemption" limitation to OSHA's authority applies to every federal statute except two, and one is the HMTA. In 1990, a drafting error created duplicative authority over DOT hazardous materials regulations concerning the "handling" of hazardous materials. In fact, OSHA now views its statutory authority "to include working conditions during the actual movement of hazardous material in commerce, as well as during the preparation of hazardous materials

prior to movement, and the loading, unloading, and temporary storage of hazardous material incidental to movement.”<sup>4</sup>

Regrettably, OSHA’s hazmat transportation rules are woefully out of date. It is unfortunate that OSHA has not rectified these regulatory deficiencies in the intervening years. As it stands, the regulated community is exposed to a number of out-dated and conflicting hazmat safety standards. If these out-dated rules from the last century were enforced, they would immediately put workers and the public in harm’s way. By way of contrast, DOT is constantly refreshing the hazardous materials regulations to cover new products and evolving international requirements. If Congress continues to expect that OSHA will share this jurisdiction spectrum, OSHA would soon find its regulatory agenda driven by DOT as it attempted to keep pace.

Another drawback stemming from OSHA’s duplicative regulatory authority results from the fact that OSHA does not have the authority to ensure uniform regulations as does DOT. The erosion of a uniform regulatory framework is exacerbated by the fact that the Occupational Safety and Health Act allows differing state requirements. Non-uniform regulations can frustrate shipments or shift risk to other jurisdictions. As noted, risk is increased because the more time and distance hazardous materials spend in transportation, the more likely it is that they will be involved in an incident.

While DOT has attempted to address these jurisdictional issues through its regulatory authority, its efforts have failed. OSHA does not recognize DOT’s definition of its authority, and DOT’s definition has created regulatory gaps, as well as overlaps, between existing US Environmental Protection Agency and Department of Justice requirements. At the same time, our recommendations recognize that these agencies have regulatory responsibilities that should be complementary. In order to harmonize requirements, minimize regulatory gaps and duplications, and promote jurisdictional certainty, consistency, and clarity, we support language requiring DOT to consult with all other federal agencies who have fixed site requirements when DOT seeks to establish requirements for transportation activities performed at fixed facilities.

We strongly urge that the statute be revised to ensure a seamless, non-conflicting regulatory standard for hazmat transportation safety.

#### Address Undeclared Hazardous Materials

The 2005 amendments provided DOT new inspection and investigation authority. DOT inspectors may open and/or remove from transportation certain packagings if they have an “objectively reasonable and articulable belief” that the packaging contains a hazardous material. Under certain circumstances, DOT may order the removal of a package from transportation for additional scrutiny. In such cases, the inspector must document his/her reasoning. In addition, inspectors are authorized to gather information about the packaging from shippers, carriers, and others, and may order the shipper to move the packaging to a safe location. The authority also contains provisions relating to the resumption of transportation for a packaging deemed to be safe, the issuance of emergency orders for unsafe conditions or practices, and the development of regulations. The Interested Parties recommend several changes to this authority.

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<sup>4</sup> 71 FR 18798.

Growing awareness of serious safety issues from “undeclared” packages (i.e., those suspected of containing hazmat but not otherwise identified) was the basis for the new inspection and investigation authority. The need was based on the ValuJet incident, which involved a totally undeclared package. The statute states that a DOT inspector may open a package if he/she has a reasonable and articulable belief that the package may contain a hazardous material. No new authority to open or test materials in declared packages was discussed or examined. Therefore, the Interested Parties believe that an inspector's ability to search, open, or remove from transportation packages of concern should be limited to those which the inspector believes contain “undeclared” hazardous materials. In addition, package opening activity should take place “at a properly equipped facility designated by the Secretary for this purpose” in order to protect public health and safety.

The Interested Parties are seeking clarification to ensure that DOT will notify the carrier and shipper, but not other parties related to the package (e.g., packaging manufacturer), that a package has been removed from transportation. We see no safety or regulatory benefit from notifying a packaging manufacturer, tester or “other person responsible for the package” in addition to the shipper and carrier.

The Interested Parties would add a new subsection on indemnification. DOT should indemnify and hold harmless persons who are injured by a release from a package that is opened or otherwise handled under this section, or whose packages were damaged or destroyed by inspectors but found to be in regulatory compliance.

Finally, we recommend that the requirement for implementing rules be updated to reflect the rulemaking DOT has initiated to implement this authority, and to ensure that the final rule addresses critical issues concerning delay in the transportation of time-sensitive materials (e.g., medical products), training and equipment for inspectors, restoration or disposal of an opened package for transportation, and cost and damage factors. The safety of the public, those directly engaged in hazmat transportation, and government enforcement officials depends on the appropriate resolution of that rulemaking.

#### Clarify a HazMat Employer’s Responsibility to Train HazMat Employees

An issue leading up to the 2005 HMTA amendments was concern over the training of non-employees who perform regulated hazmat functions for a hazmat employer. One of the proposals put forth to address the concern was to expand the definition of “hazmat employee” and “hazmat employer” to encompass those individuals who are “used” but not “employed.” The intent of the definitional change was to ensure that the non-employees were appropriately trained; the result of the definitional change would cause hazmat employers to train non-employees.

No one disputes that the training of hazmat employees is critically important, as incident statistics of human error and civil penalty standards attest. However, every “hazmat employee” has an “employer.” Hazmat employers include contractors and other third parties whose hazmat employees provide services to shippers, carriers, and packaging manufacturers. In recognition of this fact, the “or used” language was stricken from the definition of “hazmat employee.” However, in what may have been an oversight, the companion “or uses” language was retained in the definition of “hazmat employer.”<sup>5</sup>

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<sup>5</sup> 49 U.S.C. 5102(4)(A)(i)(I).

The definition of "hazmat employer" should be restored to its original text to clarify the person responsible for training hazmat employees. Each hazmat employer is responsible for training its hazmat employees, whether employed on a full time, part time or temporary basis. This definition and the proposed change to it do not affect the scope of DOT's existing statutory inspection and compliance jurisdiction over every individual who performs a hazmat employee function.

This clarification of training responsibilities will improve accountability of cargo handlers and third parties that provide services to shippers, carriers, and companies involved in the packaging and loading of hazardous materials in transportation. Improved accountability and clarification will incentivize the responsible parties to ensure that adequate training is conducted, appropriate to the employee's job duties. Improvements in function-specific training will reduce violations of hazmat regulations and those incidents resulting from improperly training employees.

As industry expands reliance on outsourcing specialized functions, the number of third-party entities specializing in assisting companies in the preparation and transport of hazardous materials may also increase. The value of outsourcing a technical function is substantially reduced unless the supplier is clearly responsible for training its own employees to comply with applicable regulations.

#### PHMSA's Role

Over 100 years ago, Congress charged the Federal government to reduce the dangers associated with the transportation of explosives and other dangerous articles. Thus began the Federal hazardous materials safety program. The establishment of DOT brought oversight of hazardous materials transportation under one authority. Historically, this important responsibility within DOT has been assigned to PHMSA and its predecessors. Given the multi-modal, multi-jurisdictional reach of hazardous materials transportation, regulatory oversight cannot be effectively assigned to any modal administration. Congress most recently affirmed this organizational imperative with the enactment of the Norman Y. Mineta Research and Special Programs Improvement Act.<sup>6</sup>

Lately, challenges have been raised about PHMSA's ability to meet its regulatory and enforcement obligations. These challenges have disrupted the timely processing of regulatory and other policy actions. While industry may agree that aspects of the program could be improved, we have not seen any shortfall that could not be remedied by more resources. At the same time, PHMSA's hazardous materials technical expertise is unmatched and recognized worldwide. The close regulatory control the agency must exercise over hazardous materials shipments has made it the most proficient and prolific of DOT regulatory agencies. To the extent PHMSA's harmonized approach to regulation of hazardous materials is undermined in deference to one specific mode or another, risk will be shifted and shipments will be frustrated. We would welcome a reaffirmation in this reauthorization of Congress' longstanding commitment to the intermodal and international "One DOT" role PHMSA carries out to ensure the safe, secure and efficient transport of hazardous materials throughout the transportation network at home and abroad.

#### Conclusion

Our communities, the public and workers engaged in hazardous materials commerce count on the safety and security of these shipments. Industry supports the closely regulated environment envisioned

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<sup>6</sup> P.L. 108-426.

under the HMTA because it has time and again proven to be the most efficient way to move hazardous materials safely and securely.

I would be glad to answer any questions.