



COUNCIL ON SAFE TRANSPORTATION
OF HAZARDOUS ARTICLES, INC.

January 31, 2011

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Dear Dr. El-Sibaie:

The Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA) hereby submits an Appeal of the Final Rule HM-233B filed in Docket No. PHMSA-2009-0410 (HM-233B) and issued on January 5, 2011. This Appeal is submitted in accordance with Title 49, Code of Federal Regulations, Subchapter A, Part 106, §106.110-.120 on behalf of COSTHA, its members and the additional associations identified at the conclusion of the document.

COSTHA is a not-for-profit organization representing manufacturers, shippers, distributors, carriers, freight forwarders, trainers, packaging manufacturers and others associated with the hazardous materials transportation industry. In addition to promoting regulatory compliance and safety in hazardous materials transportation, COSTHA assists its members and the public in evaluating the practicality and efficacy of laws, rules and regulations for the safe transportation and distribution of hazardous materials.

COSTHA recognizes the importance of requiring applications for special permits to include relevant and usable information applicable to the request. We appreciate the previous opportunity to submit comments through the Notice of Proposed Rulemaking (NPRM) process. However, we are deeply concerned our comments, thoughtfully constructed and vetted through our membership, were neither adequately considered nor addressed before issuance of the Final Rule. To the extent PHMSA considered industry's comments, we do not believe that it adequately explained its reasons for disregarding them, often providing no more than one sentence simply reiterating the agency's belief that it needs the additional data. We would like to reiterate several comments made in our previous submission, while also pointing out several outstanding questions which were raised by industry yet neither answered nor discussed to any depth in the Final Rule.

The Council on Safe Transportation of Hazardous Articles, Inc.

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Before addressing our specific appeal, we think it is important that PHMSA embrace a data driven, risk based approach to its rulemakings. In the case of the special permit program, historical data indicates that there has not been a single fatality attributed to hazardous materials transported pursuant to a special permit or approval in over ten years. During the same time period, there have been on average less than two serious injuries involving special permits or approvals each year. As such, the safety benefits to the public from the recent onerous revisions to the special permit application are virtually non-existent, while the costs associated with PHMSA's new special permits procedures - both to the regulated industry and the agency itself - are significant. Against this backdrop we articulate our specific concerns with PHMSA's final rule revising the special permit application process.

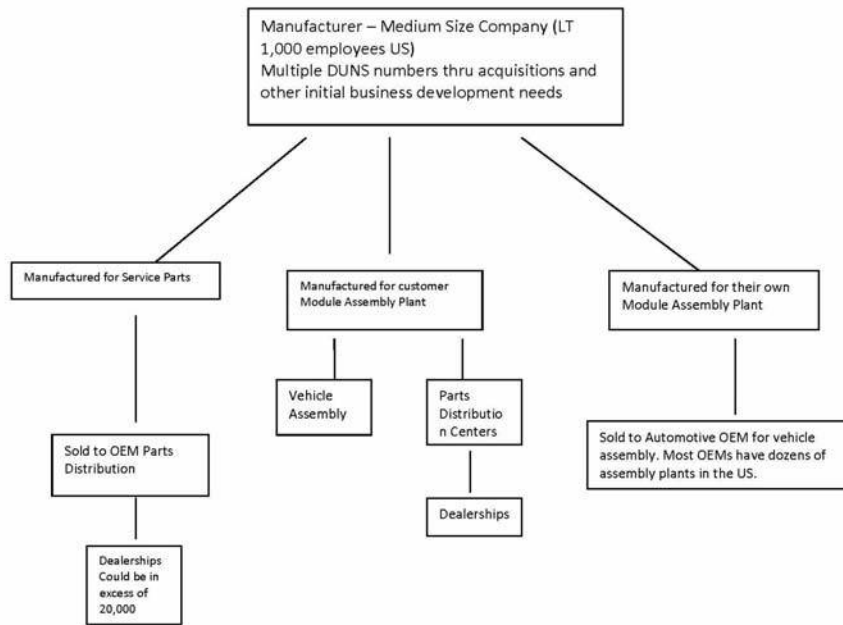
§107.105, paragraph (a)(2)

In the Final Rule, the Pipeline and Hazardous Materials Safety Administration (PHMSA) adopted the requirement to include the name, address, physical address(es) of all known locations where the special permit would be used, email address (if known), and telephone number of the applicant. As COSTHA pointed out in our comments to the NPRM, many special permits (SP) are utilized throughout a company's operational and distribution operations. Thus, the locations where an SP may be used would likely include every physical location owned by a company – for some SP holders this amounts to several hundred locations. In the Preamble to the Final Rule, PHMSA acknowledges the address list may be long but reiterates “that [PHMSA's] intention is to conduct as thorough a fitness evaluation of a company as possible.” PHMSA did not acknowledge the significant effort required to collect the possible addresses where such permits would be used, did not address the question of whether addresses would need to be continually updated if an SP was issued, and did not acknowledge the additional costs associated with collection and maintenance of the addresses. COSTHA is not aware of any reference to the additional collection activities in a cost benefit analysis.

By requiring the additional address information, PHMSA suggests all locations will be subject to a possible fitness evaluation. Industry has requested that PHMSA address fitness evaluations in a separate Rulemaking. However, it is important in the context of this Rulemaking to acknowledge the only reasons for submission of such data would be for fitness evaluation and SP enforcement. Otherwise the address of the company headquarters would be sufficient. If the addresses are needed for fitness evaluation, COSTHA requests this requirement be removed from the Final Rule until the Fitness Evaluation criteria can be resolved. If the addresses are intended for SP enforcement after the SP has been issued, PHMSA must address the questions over revisions to the list after SP application submission. For example, a location is added after the permit application is submitted. Does the application and subsequent SP file have to be updated to reflect the new location? What will an inspector do if a location where the SP is being used is not listed in the application or file? Industry must comply with the regulations, but must also contend with alternate interpretations by inspectors when the regulation is not clear. Moreover, PHMSA already has authority to request this information in the context of an inspection/enforcement proceeding. Providing this information on the front end of a SP application is a waste of scarce resources and provides PHMSA with information that likely would be outdated at the time it is needed.

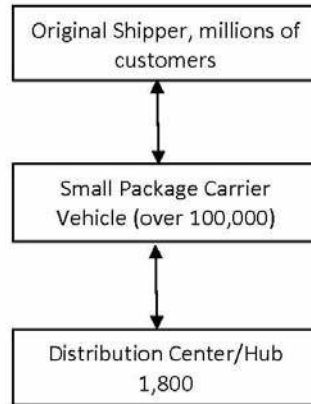
Three examples provided by different industry segments illustrate the vast amount of information that would be required to be collected, the lack of value to the agency, and the fact that the requirement to gather and provide the information does not comply with President Obama's recent regulatory strategy regarding simplifying regulatory reporting.

Example 1:

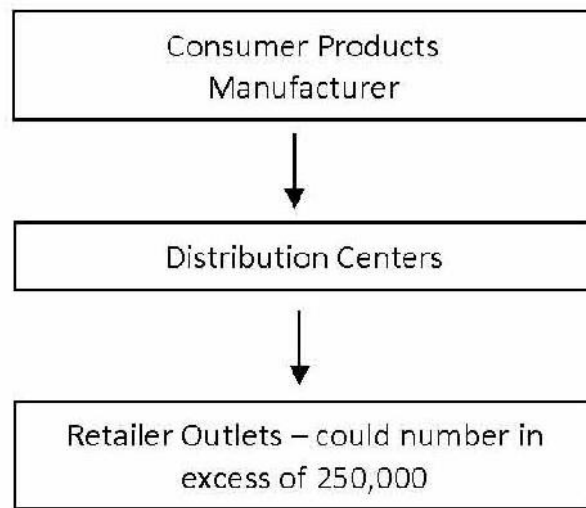


Example 2:

Small Package Carrier utilizes special permit to return non-compliant shipments which greatly enhances safety in the supply chain



Example 3:



PHMSA requires submission of the name of the Chief Executive Officer (CEO) or president. It is not uncommon for CEOs and presidents to change frequently due to company reorganization or other reasons. If a company changes CEO during the application process, will PHMSA require submittal of an amended application? A significant amount of information can change in 120 days. Can PHMSA explain why this information, including routine changes, is consequential to fitness evaluations? COSTHA believes the CEO or president data may prove more confusing to company identification if changes occur frequently or have occurred more recently than the SP request.

As previously mentioned, not all companies choose to obtain a Dun and Bradstreet Data Universal Numbering System (D-U-N-S) identifier. This identifier is typically used for credit reporting and business transactions. The US Government does require certain contractors who work under contract to have such a number, but again this is for credit and billing purposes. The adopted language does not indicate that submission of a D-U-N-S identifier is optional. Therefore, the Final Rule requires having such a number as a prerequisite to applying for an SP. Further, PHMSA did not address COSTHA's concern regarding companies who operate with multiple identifiers. Will companies be required to submit separate applications for each D-U-N-S identifier?

§107.105(c)(10)

PHMSA requires an estimate on the number of operations expected to be conducted or the number of shipments to be transported under the SP. As previously stated, it is impossible for a company to accurately prognosticate the number of shipments to be offered. PHMSA addressed COSTHA's primary concern by stating "we expect applicants to provide an estimate of the number of shipments based on the best available knowledge." However, in addressing industry's belief that PHMSA failed to justify its request for the number of operations expected to be conducted under a special permit, PHMSA's response was simply "we disagree". No additional information or justification was given. Thus, COSTHA does not feel PHMSA has adequately addressed industry's concerns that data from collected applications will be used for issuance determination and will not be used for special permit implementation enforcement purposes. Further, we continue to be

concerned the number of actual shipments will be used for fitness evaluation instead of a comparison of the number of shipments offered verses the number of incidents reported.

COSTHA strongly supports PHMSA's Special Permit and Approvals Program and will continue to encourage improvement. However, we do not believe the Final Rule improves the program, but instead creates additional unnecessary administrative burdens on both PHMSA and industry. PHMSA has not justified the additional costs which will be incurred by both small and large organizations in order to comply with the new submission requirements. PHMSA has not provided evidence of broad failures in the Special Permit application process by noting examples where the Administration lacked required information, or how this new information would have made a material difference to the safety outcome of any incident involving a SP. The Administration did not acknowledge the documented and demonstrated safety record regarding previously issued special permits, but instead chose to require significant changes to the application program as a whole.

COSTHA does not believe the previous SP application requirements were insufficient. We do not believe PHMSA has proven that the application requirements needed modification. PHMSA has not provided justification that they incorrectly issued or disallowed special permits due to previous omission of these new application requirements.

On January 18, 2011, President Obama issued an executive order requiring federal agencies to design cost-effective, evidence-based regulations that are compatible with economic growth, job creation and competitiveness and follow a number of guiding principles. Among these are considering costs and benefits and choosing the least burdensome path, ensuring a transparent regulatory process that includes public participation and a public comment period of at least 60 days, working to coordinate, simplify and harmonize regulations to reduce costs and promote certainty, and regular review of existing regulations to determine if they should be maintained, revised or repealed. This appeal is consistent with the President's directives.

Therefore, through this appeal COSTHA respectfully requests PHMSA reconsider the conditions in HM-233B, specifically the requirements for the number of locations where the permit is expected to be used, the CEO or president name, the requirement of the D-U-N-S identifier, and the estimate on the number of times the SP is expected to be used.

Sincerely,



Thomas W. Ferguson, PG, CHMM, DGSA
COSTHA Technical Consultant

In addition to the COSTHA membership, the following associations have expressed their agreement with these comments:

American Pyrotechnics Association
Agricultural Retailers Association
Institute of Makers of Explosives
National Association of Chemical Distributors