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The Journal Of HAZMAT Transportation™

Compliance ■ Security ■ Safety
For All Modes of Transport

Volume 22, Number 6 ■ March / April 2012

In this issue:

A Publication of PRI International, Inc.

877-429-7447
www.hazmatship.com

Published and Printed in the United States of America

Industry Moves To Force Quicker, Less Costly Action On Applications For Special Permits And Approvals

By Jerry W. Cox, Esq.

PHMSA faces challenges on two fronts over its process for issuing variances from hazmat regulations. Industry lawyers say the agency's application review procedures violate the Administrative Procedure Act and lobbyists, meanwhile, convinced a key congressional committee to approve legislation to hasten the issuance of Special Permits and Approvals.

The Approvals and Permits Division ("A&P") of PHMSA's Office of Hazardous Materials Safety recently implemented more than 100 pages of new Standard Operating Procedures ("SOPs") for processing the multiple thousands of applications the agency receives each year from hazmat shippers, carriers, manufacturers and companies that make packaging. When various types of applications that once took days or weeks began to languish for months, industry representatives complained that their companies faced potentially ruinous delays. In mid-2011, for example, PHMSA listed 911 applications as aged beyond 120 days, nearly two-thirds of which were older than 180 days.

Industry lawyers challenged PHMSA staff most recently at a February 29 public meeting, but the agency has created few opportunities for a court determination concerning the legality of using the SOPs instead of adopting new procedural regulations after allowing public "notice and comment." Of the approximately 45,000 applications PHMSA says A&P processed in the past two years, barely one-third of one percent were rejected because the applicant was deemed "unfit."

Recent legislation approved in the House Transportation and Infrastructure Committee offers similarly scant hope of resolving the conflict. Enactment seems unlikely because the House leadership lacks rank-and-file member support for its transportation reauthorization bill, H.R. 7, and because Senate Democrats introduced a polar opposite bill, S. 1952, that would write the controversial SOPs into statute.

Delays occasioned by the new SOPs created frustration, but hazmat industry trade associations took their concerns to lawmakers on Capitol Hill when DOT refused to reduce the red tape and proposed instead to hire two dozen more federal workers. Applicants would be expected to cover the $11.7 million a year in additional administrative costs through "user fees" for each application.

Some experienced hazmat professionals, like Laurie Moore at car battery maker Delphi Automotive, hope a middle ground will emerge. "I understand PHMSA's desire for a robust process," Moore says, "but there has to be a balance." Moore says she is not against SOPs. "I'm in favor or standardizing as much as possible, but there will always be a finite number of people in Special Permits to process applications." By contrast, she adds, "industry moves at lightning pace."

The conflict began in 2010, when U.S. Rep. James Oberstar (D-WI), who chaired the key House committee, claimed PHMSA was too "cozy" with industry applicants. In response to a report by DOT's Inspector General, PHMSA admitted some records were lost during the agency's move to its new headquarters and acknowledged that it was not appropriate for A&P to issue Special Permits to trade groups. Career staff at the agency insisted, however, that A&P did nothing to compromise safety.

Under pressure from Chairman Oberstar, who lost his re-election bid in 2010, PHMSA expanded the review process for both Special Permits (which grant a holder permission to package or ship hazmat in ways that are otherwise prohibited) and Approvals (which include a wide variety of formal agency acknowledgements that a holder may engage in certain types of anticipated

JERRY W. COX *handled transportation safety legislation in the U.S. Senate Commerce Committee. A graduate of Princeton and the University of Virginia School of Law, he is counsel to several trade groups and DOT-regulated companies. For Mr. Cox's contact information and more information on his book, Transportation of Hazardous Materials in Plain English Packaging, visit http://www.potomacstrategyassociates.com.*

activities or ship certain types of special ladings, such as explosives). The new SOPs include, among other controversial bureaucratic hurdles, a detailed multi-tier review of the applicant's "fitness," a term that does not appear anywhere in the hazmat statutes.

As delays in the issuance of Special Permits stretched far beyond the six month statutory maximum, regulated companies and hazmat trade groups cried foul. According to COSTHA's Tom Ferguson, Special Permits create jobs in the hazmat community because they "provide innovative products and services and advance the cutting edge technologies to compete in the global marketplace." In two public meetings, industry representatives and former agency officials insisted that the additional bureaucracy is "not justified on a safety basis" and that the resulting delays have seriously hurt the U.S. economy.

In response to the two-front challenges, PHMSA's new Deputy Associate Administrator for Field Operations, William Schoonover, told attendees at the agency's February 29 meeting that it may be time to consider the "impact and feasibility of alternatives" to the procedures established in the SOPs. Program head Ryan Paquet agreed it was fair to ask, "Is there another way?"

Meanwhile, however, Paquet said PHMSA will continue its three-tier fitness reviews, which he claims have become "much more efficient." As of March 15, 2012, the agency says, only 35 of the applications in its pipeline were aged more than 180 days.

Statute Requires Prompt Action on Exemptions, Not "Fitness Reviews"

49 U.S.C. Sec. 5117: "(a) The Secretary may issue ... a special permit ... in a way that achieves [an equal] safety level .... (b) [An applicant] must provide a safety analysis prescribed by the Secretary that justifies the special permit.... (c) The Secretary shall issue ... the special permit ... within 180 days ... or ... publish ... the reason why the ... decision ... is delayed ...."

Special Permit & Approval Applications (24 Months Before February 2, 2012)

Total Number Processed (Approx.)	
Number Found "Fit"	45,000
1st Tier Review	43,190
2nd Tier Review	1,593
3rd Tier Review	56
Number Found Fit	44,839
Percentage Not Found "Fit"	0.358 %

Source: PHMSA Agenda for Feb. 29, 2012, Public Meeting

According to Paquet, applicants are "instantly" matched against PHMSA's Hazmat Intelligence Portal ("HIP"), which aggregates enforcement action data across DOT agencies, and FMCSA's Safety and Fitness Electronic Records ("SAFER") System, which tracks motor carriers' safety performance. If the agency sees what its SOPs treat as a negative indication in those databases, the application is referred to a second-level review by PHMSA field operations staff or officials at other DOT agencies whose schedules and priorities are outside PHMSA's control. If PHMSA is still not satisfied, applicants are subjected to a third-tier process that may include an on-site inspection. Applicants complain that PHMSA's second- and third-tier pass/fail criteria are arbitrary and equally unknown to industry and government employees who conduct the reviews.

In a posting on its website, the agency also claims that its new online application "provides faster processing/turnaround time." Some applicants complain that electronic submissions do nothing of the sort. PHMSA's Office of Public Affairs acknowledges that it has no statistics to support the claim, but agency staff are hopeful the new approach will reduce application-related costs and delays.

When PHMSA scheduled the Feb. 29 public meeting, the agency revealed that it processed more than 45,000 applications for Special Permits and Approvals in 2010 and 2011 and that less than 2,000 of them required second-level review. Of this unlucky four percent of the applications, nearly 90 percent were eventually approved. A third of the rejects in that round applied for reconsideration, and three-fourths of them were found to be "fit" to hold whichever type of variance they requested. After all the additional work and delays, therefore, the new SOPs, screened out just a fraction – 0.00358 – just over one-third of one percent of the 45,000 applications PHMSA processed.

While PHMSA officials have kept industry focused on operational details of the application process, little attention has gone to the underlying legal and policy justification for conducting extensive reviews. In a recent letter to congressional staff, DGAC Vice President Alan Roberts flatly rejects the agency's new approach and decries the resulting "inordinate delays." Roberts, who ran the hazmat program for twenty-five years under Presidents Ford, Carter, Reagan, Bush and Clinton, emphasizes that "fitness" is not a statutory requirement. He reports that the word "fit" was written into PHMSA regulations at his personal behest solely to reinforce PHMSA's authority to revoke a particular Special Permit or Approval for egregious misconduct by the holder, not "to require pre-clearance of applicants according to a standard that does not exist."

Regardless of how the "fitness review" process began, several trade group lawyers challenge its legality. They say the new fitness determinations change substantive eligibility requirements and, therefore, can be accomplished only through "notice-and-comment" rulemaking. PHMSA's attorneys argue that the SOPs – which are difficult to find on the agency's website – are merely "internal guidance." Under that view, the agency can adopt, change or repeal the SOPs without consultation with or notice to applicants and the procedures cannot easily be challenged in court as "arbitrary and capricious." Even if the process for adopting the SOPs complies with the Administrative Procedure Act, industry attorneys counter, PHMSA's heavy reliance on open enforcement cases – where an applicant has been merely accused of breaking the hazmat regulations – violates applicants' due process rights.

In sharp contrast, the House legislation would undo nearly everything PHMSA has done in the A&P program since 2010. First, it would write into hazmat law that any procedures and criteria for issuance of Special Permits and Approvals must be done through rulemaking. Second, it would ban the imposition of "user fees" for processing applications. Third, the proposed law, which would authorize $39 million a year for PHMSA's hazmat program through 2016, would nudge the agency to eliminate many renewal applications by incorporating thousands of long-standing Special Permits into the regulations.

The House provisions would face an uphill battle in the Senate, where key Democrats introduced legislation with polar opposite provisions. In S. 1952, Commerce, Science and Transportation Committee Chair Sen. Jay Rockefeller (D-WV) and Surface Transportation Subcommittee Chair Sen. Frank Lautenberg (D-NJ) would prohibit PHMSA from issuing a Special Permit or Approval without an affirmative finding on the applicant's "fitness." The Senate bill would require applicants to list every address at which a variance will be used and provide many other details industry considers irrelevant and unduly burdensome. In other legislation, Senate Democrats sought to require imposition of PHMSA's proposed "user fees."

Delphi's Laurie Moore is skeptical about new legislation and recent agency initiatives to speed the process and avoiding the need for many renewal applications by converting more Special Permits and Approvals into generally applicable regulations. "Hazmat regulations are so convoluted and confusing already, you often have to flip to four or five different provisions to get an answer to a fairly simple question," Moore says. "Adding more footnotes to the Hazardous Materials Table is not the same thing as rewriting the regulations." ◻