



DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2022-0127 (Notice No. 2023-09)]

Hazardous Materials: Clarification of Applications for Special Permits Submitted in the Public Interest

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: PHMSA is publishing this notice to inform interested parties on how PHMSA evaluates and determines whether a special permit can be considered consistent with the public interest. This notice outlines the criteria PHMSA used to evaluate special permit applications on the basis of public interest.

FOR FURTHER INFORMATION CONTACT: Don Burger, Standards and Rulemaking Division, 202-366-4314, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, D.C. 20590-0001.

SUPPLEMENTARY INFORMATION:

I. Background

PHMSA is responsible for regulations to ensure the safe transport of hazardous materials. The Hazardous Materials Regulations (HMR) have many performance-oriented regulations that provide the regulated community some flexibility in meeting safety requirements. Even so, not every transportation situation can be anticipated and addressed by the current regulations. The hazardous materials community develops new materials, technologies, and innovative ways to move hazardous materials safely. Such innovation strengthens our economy, and some new technologies and operational techniques may enhance safety.

In order to accommodate and encourage continued development and innovation in the safe transport of hazardous materials, PHMSA is authorized to issue variances from the HMR via special permits, which set forth alternative requirements to those currently in the HMR. Special permits provide a mechanism for applying new technologies, promoting increased transportation efficiency and productivity, and ensuring global competitiveness without compromising safety. In addition, special permits enable the hazardous materials industry to integrate new products and technologies into production and the transportation stream safely, quickly, and effectively.

The Department of Transportation (DOT), through PHMSA, issues special permits under the Hazardous Materials Program Procedures (49 CFR Part 107, Subpart B). By issuing a special permit, PHMSA is in effect waiving requirements of the HMR and often imposing alternative requirements, i.e., a special permit may allow a person to perform a function not otherwise permitted under the HMR.¹ PHMSA's Approvals and Permits Branch issues the special permits on behalf of the Associate Administrator.

The HMR requires that special permits must achieve a level of safety that is at least equal to that required by the regulation from which the special permit is sought; or, if a required safety level does not exist, is consistent with the public interest.²

Various stakeholders have inquired about the criteria for evaluating special permits consistent with the public interest, as well as how these special permits are evaluated. PHMSA is publishing this guidance to inform stakeholders and interested parties seeking a special permit in the public interest of the types of information PHMSA requires when it reviews a special permit application, and to provide examples of previous approved applications for a special permit in the public interest.

¹ <https://www.govinfo.gov/content/pkg/USCODE-2011-title49/html/USCODE-2011-title49-subtitleIII-chap51.htm>

² 49 CFR 107.105 (d).

PHMSA guidance—such as this notice—is not substantive rules themselves and does not create legally enforceable rights, assign duties, or impose new obligations not otherwise contained in the existing regulations and standards. Instead, PHMSA guidance is intended as an aid to demonstrate compliance with the relevant regulations. An individual who can demonstrate compliance with PHMSA guidance is likely to demonstrate compliance with the relevant regulations. If a different course of action is taken by an individual, the individual must be able to demonstrate that its conduct is in accordance with the regulations.

II. Examples of Special Permits Consistent with the Public Interest

In the past, PHMSA has considered a special permit consistent with the public interest if the special permit provides a positive net benefit to the welfare or well-being of the public; i.e., the benefit to society from the waiver authorized in the special permit will outweigh potential harms. For example, while the transport of an unapproved explosive substance is forbidden under the HMR, it would be in the public interest to allow for a one-time transport of the substance to remove it from a location that creates higher risk for the public—such as removal of a seized explosive from a port—provided the risk to the public can be minimized through operational controls.³ Similarly, while movement of a certain hazardous material by passenger aircraft might be forbidden under the HMR, the movement might be justified if it is the only mode of transport available to a remote location and sufficient operational controls are in place to minimize risk to the public to the extent possible (e.g., limiting only to a specific carrier with defined route).⁴ Other examples of public interest special permits have supported responses to public health crises. For example, in response to the Ebola outbreak, PHMSA allowed specialized packaging to transport waste for disposal, subject to operational controls.⁵ Prior to

³ See DOT-SP 21357, Special Permit for Gateway Pyrotechnic Productions, LLC. PHMSA's Office of Hazardous Materials Safety maintains a searchable database of issued special permits on its website at <https://www.phmsa.dot.gov/approvals-and-permits/hazmat/special-permits-search>.

⁴ See DOT-SP 16392, Special Permit for Gem Air, LLC; DOT-SP 12674, Special Permit for G & S Aviation, LLC; DOT-SP 15243, Special Permit for Katmailand, Inc.

⁵ See DOT-SP 16279; DOT-SP 16278 & DOT-SP 16266, Special Permits for Stericycle, Inc.

issuance of the special permit, there were no packagings authorized under the HMR that could have handled the large quantities of waste, so it was in the public interest to authorize an alternative means to transport the waste for incineration and disposal.

III. Justification for Special Permit Applications

Section 107.105(d)⁶ outlines the information the applicant must provide when requesting a special permit application. An applicant seeking a special permit, whether on the basis of an equal level of safety required by the HMR or as consistent with the public interest, must provide:

- Information describing all relevant shipping and incident experience of which the applicant is aware that relates to the application.
- A statement identifying any increased risk to safety or property that may result if the special permit is granted, and a description of the measures to be taken to address that risk.
- Either one of the following:
 - Substantiation, with applicable analyses, data, or test results, (e.g., failure mode and effect analysis), that the proposed alternative will achieve a level of safety that is at least equal to that required by the regulation from which the special permit is sought; or
 - If the regulations do not establish a level of safety, an analysis that identifies each hazard, potential failure mode, and the probability of its occurrence, and how the risks associated with each hazard and failure mode are controlled by the provisions of the prospective permit.

Without the applicant providing information outlined in § 107.105(d), PHMSA may not be able to complete its evaluation of the application as required by § 107.113(f). Further, in providing the above information and analysis, the applicant should demonstrate that the proposed

⁶ 49 CFR 107.105(d).

alternative will achieve a level of safety that is consistent with the public interest and will adequately protect against the risks to life and property inherent in the transportation of hazardous materials in commerce.

IV. Adequate Protection Against the Risks to Life and Property

As discussed above, an applicant seeking a special permit consistent with public interest must demonstrate that their proposed alternative to the HMR will achieve a level of safety that adequately protects against risks to life and property.⁷ This is often achieved by proposing various operational controls for a special permit in the application. A determination by PHMSA that an application and the proposed operational controls provide “adequate protection” against risks to life and property does not indicate such operational controls provide a lower level of safety than a special permit that was determined to have at least an “equivalent level of safety” to the HMR. Rather it is a safety determination in the absence of a standard to compare against the proposed approach in the special permit application.

A special permit application seeking to show it is consistent with the public interest must include information on how the applicant will minimize any safety risk to the maximum extent practicable. Applicants should include explanations of: 1) the hazardous material and how it is contained; 2) known risks of the hazardous material; 3) mitigation of the risks posed by the hazardous material via packaging, hazard communication, and/or operational controls; and 4) any other relevant factors to support mitigation of any safety risks.

Operational controls to help minimize transportation risks are also important features of permits issued in the public interest. Operational controls are requirements designed to enhance safety and oversight when transporting hazardous materials under special permits. Though special permits may waive some regulatory requirements due to unusual circumstances, operational controls allow permit holders to improve safety through policies, procedures, and

⁷ 49 CFR 107.113(f)(2)

communication. Operational controls in special permits have included selecting and training specific personnel; implementing additional equipment inspections and maintenance; limiting transport to certain times, routes, or conditions; using tracking and communication systems; documenting the permitted shipment; and other measures tailored to the situation. Operational controls may also limit the movement of the hazardous material to specific modes of transportation.

V. Supporting Documentation and Duration for Public Interest Special Permits

Providing detailed supporting documentation is key to supporting PHMSA's decision-making process. PHMSA evaluates all information and data outlined in this notice in reviewing and issuing a special permit application in the public interest. If the information outlined in the HMR and described in this notice is not provided in a special permit request, it is unlikely that a special permit would be issued in the public interest as the application would not be sufficient.

Finally, PHMSA will consider the length of time that the special permit issued in the public interest should remain in effect. New special permits are limited to a maximum of two years in duration by 49 U.S.C. 5117(a)(2). Emergencies—e.g., natural disasters, failure of containment of a hazardous material in transport, etc.—require quick decision-making by PHMSA to mitigate the potential hazards to the public and the environment. Special permits issued in the public interest, such as in the case of emergencies, typically are only issued for an amount of time expected to be sufficient to address the emergency.

VI. Future Actions

This notice serves as guidance for interested parties looking to obtain special permits in the public interest. PHMSA encourages applicants seeking a special permit in the public interest to ensure applications include all necessary information to address the requirements of the HMR as outlined in this notice.

Issued in Washington, D.C., on March 7, 2024.

William S. Schoonover

Associate Administrator of Hazardous Materials Safety
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