

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION

PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
(PHMSA)

PUBLIC MEETING

MINIMUM LEVEL OF FITNESS DETERMINATIONS
(Baseline Discussion)

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1 hallway. You know, feel free. You don't
2 necessarily -- I can't really say that you
3 don't need an escort, but I don't think that
4 anyone from PHMSA really wants to walk around
5 with you. So, just get up and go ahead and
6 walk down.

7 (Laughter.)

8 MR. PAQUET: Everybody on the phone,
9 if you can do us a favor and hit your mute
10 buttons. We'll give you guys an opportunity to
11 speak towards the end. Thank you very much.

12 We have a sign-in sheet going around.
13 And instead of having everybody go whose here,
14 I think that we should just keep going.

15 We have the room until 3:30.
16 Hopefully we're not here until 3:30. But that
17 really depends on the positive comments that we
18 receive throughout this morning.

19 What we are doing here today is we
20 want to -- PHMSA and our office wants to
21 clarify the safety fitness determination
22 process. It's a three-tier process. So we are

1 going to go through a couple of slides and
2 discuss that. And then we want to elicit
3 comments on the first few which is the minimum
4 level of fitness determination and the baseline
5 determination. And, again, I'll go into a
6 little bit more of that once we get into the
7 slides.

8 Any time you speak, we are recording
9 this session, so I ask that you state your name
10 clearly and the organization that you're
11 representing. So those are the rules.

12 I'm also going to ask for a little bit
13 of discipline. I understand that folks may
14 want to use this opportunity to talk about all
15 kinds of different things. Obviously it's a
16 free country, you can say whatever you'd like.
17 But we are not going to engage in any discourse
18 about anything except for the topic at hand
19 which is our baseline minimum level fitness.

20 We want to get positive feedback from
21 the folks who actually are doing the work out
22 there on what we should be looking at, what you

1 guys think of the readily available data.
2 What's the snapshot picture that should be
3 looked at to initiate safety fitness
4 determinations. So, that being said -- yes,
5 Fritz.

6 MR. WEYBENGA: One question. This is
7 not a docketed -- Fritz Weybenga, Dangerous
8 Goods Advisory Council. This is not a docketed
9 public meeting. Is there some way that we can
10 have access to all of the comments that have
11 been submitted? It's kind of unfortunate that
12 it's not docketed and that we'd obviously have
13 those comments available on the Internet.

14 MR. PAQUET: Yeah, we're going to use
15 this as a workshop and, you know, it is our
16 goal to be as transparent as possible
17 throughout the safety fitness process and
18 throughout all of the processes that we have.
19 So we'll put up -- we'll draft the synopsis of
20 the meeting and make that available.

21 MR. WEYBENGA: Is there some way that
22 we could have all the comments that have been

1 submitted too though?

2 MR. PAQUET: Yeah, I'm not sure right
3 now.

4 MR. WEYBENGA: Okay. We'd appreciate
5 if you would look into that.

6 MR. PAQUET: Yep, will do. Okay. I
7 can't see the screen so I'm going kind of
8 lounge back and get comfortable here so I can
9 see -- there we go. Go ahead, the next one.

10 All right. Well, fitness is required
11 in the regulations. And it's kind of hard to
12 see, isn't it? I wonder if we can shut off
13 this front light? Behind you, maybe. I think
14 it's the one to the right, that funky one.
15 Next one. There you go. There you go. Yeah,
16 just press one of the lower buttons.

17 Okay. Never mind. Well, we're going
18 to work through this.

19 (Laughter.)

20 MR. PAQUET: There we go. All right
21 then. Thank you. Okay. So PHMSA has been
22 doing fitness determinations for a long time.

1 It's required in our regs when processing
2 special permits and approvals. Some of the --
3 in order to better manage the vast number of
4 special permits and approvals that are coming
5 in, we're looking to and we have created, and
6 we're looking to improve a baseline.

7 How can we take a snapshot of the
8 applicant and see whether or not they need a
9 further review or we can consider them fit?
10 That's why we're here today.

11 So far we've been using the Hazardous
12 Materials Intelligence portal which takes
13 inspection and enforcements data as well as
14 incident data from all of the modes and puts it
15 into one center place. We also utilize FMCSA's
16 SAFER data. But we've come up with a three-
17 tiered system. Next slide.

18 The initial fitness determination is
19 what we are talking about. Okay. This is that
20 snapshot. We're looking at data seeing, okay,
21 if we looked at incidents and investigations
22 what's going to be a clue that this company

1 probably has some safety concerns. That's the
2 first tier.

3 We look at HIP, we look at SAFER, we
4 look available -- readily available data and
5 try to make this, you know, snapshot
6 determination. A company that meets all the
7 criteria that we have set forth which I'll go
8 through is determined to be fit. A company
9 that exceeds one of the criterion is not deemed
10 unfit. I just want to clarify that. PHMSA is
11 not declaring any company unfit based upon data
12 alone.

13 All right. What we're talking about
14 today, this baseline, the snapshot, will not --
15 will not run into a final determination of
16 unfit without other actions being taken. Go
17 ahead.

18 I don't expect you all to read this.
19 But we will make this available. So,
20 basically, this is what we look at. This is
21 the HIP data and the SAFER data that we look
22 at. In a five-year period prior to

1 application, is there more than one serious
2 incident involving any hazardous material; more
3 than one hazardous material incident involving
4 a Table 1 material; more than one hazardous
5 material incident involving a colored tank
6 motor vehicle, railroad tank car, bulk
7 packaging, more than two hazardous materials
8 incidents involving Table 2 material; more than
9 30 hazardous material incidents involving Table
10 2 materials and non-bulk packaging. The first
11 one is in bulk packaging; four civil
12 enforcement cases, four warning letters,
13 accommodation totaling four civil enforcement
14 cases, warning letters.

15 And then the SAFER check is a motor
16 carrier safety rating of less than satisfactory
17 or a HAZMAT driver vehicle out of service
18 greater than the national average.

19 Okay. So if any of those are answered
20 yes, we move on to the second level of review.

21 If all of those are answered no, we
22 consider that company fit to operate under the

1 special permit or approval that they're
2 applying for. That doesn't mean that the
3 technical -- this is going on concurrent with
4 the technical review of the special permit or
5 approval. So this is a separate review going
6 on at the same time. Next slide.

7 So if they exceed any of those or if
8 we get a yes in any of those rows, we move on
9 to the second level review. Now, the second
10 level review is referred to in your PHMSA Field
11 Operations Division or the operating
12 administration. Either one can do a further
13 in-depth review of the data that we looked at.

14 In a lot of cases what happens is if a
15 company is applying for a shipper's special
16 permit or a special permit where they're just
17 the offeror, and they have five incidents in
18 the past five years, well, if we look into
19 those incidents. So in the snapshot we're
20 going to say, wow, there's a flag there. Okay.

21 So we're going to put that off to the second-
22 level review. The second-level review will

1 look at those incidents. What was their part
2 in it? Were they the offeror and all five
3 incidents caused by a railroad derailment and a
4 cargo tank rollover? Well, then we're not
5 going to hold that against the offeror because
6 they didn't have any part in that incident.

7 So trained investigators either with
8 the Modal Administration or with PHMSA's field
9 operations do the second level of review and
10 they're looking for those types of things.

11 Now, if in that process they say, you
12 know what, there are some considerable safety
13 concerns, or they were the cause of all of
14 those incidents. Then we'll go to the third
15 level of review. Next slide.

16 Third level of review could be a
17 thorough review of recent inspections or
18 compliance history or an on-site inspection by
19 PHMSA or the Operating Administration. I'm
20 going to reiterate. No one is deemed or
21 determined unfit without either an on-site
22 inspection or preponderance of evidence. If

1 FMCSA was just at this company two months ago
2 and found 97 violations and we have that
3 information readily available, then it may not
4 be necessary for PHMSA to go out and do another
5 on-site inspection. That's all going to be
6 documented, FMCSA, FRA, FA, the Coast Guard, we
7 work closely with them. They provide us that
8 information. In most cases it will be an on-
9 site inspection.

10 After the on-site inspection PHMSA's
11 field operations division will either recommend
12 fit or recommend deny. Okay. The only person
13 who can make the determination is the associate
14 administrator for hazardous material safety and
15 his delegates. So the operating
16 administration, PHMSA's field operations
17 division may make recommendations of fitness.
18 And the associate administrator makes the
19 follow-up determination.

20 And I don't know if I need to say that
21 again, but just in case, no company will be
22 determined unfit without either an on-site

1 inspection or a preponderance of evidence.

2 Next slide.

3 So now that we've talked about our
4 three tiers, I want to get back to the first
5 one because that's the task at hand: to get
6 comments on what should that snapshot be. And
7 we understand that there are -- I've heard
8 anywhere between 23 and 100 different types of
9 approvals. And there are different types of
10 special permits.

11 So it would be nice if we had one
12 safety fitness or minimum level of fitness for
13 everything, but I don't think that's going to
14 work. And a lot of us think that there's
15 probably a better way to do this, which is why
16 we're having this public meeting, so we can get
17 comments so we can try to formulate a better
18 way of doing business.

19 We, of course have new modifications
20 for special permits, party-to's and renewals.
21 And we also have mode neutral special permits
22 and we have mode specific special permits. So

1 how do we break those out? What do we look at
2 in each of those different cases? Should we
3 have a different minimal level of fitness for
4 everyone? And approvals. Okay. We have
5 classification which of course are EX numbers,
6 fireworks, organic peroxide, general approvals,
7 INBG code, cup and authority approvals, battery
8 approvals, cylinder, requalifiers, registration
9 and certification agencies, our explosive labs,
10 and independent inspection agencies. So there
11 they are. That's what we're looking at: the
12 different types of approvals, different types
13 of special permits.

14 What should we look at?

15 We have HIP, all the information in
16 the Hazardous Materials Information Portal is
17 readily available, it's there. It's inspection
18 data, it's incident data, it's already been
19 parsed down. And then we have access to, of
20 course, FMCSA Safer Data System. Which a lot
21 of that information is in HIP already. So, you
22 know, is that imperative? Should we just use

1 that for motor carrier type special permits?
2 Those are the type of questions that we're
3 asking and we'd love to have those answered.

4 So I told you my slide show was going
5 to be brief. So, that's what I have to show
6 you. And, again, I ask for discipline. I
7 understand that, you know, grabbing a
8 microphone at DOT can be invigorating and, you
9 know, you'd like to tell us everything that
10 we've done wrong in the past ten years. I've
11 only been here for three. So I cannot be
12 blamed for anything prior to that. And I work
13 for other people, so I really can't be blamed
14 for anything.

15 (Laughter.)

16 MR. PAQUET: So, I ask, have some
17 discipline, try to make this positive. This is
18 a workshop. We really want to feel the pulse
19 of where you guys are feeling the pain, or
20 where you guys think we can improve. What
21 should we be looking at? What is that good
22 snapshot for all of these different types of

1 approvals and special permits? And, please,
2 you know, speak about your world. It's your
3 section of this that we want to hear from you
4 about. So, please, bring that up. Feel free.
5 You know, try to keep your comments down to
6 about five minutes. Any more and you know, we
7 have some field OPS guys in the back that can
8 escort you out. You know, whether or not you
9 want to leave is up to you.

10 But, yeah, so I'll open the floor now
11 and thank you very much again for keeping this
12 positive. I see Cynthia's hand is just begging
13 to reach the sky. So, please, start us off,
14 Ms. Hilton.

15 MS. HILTON: Okay. Thank you.
16 Cynthia Hilton, with the Institute of Makers of
17 Explosives. And I'm going to start off, Ryan,
18 just saying your description of what is
19 happening is not consistent with what's in the
20 Federal Register. So, our prepared statement
21 I'm going to have to do some ad libbing now.
22 So that would be the first thing.

1 MR. PAQUET: Just trying to keep you
2 on your toes.

3 MS. HILTON: You know, what you just
4 described is inconsistent with the Federal
5 Register Notice. And I want to align our
6 association with the comments of Fritz about
7 there needs to be a way to access these
8 comments and whatnot.

9 MR. PAQUET: Okay.

10 MS. HILTON: Anyway, the explosives
11 industry is heavily reliant on special permits
12 and approvals. So the manner that you
13 administer these programs including the
14 establishment of this criteria has profound
15 implications for our industry and our ability
16 to continue to do business here. One of the
17 things that I don't want to forget to say, but
18 you brought up and so I think it's important to
19 state here, is -- and like you say, I hope
20 others will address this point -- but you asked
21 about should there be, you know, one standard
22 or different standards based on all of your

1 different permits and whatnot. I am more
2 inclined to think that the differences would be
3 when you're looking -- when you're trying to
4 make that other critical decision about
5 equivalent safety. But fitness, which is your
6 ability, your integrity, your whatever, strikes
7 me as more of a standardized thing with things
8 that I will get into.

9 With that perspective we wanted to
10 address -- I'm sorry -- six issues. If you
11 want to shoot me at five minutes, you can, I'll
12 just hand it to one of my peers to finish
13 reading the rest of our statement.

14 (Laughter.)

15 MR. PAQUET: That would be fine.

16 MS. HILTON: Okay. So to shoot me as
17 I hand the microphone -- okay.

18 Anyway, so we appreciate this
19 opportunity and we have strongly suggested that
20 this whole discussion be part of a notice and
21 comment rulemaking. The Agency has informed us
22 that rulemaking is not required because it

1 considers these criteria to be internal
2 guidance that does not affect the regulated
3 community. We disagree. Every fitness
4 determination PHMSA makes of an applicant has
5 an effect outside the agency.

6 The Federal Register Notice makes --
7 this is the whole Fritz thing about it's not
8 docketed. We have no expectation of any future
9 agency action based on what happens here. And
10 we note that since the sister agencies have
11 used rulemaking to establish fitness criteria
12 and we don't see why notice and comment
13 rulemaking is necessary for the modal fitness
14 criteria, establishing that, but not
15 necessarily here.

16 In the case of explosives industry,
17 special permits and approvals are plainly
18 substitute regulations and Federal Hazmat
19 Transportation Law requires that regulations
20 governing special permits and approvals be
21 established by notice and comment rulemaking so
22 we urge you to act in the good will that

1 prompts today's meeting and to open a
2 rulemaking as required by law to establish
3 these criteria.

4 The second issue is the whole role of
5 field operations which, thank you very much for
6 explaining that, was much clearer than in the
7 Federal Register. But based on what was in the
8 notice it seemed to us to be an extraordinary
9 and inappropriate delegation of decision-making
10 authority to field operations. We are
11 particularly vulnerable to that since we are
12 effectively regulated by these programs. Our
13 written statement provides examples of how
14 we've already been adversely impacted by
15 decision-making default through field
16 operations.

17 The third point is what we see as an
18 open-ended fitness criteria. A need for
19 definitions and clarification in the -- while
20 this public meeting is not a substitute for
21 rulemaking, it's an important step towards
22 understand our views on these minimum criteria.

1 The meeting notice reveals that PHMSA
2 is currently using these criteria. The
3 criteria similar to, but not equivalent where
4 the triggering criteria that you published in
5 the Federal Register -- I mean, in the Special
6 Permit Standard Operating Procedure some
7 differences we support, some need refinement.
8 And here I'm going to skip over some stuff
9 because what you described is different than
10 the Federal Register.

11 Let me just say that one of the things
12 further looking at your list or the Federal
13 Register, what is missing to us is -- like I
14 say, we call this open-ended thing. There's no
15 criteria, or the criteria provides no means to
16 evaluate applicants on a level playing field.
17 PHMSA should factor in the number of incidents
18 with exposure data such as company five present
19 a hazmat business to establish peer or safety
20 event groupings. There's no time limitation on
21 the aggregation of disqualifying criteria. We
22 believe there should be. More recent

1 disqualifying events should also be more
2 heavily rated than older events. And there's
3 no differentiation made between a company that
4 might fall below the criterion one or in all of
5 the categories. FMCSA has broken a lot of
6 ground in these areas in establishing
7 precedence for peer grouping or safety event
8 whatever you want to call them groupings. And
9 waiting criteria in its ongoing examination of
10 motor carrier fitness and what they've done may
11 be helpful for PHMSA to consider.

12 These same concerns apply to how
13 you're going to use civil enforcement cases and
14 warning levels. But, in addition, using this
15 criteria as a form of licensure which is kind
16 of it, you know, you can't gauge the business
17 unless we give you the thing, could cause
18 companies to challenge even the most minor of
19 actions.

20 So we appreciate that establishing
21 relevant and workable fitness criteria is not
22 an easy task. Accordingly, we urge you to

1 establish these criteria through public notice
2 and comments so the Agency can gain a more
3 comprehensive understanding of how the proposed
4 actions will impact our agency or our industry.

5 The fourth thing was how the fitness
6 criteria should be applicable to the applicant.

7 You addressed that which is not in the Federal
8 Register, but you spoke to this point, or I
9 heard you say that if you're applying for
10 something as a carrier for instance -- a carrier
11 -- as a motor carrier, that kind of criteria is
12 appropriate. But if I'm a shipper it's not
13 appropriate that you look how have I performed
14 as a motor carrier. And as you know there have
15 been -- we have incidents we could cite where
16 my inability to perform as a carrier has caused
17 a denial for me to ship something. And that
18 should not be the case.

19 The fifth thing is that we think
20 carriers should determine the fitness for their
21 modes. It's somewhat concerning that you have
22 criteria for the motor carrier mode. But you

1 recognize that, you know, some, not always
2 motor carriers that are affected here and with
3 one exception that we agree on your criteria
4 and that's the unSAT thing which soon is going
5 to go away.

6 MR. PAQUET: Right.

7 MS. HILTON: But that is incorporated
8 into federal hazmat law, so we think that's
9 appropriate if you're applying for something
10 that has a motor carrier nexus.

11 Beyond that, carriers of any mode
12 should -- could apply for special permits and
13 approvals and both special permits and approval
14 SOP spell out the rights of each middle
15 administration to conduct fitness inspections
16 or review a person for which the mode is
17 responsible. The deference is appropriate as
18 all modes have standards and methods to
19 determine the fitness of carriers they regulate
20 and the modes have been delegated authority to
21 enforce the HMRs within their regulatory
22 spheres. However, we would not support PHMSA

1 using the special permit approval program as
2 justification to establish a different standard
3 of fitness than that used by each mode nor do
4 we support any mode using this program for this
5 process as a pretext to add additional or
6 different conditions to their fitness
7 standards.

8 That the Modal Administrations believe
9 different or additional fitness criteria is
10 warranted. These new criteria should be
11 proposed by notice and comment rulemaking.

12 And then the last point is, you asked
13 specifically for impacts on our industry.
14 PHMSA has embarked on a costly, labor-intensive
15 process to ensure that applicants for special
16 permits and approval are vetted to some still
17 unknown fitness standard. Because even though
18 you described the different tiers, we still
19 don't know within tier two and tier three
20 what's an up and what's a down. Given our
21 industry's safety record, we question whether
22 this allocation of Agency common resources and

1 the imposition of unilateral, untested, and
2 onerous changes to explosive related special
3 permits approvals have improved the safety
4 profile of our industry.

5 Years ago onerous regulations --
6 regulatory requirements drove the
7 manufacturers, TNT and Nitrocellulose, for
8 exhibit, off shore. And we hope this is not
9 the fate of other commercial explosive
10 products. We can't emphasize too strongly the
11 viability of our industry is inextricably tied
12 to maintaining the required special permits and
13 approvals and the actions that PHMSA has taken
14 without public notice has affected our rights,
15 you know, to disclose to you, you know, what
16 problems and to work with you on this.

17 The rulemaking process increases
18 transparency and accountability which the Obama
19 Administration has repeatedly promised the
20 American people and provides a certainty that
21 business needs to make decisions that build
22 rather than hinder the economy.

1 So we thank you for the opportunity to
2 make comments. We do have a written statement
3 and a whole packet of letters that we have sent
4 to the Agency on this topic.

5 MR. PAQUET: I'm going to drill down
6 the one thing -- one of the topics that you
7 brought up and that's the normalizing of the
8 criteria that's used. I think that's an
9 important part of where we need to go. And
10 those are suggestions that we need. Is how do
11 we normalize, if we're going to use the
12 criteria that we're looking at, at HIP, how do
13 we normalize it? What do we use? Do we use
14 million miles? Do we use million tons shipped?
15 You know, that's the sort of positive feedback
16 that we could really use.

17 State your name and then where you're
18 from.

19 MR. BIERLEIN: I am Larry Bierlein.
20 I'm counsel to two associations, the Associate
21 of Hazmat Shippers which is interested
22 primarily in small package shipments. Big

1 companies, global companies, small package
2 issues. They are dependant upon special
3 permits and competent authority approvals. The
4 second group is the Radio Pharmaceutical
5 Shippers and Carriers Conference. They're the
6 ones who deliver the medicines to hospitals for
7 cancer treatment and they all are under special
8 permits. So there's an intense interest in
9 this process.

10 We send that much of the so-called
11 "improvement" of the process is really doing
12 harm to the Agency. We think it's done harm to
13 PHMSA. We anticipate further harm and
14 obviously anything that hurts PHMSA hurts the
15 industry that's regulated by it. And we feel
16 the fitness issue is just another negative
17 aspect.

18 I wanted to comment on Fritz
19 Weybenga's statement that this is not docketed.

20 MR. PAQUET: Uh-huh.

21 MR. BIERLEIN: I'm going to put all
22 these comments into 233(b) so there will be a

1 docket. I encourage everybody else to do the
2 same thing. So you can find them and see what
3 other people have said.

4 There are many special permits because
5 it takes time, often a lot of time, to create a
6 rule of general applicability. As a
7 consequence people need to apply either for
8 approvals because the regulations require them
9 or special permits in order to put in new
10 products, new methods of doing something, ne
11 concepts and packaging. And I would say
12 looking at -- for years at the Federal
13 Register, most of the proposals are in fact
14 improvements on the regulations. Not just
15 improvements in the technology, but
16 improvements in the safety.

17 One of the realities is that the
18 applications properly are viewed by the staff
19 as potential for further action, perhaps
20 rulemaking. They're looked at as a precedent.
21 This is a good process. It has resulted in
22 general rules. There's a long history of this.

1 All IBC's were under special permits,
2 cryogenic cargo tanks, composite package,
3 plastic drums, all of these started as special
4 permits.

5 We think there is undue emphasis on
6 the fitness as a preliminary or a cut-off point
7 in the beginning. We think the much more
8 important thing, the thing that should occupy
9 the majority of your time is the technical
10 review of the idea. Because if this person
11 comes in with it, someone else is going to come
12 in with it. If it's a bad idea, reject it.
13 Ultimately, yes, you may consider the fitness,
14 but I would note that in the Federal Aviation
15 Administration and you might want to check 14
16 CFR 11.81 as a general rule on exemptions.
17 There are no fitness criteria. You can any
18 sort of a record in the FAA and ask for an
19 exemption. It's also not in the Hazardous
20 Materials Transportation Act. It's only in
21 these regulations.

22 Fitness has not come up very often,

1 frankly and I think that was one of the reasons
2 legislators and the IG criticized it, but in
3 fact it's always been there. You did mention
4 it Ryan and I thank you for that. Someone with
5 a flagrant record of noncompliance frankly
6 doesn't come here to ask for permission, they
7 just do whatever they want. So that's not who
8 we are talking about.

9 The ones who do apply, it's an
10 extensive process. There is a give and take.
11 There is an exchange of information, there are
12 conversations and through that you are able to
13 determine, as an Agency, is someone competent
14 to do what they want to do? Do they have the
15 commitment to doing it properly? Obviously the
16 applicant knows the application or the permit
17 can be withdrawn at any time for false
18 information, a history of the use will be
19 reviewed on renewal. There's separate incident
20 reporting requirements. So these fitness
21 determinations have been happening, not with
22 the formality currently discussed, but it

1 really is wrong for some people to have said
2 that it just hasn't happened at all.

3 One of the things in the Federal
4 Register Notice that is somewhat a disparity
5 with what you said this morning is the HIP.
6 The Federal Register says the information in
7 the HIP is not accessible for privacy reasons.

8 And if that is the case, then it's a black box
9 and if it's not accessible, then there's
10 ability to ever correct incorrect information
11 and make sure that it's accurate. The data
12 points include inspections and reviews,
13 apparently regardless of findings. PHMSA
14 complaints, whatever those are, violations and
15 penalties, which sound the same to me, and as
16 Cynthia mentioned, takes into no account the
17 volume of traffic involved with the company.

18 I think our most serious concern,
19 again, following on Cynthia is the subjectivity
20 of the second and third phases of the review
21 process. We're concerned that the guideline
22 given the field inspector will be not known to

1 us, perhaps not even known to them. We do know
2 from unfortunate experience with the
3 enforcement program, the inspectors have a lot
4 of discretion throughout the department and
5 frankly the most important factor in
6 determining a civil penalty is who the
7 inspector was, not the violation. We worry
8 about that happening here.

9 The go/no-go decision that comes out
10 of the second and third phase must be concrete,
11 transparent and subject to notice and comment
12 rulemaking. This is new law where it hasn't
13 existed before. It is not an interpretive rule
14 and I wanted to quote for you from the
15 Administrative Conference of the United States
16 which is a government agency much like the NTSB
17 and it says, "agencies should use notice and
18 comment procedures voluntarily except in
19 situations in which the cost of such procedures
20 would outweigh the benefits of having input and
21 information on the scope and the impact of the
22 rules and the enhanced public acceptance of the

1 rules that would derive from public comment."
2 That is in the Administrative Conference, I
3 think, it is frankly binding on you although it
4 is only a recommendation.

5 I also think it's important to note
6 that previously all procedural rules having to
7 do with exemptions and special permits and
8 approvals have gone through public rulemaking
9 before and we think this is no exception.

10 In closing I think the fitness
11 determination should be among the last
12 considerations, not as announced in the policy
13 in the Federal Register as a first cutoff
14 point. Look at the technical validity of the
15 idea, if that's good, then you can look at the
16 fitness. But if the idea is bad, reject that.

17 And please make the field operations fitness
18 determinations transparent by putting them
19 through rulemaking -- notice and comment
20 rulemaking.

21 Thank you.

22 MR. PAQUET: Thank you for your

1 comments.

2 Just to clarify, fitness determination
3 and technical evaluation are concurrent
4 processes. They are not one before the other
5 or the other before one. They're concurrent
6 processes. I did pick up you spoke about
7 normalizing as well. I think that, you know,
8 both of the first two speakers talked about the
9 noticing comment. We're not here to talk about
10 that today. You know, I appreciate your
11 comments. So if we could, again, use this as a
12 workshop. We have -- our slide is no longer up
13 there. Yes, please, just leave that last slide
14 up there. The criteria, the different types of
15 special permits and approvals, let's think
16 about those.

17 Again, I appreciate everybody's
18 comments. If everybody takes ten minutes, then
19 we will be here until 3:30. So, let's try to -
20 - we have till 3:30, but let's try to follow
21 the five B's of public speaking, be brief,
22 brother be brief.

1 (Laughter.)

2 MR. PAQUET: You're up, Mr. Moskowitz.

3 MR. MOSKOWITZ: Thank you. My name is
4 Richard Moskowitz. I'm Vice President
5 Regulatory Affairs Council to the American
6 Trucking Associations. I will follow Ryan's
7 admonition and confine my remarks to a single
8 issue, that is determining the minimum level of
9 fitness in connection with the issuance of
10 special permits and the renewals.

11 I think with every regulatory issue
12 the place to begin is with the enabling
13 statute, in this case the Hazard Materials
14 Transportation Act. And that act provides that
15 a special permit should issue when there is a
16 level of safety that is at least equivalent to
17 the level of safety in the hazard materials
18 regulations. This equivalent level of safety
19 concept, I think, is under attack in this
20 aspect of what we're talking about here.

21 For example, with respect to motor
22 carriers under the Hazard Materials regulations

1 a motor carrier is authorized to transport
2 hazardous materials when they have a
3 satisfactory safety rating, and if they're
4 transporting placarded loads they've registered
5 with PHMSA. We are now talking about somehow
6 going beyond those standards.

7 If you will look at the public meeting
8 announcement we're concerned that you look at
9 the criteria and that is indeed a much more
10 stringent standard than simply having a
11 satisfactory safety rating as determined by
12 FMCSA or a continue to operate when they switch
13 to the new system in order for them to qualify
14 for a special permit. This type of increase in
15 the eligibility requirements is something that
16 must only be implemented through formal
17 rulemaking.

18 I'll turn my attention to the specific
19 criteria listed in the July 29th, Federal
20 Register Notice and focus specifically on three
21 of them: the incidents, the civil enforcement
22 cases, and out-of-service orders.

1 With respect to incidents the Federal
2 Register Notice says that if there are more
3 than 30 incidents involving Table 2 materials
4 it triggers additional review. So my question
5 is, why 30? Why not 20? Why not five? Why
6 not 100? And as Cynthia and Larry put it,
7 there needs to be some type of normalizing
8 factor to that. We would expect more incidents
9 with a carrier operating 5,000 trucks than we
10 would with a carrier operating five trucks.
11 I'll also encourage you to reach out to FMCSA
12 our sister agency because they've just been
13 through this issue in spades with respect to
14 the CSA 2010 criteria. It's not enough to just
15 use power units. You've got to use vehicle
16 miles traveled, there's got to be a fair way of
17 normalizing exposure.

18 I'll also note that this requirement
19 and some of the others I'll talk about fall
20 mostly on carriers as shippers are not required
21 to report hazmat incidents.

22 The other incident criteria is one

1 serious incident. Again, we've got to
2 normalize that. A company with multiple trucks
3 on the road is far more likely to have a
4 serious incident than a company with only one
5 truck on the road.

6 And we also need to think about
7 whether the incident is preventable and whose
8 fault it is. It's not fair, even though you
9 have one in your one serious incident that has
10 been recorded and logged against your DOT
11 number, if that resulted from the fact that a
12 drunk driver ran a red light and breached a wet
13 line on a tank truck that should not be held
14 against the carrier. That carrier should still
15 be able to obtain a special permit.

16 The next criteria I wanted to talk
17 about is civil enforcement cases. Here if
18 you're going to use this criteria it's
19 important that you only rely on convictions or
20 final dispositions. Relying on cases that are
21 not fully adjudicated is a denial of due
22 process. The issuance of warning letters

1 should have no bearing on whether a carrier is
2 qualified to hold a special permit. Warning
3 letters are not adjudicated and should in no
4 way be considered in determining fitness.

5 The last criteria I want to talk about
6 is out-of-service, be it hazmat out-of-service,
7 driver out-of-service, or vehicle out-of-
8 service. There you cite the percentage being
9 greater than the national average. Again, this
10 requirement applies only to motor carriers
11 which seems unfair. A carrier can transport
12 hazardous materials subject to a special permit
13 regardless of their out-of-service rate. So
14 why is the out-of-service rate somehow relevant
15 to those carriers that apply for a special
16 permit.

17 And then I'll echo the remarks of
18 Larry. We're very concerned about phases two
19 and three. PHMSA notes that these criteria are
20 starting points and would require further
21 review by field operations. This is a moving
22 target of eligibility and that's just

1 unacceptable to the regulated community. We
2 need to know where we stand. We need to know
3 what the actual fitness criteria area. To say
4 we're going to go talk to some other people out
5 in the field before we make your determination
6 and not let us know what the actual standard
7 is, is just not something that we can build a
8 business around.

9 So in conclusion, I'll just say that
10 these criteria seem to raise the bar beyond the
11 statutory notion of an equivalent level of
12 safety and therefore must be subjected to
13 formal rulemaking.

14 MR. PAQUET: In my mind anyways,
15 establishing the baseline is an attempt to
16 define, you know, to set a clear line. So,
17 that's, again -- why we're here today is if we
18 can set up a clear baseline, a clear line that
19 people can look at their own operations and
20 say, okay, well, I know what I've done in the
21 last five years. I know where I am. I am
22 confident that if I apply for a special permit

1 or approval that will fall underneath this
2 baseline criteria. Thank you very much.

3 Next?

4 MR. CALDARERA: Good morning, Ryan.
5 My name is Mike Caldarera and I am with the
6 National Propane Gas Association. NPGA is the
7 national trade association of the propane
8 industry. We have about 3200 member companies
9 with a broad cross section of membership
10 categories. But over 90 percent of our members
11 are retail propane marketers who deliver the
12 fuel to the ultimate end user, whether it's a
13 residential, commercial, or industrial type of
14 application.

15 I'll try to be brief, as you said. I
16 would just echo the sentiments of the fact that
17 we would look for this really to be within the
18 context of a regulatory rulemaking proceeding,
19 but others have already commented on that.

20 I do want to focus on one issue that
21 is sort of unique to our industry. The issue
22 of the criterion and there's a vagueness to it

1 and the concept appears to be as one size fits
2 all. This would be problematic for our
3 membership because, as you know, companies who
4 requalify propane gas cylinders use an external
5 visual qualification and they can do so under
6 the 49 CFR Part 180.209. Okay, Subsection G.

7 In order to perform this activity, the
8 companies are required to obtain a requalifier
9 identification number or RIN number which falls
10 under the approvals category. And as you know
11 the RIN is applicable to the facility where the
12 requalification activity is actually performed.

13 We have a number of NPGA members that
14 have hundreds of facilities throughout the
15 country where they will perform this function.

16 And, of course, they each have their own
17 unique RIN number. So when the company
18 applies, they basically make a mass application
19 to get hundreds of RINs which they have done.

20 The current fitness criteria basically
21 states that further review would be required
22 meeting -- if you meet one of the categories of

1 violation under the hazmat intelligence portal
2 or something. And as we said as an example,
3 you could have four warning letters that would
4 trigger that further review. Such a
5 circumstance for a company with literally
6 hundreds of facilities around the country would
7 be really completely unreasonable and could
8 have a potentially devastating impact on a
9 company's operations if for some reason they
10 would be deemed in the worst case unfit, but
11 you have all of these facilities that would be
12 impacted by it.

13 So, I think the bigger message here is
14 that trying to apply the criteria to companies
15 that have hundreds of types of facilities has
16 to be looked at a little bit further. A
17 facility that is, you know, requalifying
18 cylinders in an exchange environment in
19 Colorado should be able to do that and not be
20 impacted by something that may have happened
21 in, you know, Tennessee or something like that.
22 So it's really the comment that I don't think

1 one size fits all. So it's something to maybe
2 take a further look at.

3 Also the issue of normalizing. As I
4 understand it, I think most approvals do not
5 have an expiration, but in our case the RIN
6 numbers do. They're valid for five years and
7 companies need to renew or reapply every five
8 years. And so I do think that there needs to
9 be some normalization for he instance as others
10 have commented on. Perhaps in this case, for
11 RINS, the timeframe could be going back maybe
12 no more than five years since that's how long
13 the RINS are valid.

14 I'm not sure, there's probably some
15 other criteria that you could use. Offhand I
16 don't know, but we could certainly work with
17 you if there's something unique that presents
18 itself for our industry that we could work
19 with. So we would be happy to do that.

20 And, then again, the concept of the
21 civil case criteria is vague. I think as Rich
22 said, there really should be some final

1 adjudication before that's considered as a
2 criteria for evaluating fitness. I'll stop
3 there.

4 MR. PAQUET: Great. Thank you. Yes.
5 And you hit the nail of the head. If there's
6 a unique situation for RINS, you need criteria
7 that will determine the actual fitness of a
8 company with RINS. That's where we need to get
9 to.

10 Thank you.

11 MR. GREEN: I am Mitch Green. I'm a
12 vice president for Main Drilling and Blasting.
13 And, Ryan, not to be a dentist, but I probably
14 will drill on a few exposed nerves there. So
15 you will have to forgive me in advance.

16 We actually -- you know, we have some
17 associations and we have some representatives
18 of companies. We're a company that actually
19 goes out and takes these things and does
20 something with them. We do work every day. So
21 not too take anything away from what's been
22 said, but you want to know how it affects

1 people that are out there doing it. You said
2 that earlier.

3 You know, we're one of the largest
4 drilling and blasting concerns in the United
5 States. Just for the record, we are an
6 associate member of the IME and we agree with
7 the comments that they made here. But I'd like
8 to take a few moments to bring the issues down
9 to a granular level to explain the impact on
10 the people that depend on all of us to make
11 judicious and thoughtful decisions that are
12 based on enhancing transparency, stability in
13 the work environment, and, above all, safety
14 for the general public and for industry.

15 Now, the products and services that we
16 provide are an essential part of building a
17 vital economy. And we're committed to
18 providing these products and services in a
19 manner that is safe and efficient.

20 I'm going to give you a little bit of
21 background because if you don't have that you
22 don't understand what we do. And it will be

1 mostly centered around explosives and
2 transportation in the bulk arena of explosives.

3 Our company covers ten states in the
4 northeast, New England, Pennsylvania, and
5 Maryland. We have offices throughout our
6 operating area and we employ 325 people. We
7 run about 75 drills in our operations. We also
8 are unique in that we internally distribute all
9 of our needs to our operations through a fleet
10 of vehicles that range from pick-ups to the
11 MBTs.

12 Bulk emulsion is a key component of
13 our product line and it's a very strategic
14 cornerstone of our blasting disciplines both in
15 our quarry, mining, and construction
16 businesses. It's a significant tool in our
17 toolbox. We have worked over the years to
18 introduce this product into the mainstream of
19 our operations to enhance safety both in use
20 and transport and streamline the number of
21 products in our inventory enhancing security
22 and accountability from an ATF standpoint.

1 Today we transport only about 2.2
2 percent of our total volume of 21 million
3 pounds is 1.1 class one explosives. The
4 balance of our volume is classified as 1.5
5 which is basically the bulk emulsion carried in
6 MBT type units. And that accounts for about 75
7 percent of our consumption.

8 You need to keep in mind that 25 years
9 ago we transported at least 50 percent of our
10 volume in 1.1. So the transition alone to this
11 product has significantly increased the level
12 of safety to the public when transporting in
13 commercial explosives to say nothing about the
14 people that actually go out and perform
15 blasting every day.

16 My persona background in the industry
17 started with the first cold weather trails in
18 1980 on the forerunner of the emulsion product
19 we have today. I'm fortunate to sit next to
20 the guy that was the brainchild of that.

21 I've been in commercial explosives
22 distribution. I've been in hands-on blasting

1 for both quarry and construction and now senior
2 management for over 30 years.

3 The MBT units we use today have been a
4 constant part of my career for well over 28
5 years. I state this as the practical
6 experience in both hauling and use of these
7 products is well ingrained in my professional
8 life.

9 Finally, at our company we do not see
10 employees as 325 people, we attach an average
11 of 2.5 people to this number. Because that's
12 the true amount of people that depend on every
13 critical decision we make at our company.
14 That's a total of 812 people, just for the
15 record.

16 We are a closely held ESOP company.
17 We have two primary shareholder and
18 approximately 28 percent of our company held in
19 an ESOP trust by our employees. While our type
20 of business is not without risk, we must manage
21 that risk or safety, if you will, very
22 aggressively as our broad base of shareholders

1 demand it.

2 So as to the fitness standard, and
3 I'll cut to the point because you're looking at
4 the clock.

5 (Laughter.)

6 MR. PAQUET: Not just for you.

7 MR. GREEN: I like to feel special.

8 Currently it leaves open to
9 interpretation -- I say cutting to the point is
10 usually the best, it leaves little open to
11 interpretation, provides for a transparent,
12 honest, forthright exchange of ideas. On
13 August 16th we received our special permits.
14 We're very pleased to have received those, but
15 it was after a very long delay.

16 We have no understanding of the
17 criteria used to establish our fitness by the
18 agency in the approval process. Unless we have
19 an understanding of the standards applied to
20 us, we have no means of ensuring compliance.
21 And the Agency's actions are not only veiled in
22 secrecy, but are arbitrary and capricious. And

1 that's how the business feels.

2 If the Agency asserts that it has the
3 authority to establish safety fitness standards
4 separate and apart from the standards already
5 in place for transporting these products in
6 commerce, then it must implement them through
7 notice and comment rulemaking. Forgive me.

8 Twelve months ago our company could
9 determine if we were fit. We go through on a
10 regular basis. And I think this is the point.
11 We go through a DOT Federal Motor Carrier
12 Safety Administration compliance review and
13 they last from five to seven days. At the end
14 of that process we are given the safety fitness
15 determination of unsatisfactory, conditional,
16 or satisfactory based on a set of regulatory
17 criteria that have been published through
18 notice and comment on rulemaking. Moreover,
19 within the next year it's our understanding
20 that the Federal Motor Carrier Safety
21 Administration will fully implement it's CSA
22 2010 model which will be used to evaluate the

1 safety fitness of all motor carriers.

2 As we understand it today, the CSA
3 2010 model is intended to make the road safer
4 and it's designed to save lives. According to
5 the Agency it has been created through a
6 process of development, testing, adjustment,
7 and retesting. The CSA 2010 model measures the
8 performance of all carriers, including those
9 transporting explosives in commerce.

10 In addition, we are required to comply
11 with even more stringent standards to maintain
12 our hazardous material safety permit. Not only
13 are we required to have a satisfactory rating,
14 but we are also required to fall below certain
15 thresholds of roadside, out-of-service
16 violation inspection rates for the vehicle, the
17 driver, and the hazmat. Furthermore, we are
18 also required to fall below the threshold crash
19 rates.

20 The hazmat permit is renewed every two
21 years. So we come up for a review every two
22 years on that. I want you to keep in mind

1 explosives to our business that is a fuel, it's
2 an energy that drives our business. Without it
3 we are drilling and there ain't much in
4 drilling, I'm going to tell you that right now.

5 The roadside criteria are so -- so
6 stringent that it requires a weekly review of
7 our operations -- weekly review of our
8 operations and roadside inspection numbers to
9 ensure that we're in continued compliance.

10 While we may have issues with the
11 strictness and means of measuring the criteria
12 for the hazmat permit, at least the standards
13 are published. To add yet another layer, and I
14 think this is the point, to add another layer
15 of regulatory oversight which has not been
16 through the rulemaking process and possibly
17 duplicates or conflicts with existing
18 requirements does not comport with the tenants
19 of due process and is unnecessary to ensure
20 safety.

21 FMCSA -- PHMSA and both DOT are both
22 DOT modalities and there must be consistent

1 standards among the modalities or interstate
2 commerce as we know it will cease to exist.
3 The ambiguity surrounding the new standards
4 creates the question are they above, below, to
5 the side, or interwoven into the current
6 regulations we live by? This lack of
7 transparency is destabilizing for the business
8 to echo another comment.

9 So let's return real quick to the
10 numbers, 325 employees, 812 dependants, 300
11 shareholders in our business, 75 drills and
12 over 1,000 customers all have actual or vested
13 interest in the tool that produces 75 percent
14 of our work. So if we lose a special permit on
15 a basis that's unclear or arbitrary or
16 arbitrarily applied, then those people are at
17 risk and they pay the price. We lose 75
18 percent of our toolbox which we need to do our
19 work. Without explosives our business as we
20 know it today is out of business. It is out of
21 business. Does this standard provide for
22 increased safety to the public or does it

1 create another duplicate layer of compliance
2 that serves to further put at risk businesses
3 that work hard to comply and be good corporate
4 citizens, believe it or not? An unanswered
5 question at present.

6 I would summarize this in a tenet that
7 I used in my blasting career when I was doing
8 that. When you add greater complexity to blast
9 designs, you increase the possibility of error.
10 And when you increase the possibility of
11 error, the loser in this equation is usually
12 safety. So if the Agency believes it has the
13 authority to implement additional safety
14 standards for transportation of explosives
15 under special permits, there needs to be an
16 open process. I think we can bring a lot to
17 the table.

18 The benefits of the rulemaking process
19 are clear and the industry has valuable input
20 and experience -- experience to provide in this
21 regard which it cannot provide if there's no
22 notice and comment on rulemaking.

1 We are still using a special permit
2 and I remember when I was 25 years old in this
3 business, the fact that these permits have
4 existed and been operated under safely, I might
5 add, for so long indicates that the time has
6 come for those standards really to be
7 incorporated into the regulations. So if you
8 want an idea, there is one.

9 MR. PAQUET: Thank you.

10 MR. GREEN: I wanted to give you
11 something.

12 MR. PAQUET: No, actually, --

13 (Laughter.)

14 MR. PAQUET: Thank you for your
15 comments, I appreciate --

16 MR. GREEN: The special --

17 MR. PAQUET: Oh, you're still going --

18 MR. GREEN: I'm still going. The
19 special permit process needs to be streamlined.
20 Those practices and processes that have become
21 current industry operating procedures and which
22 have been over the course of time proven safe

1 should be incorporated into the regulations.
2 So what I'm not going to do is -- I'll cut off
3 the last piece, but I do want to say this,
4 because I think it is very, very important and
5 I think we lose sight of it today. Especially
6 between when you're trying to work between the
7 regulatory environment, the general public's
8 interest and trying to do business, you need to
9 understand as an officer of a company I have to
10 be sure that we manage all that risk. And I'm
11 going to tell you right now that if for a
12 moment, all the associations and regulations
13 aside, that you do not believe that an officer
14 of the corporation doesn't wake up every day in
15 the morning, every day in the morning, and
16 understand that not to do the right thing from
17 a liability standpoint that puts you in a court
18 of law, that you are sued for personally and
19 potentially criminally is more effective
20 probably than any regulation we have today.

21 So I think the seriousness that we
22 take in bringing this issue forward to you, you

1 can put us out of business if this is not
2 handled right. And we do need a voice at the
3 table.

4 MR. PAQUET: Thank you. Now, I just
5 want to summarize one point. Obviously your
6 company carries a hazardous material safety
7 permit, and I apologize if you didn't already
8 know, I helped implement that with motor
9 carriers. So I apologize for that.

10 MR. GREEN: No. What --

11 MR. PAQUET: I helped implement the
12 hazardous material safety permit for motor
13 carriers. You can throw something at me later
14 if you want.

15 MR. GREEN: (Off microphone.)

16 MR. PAQUET: But your company holding
17 a hazardous material safety permit it's your
18 opinion that that should equate to fitness to
19 hold a special permit? Did that summarize
20 somewhat?

21 MR. GREEN: (Off microphone.) What
22 I'm saying is specifically --

1 MR. PAQUET: Yep.

2 MR. GREEN: (Off microphone.) Thanks.
3 Sorry. No, what I am saying is that we
4 already have two elements.

5 MR. PAQUET: Right.

6 MR. GREEN: And you're using those
7 elements currently.

8 MR. PAQUET: Yep.

9 MR. GREEN: And in trying to figure
10 out how can you use them --

11 MR. PAQUET: Right.

12 MR. GREEN: -- and then add in a tier
13 two and a tier three. My point is that, those
14 are very comprehensive in and of themselves.
15 And let's move the special permit right off the
16 table for a minute. So when you look at, is a
17 company fit to transport --

18 MR. PAQUET: Uh-huh.

19 MR. GREEN: -- under the special
20 permit using that criteria, you know, I would
21 have to say that in my opinion that they are
22 fit --

1 MR. PAQUET: Right.

2 MR. GREEN: -- to transport at that
3 point.

4 MR. PAQUET: So if we had the table up
5 here again which we don't need to bring it up,
6 but if on top of that table was a company -- a
7 motor carrier holds a hazardous material safety
8 permit with FMCSA in good standing, fit.

9 (Chorus of yes.)

10 MR. PAQUET: I just want to try to get
11 so I'm clear on what --

12 MR. GREEN: Now, but, let me go to the
13 hazardous materials permit. Do you want to go
14 there?

15 MR. PAQUET: No.

16 MR. GREEN: Okay.

17 MR. PAQUET: No, I don't, not at all.

18 (Laughter.)

19 MR. GREEN: Okay. But my point is
20 though that those come in too. That that's
21 going to come into the criteria being woven in
22 under CSA 2010.

1 MR. PAQUET: Right. Right.

2 MR. GREEN: So the influence of that
3 permit will be felt in that piece.

4 MR. PAQUET: Okay.

5 MR. GREEN: So I think as you look
6 forward as to CSA 2010 I think that that will
7 help solve a lot of the issues that you're
8 trying to accomplish when it comes to transport
9 of explosives and what we're doing.

10 MR. PAQUET: Great. Thank you.

11 MR. GREEN: Okay.

12 MR. PAQUET: Thank you. Thank you.

13 MR. FERGUSON: I wouldn't want to cut
14 off the explosives representative either.

15 Tom Ferguson, Council on Safe
16 Transportation of Hazardous Articles. The
17 unfortunate part of being the fifth or sixth
18 speaker is a lot of the comments have probably
19 been covered. But I think a lot of them need
20 to be addressed for emphasis once again.

21 I think I have a few less items to
22 make than Cynthia, so maybe I can cut it not

1 quite to eight.

2 So COSTHA is a not-for-profit
3 organization with 150 member companies involved
4 in all aspects of hazardous materials
5 transportation including the aerospace
6 industry, automotive industry, air, water, and
7 motor carriers, package manufacturers, the
8 pharmaceutical industry and a variety of other
9 industries who package, offer and transport
10 dangerous goods.

11 Our members rely on the special
12 permits and approvals program to improve
13 safety, provide innovative products and
14 services and advance cutting edge technologies
15 to compete in the global marketplace. This
16 function enhances the ability of our members to
17 continue to provide jobs to the U.S. industry.

18 Some of our members supply articles, devices,
19 and substances that are critical to our
20 national defense. We have monitored and
21 participated in the review of the SPNA program
22 over the last several years and look forward to

1 PHMSA's continued improvements and its members
2 are practitioners of a "safety-first" culture
3 and are strong advocates of safety. We agree
4 that the fitness evaluation certainly played an
5 important role in the review and approval
6 process. However, the current standard
7 operating procedures are anything but
8 transparent and at times appear either
9 contradictory to each other or contradictory to
10 how the procedures are being utilized.

11 It appears PHMSA is continually
12 changing the fitness evaluation criteria and we
13 see that from the differences between your
14 slides and the notice.

15 In October 2009 PHMSA published a
16 document, Special Permits Standard Operating
17 Procedures, Version 1.0. This document clearly
18 detailed the special permits process and
19 including the fitness evaluation. A similar
20 document specific to approvals was also
21 published within Section 6.2 of that document
22 PHMSA documented the fitness evaluation process

1 included a three-phase fitness determination
2 that you've identified here. And that would be
3 initiated if the initial minimum criteria were
4 not met. Whether or not COSTHA supported all
5 of the minimum criteria we applauded PHMSA's
6 effort for publishing the information.
7 However, since October 2009 both the special
8 permit and approval SOPs have been removed from
9 the PHMSA website. This may be a simple
10 oversight, however we believe the lack of
11 information continues to cause concern and
12 frustration to the regulated community.

13 You can keep looking for it. I looked
14 for it yesterday. And if it's there, it's
15 buried.

16 Given that the details identified in
17 the notice for this meeting do not fully match
18 the criteria in the 2009 document, industry
19 continues to struggle with what exactly
20 constitutes minimum criteria.

21 The minimum criteria defined in the
22 notice -- so I'm going to speak specific about

1 the notice even though we've got some items
2 here because it's a little bit different. It
3 identifies three areas of interest, incident
4 criteria, enforcement cases, and vehicle safety
5 records. Vehicle safety records come from the
6 SAFER database and provide rates that can be
7 compared to the national averages, the
8 discussion of normalization of the data. PHMSA
9 even notes that if the number of inspections
10 falls below ten the criteria is not to be used.

11 But when reviewing incident criteria, the
12 concept of rates appears to be lost. PHMSA
13 does not consider the rate of hazardous
14 material incidents, but instead focuses on the
15 actual number. COSTHA strongly believes that a
16 company's transportation records should be
17 reviewed as a rate based on the percentage of
18 overall activities. For example, should a
19 company that has experienced one incident per
20 10,000 shipments be held to the same standard
21 that experienced one incident per ten
22 shipments.

1 The SAFER data considers the fact that
2 accidents do happen. But organizations who
3 strive for safety and quality will see less
4 instances per number of shipments. COSTHA
5 realizes PHMSA does not currently collect the
6 number of actual shipments. So the rate is
7 very difficult to calculate. We suggest this
8 may be something that you might want to include
9 as far as future consideration for data.

10 Additionally, a number of our members
11 have experienced delays or denials based on
12 SAFER data that does not reflect actual
13 conditions. For example, two members reported
14 initial denials based on a high rate of out-of-
15 service vehicles. However, neither of these
16 companies transport hazardous materials on
17 their vehicles and certainly would not
18 transport the hazardous materials covered by
19 any requested special permits or approvals.
20 And I can provide specific data at a later
21 date, not in a public forum.

22 MR. PAQUET: Right.

1 MR. FERGUSON: What then is the
2 correlation between non-hazmat SAFER data and
3 the ability for an applicant to implement a
4 special permit or approval?

5 With regards to enforcement cases, the
6 minimum criteria includes references to civil
7 penalty cases, warning letters, a combination
8 of the two or at least in the notice -- the
9 public meeting notice -- any open cases. When
10 a case is opened by an agency the subject of
11 the case has the opportunity to provide
12 information as to the allegations of
13 noncompliance. Many cases are closed without
14 issuance of either a warning or civil penalty
15 when the investigators eventually determine a
16 violation has not occurred.

17 We do not believe it is appropriate to
18 include open cases as part of the fitness
19 minimum criteria since the particulars of the
20 case have not been finalized. Such an action
21 puts undue burden on the applicant for
22 potentially no proven reason.

1 COSTHA membership includes a number of
2 air carriers who are regulated by the FAA in
3 many different areas. Air carriers routinely
4 undergo FAA inspections for any number of
5 reasons. If an air carrier receives an
6 enforcement case or a warning letter as a
7 carrier for inappropriate airport signage, for
8 example, why would this carrier trigger
9 additional scrutiny for the ability of a
10 maintenance department to ship under a special
11 permit or approval. Carriers can serve as two
12 separate components in the transportation
13 process and operate as separate entities under
14 one roof with regards to hazardous materials.
15 Providing a simple trigger number of penalties
16 or warning letters to a carrier does not
17 reflect the performance nor the risk of the
18 operation asking for the special permit in all
19 cases.

20 Finally, I would like to address the
21 implementation of the fitness evaluation. We
22 understand the tremendous pressure and

1 responsibility PHMSA has in reviewing and
2 approving special permits. However, several of
3 our members have experienced problems with
4 obtaining special permits or approval because
5 the three-tier approach was not initiated.
6 Instead, because the minimum criteria was not
7 met the approval was denied. We sincerely hope
8 this type of situation is now in the past. But
9 this example points to the lack of transparency
10 in the process to both industry and PHMSA
11 staff.

12 If an individual within an
13 organization does not understand the full
14 conditions of the process, and their process in
15 that process, the process will not work as
16 designed. Given that resources are being
17 pooled within PHMSA to eliminate the backlog
18 and right size the workload it is imperative
19 those temporarily involved in the fitness
20 evaluation understand their responsibilities so
21 that improper denials or approvals are not
22 given. Given this lack of transparency -- and

1 forgive my bringing this up again -- COSTHA
2 would support addressing these issues in a
3 formal rulemaking process.

4 We thank you for providing this forum
5 as an opportunity to summarize our comments and
6 we'll happily provide any further written
7 comments or details as needed.

8 MR. PAQUET: All right. Just one
9 thing. I'm sure that when I ask this question
10 20 people will want to respond. But, if we can
11 just keep it to Tom for just one second. And
12 it's about using open cases. Okay. So a PHMSA
13 field operations goes out, does an inspection,
14 finds a slew of violations. It's an open
15 enforcement case -- of course is closed. Well,
16 in the course of reviewing for a special permit
17 to operate, you know, an exemption or special
18 permit, should PHMSA not at least say, hold on,
19 we need to -- you know, we know that there are
20 problems or there appears to be problems there.
21 Let's at least take a second look. And,
22 again, don't -- you know, I have to jump up and

1 please, I'm just throwing it out there because
2 it's a workshop. I see you, Rich.

3 MR. FERGUSON: And I think that the
4 issue there is you can use a simple cliché,
5 innocent until proven guilty.

6 (Simultaneous conversation.)

7 MR. PAQUET: Oh, absolutely.
8 Absolutely.

9 MR. FERGUSON: The fact is that an
10 inspector that walks in, in their opinion may
11 identify something. And they can bring an open
12 -- or open a case for any number of reasons.
13 Certainly it might be hazmat, certainly it
14 might not be hazmat. However, the recognition
15 that this is specifically tied -- as given by
16 the other examples -- to a business' ability to
17 survive or to actually operate --

18 MR. PAQUET: Uh-huh.

19 MR. FERGUSON: -- and may not have
20 anything to do actually with safety. You need
21 to focus on what has actually been identified,
22 what has actually been found and what has been

1 closed. Because, again, indeed, that's why the
2 process of opening cases, the discussion back
3 and forth, and then finally closing the case,
4 that's why that process is there. It needs to
5 be a closed case.

6 MR. PAQUET: Okay. Thank you. I'm
7 hesitant to -- you know, I'm trying to --

8 MR. MOSKOWITZ: You know what's
9 coming.

10 MR. PAQUET: Yeah, but I'm trying to -
11 - I am trying to draw out some positive
12 discussion. You know, I'm hesitant to have
13 everybody respond. Because I'm sure everybody
14 has a good answer to that. But --

15 MR. MOSKOWITZ: I think everyone will
16 agree with this. It's a denial of due process.
17 Rich Moskowitz, ATA. It's a denial of due
18 process, it's arguably unconstitutional and you
19 have a right to revoke the special permit if
20 after the formal adjudication reveals that
21 there is some reason that that individual is
22 unfit, then that special permit could be

1 revoked. But to consider an unadjudicated,
2 open case as a criteria for evaluating a
3 special permit is just not fair.

4 MR. PAQUET: Right. Yeah. Okay.

5 MS. LAWLESS: Hi, my name is Sue
6 Lawless. I represent several companies
7 involved in the explosives industry. I have a
8 few comments, but mostly some questions for
9 you. And I don't know whether you're taking
10 questions, but perhaps this is a good forum
11 since it is a workshop to answer some
12 questions.

13 The first thing that I would say is
14 that it troubles me that we are legitimizing
15 the authority of PHMSA to establish a safety
16 fitness procedure by discussing it. Because I
17 would say to you that if you take a good look
18 at your enabling legislation that that
19 authority doesn't exist. And if it doesn't
20 exist you have to ask yourself, why are you
21 making more work for yourself when the issue
22 that you're talking about, the fitness of a

1 company to conduct transportation under special
2 permit, depending on which modality that
3 company is operating in has already been
4 established by another modality. So, for
5 example, I deal mostly with highway
6 transportation. So if the Federal Motor
7 Carrier Safety Administration has established
8 standards for determining the safety fitness of
9 a company, I think it is dangerous territory
10 for PHMSA to come in and say, well, here is yet
11 another standard that a company is going to be
12 held to.

13 So I think that I'm troubled by PHMSA
14 wanting to undertake even more work when the
15 work has really already been done. And
16 especially in light of CSA 2010 which the data
17 is going to be available to you where you're
18 going to have, you know, I don't know how many
19 hundreds of thousands of dollars that have been
20 devoted to determining a nexus between a
21 particular violation or a particular activity
22 and a safety risk, why wouldn't you use that

1 data in furtherance of your effort. So if you
2 feel compelled and you feel that the Agency has
3 authority to do it, why not use the resources
4 that are already available to you as opposed to
5 reinventing the wheel and trying to come up
6 with things that have some nexus.

7 I take it from what you have presented
8 and from what I have seen in the procedures
9 that there wasn't a really big analysis done
10 on, geez, if a company has one incident, one
11 serious incident, does that have a causal
12 connection to the probability for that company
13 to have another incident? And unless that
14 analysis has been done, really anybody in this
15 room -- we're all sitting around sort of taking
16 our best educated guess on what makes a company
17 fit or unfit.

18 So I put to you that it's nice to have
19 a workshop and it's nice to talk about it, but
20 you have the data available to you to do the
21 analysis of what is the true meaning of any
22 particular event. If a company has ten serious

1 incidents and has 30 vehicles or however many
2 miles traveled, you can do that analysis and
3 the agency has that analysis available to it.
4 And that has to be the starting point. Because
5 if you're sitting throwing, you know, darts at
6 a dart board saying, you know, yeah, that's
7 significant, could be significant, I don't know
8 if it's significant, it's sort of meaningless.

9 But I want to get to the questions
10 that I have. My first question for you is, are
11 the baseline -- these threshold determinations
12 currently being applied to people who are
13 applying for special permits?

14 MR. PAQUET: Going back to your -- we
15 are using this to manage the fitness
16 determination.

17 MS. LAWLESS: Okay. So are you using
18 what was published in October of 2009?

19 MR. PAQUET: I don't recall if that's
20 the same.

21 MS. LAWLESS: Is what you're using,
22 has that been published any place?

1 MR. PAQUET: I know that we have --
2 our approvals documents -- our approval SOPs
3 are being readied to be put on the website.
4 They've been vetted through time and time again
5 and we're updating our special permits SOP as
6 we speak.

7 MS. LAWLESS: And do you -- does the
8 Agency have a timeline? We're talking at the -
9 - you know, sort of the gate, you're viewing
10 this as a gateway issue now. You know, what is
11 going to cause us to look at you differently
12 when you're applying? So this is only the
13 first of three phases as envisioned by the
14 Agency. What is the timeline for establishing
15 the criteria for the other two phases?

16 MR. PAQUET: Our goal as in the
17 regulations is to process special permits
18 within 180 days.

19 MS. LAWLESS: No, I'm sorry, that was
20 a poorly asked question then. So right now
21 we're talking about what should the baseline
22 be. You're asking everybody to participate.

1 And then as part of that process you say, okay,
2 if you're subject to this initial determination
3 that you need more consideration, you go to the
4 second phase of your evaluation and eventually
5 the third phase and that phase probably
6 involves an onsite review. But right now I
7 think you'd acknowledge nobody has any idea
8 what that onsite review could be. It could be
9 done by the FMCSA, it could be a compliance
10 review, it could be an investigator going out
11 and taking a look at some documents, all
12 documents, who knows.

13 So is there a timeline that the Agency
14 has set for itself to figure out what that end
15 process is going to be before the Agency, if it
16 has authority to do so, would determine that
17 someone is unfit?

18 MR. PAQUET: On specific cases we want
19 to process our special permits within 180 days.

20 So this is a concurrent process with the
21 safety evaluation.

22 MS. LAWLESS: Still not my -- the

1 question is, are you ever going to say what
2 that final process is, Ryan? Are you ever
3 going to get to the point -- you have a process
4 and you say, we'll come out to your office.
5 We'll come out and look at you and say, are you
6 fit or unfit? You know, what does -- when is
7 that going to be --

8 (Simultaneous conversation.)

9 MS. LAWLESS: -- decided?

10 MR. PAQUET: We have extensive
11 standard operating procedures on all of our
12 field operations activities.

13 MS. LAWLESS: And is that going -- is
14 it what I have that's published in October or
15 is it something different?

16 MR. PAQUET: It's the field operations
17 --

18 MS. LAWLESS: And is that published?

19 MR. PAQUET: Yes.

20 MS. LAWLESS: Okay. And that's what
21 you would say that is going to be used to
22 determine the fitness if you have to go to that

1 third tier of review?

2 MR. PAQUET: Those are the operating
3 procedures that our field operations will use.

4 MS. LAWLESS: That's all I have.

5 MR. PAQUET: Thank you. Somebody way
6 in the back. Fritz.

7 MR. WEYBENGA: Thank you. Fritz
8 Weybenga, Dangerous Goods Advisory Council.
9 And unfortunately I have to say, I have not
10 come prepared specifically to talk about the
11 slide that you have on the screen because that
12 wasn't in the notice. And, you know, it would
13 be helpful if we could have better clarity in
14 the future in terms of what the intention of a
15 public meeting is. And certainly we'll be
16 happy to provide some information on that
17 information in the future.

18 Personally, I have to say that that is
19 whole discussion of fitness to me is really a
20 tremendous distraction particularly in view of
21 the fact that the Agency is really woefully
22 behind in terms of issuing special permits and

1 approvals. And to spend so much time on this
2 issue which in my mind is basically a non-
3 issue, is just taking away valuable resources
4 for something that's inappropriate.

5 For example, when we look at hazardous
6 materials that are transported under the
7 regulations, short of, you know, the HMSP
8 permits, things like that, we can move very
9 dangerous materials without benefit of any
10 fitness evaluation at all. And so it kind of
11 begs the question, why are we focusing so much
12 attention on fitness in relation to a special
13 permit which in fact may be a safer alternative
14 than is being provided by the regulations
15 itself, you know, in the face of people being
16 able to move things without any fitness
17 evaluation at all.

18 And when I look at the criticisms that
19 have been levied against the Agency, and I
20 don't agree with all of them, but when I look
21 at those criticisms, those criticisms that I've
22 heard is that there is a lack of any fitness

1 evaluation, not -- not a criticism of the
2 fitness evaluation that's been done. And I
3 would suggest that -- you know, that the Agency
4 keep it simple. There's the old KISS
5 principle.

6 MR. PAQUET: Yes.

7 MR. WEYBENGA: And that you restrict
8 yourself only to looking at closed civil
9 penalty cases rather than going into incident
10 analysis and all those other kinds of things.

11 And I have to ask, you know, where are
12 the bodies buried in this whole business.
13 Where have we found that, you know, people are,
14 you know, driving around with hazardous
15 materials that they shouldn't be, you know,
16 that are unfit? I mean, where are the
17 examples? We heard some at the subcommittee
18 meeting, but those were basically bogus in my
19 opinion. And the Agency should have better
20 defended themselves against those.

21 Like other speakers, we strongly
22 support the idea of if we are going to go

1 through this exercise that it should be done
2 through a regulatory process, not this kind of
3 administrative action where we have no
4 opportunity really to participate.

5 Like others, we think it's
6 inappropriate to use a one-size-fits-all
7 approach. And we think there needs to be
8 discretion in terms of applying fitness.
9 Certainly as I've mentioned, there are
10 instances when special permits actually improve
11 the level of safety.

12 One glaring example is an improved
13 rail tank car design for TIH materials where
14 the regulations don't provide for a specific
15 design, but a special permit does. And that
16 special design is better than what's provided
17 in the regulations. Why would we apply, you
18 know, rigorous fitness criteria to something
19 like that?

20 In other cases, I don't think the
21 criteria that you're applying are germane to
22 the actual approval or special permit being

1 considered. And in the case of approvals, we
2 note that the vast majority of approvals are
3 essentially classification approvals. That is,
4 they are for providing an EX number for a
5 firework or an explosive, an organic peroxide
6 or self-reactive substance. These basically
7 are requests for confirmation of the
8 appropriate classification of a material. Why
9 do we need to have a fitness evaluation for
10 confirming the appropriate classification of a
11 material?

12 Going on, I have to say that you,
13 know, the fitness evaluations have in part
14 significantly delayed the issuance of approvals
15 and special permits. And, you know, I think
16 the Agency, hopefully recognizes that you are
17 costing -- you are introducing a cost to the
18 American economy. These are innovative ideas,
19 typically they are new products and by delaying
20 their transportation you are, you know, you're
21 making the situation worse in terms of a bad
22 economy already.

1 When it comes to incidents and using
2 incident data as a basis for fitness, I think
3 that's totally inappropriate. Others have
4 spoken about due process in relation to open
5 cases. But the same applies in the case of
6 incidents. An incident report is provided by
7 somebody or prepared by somebody who has no
8 training in terms of looking at the cause and
9 effect of an accident. They are simply putting
10 down the fact. They are not assessing blame.
11 Typically the carrier is the one who is
12 preparing the incident report. And, you know,
13 a lot of times the incident is not the problem
14 of the carrier. It may be that the shipper has
15 provided a defective package. Are you going to
16 blame the carrier then and say, well, you've
17 had your 30 incidents even though, you know,
18 XYZ Chemical was the one that provided leaking
19 drums to you, we're going to, you know, put you
20 under the microscope in terms of further
21 fitness evaluation on the basis of, you know,
22 something that is XYZ Chemical's fault.

1 And at the same time, you know, the
2 incident reports themselves they don't
3 investigate, you know, who was really to blame.
4 They're just reporting the facts. And there
5 is no ability of a chemical company or a
6 shipper to go back and say, hey, wait a minute,
7 it really wasn't my fault. The carrier dropped
8 this package and should I be held responsible
9 for, you know, the carrier's negligence in
10 terms of dropping a package.

11 So, you know, the same argument holds
12 in the case of incident reports. There is no
13 due process that's provided there. And so it's
14 totally inappropriate to use incident reports
15 as a basis for, you know, evaluating fitness.

16 And likewise in the case of serious
17 incidents, there's a -- I assume you're talking
18 about the serious incidents that are in
19 171.15(b). There's no definition of serious
20 incidents in 171.8, contrary to the SOP saying
21 that. But if you look at the serious
22 incidents, there's a whole range that includes,

1 you know, a death, it includes an injury. But
2 it also includes, for example, loss of a class
3 nine material marine pollutant. And I would
4 suggest that -- you know, there's a wide range
5 of incidents there and, you know, it may be
6 appropriate to get excited about some and not
7 others.

8 The other things is, is that when you
9 look at those incidents, one of them happens to
10 be evacuation. Well, who decides evacuation?
11 Well the emergency responder on scene. Well,
12 maybe the emergency responder overreacted. Are
13 we going to then, because that emergency
14 responder overreacted, are we going to deny
15 fitness on the basis of an emergency
16 responder's inappropriate action?

17 Like others, I would certainly echo
18 the inappropriateness of using open cases.
19 Similarly, I think warning letters or just a
20 notification of probable cause, there's no real
21 process in terms of somebody coming back and
22 countering and saying, hey, wait a minute, I

1 really didn't violate the regulations, it's
2 just an indication that, hey, there may be
3 something amiss and you better take a look at
4 it. And I think that's the way that these are
5 normally handled. So it would be inappropriate
6 to use warning letters in our opinion.

7 And then similarly in the case of the
8 SAFER criteria, again, we would feel that those
9 are inappropriate in some cases. We had one
10 member who was shut down for some period of
11 time because he did not have a safety rating.
12 This company had one truck that moved up and
13 down the mountain and he didn't have a safety
14 rating and that was the reason for delaying the
15 issuance of a special permit. And I think
16 that's really unrealistic and inappropriate.

17 Thank you for this opportunity.

18 MR. PAQUET: Thank you, Fritz. I just
19 want to highlight one thing that you said about
20 classification approvals and the need for any
21 type of fitness evaluation at all. That's
22 where you were going with that; right?

1 MR. WEYBENGA: Yes.

2 MR. PAQUET: Okay. Thank you.

3 I think there's one in the back. And
4 in fairness, since everybody else is taking ten
5 minutes, go ahead.

6 (Laughter.)

7 MR. SWITZER: My name is Rick Switzer
8 on behalf of two associations, the Gases and
9 Welding Distributors Association and the
10 National Private Truck Council and member
11 companies of both of those organizations rely
12 significantly on special permits, in particular
13 in transporting their own goods. They are both
14 shippers and carriers in both cases. They are
15 private fleets.

16 I think it would be instructive to
17 contrast this project with the FMCSA's CSA 2010
18 program.

19 MR. PAQUET: Uh-huh.

20 MR. SWITZER: Because both of them are
21 attempts to do safety fitness evaluations. In
22 the FMCSA's case of motor carriers, in this

1 case using motor carriers, but also shippers
2 and carriers and other modes as well. And in
3 the CSA 2010 project began with not one public
4 meeting, but months of public hearings around
5 the country for input from hundreds of
6 different motor carrier representatives. And
7 CSA 2010 is really an attempt to use
8 scientifically valid qualitative data to
9 evaluate motor carrier safety fitness.

10 They're really trying to put together
11 objective, not subjective criteria and
12 information that carriers can look at to see
13 where they stand. And, in fact, just last
14 week, I believe the FMCSA opened up their
15 database so that carriers can view their own
16 individual company data to see, one, if the
17 analysis really seems to fit, and two, whether
18 or not the carrier has compliance issues.

19 I think the other very important point
20 is that the FMCSA has determined that their
21 review of the safety fitness methodology has to
22 go through notice and comment rulemaking. And

1 that rulemaking is now at the FMCSA and is
2 being drafted. It's scheduled to go up to the
3 Office of the Secretary sometime later this
4 year. I think if the FMCSA thinks it's
5 necessary to do notice and comment rulemaking
6 on safety fitness determinations for truckloads
7 of potato chips, PHMSA ought to use the same
8 approach towards truckloads of hazardous
9 materials. I think it's required by law and
10 it's a good policy decision as well.

11 It's also my understanding that this
12 CSA 2010 data is going to supplant the SAFER
13 data in your program as well. Although it
14 doesn't say so specifically in the Federal
15 Register notice, it seems to make sense that
16 once you get a new safety fitness methodology
17 in FMCSA that that's going to supersede the
18 SAFER data that you're using now.

19 It's important to realize too that CSA
20 has gone through a 30-month validation process.

21 It's not just something that we hope works.
22 They're trying to see if it actually works in

1 the real world. There was a multi-state pilot
2 program with motor carrier volunteers to make
3 sure that the data actually does what they
4 intended it to do. And the FMCSA actually
5 hired the University of Michigan Transportation
6 Research Institute to conduct a preliminary
7 analysis of the seven different basic scores
8 that a motor carrier will have. And that
9 preliminary analysis showed that five of those
10 basics actually did significantly predict and
11 enhanced risk for carriers that had bad scores,
12 but two didn't. And the FMCSA is working to
13 revise the program because of the information
14 that came out of that preliminary analysis.

15 They've also gone through a laborious
16 process with motor carriers to get input as
17 they're developing the CSA methodology and it's
18 helped in particular things like using better
19 exposure data so that we can normalize the
20 carrier statistics that they're making these
21 determinations on.

22 It's a very involved process. It's

1 taken several years, but I think ultimately
2 it's going to result in a qualitative system
3 that makes a great deal of sense. I'm not
4 getting the same comfort level with your
5 program.

6 And I understand the sense of urgency
7 that PHMSA has in developing this. I
8 understand the political concerns that are
9 here, but I don't think that you can use that
10 as an excuse to ignore either basic principals
11 of scientific methodology or the Administrative
12 Procedure Act. So I ask you to consider that.

13 Thank you.

14 MR. PAQUET: Thank you.

15 MS. HEALD: Robyn Hill with the
16 Chlorine Institute. The Chlorine Institute is
17 a 205-member not-for-profit trade association
18 of chloride producers worldwide as well as
19 packagers, distributors, users, and suppliers.

20 And the Institute's North America producer
21 members account for more than 95 percent of
22 total chlorine production capacity for the

1 United States, Canada and Mexico.

2 The Chlorine Institute fully supports
3 DOT's goal of (inaudible) shippers of hazardous
4 materials are fit to handle these materials
5 safely under the regulations or under special
6 permits.

7 DOT has the responsibility to apply
8 sound science to verify that an equivalent
9 level of safety to that specified by the
10 regulations will be achieved before a special
11 permit can be issued. Although this effort is
12 crucial for the safe transportation of
13 hazardous materials, CI is uncertain of the
14 process that will be used to determine fitness.

15 In its role of guardian of public
16 safety, DOT should determine the most
17 appropriate process and define that process to
18 the potential applicants.

19 Chlorine and related chemicals are
20 used throughout the U.S. economy and are key to
21 the protection of public health. Often in the
22 past to enhance packaging for these materials

1 special permits are used. Special permits are
2 currently used by many CI members in ways such
3 as transporting bleach in fiberglass,
4 reinforced plastic tank trucks. The
5 identification requirements for inspecting
6 safety vent assemblies on hydrochloric acid
7 tank cars which is currently being incorporated
8 into the regulations and using various safety
9 features or construction on chlorine tank cars.

10 Recently one significant potential
11 transportation enhancement has been identified,
12 a new chlorine rail tank car design which is
13 currently pending special permit approval.

14 CI Supports the review of special
15 permits such as this that achieve potential
16 advancements in safety utilizing a process
17 based on sound science and engineering.
18 PHMSA's decision regarding an application's
19 disposition should only be made after an
20 equivalent level of safety determination has
21 been conducted which considers all factors of
22 design, construction, and operation.

1 Special permit processes -- to
2 consider alternative approaches to achieve a
3 level of safety -- or beyond the current
4 regulatory requirements. We do not understand
5 for what reasons a shipper or carrier who is
6 fit to operate should be excluded from using
7 these alternative means to achieve the level of
8 safety prescribed in the regulations.

9 We also are not sure why a shipper or
10 carrier requesting a permit would be held to a
11 different fitness standard than any other
12 shipper or carrier of hazardous materials
13 operating under the current regulations.
14 Because many CI members use special permits to
15 transport chlorine and other emission chemical
16 products understanding the process for
17 determining the fitness of applicants is
18 important to our members' operations.

19 PHMSA has mentioned the need to better
20 evaluate fitness by collecting additional
21 information from special permit applicants.
22 But nowhere does PHMSA define the requirements

1 needed to determine fitness such as specified
2 historical timeline for required documents.

3 PHMSA has also not shared how the
4 required information will be used. Without
5 defining the parameters of the fitness
6 evaluation process conditions for what
7 constitutes the fit applicant versus the unfit
8 applicant is unclear.

9 IF PHMSA published detailed criteria
10 to be used in evaluating fitness, it would help
11 expedite an already burdensome application
12 review process and help guide an objective and
13 consistent process.

14 A defined fitness evaluation process
15 would also ensure the applicants understand
16 what is required of them and as well as assist
17 them in taking any corrective actions
18 necessary.

19 Thank you. I'll be brief since it's
20 similar to other comments.

21 MR. PAQUET: Thank you. And folks on
22 the phone, we'll give you your opportunity in a

1 couple seconds or a couple minutes. A couple
2 minutes. Sorry, I didn't mean to say seconds.

3 MS. McAULIFFE: I only need a couple
4 of minutes, Ryan. Heidi McAuliffe, American
5 Coatings Association. I have probably three or
6 four pages of comments. I'm going to spare you
7 all that. I agree with most of the comments
8 that my trade association colleagues have
9 articulated here today most notably on the need
10 for rulemaking particular to this issue.

11 I guess what really strikes me, Ryan
12 is the lack of effort that PHMSA has made to
13 sort of avoid a rulemaking on this. I have to
14 tell you that earlier this week I was looking
15 for some reference to this meeting on the
16 website and I couldn't find it anywhere. It
17 wasn't on the PHMSA calendar, it wasn't on the
18 hazmat calendar. I couldn't find any documents
19 relevant to it on the website and I guess I'm a
20 little bit concerned about the effort that's
21 being made to just avoid rulemaking on this.

22 The fact that the October 2009 SOPs

1 are difficult to find, they're not consistent
2 with what was published in the notice for this
3 meeting in the Federal Register, and then your
4 presentation this morning, you know, had some
5 differences as well, makes us all wonder what
6 the standard really is. A standard that is
7 very important to the operation of businesses,
8 people in the regulated community need to work
9 under these special permits. So, I know you've
10 heard that comment before this morning, and I
11 apologize, but I feel that it needed to be
12 emphasized.

13 The other comment that I want to make
14 is on the criteria, sort of the bright line
15 criteria, having to do with the incident
16 reports. Is it one serious incident, the more
17 than 30 for a Table 2 material, those types of
18 criteria most of my colleagues have addressed
19 that issue as well. And the comment that I
20 want to make is -- I mean, I endorse and
21 support all those comments and my members do as
22 well, but the comment that I want to make is

1 that the incident reporting system, as Fritz
2 indicated and some others, isn't a sign of
3 liability, it isn't the finding of liability.
4 It's merely a recitation of facts. And as I
5 understand that the 5800 reports were --
6 initially they were originated or created to
7 sort of document the consequences of hazardous
8 materials incidents; not, as we said before,
9 liability. And I think Fritz discussed an
10 incident or an example where a carrier makes
11 5800 report, but, you know, it wasn't really
12 the carrier's fault because perhaps the shipper
13 did something that caused this incident. I
14 want to give you a different example. I mean,
15 what if a carrier is, you know, coming down the
16 road and they are T-boned in the middle of an
17 intersection and hence we have an incident and
18 then shipper, you know, the shippers who have
19 their materials on that carrier's vehicle are
20 looking for special permits.

21 I don't know how you backtrack in that
22 type of situation and make findings against the

1 shippers.

2 And another type of example is if, you
3 know, which often happens with paint products
4 is what if there's incidents in the handling of
5 the product, you know, unloading. If a
6 palliative material is speared by a forklift?
7 Again, how do you assess that type of an
8 incident against the shipper?

9 So all of these different types of
10 examples need to be considered and it just
11 seems inconsistent to be using these incident
12 reports for a finding of safety or fitness --
13 safety and fitness for special permits. So it
14 just seems inconsistent. There's a disconnect
15 between the purpose of the incident reporting
16 and how you're using them in evaluating
17 applications for special permits.

18 I guess I'd also like to say that I
19 support the position that you should not be
20 using open cases for safety ratings. Again,
21 due process issues are very obvious there.
22 And, again, I have, like I said, three of four

1 pages of comments. I'll submit those directly
2 to you and I'd be happy to put those in the HN-
3 233(b) docket as well.

4 MR. PAQUET: Thank you.

5 MS. McAULIFFE: Thank you.

6 MR. PAQUET: Okay. Well, if everybody
7 in the room who would like to speak has spoken,
8 then we can look to see who is on live meeting
9 and I can give you a rundown instead of asking
10 for people on the phone because that's always
11 kind of a difficult situation. So, on top we
12 have Bob. And if Bob would like to take some
13 time to speak, I'll give you a couple seconds
14 to respond.

15 (No response.)

16 MR. PAQUET: And if it's a no, then
17 we'll move on to C. Yeager.

18 (No response.)

19 MR. PAQUET: And the next one is
20 Carmen Hower. And I apologize if I
21 mispronounce a name.

22 (No response.)

1 MR. PAQUET: And then there's Carrie
2 Wayne.

3 (No response.)

4 MR. PAQUET: And if I go to fast, then
5 just speak up and we'll get you in.

6 D.O. Mullin?

7 MR. MULLIN: (Off microphone.) as a
8 fleet owner we generally support the comments
9 that have been presented today. We are a large
10 fleet owner of tank cars -- normalization
11 according to the size of the fleet has to be a
12 consideration.

13 The question as mentioned earlier,
14 performance measures being proposed for this is
15 perhaps being inappropriate to true measures of
16 safety. And we also question whether this
17 should be put through the rulemaking process.
18 Thank you.

19 MR. PAQUET: Thank you.

20 The next one is Donna.

21 MS. EDMONSON: Donna Edmonson from
22 Rodia, Inc. Again, I echo a lot of the

1 comments that we have heard on this issue. And
2 one of the particular concerns that we had was
3 regarding doing the fitness rating based upon
4 the number of incidents. In your actual
5 notification you didn't put a timeframe as to,
6 you know, okay, you said 30 incidents, but was
7 it since the inception of the company or was it
8 in the past year, past two years, past five
9 years, whatever. And that was one of the
10 concerns that I had coming into this meeting.

11 Also the number of warning letters
12 received. The size of the company involved
13 when, you know, if it's a large company they
14 could have any number of incidents, if it's a
15 smaller company, 30 incidents, you know, for a
16 small company in my mind would be a lot of
17 incidents, but 30 incidents for a very large
18 company that makes thousands of shipments a
19 year is not that many. So it's a proportional
20 issue.

21 I believe you did address that towards
22 the beginning of your talk, but unfortunately

1 the audio portion of this program has not been
2 very good, so it was very hard to make out what
3 you were saying.

4 MR. PAQUET: I apologize for that.

5 Okay. Thank you. Jennifer --
6 Jennifer Beulah.

7 (No response.)

8 MR. PAQUET: Next is JRM.

9 JRM: Pass.

10 MR. PAQUET: Pass. Thank you.

11 Julie Heckman.

12 (No response.)

13 MR. PAQUET: Kristin Wortman?

14 (No response.)

15 MR. PAQUET: Laurie Moore.

16 MS. MOORE: Yes, I have one comment to
17 make. We --

18 MR. PAQUET: I'm sorry --

19 (Simultaneous conversation.)

20 MS. MOORE: -- and we do not have our
21 own fleet of vehicles, so we use all third-
22 party providers. So, I guess my question would

1 be and I'm not quite clear because, again, I
2 didn't hear the beginning of the conversation
3 due to the audio quality. I'm not quite sure
4 how the number of incidents for a third-party
5 carrier figures into my fitness evaluation. So
6 I would like you to explain that a little bit
7 further if you could. Thank you.

8 MR. PAQUET: Well, I'm not sure -- I'm
9 not sure I understand the question. I would
10 ask that -- number one, what would be the ideal
11 situation and if you could just restate the
12 question, I'd appreciate it.

13 MS. MOORE: Okay. Okay. My company
14 uses all third-party logistics providers --

15 MR. PAQUET: Right.

16 MS. MOORE: -- for our dangerous
17 shipments.

18 MR. PAQUET: Right.

19 MS. MOORE: So I'm applying for a
20 special permit, or I'm applying for a competent
21 authority approval --

22 MR. PAQUET: Right.

1 MS. MOORE: -- to transport a product
2 via -- normally it's via all modes, but in some
3 instances it's a specific mode. So given that
4 I am doing that, are you focusing then the
5 evaluation just on my portion of it, or does
6 the carrier involvement also get factored --

7 MR. PAQUET: Is this --

8 MS. MOORE: -- depending on what
9 carrier I choose?

10 MR. PAQUET: No, you don't provide us
11 the carrier information. So you're providing
12 us the information as an offeror. So we --

13 MS. MOORE: Correct.

14 MR. PAQUET: -- can only look at you.

15 MS. MOORE: Okay. Thank you.

16 MR. PAQUET: Thank you. Lisa Nitsche.

17 (No response.)

18 MR. PAQUET: Mandy Johnson?

19 MS. JOHNSON: Yes, I would -- I
20 represent Maxam North America and as such we
21 support the IME statement and would like to see
22 this go to rulemaking. Again, I echo the

1 comments of some of the earlier speakers. The
2 sound was difficult to hear at the beginning.
3 So I'm looking forward to getting a transcript
4 of the beginning of the meeting if that would
5 be possible. But thank you very much and I
6 appreciate the opportunity to participant in
7 this meeting today.

8 MR. PAQUET: Thank you, Mandy.
9 Mark Connolly.

10 MR. CONNOLLY: Hello. This is Mark.
11 I generally support the comments particularly
12 that have been provided by DGAC. And I too did
13 not understand what was done in probably the
14 first 15, 20 minutes of the meeting. The audio
15 was very difficult to understand. I'm very
16 concerned. We are a producer of 5.2 materials
17 as well as 4.2 materials. And I have a
18 challenge with regards to applications for
19 competent authority approvals and the review of
20 number of incidents. Perhaps you mentioned
21 something about it at the beginning of the
22 meeting. If there's a way for PHMSA to look at

1 total number of incidents in relation to the
2 total number of hazardous material shipments
3 over a given period of time. And I'd
4 appreciate a transcript and how could I get
5 one.

6 MR. PAQUET: We'll work on that. That
7 was brought up in the beginning, Mark, and we
8 don't have a plan for it, but we'll look into
9 what we can do on getting a transcript.

10 MR. CONNOLLY: Thank you.

11 MR. PAQUET: Thank you for your
12 comments.

13 Nicole Brewan?

14 MS. BREWAN: Yes, good afternoon, good
15 morning. Nicole Brewan with the Railway Supply
16 Institute, a trade association representing
17 suppliers to Crossland Freight Railroads,
18 Shortline Passenger rail. Primarily we are
19 here listening today on behalf of our tank car
20 manufacturer companies. And I do have to echo
21 one member company, (inaudible) also on the
22 call today. We echo their comments and also

1 just a reminder we're here primarily right now
2 in the listening capacity. But if there's a
3 way to get the transcript because I too had a
4 hard time listening to the front portion of the
5 conversation, I'd greatly appreciate it. Thank
6 you.

7 MR. PAQUET: Thank you.

8 Oliver Ramirez from ORICA.

9 MR. RAMIREZ: Yes, ORICA supports the
10 comments made by IME. We thank you for having
11 the forum. We also echo the comments of
12 wishing to see a transcript as the beginning
13 was hard to hear. And we have no further
14 comments.

15 MR. PAQUET: All right. Thank you.
16 Rajeer Singhal from SENEX.

17 MR. SINGHAL: We support IME comments
18 completely and also request that a transcript
19 be sent to us. The sound was pretty bad.

20 MR. PAQUET: Thank you.

21 S. Chapman.

22 (No response.)

1 MR. PAQUET: Thomas McGourty from
2 BASF.

3 MR. MCGOURTY: Yes, sir. First,
4 nobody could hear anything. So if you had a
5 way to measure who's on the call and send
6 everybody a transcript, I'm sure that would be
7 appreciated.

8 MR. PAQUET: Okay.

9 MR. MCGOURTY: I have three points --
10 three quick points. The first one, and, again,
11 I had some trouble hearing in the beginning.
12 But it seemed to me like the evaluation having
13 fixed numbers loses the whole -- loses the
14 whole ability of companies when there's a ten
15 person company and a thousand person company.

16 So, you know, it would seem to me that
17 as had been described some measure of shipments
18 would probably be wonderful if you could do it
19 in some kind of ratio. However, I know that
20 the number of shipments is not something that's
21 generally tracked. And it might be simpler to
22 set your peers or the peer criteria based on

1 the income, the net revenue of a company which
2 a public number that's published. That's just
3 an idea for you. So that the larger companies
4 have theoretically more shipments, so they have
5 more abilities to potentially have an incident.
6 So they shouldn't be judged as hard as a ten-
7 person company.

8 The second thing is, it seems also
9 this tier process intentionally misses the
10 facts of the whole special permit program.
11 What you're doing is dismissing, in some cases,
12 a permit. And let's say the carrier is not a
13 great carrier, but if the permit brings the
14 level of protection higher than currently
15 exists in the regulations, why would you not
16 grant that permit?

17 And then finally, the special permit
18 and the lookup is online. I can find anybody's
19 special permit if I know the number. The
20 competent authority assessments is not online.

21 And I'm wondering why that is and could that
22 be addressed? Because we have competent

1 authority assessments and we can't even find
2 out what the information is about that one.
3 Thank you.

4 MR. PAQUET: Thank you. And I'll look
5 into that, the availability of that online.
6 Thank you for your comments.

7 Is there anyone else on the phone
8 that's not online that would like to speak.

9 And I apologize for the audio quality.
10 You know, our technology isn't what it should
11 be yet. So hopefully, you know, if we have
12 another one of these, maybe on a different
13 topic, we'll have better phones and better ways
14 to communicate to people that don't -- can't
15 make it to D.C.

16 Again, is there anyone on the phone --

17 MR: : (Inaudible) with Down
18 Chemical. And I just want to -- I'll just make
19 this short. I just want to say we strongly
20 support TJNC's comments and we'll also be
21 submitting separate written comments as well.
22 So thank you.

1 MR. PAQUET: Thank you. Okay. Well,
2 thank you all. Closing comments.

3 MR. BIERLEIN: This is not so much a
4 comment, but a follow-on his statement. Can
5 you give a time period within which people can
6 submit their written statements to this
7 meeting?

8 MS. HILTON: And to where? Because
9 there's nothing in the Register that would
10 indicate that there's any way outside of this
11 meeting to --

12 MR. PAQUET: Okay. The approvals --
13 you can submit written comments to the e-mail
14 address that's on the public meeting notice,
15 pprovals.DOT.gov. That would be a great place.
16 Okay. Because that's looked at every day. So
17 we'll make sure to capture those.

18 Well, again, thankfully it's not 3:30
19 and we can conclude the meeting. Thank you all
20 for your comments. I appreciate it.

21 I understand we have a lot of work to
22 do and hopefully we can make some positive

1 progress from the comments that are made and
2 things that we need to do.

3 So thank you all for coming.

4 (Whereupon, at 11:30 a.m., the meeting
5 was adjourned.)

6

REPORTER'S CERTIFICATE

This is to certify that the attached proceedings
before:

UNITED STATES DEPARTMENT OF TRANSPORTATION

In the Matter of:

PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
(PHMSA)
PUBLIC MEETING

Were held as herein appears and that this is the
original transcript thereof for the file of the
Department, Commission, Board, Administrative Law Judge
or the Agency.

Further, I am neither counsel for or related to any
party to the above proceedings.

E. Francis Donovan

Official Reporter

Dated: March 29, 2010