INTERESTED PARTIES FOR HAZARDOUS MATERIALS TRANSPORTATION

December 20, 2022

VIA ELECTRONIC MAIL
Docket Management System
U.S. Department of Transportation
Washington, DC 20590

Re: Docket No. PHMSA-2022-0033; HM-208J

To whom it may concern,

On behalf of the Interested Parties for Hazardous Materials Transportation (Interested Parties)[1], I am responding to the Pipeline and Hazardous Materials Safety Administration's (PHMSA) request for comments on potential adjustments to the agency's hazardous materials registration and fee assessment program.

The Interested Parties represent companies that are required to register with PHMSA as shippers or carriers of hazardous materials and remit fees to fund the agency's emergency preparedness grant (EPG) programs.[2] Since we represent feepayers engaged in all activities that trigger EPG fees, our views should be given considerable weight knowing that our recommendations result in the generation of revenue sufficient to meet the requirements of the new obligation limitation set by the Infrastructure Investment and Jobs Act (IIJA).

Overview

The 1990 amendments to Federal Hazardous Materials Transportation Law (FHMTL) provided PHMSA authority to fund EPGs through fees paid by persons required to file hazardous materials registrations. Since Registration Year (RY) 2000-2001, PHMSA has relied on a two-tier fee scale based

[1] The Interested Parties is a volunteer-run coalition of organizations that share an interest in legislative and regulatory issues related to the safe and secure domestic and international transportation of hazardous materials. Interested Parties members include associations representing hazardous materials shippers, carriers, packaging manufacturers and other related groups. The following IP members have approved these comments: Agricultural Retailers Association; Airlines for America; American Chemistry Council; American Coatings Association; American Fuel & Petrochemical Manufacturers; American Pyrotechnics Association; American Short Line and Regional Railroad Association; American Trucking Associations; The Chlorine Institute; Compressed Gas Association; Council on the Safe Transportation of Hazardous Articles; Dangerous Goods Advisory Council; The Fertilizer Institute; Gases and Welding Distributors Association; Industrial Packaging Alliance of North America; Institute of Makers of Explosives; International Vessel Operators Dangerous Goods Association; Medical Device Transport Association; National Association of Chemical Distributors; National Industrial Transportation League; National Motor Freight Traffic Association, Inc.; National Private Truck Council; National Propane Gas Association; National Tank Truck Carriers; New England Fuel Institute; Radiopharmaceutical Shippers & Carriers Conference; Renewable Fuels Association; Sporting Arms and Ammunition Manufacturer's Institute; Reusable Industrial Packaging Association; The Sulphur Institute.

[2] 49 CFR Subpart G.

on the commercial activity of business entities as defined by the Small Business Administration (SBA)[3] to assess fees from shippers and carriers of placarded loads.[4]

This two-tier scale has served PHMSA and feepayers well. PHMSA has been able to generate sufficient revenue for program operations while minimizing administrative complexity and providing feepayers certainty about the amount of fees due. These outcomes, proven over time, should be the standard by which any adjustments to feepayer requirements are measured, particularly considering that PHMSA has no enforcement system in place to ensure that all feepayers are paying their required share.

Feedback on PHMSA Policy Questions & Options

Before we respond to PHMSA's questions, we have policy observations and questions for the agency. PHMSA presents several revenue-generating scenarios and policy options based on the EPG obligation ceiling set by the IIJA. Missing from PHMSA's presentation, however, is an analysis of the need to generate this level of revenue. Consider the following:

- The EPG obligation limitation is not a spending mandate. It is a spending ceiling that PHMSA may not exceed.

- The hazardous materials fee program is classified by the Office of Management of Budget (OMB) as mandatory spending. As such, spending from this account is subject to sequestration pursuant to the Balanced Budget and Emergency Deficit Control Act. Each year, OMB sets the percentage and dollar amount of the reductions that are required for accounts with sequestrable direct spending. In fiscal year (FY) 2023, the sequestration level for the hazardous materials fee program is 5.7 percent, with an expected savings of $2.7 million. In short, at most, PHMSA would need to set fees at a level capable of generating $44,155,975, not $46,825,000, based on this FY's sequestration percentage.

- PHMSA is not now spending all the funds it raises under pre-IIJA caps. On average, PHMSA recovers several million dollars annually from unused EPG awards. While the agency offers technical assistance and is taking other steps to reduce unspent funds, the fact remains that these funds may only be spent for EPGs, and unused revenue is credited against the amount of revenue the agency needs to generate in a subsequent FY.

- The EPGs that are funded by hazardous materials registration fees are, in fact, four separate grant programs.[5] Each program has different purposes, grantee pools, and performance outcomes. Commenters would benefit from PHMSA analysis of the relative outcomes of these programs and

[3] 13 CFR part 121. Business entity size standards are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified.
[4] RSPA-99-5137; HM-208C (14 February 2000).
[5] Hazardous Materials Emergency Preparedness (HMEP), Hazardous Materials Instructor Training (HMIT), Supplemental Public Sector Training (SPST), and Assistance for Local Emergency Response Training (ALERT) grants.

identification of unmet needs program by program showing that grantees have the capacity to use additional funds productively if provided. For example, what findings can be made about each program compared to the percent of reused grants that are returned? Are there some grant programs that would be challenged to convert additional funds into measurable outcomes that advance program objectives? In short, what is the actual need for additional funding? Until a more complete needs analysis is provided, other than the fact that the IIJA raised the obligation limitation, just throwing additional funds at a program is unlikely to produce results warranting additional investment.

Pending additional input from PHMSA on matters raised above, following are recommendations for the agency to consider in response to the three main areas of inquiry posed in this advance notice of rulemaking (ANPRM): Should PHMSA (1) increase the hazardous materials fee cap; (2) expand the base of feepayers; or (3) adopt a different fee scale that is based on "relative risk."[6] Missing from the ANPRM, however, is disclosure that PHMSA can meet its funding targets without implementing any of these policy changes. In fact, the "alternative scenarios" chart should have included this "baseline" outcome. It would have revealed that the burden of generating the additional IIJA-authorized revenue would fall disproportionately on small business registrants. Using PHMSA's published data[7], if the fee for non-small businesses was raised to the $3,000 maximum, the fee for small businesses would need to be increased from $250 to $944 – a three-fold increase and an unacceptable outcome from our perspective. With this fact in mind:

- Raising the Fee Cap: We support asking Congress to increase the statutory $3,000 hazardous materials registration fee cap. Of the four scenarios PHMSA posits to generate revenue totaling the IIJA obligation limitation of $46,825,000, only one, scenario B, could be achieved under current law. The others would require a higher than $3,000 payment by some faction of feepayers. Until the fee cap is raised, it is misleading to suggest that these scenarios are options. That said, we support congressional action to raise the maximum payable fee. Our support envisions two new statutory caps of $500 per small business feepayer and $5,000 per non-small business feepayer.[8] These caps would provide PHMSA the flexibility to set fees under each cap, ensuring that no one group shoulders a disproportionate share of the increase and thus protecting the interests of all feepayers.

- Expanding the Base of Feepayers: We oppose expanding the pool of persons subject to registration for the purpose of generating more revenue for the EPG programs. The purpose of the EPG programs is to prepare communities to respond to, mitigate, and recover from serious hazardous materials incidents that they would not, without additional assistance, be equipped to manage. As a proxy for this level of risk, Congress and PHMSA have looked to placarding as a guide. Since 2000, the agency has required all shippers and carriers of placarded loads (except for farmers who are shipping or transporting placarded loads solely in support of their farming operations) to register and pay the EPG surcharge.[9]

[6] 87 FR 57861 (22 September 2022).
[7] See "Alternative scenarios for registrants" table. 87 FR 57861-2 (22 September 2022).
[8] PHMSA suggests a new cap of $5,000. 87 FR 57863 (22 September 2022).
[9] 49 CFR 107.601. See HM-208C.

We support continuation of the use of placarding to identify those Congress intended should be contributing to EPGs. PHMSA's suggestion that the universe of "large businesses" be expanded beyond those shipping or transporting placarded loads should be rejected. Setting fees based on ability to pay rather than risk would set a troubling precedent.

Likewise, the suggestion that persons who acquire approvals[10] or special permits[11] should contribute to the funding of EPGs has no merit. Approvals and special permits are safety-based. PHMSA issues these documents individually to applicants only after determining that the permitted or approved activity achieves the same, or a better, level of safety than that of the HMR, or that the activity is consistent with the public interest.[12] It would create a conflict of interest to allow PHMSA to make these safety determinations while at the same time relying on the issuance of these documents to meet the revenue generating needs of the EPGs. In the past, PHMSA has proposed underwriting its regulatory program by levying fees on approval and special permit holders. Each time, the regulated community has opposed these proposals, and they have been rejected by Congress.

Finally, those paying fees to fund the EGPs have an expectation of enhanced preparation and response to incidents involving their shipments. Before pursuing suggestions to impose fees on any subgroup subject to the Hazardous Materials Regulations (HMR), other than those shipping or transporting placarded loads, PHMSA should provide data relative to the incident rates of the regulated functions performed by potential new fee-paying subgroups and how the enhanced preparation and training funded by the grants prioritizes these risks.

- Relative Risk: We strongly disagree with PHMSA's statement that the "current registration fee structure does not consider the relative risk of applicants, products, transport routes, or other relative risks (or lack thereof) imposed by an applicant to the public due to the specific hazardous materials transported."[13] Instead, we emphatically affirm that the hazardous materials fee program is already risk-based. As noted above, placarding identifies hazardous materials shipments that present a sufficient risk to the public and emergency responders to warrant federally-provided planning and training assistance. Placarding requirements vary by type and quantity of material and are risk-based. Furthermore, PHMSA justified the establishment of its two-tier fee scale as "risk-based" because non-small businesses are more likely to be offering or transporting large volumes of hazardous materials from multiple locations and over greater distances.[14] These aspects of the current registration mandate are consistent with a number of the risk-based factors Congress has directed the agency to consider.[15] As part of the 2000

[10] The need for an approval to perform certain functions under the Hazardous Materials Regulations (HMR) is not optional. Rather, approvals are required to attain full regulatory compliance.
[11] Special permits are not a precondition of regulatory compliance. Rather, applicants have the option to request special permits to perform any function that is not otherwise permitted under the HMR. Special permits provide PHMSA leverage to access private sector research and development on a scale that the agency could not duplicate.
[12] Approvals that provide an exception from regulatory requirements must meet these conditions.
[13] 87 FR 57861 (22 September 2022).
[14] 65 FR 7303 (14 February 2000).
[15] 49 USC 5108(g)(2)(B).

rulemaking, PHMSA rejected proposals to more finely distinguish between levels of imputed risk because such proposals "would require the imposition of a complicated system that would necessarily involve significant recordkeeping burdens on the regulated public."[16] We could not agree more.

Lastly, PHMSA, as noted above, has no system in place to ensure that all feepayers are paying their required share, even with its simple two-tier fee scale. Proposals that would further complicate the levels and amounts of payment categories could, unintentionally or not, result in registrants underpaying fees and, consequently, a failure to fund the EPG program as planned.

In summary, we strongly endorse the current two-tier fee scale based on the level of commercial activity assigned to business entities by the SBA that PHMSA has used since RY 2000-2001. We do not support broadening the universe of feepayers beyond shippers and carriers of placarded loads. Using any or a combination of the options suggested in this advance notice would greatly complicate the administration and "honor system" enforcement of fee collection as well as creating needless uncertainty among feepayers as to what fee, year to year, they would have to pay. Finally, while outside the scope of this proceeding, Congress needs to lift the $3,000 per registrant fee cap.

Timing

While not mentioned in the ANPRM, PHMSA has stated its intention is to finalize this rulemaking in time for new fees to be effective for RY 2023-2024. This means that the rulemaking would have to be promulgated by the end of April 2023. By any measure, this truncated timeline is daunting. While the agency's sense of urgency may seem justified considering that the IIJA was enacted in 2021, this rulemaking initiative is premature.

When Congress enacted the IIJA and increased the obligation ceiling for the EPGs by 60 percent, it omitted providing PHMSA flexibility on how to raise those additional fees in a way that would be fair to the regulated community. PHMSA recognized this oversight, proposing in its FY 2023 budget request that Congress increase the statutory cap on the amount any one registrant could be charged from $3,000 to $15,000. At this time, PHMSA is aware that Congress is reviewing this issue and considering how best to provide relief so that the agency is not forced to promulgate fees that would unreasonably burden small businesses. [17]

For these reasons, PHMSA should table docket HM-208J until statutory issues can be rectified.

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[16] 65 FR 7303 (14 February 2000).

[17] The Conference Agreement on PHMSA's FY 2023 Budget request directs the agency "to work with the authorizing committees and relevant stakeholders to develop a proposal for increased fee levels that would support the authorized level of spending under section 26001 of the IIJA." See FY 2023 Omnibus Appropriations Bill, Division L – THUD, page 61, released December 20, 2022.

Thank you for the opportunity to comment on this important subject. Please contact me, prankin@ripaus.com, if you have any questions on our comments.

Paul W. Rankin, Chair

cc: William Schoonover, Associate Administrator for Hazardous Materials Safety