



The safety and security association of the commercial explosives industry • Founded 1913

July 16, 2007

Docket Operations, M-30
West Building Ground Floor, Room W12-140
US Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

RE: 2007-27181¹

Dear Sir or Madam:

On behalf of the Institute of Makers of Explosives (IME), I am submitting comments in support of the Pipeline and Hazardous Materials Safety Administration's (PHMSA) information collection request (ICR) to the Office of Management and Budget (OMB), asking to revise its Hazardous Materials Emergency Preparedness (HMEP) grants application to include more detailed information about hazardous materials transportation fees imposed by applicants and to more accurately evaluate the effectiveness of the grant program.

Interest of the IME

The IME is the safety and security association of the commercial explosives industry. Our mission is to promote safety and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations. Commercial explosives are transported by every mode and used in every state. Additionally, our products are distributed worldwide, while some explosives, like TNT, must be imported because they are no longer manufactured in the United States. IME members are both shippers and carriers of hazardous materials. As such, we are subject to PHMSA's hazmat registration and fee requirements, which fees support the HMEP grant program. Likewise, a number of state-imposed hazmat fees apply to our industry. We have a keen interest in how the agency's hazmat registration funds and state hazardous materials transportation funds are used.

State and Tribal HazMat Fees

The hazardous materials transportation community has long been subject to a variety of state-imposed fees. These fees have generated hundreds of millions of dollars in revenue. Because many of these fees were flat and unapportioned and because many states diverted fees to purposes unrelated to the transportation of hazardous materials, industry asked Congress to establish limits on such non-federal fees.

¹ 72 FR 36754 (July 5, 2007)

The 1990 amendments to the Hazardous Materials Transportation Act (HMTA) established the HMEP grant program to cover the “unfunded” federal mandate that states develop emergency response plans and to contribute toward the training of emergency responders. Because the HMEP grants program was to be funded by a new federal fee imposed on the regulated industry² in addition to the state fees already being assessed, Congress included a provision in the HMTA directing the Secretary of Transportation to –

allocate amounts made available for grants under this subsection for a fiscal year among eligible States and Indian tribes based on the needs of the States and tribes for emergency response training. In making a decision about those needs, the Secretary shall consider –

(C) whether the State or tribe imposes and collects a fee on transporting hazardous material;
(D) whether the fee is used only to carry out a purpose related to transporting hazardous material;³

In the preamble to the final rule implementing the grants program, the agency acknowledged the concern and recommendation of industry that “in instances where there is no clear demonstration that State-levied hazardous materials fees are being used as required by [49 U.S.C. 5125(f)], such state[s] should be prohibited from receiving an award.”⁴ PHMSA also stated that,

Section 110.30(a)(4) of this final rule requires applicants to provide information on the assessment, collection and disposition of State, local or Indian tribe imposed fees on the transportation of hazardous materials. [PHMSA] is sensitive to the issue raised by this commenter and will carefully consider that information in its grants-review process.⁵

In spite of these congressional directives and agency pronouncements, PHMSA has heretofore never applied these criteria when determining grant awards under the HMEP grants program.

As noted above, the 1990 amendments also added new preemptive authority at 49 U.S.C. 5125 that allowed non-federal hazmat fees “only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.”⁶ In the final rule instituting the hazmat registration fees that support the HMEP grants, the agency explained that, since the provision “was added to the HMTA by Congress [in] the same law which mandated the registration and grants program[,] it clearly demonstrates a legislative intent to authorize hazardous materials transportation fees so long as those fees meet the criteria of that section.”⁷

It was soon discovered, however, that the agency did not intend to seek information about state hazmat fees in awarding HMEP grants and that some states were not willing to provide industry with information sufficient to determine whether states with hazmat fees were complying with the limitations of the HMTA. In response, Congress amended the agency’s preemptive authority in 1994, extending to the agency discretionary authority to collect information necessary to make the grant need determinations required by law and to determine if the agency was inadvertently awarding limited HMEP funds to states who fees violated federal law.⁸ Specifically, Congress directed states “to report to the Secretary on –

² 49 CFR 107 Subpart G. Also see, HM-208F - Registration and Fee Assessment Program, 72 FR 24536 (May 3, 2007).

³ 49 USC 5116(b)(4)(C)&(D).

⁴ 57 FR 43064 (September 17, 1992).

⁵ ibid.

⁶ 49 U.S.C. 5125(f)(1).

⁷ 57 FR 36626 (July 9, 1992).

⁸ 49 USC 5125(f)(2).

- (A) the basis on which the fee is levied upon persons involved in such transportation;
- (B) the purposes for which the revenues from the fee are used;
- (C) the annual total amount of the revenues collected from the fee; and
- (D) such other matters as the Secretary requests.”

In this notice, PHMSA provides the clearest documentation as to why OMB should honor the agency’s request to exercise its discretionary authority concerning non-federal fees. In 2002, 41 states responding to an industry survey indicated that they assessed some type of hazmat fee; some states assessed more than one such fee based on the type of hazardous material transported.⁹ A figure far higher than the twelve states PHMSA has been able to identify through its current grant application information request.¹⁰ The under-reporting may have something to do with the vagueness of the current question. For this reason, we would suggest the following modification to the proposed ICR state/tribal fees questions:

1. Does your State or tribe assess a fee or fees in connection with the transportation of hazardous materials?
2. If the answer to question 1 is “yes,”
 - a. What State agency(ies) administers the fee(s)?
 - b. ~~For each fee identified, W~~what is the amount of the fee and the basis on which the fee is assessed? Examples of the bases on which fees may be assessed include: (1) An annual fee for each company which transports hazardous materials within your state or tribal territory; (2) a fee for each truck or vehicle used to transport hazardous materials within your State or tribal territory; (3) a fee for certain commodities or quantities of hazardous materials transported in your State or tribal territory; or (4) a fee for each hazardous materials shipment transiting your state or tribal territory.
 - c. Is company size considered when assessing the fee(s)? For instance, do companies meeting the Small Business Administration’s (SBA) definition of a small business pay the same or lesser fee amount than companies that do not meet the SBA definition?
 - d. For what purpose(s) is the revenue from the fee(s) used? For example, is the revenue used to support hazardous materials transportation enforcement programs? Is the fee used to support planning, developing, and maintaining an emergency response capability?
 - e. What is the total annual amount of the revenue collected from each fee for the last fiscal year or 12-month accounting period?

It is worth noting that during the 15 years industry has been paying hazmat registration fees to funds HMEP grants, courts have found a number of state hazmat transportation fees discriminatory and malapportioned.¹¹ During this time, PHMSA also preempted two other states’ fees for violating the HMTA’s limitations on non-federal fees.¹² Despite these outcomes, PHMSA has provided grant assistance to every state in each grant cycle, even rewarding errant states with financial assistance.

⁹ Biennial State Hazardous Materials Transportation Fee Survey Analysis, Dangerous Goods Advisory Council, 2002. This survey is no longer conducted.

¹⁰ 72 FR 36756 (July 5, 2007).

¹¹ *American Trucking Associations, Inc. v. State*, 180 N.J. 377, 852 A.2d 142 (N.J. 2004); *American Trucking Assn's Inc. v. State of Wisconsin*, No. 95-1714, 1996 WL 593806 (Wisc. App. Ct., October 1996); *American Trucking Assn's Inc. v. Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993); *American Trucking Assn's Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991).

¹² PD-21(R) 64 FR 54473 October 6, 1999. Complaint for judicial review, *Tennessee v. U.S. Dept. of Transportation*, C.A. No. 3-99-1126 (M.D. Tenn.), filed Dec. 3, 1999; order denying claim of state sovereignty (Feb. 27, 2001); affirmed and remanded, 326 F.3d 729 (6th Cir); cert. denied, 124 S.Ct. 464 (2003); judgment in favor of DOT and AWHMT (June 28, 2004). PD-22(R) 68 FR 550880 (September 20, 2002).

Therefore, we welcome PHMSA's willingness to collect the information authorized by §5125 in order to more effectively carry out its statutory mandates. We believe that the least burdensome way to capture this information is, as PHMSA has proposed, through the HMEP grant application process. In fact, the proposed questions, allowed by law, simply clarify a pre-existing question.¹³

At the same time, PHMSA is seeking a three-year extension of its current ICR for the HMEP grants program. IME joined with a number of other affected associations urging OMB to limit the current forms extension to one-year so that the reforms envisioned by this notice can be effected prior to the distribution of the HMEP grant application for the FY 08 grant cycle.

HMEP Performance Reports

As noted above, the purpose of the HMEP grants is to cover the "unfunded" federal mandate that states develop emergency response plans and to contribute toward the training of emergency responders. Industry has contributed nearly \$183 million, through hazmat registration fees, during the life of the grants program.¹⁴

For a number of years, we have called for more accountability in the HMEP grant program and more evidence of coordination among other similar federal initiatives to ensure that all resources are used as efficiently and effectively as possible. We are not alone in our concern. In 2005, the Volpe Center issued a report making recommendations to better align grantee activities with program goals.¹⁵ And, as PHMSA references, the National Transportation Safety Board, in response to a hazmat incident that same year, recommended that PHMSA "require and verify that states and their communities receiving [HMEP grants] conduct training exercise and drills ... as a means to evaluate state, regional, and local emergency response plans."¹⁶ Shortly after this incident, Congress enacted the 2005 amendments to the HMTA.¹⁷ One of the provisions directs PHMSA to submit annual reports to Congress on the allocation and uses of the grants, to identify the ultimate recipients and to provide a detailed accounting of all grant expenditures, as well as an evaluation of the efficacy of the programs carried out.¹⁸ PHMSA was also directed to make this information available to the public.

This is the second time Congress has intervened to direct that information be provided on the use of HMEP grants. In the 1994 amendments to the HMTA, Congress directed that PHMSA (then the Research and Special Programs Administration) report detailed information on the HMEP training grants.¹⁹ While the report, released in 1998, included information on the HMEP planning grants, as well as the training grants, the information was anecdotal and a disappointment to many in industry who were hoping that the report would validate the commitment of millions of dollars in registration

¹³ The HMEP grant application currently asks applicants to, "Submit a written statement explaining whether the state assesses and collects fees on transportation of hazardous materials and whether such assessments of fees are used solely to carryout purposes related to the transportation of hazardous materials."

¹⁴ FY 1992-2006, HMRP, DOT, October 6, 2006.

¹⁵ Hazardous Materials Emergency Preparedness Grants Program; Assessment of the alignment between local activities and program goals, John A. Volpe National Transportation Systems Center, for PHMSA, October 2005.

¹⁶ Railroad Accident Report: Collision of Two CN Freight Trains – Anding, Mississippi, July 10, 2005, NTSB Report Number RAR-07-01, adopted March 22, 2007.

¹⁷ PL 109-59.

¹⁸ 49 U.S.C. 5116(k).

¹⁹ PL 103-311, sec. 119(k).

fees to the grant enterprise.²⁰ When Congress took this issue up again with the 2005 amendments to the HMTA, we strongly supported the expansion of the reporting requirement to cover both planning and training grants, the mandate that the report be issued annually, and the directive that the information be shared with the public. While no reports have been issued to date under the 2005 authority, we believe PHMSA is fully committed to meet the reporting mandate. Essential to this mission is access to the information PHMSA proposes to collect from its grantees on their use of and accomplishments with HMEP grant assistance.²¹ We also believe that this type of specified information will enhance the quality of PHMSA's budget requests regarding this program.

Conclusion

We welcome PHMSA's ICR initiatives and urge OMB to grant the agency's requests with regard to non-federal hazardous materials transportation fees and HMEP performance reports. Efforts to obtain information on such non-federal fees and useful about the HMEP grant programs have come up short in the past. This information is necessary for PHMSA to fulfill its statutory mandates. We appreciate the opportunity to submit these comments on this time-sensitive and critical matter.

Sincerely,



Cynthia Hilton
Executive Vice President

²⁰ Report to Congress on the Hazardous Materials Emergency Preparedness (HMEP) Grants Program, DOT, August 1998.

²¹ 72 FR 36756-7 (July 5, 2007).