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CONCERNS WITH HAZARDOUS
MATERIALS SAFETY IN THE U.S.:
IS PHMSA PERFORMING ITS MISSION?

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HEARING

BEFORE THE

COMMITTEE ON
TRANSPORTATION AND INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

September 10, 2009

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HEARING ON CONCERNS WITH HAZARDOUS MATERIALS SAFETY IN THE U.S.: IS
PHMSA PERFORMING ITS MISSION?

Thursday, September 10, 2009

House of Representatives
Committee on Transportation and Infrastructure,
Washington, DC.

The Committee met, pursuant to call, at 10:00 a.m., in room 2167, Rayburn House Office Building, the Honorable James Oberstar [Chairman of the Full Committee] presiding.

Mr. Oberstar. The Committee on Transportation and Infrastructure will come to order.

Today we have a hearing in the nature of a continuation of inquiry into the conduct of the Pipeline and Hazardous Materials Safety Agency.

In a way, you could say that this hearing began 22 years ago with the explosion of the gasoline pipeline in Mounds View, Minnesota, just outside my district, when a gasoline pipeline had lost its cathodic protection. There was a dent in the line that had been there for years unnoticed, and at that point there was a failure. Gasoline leaked from the pipeline into the ground. There was no shutoff valve, there was no sensor to detect the drop in pipeline pressure, and the gasoline leaked, apparently for days.

And the fumes worked their way up through the soil to the street level, and at 2:00 a.m. a car driving appropriately through the neighborhood, but with a loose tailpipe that dragged on the ground, sparked, ignited the fumes that exploded the street into a ball of fire, buckled and melted the pavement, and a homeowner, a mother and her six-year-old, saw the fireball, heard the sound, went out on their front porch and were incinerated, as was their house.

The National Transportation Safety Board did an extensive inquiry, found the failures: the rupture in the pipeline; the loss of cathodic protection, corrosion that resulted; the failure to have frequent, automatic sensors for pipeline pressure loss and for leakage; and that the agency had no measures in place, no procedures in place, and an insufficient numbers of inspectors both at the Federal level and those that are funded by the Federal Government in cooperation with the State.

I was Chair of the Investigations Oversight Subcommittee at the time. We held a very extensive hearing into the causes and preventive measures that should be taken and recommended steps to be taken. But what struck me at the time was that there was not a culture of safety at the pipeline safety agency; that the very top person, the administrator of the agency, had no clear idea of what safety means.

And even though we provided--I moved legislation or amendment in our surface transportation in the authorizing Subcommittee to create additional positions for inspection, for inspectors at the Federal and State level and they were funded, but over time the attention was lost and the agency continued to operate in what I can only describe today as a deteriorated condition of public vigilance.

Safety is not a one-time snapshot. Safety is continuing vigilance. I lived it personally when I worked in the mines, when I was going through college, and I worked in a concrete Ready Mix concrete block factory, I worked on construction zones, street and highway construction. It is a matter of mind-set of safety and of vigilance, and this agency has lost its way and, along the way, has developed a very cozy relationship with the industry it regulates.

The oversight and investigations role and heritage of this Committee goes back to 1959, when then Speaker Sam Rayburn asked my predecessor over there, portrait in the corner, John Blatnik, to chair the special investigating committee on the Federal Aid Highway Program to uncover waste, fraud, abuse, as it turned out, criminal activity in the early days of construction of the interstate highway system. The result of those investigations over a period of six years resulted in 36 Federal and State and private contractor personnel being sent to State and Federal prison. Some of them are still there.

At the beginning of those investigations, no State had internal audit and review procedures in its highway program. As a result of those investigations, every State adopted such procedures and has continued to refine them.

The work of that committee was expanded into other areas of the Full Committee's jurisdiction, because we know that maintaining oversight of the Executive Branch agencies is the responsibility of the Congress. We pass the laws; they enforce them. It is our job to make sure they are doing the public's business, and we will continue to pursue that responsibility in this Committee.

PHMSA's culture appears plagued by a belief the agency should make things as easy as possible for the industry that it should be regulating. I have asked the staff, since the time we regained the majority, to take a special, careful, thorough review of this agency, based on my previous experience that I have already described. The investigation undertaken by our Committee staff, and also by the Inspector General of DOT, uncovered a shocking number of failures by the agency to follow Federal law in hazmat regulation, outright neglect in

regulating the transportation of hazardous materials. We also heard from numerous employees, those with a real conscience and with a concern for the public interest, that their agency was entirely, as I suspected and have experienced over the years, too cozy with the industry.

This is a theme we have uncovered in previous investigations; in our Coast Guard hearing, where there was a similar relationship between the Coast Guard and Lockheed Martin, who were told to self-regulate. We saw it last year in the inquiry into failure of FAA to oversee safety at major airlines, including Southwest, which was the subject of a very significant hearing. Again, the FAA inspector staff was told that the industry is our customer.

Safety is not a customer relationship, it is an arm's length relationship. And if the FAA treats an airline as the customer and the customer isn't satisfied with the oversight service they are getting, then they can ask for changes, and they did, and the principal maintenance inspector was pulled from the Southwest ticket, just as similar actions occurred at the Coast Guard.

In the result of our Coast Guard hearings and inquiry, and of the Inspector General's very thorough work, we have passed legislation that will change those practices at Coast Guard, and the Coast Guard itself has instituted changes. Similarly at FAA, we have moved legislation to change the way safety is conducted and taken out the customer service initiative. It has no place in safety. It doesn't mean that there should be an adversarial relationship, but it does mean there must be an arm's length relationship between the regulated and the regulators.

What we found is that PHMSA almost never turns down a request from industry for a special permit. A special permit is an exemption from regulations to carry hazardous material that normally would be prohibited by Federal regulation. This raises the issue--and I will ask the Inspector General and the under secretary to address the question of why there should continue to be rule by exception, why there should be special permit, and why shouldn't there be a permitting structure to govern this matter, rather than each case be considered; 5,000 such applications in a two-year period, and less than two percent were denied. Saying there is a cozy relationship with industry is an understatement.

PHMSA never performs fitness reviews, although required to do so, and it does not review the safety record or the enforcement record of applicants for special permits, and that is required by Federal regulations, they are defined in their own regulations. They have no idea, in this agency, where the special permits are being used. If you issue a special permit and you don't know where they are being used, then it is virtually impossible to monitor and enforce those permits.

Furthermore, the records are in appalling conditions. The vast majority of special permit applications our Committee staff and I reviewed, there was no safety analysis, there was no justification in the approval records. The agency relies almost entirely on self-certification by the applicant. That is a formula for failure, as we saw in the Coast Guard and the FAA inquiries.

Further, the agency grants special permits to industry trade associations, which then can distribute those permits to any of its members. Those trade associations are not safety agencies, they are advocacy groups. They are perfectly legal, but they are not safety responsibility agencies. This practice defies common sense. There is no way to hold a trade association accountable under the law, and often PHMSA, in response to our questions, has no idea who is using a particular special permit.

Furthermore, they operate all by themselves, PHMSA. They do not coordinate with FAA, with the Federal Railroad Administration, with Federal Motor Carrier Safety Administration, all of whom have safety responsibilities. There are cases where those regulatory agencies were opposed to granting of exceptions, and yet they were ignored.

PHMSA also issues approvals and permits to agents of foreign governments without any evaluation of the fitness of the foreign company. On July 4, 2009, this year, four people were killed in North Carolina when a truck loaded with Chinese fireworks exploded. PHMSA was unable to provide critical documentation on this permit.

They often ignore the concerns of their own enforcement personnel. Numerous of the staff told our Committee investigators that their warning and advisories have repeatedly been ignored by senior management. A senior manager told our Committee investigators I take enforcement personnel views with a grain of salt. That is reprehensible. This agency needs a house cleaning.

PHMSA itself needs that 60 to 90 percent of hazmat accidents go unreported and the agency has no data driven base. There was a universal view expressed within the agency that their data is inaccurate, incomplete, and virtually useless. That is unacceptable.

There are volumes more information, but it is clear this agency's relationship with the industry it regulates needs to be completely overhauled. Its current state is unacceptable, to say the least.

The industry will say, oh, we haven't had any fatalities-- of course, there were those three or four people--but that is not a safety mind-set; that is what I called of the FAA a tombstone mentality. You wait until people are dead and then

you start acting? That is not right. Twenty years ago I recommended more inspection, safety mind-set, higher standards within this agency. It has deteriorated from there.

Today's hearing marks a turning point in the history of that agency. The Deputy Secretary, Mr. Porcari, has taken action as soon as he became aware of these findings and those of the Inspector General. I am happy he is here. I am grateful to the Inspector General, Mr. Scovel, for his persistent work and detailed thorough and dispassionate detailed work on this issue.

Now the Chair is happy to recognize the gentleman from Pennsylvania, Mr. Shuster.

Mr. Shuster. Thank you, Mr. Chairman. Let me start off first by saying happy birthday to you. I have exposed you.

Mr. Oberstar. Yes. Thank you. No songs.

Mr. Shuster. I am fortunate that you say no songs, because my voice isn't that pleasant to listen to. But, anyway, happy birthday to you.

Mr. Oberstar. Thank you very much.

Mr. Shuster. And many, many more.

Mr. Oberstar. At a certain point, birthdays are overrated.

Mr. Shuster. Well, good morning to everybody. Welcome to this hearing today on hazardous materials. Welcome to the Inspector General and to the Deputy Secretary. Thank you for being with us today.

The Department Inspector General has raised legitimate concerns about PHMSA's handling of special permits, approvals for hazardous materials, transportation practices that fall outside of the normal regulations, and, as the Chairman has documented, there are certainly a lot of improvements needed to be made at PHMSA, especially in the record keeping and those areas; and that is what this hearing is all about today, to talk about those issues.

So I look forward to hearing from PHMSA and the Deputy Secretary on how they play to improve the process, including an explanation of the action plan that you have developed to take care of some of these problems.

I also look forward to hearing from the institute of the makers of explosives about advances in the safety of transporting blasting materials essential to mining and construction industries. Given the inherent risk associated with transporting materials designed to explode, the industry does have an outstanding safety record. The use of multi-purpose bulk trucks, or MBTs, allows the industry to move a wide range of materials necessary for blasting operations in the same vehicle, thereby reducing the total number of vehicles carrying hazmat over the highways; and, remarkably, these MBTs have never caused a single injury or fatality in transportation.

I think we need to strike a balance in hazmat transportation policy between making sure that appropriate safeguards are in place, while at the same time being careful that we do not unnecessarily burden the workhorse industries of our economy. Safe and efficient transportation of hazardous materials is enormously important to the national economy and our way of life.

Twenty-eight percent, or nearly a third, of all ton miles of annual freight on our roads, rails, waterways, and air cargo is considered a hazardous material. These shipments include everything from heating oil, gasoline, fertilizer, drinking water, chemicals, and medical materials use to treat sick folks. It is absolutely necessary that we are able to safely and quickly deliver a wide range of potentially dangerous materials without unnecessary bureaucratic interference.

Hazmat carriers have a remarkable safety record. The percentage of movement of hazardous goods resulting in an injury or fatality is an astonishing statistic. I have said it before, but .00002 percent result in injury and about .000014 percent of movements result in a fatality. There are about four times as many deaths caused by lightning strikes annually than by hazardous material transportation accidents.

As I said, this is a remarkable safety record and I think this is the measurement that we need to use to determine what we are doing, if it is right or if it is wrong, not how many permits are rejected. I think using that as a measurement is a false sense of what an agency is doing and an industry is doing and how it is performing.

Of course, when you are talking about moving dangerous goods, there is going to be risk and there are going to be accidents. There is no way to completely eliminate risk. What we need to do is make careful choices about where we can best use our resources to minimize the risks. I know that PHMSA is very short-handed and it is very difficult for the number of people they have to move forward on some of these things.

But we have to make the effort and we have to do what is necessary to make sure that they do keep the records, that they do have a process in place for these special permits, as much for safety as for industry, so that they know, when they are going to apply for a permit, they know what the process is and they can count on some consistency when they are doing that. We don't want to knot the system up and create red tape that will cease to be effective for the user and that could damage our economy and our society.

So I look forward to hearing from our panelists and, with that, I yield back, Mr. Chairman.

Mr. Oberstar. I thank the gentleman for his comments.

Do other Members wish to be heard?

Ms. Brown. Mr. Chairman?

Mr. Oberstar. Ms. Brown.

Ms. Brown. Thank you, Mr. Chairman. First of all, I too want to say happy birthday and thank you for your service on this Committee. As I say, you are the guru of transportation.

Also, I want to thank Ranking Member Mica for holding this hearing today on the Hazardous Material Safety Program. I also want to thank the staff for their hard work in investigating this serious issue.

Each day, nearly 1.2 million shipments of hazardous materials are moved by all modes of transportation. Over the last decade, there have been over 170,000 incidents involving the transportation of hazardous materials, resulting in 134 fatalities, 2,783 injuries, and more than \$631 million in property damage. More disturbing, the Pipeline and Hazardous Materials Safety Administration has only 35 inspectors to cover over 300,000 hazmat-related entities.

This issue is so important to the communities that see hazardous material travel on their roads and railroads. At many of the hearings we have held dealing with rail safety, residents and local officials and firefighters and others have expressed their concern with the transport of these dangerous materials, and it is my guess that once they hear about what the Pipeline and Hazardous Materials Safety Administration has done or, more importantly, has not done, I am sure they will be even more concerned.

There was such a lack of oversight and inappropriate level of corporate influence during the Bush Administration that many agencies have become dysfunctional. This is why I am pleased to see that the Transportation and Infrastructure Committee is making the effort to provide proper oversight to the agencies within its jurisdiction.

In May of this year, I held a Subcommittee hearing on the Department of Transportation's Hazardous Materials Safety Program with all of the stakeholders to learn what improvements needed to be made for the new hazmat reauthorization bill.

During the hearing it became clear that there were significant problems in the program. The agency does not look at its own data on accidents and incidents; it does not follow up on unreported incidents; and it does not even review whether a carrier should be registered to transport hazmat materials. Let me say that again. The agency does not look at its own data on accidents and incidents; it does not follow up on unreported incidents; and it does not even review whether a carrier should be registered to transport hazmat materials.

It grants an alarming number of waivers from important safety regulations and provides with little or no oversight on permit holders. And it has so few inspectors that I cannot understand how they can begin to inspect 300,000 hazmat entities to make sure that they are complying with the regulations and the terms of the waiver.

The subsequent investigations by Committee staff and the DOT Inspector General confirmed what the Subcommittee heard from witnesses at our hearing and even uncovered additional problems with current Hazmat Safety Programs.

I am hopeful that the new Administration is willing to work harder at administering these important Hazardous Materials Safety Programs and look forward to hearing how they plan to fix the serious problems.

With that, I want to welcome today's panelists and thank you for joining us. I am looking forward to hearing their testimony.

Thank you, Mr. Chairman, for holding this hearing.

Mr. Oberstar. And thank you for your previous work on the hearing that you conducted as Chair of the rail Subcommittee. It laid the groundwork for today's hearing.

Mrs. Capito.

Mrs. Capito. Thank you, Mr. Chairman. Briefly, I would like to make a brief opening statement. I would like to thank the witnesses for being here.

Representing the State of West Virginia, in looking at the States that are listed by consumption of explosive materials, our State is number two; number one being Wyoming, number two being West Virginia for, I think, rather obvious reasons. But, in West Virginia, if you want to build a road, you need explosive materials. If you want to create a mine, you need explosive materials.

So it is extremely important that these materials are safely transported to the mine site or the construction site. And it is done on a very frequent basis, obviously, in our State, traveling all of the roads, not just the major highways, but some of those little ones going up to where a lot of folks live in the hollows and more rural parts of our State.

So I am very interested in this report. I am interested to see what your plans are going to be going forward to address some of the issues. So I appreciate the Chairman bringing this to light and bringing it before the full Committee, and I look forward to the testimony of the witnesses. Thank you.

Thank you, Mr. Chairman.

Mr. Oberstar. I thank the gentlewoman for her statement.

Yes, Wyoming, with the Powder River Basin coal mining operations and West Virginia with highway and coal operations. We in Minnesota, in my district, the iron ore mining industry uses 300,000 pounds a day of explosives to extract the iron ore from the rock harder than granite that fuels our steel industry. We are very familiar with explosive materials. I have been on mine sites, I have worked in the iron ore mines myself, and I know what that is and what it means to have 55 to 60 million pounds a year of explosives on the roadways.

Other Members wish to be heard? Mrs. Napolitano?

Mrs. Napolitano. Thank you, Mr. Chairman. I was going to wait, but you hit on some very key points, because, as I have stated before, the products coming in from abroad travel through my district; mini trains, a mile and a half long carrying explosives or carrying all kinds of hazardous material.

I have been involved in the issue of chlorine because we have had spills in our Los Angeles area. You are talking about 12 million people and that is very, very important for us to understand whether the fire department's placarding is consistent, that they can read it as they are responding to an incident, or whether or not the railroad is maintaining the lines so there are no accidents because of hairline cracks in the rails. I mean, all those come to play.

So what I am very concerned is whether or not the agencies have enough budget, have enough personnel to be able to do all the follow-up that is going to be required to consistently apply to all the hazardous materials being carted so that there is better safety. And while I understand that there haven't been very many reported, what about the unreported accidents?

So those are things that I would like to hear, Mr. Chairman, and would be able to have a lot more of, how should I say, interest in. Thank you, sir.

Mr. Oberstar. Ms. Markey.

Ms. Markey. Yes, thank you, Mr. Chairman and staff, for holding this important meeting.

In my own district we have dealt with two tanker trucks crashing into the Poudre River in recent weeks. The Poudre River provides drinking water for two of the major towns in my district, Fort Collins and Greeley. The first spill, about three weeks ago, dumped 5,000 gallons of tar into the river and EPA contractors had to be brought in with cranes to lift out large sections of asphalt out of the river.

Within two weeks, a second tanker crashed into the same river, releasing 7,000 pounds of liquid asphalt and gallons of diesel fuel. Incidentally, because crews were still cleaning up the first spill, they were able to contain the second spill rather quickly. Both drivers were cited with careless driving and the main contractor is no longer allowed to have asphalt trucks on the highway until it can prove to the Colorado DOT that it has a safety plan in place.

Fortunately, in this situation, there was not a great threat to public health. However, I cannot imagine the repercussions if the asphalt had been a more hazardous chemical. I applaud the efforts of those who have helped contain the effects of these spills into the Poudre River and I look forward to discussing and establishing increased oversight of the Pipeline and Hazardous Materials Safety Administration.

Thank you.

Mr. Oberstar. Thank you for that very personal touch to this hearing; it brings it much closer to home when you have those experiences.

Mr. Hare.

Mr. Hare. I will just adapt, if that is OK with you, Mr. Chairman. Let me just thank everybody for being here today. I want to join my colleagues in wishing you a very happy birthday and I want to thank you and the Ranking Member for holding this important hearing today. I commend you for the sense of duty that you have in leading this Committee in effective oversight of the United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration.

As we know, PHMSA is the leading agency responsible for regulating and monitoring the movement of hazardous materials. It was created in 2004 under the Norman Y. Mineta Research and Special Programs Improvement Act and was preceded by the Research and Special Programs Administration. The role of PHMSA is clear: to protect the American people by ensuring the safe transportation of hazardous material.

Mr. Chairman, after learning of the finding of both the DOT Office of Inspector General's audit of PHMSA's Hazardous Material Safety Program, in particular the Special Permits and Approval Program, as well as findings from the Committee staff's recent investigation, I am very concerned that PHMSA is not fulfilling its role. I am most concerned with the revelation that PHMSA has failed to maintain an arm's length relationship with industry and, in doing so, has lost sight of its main focus, which is public safety.

Now it is our responsibility, as the Committee of jurisdiction, to examine these issues and ensure that PHMSA has what it needs to do the job that it was created to do, ensure safety of our hazmat workers and non-profits.

I look forward to hearing from the witnesses today.

Let me again thank you, Mr. Chairman and the Ranking Member, for holding this important meeting, and I would yield back.

Mr. Oberstar. I thank the gentleman.

Mr. Ortiz?

Mr. Ortiz. I really don't have any statement, but this is a very, very important and serious hearing. With all the kind of material that is being moved, I would just hope that we could-- and I am just waiting to see if I can stay here long enough, because I have another meeting--to listen to your testimony. But Texas is a big State, as you well know, and we move tons and tons of stuff all over the highways, and just because we haven't had an accident doesn't mean that there isn't one that could happen that could destroy a lot of lives.

So, Mr. Chairman, again, to you, happy birthday, 25th

birthday. Congratulations. I wish you many more and thank you so much for having this hearing today, because it is a very, very important hearing. Thank you so much, Mr. Chairman.

Mr. Oberstar. Thank you. I thank all of you. In preparation for this landmark occasion, I went out and rode 75 miles over the weekend on my bike, not on my car.

If there are no other requests, we will begin with Inspector General Scovel.

TESTIMONY OF THE HONORABLE CALVIN L. SCOVEL, III, INSPECTOR GENERAL, U.S. DEPARTMENT OF TRANSPORTATION, WASHINGTON, D.C.; AND THE HONORABLE JOHN D. PORCARI, DEPUTY SECRETARY OF TRANSPORTATION, U.S. DEPARTMENT OF TRANSPORTATION, WASHINGTON, DC.

Mr. Scovel. Mr. Chairman, Ranking Member Shuster, Members of the Committee, thank you for inviting me here today to discuss PHMSA's Special Permits and Approvals Program. My testimony focuses on weaknesses we have identified and how PHMSA authorizes and oversees these exemptions to hazmat regulations, weaknesses that call for a fundamental rethinking of PHMSA's approach.

As currently structured, PHMSA's Special Permits and Approvals Program carries little assurance that hazmat will be safely transported. This is evidenced by PHMSA's practice of granting permits without full knowledge of applicants' safety histories and the agency's record of inattention to longstanding safety issues.

First, PHMSA does not look at applicants' incident and compliant records when granting, renewing, or allowing party-to permits. We found this to be the case even when applicants had multiple incidents and enforcement violations for years prior to receiving their permit. For example, PHMSA granted a special permit to a company to operate bulk explosive vehicles, even though that company had 53 prior incidents, 9 of which were serious vehicle rollovers. Of particular concern is PHMSA's practice of granting special permits to trade associations, effectively giving a blanket authorization to thousands of member companies without any assessment of their safety histories or need for the permit.

PHMSA also grants special permits and approvals without thoroughly evaluating applications. PHMSA's reviews of 65 percent of the 99 permits and all 56 approvals we looked at were either incomplete, lacked evidence of an equal level of safety finding, or simply non-existent.

Further, PHMSA's risk-based oversight criteria omits a key rating factor that should drive compliance reviews, that is, whether a company holds a special permit or approval. However, our visits to 27 companies found that more than half did not comply with the terms of their permits. Some officials did not know which permits applied to their location and some were unaware that they even had a permit to abide by.

PHMSA's lack of coordination with FAA, FRA, and FMCSA exacerbates these weaknesses. These agencies may have critical safety data on applicants seeking a permit. Yet, we found PHMSA did not coordinate 90 percent of the new and party-to permits, or any of the renewals we reviewed. PHMSA also did not coordinate most of the emergency permits we reviewed, even though the law specifically requires that coordination.

The second vulnerability we identified is PHMSA's inattention to longstanding safety issues. Most notably, PHMSA ignored safety concerns regarding transportable explosives, concerns first raised by its own Office of Hazardous Materials and Enforcement over two years ago. We called for PHMSA to take action on this in our July 2009 management advisory.

This is not the first time longstanding safety concerns have gone unaddressed. There has been intense debate among PHMSA, FAA, NTSB, and other aviation stakeholders on the safe transport of lithium batteries by air. Last year, eight lithium battery incidents involving air carriers occurred, two of which were life-threatening, and we have seen six so far this year. Yet, PHMSA has not stepped up its coordination efforts or addressed all of FAA's and NTSB's concerns.

For example, we found PHMSA granted an emergency special permit in 2008 to ship lithium batteries by air with a poisonous gas normally not allowed on aircraft. According to FAA, PHMSA did not explain how an equal level of safety would be met or provide safety measures for the pilots. PHMSA is working with FAA to propose changes to the Department's recently amended rule requiring safety measures for air transport of lithium batteries; however, these efforts only began after serious incidents and high-level departmental attention.

In closing, I want to recognize Secretary LaHood and Deputy Secretary Porcari for their leadership in directing PHMSA to develop an action plan in response to our recent advisory on PHMSA's special permit process. PHMSA's plan shows promise and we will continue to monitor its progress. In addition, we believe the actions described in Deputy Secretary Porcari's statement could address many other fundamental weaknesses we have identified. The Secretary and Deputy Secretary's continued support will be critical to successfully implement these planned actions and achieve the intent of the program, that is, to ensure permit holders safely transport hazardous materials.

This concludes my statement, Mr. Chairman. I would be happy to answer any questions you or Members of the Committee may have.

Mr. Oberstar. Thank you very much, Inspector General

Scovel. Your entire document will be included in the Committee hearing record at this point. It is a comprehensive detailed analysis of this agency and its shortcomings, and your recommendations for improvements. We will get to those in a bit.

Deputy Secretary Porcari, congratulations, first of all, on your appointment to the position. I have known you from the time you served in Maryland as secretary and you have already made a good start within the Department.

Mr. Porcari. Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Shuster, and distinguished Members of the Committee, on behalf of Secretary of Transportation Ray LaHood, I appreciate the opportunity to discuss the Pipeline and Hazardous Materials Safety Administration's Special Permits and Approval Program.

I have been briefed by your staff on a number of serious deficiencies in and concerns with the Hazardous Materials Program, including its Special Permits Program. I have also been briefed by the Department's Office of Inspector General regarding the Hazmat Special Permits Program and the advisory that the Office of the Inspector General issued on special permits for explosive mixing trucks. I have also been briefed on a 2008 internal review of PHMSA's safety culture regarding perception of the agency's employees as to the safety commitment of the agency.

Mr. Chairman, Members of the Committee, I share your concern that the agency is off track on its primary mission, safety. Let me be clear. Secretary LaHood and I regard transportation safety as the Department's primary mission and we are taking action to get PHMSA back on that mission. I would like to report briefly on the actions we have taken to begin this process and to address some of the immediate concerns.

First, the Department has a detailed action plan, which you have been provided copies of, to address the safety concerns raised by the Inspector General about the Special Permits and Approval Program. Before I discuss the specifics of that, I would like to also briefly describe the importance of the Special Permits Program to our overall regulatory program.

DOT issues special permits under the authority provided in the Federal hazardous materials transportation law. Special permits allow the industry to quickly adopt and utilize new technologies and new ways of doing business that may not be accommodated in the regulations. DOT also issues special permits on an emergency basis to facilitate emergency transportation, such as to authorize the transportation of supplies to areas affected by natural or manmade disasters. By law, special permits must provide a level of safety equivalent to that required by the regulations or a finding that is consistent with the public interest and Federal hazardous materials law if a required level of safety does not exist.

Every year, DOT issues approximately 120 new special permits, authorizes approximately 100 modifications to existing special permits, and issues approximately 1100 renewals. New special permits may be authorized for up to two years, at which time they may be renewed for a period of up to four years.

Obviously, this is an important part of the program. We recognize there are deficiencies and we are working hard to address these deficiencies with the detailed action plan that is submitted. Briefly, we have taken the following actions: one, conducted a comprehensive top-to-bottom review of current written special permit policies, procedures, and practices to ensure that the safety goals are met; two, review the criteria, policy, and procedures used to make the legally required equivalent level of safety determinations and revise those procedures where necessary; three, develop enhanced written procedures to provide for better coordination for the issuance of permits with the Federal Motor Carrier Safety Administration, the FAA, the Federal Railroad Administration, and the Coast Guard; four, to clarify PHMSA policy to assure the trade associations are not holders of special permits; and, five, by February, the Pipeline and Hazardous Materials Safety Administration will have a business plan in place to create a centralized data analysis office to improve the data quality and the information technology systems that are currently in place.

This new technology will greatly enhance the productivity, accountability, and overall safety performance responsibilities of the Hazardous Materials Office of Special Permits. The new system will include an online application that will not be processed until completed, a mechanism for alerting holders of special permits 90 days in advance of the expiration of the permit and a notification system to communicate safety concerns.

An additional part of the action plan was developed to address the concerns raised in the OIG advisory related to explosive mixing trucks. It includes issuing a notice of proposed modification of the special permits for explosive mixing trucks to provide additional safety conditions, including vehicle inspection and maintenance, enhanced driver training, incident reporting and investigation, fire prevention and emergency response plans.

It also notifies special permit holders of the intent to evaluate each holder's fitness to operate these trucks. These stakeholder responses are due in September. It includes conducting fitness reviews of current special permit holders to assure compliance with the permit terms and a review of expired permits; contracting for an independent risk assessment of explosive mixing trucks in transportation; reviewing documentation, including safety assessments and analysis, to

ensure that documentation supports the issuance of a special permit; and rescinding any special permit authorized for a holder who is considered unfit to safely transport these materials. Our action plan will evolve and update as necessary.

As I mentioned, I was briefed late last week by your staff on the findings of the Committee investigation. You identified specific concerns. These are concerns that the Secretary and I share, including that our data analysis capability is totally inadequate to ensure that the hazmat program is data driven and able to focus on the greatest hazards. I want to assure the Committee that we will work with you to address all of these important issues that you so diligently raised.

The rest of that is submitted for the record. I would conclude by mentioning the lithium battery regulation. The Committee has expressed interest in the notice of proposed rulemaking on lithium batteries. It is clearly a very important issue. The Department has forwarded to OMB a notice of proposed rulemaking yesterday for review on that, and we will continue moving on that as well.

Finally, and perhaps most importantly, safety culture, which, Mr. Chairman, you clearly listed in your opening remarks. Re-establishing a safety culture is perhaps the top priority. It is an ongoing effort. We expect, within the next 90 days, the employees will once again view the organization and its leadership as strongly committed to its safety mission.

The fact that Secretary LaHood has specifically detailed me to oversee this I think is an indication of how serious we take this. We will, again, revise procedures; we will update requirements; we will institute new rulemakings where appropriate. Our first priority is and will continue to be safety. We will not tolerate agency actions that undermine our commitment to safety and we will rescind or deny renewal of permits for unsafe actors.

Thank you. With that, I will be happy to answer any questions.

Mr. Oberstar. Thank you very much, especially for those closing comments about addressing the need for a culture of safety at the agency. I would suggest a re-education session for them. There are some very good actors and very good conscientious personnel, and there are others who need to be retrained, who look to the trade association representatives for guidance, not to their leadership for guidance. That chain has to be broken, and that will take the Secretary's leadership, which he has already indicated, and yours, as you have already undertaken.

Your DOT action plan I think is excellent. I don't see anything there about association special permits, however. Have you addressed that issue?

Mr. Porcari. Mr. Chairman, no permits will be issued to associations. We are in the process of, as part of the action plan, of making it clear that permits are not issued to associations. After appropriate review, they are issued to companies.

Mr. Oberstar. Does that mean that the Department will terminate those 12 association authorities?

Mr. Porcari. We are in the process of and will modify, terminate, whatever is necessary to make clear that each of those permits and every permit is to an individual company, not to a trade association.

Mr. Oberstar. Report back to us when you have completed that.

Mr. Porcari. I will be happy to do that.
[The information follows:]

[GRAPHIC] [TIFF OMITTED] T2158.021

Mr. Oberstar. In the opening chapter of the law governing transportation of hazardous material, section 5101 states the purpose of this chapter is to protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce.

That is a rather unequivocal statement, yet, the trade industry witness says the law says that PHMSA regulates against unreasonable risk. That is a misstatement of the law. In section 5103, general regulatory authority, in the subsection designating material as hazardous, Secretary shall designate material--and it lists the various types of materials--as hazardous when the Secretary determines that transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property.

Do you have some recommendations for amendment of that provision?

Mr. Porcari. Mr. Chairman, if there is something that we are not doing there consistent with the overall safety mission, we will modify it and do whatever we need to.

Mr. Oberstar. That is the current statutory language, form that may pose an unreasonable risk to health and safety or property. That is not the way safety is conducted or directed in the FAA Act.

Mr. Porcari. That is correct, Mr. Chairman.

Mr. Oberstar. Safety, in the opening paragraph of the FAA Act of 1958, the directive is safety shall be maintained, safety in aviation shall be maintained at the highest possible level. It doesn't say acceptable or unacceptable risk; it sets the bar very high. And I invite your reconsideration of this language to something that is measurable. This is a very subjective statement in law, and we have the opportunity and

the authorization of surface transportation law to make appropriate changes. So I would like your attention to that issue and report back to the Committee.

Mr. Porcari. I would be happy to do that, Mr. Chairman. Again, safety as a culture is also an ongoing process, there is not an endpoint to it, and, in many ways, the Federal Aviation Administration is the leader in the Department in that. I should point out that Secretary LaHood has directed us to take other measures beyond the subject of the hearing today to institute safety as a Department-wide cultural imperative, and when we say safety is our number one priority, these are specific measures to make sure that that is the case across the board.

Mr. Oberstar. I welcome that initiative. I welcome the Secretary's firmness; he is a person of purpose and driven, and he will achieve results. He is no-nonsense.

Inspector General Scovel, why special permits? Why the modifications? Why 120 new special permit applications every year? Why some 100 modifications, from your testimony, to existing--I think maybe that is the Department's testimony--to existing special permits? Why 1,100 renewals? It seems to me that there is an inadequate structure to begin with. It seems to me that there is haphazard, a case-by-case approach to the regulation of safety in this agency.

Mr. Scovel. Mr. Chairman, we have had our audit ongoing for the last 14 months into PHMSA's Special Permits and Approvals Program. It quickly became obvious to us, first from the sheer number of special permits and approvals--5500-plus permits, 118,000-plus approvals--that it appeared that the innovations and the advancements and the improvements that industry has come up with for the transportation of hazardous materials has essentially swallowed the body of law that is contained in the hazardous materials regulations in the Code of Federal Regulations.

The Department hasn't had a structure in place, a strategy in place to bring in the techniques and advancements represented by the special permits and approvals, to bring them into law. As a result, exemptions to the procedures and processes specified in the regulations have been granted in the form of these special permits and approvals. One of our strongest recommendations to the Committee and to the Department is that it establish a strategy for methodically, and in a disciplined way, bringing the current technology, the current practice, industry practice into regulations so that the entire practice of special permits and approvals can be brought under control.

Mr. Oberstar. That is a very important, very strong suggestion, and one that we will follow up on.

This is a special permit issued by the Pipeline Hazardous Materials Safety Administration. It was granted to a particular company plus 84 other cargo carriers. It authorizes transportation in commerce of hazardous materials in an inaccessible location aboard an aircraft. Inaccessible meaning the crew can't reach that place to put out a fire.

We heard this in the ValuJet crash with the oxygen bottles carried loosely onboard, not protected individually, not secured, and placed inside a tire that the aircraft was carrying to another destination. And when they exploded, that tire caught fire and provided fuel to the fire and brought the aircraft down and lost lives.

Now, the crew was in no way able to access that compartment, they were not aware that those oxygen bottles were onboard, they were not aware that onboard they were not secured or isolated one from the other; and that was 15-plus years ago. You would think that somebody had learned a lesson in the meantime. Apparently not. Explosives, flammables, poison, corrosives covered by this special permit. And it specifically says in any inaccessible compartment. How can they justify that? Did you talk to them about that, Mr. Scovel?

Mr. Scovel. We did not. We know that that is a particular concern of NTSB's with regard to the transport of lithium batteries in inaccessible locations aboard cargo aircraft. As the Committee may know, cargo aircraft aren't required to have fire suppression systems, and, in fact, the standard fire suppression system aboard any passenger aircraft isn't capable of suppressing most lithium battery fires should they happen in a passenger aircraft. It is a particular concern.

One of NTSB's key recommendations, in our view, is that when lithium batteries are to be carried in inaccessible locations, that they be carried in fire-resistant containers. NTSB has been fighting this battle for 10 years; it is still not satisfactorily resolved, in our view.

Mr. Oberstar. That is just unacceptable. There are many others. I will conclude for the moment on this one. Issued November 9, 2006, this emergency special permit authorizes transportation in commerce of nitric acid, etcetera, etcetera. It waives the requirements for marking, for labeling, for shipping papers; waives the requirement for aviation stowage requirement; it waives the requirement for notice to the pilot in command. In November 1973, nitric acid carried aboard an aircraft on a PanAm Airline aircraft resulted in emergency landing in Boston and three crew were killed.

The argument that there are only a few of these, until someone's life is lost. Now, if you are operating in a haphazard structure and comforting yourselves saying we haven't had many fatalities, only a few or it is only rare, then try being one of the family members. Try putting yourself in the position of those who have lost a loved one or being aboard one

of those horrible accidents and dying a painful death. That is not acceptable.

Mr. Shuster.

Mr. Shuster. Thank you, Mr. Chairman.

Mr. Scovel, I think we all agree, especially on the heels of what the Chairman said, that there has been haphazard, the process hasn't been in place that needs to be; we have uncovered a lot of shortcomings and failings at PHMSA in its record-keeping and the like. I don't know that I have seen it, but can you assess the overall safety record within the hazmat materials movement industry? What is the assessment of the IG's Office on the overall record?

Mr. Scovel. Mr. Shuster, I can't speak to the overall record of the industry as a whole. The focus of our recent audit has been the Special Permits and Approvals Program administered by PHMSA itself. We have found serious deficiencies in the program design and execution of the Special Permits and Approval Program that leads us to question, frankly, whether there has been the exercise of due diligence in that particular office within PHMSA and the safety culture, the understanding of safety culture within that office. My recent work wouldn't qualify me to speak to industry practice, however.

Mr. Shuster. It would seem to me that would be an important part of the IG's role, to assess the situation and what are the outcomes, good or negative. Again, the records I see are that it is still a remarkably safe record, in spite of the fact that the process is flawed and failed and needs to be improved.

You mentioned something about these special permits, that the advances in technology and improvements in industry have swallowed up the law. Can you be more specific? That sounds like a positive--well, it sounds like the law is lagging way behind and needs to be changed because there have been advancements in the industry. Can you address that more specifically?

Mr. Scovel. Yes, sir. In fact, I can give you an example. The hazardous materials regulation specifies a procedure for carrying certain hazmat in rail tank cars. In fact, the process for that that is specified in the regulation has been overtaken by events within the industry; a much safer rail tank car is now standard within the industry. By our accounts, it has an excellent safety record. Yet, the regulation itself hasn't been updated to incorporate the new technology. Rail companies still need to apply for and renew special permits to use the latest technology instead of the older one.

To return to your earlier question, sir, about practice within the industry, I can say, from our experience with trade associations and the agency's practice of granting special permits to trade associations, that those bodies have not been diligent across the board either in keeping their members up to date on what the permits entail, indeed, even whether certain members are the recipients, through their trade association, of permits to begin with.

And we have had experience in our field visits with companies that told us, in fact, that they had recently been informed in kind of a good news-bad news phone call from their trade association, good news, oh, that practice that you have been engaged in for some time now, carrying hazmat in a particular manner, we forgot to tell you have a special permit, so you may be covered; bad news, there may be a team of OIG auditors on the way to check and see how you are carrying it out.

So I suppose that is an indicator of some sort on the state of play within the industry or at least how certain trade associations view their responsibilities.

Mr. Shuster. I would hope these trade associations, one of their roles should be informing and help to keep that industry up to speed on where safety issues are, and I think the trade industry is not doing that, is failing their membership significantly.

Mr. Scovel, do you believe that PHMSA's action plan addresses most of the concerns that you have raised?

Mr. Scovel. It does address most of the concerns and we are very grateful to Deputy Secretary Porcari and Secretary LaHood for their leadership at the top levels of the Department in bringing home to PHMSA the importance of both our findings and the Committee's staff's findings regarding deficiencies, in our case, of special permits and approvals. We do recognize, as we work through the action plan, that at this point it is rather high level. It has a list of actions, it has a time line for carrying those out. Of course, we recognize it is a work in progress; the Department will need to add detail to it, they will have to tag resources to actions, they will have to recognize limitations and develop strategies to overcome those.

The Chairman questioned the Deputy Secretary on an omission from the action plan regarding a plan to address special permits issued to trade associations. Frankly, it is not clear in my mind that PHMSA or the Department is going to follow up with all 5,000-plus individual members of trade associations who may have derivatively received special permits. The agency basically has to follow up with an individual fitness determination in the case of every single company, and we hope the Department will commit to that level of effort.

Mr. Shuster. That is going to obviously take resources. If I could, just one final question. Are the resources in place? I guess that is not a fair question; they are not in place, whether they are human resources or technological advances. Have you assessed is it going to take a lot more personnel or

can you overcome some of these shortcomings by technology?

Mr. Scovel. It will take a combination of two, Mr. Shuster, certainly technology, better data systems are required. The Deputy Secretary acknowledged that in his statement to the Committee. It is going to take time and a strategy. Frankly, some sizeable number of those special permit holders that have received their permits supposedly through their trade associations, a good number of those aren't engaged in those practices at all, as we have learned in our field visits. Some of those can be sliced off the top. There will be some number, however, who are left who are engaged in the practice. The agency hasn't done an individual fitness determination in the cases of those companies and they need to get to it.

Mr. Shuster. Backtrack there a little bit. You said there are some companies that are doing a good job? Is that what I understood you to say?

Mr. Scovel. Yes. If I can be specific. As part of our examination of this practice of granting permits to trade associations, we visited 18 companies that belong to 7 of the 12 trade associations. We found that 10 of those 18 were not performing the activity in the special permit. So not applicable, they may be cut off from the permit, no further review needed.

Four companies were not located at the address provided by their association. Association clearly not on the ball. They didn't know, PHMSA doesn't know. That needs to be updated. Three companies, 3 of the 18, had compliance issues we found regarding shipping papers, training, security plans; and these are essential plans of any comprehensive hazmat program. Two companies didn't know that a special permit applied to their activities. Sir, basically, we found that one company out of the 18 appeared to be in compliance with the terms and conditions of the special permit.

Mr. Shuster. Thank you very much.

Mr. Oberstar. Those last comments are very powerful, very revealing, and troubling; more than troubling, disturbing. In further response to Mr. Shuster's question about safety, my dictum has been that safety begins in the corporate board room; not in the regulatory agencies, not in this Committee, and not in the Congress. It begins in the corporate board room. They have the first responsibility. Airline executives have that first responsibility.

But the role of safety in aviation goes back to 1926 and Herbert Hoover, when he was Secretary of Commerce, and more in the interest of developing aviation as a commercial activity than for safety of personnel. There was only the pilot, there was no passenger air service in those days. But he initiated the first aviation safety rulemaking of the Federal Government in 1926 as Under Secretary and later Secretary of Commerce.

In those days, it was not uncommon for a wing to fall off an aircraft in flight. It was not uncommon for an engine to fall off the aircraft in flight. That was bad manufacturing. But it went back to the corporate structure of being safe before you put an aircraft out in flight.

So there is and there are examples in explosives material transportation of board rooms with a culture of safety. I visited one over the past weekend in my district, where they typically handle 300,000 pounds of explosives a day during the mining years. They are very meticulous. They supervise their drivers; they put them through training and retraining procedures. They have worked to perfect the transport vehicles themselves. I talked with every one of the drivers individually, apart and away from the company management. They are doing their very best. And they question the regulatory structure that is in place. They are doing what they think is the best practice.

And then as to the incidents, here is a report, an internal document in PHMSA, May 11, 2007, estimating the extent of under-reporting of hazmat incidents. There are many reasons to suspect that carriers are under-reporting hazmat incidents. It goes on in the opening paragraph, preliminary conclusion, the incidents that are reported to us might represent only 10 to 40 percent of all incidents that are actually occurring. That would mean that we are missing from 60 percent, that is, 26,000 incidents a year, to 90 percent, that is, 151,000 incidents a year. Our database reflects only 17,000 incidents a year.

From 2006 to June 2009, there were 1,450 unreported and only 7 enforcement actions. That is not a culture of safety. That is not carrying out your responsibility. This was an internal report and wasn't acted on by senior management; they just dismissed it.

Next, Ms. Brown.

Ms. Brown. Thank you.

First of all, let me thank both of you gentlemen for your leadership in this area. As we begin to do the reauthorization, I guess a couple of things point out in my mind. First, I want to start with you, Mr. Secretary. My staff used a strong word, termination. I don't want to use that. I think the leadership should decide on whether someone should be terminated.

But I do think it should be some kind of a shakeup or a moving of the chairs. What has happened in the agency? Because I understand that there has been contact with the companies, letting them know investigations are going on. What is it that people in the agencies need to understand that safety doesn't have anything to do with who is in the Administration. Everybody needs to do their job.

Mr. Porcari. It is an excellent question, ma'am. First, it starts at the top. As Deputy Secretary, I am directly engaged

in this. I will stay engaged. I am not going away. It is a process that, as the Inspector General pointed out, as we go forward with the action plan, we will get into more and more detail.

Building a culture of safety and keeping that culture of safety in the agency is going to require that message from the top. We will shortly have a nominee as the administrator. That is an important part of the puzzle. The working relationship between the special permits process, the enforcement process, our sister agencies within DOT and referrals, all of those need to be fixed and will be, and we will make the organizational and personnel changes necessary to carry this out. Again, this is a public trust issue, it is a fundamental responsibility. These are substances that are necessary for our everyday lives and for our economy, but we are committed to doing this safely. It is, I think, clear that we took our eye off the ball at some point. We are focused like a laser on it now.

Ms. Brown. Well, I want to thank you for your leadership in this area. As I said earlier, we have had hearings all over the Country where these issues of hazardous materials coming through the community, whether it is the firemen that were talking to us when we went to Mrs. Napolitano's district, whether it was the elected officials, this is the issue that comes up. They are concerned. They want to know and they want to know that we are doing our job and we have the oversight. So I am very interested in what recommendations you think we need to put in the bill to make sure that we have the safeguards there.

Mr. Porcari. It is clear, as, again, the Inspector General pointed out, from the size of the body of special permits that it is difficult to keep up with changing technology and the state of the art, and at the same time, as the Chairman pointed out, the level of safety and the requirements for safety, that bar is getting higher with time, as it should. I look forward to working with you through the authorization process because it really is an opportunity to fundamentally reevaluate where we are now, where we should be, and how that authorization can be one of the mechanisms to get there.

Ms. Brown. I understand there are only 35 employees. It is not that I am interested in revving up, but we want to know that we have the appropriate number and we can use the new technology.

Mr. Porcari. Staffing is certainly a part of it. Data is a very important part of it. Any safety process where you have safety management systems and you have a culture of safety, you can't do that without the proper data and mining and analyzing that data correctly. We are way behind the curve on that; that is clearly one of the most important parts of the effort here.

Ms. Brown. Thank you.

Mr. Inspector General, thank you again for your leadership in this area. You have done a good due diligent job in keeping us informed and doing the oversight that is needed. I guess my question to you, in listening to the staff, they indicated there were eight serious violators that have--you know, when we did the research, they really have violated all of the rules. What can we do to flag them today as we speak?

Mr. Scovel. Ms. Brown, I would have to consult with my staff and probably Committee staff as well to understand those individual cases. However, if I can generalize by saying that, as the Deputy Secretary has acknowledged, proper acquisition of data, proper use of that data is a problem with PHMSA. As that problem is fixed--and I am very confident that, through the Department's leadership, it will be--that violators of the type you describe can be identified.

At that point there needs to be a very careful, a very diligent effort to make sure that, as part of the risk-based oversight system that PHMSA, like all modes in DOT, must employ, that those violators are flagged for further compliance reviews and, if necessary, any permits or whatever are terminated, suspended, addressed in the appropriate fashion as provided for due process and by regulation.

Ms. Brown. Do you think that the Department of Transportation has the tools that they need working with other safety organizations to do the job for the communities that we represent?

Mr. Scovel. Not yet, ma'am.

Ms. Brown. OK.

Mr. Scovel. And the Department itself has acknowledged that, both in terms of staff, perhaps numbers--I don't want to prejudge that, but in terms of staff outlook or safety culture, their training most certainly, because, in all fairness, some of these practices that we highlighted in our statement for the Committee today developed many years ago. For instance, the oldest trade association special permit that we identified dates back to February 1994, and it has become a practice, apparently, that nobody has questioned until now. So the current crew in Special Permits and Approvals, they have been working with what they have been given. They certainly need to be re-educated and retrained.

Ms. Brown. Well, I am very interested in what your recommendations are as far as what we need to do as we develop and move forward on the reauthorization bill.

Thank you again for your leadership, both gentlemen.

Mr. Scovel. Thank you, ma'am.

Ms. Brown. [Presiding] Mrs. Napolitano.

Mrs. Napolitano. Thank you, Madam Chair.

I am listening with great intent on the hazardous transportation of materials. In my particular area, we do a lot

of chlorine because of water treatment plants that we have and others. Years ago, I went to one of the chemical companies to see how they were transporting chlorine. At the time, the transport tubs that were plastic were not double-walled. They were beginning to get into double-walled.

Well, that poses a great concern because they travel by truck to get them to these areas after they unload them from the railroad. Concern is there is the current thinking that there is a substitute to chlorine or that they should move the chlorine generation plants closer to the sanitation districts or to the water districts for being able to avoid these long transportation areas or having to transport them long distances.

Are you, in any way, shape or form, aware of anything that they are doing in transportation of chlorine gases?

Mr. Porcari. Ma'am, I am not personally aware of any changes in the transportation of chlorine gases. What I would like to do is actually get that information to you and provide it to the Committee.

Mrs. Napolitano. It would be very helpful, because I work with the Councils of Government and three of them represent probably about seventy-some odd cities out of the 85 in Los Angeles County alone, and they are all very, very concerned about any releases in their area because it is so compact.

[The information follows:]

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[GRAPHIC] [TIFF OMITTED] T2158.024

[GRAPHIC] [TIFF OMITTED] T2158.025

The other question I have is the hazmat placards on rail cars. That has been an issue in my communities for the last 15, 20 years, that I know of. Some railroad companies supposedly are looking to get rid of the hazardous material placards on railroads and keeping them within the engineer's cab. To me, that is ludicrous, because what if that particular train piece is injured or derailed, or in smoke, whatever? Then how are the hazmat folks being able to respond what is on that train?

Mr. Porcari. Ma'am, the placarding is an important part of the safety process, knowing, as you point out, what is in that particular rail car or in that container. I am not aware of any pending waiver of those requirements, but, again, what I would like to do is go back and check that and report to the Committee.

Mrs. Napolitano. OK. It seems to me there was some discussion, particularly on this Committee, a couple years ago in regard to the viability of being able to do away with them because of the terrorism issue, that they could target those particular cars. So that is what brought that particular issue. But I would really appreciate it if this whole Committee would be able to get that information.

Mr. Porcari. I would be happy to do that.

[The information follows:]

[GRAPHIC] [TIFF OMITTED] T2158.026

Mrs. Napolitano. I am assuming that you work with the local entities like the Public Utilities Commission and the hazmat areas to request from them information about situations where it may not be reported by the carriers, whether it is rail or truck.

Mr. Porcari. One of the deficiencies we have right now is actually gathering that kind of data to make sure that we have comprehensive information on incidents that may not otherwise be reported. We know that is one of the activities that we have to do a better job on and that is part of what we want to do going forward.

Mr. Scovel. Thank you, Mrs. Napolitano. Perhaps our work can shed a little bit of light on your concerns. Signage and placarding are tremendous issues when we are talking about any first responders, police or fire and so forth. As part of our examination of special permit or approval holders, we visited 27 companies in the field, and we found that 59 percent of them were not in compliance with at least some of the terms of their special permits, and those special permits specified the type of signage or placarding that would be required for that mode of transportation and that particular hazardous material, and signage problems were prominent among those that we identified among those special permit and approval holders.

Mrs. Napolitano. Well, this concern came out from one of the local fire departments, who has a cooper rating, and one of the firemen lived in the general area where one of the BNSF trains would go by. He said he couldn't identify the hazardous placards. So, to me, that shows that there is no cooperation between them to be able to help standardize them so they can be recognized.

Then the last question very quickly is budget and personnel. While I know that you are short, there are not that many inspectors that you have, what will help to be able to ensure that we continue to focus on public safety?

Mr. Porcari. As you correctly point out, ma'am, there are budgetary implications to this. We are looking at that right now, both personnel issues, the information technology needs, and there is substantial cost involved with that. In the

conversations I have had with the Secretary on this topic, he has made it very clear that safety is paramount, that we need to, as we are working through the budget process on a multi-year basis, make sure that that is reflected in our priorities. We are in the process of sorting that out right now.

Mrs. Napolitano. Thank you, Madam Chair. I think that would be very good information for the Committee.

Ms. Brown. Thank you.

We are going to stand in informal recess for about 30 minutes. We have three votes and we are going to start with my friend when we come back. OK? All right, we are in informal recess.

[Recess.]

Mr. Oberstar. [Presiding] The Committee on Transportation and Infrastructure will resume its sitting. Apologies to all witnesses and Members and others for the over-long interruption by votes on the House Floor.

There are a few things yet to be reviewed. What troubles me, Mr. Secretary and Mr. Scovel, is this June 16 request or previously the decision was made by Pipeline and Hazardous Materials, a request from FAA to test the compliance of various airlines' hazmat handling procedures. The FAA made that request in 2005, August of 2005.

It took nearly a year for the Office of Pipeline and Hazardous Materials to respond, and they denied the request of FAA to undertake compliance testing of their airlines' hazmat handling procedures, while at the same time approving a number of special permits and extensions and approvals, which are a curious component of this agency's operations.

How in heaven's name can they justify that conduct? The words of the denial are your application did not contain information to demonstrate that your proposal would be in the interest of the public. How can it not be in the interest of the public for the Federal Aviation Administration to conduct compliance review of airlines' participation in and compliance with movement of hazardous materials, especially in the aftermath of the Value Jet crash, especially in the aftermath of other incidents that we know about, that I know about of hazmat movement onboard aircraft?

Do you want to start, Mr. Scovel?

Mr. Scovel. Mr. Chairman, if I may, I confess I have no answer to you. We are as mystified as you appear to be by PHMSA's response to FAA's request. I will simply note that FAA's request was taken in response to a recommendation contained in our 2004 report, which examined FAA's own hazmat program. FAA, to its credit, accepted that recommendation, concurred in it and attempted to move out, and apparently was stymied by a PHMSA decision.

Mr. Porcari. Mr. Chairman, likewise, I cannot explain the decision at the time. I will tell you, having been made aware of it and looking into it, it does not make sense to me. I have recently asked the FAA if they still believe it is worthwhile doing this and they want to do it. They have indicated yes and we are going to go ahead and do that.

If there are concerns about crew members, for example, being confused by this labeling, if that was the concern, we can certainly make accommodations to notify the crew as to what is going on. There are ways to do this. My observation is I thought it was actually a very valid and useful way of actually testing some of the processes and making sure that the labeling, packaging, and placement was correct. So FAA is interested in doing it; we are going to go ahead and do that.

Mr. Oberstar. Thank you for that response, but I would read from the request. The background, as Inspector General Scovel just said, the FAA says that the Department of Transportation's Office of Inspector General conducted an audit of FAA's hazardous materials program, issued a report and recommended that FAA develop and implement a covert testing program. That information was submitted to PHMSA.

Further, FAA said that the FAA plans to "package, mark, label, and document the shipments as if they were normal shipments of hazardous materials, but, for safety reasons, no actual hazardous materials will be used in conducting the covert tests." That is the responsibility of the agency, to test, to test their own people. They conduct internal reviews, audits, and evaluations of FAA maintenance inspection personnel, procedures, activities.

This is an appropriate way to see whether the agency is doing its work, whether the airlines are doing their work; and they were denied, at the very same time that this agency approves hundreds of special permits for the industry to carry real hazardous materials.

All right, thank you for proceeding with that issue and getting FAA back on track to doing their responsibilities.

This is a good lead into the weaknesses found in the processing of approvals. The Inspector General's staff has found this; the Department is aware of it; our Committee investigative staff spent a good deal of time reviewing these. Approvals are different from special permits. An approval can be issued only if there is a specific provision in the regulation that allows the Office of Hazardous Materials to provide relief from a particular regulation. But consistently there is no showing of the need for that special approval, why the relief is requested, and it seems that while special permits have a limitation, there is no limitation or time limit on the approvals.

Mr. Scovel, you have spent a good deal of time on that issue. What are your recommendations?

Mr. Scovel. Mr. Chairman, we have a number of recommendations pertaining both to special permits and approvals. Our recommendation, if we were to speak very generally to the approval process, is that, like special permits, there needs to be a clearly defined and uniform approval application process, preferably web-based. We have met, my audit team has met twice with representatives of industry and this is one request that they have pointedly addressed to us, not expecting, of course, that we were in any position to approve it, but certainly hoping that we might incorporate it into our recommendations for the Committee's and the Department's consideration.

Mr. Oberstar. Mr. Porcari?

Mr. Porcari. Mr. Chairman, I agree with the clearly defined and uniform part of it. We owe consistency and predictability and transparency. That starts with asking the right questions and making sure that we have a comprehensive application that includes all the details that it needs to have. We clearly do not have that in all cases now. That is one of the things, going forward, that I know that we can do very quickly and will do quickly.

Mr. Oberstar. These approvals are not published in the Federal Register. Will you direct the agency to do that in the future?

Mr. Porcari. The approvals are required to be in the Federal Register; they will be in the Federal Register.

Mr. Oberstar. Have you sent a directive to PHMSA to do this or you just told them verbally that that is what they will do?

Mr. Porcari. I believe that they are required in the Federal Register.

Mr. Oberstar. Yes, they are, but they are not published; they haven't been.

Mr. Porcari. If they are not published, we will make sure that they are.

Mr. Oberstar. And once a year PHMSA publishes its final action on special permit applications. Once a year. That is not transparency, openness. That ought to be concurrent with their action.

Mr. Porcari. Mr. Chairman, we are clearly living in a different era, where it is a lot easier to be transparent. And when we are reporting basically in real-time on contacts that we are having in meetings, we can certainly have better than annual reporting on our permitting process. Again, having it web-based is one of the ways to do that.

Mr. Oberstar. Now, an issue consistently over 20-plus years with this agency, the pipelines activity was grossly underfunded in the mid-1980's. I authored language in Committee and then on the House Floor in the appropriation process to increase the number of inspector positions for the pipeline inspection program, Federal and State, and increased funding for them. That has deteriorated over time and fallen off. Overall for the agency, first of all, how many inspectors does the agency have now for all of its activities? And both Mr. Scovel and Secretary Porcari, what are your recommendations for staffing improvements and increases?

Mr. Scovel. Mr. Chairman, Deputy Secretary Porcari may have more recent information than I do, but my audit team, in the course of the last 14 months, determined that, at the time of their addressing this question, there were 35 inspectors on PHMSA's staff, as has previously been noted here on the record, that are responsible for 300,000 or so entities transporting and shipping and packaging hazmat.

Our staff, we have kicked around the question of how PHMSA can gain better control of this inspection process. Certainly, the number of inspectors is one key target. As you well know, sir, FAA has wrestled with the same question in connection with their inspection process. It is universally acknowledged there can never be enough inspectors; however, with the proper risk-based oversight system and with the proper staffing study, both of which we think are now currently missing from PHMSA's effort, they can better leverage what they have.

It is also worth noting, sir, that the other modes in the Department, FMCSA, FAA, FRA, as well as various States, have inspector resources. PHMSA must better integrate those resources and leverage them together because they will never have enough inspectors of their own. But it is a multi-phased and a multi-pronged effort that PHMSA needs to undertake in order to strengthen its inspections.

Mr. Oberstar. So intermodalism would be a benefit to the entire inspection process. In the surface transportation assistance bill that we have reported from Subcommittee, I create a council on intermodalism and an under secretary for intermodalism, and require a monthly meeting of the modal administrators, among other responsibilities, to develop a national strategic safety plan to integrate the competencies of all the modes on safety; and, if we get this bill enacted, that will be a requirement and will be on the top of the priority list.

Meanwhile, you don't have to wait for that. Meanwhile, you can bring those modal administrators together and ask them to develop a common safety plan and how to harness the resources of--it should be--it has been said many--one department, one DOT, everyone pulling together. So intermodalism will be a way to do that.

Mr. Porcari. Absolutely, Mr. Chairman. First, just on the numbers, there are currently 35 inspectors and 7 field supervisors, for a total of 42.

The point about leveraging other inspectors in the field is

a very important one that is an obvious way that we can work intermodally, and part of our plan going forward is to do just that, whether it is the Federal Aviation Administration, the Federal Motor Carrier Safety Administration, or any other asset in the Department. You can have a force multiplier by doing that.

Finally, on intermodal safety as an organizing principle, if I may, the perspective I am coming from is from a State DOT that is the one truly intermodal State DOT. That was how it was organized, and one of the early discussions with Secretary LaHood when I came on board was safety as an organizing principle at U.S. DOT. I do not want to steal the Secretary's thunder, and I am aware of the provision in the bill that has been marked up. But I will tell you that there are some very important steps forward in the Department with safety as an intermodal organizing principle that the Secretary has directed and perhaps, most appropriately, he should describe, but we are moving forward on that right now.

[The information follows:]

[GRAPHIC] [TIFF OMITTED] T2158.027

Mr. Oberstar. That is very encouraging. I am delighted to hear that. That is the first good news, structurally, about this Department I have heard in a long time.

Just a little reminiscence. I was administrative assistant for my predecessor, John Blatnik, who was chair of the Executive and Legislative Reorganization Subcommittee of the Committee on Government Operations at the time that President Lyndon Johnson proposed establishing a Department of Transportation. He made that recommendation in January of 1966 and sent his staff up to meet with us and with Senator Magnuson's staff in the other body, and we spent from January through October crafting the proposal to bring 34 agencies of Government together under one roof in the Department of Transportation. Hearings and markup in Subcommittee and passage on the House Floor, conference with the Senate. In October, President signed the bill. We thought they are all going to work together. They haven't. It has been a disappointment.

With this legislation, the surface transportation bill, we are going to make that legislative change and cause this synergy to happen among all the modal administrations, and starting with safety.

Mr. Porcari. Well, again, it is a very important point even in the absence or preceding any legislation. There is an awful lot that you can do as Secretary organizationally, and Secretary LaHood is actually in the process of doing that right now. There is much more intermodal work and cooperation specifically on safety issues than we have had in the past, and I think of it as low hanging fruit; it is something that is relatively quick and easy to do and get some measurable benefits from.

Mr. Oberstar. That is very important and good. I encourage you and Secretary LaHood to continue pressing forward with this. Also, we need to revisit the issue of special permits and approvals and the follow-ups to those and this rather incoherent process, two years and four years and unlimited time frames.

Mr. Scovel, do you have some recommendations for how this process of permitting can be rationalized?

Mr. Scovel. I do, Mr. Chairman. And if you will permit me to offer recommendations for the Committee's consideration, as well as the Department's, based on all of our audit work; it goes beyond simply the permitting and approval process.

I just mentioned the improved application process. Certainly, that is one that may well be low hanging fruit, in Mr. Porcari's terms, for the Department to implement.

Number two, special permits for trade associations. The Department, to its credit, has made clear that those will not be issued to associations, they will be issued to individual members. However, there is still the question of 5,000 members of associations in the field perhaps believing that they can continue to operate under special permits issued to their associations. That needs to be addressed. There hasn't been the level of fitness determination made company by company yet, and safety demands it.

Fitness definition, a precise definition of what constitutes an applicant's fitness to conduct the activity authorized by the permit or approval.

Next, safety history.

Mr. Oberstar. On that point, isn't there a standard for fitness in FAA?

Mr. Scovel. I believe there is, sir, but---

Mr. Oberstar. There are the three--fit, willing, and able-- and fitness is a very clear standard established both in law and in practice in the FAA, and there should be some lessons learned and applied to PHMSA.

Mr. Scovel. I agree, sir. In fact, within the PHMSA context, the definition is not nearly as clear as it is applied in other modes. As you know, the regulation permits PHMSA to find that an applicant is fit based on prior compliance history, information in the application itself, and other information available to the associate administrator. Very broad; too general; not helpful to applicants, as well as to those who must administer the process.

That gets me, really, to my next point, and that is safety history as a factor in determining fitness. PHMSA fought and won this battle back in 1996. We determined, conducting our own

little history study, at the time this regulation was written, PHMSA received industry conducts opposing the use of compliance history to assess an applicant's fitness.

At the time, RSPA, PHMSA's predecessor, disagreed with those comments and stated in the preamble to the final rule, and I will quote: "Enforcement actions may be indicative of an applicant's ability or willingness to comply with the applicable regulations. Because the associate administrator is considering whether to authorize compliance with specific alternatives to the HMR, the likelihood of an applicant's compliance with those alternatives is relevant to public safety." And the final rule did establish that an applicant's compliance history should be or may be considered, and that is the operative language here; it is not required, but it may be considered by the administrator in determining fitness.

Mystifying, as well, to us is why PHMSA, in the years since fighting and winning that battle, has ceded the ground to industry, for whatever reasons that can't be known to us at this point. But PHMSA has made clear that they do not consider safety history as a relevant factor in determining fitness. They confine their examination to the four corners of the applicant itself: action, process, package. That is pretty much all that they are looking at. That seems to us to fly in the face of common sense and we strongly recommend that the Department address that.

Mr. Oberstar. Should that be changed in law? Should law itself define that more clearly, instead of leaving it to regulation that can be changed and opposed and undermined from time to time?

Mr. Scovel. That is a policy question, of course, sir, but we would think that it is an important enough point to be enshrined in law.

Mr. Oberstar. Thank you.

Mr. Scovel. A couple of other points, and then I will yield.

Level of safety, as well, needs to be addressed for the benefit of applicants, as well as administrators.

The agency should establish a coordination working group. One of the points that we highlighted in our testimony today is the lack of coordination between PHMSA and the other modes in determining safety history, for one, enacting on applications.

Next, an enhanced risk-based approach to oversight. As our testimony today, our statement made clear, PHMSA does not cite as a priority factor in its oversight system whether a hazmat carrier may be a holder of special permits or approvals. We think that it is important enough to be included as a priority factor in addition to what PHMSA already recognizes; accident investigation, third-party complaint inquiries, and fitness inspections.

Finally, longstanding safety concerns, Mr. Chairman; time frames for resolving matters like bulk explosive vehicle questions, lithium batteries, and, as Mr. Porcari has mentioned, a process at the Department level to resolve such intermodal disputes.

Thank you.

Mr. Oberstar. That is a very comprehensive list. Thank you for that listing.

Mr. Secretary, do you want to respond to those points?

Mr. Porcari. Just very briefly, Mr. Chairman. I think those are all very valid points. I would like to just underscore one of them in particular, the relevance of safety history in the fitness definition. We should--not may, but should--certainly take that into account. I think that certainly is common sense and directly relevant to the overall fitness of an applicant.

Mr. Oberstar. Thank you. Whatever you can do by regulatory change you should do. You are clearly on track toward doing that, and whatever else is necessary we will incorporate in legislative language in our crafting of the next transportation bill.

Inspector General Scovel, have you reviewed the Department's program for the future, the proposals listed in the Secretary's statement? This plan of action looks good on its surface. It seems to me that there is very specific time frames--within 10 working days, within 15 days, within 15 days, within 30 days--actions to be taken. Looks to me like a good checklist.

Mr. Scovel. It is, sir. Frankly, we were very impressed that the Department's senior leadership acted as quickly as they have in order to attempt to impose control from their level over PHMSA's process for special permits and approval, and that was really the subject matter of our own inquiry. As I previously noted this morning, details remain to be filled in. Although the action plan addresses special permits, very little, if any, mention made of approvals, for instance, a point that you made. And a continuing point for us, trade association permits. A plan needs to be put in place. Industry needs to be notified. The genie needs to be put back in the bottle regarding all of those 5,000-plus permits.

Mr. Oberstar. And as a corollary to that point, shouldn't there be some guidance, direction, understanding of a culture of safety of having an arm's length relationship with those whom the agency regulates?

Mr. Scovel. Yes. And that is a point that has been made repeatedly in this hearing room mode to mode to mode. As we look at it, Mr. Chairman, partnership is the term that is often used between modal administrators and their staffs and the industries that they regulate. In my view, partnership can sometimes cross the line into the goal, instead of being a

means to the end of instituting as safe a program as we possibly can. That should be, we think, a key part of any safety culture re-education effort within PHMSA, as well as other modes.

Mr. Oberstar. Mr. Secretary, apparently, you agree with that?

Mr. Porcari. Mr. Chairman, you will find me agreeing that it is important to have a correct relationship with industry, and with all that implies. We certainly solicit input. We should never, and will not, cede the essential safety function and the regulatory role that serves that safety function.

Mr. Oberstar. This is the third in a series of failures within the Department. Well, the Coast Guard is no longer in the Department, but in my mind they still are. But there was this indistinguishable link between the Coast Guard and its contractor, Lockheed Martin, who were given authority to self-approve their work. The second was the FAA and the customer service index.

And the third now is PHMSA. Enough. We are drawing the line, cleaning house, changing the culture, putting it on the right track. We appreciate what you are doing and we will continue to oversee. Safety is an ever-vigilant responsibility. And for those who think that we have had the hearing, we had to look at the agency, and we can now take a deep breath and they will all go away, I am not going away and safety is not going away.

I grew up in the family of an underground miner, where lives depended on each other and on the equipment with which they worked, and I will never forget my father's comment when I asked--he was chairman of the safety committee for 26 years in the Godfrey underground mine. I said, what sticks in your mind, Dad? He said the most unforgettable sound in the underground is the screams of the men when the cable on the cage broke and there was nothing to stop their fall to their death. You never relax your vigilance on safety.

Thank you very much for your testimony.

Mr. Porcari. Thank you, sir.

Mr. Oberstar. Our next witness is Mr. Lon Santis, Manager of Technical Services for the Institute of Makers of Explosives.

Mr. Santis, welcome to our Committee and to the hearing. Your full statement will be included in the record. You may summarize as you wish and proceed with your statement, which I read in great detail.

TESTIMONY OF LON D. SANTIS, MANAGER, TECHNICAL SERVICES,
INSTITUTE OF MAKERS OF EXPLOSIVES, WASHINGTON, DC.

Mr. Santis. Thank you, Chairman Oberstar.

IME members are dependent on special permits, or SPs, issued by PHMSA to transport bulk blasting agents and oxidizers in multi-purpose bulk trucks, or MBTs, that are specially designed for this purpose. The SPs apply unique and applicable requirements which provide for the safest and most secure way to deliver blasting materials to the job site.

To our knowledge, there has never been a fatality, injury, or explosion attributed to the hazardous materials onboard these vehicles in over 10 million trips. This is only through the continual vigilance that the Chairman mentions and a culture of safety that exists within the explosives industry.

Nonetheless, IME has cooperated over the years with PHMSA on enhancements to the safety of this type of transportation, the most recent effort starting in May of 2008. After considerable study, we expect to adopt measures in our standard for this activity, SLP-23, by the end of this year that address the root causes of rollover accidents with these vehicles.

If SPs authorizing the use of MBTs are revoked or severely restricted, the resulting damage to the U.S. economy could be much worse than any single terrorist event. Industry does not have the capacity to deliver the billions of pounds of materials that are currently transported annually in MBTs by other modes or packaging. Additionally, risk to the public would increase because more sensitive products would replace those shipped by SP and more vehicles would be on the highways.

Given the importance of MBTs to the national recovery and infrastructure development, we urge the Committee to take a reasoned and rational approach. This has not been entirely the case with the recent OIG management advisory and PHMSA's response. We object to the agency's use of sensational descriptors, direct comparisons to terrorists' intentional acts, and unfounded accusations of misbehavior.

For example, statements that MBTs are bombs on wheels, catastrophes waiting to happen, and prone to rollover are out of proportion to any rational risk-based analysis of the operation of these vehicles. The public interest is not served by an appeal to emotion when objective analysis rooted in science is required.

In addition to the absence of any fatalities or injuries, the public should know the following. The typical MBT has a center of gravity height of 75 inches, which is lower than the center of gravity height of the average loaded semi trailer. We believe that the average rollover rate per mile for MBTs is many times better than other vehicles with the same center of gravity height and wheel width. These materials will not accidentally explode from the forces encountered in the normal course of transportation if the transportation is compliant with the HMR.

In an MBT accident, the risk is not increased if the

materials mix, because sensitization only occurs within certain ranges of mixtures and methods of mixing that will not occur in an accident. There is very little probability that the bulk materials may explode in a fire, and MBTs minimize the overall risk to the public.

Even though several MBTs have burned to the ground without incident, it is out of an abundance of caution that we recommend that when explosives or oxidizers are involved in a fire, that a standoff perimeter be established. These materials must be exposed to a fire for a long period of time before reaction can take place, in which time emergency responders can evacuate people to safety. To help ensure proper response is taken with explosives incidents, IME and PHMSA updated and distributed a training program to every fire department in the United States of America in 2003 on how to respond to these incidents.

Several recommendations have been made that would impose unreasonable and onerous requirements on MBTs and increase risk. Perhaps the most serious of these is the suggestion to prohibit the transportation of class 8 materials on MBTs. This prohibition would jeopardize the latest advancement in MBT safety, which involves sensitizing non-explosive materials after they have been loaded into bore holes by the MBT. The result would be more vehicles on the highway and more sensitive explosive products being transported and used.

IME has shared recommendations with both the OIG and PHMSA on how the SP program may be improved. The agency and Congress should focus on these deficiencies, not attempting to raise public fears and damage the reputation of the commercial explosives industry. MBTs do not present an unreasonable risk to health and safety or property, and the alternatives increase risk.

I would be happy to answer any questions.

Mr. Oberstar. You raise concern about characterization of the conveyance of explosive materials. I don't know to whom you have reference saying that they are bombs on wheels, but I have never, nor have my staff, characterized the movement of explosives by the industry in that way.

And you may be very understandably sensitive to comparison to the McVeigh situation you cite in your testimony. It is not unreasonable for people who are not specialists in the field to fear that movement of these individual materials separately could result in an accident that produces this kind of tragedy. That Murrow Building explosion certainly captured the public attention and fear and concern.

But that is not the purpose of this hearing. We are not here to ride herd on any individual company, but on the process by which PHMSA conducts its business and its oversight and establishes standards, and the issuance of special permits and then the approval process. The law makes it very clear the Secretary shall publish in the Federal Register a notice that an application for special permit has been filed and give the public an opportunity to inspect the safety analysis and comment on the application. That is not consistently done by PHMSA over all its years.

But there is no such requirement for an approval, and there are vastly more approvals than there are special permits. In what way would the industry be disadvantaged if those approvals also were published in the Federal Register as a means of public notification?

Mr. Santis. I am not sure the industry would be disadvantaged. However, I am not sure there would be a lot to gain by that. An approval is granted when a product meets certain specified criteria. It is a black or white issue; it either meets the standard, it passes the test that the United Nations has set or it doesn't.

Therefore, it is quite different than a special permit, in which the special permit is granted when someone wants to engage in an activity that is slightly different than what the regulations require. The approvals must be given based on what the regulations require.

Mr. Oberstar. But you have no objection to approvals being published in the Federal Register so that they are available to the public?

Mr. Santis. My only concern would be an added responsibility on an already stretched thin workforce.

Mr. Oberstar. That is their job. They can work more efficiently. And we will provide them with additional personnel. We will make sure there is funding and staffing to carry this out. But the public interest should come first.

You also, in your testimony, state ``The Institute of Makers of Explosives is taking steps to add measure in its standards to address the major causes of rollovers.'' What are those steps and what do you mean by adding measure? Explain that statement.

Mr. Santis. We have had a standard for MBTs for a number of years. When it was brought to our attention that PHMSA had concerns over the numbers of rollover incidents, we did not necessarily agree that the trucks are rollover prone and so forth, and thus did not believe that there was an imminent, an emergency situation. But, nonetheless, this industry is committed to safety, and as you have mentioned, there is a continuous vigilance on safety.

So, in order to address those rollovers--and no one wants to have a single rollover--we looked at the causes of those rollovers, and the two causes were primarily driver error and tire issues. These trucks have to travel off-road on very severe conditions, and the tires take much more abuse than a

normal vehicle, so it stands to reason that the tires would be a little bit more of an issue.

So what we did was we pulled together not just the IME members, and this is one of the first times we have done this, we reached out to the entire regulated community and invited them to the table to talk about how we could improve or lower the probability that a rollover may occur. And we worked through that process and had many meetings, developed a number of recommendations relative to driver training, relative to the quality of tires.

That is currently going through our subcommittee, will most likely be reviewed by the Committee that is responsible for this document in October. At that point it will go to our legal affairs committee and then on to our board of governors for final approval.

Mr. Oberstar. I am very much familiar with the stability needed for MBTs; they operate in my district in the iron ore mines; travel on the highway in order to get to the mining location and then on location they have to go on very rugged terrain, and they have to have very careful training of the drivers and structural integrity of the vehicles so they don't roll over on the mine site. And there has to be very careful separation so that, should there be an accident, should these separate materials that have very powerful explosive capabilities, don't mix and accidentally explode.

In the case of mining explosives for both coal mining, iron ore mining, and other hard rock mineral blasting, the most serious thing that has occurred has been a terrible fire, a fire that, in one case, burned for days. Extreme heat; melted aluminum, melted steel. That is very serious.

So I understand what you are talking about. But I think that the agency itself needs to be doing a better job, and the question I would have is what is your view on conduct of safety fitness review by PHMSA of agencies that apply for special permits and approvals. Should they review the incident history? Should they review, as the Inspector General said, the safety history of the agency, its compliance history?

Mr. Santis. Well, I would say that it would stand to reason that PHMSA would examine data generated by the Federal Motor Carrier Safety Administration. My understanding is that that agency is primarily responsible for evaluating the fitness of motor carriers. They accumulate a lot of data and information, and I can't see any reason why that information should not be taken into account.

Mr. Oberstar. Very good. We will make sure that they do that.

Has PHMSA told your members, separate from the show cause letter, that their permits will be revoked? Have you heard any comment from PHMSA that permits will be revoked?

Mr. Santis. Not specifically. I think everyone realizes that a special permit is a privilege and that the specter of revocation always exists and that they must maintain the requirements to continue to hold that special permit. So they certainly know what can happen.

Mr. Oberstar. I raise that point because it has come back to me and to staff from various of your members that this hearing and this review by the Inspector General is going to result in revocations, and there is no such plan underway by the Inspector General, nor is it the purpose of this hearing to do that. But PHMSA does propose modifications to special permits. Do you have any comments? Are you aware of their proposals and do you have comments on them?

Mr. Santis. Yes. You are referring to the show cause letters, I believe?

Mr. Oberstar. Yes.

Mr. Santis. Yes. There are, well, essentially, most of these recommendations I think are based on the recommendations that the Institute brought to PHMSA in March of this year, so the things that we recommended and that are going to go into SLP-23 that are in the show cause letter, we certainly support.

However, we do believe there are a couple of things in here that are not justified on a cost benefit basis. We believe that some technology that is discussed in here doesn't exist. We are not aware, for example, of a fuel cutoff device for these types of vehicles that will function at 45 degrees angle. We are just not aware of it.

So there are some concerns and I think they have been expressed to the agency, and hopefully this process will continue on and we will come up with the meaningful and important additions to these---

Mr. Oberstar. One of the proposals of PHMSA is driver qualification and training, "The special permit grantee must annually audit its program for the qualification and training of the persons who operate the vehicles authorized under these special permits" and lists three reasons or standards to be observed in that qualification and training. Do you have any objection to that?

Mr. Santis. No. No. We train our drivers way beyond what the regulations require in our industry, and---

Mr. Oberstar. Are their records annually or periodically reviewed, that is, apart from the commercial driver license activity, their conduct in driving of their personal vehicle?

Mr. Santis. Yes.

Mr. Oberstar. If they are stopped for a DUI?

Mr. Santis. Yes. Yes, we support that. We support examining a driver's off-duty record in consideration of their fitness to drive an MBT, certainly.

Mr. Oberstar. That is a standard that is used in aviation

and that is important, and I am glad you are in conformity.

On vehicle inspections and tire standards, do you have any objections to those items? You are familiar with them?

Mr. Santis. Only some minor concerns about the tires. I know we have--we believe that a tire should not be in service for more than six years. However, the show cause letter goes a little bit further and says that a tire over six years old should not be on the vehicle. Part of the concern there is that people sometimes buy tires in large quantities and may not put the tire on until several years, and it is stored in a climate controlled condition so that it doesn't deteriorate. So we believe in the six year service life.

Mr. Oberstar. Well, our purpose is not to modify or propose modifications of this show cause order, but it is part of the compliance spirit that I think is important both with PHMSA and within the industry. Do you have any other comments that you would like to make about questions I raised or with Mr. Scovel or the Deputy Secretary?

Mr. Santis. Only that we think that PHMSA must have the information that they need to do their job, and, in my experience, IME has always provided the information and PHMSA has made the decision. Providing that information gives PHMSA power. It especially gives PHMSA power at the United Nations.

And as you may be aware, we participate in the Committee of Experts on the Transport of Dangerous Goods at the United Nations. IME has an NGO status; DOT is the United States' representative. At those meetings in Geneva, the IME and PHMSA come together to represent the United States. We are on the same team at the United Nations, and that requires a good deal of good deal of close interaction, simply because PHMSA does not have the personnel and the information on explosives that the industry has because it is our life's work, and they must regulate an entire cadre of hazardous materials and know a little bit about a lot of things; whereas, we have people that know pretty much everything about one thing.

Mr. Oberstar. That is an interesting observation. The U.S. does this in many other--the International Maritime Organization has both U.S. Government and industry representatives, and the same with ICAO, the International Civil Aviation Organization, there are industry and Government personnel represented. So that is an interesting thought.

As we conclude--I have to be at another Committee activity shortly--I want to just highlight your comment which was in your written testimony and which you delivered in your oral presentation: there has not been sufficient attention paid to the absence of any fatalities or injuries from these accidents. The absence of failure is not the presence, is not necessarily the presence of safety.

That comment would be similar to saying that too much attention was paid in 1984 and 1985 to the reports of near midair events by the FAA when no fatalities resulted from aircraft flying too close to each other in the airspace. We got those reports. I was Chair of the Investigations Oversight Subcommittee at the time and the industry said, oh, pooh pooh, that doesn't mean that the airspace is unsafe.

And then two aircraft collided over Cerritos, California. We had repeatedly raised this issue after we had repeatedly said we need something like a traffic collision avoidance systems and mode sea transponders onboard aircraft. And then when fatality occurred, the agency responded that is a graveyard tombstone mentality that must be banished from the safety arena. And it doesn't help to say these are incidents; these are accidents. These are situations that can and do result in fatalities.

So these sorts of conditions are precursor to impending failure.

Mr. Santis. That is right. We have a word for that in our industry; we call them near misses or lessons learned. And we pay an enormous amount of attention anytime something happens that could lead to a more serious event, and I believe that is how this industry has been able to improve itself to the point where--well, let me go back 100 years, when---

Mr. Oberstar. Black powder and dynamite.

Mr. Santis. Black powder, dynamite. Hundreds of people being killed annually in events. Today, we can count annual fatalities on one hand, and sometimes don't even need any fingers in a year; and that is through the continual vigilance that you talk about. It is through looking at lessons learned. For example, the rollovers. There were no explosions, fires from the rollovers.

But that is not acceptable to us. The rollover indicates that there could be something happen; therefore, we need to address the rollover. Any time there is something that happens in our workplace that is the near miss, the close call, whatever word you use, we pay enormous amount of attention to it and treat it almost as if it was the catastrophe, because we know it could have been; and then we look at it and say what could we do to prevent that near miss from happening. We are ahead of the disaster that way.

Mr. Oberstar. I thank you for those comments and hope that you take this hearing as a call to continued vigilance, and that the agency straightens out, they adopt a compliance attitude and an oversight responsibility. We will continue to review and monitor the actions of the agency and the industry's compliance therewith.

Thank you very much for your testimony.

Mr. Santis. Thank you.

Mr. Oberstar. The hearing is adjourned.

[Whereupon, at 1:22 p.m., the Committee was adjourned.]

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