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October 14, 2014

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

Re: Docket No. PHMSA-2012-0260 (HM-233E)
“Hazardous Materials: Special Permits and Approvals Standard Operating Procedures
and Evaluation Process”

To Whom It May Concern,

The Reusable Industrial Packaging Association (RIPA) is the U.S.-based trade association for businesses involved in the reconditioning, manufacturing, reuse and recycling of industrial containers such as steel drums, plastic drums, and composite IBCs. RIPA’s membership accounts for the vast majority of the U.S. container reconditioning industry, as well as a substantial share of packaging manufacturing firms.

These comments are offered in response to PHMSA’s Notice of Proposed Rulemaking (NPRM) of August 12, 2014 (79 Fed. Reg. 47047): “Hazardous Materials: Special Permits and Approvals Standard Operating Procedures and Evaluation Process”.

RIPA has had particular experience in the area of Approvals for new technology. Several RIPA member have, in recent years, sought an Approval for leakproofness testing of drums using ultrasonic sensing, a proven technology in many other industrial applications. Our experience has informed our views on such matters as whether an application is “complete”, the readiness of an applicant to operate under an Approval (i.e., “fitness”), and the overall process of engagement with the agency on such a matter.

RIPA supports PHMSA’s proposal to limit the historical period over which the agency will review an applicant’s performance history. The proposed limit of 4 years dating back from the date of application should be practical and more than sufficient to ensure safety.

RIPA supports PHMSA's stated intention to remove "low level" incident data from fitness determinations, focusing rather on high level incidents involving death, injury or other "high consequence" cases (79 Fed. Reg. 47051). RIPA does not believe an isolated incident or a reported packaging leak, with no other attendant consequences, warrants a rejection of fitness.

PHMSA's proposal includes an initial Automated/Technical Review of an application, comparing an applicant's performance history to agency inspection data. If, in this review, certain "triggers" are found (such as death or injury), a Safety Profile Review is activated. If, in this review, certain other triggers are found (such as injury attributable to the packaging), an On-Site Review is required. After the on-site review, personnel from the Field Operations Division (FOD) issues a "fitness memorandum" with a recommendation of "fit or unfit". In most cases, PHMSA's Approvals and Permits Division would concur with the FOD recommendation and accept or deny an application accordingly.

RIPA appreciates the effort to clarify which findings lead to an on-site review; however, the proposed criteria are still somewhat vague and broadly defined. For instance, "insufficient corrective actions" taken following two or more prior enforcement cases is a standard so broad as to be nearly meaningless. If corrective actions were insufficient, isn't the applicant still out of compliance? Also, who makes a determination of "insufficient corrective action"? Is there a document trail to follow in making such a determination? What if those cases were several years in the past, and were administered by wholly different personnel? Does the proposed 4-year historic limit apply here?

RIPA believes that "fitness" indeed should be limited, as proposed, to a time-limited horizon (e.g., 4 years). Additionally, RIPA believes that on-site reviews should be limited to the most serious instances of safety concerns. However, the criteria for "fit or unfit" remain somewhat malleable. An FOD agent may have reasons to make recommendations that seem far removed from the narrow special permit or approval being sought.

RIPA maintains that an on-site review of an applicant for an approval need not be a "curb-to-curb" inspection, but rather should be a limited review of the operation or packaging in question. Inspectors should take other action only on compliance issues "in plain sight". In our experience, this threshold provides equivalency in terms of public safety.

Additionally, PHMSA should address how its proposed modifications to the approval procedures will affect the increasing backlog of approval applications. According to data recently supplied by the agency, as of October 6, 2014, there were 783 approval applications that had been in process for more than 120 days without a decision. As of July 7, 2014, there were only 570 approval applications older than 120 days. In just three months, the number of applications beyond the 120-day threshold has grown over 37 percent. RIPA is concerned that the additional levels of scrutiny for approval applicants will add to this regulatory backlog.

Finally, in prior official comments to the agency (February 29, 2012; Paul W. Rankin), RIPA asked how an applicant can demonstrate its readiness to meet the terms of an approval if, in fact, the large investment required cannot be made without some certainty of being approved. PHMSA should articulate a process to encourage the adoption of new and better technologies without the huge uncertainty that the application process currently presents. Without reverting to a “party status” regimen, perhaps an “approval technical template” could be offered as a guideline for applicants seeking the same (or very similar) approval. Such a template might also help applicants understand better the threshold for a “complete” application. In any case, RIPA believes that PHMSA’s plans to codify into the HMR certain Approvals with wide applicability and records of safety could also go a long way in disseminating new technologies and safe practices.

RIPA appreciates any efforts by PHMSA to avoid linking a rejection or denial of an application to a single metric or a single occurrence in an applicant’s history. RIPA appreciates PHMSA’s every expressed intention to work *with* an applicant to navigate the application process.

RIPA appreciates the opportunity to comment on these issues. We look forward to working with the agency on these matters in the future.

Sincerely,



C.L. Pettit
Director, Regulatory and Technical Affairs

cc: R. Buckner, Chair
P. Rankin, President
R. Schweitzer, Counsel