

Applications for Special Permits Submitted in the Public Interest/Hazardous Materials: Pipeline and Hazardous Materials Safety Administration Issues Guidance



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The Pipeline and Hazardous Materials Safety Administration (“PHMSA”) published a Notice on March 12th intended to provide guidance on how it evaluates and determines whether a Special Permit can be considered consistent within the public interest.

See PHMSA-2022-0127-0001.

The Notice outlines criteria PHMSA uses to evaluate Special Permit applications on the basis of public interest.

The Hazardous Materials Regulations (“HMR”) promulgated pursuant to the Federal Hazardous Materials Transportation Act are described by PHMSA as having:

...many performance-oriented regulations that provide the regulated community some flexibility in meeting safety requirements.

However, PHMSA recognizes in its March 12th Notice that not every transportation system situation can be anticipated and addressed by the current regulations. It acknowledges that the hazardous waste community:

...develops new materials, technologies, and innovative ways to move hazardous materials safely.

As a result, PHMSA describes the use of Special Permits to authorize variances from the HMR. Such Permits can allow alternative requirements to those found in the HMR.

PHMSA issues Special Permits under regulations found at 49 CFR Part 107, SubPart B (Hazardous Materials Program Procedures). The Approvals and Permits Branch is the section of the PHMSA that issues Special Permits.

Special Permits are required to achieve a level of safety that is at least equal to that required by the regulations from which the Permit is sought. In the alternative, if a required safety level does not exist, the Special Permit must be consistent with the public interest.

PHMSA states in the March 12th Notice that stakeholders have enquired about the criteria for evaluating Special Permits consistent with the public interest. The guidance provided by the Notice is intended to

outline such criteria. In addition, it provides examples of previously approved applications for a Special Permit in the public interest.

By way of summary, PHMSA notes that it considers a Special Permit consistent with the public interest if it provided a positive net benefit to the welfare or wellbeing of the public. It provides as an example:

...while the transport of an unapproved explosive substance is forbidden under the HMR, it would be in the public interest to allow for a one-time transport of the substance to remove it from a location that creates higher risk for the public – such as removal of a seized explosive from a port/provided the risk to the public can be minimized through operational controls.

Another example provided is PHMSA's allowance of specialized packaging to transport waste disposal during the Ebola outbreak.

Information required when requesting a Special Permit application is stated to include:

- Information describing all relevant shipping and incident experience of which the applicant is aware that relates to the application.
- A statement identifying any increased risk to safety or property that may result if the special permit is granted, and a description of the measures to be taken to address that risk.
- Either one of the following:
- Substantiation, with applicable analyses, data, or test results that the proposed alternative will achieve a level of safety that is at least equal to that required by the regulation from which the special permit is sought; or
- If the regulations do not establish a level of safety, an analysis that identifies each hazard, potential failure mode, and the probability of its occurrence, and how the risks associated with each hazard and failure mode are controlled by the provisions of the prospective permit.

The March 12th Notice also describes how an applicant seeking a Special Permit consistent with public interest must show how safety risk will be minimized. The role of operational controls in addressing this issue is described.

Finally, the Notice also describes the importance of submitting detailed supporting documentation and considerations in the length of time that a Special Permit will remain in place.

A copy of the March 12th Notice can be downloaded [here](#).