

PLAN FOR CONVERTING APPROVALS INTO REGULATIONS OF GENERAL APPLICABILITY

Background

The Hazardous Materials Regulations (HMR) generally are performance-oriented regulations, which provides the regulated community with a certain amount of flexibility in meeting safety requirements. The HMR are promulgated under the Federal Hazardous Materials Transportation Law (Federal hazmat law, 49 U.S.C. 5101 et seq.).

In order to achieve an acceptable level of safety and to provide oversight to various functions under the HMR, certain approvals must be obtained. Requirements identifying conditions for which approvals are necessary are incorporated into the HMR through various rulemaking actions. As defined in 49 CFR 171.8, approval means “a written authorization, including a competent authority approval, from the Associate Administrator or other designated Department official, to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter (49 CFR parts 171 through 180)”.

Conditions or requirements identifying when Competent Authority Approvals are necessary or authorized are incorporated in international regulations issued by International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO), which have been incorporated by reference into the HMR. As defined in 49 CFR 171.8, competent authority means “a national agency responsible under its national law for the control or regulation of a particular aspect of the transportation hazardous materials (dangerous goods). The term Appropriate Authority, as used in the ICAO Technical Instructions (Incorporated by Reference, see § 171.7), has the same meaning as Competent Authority. For purposes of this subchapter, the Associate Administrator is the Competent Authority for the United States”.

Types of Approvals

PHMSA issues several types of approvals, in response to applications from many different sectors of the hazardous materials industry. Approvals authorize a range of activities, such as the packaging and shipping of certain radioactive materials; the testing of certain types of cylinders; the certifying that agencies are qualified to perform certain functions, inspections, or the classification of materials; and the transporting of lithium batteries. It is important to note that the agency only grants approvals for activities allowed (if approved) under specific conditions identified in the HMR. Applicants seeking to engage in an activity that is not permitted by the HMR must apply to PHMSA for a special permit.

Approvals granted by PHMSA are authorized by different parts of Title 49 of the CFR. Table 1 displays the different approvals granted by PHMSA, and also includes the authorizing sections of the CFR.

Table 1: Approvals Issued by PHMSA

Approval Type	CFR Citation
M numbers for identification of manufacturers	49 CFR 178.3
RIN for visual requalifiers	49 CFR 180.209
Explosives	49 CFR 173.56
Fireworks	49 CFR 173.56
Chemical oxygen generators	49 CFR 173.168 (a)
Self-reactive materials and organic materials	49 CFR 173.124; CFR 173.128
Domestic cylinder requalifiers	49 CFR 107.805
Domestic cylinder repair/rebuild companies	49 CFR 107.805
Foreign cylinder requalifiers	49 CFR 107.805
Foreign cylinder repair/ rebuild companies	49 CFR 107.805
Foreign cylinder manufacturers with Independent Inspection Agencies (IIAs)	49 CFR 107.807
United Nations (UN)/ International Organization for Standardization (ISO) cylinder manufacturers	49 CFR 178.70
Designated approval agencies	49 CFR 107.401
Independent inspection agencies	49 CFR 107.803
Package certification agencies	49 CFR 107.401
Explosive examination agencies	49 CFR 173.56
Lighter testing agencies	49 CFR 173.308
International IMDG/ICAO competent authority approval	49 CFR 107.705
General approval	49 CFR 107.705
Lithium batteries	49 CFR 173.185
Fuel cells	49 CFR 173.230
Radioactive materials and packaging	49 CFR 173.471; 49 CFR 173.472; 49 CFR 173.473
Radioactive material classifications	49 CFR 173.476

For operational purposes, the approvals identified in Table 1 are generally grouped into six categories.

Approval Category	Approval Types
Registration	• M numbers for identification of packaging manufacturers
	• RIN for visual requalifiers
Classification	• Explosives
	• Fireworks
	• Chemical oxygen generators
	• Self-reactive materials and organic peroxides
Cylinders	• Domestic cylinder requalifiers
	• Domestic cylinder repair / rebuild companies
	• Foreign cylinder requalifiers
	• Foreign cylinder repair/rebuild companies
	• Foreign cylinder manufacturers with Independent Inspection Agencies (IIAs)
	• United Nations (UN)/International Organization for Standardization (ISO) cylinder manufacturers
Certification Agencies	• Designated approval agencies
	• Independent inspection agencies
	• Package certification agencies
	• Explosive examination agencies
	• Lighter testing agencies
General Approvals	• International IMDG/ICAO competent authority approval
	• General approval
	• Lithium batteries
	• Fuel cells
Radioactive Materials	• Radioactive material package designs
	• Radioactive material classifications

Conversion of Approvals into Regulations of General Applicability

Based on review of the above tables and review of the various types of approvals issued by PHMSA, as identified in the table, several approvals are, in effect, registration type approvals. These include M numbers and visual cylinder requalifiers. The HMR specify that applicants obtain these types of approvals prior to the conduct of business. Based on the type of approval issued, no additional regulatory incorporation is necessary.

PHMSA issues classification approvals for commercial explosives, governmental explosives, fireworks, chemical oxygen generators, self-reactive materials, and organic peroxides. Explosive approvals are based on an evaluation by an approved entity, subsequent review by PHMSA, and the issuance of a classification approval. All fireworks must be in compliance with, and meet the terms and conditions of, the American Pyrotechnic Association Standard 87-1 which is incorporated by reference as part of the HMR, or be submitted to a DOT-approved laboratory for examination and classification. Military explosives are classed by a component of the DOD,

appropriate documentation is submitted to PHMSA, and an appropriate classification document is issued to the government agency. PHMSA also issues approvals for alternative types of stabilization of organic peroxides and for oxygen generators.

Both registration and classification approvals are conditions of performing a specific function. For example, an explosive may not be offered for transportation unless approved by PHMSA. Since these approvals are conditions of doing business, no additional regulatory inclusions are necessary.

Other types of approvals issued by PHMSA are inspection or audit based approvals. These approvals are issued based on an on-site facility inspection by PHMSA or a third-party inspection agency, operating under authority granted by PHMSA. These on-site audits are conducted to ensure that an applicant has the processes, equipment, personnel and training necessary to perform the function for which approval is sought. These approvals include those issued to Independent Inspection Agencies, Designated Agents, cylinder manufacture, repair, and requalification facilities, third party test labs, lighter test labs, and explosive test labs. Requirements for obtaining these approvals are specified in the HMR. Since these approvals are on specifically identified functions and on-site inspections, no additional regulatory incorporation is necessary.

It is important to note that not all approvals are appropriate for incorporation into regulations of general applicability. Approvals that address narrow and specialized transportation situations, operations or limited time movements, for example, may not be likely candidates for adoption into the HMR. There may also be circumstances for which it is preferable to provide more control and oversight over the activities being allowed than PHMSA would have if such authority were provided in the HMR and generally available.

This plan establishes a systematic process for reviewing outstanding approvals identified above and incorporating them, where appropriate, into the HMR. Converting approvals into regulations of general applicability reduces paperwork burdens and facilitates commerce while maintaining an acceptable level of safety. Additionally, adoption of approvals as rules of general applicability provides wider access to the benefits and regulatory flexibility of the provisions specified in the approval.

Under this plan, teams of specialists from the PHMSA's Standards and Rulemaking Division (PHH-10), Engineering and Research Division (PHH-20), and Approvals and Permits (PHH-30) will review all active approvals and identify those that should be incorporated into the HMR. The plan contemplates the initiation of at least one rulemaking project each year to propose the conversion of a group or category of special permits into regulations of general applicability.

The reviews will proceed in the following order:

- (1) Approvals issued to members of associations;
- (2) Approvals in effect for more than five years;
- (3) Approvals issued under IMO/ICAO standards;
- (4) All remaining approvals not included in categories 1-3.

Staffing

For each project, PHH-10 will assign a manager to oversee/lead the project, a senior regulations specialist as team leader, and at least one additional staff member. PHH-20 will assign at least one subject matter expert to each project. PHH-30 will assign at least one special permits specialist to each project. PHMSA's Office of Chief Counsel will assign at least one attorney-advisor to each project. As necessary, each project will also include staff from the Federal Aviation Administration, Federal Railroad Administration, Federal Motor Carrier Safety Administration and the United States Coast Guard. Additional staffing will be determined as projects progress.

Approvals Issued to Members of Associations

PHMSA previously issued specific approvals to members of an association when many of its members are small businesses with a common interest in obtaining authority to perform a specific transportation activity and there is no large business entity to take the lead in seeking such authority and the association has the resources to gather the necessary information and perform any necessary research. It should be noted that on May 4, 2010, PHMSA issued a policy stating that approvals may only be issued to individual companies or businesses entities.

Approvals previously issued to the members of an association may be one of the most suitable types for adoption into the HMR. Such approvals generally have broad applicability; moreover, many of them have been in effect for a number of years and have demonstrated safety records. Therefore, conversion of such approvals to regulations of general applicability is the first priority tasking for this initiative. Currently, there are 12 active approvals that were granted to members of associations.

Task	Due Date	Status
Identify all Approvals issued to members of associations	July 2, 2010	Complete ¹
Prioritize approvals for incorporation into the HMR*	December 3, 2010	Complete
Initiate rulemaking to incorporate identified approvals	August 4, 2011	

* Note that based on this assessment, those approvals not incorporated into the HMR may be issued to individual members, or modified or rescinded as necessary.

¹ PHMSA has identified the approvals issued to members of associations. It is possible that as PHMSA continues to process and evaluate approvals additional approvals held by associations may be identified. If so, they will be added to the list and prioritized.

“Old” Approvals

A number of ‘old’ approvals may be in existence that were not issued with expiration dates. These longstanding approvals should be reviewed to determine if they should be maintained and reissued with expiration dates, converted into regulations of general applicability, or terminated.

On August 20, 2010, PHMSA ceased to issue expiration dates for classification approvals. PHMSA retains the authority to issue expiration dates for specific classification approvals on a case-by-case basis.

Other new approvals are issued for a period of not more than five years. After five years, an approval holder may apply for a renewal of the approval. There is no statutory or regulatory limitation on the number of times an approval may be renewed. Thus, there are a number of active approvals that have been in effect for five or more years.

Certain long-standing approvals may be good candidates for incorporation into the HMR. The team will identify and review all approvals that have been in effect for more than years to identify those that should be incorporated into the HMR. The team will then group the approvals by subject area and will establish a priority ranking for incorporating them into the HMR, considering the nature of the authorized operations and the length of time the approvals have been in effect.

Task	Due Date	Status
Identify all approvals that have been in effect for more than 5 years	December 1, 2010	Complete
Identify approvals that could be incorporated into the HMR	April 1, 2011	
Prioritize identified approvals for incorporation into the HMR	June 1, 2011	
Initiate rulemaking to incorporate identified approvals into the HMR. (This action may require initiation of two or more targeted rulemakings.)	NPRM – December 1, 2011 Final Rule – July 1, 2012	

Approvals issued under IMO/ICAO standards

As previously described, the Associate Administrator for Hazardous Materials Safety is designated the Competent Authority of the United States. The ICAO Technical Instructions and the IMO Dangerous Goods Code are internationally adopted regulations that govern the shipment and transportation of hazardous materials by air and vessel. These regulations contain provisions

that require the Competent Authority to approve specific operations or authorize waivers of requirements in those regulations. Accordingly, PHMSA issues Competent Authority Approvals (CAA) as required or authorized. In addition, even though the HMR are domestic regulations promulgated by the Competent Authority of the United States, a written CAA may be required to facilitate international commerce.

Task	Due Date	Status
Identify active IMO/ICAO approvals	July 1, 2011	Complete
Identify approvals that could be incorporated into the HMR	December 1, 2011	
Identify approvals that could be incorporated into IMO/ICAO	December 1, 2011	
Prioritize identified approvals for incorporation into the HMR	March 1, 2012	
Initiate rulemaking to incorporate identified approvals into the HMR. (This action may require initiation of two or more targeted rulemakings)	May 1, 2012	
Begin plans for presentation of proposals for IMO/ ICAO incorporation of identified approvals	May 1, 2012	

Ongoing Approvals Reviews

Once the comprehensive reviews outlined above are completed, PHMSA will continue to conduct annual reviews of active approvals to identify those that should be incorporated into the HMR. PHMSA expects to initiate at least one rulemaking each year to propose to adopt the provisions of identified approvals as regulations of general applicability.

Task	Due Date	Status
Review approvals not covered by previous reviews and group by type or category	April 1, 2013	
Identify approvals that should be incorporated into the HMR	July 1, 2013	
Prioritize identified approvals for incorporation into the HMR	December 1, 2013	

Task	Due Date	Status
Initiate rulemaking to incorporate identified approvals into HMR (This may necessitate two or more targeted rulemakings)	NPRM – 7/1/2014 Final Rule – 1/1/2015	