TESTIMONY
Before

The United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Railroads, Pipelines and Hazardous Materials

Hearing on

"Examining Issues for Hazardous Materials Reauthorization"

Presented By

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Chairman Denham, Ranking Member Brown, and other members of the Subcommittee, I sincerely appreciate the opportunity to appear before you this afternoon to discuss issues regarding Hazardous Materials Reauthorization, an issue of vital importance to the U.S. fireworks industry.

I am Stephen Pelkey, President and CEO of Atlas Advanced Pyrotechnics, Inc., headquartered in Jaffrey, New Hampshire. I also currently serve on the Board of Directors of the American Pyrotechnics Association (APA)[1] and as the Chairman of APA's Transportation Committee.

Atlas Advanced Pyrotechnics was founded in 1950 and is a prominent professional fireworks display company producing professional fireworks displays throughout New England, including Boston's 4th of July and First Night celebrations, and for 6 years from 1997-2002, we were contracted for the DC Capitol Fourth Display. We also produce 15 fireworks displays internationally. Most recently we received the Gold Jupiter Award during the Montreal International Fireworks Competition for best pyromusical performance among eight (8) countries represented, which is one of the highest honors for a U.S. display company. Through our matching budget program, Atlas in also engaged in producing numerous displays for charitable programs in New England such as the Special Olympics, Make A Wish Foundation, Making Strides Against Breast Cancer, United Way, and the Cystic Fibrosis Ski Challenge.

While we are primarily engaged in professional fireworks displays, Atlas also operates six (6) consumer fireworks retail stores located throughout New Hampshire and Maine.

Atlas employs 24 full-time workers. During our busy Fourth of July season, our employment rolls swell to approximately 750 total workers. Atlas produces 800 fireworks displays annually, 75% of which occur over a two week period surrounding the Independence Day holiday. Each fireworks display must be transported by a licensed and trained pyrotechnican who holds a valid Commercial Driver's License with a Hazardous Materials Endorsement and our drivers must operate under a valid Hazardous Materials Safety Permit (HMSP) issued to our company. Our display fireworks are classified, regulated and transported as Division 1.1 or 1.3 explosives and are subject to regulations of the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) and the Federal Motor Carrier Safety Administration (FMCSA) when transported in intrastate and interstate commerce. As such, we are a very interested stakeholder in today's hearing.

I am here today on behalf of the APA. APA also participates in the Interested Parties for Hazardous Materials Transportation (Interested Parties) coalition.[2] The Interested Parties have provided detailed recommendations to the Subcommittee for consideration of any new hazmat transportation legislation. While we endorse all these recommendations, I have been tasked to address the coalition's and APA's Transportation and Public Display Committee's number one priority. This priority concerns the FMCSA's Hazardous Materials Safety Permit Program (HMSP) and the on-going delays in reforming this flawed program. Given the enviable safety record of those subject to this permit program, FMCSA's lack of

[1] The APA is the principal safety and trade association for the fireworks industry representing manufacturers, importers, distributors, retailers, suppliers and professional display companies. The APA has over 240 member companies. Along with their subsidiaries, APA member companies are responsible for approximately 90% of the fireworks manufactured, imported, distributed and displayed in the U.S.

[2] The Interested Parties represent industries and public safety agencies with operations in every state, have combined business revenues in excess of $1 trillion, employ millions of workers, and have an enviable record of hazardous materials transportation safety and security. The Interested Parties exist to share information, to identify issues and to advocate for policies relating to the safe, secure and efficient transportation of hazardous materials.

attention to effect promised reforms is inexcusable. For many HMSP holders, loss of a permit is an "out-of-business" edict.

Background

Congress established the HMSP in 1990[3], although FMCSA did not implement the program until 2005.[4] In the preamble to the rule, FMCSA stated that the program would reduce crashes. In fact, the safety record of HMSP holders, while outstanding, is better during the nine years preceding the program than in the nine years since.

The HMSP Program Is Flawed

The HMSP program has been seriously flawed since inception.[5] Initially, FMCSA proposed that carriers with a satisfactory safety rating could get a permit by simply asking. The rationale was that a carrier's safety rating was the agency's fitness standard. To accommodate carriers with no rating, the agency proposed using a fitness metric based on out-of-service (OOS) violations and crash rate. This policy was repeated in the preamble to the final rule. However, the Agency changed the regulatory text to say the permit holders had to have a satisfactory rating and not exceed the OOS and crash rate thresholds. The Agency's rule provided a means for holders to appeal or seek waivers of determinations to revoke or suspend permits, but it provided no such due process if, on the day the holder's permit expired, it was below the OOS thresholds necessary to qualify for a permit.

Because of the safety record of those in the program, FMCSA cannot justify suspending or revoking permits of those holders who are "underwater" based on OOS and crash rates. In the entire course of the program, the agency has issued only six suspensions, and seven revocations. No HMSP holder has been declared an imminent hazard. So, the Agency's inaction to address compliance issues and work with carriers to help them recover when they are underwater results in automatic denials on the date their permits expire. Fireworks companies, like many of the other companies required to hold permits, are specialized carriers. If a fireworks display company loses its HMSP, it cannot haul something else while it waits to "age out" disqualifications. Fireworks are what the company does. It is effectively "out of business," unless it can find an alternate means to deliver those displays.

At the present time, to retain a HMSP, a carrier must maintain OOS inspection rates for vehicle, driver, and Hazardous Materials violations below a set percentile. While permit holders are judged against all carriers under the vehicle and driver rates, they are judged against themselves when determining the hazmat OOS rate. The result is that the hazmat OOS rate, which is based on violations that for the most part are not crash causal, are the most troubling and difficult to maintain compliance. In order to stay above the FMCSA designated hazmat OOS threshold, a carrier must have 14 "clean" hazmat inspections to overcome the effects of one bad inspection. The system is not set up to provide and record clean inspections. Unlike, large transportation companies that operate year round and are inspected frequently, display fireworks transporters operate primarily on a seasonal and periodic peak time basis, typically driving much shorter distances and many fewer miles as compared to long-haul freight transporters. In order to meet local and state regulations as well as meet their customer's needs,

[3] Senate Rept. 101-449. Hazardous Materials Transportation and Uniform Safety Act of 1990, August 30, 1990.
[4] 69 FR 39350, June 30, 2004.
[5] Id.

fireworks display transporters predominately operate over weekends, during holiday periods and at odd hours when inspection stations are not open.

While the permit is valid for two years, OOS rates are calculated only with data from the last 12 months of the permit cycle. During this time, a permit holder has no control over when it may get an inspection that results in an OOS violation. The closer a carrier gets to its permit expiration date, the greater the uncertainty for the carrier. The arbitrary outcome is that on any given date, one permit holder can be denied an HMSP while another holder with the same OOS rate but a later permit expiration date, is able to continue to operate.

Atlas's Experience

Atlas has first-hand experience with this extremely flawed permit program as we unfortunately lost our permit in 2011 as a result of receiving several erroneous OOS citations that put our company above the HMSP disqualification threshold. In order for us to survive, and deliver and execute our contracted fireworks displays, we legally transported less than 55 lbs. of fireworks – the threshold which triggers the application of the HMSP. For many displays we shipped products in separate trucks, at times up to 8 to 10 separate trucks on the road moving less than 55 lbs. in each vehicle to each of our contracted display sites for the better part of an entire year, while we "aged out" the necessary 12 month period to obtain a renewal of our permit. As you can imagine, placing additional trucks on the road to deliver Division 1 explosives to a display site, rather than transporting all of these products in one vehicle, does not enhance public safety nor does it satisfy the spirit of safety intended with the HMSP program. Moreover, it placed an undue burden on our company in terms of both time and money as we needed to secure additional rental trucks and CDL licensed drivers with Hazardous Materials Endorsement (HME) to ensure that our drivers could operate in compliance within the Hours of Service (HOS) requirements.

With regard to the citations that resulted in the loss of our HMSP, we should have been cited for having an improper UN identification number on the shipping paper, rather than the charge of "No Shipping Papers Offered." According to the inspection and enforcement criteria issued by the Commercial Vehicle Safety Alliance (CVSA), an incorrect UN Number does not constitute an out-of-service condition.[6] We appealed the erroneous citation in FMCSA's DataQs , however, the State authority issuing the citation, entered the citation as "No Shipping Papers Offered," and FMCSA chose to side with the State authority, rather than providing us with an opportunity to appropriately appeal the citation directly to FMCSA. Without the opportunity for an additional level of review, Atlas was also not afforded the opportunity to address the fact that all of the citations issued were after shipments had been delivered to their final destination, and most were loaded and ready for their respective community displays. While we understand limited Agency resources necessitate the delegation of safety regulation enforcement to the states, we believe it is not appropriate that the Agency has delegated its ultimate authority to determine whether a HMSP holder's permit should be renewed or denied.

APA's Transportation Committee recently completed a review of the available data on APA's 66 HMSP carriers to determine how many companies may be in jeopardy of losing their permit prior to the busy Independence Day holiday. Based upon a review of FMCSA's Safety Management System (SMS) data, three (3) carriers are currently at the threshold where they may lose their HMSP. While only three (3)

[6] Commercial Vehicle Safety Alliance, North American Standard Out-of-Service Criteria, Revised April 1, 2011, Part III, Hazardous Materials Out-of-Service Criteria, Pg. 59.

carriers may sound like an insignificant number, it is an in or out of business proposition and illustrates the unfairness of a system based on the arbitrary date that your permit expires.

Need for Additional Level of Review

The APA, along with several other trade associations representing companies subject to the HMSP program, has been advocating for the need for an administrative process that would allow the FMCSA to intervene outside of DataQs.[7] We will call this an "additional level of safety review" to determine a carrier's fitness prior to the denial of a HMSP. What happened to Atlas, illustrates the great need for HMSP holders to be afforded a meaningful, clear and understandable opportunity for an additional level of review before a permit can be automatically denied for OOS disqualifications. Learning to challenge a violation in the DataQs is not a simple task, especially if a company does not have a full-time person specifically trained on the data system and focused solely on that job function. Had my company been afforded an additional level of review, I have no doubt whatsoever, that our HMSP renewal would not have been denied.

MAP-21 Mandated HMSP Assessment

In 2011, FMCSA agreed that the program was flawed and accepted a petition for rulemaking submitted by APA and other affected stakeholders to reform the HMSP. However, we are disappointed that the Agency has not made reform of this program a priority. Rather, FMCSA said it would not move forward until its CSA safety fitness rule was finalized. This rule has not even been proposed and it is unknown when it will be finalized. When Congress enacted MAP-21,[8] it mandated the Agency to report on actions that FMCSA could take to improve the program, including whether to provide carriers opportunities for an additional level of fitness review prior to the denial of a HMSP.[9] The APA participated in the assessment process as an invited stakeholder and shared our industry's concerns and recommendations for improving the program.

The assessment report to Congress was due on October 1, 2013. The report was just issued in March 2014, over five months late. In that report, the assessment showed that HMSP holders are among the safest motor carriers on the nation's highways as measured by crash and OOS rates. The assessment also illustrated that the HMSP carriers are being adversely impacted by flaws inherent in the HMSP program because of the timing and methodology of the HMSP renewal cycle.

In the assessment, FMCSA recognized the need to provide a means for corrective actions and/or a second level of review for carriers with little roadside data and high OOS or crash rates. However, the Agency does not establish a timeframe to address this ongoing problem which is of critical importance to the 1,497 carriers subject to HMSP program. HMSP holders need some level of assurance that they will not simply lose their permit, which their livelihood depends upon, due to this seriously flawed permit program.

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[7] The DataQ system is flawed. Among the criticisms of the program are that it required the officer issuing OOS citation to admit error; it asks this official to be proficient in relatively complex hazmat regulations; and the process only is available for appeals, not waivers.

[8] Moving Ahead for Progress in the 21st Century Act (P.L. 112-114)

[9] Id. Section 33014

I am pleased to see a number of recommendations outlined in the assessment; however, several of the recommendations will require rulemaking, which is a lengthy process. In short, HMSP holders still have no prospect of immediate relief. Every day that the Agency continues to enforce this program is one day too many. Providing HMSP holders an opportunity for an additional level of safety review before their permit is denied must be a priority.

Conclusion

We are grateful to members of this Subcommittee who have joined in efforts to reform this program. The effort has been bipartisan – Chairman Shuster, Rep. Rahall, and Rep. Graves, HMSP holders thank you. We regret that reasonable appeals have fallen on deaf ears. We look forward to a new legislative opportunity to require reforms by a date certain.

Atlas is committed to ensuring safety in the handling, transportation, and execution of our fireworks displays. We actively promote safety to our customers and the millions of Americans across the country that gather to celebrate our American tradition of lighting up the skies with fireworks as a symbol of our pride and patriotism on Independence Day.

Atlas supports the fireworks industry by actively participating in groups like the American Pyrotechnics Association, the American Fireworks Standards Laboratory, and the National Council on Fireworks Safety. We work cooperatively with state, local and federal regulatory officials as well as fire and code enforcement officials to ensure responsible regulation of fireworks activities.

Atlas, and members of the APA, will continue to provide safe and spectacular fireworks displays to delight and thrill America's families across our great nation. Atlas will strive to retain our HMSP and we hope that the several fireworks display companies, who currently are in jeopardy of losing their permit, will overcome that random fate, so collectively we are not at risk of disappointing the crowds of spectators, or our customers and sponsors, by finding ourselves in a position to cancel those contracted celebrations planned for America's birthday.

Thank you for this opportunity to testify. I would be happy to answer any questions that you may have.