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United States Senate

WASHINGTON, DC 20510-3603

COMMITTEES:
ARMED SERVICES
ENVIRONMENT AND PUBLIC WORKS

January 9, 2008

The Honorable Mary E. Peters
Secretary of Transportation
United States Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20599

Dear Secretary Peters:

Recently, I had the opportunity to visit with Department of Environmental Quality Emergency Response Coordinator for Oklahoma. We discussed the Notice of Rulemaking from the Pipeline Hazardous Materials Safety Administration (PHMSA) for information collection activities directed toward Hazardous Materials Emergency Planning (HMEP) grants authorized under the Hazardous Materials Transportation Act. As a result of my visit, I understand that the State Emergency Response Commissions, Local Emergency Planning Commissions and the National Association of SARA Title Three Program Officials are concerned about the increased burden this information collection activity will place on local volunteers around the country. I share these concerns and would like further information from PHMSA to clarify the purpose of this additional activity.

Certainly, there should be accountability for spending of federal grant funds. I understand that the HMEP program produces an annual report which includes the number of responders trained, the training courses offered, the number of LEPCs assisted, the number of exercises completed and the number of local emergency plans updated over the previous grant cycle. In addition, an audit of the HMEP program was conducted by GAO - GAO/RCED-00-190 - and they found a competent and productive program that was meeting its statutory objectives. It would appear that the information currently collected by PHMSA is adequate to account for the program and communicate its effectiveness.

The information collection notice proposes to impose a very detailed assessment of expenditures of HMEP funds. PHMSA has indicated that each grantee, state or tribe, will spend approximately 80 hours answering the proposed questions. Since the information must come from LEPCs, it is estimated that local volunteers will need to spend almost a week answering questions about HMEP

grant funds. Although these funds are small, $2,000 per LEPC in Oklahoma, it is the only funding available for LEPCs under the unfunded SARA Title III federal mandate. It seems unlikely that volunteers will be able to spend 40 additional hours in detailed accounting which duplicates information currently collected in the grant application and performance reports. Similarly, the proposed questions duplicate information already provided concerning training both deliver of training and curriculum development.

The HMEP program has been effective in assisting LEPCs to function in the preparedness continuum of planning, exercising and training. There appears to be well documented accountability for the HMEP grant funds. As there has been no legislative mandate to require a more detailed accounting of grant funds, the proposed information activity seems to unnecessarily burden local volunteer planners and first responders.

What additional benefit to achieving the objective of enhancing community preparedness will come from the proposed information collection effort?

I would very much appreciate an explanation and rationale for this increased information activity collection activity including how PHMSA will use the additional information to enhance the HMEP program.

Thank you for your assistance with this matter. Should you require additional information, please do not hesitate to contact Ruth Van Mark on my staff at 202 224-8204.

Sincerely,

James M. Inhofe
United States Senator

JMI/rvm

PHMSA-2007-27181-0047[1]

Comment Info: ==========

General Comment:The Pueblo Local Emergency Planning Committee agrees with Mr. Gablehouse.

Comments to DOT PHMSA Information Collection Activity Notice
Docket PHMSA-2007-27181

Electronically submitted

Dear OMB:

Thank you for this opportunity to comment on what we believe to be a very important notice.

We are the Local Emergency Planning Committee for Jefferson County, Colorado under the Emergency Planning and Community Right-to-Know Act. In addition we are the Citizen Corp Council for Jefferson County. In these roles we work with local emergency planning committees, first response organizations, facilities, and the public regarding emergency planning, response and community right-to-know. We work extensively with local emergency planning committees both in Colorado and throughout EPA Region VIII.

LEPCs are totally dependant on HMEP funding distributed through the states to support our planning, training and exercise activities. The dramatic increase in reporting burdens proposed by the current notice will fall on organizations just like us as the users of the funding. These burdens are not trivial. We are a totally volunteer group. Our sister organizations are also volunteer groups. Devoting time and energy to reports detracts from their other very important missions. Such an increase in burden will make it harder to justify seeking HMEP money.

We have reviewed the comment letters submitted by NASTTPO and the Colorado Emergency Planning Commission and are in agreement with the points they make.

The proposed reporting burdens are focused inappropriately. There is a cycle to community preparedness. That cycle is planning-training-exercises. You can't do one without the others.

You cannot judge the value of any one piece without understanding how LEPCs use money for the entire cycle. PHMSA has focused on measuring attributes that, while easy to count, fail to actually address the important aspects of how local agencies use HMEP monies. Unless you seek reporting on the broader elements of the continuum, you cannot possibly measure whether community preparedness has improved.

As NASTTPO has stated: "Training is pointless without a plan to train against and exercises to measure whether training has covered necessary skills. Planning is pointless without exercises to test the plan and the level of training. Exercises are pointless unless they test planning and skills learned through training."

PHMSA should recognize that increased burdens need to have point. In this case collecting information that does not truly measure community preparedness is foolish and inappropriate.

PHMSA-2007-27181-0046[1]

Comment Info: ==========

General Comment:As coordinator for the Navajo County, AZ Local Emergency Planning Committee, I
strongly concur with the comments that seek to avoid increased burdens on grassroots communities that are already doing our level best to meet existing requirements and be successful in our activities. We're carefully evaluated by our own self-audit programs and well-coordinated by state efforts. You should realize that any increase in information seeking will ultimately filter down to where the data exists, namely at the local level. Let's NOT rush into creating additional burdens where non exist. We plan, train and exercise to prevent, respond to and recover from incidents. The Hazardous Materials Grant funds we receive are small because there hasn't been a great deal of money to share among 15 counties in Arizona. We stretch the dollar as far as we can and get as much bang for the buck as possible.... don't stretch us until we snap! We all lose that way!

I support the strong words submitted in support of taking a deep breath and assessing what your needs are before levying requirements on SERCs, TERCs, LEPCs throughout the country.

Respectfully Submitted

Tim Zaremba

PHMSA-2007-27181-0045[1]

Comment Info: ==========

General Comment:I concur with the spirit of the letter by NASTTPO opposing the HMEP Proposal.

PHMSA-2007-27181-0044[1]

Comment Info: ==========

General Comment:Comments of the Local Emergency Planning Committee for Jefferson County Colorado.

PHMSA-2007-27181-0043[1]

Comment Info: ==========

General Comment:Comments of the National Association of SARA Title III Program Officials

PHMSA-2007-27181-0042[1]

Comment Info: ==========

General Comment:As the Coordinator of a three county wide (Colorado) HazMat response team with
over 100 Hazardous Materials Technicians, I support and concur with the comments of the Colorado Emergency Planning Commission (CEPC). As the end user of the funds, I depend greatly upon the ability of the CEPC to fund training, exercises and planning activities. Any reduction in the State's ability to support these activities would have a negative impact on the local emergency responder training programs. It has been my experience that the funds are used appropriately and efficiently for the intended purpose so I am not sure where the additional reporting requirements are needed or justified.

Thank you for the opportunity to comment on these issues.

PHMSA-2007-27181-0041[1]

Comment Info: ==========

General Comment:I agree with and support those comments made by Mr. Dan Roe and others in
opposition as a citizen of the United States and as the the Pinal County, Arizona, Local
Emergency Planning Committee (LEPC) coordinator.

National Association of SARA Title III
Program Officials
Concerned with the Emergency Planning and Community Right-to-Know Act

December 21, 2007

Office of Management and Budget
Attn: Desk Officer for PHMSA
725 17th Street, N.W.
Washington, DC 20503

Re: Comments to Docket No. PHMSA-2007-27181 (Notice No. 07-10)

Dear OMB & PHMSA;

This letter is in response to Docket No. PHMSA-2007-27181, Information Collection Activities. The National Association of SARA Title III Program Officials (NASTTPO) is made up of members and staff of State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), Local Emergency Planning Committees (LEPCs), various federal agencies, and private industry. Members include state, tribal, or local government employees as well as private sector representatives with Emergency Planning and Community Right to Know (EPCRA) program responsibilities, such as health, occupational safety, first response, environmental, and emergency management. The membership is dedicated to working together to prepare for possible emergencies and disasters involving hazardous materials, whether they are accidental releases or a result of terrorist attacks. Thank you for the opportunity to again comment in opposition to the proposed information collection proposal.

As stated in earlier comment letters, our membership is heavily dependent on HMEP funding distributed through the states. The burdens of the proposed information collection will fall on the local, tribal, and other organizations that are users of the planning and training grant funding. Many of these member agencies are composed of volunteers.

Mr. Willke stated in his presentation to the NASTTPO conference in November 2007 that PHMSA wants to tell the story of the HMEP grant program, "what it does at the ground level, what it accomplishes, the importance of this program to the States and your communities" and "is this the only money that they get, how do they use it, what do they do that they couldn't do with it otherwise." We appreciate that sentiment and appreciate PHMSA's need to account for how the money in this program is spent; however, PHMSA can effectively communicate the story and message of the grant

program by assessing the information PHMSA already collects. In fact PHMSA does that now with its existing reporting and data collection effort. The HMEP grant program is mature and well understood by recipients and Congress. Even GAO has noted that this is a well run program serving the purposes for which it was designed. GAO/RCED-00-190

The proposed additional use of the volunteer organizations' time to compile meaningless additional information will detract from their other very important missions, namely making our communities safer. Mr. Willke emphasized that PHMSA wanted to build the grant program and make it stronger, but not by detracting from communities' emergency response and preparedness activities. This proposal does detract – it is harmful to community preparedness.

Sadly, PHMSA has focused on measuring attributes that, while easy to count, fail to actually address the important aspects of how local agencies use HMEP monies. PHMSA is out of touch with the White House in this approach. In a speech to the National Congress on Secure Communities on December 18, 2007, Mr. Joel Bagnal, Assistant to the President for Homeland Security and Counterterrorism emphasized that emergency planning is a process. You cannot judge the value of any one piece without understanding the entire cycle. PHMSA's approach in this proposal is inappropriate as it measures aspects of the process that fail to emphasize the planning-training-exercise cycle that local agencies follow.

Training is pointless without a plan to train against and exercises to measure whether training has covered necessary skills. Planning is pointless without exercises to test the plan and the level of training. Exercises are pointless unless they test planning and skills learned through training.

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility.

The inclusion of the proposed questions in the HMEP grant application is not necessary for the proper performance of the Department. PHMSA states that the information requested will provide data to evaluate emergency response planning and training programs conducted by States and Indian tribes. PHMSA further states the information sought will enhance emergency response preparedness and response by allowing PHMSA and its State and tribal partners to target gaps in current planning and training efforts and focus on strategies that have been proven to be effective. In addition, Mr. Willke stated that the real effort PHMSA is making is "to increase the HMEP grant program to the states, to better understand the areas of greatest need and where this money is going and our accountability to Congress."

Given the objectives of the grant program and the information the Secretary currently collects under this program, the proposed questions are unnecessary to these stated purposes. We believe that PHMSA has broad authority to collect information from

grant recipients but that authority should not be used without a clear plan and purpose for the collection of non-essential information. The proposed questions do not further assist the Secretary to determine whether the State or tribe's activities are eligible for funding, the Secretary's function under the grant program. See 49 C.F.R. § 110.40. Also, the proposed questions do not further assist the Secretary to comply with the reporting duties under Section 5116(k). See 49 U.S.C. § 5116(k). PHMSA can adequately "account for the program and communicate its effectiveness," as Mr. Willke stated to NASTTPO when discussing reauthorization, with the information currently collected.

The purpose of the Hazardous Materials Transportation Act (HMTA) is the provision of "adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce." Section 5101. And, the purpose of the Hazardous Materials Public Sector Training and Planning Grants Program is to support "the emergency planning and training efforts of States, Indian tribes, and local communities to deal with hazardous materials emergencies, particularly those involving transportation," and to enhance the implementation of the Emergency Planning and Community Right-To-Know Act (42 U.S.C. 11001). Section 110.1. Grant applicants are currently required to provide project narrative statements, budget information, statements of work, financial reports, audits, and performance reports. See Sections 110.30, 110.70, 110.90. The proposed information collection duplicates these efforts. LEPCs should not be required to use their valuable time and decrease community preparedness, contrary to the HMTA's purpose and objectives, to assemble information duplicative of what PHMSA already collects or which serves no purpose.

Mr. Willke also stated that "it is not our intention to put a burden on the LEPCs or other small organizations to explain what they do, but I hope as representatives in the States we can get at that level some understanding." Through this statement, PHMSA shows that it misunderstands the relationship between the LEPCs and the SERCs and overlooks the fact that the burden of the proposed information collection will fall heavily to the LEPCs and other small organizations to provide additional accounting for their activities.

In addition, as stated in previous comment letters, the overall intent of the grant program is one of leniency so as to allow States and tribes to engage in a wide variety of administrative activities, research, and field work directed toward the safe transport of hazardous materials. A more narrow interpretation, signified by the specificity of the proposed questions, defeats the overall purpose of the grant program by restricting the flow of money to activities the State or tribe considers necessary to the safe transportation of hazardous materials through its jurisdiction.

Moreover, if the Secretaries of Transportation, Labor, and Energy, Directors of the Federal Emergency Management Agency and National Institute of Environmental Health Sciences, Chairman of the Nuclear Regulatory Commission, and Administrator of the Environmental Protection Agency must periodically review all emergency response and preparedness training programs of that department, agency, or instrumentality to minimize duplication of effort and expense of the department, agency, or instrumentality

in carrying out the programs, the Secretary of Transportation should similarly work to minimize duplication of effort and expense of State emergency response commissions. See Section 5116(h).

Beyond the general flaws expressed, the subsections below discuss specifically how the proposed questions duplicate information currently collected under the HMTA and grant program.

A. Fees

First, PHMSA proposes to revise the information collected concerning State or tribe imposed fees related to the transportation of hazardous materials. Under Section 5125(g)(1), States and tribes are permitted to impose fees related to the transportation of hazardous materials if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. Further under Section 5125(g)(2), the Secretary may request information on the basis on which such fee is levied, the purpose for which the revenues are used, the annual total amount collected, and other such matters as the Secretary requests. Currently, States and tribes are required to provide in their grant applications a written statement explaining whether the applicant assesses and collects fees on the transportation of hazardous materials and whether the fees are used solely to carry out purposes related to the transportation of hazardous materials. Section 110.30(a)(4).

While the Secretary is authorized under Section 5125(g)(2) to request more detailed information about such fees than currently requested, some of the additional proposed questions do not assist the Secretary's determination of whether fees are fair and used for a purpose related to transporting hazardous material. For example, asking what state agency administers the fee and whether company size is considered when assessing the fee does not aid in the determination of whether the fee is fair and used for a purpose related to transporting hazardous material. See proposed questions 2a and 2c. This information is unrelated to the purpose of the fees thus is unnecessary and does not have practical utility.

B. Planning Grants

Second, PHMSA proposes to revise the current information collection concerning planning grants. PHMSA states the revised information collection will enable PHMSA to more accurately evaluate the effectiveness of the grant program in meeting emergency response planning needs.

The proposed planning questions are duplicative of information currently collected in the grant application and performance reports. PHMSA proposed question 1 asks what amount of planning grant funds was used to assist LEPCs and the number of LEPCs assisted. However, Section 5116(a)(2) only requires the State agree to make at least 75 percent of a planning grant available to LEPCs and Section 110.30(b)(3) requires

a written statement of that agreement in addition to an explanation of how the State intends to make such funds available. Furthermore, Section 110.70(a)(1) requires the State to conduct fiscal control and accounting procedures sufficient to permit tracing of funds provided for planning to a level of expenditure adequate to establish that at least 75 percent of planning funds were made available to LEPCs. This information currently provided by grant applicants allows PHMSA to determine that the State made at least 75 percent of the planning grant available to LEPCs, as required by the HMTA. See Section 5116(a).

Proposed questions 1a-e are also duplicative and unnecessary. Under Section 110.30(b)(1), State grant applicants must submit a statement that the State is complying with the Emergency Planning and Community Right-To-Know Act. Under this Act, LEPCs are required to complete preparation of an emergency plan and review the plan at least once a year. 42 U.S.C. § 11003(a). Further, LEPCs must evaluate the need for resources necessary to develop, implement, and exercise the emergency plan. Section 11003(b). LEPCs must also include in the emergency plan information on notification, evacuation plans, training programs, and methods and schedules for exercising the emergency plan. Section 11003(c). Thus, question 1b is unnecessary because LEPCs must review their emergency response plans annually; question 1c is unnecessary because LEPCs are required to develop emergency plans; question 1d is unnecessary because LEPCs address training programs and exercises in their emergency response plans; and question 1e requests a level of detail, as do questions 1a-d, that has no practical utility so long as a State makes at least 75 percent of planning grant funds available to LEPCs, as statutorily required.

In addition, proposed question 2 is unnecessary because States and tribes already provide the requested information and the additional level of detail proposed will not further assist PHMSA's evaluation of the effectiveness of the planning grant program. The grant application requires the applicant provide a project narrative statement of the goals and objectives of each proposed project including: the current abilities of the applicant's program for preparedness response; the need to sustain or increase the program; the current participation or intention to assess the need for a regional team; the impact the grant will have on the program; whether the program knows or intends to assess transportation flow patterns; a schedule for implementing the proposed grant activities; and a description of how the program will be monitored. Section 110.30(b)(5).

The grant application also requires a statement of work in support of the proposed project describing and prioritizing the activities and tasks to be conducted, the costs associated with each activity, and a schedule for implementation. Section 110.30(a)(7). And, applicants are required to submit performance reports for planning grants including comparisons of actual accomplishments to the stated goals and objectives. Section 110.90(b)(2). Therefore, the information in proposed questions 1a-e is already provided in the grant application and performance reports. Moreover, applicants are required to provide detailed budget information in Standard Forms 269, 270, and 424A, as required by Sections 18.41(b), 110.90(b)(4), and 110.30(a). Thus, the breakdown of fund usage requested in the proposed questions is unnecessary and has no practical utility due to the

provision of budget information by States and tribes in the grant applications, performance reports, and budget forms.

Lastly, the requested information in proposed question 3 is also provided in the grant application project narrative, as stated above. Section 110.30. Therefore, such information collection is unnecessary.

C. Training Grants

Third, PHMSA proposes to revise the current information collection concerning training grants. PHMSA states the revised information collection will enable PHMSA to more accurately evaluate the effectiveness of the grant program in meeting emergency response training needs.

The proposed training questions are duplicative of information currently collected under the grant application and performance reports; thus are unnecessary. First, Section 110.30(c)(5) requires grant applicants provide a project narrative of the goals and objectives of each proposed project including: a description of the current hazardous materials training programs; the training audience; the estimated total number of persons to be trained; the ways in which the training grants will support the training program; a description of how the training will be monitored; and a schedule for implementing the proposed training grant activities. Second, Section 110.90(b)(2) requires project managers to submit a performance report that includes a comparison of actual accomplishments to the stated goals and objectives. Therefore, the proposed questions 1a, 1b, and 1e are unnecessary because grant applicants provide the requested information in the grant application and performance reports. Furthermore, as stated in response to the planning questions above, grant applicants are required to provide detailed budget information in Standard Forms 269, 270, and 424A, as required by Sections 18.41(b), 110.90(b)(4), and 110.30(a); thus, the detailed breakdown of fund usage requested in the proposed questions is unnecessary and has no practical utility due to the provision of budget information by States and tribes in the grant applications, performance reports, and budget forms.

In addition, questions 1c and 1d are unnecessary because the HMTA only requires a State or tribe certify that the total amount the State or tribe expends to train public sector employees will equal at least the average level of expenditure for the last two fiscal years, that the State or tribe will use a training course identified under Section 5115 or another course the Secretary determined consistent, and that a State agrees to make at least 75 percent of the grant available for training public sector employees. Section 5116(b). The statute also lists the possible uses of the training grant including tuition, travel, room and board, and use by the State or tribe to provide training. Section 5116(b)(3). The proposed questions 1c and 1d do not have practical utility in assisting PHMSA to determine the effectiveness of the training grant program because such specificity is not required by the HMTA and does not assist the Secretary in carrying out the broad objectives of the training grant program. In addition, the proposed questions do

not provide additional information, beyond that already collected, which outweighs the burden of collecting such information; therefore these questions are inappropriate.

Proposed question 2 is duplicative and unnecessary. Grant applicants currently describe their monitoring systems for their training programs in Section 110.30(c)(5)(iii). In addition, States must provide a written certification explaining how the State is complying with sections 301 and 303 of the Emergency Planning and Community Right-To-Know Act, which requires a State to establish State Emergency Response Commissions, Local Emergency Planning Committees, and emergency planning districts. See Section 11001. Therefore, the information requested in proposed question 2 is currently provided in the grant application and the question is unnecessary.

Lastly, the requested information in proposed question 3 is also provided in the grant application project narrative, as stated above. Section 110.30. Therefore, such information collection is unnecessary.

(2) the accuracy of the Department's estimate of the burden of the proposed information collection.

PHMSA has underestimated the burden and impact of the proposed information collection. The proposed information collection will unnecessarily take valuable time from the individuals volunteering to protect United States citizens from hazardous material hazards.

PHMSA states that it appreciates concerns about additional burden detracting from grantees planning and training efforts but believes the more detail information requested should be readily available due to the current data collection. However, PHMSA fails to consider the true difference between the general statements concerning the breakdown of grant administration and the minutely detailed calculations requested in the proposed collection. The precise amount and percentages calculations proposed will be very burdensome on the majority of communities, particularly since most administer their programs using volunteers. Mr. Willke stated that PHMSA is looking to "account for every dollar, that we know where 100% of the money goes in terms of the allowable expenditures for the funds." Requiring over LEPCs to conduct this precise level of accounting will detract from community preparedness, contrary to the statutory objectives of the HMTA and the grant program. .

Even though Mr. Willke continued that PHMSA is "not looking for it [accounting] to be brought down to the local LEPC levels" because "it wouldn't do us any good as well to go down to that level, but perhaps to the State level, to give us some understanding of that," the level of accounting in the proposed information collection does go down to the LEPCs and will heavily burden these volunteer organizations. States distribute this money to LEPCs and they must rely on the LEPCs to report on its use.

Further, PHMSA increased the burden of the proposed information collection on applicants by the inclusion of unnecessary questions, as discussed above. PHMSA

should delete the questions that are unrelated to the objectives of the HMTA, such as the fees questions 2a and 2c. PHMSA should also delete the proposed questions collecting information currently submitted in the grant applications, budget forms, and performance reports. The burden on applicants to compile information currently provided to PHMSA is unnecessary and detracts from efforts spent on community response and preparedness activities.

Moreover, PHMSA fails to recognize the continuity of the planning, exercise and training activities conducted under the grant program. The planning activities consist of numerous connected parts that are virtually impossible to separate out dollar for dollar. Similarly, the training activities cannot properly be broken out of the continuum of planning, training, and exercises. Requiring individual dollar assessments of each phase of these programs is unreasonable due to the continuity of these programs. Further, PHMSA has not clearly stated the necessity of the proposed level of micromanagement. Without a clear purpose for the proposed level of detailed itemization and because of the heavy burden providing such detail will place on grant applicants, the proposed information collection is unnecessary and unreasonable.

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

As discussed above, the proposed information collection is unnecessary and has no practical utility due to the information currently provided by grant applicants in the grant applications, budget forms, and performance reports. However, if PHMSA must go forward with some enhanced information collection, the burden on applicants can be reduced by deleting questions requesting information collected elsewhere and questions unrelated to the objectives of the HMTA and the regulation. The level of detail must also be refined as the proposed will simply overwhelm these mostly volunteer organizations. Requiring applicants to use their valuable and limited time to duplicate reporting efforts currently conducted and assess information already available to PHMSA instead of focusing on community response and preparedness is contrary to the objectives of the HMTA and the grant program.

If PHMSA must collect this in-depth level of information, PHMSA should create an automated questionnaire that utilizes a multiple choice question/answer format. The automated questionnaire should begin with a yes/no question to determine general applicability and allow applicants to opt out of the question if it does not apply. The automated questionnaire should then allow applicants to estimate and choose answers from proposed choices, representing a grant applicant's general knowledge of the state program. For example, answers might give numerical ranges representing percentages, monetary amounts, or number of times a specific exercise was undertaken. Also, questions that direct the applicant to make written descriptions of grant moneys should be reformatted into a multiple choice style. The automated questionnaire can provide a

space for additional comments at the end of each section should an applicant affirmatively choose to take on an additional time burden.

Conclusion

In conclusion, the proposed information collection should not go forward because it is not necessary for the proper performance of the Department due to the current information collected and lack of clearly stated purpose for the additional information requested. In addition, PHMSA failed to respond to concerns previously expressed and actually increased the reporting burden on grant applicants. Most importantly, PHMSA fails to recognize the continuity of the planning and grant program and would actually reduce community preparedness, contrary to the purpose of the HMTA and grant program, due to PHMSA's misapplied reporting emphasis and the unnecessary use of the grant applicant's time and efforts.

Thank you for your consideration.

Respectfully,
NASTTPO

Timothy R Gablehouse
President

PHMSA-2007-27181-0040[1]

Comment Info: ==========

General Comment:Word document submitted.

BY ON-LINE POSTING – December 20, 2007 (11:30 PM MST)
Office of Management and Budget
Attention: Desk Officer for PHMSA
725 17th Street, NW
Washington, DC 20503

Reference: Docket No. PHMSA-2007-27181 (Notice No. 07-10)
Information Collection Activities
Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT
Notice and request for comments.

These comments should be considered with my previous comments on this subject as well as the inputs provided to Ted Wilke at the National Association of SARA Title Three Program Officials (NASTTPO's) Mid-Year Conference Meeting in November, 2007.

1. PHMSA's proposed collection of information is NOT necessary for the proper performance of the functions of the Department. RSPA and its successor PHMSA have clearly established one of the finest track records, (as attested to by GAO evaluations, grantee comments and national acclaim), for the proper execution of the Hazardous Materials Emergency Preparedness Grants program for both Planning and Training. The additional information being sought by PHMSA, over and above what is already collected, will have little practical utility and contribute minimally, if at all, to program enhancements. There's an old expression that seems to clearly fit these proposed changes to PHMSA regulations that PHMSA's leadership/management should heed: "If it ain't broke...don't fix it!" If PHMSA believes something is "broke" you have a long listing of grantees with whom to discuss the issue and work to resolve those issues. Dictating changes because of whatever pressures are being felt at PHMSA that will ultimately impair community safety by diverting valuable time needed to plan, train and exercise to completing questionably valuable paperwork isn't a logical path to follow. It's a dangerous path to follow.

I suggest that PHMSA management stand back and take a deep breath and if you are compelled by Congress to provide additional information, then get the stakeholders together by whatever practical means necessary BEFORE publishing rules that are going to significantly and negatively impact on grassroots accomplishment of safety related missions. There is an apparent infatuation with numbers and metrics that doesn't pass the common-sense tests at the grassroots levels. Planners and responders are doing their best to keep their communities safe. They know what they need and they therefore plan and train to meet those needs. They are supported in those efforts by their Local Emergency Planning Committees and State Emergency Response Commissions. That successful functionality has been in existence for two decades and while levels of activities vary throughout the nation, you'd be hard pressed to find a planner or a responder that isn't exhaustively doing their level best to save lives, protect property, work problems, report accurately and ensure recovery to normalcy in minimum time. That's what the HMEP

funds support and the funds support it positively because of the logic in which the basic law was created that allowed and encouraged creative thinking and use of funds within clear guidelines, with minimal reporting. Again... "if it ain't broke... don't fix it!"

If you believe it to be broken, discuss that. PHMSA should be specific, not on a fishing expedition that will significantly burden tribes, states, and local jurisdictions. Does PHMSA have a system in place for measuring the effectiveness of emergency responses to hazardous materials incidents? What is it? Has PHMSA hosted workshops to discuss that issue? When? If not, why not? Why shift the burden to tribes, states and local jurisdictions rather than work to solve problems at the national level using the stakeholder and partnership processes that have proven so successful. How were the questions you arrived at derived?

2. The Department's estimate of the burden of the proposed information collection is, in my opinion, way...way off base. Where were the stakeholders in the creation of these questions? Where were the grantees and their sub-grantees in this derivation? PHMSA's sister agencies who have failed to involve stakeholders have paid the price of failure, time and time again, for not involving their stakeholders properly. In this instance, the key stakeholders are the ones you are looking to burden, namely: local, parish, county, tribal and state partners. How were they engaged in the promulgation of these proposed rules? How were TERCs, SERCs , LEPCs engaged? Were their daily burdens recognized and were they given ample time to study, evaluate and participate in providing inputs? Have you asked yourself, what's the rush? Why only a 30 day period for this and why so close to the holidays? This whole process only started in July, 2007. Again, what's the rush? And once again, before fixing something that isn't broken, ensure you need to make these changes. If there are factions pushing for changes, and factions opposed to these changes, get them together and work on consensus. Let the true political rather than the dictatorial process work. Don't rush it through a 30 day comment period. Take a deep breath and take your time to get it done right. After all, you're looking to change nearly two decades of success. How sure is PHMSA that this will improve what is is already functioning in a sound manner? How can you be sure if the stakeholders didn't assist you in coming up with your additional questions? You noted that the HMEP grant program was established over 15 years ago and has continued with few changes since its initial implementation. You cite what the funds can be used for and how the grant is funded. Sure seems that there's an underlying concern and agitation that something should change. Why? There's a continuum that is an accepted truth in community readiness, namely planning, training and exercising. It's been that way for thousands of years and will continue to be that way for thousands more if we're careful to preserve logic in how we conduct our affairs. Let PHMSA continue to lead the fold in accepting that continuum as a basic truth, knowing that State Emergency Response Commissions, Tribal Emergency Response Commissions, and Local Emergency Planning Committees, use HMEP funds to complete that entire cycle. Perhaps PHMSA needs assistance from the grassroots levels to understand that process. Come on down!

3. PHMSA should certainly bring the stakeholders together to ascertain the methods to enhance the quality, utility, clarity of information that is to be collected. If a survey is

needed, PHMSA should use the grantees to help develop that survey so that the right information is gathered. PHMSA should host a key partner meeting that has a clear, participative agenda so that appropriate discussions can take place.

What is it that PHMSA believes is wrong with the quality, utility and clarity of information gathered now? I would think that PHMSA must have something in mind in that arena if it's looking to enhance those information qualifiers.

4. Once PHMSA, through the stakeholder process, minimizes the questions being asked to only essential elements of information and ensures that the change to process will not prove to be the straw that breaks the camel's back, then...and only then, should the method of collection be further explored. At first blush, my suggestion would be reporting through a secure website into an online database managed by PHMSA would be the way to go...but that's at first blush.

In summary PHMSA should put some brakes on this train and re-approach the issue through key stakeholder sessions that involve interested parties that are pushing for change and those who do not see a need for the change before traveling down tracks that may cause derailment of a successful program.

Respectfully submitted,

Daniel Roe

PHMSA-2007-27181-0039[1]

Comment Info: ==========

General Comment:The Adams County LEPC concurs with the comments submitted by both the
NASTTPO and the Colorado Emergency Planning Commission. We would like to stress the concepts of the fact that there is a cycle to community preparedness that includes planning - training - exercises. None of these steps can exist independent of the others and expect success. In addition, you cannot judge the value of any one of these pieces without understanding how LEPCs use money to assist in the cycle as a whole.

PHMSA has focused on measuring attributes that are easy to count, yet fail to address the important aspects of how local agencies actually use HMEP monies.

Training is pointless without a plan to train against and exercises to measure whether or not the training has covered essential and necessary skills. Planning is pointless without excercises to test the plan and the effectiveness of the training.

Finally, exercises are pointless unless they test planning and the skills learned through the training. At the root, these three pieces are intertwined and cannot and should not be treated as separate entities.

PHMSA-2007-27181-0038[1]

Comment Info: ==========

General Comment:I concur with PHMSA-2007-27181-0007

PHMSA-2007-27181-0037[1]

Comment Info: ==========

General Comment:BY ON-LINE POSTING ? December 20, 2007 (11:30 PM MST)
Office of Management and Budget
Attention: Desk Officer for PHMSA
725 17th Street, NW
Washington, DC 20503

Reference: Docket No. PHMSA-2007-27181 (Notice No. 07-10)
Information Collection Activities
Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT
Notice and request for comments.

These comments should be considered with my previous comments on this subject as well as the inputs provided to Ted Wilke at the National Association of SARA Title Three Program Officials (NASTTPO?s) Mid-Year Conference Meeting in November, 2007.

1. PHMSA?s proposed collection of information is NOT necessary for the proper performance of the functions of the Department. RSPA and its successor PHMSA have clearly established one of the finest track records, (as attested to by GAO evaluations, grantee comments and national acclaim), for the proper execution of the Hazardous Materials Emergency Preparedness Grants program for both Planning and Training. The additional information being sought by PHMSA, over and above what is already collected, will have little practical utility and contribute minimally, if at all, to program enhancements. There?s an old expression that seems to clearly fit these proposed changes to PHMSA regulations that PHMSA?s leadership/management should heed: ?If it ain?t broke? don?t fix it!? If PHMSA believes something is ?broke? you have a long listing of grantees with whom to discuss the issue and work to resolve those issues. Dictating changes because of whatever pressures are being felt at PHMSA that will ultimately impair community safety by diverting valuable time needed to plan, train and exercise to completing questionably valuable paperwork isn?t a logical path to follow. It?s a dangerous path to follow.

I suggest that PHMSA management stand back and take a deep breath and if you are compelled by Congress to provide additional information, then get the stakeholders together by whatever practical means necessary BEFORE publishing rules that are going to significantly and negatively impact on grassroots

accomplishment of safety related missions. There is an apparent infatuation with numbers and metrics that doesn?t pass the common-sense tests at the grassroots levels. Planners and responders are doing their best to keep their communities safe. They know what they need and they therefore plan and train to meet those needs. They are supported in those efforts by their Local Emergency Planning Committees and State Emergency Response Commissions. That successful functionality has been in existence for two decades and while levels of activities vary throughout the nation, you?d be hard pressed to find a planner or a responder that isn?t exhaustively doing their level best to save lives, protect property, work problems, report accurately and ensure recovery to normalcy in minimum time. That?s what the HMEP funds support and the funds support it positively because of the logic in which the basic law was created that allowed and encouraged creative thinking and use of funds within clear guidelines, with minimal reporting. Again? ?if it ain?t broke? don?t fix it!?

If you believe it to be broken, discuss that. PHMSA should be specific, not on a fishing expedition that will significantly burden tribes, states, and local jurisdictions. Does PHMSA have a system in place for measuring the effectiveness of emergency responses to hazardous materials incidents? What is

it? Has PHMSA hosted workshops to discuss that issue? When? If not, why not? Why shift the burden to tribes, states and local jurisdictions rather than work
to solve problems at the national level using the stakeholder and partnership processes that have proven so successful. How were the questions you arrived at derived?

2. The Department?s estimate of the burden of the proposed information collection is, in my opinion, way?way off base. Where were the stakeholders in the creation of these questions? Where were the grantees and their sub-grantees in this derivation? PHMSA?s sister agencies who have failed to involve stakeholders have paid the price of failure, time and time again, for not involving their stakeholders properly. In this instance, the key stakeholders are the ones you are looking to burden, namely: local, parish, county, tribal and state partners.

How were they engaged in the promulgation of these proposed rules? How were TERCs, SERCs , LEPCs engaged? Were their daily burdens recognized and were they given ample time to study, evaluate and participate in providing inputs? Have you asked yourself, what?s the rush? Why only a 30 day period for this and why so close to the holidays? This whole process only started in July, 2007. Again, what?s the rush? And once again, before fixing something that isn?t broken, ensure you need to make these changes. If there are factions pushing for changes, and factions opposed to these changes, get them together and work on consensus. Let the true political rather than the dictatorial process work. Don?t rush it through
a 30 day comment period. Take a deep breath and take your time to get it done right. After all, you?re looking to change nearly two decades of success. How sure is PHMSA that this will improve what is is already functioning in a sound manner? How can you be sure if the stakeholders didn?t assist you in coming up with your additional questions? You noted that the HMEP grant program was established over 15 years ago and has continued with few changes since its initial implementation. You cite what the funds can be used for and how the grant is funded. Sure seems that there?s an underlying concern and agitation that something should change. Why? There?s a continuum that is an accepted truth in community readiness, namely planning, training and exercising. It?s been that way for thousands of years and will continue to be that way for thousands more if we?re careful to preserve logic in how we conduct our affairs. Let PHMSA continue to lead the fold in accepting that continuum as a basic truth, knowing that State Emergency Response Commissions, Tribal Emergency Response Commissions, and Local Emergency Planning Committees, use HMEP funds to complete that entire cycle. Perhaps PHMSA needs assistance from the grassroots levels to understand that process. Come on down!

3. PHMSA should certainly bring the stakeholders together to ascertain the methods to enhance the quality, utility, clarity of information that is to be collected. If a survey is needed, PHMSA should use the grantees to help develop that survey so that the right information is gathered. PHMSA should host a key partner meeting that has a clear, participative agenda so that appropriate discussions can take place.

What is it that PHMSA believes is wrong with the quality, utility and clarity of information gathered now? I would think that PHMSA must have something in mind in that arena if it?s looking to enhance those information qualifiers.

4. Once PHMSA, through the stakeholder process, minimizes the questions being asked to only essential elements of information and ensures that the change to process will not prove to be the straw that breaks the camel?s back, then?and only then, should the method of collection be further explored. At first blush, my suggestion would be reporting through a secure website into an online database managed by PHMSA would be the way to go?but that?s at first blush.

In summary PHMSA should put some brakes on this train and re-approach the issue through key stakeholder sessions that involve interested parties that are

pushing for change and those who do not see a need for the change before traveling down tracks that may cause derailment of a successful program.

Respectfully submitted,

Daniel Roe
Mesa, AZ

Randall J. McConnell
RJM Concepts, LLC
8281 West Evans Avenue
Lakewood, Colorado 80227
December 21, 2007

Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Attn: Desk Officer for PHMSA

Re; Comments to Docket No. PHMSA-2007-27181 (Notice No. 07-10)

Dear PHMSA:

This letter is in response to the docket number referenced above. As a professional in the emergency preparedness and response field I have over 35 years experience at Federal facilities, private industrial operations, major healthcare facilities, universities and colleges, and volunteer, part-paid and paid fire protection and hazardous material response districts. All of these facilities are dependent to varying degrees on planning and response agencies and activities affected by the proposed Information Collection Activities. I further serve in a volunteer capacity as a member of the Local Emergency Planning Committee (LEPC), a director for a major fire protection district located just west of Denver, and a director for a moderate-sized water and sanitation district. Within these various roles I have frequent opportunity to apply and be impacted by Federal, State and local regulations and funding, such as that provided by HMEP, and serve as a fiduciary of taxpayer resources.

Within the scope of my professional and civic experience I find the proposed HMEP requirements to be generally unnecessary, frequently redundant, and burdensome. Specific comments have been provided in responses submitted separately by the National Association of SARA Title III Program Officials (NASTTPO), the Colorado Emergency Planning Commission (CEPC), and the Jefferson County LEPC. I wholeheartedly concur with those comments and recommended they be seriously considered and incorporated. Particularly relevant in those comments is the need to maintain the plan-train-exercise continuum, a need that the proposed activities do not recognize or support.

Some level of bureaucratic structures and processes are necessary in complex societies, however the proposed level and type of information collection is unnecessary and wasteful. As the creator of a few bureaucratic processes myself, I can emphatically state that the public interest and well-being is not well served by this proposal.

Sincerely,

Randall J. McConnell

Comment Info: ==========

General Comment:-There is a cycle to community preparedness. That cycle is planning-training-
exercises. You can't do one without the others.

-You cannot judge the value of any one piece without understanding how LEPCs use money for the entire cycle.

-PHMSA has focused on measuring attributes that, while easy to count, fail to actually address the important aspects of how local agencies use HMEP monies.

-Training is pointless without a plan to train against and exercises to measure whether training has covered necessary skills. Planning is pointless without exercises to test the plan and the level of training. Exercises are pointless unless
they test planning and skills learned through training.

Comment Info: ==========

General Comment:As a person with a substantial amount of exercise experience in this field, I
concur with the comments provided by the Colorado Emergency Planning Commission and the Jefferson County Local Emergency Planning Committee.

Comment Info: ==========

General Comment:Please see attachment for response to above action.

Office of Management and Budget

Attn: Desk Officer for PHMSA

725 17th Street, N.W.

Washington, DC 20503

Re: Comments to Docket No. PHMSA-2007-27181 (Notice No. 07-10)

December 5, 2007

Dear PHMSA:

In response to Docket No. PHMSA-2007-27181, Collection Activities.

We appreciate this opportunity to comment. The Colorado Emergency Planning Commission (CEPC) is the "SERC" for Colorado under the Emergency Planning and Community Right-to-Know Act as well as performing additional duties under state law. In this role we work with local emergency planning committees, first response organizations, facilities, and the public regarding emergency planning, response and community right-to-know. We have been actively involved in implementation of the Emergency Planning and Community Right-To-Know Act since its inception. We work extensively with local emergency planning committees both in Colorado and throughout EPA Region VIII.

We are totally dependant on HMEP funding distributed through the states to support our planning, training and exercise activities through the LEPCs and first responder training through other state agencies and volunteer instructors. The burdens proposed by the current notice will fall on organizations that are the users of the funding. These burdens are not trivial. The LEPC organizations are volunteer groups. Devoting time and energy to reports detracts from their other very important missions.

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility.

The inclusion of the proposed questions in the HMEP grant application is not necessary for the proper performance of the Department. PHMSA states that the information requested will provide data to evaluate emergency response planning and training programs conducted by States and Indian tribes as well as summarize the achievements of the HMEP grant program. PHMSA further states the information sought will enhance emergency response preparedness and response by allowing PHMSA and its State and tribal partners to target gaps in current planning and training efforts and focus on strategies that have been proven to be effective. However, given the objectives of the grant program and the information the Secretary currently collects under this program, the proposed questions are unnecessary to these stated purposes thus do not have practical utility. The proposed questions do not further assist the Secretary to determine whether the State or tribe's

activities are eligible for funding, the Secretary's function under the grant program. See 49 C.F.R. § 110.40. Also, the proposed questions do not further assist the Secretary to comply with the reporting duties under Section 5116(k). See 49 U.S.C. § 5116(k).

The purpose of the Hazardous Materials Transportation Act (HMTA) is the provision of "adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce." Section 5101. And, the purpose of the Hazardous Materials Public Sector Training and Planning Grants Program is to support "the emergency planning and training efforts of States, Indian tribes, and local communities to deal with hazardous materials emergencies, particularly those involving transportation," and to enhance the implementation of the Emergency Planning and Community Right-To-Know Act (42 U.S.C. 11001). Section 110.1. Grant applicants are currently required to provide project narrative statements, budget information, statements of work, financial reports, audits, and performance reports. See Sections 110.30, 110.70, 110.90.

The proposed information collection duplicates these efforts. LPECs should not be required to use their valuable time and decrease community preparedness, contrary to the HMTA's purpose and objectives, to assemble information PHMSA already collects. Further, as many commenters' have noted, PHMSA has failed to provide a clear rational for the collection of this additional information, data collection for the sake of data collection is unreasonable.

In addition, as stated in previous comment letters, the overall intent of the grant program in the HMTA is one of leniency so as to allow States and tribes to engage in a wide variety of administrative activities, research, and field work directed toward the safe transport of hazardous materials. A more narrow interpretation, signified by the specificity of the proposed questions, defeats the overall purpose of the grant program by restricting the flow of money to activities the State or tribe considers necessary to the safe transportation of hazardous materials through its jurisdiction.

Moreover, if the Secretaries of Transportation, Labor, and Energy, Directors of the Federal Emergency Management Agency and National Institute of Environmental Health Sciences, Chairman of the Nuclear Regulatory Commission, and Administrator of the Environmental Protection Agency must periodically review all emergency response and preparedness training programs of that department, agency, or instrumentality to minimize duplication of effort and expense of the department, agency, or instrumentality in carrying out the programs, the Secretary of Transportation should similarly work to minimize duplication of effort and expense of State emergency response commissions. See Section 5116(h).

Beyond the general flaws expressed, the subsections below discuss specifically how the proposed questions duplicate information currently collected under the HMTA and grant program.

A. Fees

First, PHMSA proposes to revise the information collected concerning State or tribe imposed fees related to the transportation of hazardous materials. Under Section 5125(g)(1), States and tribes are permitted to impose fees related to the transportation of hazardous materials if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for

emergency response. Further under Section 5125(g)(2), the Secretary may request information on the basis on which such fee is levied, the purpose for which the revenues are used, the annual total amount collected, and other such matters as the Secretary requests. Currently, States and tribes are required to provide in their grant applications a written statement explaining whether the applicant assesses and collects fees on the transportation of hazardous materials and whether the fees are used solely to carry out purposes related to the transportation of hazardous materials. Section 110.30(a)(4).

While the Secretary is authorized under Section 5125(g)(2) to request more detailed information about such fees than currently requested, some of the additional proposed questions do not assist the Secretary's determination of whether fees are fair and used for a purpose related to transporting hazardous material. For example, asking what state agency administers the fee and whether company size is considered when assessing the fee does not aid in the determination of whether the fee is fair and used for a purpose related to transporting hazardous material. See proposed questions 2a and 2c. This information is unrelated to the purpose of the fees thus is unnecessary and does not have practical utility.

B. Planning Grants

Second, PHMSA proposes to revise the current information collection concerning planning grants. PHMSA states the revised information collection will enable PHMSA to more accurately evaluate the effectiveness of the grant program in meeting emergency response planning needs.

The proposed planning questions are duplicative of information currently collected in the grant application and performance reports. PHMSA proposed question 1 asks what amount of planning grant funds was used to assist LEPCs and the number of LEPCs assisted. However, Section 5116(a)(2) only requires the State agree to make at least 75 percent of a planning grant available to LEPCs and Section 110.30(b)(3) requires a written statement of that agreement in addition to an explanation of how the State intends to make such funds available. Furthermore, Section 110.70(a)(1) requires the State to conduct fiscal control and accounting procedures sufficient to permit tracing of funds provided for planning to a level of expenditure adequate to establish that at least 75 percent of planning funds were made available to LEPCs. This information currently provided by grant applicants allows PHMSA to determine that the State made at least 75 percent of the planning grant available to LEPCs, as required by the HMTA. See Section 5116(a).

Furthermore, the proposed questions 1a-e are also duplicative and unnecessary. Under Section 110.30(b)(1), State grant applicants must submit a statement that the State is complying with the Emergency Planning and Community Right-To-Know Act. Under this Act, LEPCs are required to complete preparation of an emergency plan and review the plan at least once a year. 42 U.S.C. § 11003(a). Further, LEPCs must evaluate the need for resources necessary to develop, implement, and exercise the emergency plan. Section 11003(b). LEPCs must also include in the emergency plan information on notification, evacuation plans, training programs, and methods and schedules for exercising the emergency plan. Section 11003(c). Thus, question 1b is unnecessary because LEPCs must review their emergency response plans annually; question 1c is unnecessary because LEPCs are required to develop emergency plans; question 1d is unnecessary because LEPCs address training programs and exercises in their emergency response plans; and question 1e requests a level of detail, as do questions 1a-d, that has no practical utility so long as a State makes at least 75 percent

of planning grant funds available to LEPCs, as statutorily required.

In addition, proposed question 2 is unnecessary because States and tribes already provide the requested information and the additional level of detail proposed will not further assist PHMSA's evaluation of the effectiveness of the planning grant program. The grant application requires the applicant provide a project narrative statement of the goals and objectives of each proposed project including: the current abilities of the applicant's program for preparedness response; the need to sustain or increase the program; the current participation or intention to assess the need for a regional team; the impact the grant will have on the program; whether the program knows or intends to assess transportation flow patterns; a schedule for implementing the proposed grant activities; and a description of how the program will be monitored. Section 110.30(b)(5). The grant application also requires a statement of work in support of the proposed project describing and prioritizing the activities and tasks to be conducted, the costs associated with each activity, and a schedule for implementation. Section 110.30(a)(7). And, applicants are required to submit performance reports for planning grants including comparisons of actual accomplishments to the stated goals and objectives. Section 110.90(b)(2). Therefore, the information in proposed questions 1a-e is already provided in the grant application and performance reports. Moreover, applicants are required to provide detailed budget information in Standard Forms 269, 270, and 424A, as required by Sections 18.41(b), 110.90(b)(4), and 110.30(a). Thus, the breakdown of fund usage requested in the proposed questions is unnecessary and has no practical utility due to the provision of budget information by States and tribes in the grant applications, performance reports, and budget forms.

Lastly, the requested information in proposed question 3 is also provided in the grant application project narrative, as stated above. Section 110.30. Therefore, such information collection is unnecessary.

C. Training Grants

Third, PHMSA proposes to revise the current information collection concerning training grants. PHMSA states the revised information collection will enable PHMSA to more accurately evaluate the effectiveness of the grant program in meeting emergency response training needs.

The proposed training questions are duplicative of information currently collected under the grant application and performance reports; thus are unnecessary. First, Section 110.30(c)(5) requires grant applicants provide a project narrative of the goals and objectives of each proposed project including: a description of the current hazardous materials training programs; the training audience; the estimated total number of persons to be trained; the ways in which the training grants will support the training program; a description of how the training will be monitored; and a schedule for implementing the proposed training grant activities. Second, Section 110.90(b)(2) requires project managers to submit a performance report that includes a comparison of actual accomplishments to the stated goals and objectives. Therefore, the proposed questions 1a, 1b, and 1e are unnecessary because grant applicants provide the requested information in the grant application and performance reports. Furthermore, as stated in response to the planning questions above, grant applicants are required to provide detailed budget information in Standard Forms 269, 270, and 424A, as required by Sections 18.41(b), 110.90(b)(4), and 110.30(a); thus, the detailed breakdown of fund usage requested in the proposed questions is unnecessary and has no practical utility due to the provision of budget

information by States and tribes in the grant applications, performance reports, and budget forms.

In addition, questions 1c and 1d are unnecessary because the HMTA only requires a State or tribe certify that the total amount the State or tribe expends to train public sector employees will equal at least the average level of expenditure for the last two fiscal years, that the State or tribe will use a training course identified under Section 5115 or another course the Secretary determined consistent, and that a State agrees to make at least 75 percent of the grant available for training public sector employees. Section 5116(b). The statute also lists the possible uses of the training grant including tuition, travel, room and board, and use by the State or tribe to provide training. Section 5116(b)(3). The proposed questions 1c and 1d do not have practical utility in assisting PHMSA to determine the effectiveness of the training grant program because such specificity is not required by the HMTA and does not assist the Secretary in carrying out the broad objectives of the training grant program. In addition, the proposed questions do not provide additional information, beyond that already collected, which outweighs the burden of collecting such information; therefore these questions are unnecessary.

Furthermore, proposed question 2 is duplicative and unnecessary. Grant applicants currently describe their monitoring systems for their training programs in Section 110.30(c)(5)(iii). In addition, States must provide a written certification explaining how the State is complying with sections 301 and 303 of the Emergency Planning and Community Right-To-Know Act, which requires a State to establish State Emergency Response Commissions, Local Emergency Planning Committees, and emergency planning districts. See Section 11001. Therefore, the information requested in proposed question 2 is currently provided in the grant application and the question is unnecessary.

Lastly, the requested information in proposed question 3 is also provided in the grant application project narrative, as stated above. Section 110.30. Therefore, such information collection is unnecessary.

(2) The accuracy of the Department's estimate of the burden of the proposed information collection.

PHMSA has underestimated the burden and impact of the proposed information collection. Hazardous materials pose a daily hazard to the people and the environment of Colorado; for example, the Department of Public Health and Environment recorded 2,431 reported spills during 2002-2005, 993 at fixed facilities. See State of Colorado Emergency Operations Plan – 2007, 26 available at http://dola.colorado.gov/dem/publications/seop_2007.pdf. The proposed information collection will unnecessarily take valuable time from the individuals volunteering to protect Colorado citizens from these hazards.

PHMSA states that it appreciates concerns about additional burden detracting from grantees planning and training efforts but believes the more detail information requested should be readily available due to the current data collection. However, PHMSA fails to consider the true difference between the general statements concerning the breakdown of grant administration and the minute detailed calculations requested in the proposed collection. The

precise amount and percentages calculations proposed will be very burdensome on the majority of communities, particularly since most communities administer their programs using volunteers. Colorado has 63 LEPCs, the majority of which function without a budget or with only a small amount of money granted from the State Emergency Planning Commission. The use of such volunteers' already limited time will detract from community preparedness, contrary to the statutory objectives of the HMTA and the grant program.

Further, PHMSA increased the burden of the proposed information collection on applicants by the inclusion of unnecessary questions, as discussed above. PHMSA should delete the questions that are unrelated to the objectives of the HMTA, such as the fees questions 2a and 2c. PHMSA should also delete the proposed questions collecting information currently submitted in the grant applications, budget forms, and performance reports. The burden on applicants to compile assess information already provided to PHMSA is unnecessary and detracts from efforts spent on community response and preparedness activities.

Moreover, PHMSA fails to recognize the continuity of the planning and training activities conducted under the grant program. The planning activities consist of numerous connected parts that are virtually impossible to separate out dollar for dollar. Similarly, the training activities are a continuum of planning, training, and exercises. Requiring individual dollar assessments of each phase of these programs is unreasonable due to the continuity of these programs. For example, some LEPCs in Colorado are organized within the offices of a first response agency or local government office of emergency management. See The Practical Evaluation of Local Emergency Planning and Preparedness available at http://www.gcgllc.com/LEPC%20White%20Paper.pdf. In these situations, the functions of the agency and the LEPC are complementary and impracticable to tease apart at the level in the proposed questions. Further, PHMSA has not clearly stated the necessity of the proposed level of micromanagement. Without a clear purpose for the proposed level of detailed itemization and because of the heavy burden providing such detail will place on grant applicants, the proposed information collection is unnecessary and unreasonable.

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

As discussed above, the proposed information collection is unnecessary and has no practical utility due to the information currently provided by grant applicants in the grant applications, budget forms, and performance reports. However, if PHMSA must go forward with the proposed information collection, the burden on applicants can be reduced by deleting questions requesting information collected elsewhere and questions unrelated to the objectives of the HMTA and the regulation. Requiring applicants to use their valuable and limited time to duplicate reporting efforts currently conducted and assess information already available to PHMSA instead of focusing on community response and preparedness is contrary to the objectives of the HMTA and the grant program.

In addition, requiring applicants to provide the detailed calculations in the proposed questions is an unreasonable burden, also discussed above. If PHMSA must collect this in-depth level of information,

PHMSA should create an automated questionnaire that utilizes a multiple choice question/answer format. The automated questionnaire should begin with a yes/no question to determine general applicability and allow applicants to opt out of the question if it does not apply. The automated questionnaire should then allow applicants to estimate and choose answers from proposed choices, representing a grant applicant's general knowledge of the state program. For example, answers might give numerical ranges representing percentages, monetary amounts, or number of times a specific exercise was undertaken. Also, questions that direct the applicant to make written descriptions of grant moneys should be reformatted into a multiple choice style. The automated questionnaire can provide a space for additional comments at the end of each section should an applicant affirmatively choose to take on an additional time burden.

Conclusion

In conclusion, the proposed information collection should not go forward because it is not necessary for the proper performance of the Department and PHMSA has not clearly expressed the practical utility and purpose of the additional information. In addition, PHMSA failed to respond to concerns previously expressed and actually increased the reporting burden on grant applicants. Most importantly, PHMSA fails to recognize the continuity of the planning and grant program and would actually reduce community preparedness, contrary to the purpose of the HMTA and grant program, due to PHMSA's misapplied reporting emphasis and the unnecessary use of the grant applicant's time and efforts.

Using the published data of the OMB estimate of 5,428 hrs/annum, more than two (2) full FTEs would need to be hired in Colorado just to handle the reporting requirements.

If this is the case, the State of Colorado will have to review it's participation in the HMEP Grant Program.

Sincerely,

Jack Cobb

Greg Stasinos

Co-Chairs
Colorado Emergency Planning Commission

PHMSA-2007-27181-0032[1]

Comment Info: ==========

General Comment:To the PHMSA:

I am a Board member for our local/county LEPC. I am sending this in accordance and in agreement of our board with their foreknowledge and approval. The pending legislation for the HMEP grant would prove an undue and unnecessary hardship for the LEPC's that benefit from this grant. Our County LEPC currently receives a $2000.00 grant from the Oklahoma Emergency Management Agency (OEM) for planning. This grant is made available to us as part of the HMEP grant to the state of Oklahoma.

We recieve this funding only by completing and maintaining the organizational requirements and exercises that are currently in-place and these are recorded and monitored by sending in quarterly reports with verifications and additional dpcumentation and standard forms. This includes but is not limited to 24 hour access, community outreach, annual drills, Tier II:collection; storage; reference; 24 access and other elements associated with HazMat information and safety. The grant funding is only released in parts after completion and the meeting of the state's requirements. I would like to remind this body these are the grant requirements, not what has to be done in an actual event. In that case, we can immediately add hours and or days for responding, the required activities, monitoring, cleaning-up and after-action events, safety issues and reports.

Our LEPC is indicative of all LEPC's. It is a volunteer program which also incorporates unpaid professionals, who volunteer their time, effort and resources in

order to have an LEPC in our communities and jurisdictions. The money allotted is needed and utilized for this objective but doesn't cover the cost in human resources, personnel and needed additional resources, time and costs. Our LEPC group is possibly more unique in that it covers a large area but has limited resources to draw upon due to limited population and distance from outside assistance. We are dependent upon each other and our closest neighbors with or without any funding or additional support from outside sources. Your funding provides for us to have access to training and or resources that might not be readily available or affordable. It also helps sustain and maintain our organization
but it doesn't necessarily "keep it alive". We do follow the existing format in our

meetings, trainings and requirements. The majority of our members have taken the required NIMS training and continue to take additional courses, either on-line or as instructors become available. Once again this is on the individual's time, with their effort and at their cost for the most part. To try and break down every minute should be considered an undue hardship and frankly unworthy of the participants and their efforts for the LEPC organization to exist and possibly survive. I must re-emphasize everything is appreciated but to add more to an already burdened and strained membership load-additional duties, in a purely volunteer organization is without merit and detracts rather than adds to its efficiency.

We had a full scale activation this past summer in a missing person event. People who were trained in the Nims/ICS structure advised that it was one of the best run examples of this structure that they had seen and confirmed its effectiveness in action, not only theory. It was due to the previous training already
in place that we, as an organization were able to implement and efficate this in a live action. Another example I would like to express is that we had a tabletop exercise less than a month ago. It was well attended and actively participated in. Those that couldn't attend weren't there, because they couldn't take off from their jobs. This was largely due to having fought a grass fire a few days prior and because so many people in smaller communities have so many other volunteer

duties that one is constantly having to "catch up" with their salaried positions when there is an actual event. I hope that this is a case in point. We have people who are using their vacation time to try to attend trainings. This is at the expense
and with the compliance of their work, affecting their income/resources and maybe, most importantly, their time with their families. They are giving enough- don't be part of the process that places the "straw that breaks the camels back". We are out "there" or "here" doing this-on call 24/7 maintaining standards that we are utilizing and implementing for the good of our families and communities effectively. We are in compliance with state and national standards. What more do we have to do.... what more do we have to prove.

Thank you for giving us a format in which to speak and hopefully contribute to this process from the other end of the spectrum.

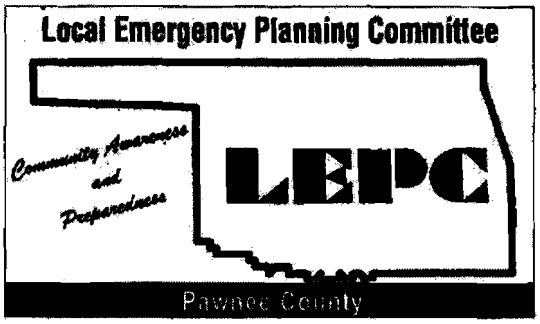
Sincerely,
Keith Shadden
Board Member
Beaver County LEPC

PHMSA-2007-27181-0031[1]

Comment Info: ==========

General Comment:At the December 7, 2007 meeting of the Cleveland County Local Emergency
Planning Committee, the proposed changes to the Hazardous Materials Emergency Preparedness grant program were discussed and the committee voted unanimously to authorize the executive board to formulate and sign the attached comment letter. Please accept the attachment as the consensous of our committee and take into consideration our concerns when making your decission.

Thank you.



07 DEC 17 A 8:17

December 7, 2007

Pipeline and Hazardous Materials Safety Administration
Attention T. Glenn Foster, PHH-1
1200New Jersey Avenue, SE., East Building, 2nd Floor
Washington, DC 20590-0001

RE: [Docket No. PHMSA–2007–27181 (Notice No. 07–10)]
Information Collection Activities

Dear Mr. Foster,

As Chairman of the Pawnee County Local Emergency Management Committee (LEPC) I am greatly concerned of the proposed rule to increase the reporting burden upon the recipients of the Hazard Materials Emergency Preparedness grant (HMEP) program. The Pawnee County LEPC is currently a recipient of $2,000 per year from the Oklahoma Emergency Management (OEM) for Chemical Hazard planning and preparedness activities as part of the HMEP grant to the State of Oklahoma.

Conditions for the receiving the HMEP assistance through the OEM include certification, demonstration, and reporting of all LEPC activities as required under EPCRA. These activities include preparation and updating of Pawnee County Chemical Emergency Preparedness Plans, conducting an annual exercise using the plan, maintaining a 24/7 Hazardous Chemical incident reporting number, conducting annual Hazardous Chemical inventories within Pawnee County, collecting, processing and issuing Tier II reports to the local Emergency Responders and their perspective communities or jurisdictions. These activities are reported at minimum two times per year to the OEM.

Pawnee County is located in rural Oklahoma with predominant land use being agriculture and oil and gas production. Emergency responders within Pawnee County consist primarily of thirteen rural volunteer fire departments, one Tribal (Pawnee Nation) fire department, and the Pawnee County Sherriff Office. Resources (man, money, and equipment) are limited. Pawnee County has a significant Hazardous Materials Inventory at both fixed facilities and through the many transportation corridors (air, railroad, pipeline, and over the road) throughout the County. Incident involving hazardous chemical on any one of the venues occur from time to time. The LEPC has been able to provide Certified Hazmat training to its volunteer firefighters in and around Pawnee County. It is only through the efforts of the Pawnee County LEPC and its participants that we can plan, train for, and effectively (and safely) respond to and manage these incidents involving Hazardous Chemical.

The Pawnee County LEPC is spending over $5,000 per year in human resources to administer the program now. Volunteer resources spent far exceed $20,000 per year when considering the actual planning, training, and response time of the emergency responders annually. When you conduct an

exercise, you can estimate another $3,000 to $5,000 of actual and volunteer cost associated with the planning, implementation, and reporting of the exercise.

As you can clearly see, the level of activity involving the administering of the Hazardous Chemical Emergency Preparedness program far exceeds the amount of compensation or assistance provided under the funding level. The LEPC initiative is already an "unfunded federal mandate". Increase of additional reporting burden is redundant and will certainly increase significantly the administration burden of effectively administering the Pawnee County LEPC. The adverse effect will certainly be for many counties such as Pawnee County across the country withdrawing its participation under the LEPC and HMEP program.

The intent or purpose of the proposed rule clearly appears to be an attempt by special interest among the transportation industry or PHMSA to increase the administrative burden upon the States and counties to discourage participation under the HMEP program. The effects or impact of this proposed rule will result directly in the loss of human life and property as communities are no longer able to adequately inventory, plan, prepare, and/or respond to these Hazardous Chemical Emergencies.

If additional reporting is needed as proposed, then the HMEP program should be funded to a level to represent the actual resources being exhausted or expended to meet the additional needs. The State of Oklahoma has made efforts (with success) in recent years to streamline the program administration and associated reporting cost. These efforts are resulting in increase HMEP program participation. Additional reporting requirements are redundant and will effectively work toward "undoing" the accomplishments that the State and counties have made under the HMEP program.

The Pawnee County LEPC is asking that PHMSA withdraw the proposed information collection rule and strongly consider increasing focusing on increase funding for such HMEP initiatives.

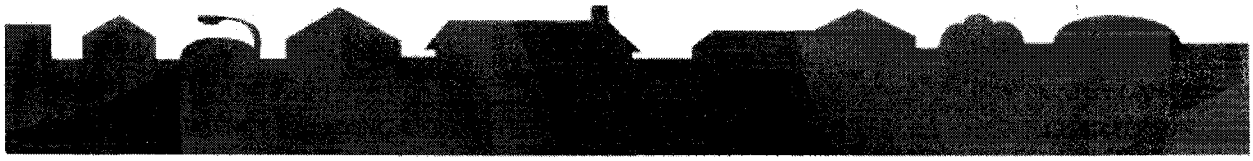
Cordially,

Monty Matlock, Chair
Pawnee County LEPC

Contact Information:

Pawnee County LEPC
500 Harrison, Room 202
Pawnee, Oklahoma 74058

Phone: 918.762.3655
Email: mmatlock@pawneenation.org



December 7, 2007 Electronically Submitted

Pipeline and Hazardous Materials Safety Administration

RE: [Docket No. PHMSA–2007–27181 (Notice No. 07–10)]
Information Collection Activities

Dear PHMSA:

We, the undersigned, respectfully submit the following comments on the above reference docket.

The Cleveland County Local Emergency Planning Committee (LEPC) will be directly affected by the proposed rule to increase the reporting burden associated with the Hazardous Materials Emergency Preparedness (HMEP) grant program. The Cleveland County LEPC currently receives a $2,000 grant from the Oklahoma Emergency Management Agency (OEM) for planning. This grant is made available to us as part of the HMEP grant to the state of Oklahoma.

Our LEPC is made up of volunteers; we all have other jobs and struggle to find the time to devote to planning and preparing for chemical accidents. We have people on the committee from local business (this work is not a part of their profit line), other nonprofit organizations, volunteer fire departments, and other state and local governmental organizations. Involvement in the LEPC takes time away from our other responsibilities but we all believe in what we are doing through the LEPC.

Our LEPC does not have another mechanism in place to raise funds on its own. Our only source of funds to-date comes to us through the HMEP grant process. While the $2,000 we receive each year through this grant is a relatively meager amount, when compared with the amount of time and resources required to prepare and plan for the potential chemical spills that have occurred in the past and will certainly occur in the future, we are still grateful to have it.

There are not very many fixed facility chemical manufacturers or users in our county but we do have a major interstate highway and a major railway that pass through the county on which hazardous chemicals are transported every day of the year. Many of the companies that have fixed facilities within the county contribute to our efforts to plan for chemical accidents through their participation in the LEPC. The transportation industry on the other hand does not participate on a regular basis in planning or preparing for a chemical spill in our county. We should mention that the BNSF railroad was generous enough to supply some training for our emergency responders twice in the past. On both occasions however it was the LEPC that supplied the facilities for these training events and it was the money we received through the HMEP grant that enabled us to rent the facilities.

Besides the railcar training, the LEPC has spent HMEP grant money to send people that work in the emergency response community to HAZMAT classes and to help fund conferences and workshops for the emergency responders and others in the community with special needs. We have paid for a few of our members to attend classes at the Transportation Technology Center, Inc., a world class HAZMAT training facility. We believe it is necessary for the people we have sponsored to this school to have this level of training because they are members of one of six teams in Oklahoma that are committed to responding to a HAZMAT incident anywhere in the state.

We have also sponsored a Special Needs Seminar for businesses, private and non-profit, and others in the community that deal with people who have special needs. This was an issue that came up after the tragic emergency response effort seen following Katrina. We have sponsored several other workshops for emergency responders both professional and volunteers. We have an active group of amateur ham radio operators, a group that would be essential in a time when other forms of communication were not functioning. We feel it is vitally important to keep these groups up-to-date on training and that is where we have tried to focus our limited funds. These are all groups that could be called upon in a response to a transportation accident involving a chemical spill.

Of course you know all about these activities through the reports we are have been sending in to support our HMEP grant application. We hope that you agree with us that these are the kinds of activities we should be using these funds for and that we are not misappropriating the money you have been giving us. Again we are very grateful to be able to do these things to make our county and state a safer place to live and work.

In order to receive funding through the HMEP, we must certify and demonstrate that the LEPC is conducting the activities required under the Emergency Planning and Community Right-to-Know Act. These activities include preparing and updating annually the emergency plan for the county, exercising the plan annually, maintaining a 24/7 spill reporting number, conducting community outreach, have regular open meetings, collect and make available Tier II hazardous chemical inventories, and track hazmat incidents. We must provide evidence that our LEPC is doing these things twice a year to Oklahoma Emergency Management and after we have provided the information, the money is released to the LEPC. It really operates like a reimbursement because the LEPC has to be functioning before it can receive money.

In addition to the semiannual reports we submit to OEM to document and attest to proper use of the funds, our account is subject to an audit by an outside entity. The LEPC's funds are kept in an account administered by the Cleveland County Treasurer's office. As such they are subject to an annual audit; one more way in which you are assured of our good stewardship of the grant money.

If this rule passes we will have to spend a lot more time on paperwork and that will just cut into the time spent actually working to make our communities safer. That isn't good business practice and just doesn't make sense.

In the proposed rule there are questions we will be required to answer about how much of the grant money went to each function of the committee including: plan updates, exercising, training etc. We have very little money and it all goes toward education and providing training for emergency responders in our county. It would be a cumbersome task to try to accurately track how much time each LEPC volunteer devotes to each task. The volunteers do not all work in one central office which would make tracking their time more manageable, they are all spread out across the county working in different offices which would make it very difficult to track individual time spent on individual projects. We would probably need to hire someone to do this. Could we expect some additional grant money? Even if we could expect additional grant money we couldn't use it to hire someone because we are not allowed to pay salaries with grant money.

The requirements of the current HMEP grant application and reporting require that, the volunteer who serves as our secretary, spend about (we don't keep time logs) 4 hours after each of our quarterly meetings typing up the minutes and updating membership records, both of which must be submitted with our grant reports. Filing out the grant application, in its current form, requires about a day to fill out the application, and gather all of the supporting documents, getting signatures, and mailing it to the appropriate parties. Then most of this must be done again half way through the year. While we are able

to give you're an estimate of the time required for these functions we do not have any idea how much of the independent auditor's time it took to review the grant requirements and determine that the funds were being maintained and spent appropriately.

And in the end, what would all this extra information collection accomplish; nothing that we can tell. From our perspective you should be able to discern from the current reports the effectiveness of the program.

At some point the process of getting and accounting for these funds would become too cumbersome and we would just have to forgo them. We understand from the Federal Register that you do not intend that this be the outcome of this proposal but it sure looks to us like whether intended or not that will be the outcome.

In short, Cleveland County benefits from and is grateful for HMEP funding. We comply with requirements for planning and exercising. We send our folks to required training and are glad HMEP helps pays for the training because our county can't afford to pay for all that is necessary for our volunteers. The program actually works and we do account for the money we spend. It doesn't make any sense to spend time on paperwork that doesn't add to our ability to protect our community. We just don't have time. We all have families and jobs and we volunteer with the LEPC because it is the right thing to do and we want our county to be a safe place to work and live. Please help us do the right thing. Please don't make it more difficult because truly, it is already hard enough. The Cleveland County LEPC respectfully asks that PHMSA withdraw the proposed information collection rule.

Thank you for your consideration. We appreciate the opportunity to comment.

Respectfully,

Cathy Canty
Chairperson

Dan Cary
Cleveland County Emergency Manager

Shane Cohea
Treasurer

Lyle Milby
Secretary

PHMSA-2007-27181-0030[1]

Comment Info: ==========

General Comment:I am attaching comments in opposition of the proposed rule on behalf of the
Oklahoma Hazardous Materials Emergency Response Commission.

OKLAHOMA HAZARDOUS MATERIALS EMERGENCY RESPONSE COMMISSION

Comments to Docket No. PHMSA-2007-27181 (Notice No. 07-10)
Information Collection Activity Notice of Rulemaking

Dear PHMSA;

As Chair of the Oklahoma Hazardous Materials Emergency Response Commission, (OHMERC), I want to thank you once again for the opportunity to comment in opposition to a proposed rule which will increase the reporting burden for first responder volunteers in Oklahoma. Oklahoma has commented on two other occasions in opposition to the proposed addition of non-essential information collection and the state remains opposed to this activity.

The OHMERC is composed of representatives from the Oklahoma Department of Environmental Quality, the Oklahoma Emergency Management Agency, the Oklahoma Department of Public Safety, the Oklahoma State Fire Marshall, the Oklahoma Office of Homeland Security, local emergency responders and the regulated community. The Commission works to assist Oklahomans in preparation for possible emergencies and disasters involving hazardous materials, whether they are accidental releases or result from terrorist acts. The Commission oversees the distribution of HMEP grants to Local Emergency Planning Committees (LEPC) specifically for planning for hazardous materials incidents and for training of local responders. The majority of local fire departments in Oklahoma are volunteer departments, the only hazardous materials training available to them is the training provided by HMEP funding. The rural, volunteer fire departments are expected to respond to transportation incidents throughout the state. Additionally, HMEP grants to LEPCs for planning are the major source of funding for emergency planning in Oklahoma. Only active LEPCs which demonstrate compliance with the Emergency Planning and Community Right-to-Know Act are eligible to receive these small $2,000 grants.

Local emergency responders and planning committees are almost entirely dependant on HMEP funding distributed through the state. The burdens proposed by the current notice will fall on not just state agencies. Rather, it will fall primarily on local organizations that are users of the funding. These burdens are not trivial. All LEPCs and most of our rural fire departments are volunteer groups.

As previously noted, the OHMERC believes this rule to be unnecessary because HMEP grantees are already required to provide an accounting of funding to PHMSA. For example, currently Oklahoma receives $188,028.00 from the HMEP grant, but we are required to provide a 20% match making the grant total $235,036.00. The 20% match is provided with in-kind man-hours from OSU training and LEPC assistance provided in-person. Currently $92,000 is provided to OSU Fire Training for local hazmat classes and ICS classes. This year, 21 LEPCs have been granted $2,000 each for a total of $42,000. In order to get the funding, LEPCs must update their emergency plan, exercise the plan, maintain a 24/7 telephone number for spill reporting, conduct community outreach, have regular meetings, have a procedure to provide Tier II information on request, and track hazmat incidents. Reports are required semi-annually from LEPCs and money is granted semi-annually after verification of activities. Administratively, $53,000.00 goes to one FTE at OEM who is responsible for the grant and the state-wide emergency operations plan. Additionally, $1028.00 is set aside for travel to attend training. The OHMERC quarterly receives list of all hazmat or ICS classes conducted using HMEP grant money along with the number of students in each class. The OHMERC is also given an update on the progress of each grant funded LEPC is making in meeting accountabilities. In summary, the money is used effectively with full accountability. DOT already has a break down of where the grant money goes. The following is the information already provided to DOT:

SECTION B - BUDGET CATEGORIES

6. Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY				Total (5)
	(1) Planning	(2) Training	(3)	(4)	
a. Personnel	$17,665	$36,981			$54,646
b. Fringe Benefits	$0	$0			$0
c. Travel	$1,329	$2,784			$4,113
d. Equipment	$0	$0			$0
e. Supplies	$0	$0			$0
f. Contractual	$0	$0			$0
g. Construction	N/A	N/A			N/A
h. Other (Passthrough)	$56,983	$119,294			$176,277
I. Total Direct Charges (sum 6a-6h)	$75,977	$159,059			$235,036
j. Indirect Charges	$0	$0			$0
K. TOTALS (sum of 6i and 6j)	$75,977	$159,059			$235,036

All HMEP grantees provide a similar accounting of expenditures of HMEP funds. Therefore further information collection is unnecessary and burdensome.

Further, PHMSA has failed to provide a good rational for the collection of this additional information. We do not believe that DOT/PHMSA should impose the burden of information collection without a clear plan and purpose to use the information in a fashion that comports with statute and regulation. Until and unless DOT/PHMSA is clear

in its plans for the use of the information it appears that the proposed collection activity is simply an increased burden without a purpose.

The proposed rule includes three sections of additional reporting burden. Each section has basic flaws beyond the general flaws in rational already expressed. The first section would require grantees to research and report extensively on possible fees imposed on the hazardous materials transportation industry by some other agencies for some other purpose. None of the agencies represented on the OHMERC imposes fees on the hazardous materials transportation industry. No other fees in the state of Oklahoma are used for training for response to hazardous materials incidents or for planning for such incidents. It is unreasonable to suggest the OHMERC or member agency embark on a fishing expedition in the state to see if the industry is being charged a fee for some agency for some purpose. If PHMSA feels this information is important, DOT has the means to gather that information. In all likelihood, if such a fee is charged, it will be charged by a state Department of Transportation. Clearly US DOT has the contacts in place to gather that information. If US DOT does not have the ability to query state transportation departments, the industry must surely be aware of those entities that impose fees on hazardous materials transportation and could easily provide that information to PHMSA. In short, it is unreasonable to require grantees to provide information about fees or programs which they do not administer.

The second section of additional information involves planning grants. The information in the initial question about how much money is provided to LEPCs for planning is easily obtainable and in fact, US DOT already has that information so the question is basically redundant. Questions concerning emergency plans reveal a lack of understanding by PHMSA concerning the function of LEPCs. LEPCs were required to complete local emergency plans in 1987 and are required by law to update them annually. They are also required to exercise their plan annually. Emergency preparedness is a continuum of activities including updating the plan, training and exercising. It is probably almost impossible to separate the exact dollar amount spent on each activity since each one is part of a continuum of activity. It is certainly reasonable to require that LEPCs which receive HMEP grant funding comply with the requirements of EPCRA as Oklahoma currently does. If an LEPC is in compliance, then they are engaging in all the activities of the preparedness continuum. To require volunteers, because all LEPC members are in fact volunteers, to spend time answering unnecessary questions and trying to tease out exactly how much of their total grant was spent in activities which overlap is unreasonable. The dedicated volunteers who serve on LEPCs already give up valuable time to actually do the work of planning, training and exercising in addition to meeting, providing outreach, collecting information and tracking hazardous materials incidents. Please respect their service by understanding that no one has time for paperwork which will not make communities safer. Additionally, questions on assessment and commodity flow studies once again reflect PHMSA's lack of understanding of local capabilities and costs. Most volunteer firemen would be hard pressed to complete assessments given their other responsibilities. While commodity flow studies are extremely valuable, they are also extremely expensive to conduct properly so that usable information results. In fact, in Oklahoma we have not been able to conduct a statewide commodity flow study

because funds are not available. The strict percentage allotted for planning under the HMEP grant system makes it almost impossible to use HMEP funds for flow studies due to the expense of such studies. Flexibility in use of HMEP funds between training and planning might allow such studies but that does not exist now.

The final series of questions involves training. Again, the questions reveal the lack of understanding by PHMSA of the training requirements already in place on first responders. The folks who respond to hazardous materials accidents must have certain levels of training under OSHA regulations. There are also requirement under NFPA. In addition, there are now NIMS/ICS training requirements from DHS. Local volunteers do not have the luxury to assess what training they might need, they are strapped to get the required training. PHMSA clearly does not understand the turn-over associated with volunteer fire departments. Every year, new volunteers must start over with training requirements. Every year, long time members of a volunteer force must take refresher courses and the additional courses that DHS has been requiring every year since it came into existence. Once again, questions about how much of the training budget went for each phase of training such as monitoring, evaluating, critiquing, and management activities will be almost impossible to calculate and the purpose of that level of micromanagement has not been stated.

The OHMERC believes PHMSA has greatly underestimated the reporting burden of this proposed rule. Although there are only three numbered questions in the rule pertaining to planning, if one looks closely there are actually 31 questions embedded in these three. Similarly, there are 17 questions on use of grant funds for training embedded within three questions. In the section on possible state fees, while there are only 2 numbered questions, there exists the possibility of actually 9 total questions to answer. So, although on the surface, it appears as if grantees are only gathering information on 8 questions, actually 59 questions require answers under this rule. Just that number alone demonstrates the unnecessary burden of this rule. In addition, based on PHMSA's estimates of number of grantees and total hours of burden, the State of Oklahoma is expected to spend 80 hours complying with this rule. Two week, yes two weeks, spent answering questions for which no purpose has been expressed. But it is really worse than that. Most of the information has to be collected by LEPCs. Assuming that they spend half the time estimated by PHMSA for grantees on information collection, that means volunteers will spend 40 hours, a week, trying to gather this information. That is an unreasonable burden to place on volunteers. Considering that 21 LEPCs receive HMEP funds in Oklahoma, that is a total of 840 additional hours that PHMSA failed to consider. The reporting burden for Oklahoma would not be 80 hours as estimated by PHMSA but actually 920 hours. That folks is 23 weeks. Half a year spend on paperwork. That would probably be funny if it were not time taken from actually protecting Oklahoma citizens.

In summary, this rule should not go forward because it is not necessary for the proper performance of the Department and PHMSA has failed to articulate any utility for the information. Additionally, PHMSA has grossly underestimated the burden this rule would impose upon grantees, LEPCS and volunteers around the country. Finally, the

information, if collected, will be flawed because PHMSA fails to understand the preparedness continuum or the present requirements under law for LEPCs and first responders and thus does not ask questions which can be answered accurately.

PHMSA has failed to demonstrate a need to collect this additional information. PHMSA failed to respond to concerns from states and LEPCS about the burden imposed by this information collection expressed previously.

On behalf of the OHMERC and LEPCS in Oklahoma, I would like to close with a reminder that this burden will be placed on folks who already give freely of their time to help keep their families and neighbors safe. Every county in Oklahoma has hazardous materials transported on its roads and highways. Every citizen in Oklahoma is vulnerable to harm if accidents involving these materials are not responded to quickly and efficiently. Such response cannot occur without a preparedness continuum of planning, training and exercising. Men and women in Oklahoma are willing to give up valuable time with their families and friends to participate in this continuum because they know it is important work. Will they stop volunteering just because someone in Washington, DC who doesn't understand the process suddenly gives them a week's worth of paperwork to fill out? I don't know that answer to that question. I do know the health and safety of Oklahomans is too valuable take the risk that the increased burden of this rule will discourage the volunteer efforts of these local heroes. Please, respect the time and effort of volunteers. Please, acknowledge the risk transportation of hazardous materials imposes on innocent bystanders everyday. Please, honor the efforts of folks willing to stand in the gap. Please, do not impose unnecessary paperwork with no practical utility on people with real lives. Please, withdraw this proposed information collection rule.

Sincerely,

Montressa Jo Elder
Chair, Oklahoma Hazardous Materials Emergency Response Commission

Comment Info: ==========

General Comment:Kiowa County Emergency Management and the Local Emergency Planning Committee serves a population of approximately 10,000 people. Being a rural county in Southwest Oklahoma, with a low population, we have a very limited tax base in which to fund all the offices required by state and federal laws and mandates. Most of those laws and mandates are unfunded.

Our local LEPC receives no funding in which to operate from from the local government.

If the required reporting requirements are implemented for local LEPC's, someone will have to work to gather, collect and dissimenate that information. This means someone will have to fund the position. If the local government has to fund this position, it means there will have to be cuts made somewhere in the local government.

Most generally this means the Emergency Manager will have to be cut from employement, or that the Sheriff will have to eliminate one of his two deputies.

The HMEP Grant that the small local jurisdictions receive are important to keep an all volunteer LEPC operating and meeting and conducting business. If reporting requirements to the local LEPC are imposed, it will be harder to get local people to

serve on the LEPC.

I feel that if the reporting requirements are imposed, more funding will have to be given to the small, rural jurisdictions to pay someone to fill the position created by
the bureacry of this reporting requirement

Stephen T. Grayson
Vice Chairman
Kiowa County LEPC

PHMSA-2007-27181-0027[1]

Comment Info: ==========

General Comment:I am Chairperson for our local Emergency Planning Committee. I wish to express
my dismay at the prospect of more red tape reporting requirments being placed on the small volunteer LEPC groups such as the one I am part of. We have more than we can do now and are pressed for time to get it all done. As volunteers it is hard to recruit enough people to help since we all have jobs and personal responsibilties we must tend to also. Please consider that we are not able to hire help to take on additional burdens and act accordingly.

PHMSA-2007-27181-0025[1]

Comment Info: ==========

General Comment:
OKLAHOMA HAZARDOUS MATERIALS
EMERGENCY RESPONSE COMMISSION

October 30, 2007

Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 ? 17th Street, NW
Washington, DC 20503

RE: Request to Modify the Hazardous materials Public Sector Training and Planning Grants Application (OMB Control Number 2137-0586)

Dear Administrator Dudley;

As Chairman of the Oklahoma Hazardous Materials Emergency Response Commission (OHMERC), I previously commented regarding the DOT PHMSA Information Collection Activity Notice, Docket PHMSA-2007-27181. The OHMERC oversees the distribution of HMEP grants to Local Emergency Planning Committees specifically for planning for hazardous materials incidents and for training of local responders. Since HMEP grant funds are only source of training funds for Oklahoma?s volunteer first responders as well as the only source of funds for exercising response to hazardous materials incidents, this funding stream is vitally important to the safety of Oklahoma citizens.

I was recently made aware of a letter sent to you on Oct. 12, 2007 from a group calling themselves ?Interested Parties for Hazardous Materials Transportation.? This letter is so disturbing to me that I am compelled to address the apparent intent and content to you directly. First, by sending the letter to you rather than posting to the public docket, it appears that this group is deliberately attempting to circumvent public participation in the rule making process. By taking this action, this group has tried, behind closed doors, to influence agencies in the middle of an analysis of comments concerning a very important rule making action. I am grateful that DOT recognized that this attempt was clearly improper and posted the letter so that it becomes part of the public process even though it took 10 days to do so. Please note that I am posting this response to the public docket at the same time it is transmitted to your office. I would ask that your agency make clear that legitimate comments directed to rule making must be available to all parties potentially affected by such rule making. Please do not allow an industry with means to employ a professional lobbyist to override the interests of public safety which are represented by state and tribal employees and local volunteers.

In addition to the improper attempt to unduly influence the rule making process, there are a couple of issues raised in this letter from ?Interested Parties? which I wish to clarify. First, they are correct that many of us at the state and local level joined together in researching and developing a response to the notice of

information collection activity. Those of us who work daily with planning and training to respond to hazardous materials incidents rely on our collective experience to enhance our programs. I work closely with other states to identify and solve common problems. Such collaboration and networking is important because, as I am sure you are aware, most government employees have a number of responsibilities. Personally, during the comment period for this particular notice, there were four ongoing presidentially declared disasters in the State of Oklahoma. As the Department of Environmental Quality Emergency Response Coordinator, I was very busy with duties to help insure the rapid recovery across the state from unprecedented flooding accompanied by hazardous materials spills. I felt it was vitally important to comment on this information collection notice and I was very grateful to my colleagues across the country who worked together to provide background research to me. Yes, we had a coordinated voice. This should not lessen the impact of my objections to the information collection notice but rather strengthen them; it demonstrates the collective concern of folks all over the United States who work daily to make citizens safer despite hazardous materials transported through their communities.

I would like to reiterate my opposition to increasing the burden of information collection on the volunteer responders and planners in Oklahoma. As I stated previously, over 80% of fire fighters in Oklahoma are volunteers. They have jobs and family responsibilities in addition to helping their neighbors in times of emergencies. HMEP funds are the only; I repeat the only, source of hazardous materials training for these dedicated individuals. Oklahoma does not collect any other fees for this purpose. In addition, HMEP funds are provided to LEPCs who can demonstrate that they update their hazardous materials plan and exercise that plan annually. Again, these are the only; I repeat the only, funds available to
provide the resources for the required planning and exercising. In my 19 years of participation in emergency planning and exercises, I am unaware of a single exercise that did not include a hazardous material transportation incident aspect. I have several counties in which there are less than five facilities which are required
to submit a hazardous chemical inventory, so for these counties the only real risk of a hazardous materials incident is transportation related. These volunteer groups

of responders and planners already submit detailed information on their use of HMEP funds. It is neither reasonable nor correct to impose further burden on these folks without a clear plan and purpose and without demonstration that such burden would increase the effectiveness of emergency response. The information collection notice fails in both respects. As an employee of a regulatory agency, I frequently hear impassioned requests from industry, particularly small business, to reduce paperwork burden. It is therefore extremely strange to hear an industry group argue to increase paperwork burden on the very folks who volunteer to put their lives on the line to protect their citizens in case that industry has an accident.

In closing I am asking that you consider three points in regards to the actions of the ?Interested Parties?. First, that all agency deliberations are conducted in full
view of the public and that improper attempts behind closed doors to influence analysis of comments are rejected. Second, that the coordinated comments of state and tribal representatives and local volunteers be seen as valid objections based on common needs and experiences of a natural constituency. Third, and most importantly, that further burden is not placed on volunteers. Do not further burden the men and women who already miss soccer games, dance recitals and anniversary dinners in order to serve their fellow citizens. Do not impose unnecessary hardship on volunteers who give up nights and weekends to attend training and conduct exercises so their communities can be safer. Please respect the dedicated efforts of volunteers in Oklahoma and around the country.

Thank you for your time and consideration.

Sincerely,

Montressa Jo Elder, Chairman
Oklahoma Hazardous Materials Emergency Response Commission

Cc: Ted Wilke, Associate Administrator for Hazardous Materials Safety, DOT

PHMSA-2007-27181-0024[1]

Comment Info: ==========

General Comment:NASTTPO response to the Interested Parties late filed comment letter.

OKLAHOMA HAZARDOUS MATERIALS EMERGENCY RESPONSE COMMISSION

October 30, 2007

Susan E. Dudley
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 – 17th Street, NW
Washington, DC 20503

RE: Request to Modify the Hazardous materials Public Sector Training and Planning Grants Application (OMB Control Number 2137-0586)

Dear Administrator Dudley;

As Chairman of the Oklahoma Hazardous Materials Emergency Response Commission (OHMERC), I previously commented regarding the DOT PHMSA Information Collection Activity Notice, Docket PHMSA-2007-27181. The OHMERC oversees the distribution of HMEP grants to Local Emergency Planning Committees specifically for planning for hazardous materials incidents and for training of local responders. Since HMEP grant funds are only source of training funds for Oklahoma's volunteer first responders as well as the only source of funds for exercising response to hazardous materials incidents, this funding stream is vitally important to the safety of Oklahoma citizens.

I was recently made aware of a letter sent to you on Oct. 12, 2007 from a group calling themselves "Interested Parties for Hazardous Materials Transportation." This letter is so disturbing to me that I am compelled to address the apparent intent and content to you directly. First, by sending the letter to you rather than posting to the public docket, it appears that this group is deliberately attempting to circumvent public participation in the rule making process. By taking this action, this group has tried, behind closed doors, to influence agencies in the middle of an analysis of comments concerning a very important rule making action. I am grateful that DOT recognized that this attempt was clearly improper and posted the letter so that it becomes part of the public process even though it took 10 days to do so. Please note that I am posting this response to the public docket at the same time it is transmitted to your office. I would ask that your agency make clear that legitimate comments directed to rule making must be available to all

industry with means to

employ a professional lobbyist to override the interests of public safety which are represented by state and tribal employees and local volunteers.

In addition to the improper attempt to unduly influence the rule making process, there are a couple of issues raised in this letter from 'Interested Parties' which I wish to clarify. First, they are correct that many of us at the state and local level joined together in researching and developing a response to the notice of information collection activity. Those of us who work daily with planning and training to respond to hazardous materials incidents rely on our collective experience to enhance our programs. I work closely with other states to identify and solve common problems. Such collaboration and networking is important because, as I am sure you are aware, most government employees have a number of responsibilities. Personally, during the comment period for this particular notice, there were four ongoing presidentially declared disasters in the State of Oklahoma. As the Department of Environmental Quality Emergency Response Coordinator, I was very busy with duties to help insure the rapid recovery across the state from unprecedented flooding accompanied by hazardous materials spills. I felt it was vitally important to comment on this information collection notice and I was very grateful to my colleagues across the country who worked together to provide background research to me. Yes, we had a coordinated voice. This should not lessen the impact of my objections to the information collection notice but rather strengthen them; it demonstrates the collective concern of folks all over the United States who work daily to protect the citizens of Oklahoma from hazardous material releases through the planners in Oklahoma. As I stated previously, over 80% of fire fighters in Oklahoma are volunteers. They have jobs and family responsibilities in addition to helping their neighbors in times of emergencies. HMEP funds are the only; I repeat the only, source of hazardous materials training for these dedicated individuals. Oklahoma does not collect any other fees for this purpose. In addition, HMEP funds are provided to LEPCs who can demonstrate that they update their hazardous materials plan and exercise that plan annually. Again, these are the only; I repeat the only, funds available to provide the resources for the required planning and exercising. In my 19 years of participation in emergency planning and exercises, I am unaware of a single exercise that did not include a hazardous material transportation incident aspect. I have several counties in which there are less than five facilities which are required to submit a hazardous chemical inventory, so for these counties the only real risk of a hazardous materials incident is transportation related. These volunteer groups of responders and planners already submit detailed information on their use of HMEP funds. It is neither reasonable nor correct to impose further burden on these folks without a clear plan and purpose and without demonstration that such burden would increase the effectiveness of emergency response. The information collection notice fails in both respects. As an employee of a regulatory agency, I frequently hear impassioned requests from industry, particularly small business, to reduce paperwork burden. It is therefore extremely strange to hear an industry group argue to increase paperwork burden on the very folks who volunteer to put their lives on the line to protect their citizens in case that industry has an accident.

In closing I am asking that you consider three points in regards to the actions of the "Interested Parties". First, that all agency deliberations are conducted in full view of the public and that improper attempts behind closed doors to influence analysis of comments are rejected. Second, that the coordinated comments of state and tribal representatives and local volunteers be seen as valid objections based on common needs and experiences of a natural constituency. Third, and most importantly, that further burden is not placed on volunteers. Do not further burden the men and women who already miss soccer games, dance recitals and anniversary dinners in order to serve their fellow citizens. Do not impose unnecessary hardship on volunteers who give up nights and weekends to attend training and conduct exercises so their communities can be safer. Please respect the dedicated efforts of volunteers in Oklahoma and around the country.

Thank you for your consideration.

Sincerely,

Montressa Jo Elder, Chairman
Oklahoma Hazardous Materials Emergency Response Commission

Cc: Ted Wilke, Associate Administrator for Hazardous Materials Safety, DOT

National Association of SARA Title III Program Officials
Concerned with the Emergency Planning and Community Right-to-Know Act

October 24, 2007 Posted in Docket PHMSA-2007-27181 at Regulations.gov

Susan E. Dudley Via Fax 202.395.3888
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 – 17th Street, NW
Washington, DC 20503

RE: Request to Modify the Hazardous materials Public Sector Training and Planning Grants Application (OMB Control Number 2137-0586)

Dear Administrator Dudley;

The "Interested Parties" (IP) letter to you, responding to commenters' key points does not make many new arguments beyond those in their earlier comment letters. Primarily, the IP argue that the additional information will help PHMSA determine where need exists for grant money and allow targeted assistance.

What is most galling, however, is this blatant attempt to derail the public process of soliciting comments by a back-door approach. This is the tactic of a party with a hidden agenda rather than one with a legitimate position.

This back-door effort taints what has otherwise been a open public process regardless of whether the letter was ultimately posted to the docket – 10 days after receipt. The letter was not timely under the FR notice and is grossly improper. At this point, the process is so tainted by the potential consideration of the IP material, the inability of other commenters to respond and the possibility of other ex-party communications that any proposal to change the types of questions posed to HMEP grantees should be re-noticed for public comment.

I. Additional information aids identification of need

The IP argue that "PHMSA's proposal to glean additional relevant information will aid the agency in its efforts to identify where need exists and to provide targeted and worthwhile assistance." The IP state again that the Secretary has discretion "to consider whatever appropriate factors would aid in determining where needs do exist." While all parties agree that the Secretary has information collection authority and discretion, this

argument differs from the arguments in the comment letters because the other letters argue that the additional information will not help PHMSA determine how effectively grant money is being spent. Here, it appears that the IP argue the additional information will assist PHMSA to determine where the grant money is most needed.

However, while identification of need is a valid argument, PHMSA already gathers information concerning State and Tribe hazardous materials transportation fees; thus, the proposed additional information is unnecessary and duplicative. The Research and Special Programs Administration (RSPA) anticipated in 1992 that "the most needy projects will be clearly identified through hazard-specific information which must be provided by an applicant and considered in the grant award process" and specifically rejected revising the rule to prohibit a grant award in instances where there is no clear demonstration that State hazardous materials fees are being used as required. 57 Fed. Reg. 43062 (Major Issues (C)).

Under Section 110.30(a)(4), the HMEP application must include "a written statement explaining whether the State or tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to carry out purposes related to the transportation of hazardous materials." Further, under Section 5125(f), the Secretary may request information concerning the basis on which the fee is levied, the purposes for which the revenue is used, the total amount collected, and other relevant matters. This information currently allows PHMSA to determine where need exists that is not covered by such fees. Further, the proposed questions ask for information, such as what agency administers the fee and whether company size is considered, that is not relevant to determining which parties are most in need. As the comment letters state, data collection for the sake of data collection is unreasonable.

Moreover, the IP argue that the other factors are intimately related to transportation and cannot be separated in their consideration while the comment letters argue that other factors besides transportation must be considered to determine need. While fees should be, and are reported, Section 5116(b)(4) explicitly states the other information relevant to whether the Secretary should allocate grant money. Therefore, fees are an important factor as to whether a party should receive an HMEP grant, but they are not the determinative factor for the level of need. And as stated above, fee information is already collected thus the duplicative questions are unnecessary.

II. Fees should be reported and monitored

The IP state that States are failing to report their non-federal fees in their HMEP grant applications thus State and Tribe fees should "be reported and monitored to ensure that they are being assessed and applied in accordance with federal law." The IP argue that an assurance that such fees are "both properly reported and properly applied to their required use is reasonable." The IP further argue that the comment "it would be improper to state that PHMSA should measure such effectiveness solely on whether the fee is used solely to carry out a purpose related to the transportation of hazardous

material" is a tacit admission that some States are not applying their fees solely for purposes related to hazardous materials transportation.

As stated above, Sections 110.30(a), 5116(b)(4) and 5125(f) already require States and Tribes to report fees collection in connection with the transportation of hazardous material. If an HMEP applicant does not provide sufficient information, the Secretary may request more detail about the State or Tribe's fees. Section 5125(f). Therefore, because hazardous materials transportation fee information is already collected by the Secretary, the proposed questions are unnecessary.

Further, the RSPA stated that the grant programs "increase the emphasis on emergency planning related to hazardous materials moving in transportation, and improve the capability of local jurisdictions to plan for and respond to potential risks posed by hazardous materials in transportation, as well as at fixed sites." 57 Fed. Reg. 43062 (Major Issues (A)). This statement supports the argument in the comment letters that measuring effectiveness solely on whether fees are used only for purposes related to the transportation of hazardous material is improper, not the IP argument that States and Tribes are misapplying their collected fees when such fees are used for other purposes than transportation of hazardous materials.

III. Congress requires information collection

The IP argue that, given the finite funding available and the Secretary's mission to determine where need exists, "Congress required the Secretary to consider whether the State or Tribe imposes and collects a fee on hazardous materials transportation and whether the fee is applied only to carry out a purpose related to hazardous materials transportation." The IP also state that "Congress vested such authority [for collecting information concerning State and Tribe hazardous materials transportation fees] in the Secretary to ensure that States and Tribes would not hide behind the guise of so-called hazardous materials transportation fees, while applying the revenues raised from transporters to serve ends that are unrelated to hazardous materials transportation." The IP argument continues that the "intent [in vesting such authority] was to prevent unnecessary hindrances to the national, uniform scope of hazardous materials transportation."

The statements concerning the Secretary's authority and discretion are correct; however, the Senate and House reports and hearings of the HMEP grant program do not focus singularly on transportation but consistently stated all factors listed in Section 5125(f) that the Secretary may consider. See e.g. S. REP. NO. 101-449 (1990); H.R. Rep. No. 101-444 part 1, 25 (1990) (impose fees so long as reasonable and used exclusively for hazardous material transportation purposes (including emergency response training and planning activities)); H.R. Rep. No. 101-444 part 2, 39 (1990) (allocation of funds to be based upon demonstrated needs taking into consideration certain specified factors); *Reauthorization of the Hazardous Materials Transportation Uniform Safety Act of 1990: Hearing Before the Subcomm. On Surface Transportation of the Comm. On Commerce, Science, and Transportation*, 103rd Cong. (1993). Therefore, while hazardous materials

transportation fees are to be used for a purpose related to transporting hazardous material, the fees may also be used for "enforcement and planning, developing, and maintaining a capability for emergency response." Section 5125(f). These other factors facilitate safe transportation of hazardous materials but to say the fees can only be used for transportation ignores the Congressional intent in including the other factors for preparation and emergency response.

Further, the IP's use of the statement by the RSPA in 57 Fed. Reg. 30626 does not advance their argument that the Secretary's authority to collect information on State and Tribe hazardous materials transportation fees as granted by Congress was intended to ensure that States and Tribes do not hide behind the guise of such so-called fees. The RSPA does state that the grant program was added to the Act clearly demonstrating "a legislative intent to authorize hazardous materials transportation fees so long as those fees meet the criteria of that section." 57 Fed. Reg. 30626 (B9). However, RSPA also stated that the Federal registration and fee program does not preempt or restrict a State or Tribe's ability to impose fees on carriers of hazardous materials. Id.

Also, the IP continue to ignore the fact that the Act clearly states that fees must be fair and "used for a purpose related to transporting hazardous material, *including* enforcement and planning, developing, and maintaining a capability for emergency response." Section 5125(f) (emphasis added). These purposes, while related to hazardous material transportation, do not solely concern actual transportation. Therefore, States and Tribes are permitted to use fees collected from hazardous materials carriers for purposes other than direct transportation of hazardous materials and are not hiding "behind the guise of so-called hazardous materials transportation fees" when they do so.

IV. Burden of additional disclosure

The IP state that applicant States and Tribes already generate "a good deal of related information" thus disclosure of additional relevant data "should not be unnecessarily burdensome." Apparently the IP members have never worked with volunteer first responder organizations. Every additional data collection effort is a burden. While some burdens are reasonable, data collection for the sake of collection is not.

V. PHMSA reporting requirements

The IP note that PHMSA is required under Section 5116(k) to prepare an annual report disclosing the allocation and uses of the planning and training grants and argue that the additional information proposed will help PHMSA satisfy that reporting requirements.

What the IP fails to note, however, is that the information Section 5116(k) requires the Secretary to report is already collected through the grant application process. Under 110.30(c)(5), grant applicants must provide a project narrative describing the current training programs, the training audience, the estimated total number of persons to

be training, and the ways the training grants will support training needs. This is the information required by Section 5116(k); the Secretary "shall identify the ultimate recipients of training grants and include a detailed accounting of all grant expenditures by grant recipients, the number of persons trained under the grant programs, and an evaluation of the efficacy of training programs carried out." Therefore, the Secretary, in allocating grant money, currently collects the information necessary for the Section 5116(k) reports. The proposed questions do not add relevant information for these reports.

VI. 1990 amendments and reduction of State and Tribe fees

The IP note that when they supported the 1990 Act amendments, including the HMEP grant program, they did so with the understanding that creation of a federal repository of grant monies to ensure sufficient preparation for emergency responders would reduce the need for State and Tribes to impose their own fees to fund emergency responders.

The IP may have believed that the HMEP grant program would reduce the need for State and Tribe fees on transportation of hazardous materials but the Act clearly allows States and Tribes to impose such fees. Section 5125(f). And, considering the need to facilitate responses to accidents involving transportation of hazardous materials and provide continual planning and training for such responses, the additional funding provided by the fees is valuable and necessary. Therefore, PHMSA should not burden the collection of those fees by States and Tribes with the proposed additional information requirement.

VII. Addressing unfair or malapportioned non-federal fees

The IP argue that addressing "unfair or malapportioned non-federal fees via litigation or individual petitions for preemption is unnecessary and costly" and "undermines Congress' purpose in providing PHMSA with the authority to consider whether fees are fair and properly utilized when considering HMEP grants." Further, IP argue that doing so places PHMSA under an unnecessary administrative burden to respond to preemption petitions on an individual basis.

However, as stated by the comment letters, "individual parties are better equipped not only to recognize the unfairness, but also to take legal action in order to dispute the fee." In addition, neither the Senate or House reports nor hearings, cited above, stated the Secretary must consider apportionment of fees. The language of the Act is that fees must be "related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response" not "apportioned" among hazardous materials transportation. Section 5125(f). If Congress had wanted the Secretary to determine how State and Tribe fees are specifically apportioned, Congress would have stated so.

Conclusion

As our colleague from Oklahoma so ably states:

" ... many of us at the state and local level joined together in researching and developing a response to the notice of information collection activity. Those of us who work daily with planning and training to respond to hazardous materials incidents rely on our collective experience to enhance our programs. ... Such collaboration and networking is important because, as I am sure you are aware, most government employees have a number of responsibilities. ... Yes, we had a coordinated voice. This should not lessen the impact of [our] objections to the information collection notice but rather strengthen them; it demonstrates the collective concern of folks all over the United States who work daily to make citizens safer despite hazardous materials transported through their communities."

What the IP entities, hiding behind a front rather than a collective effort, fail to understand is that HMEP funding is frequently the only money first responders and emergency planners ever see that allows them to work towards community safety. Planning, training and exercises are not each some sort of free-standing commodity that can be mixed and matched. Rather they are parts of the continuum of safety efforts practiced by communities.

The IP entities are engaged in a commercial enterprise. They are expected to profit from that enterprise. The agencies that use HMEP funding do not profit from the transportation of hazardous materials into or through their communities. They must simply cope and adapt to these hazards. If this process were fair, transportation companies that ship through areas with limited equipment and poorer levels of training would pay those communities more to improve their capacities. Instead, what the IP entities propose is to further disadvantage these communities by a meaningless increase in the burden of obtaining even the small amounts of money the IP entities would grudgingly allow.

Sincerely,

Timothy R Gablehouse
President

TRG/tg

E-mail: Ted Willke, Associate Administrator for Hazardous Materials Safety, DOT

Comments to DOT PHMSA Information Collection Activity Notice
Docket PHMSA-2007-27181

Electronically submitted

Dear PHMSA:

Thank you for this opportunity to comment on what we believe to be a very important notice.

The National Association of SARA Title III Program Officials (NASTTPO) is made up of members and staff of State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), Local Emergency Planning Committees (LEPCs), various federal agencies and private industry. Members include state, tribal or local government employees as well as private sector representatives with Emergency Planning and Community Right to Know (EPCRA) program responsibilities, such as health, occupational safety, first response, environmental, and emergency management. The membership is dedicated to working together to prepare for possible emergencies and disasters involving hazardous materials, whether they are accidental releases or result from terrorist acts.

Our membership is heavily dependant on HMEP funding distributed through the states. The burdens proposed by the current notice will fall on not just state agencies. Rather, it will fall on local, tribal and other organizations that are users of the funding. These burdens are not trivial. Many of our member agencies are volunteer groups. Devoting time and energy to reports detracts from their other very important missions.

We believe that DOT/PHMSA has broad authority to collect information from grant recipients. That authority should not be used absent some actual purpose and proposed use for the information collected.

The collection of additional information in the manner advocated by petitioner and other commenters is unjustified because their suggested use of that information is improper. In any event, as DOT/PHMSA notes, you already collect a large percentage of the information requested. Data collection for the sake of data collection is unreasonable.

We do not believe that DOT/PHMSA should impose the burden of information collection without a clear plan and purpose to use the information in a fashion that comports with statute and regulation. At this point all we really have is the advocacy of outsiders regarding the use of the information. Until and unless DOT/PHMSA is clear in its plans for the use of the information it appears that the proposed collection activity is simply an increased burden without a purpose.

The petitioner and commenters characterizes Congress' purpose in enacting the 1990 amendments as funding a federal mandate that enables states to "develop emergency response plans" and train "emergency responders." However, this statement oversimplifies and narrows the purpose of the 1990 amendments. Section 117(a) of the HMTA requires the Secretary of

Transportation to make grants to States for "developing, improving, and implementing emergency response plans under EPCRA, including the determination of flow patterns of hazardous materials within a State and between a State and another State; and determining the need for regional hazardous materials response teams." 49 U.S.C. § 117(a). Section 5125(f) of the HMTA also states that grant moneys may be used for "enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(f). In a federal publication, the Agency further explained that the overall purpose of the grants is "to improve the capability of communities to plan for and respond to the full range of potential risks posed by accidents and incidents involving hazardous materials." 57 Fed. Reg. 43062 (Sept. 17, 1992). It is clear from both the statutory language and the information found in federal publications that the overall intent of this aspect of the HMTA is one of leniency. It is meant to allow states to engage in a wide variety of administrative activities and research, as well as engaged work out in the field, directed towards the safe transport of hazardous materials. A more narrow interpretation would defeat the overall purpose of the grants by restricting the flow of money to activities that the state finds necessary to ensure the safe transport of hazardous materials.

Additionally, the petitioner's comments suggest that the propriety of a state's utilization of non-federally assessed fees is solely dependent on whether the fee collected is used for a purpose related to transporting hazardous material. The HMTA, as well as the applicable Federal Register excerpts, state that this is only one factor to be considered in the awarding of or denying of grants. A number of other factors are at the discretion of the Secretary of Transportation, including "the number of hazardous materials facilities, types and amounts of hazardous materials transported, population at risk, frequency and number of incidents recorded in past years, high mileage transportation corridors, whether the State or Indian tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to carry out purposes related to the transportation of hazardous materials." 57 FR 43064 (Sept. 17, 1992). Because a wide variety of factors could come into play when assessing the propriety of grant awards, it would be incorrect to state that PHMSA should have assessed grant awards solely on "whether the fee is used only to carry out a purpose related to transporting hazardous material" and failed to fulfill that duty. 49 U.S.C. 5116(b)(4)(D).

49 USC 5125(f)(1) does state that a fee can only be imposed on a hazardous waste transporter if that fee is used for a purpose related to the transporting of hazardous material. However, this information only need be reported to the Secretary of Transportation "on the Secretary's request" and is not "mandated" by the statute. Petitioner and commenters characterizes this reporting "requirement" as a "congressional mandate," which is not correct. The additional information should only be collected if it serves some specific purpose – Congress did not mandate information collection for the sake of information collection.

There are several other more specific arguments put forth by the petitioner and commenters that need to be addressed in greater detail:

1. "[I]n instances where there is no clear demonstration that State-levied hazardous materials fees are being used as required by [49 U.S.C. 5125(f)], such state[s] should be prohibited from receiving an award."[1]

The above argument was specifically rejected by the Research and Special Programs Administration's ("RSPA") September, 1992 discussion of public comments to the final rule implementing the Public Sector Training and Planning Grants Program ("PTPG")[2]. RSPA responded to the above argument by stating:

> RSPA is sensitive to the issue raised by this commenter and will carefully consider that information in its grants-review process. However, it is not necessary to revise the rule in the manner suggested by the commenter.[3]

RSPA chose not to revise the rule as suggested because whether a state collects a fee and how that fee are only some factors to be considered when allocating funds. Other factors the RSPA considers include: the number of hazardous materials facilities; types and amounts of hazardous materials transported; population at risk; frequency and number of incidents recorded in past years; and high mileage transportation corridors.[4] These factors are also included in the statutory section on monitoring and review of Planning and Training Grants.[5]

Although state fees have been invalidated through either the preemption determination process or by a court, "no state in any year has been denied a PTPG"[6] a fact which demonstrates that the RSPA considers all of the above factors when allocating monies, not just state fee collection and usage. The additional information proposed for collection simply will not inform this analysis in any way relative to the burdens imposed on the grant recipients.

2. "[The newly requested fee information] would provide the data necessary for both the agency and the regulated community to determine if states are in compliance with applicable provisions of the HMTA."[7]

The Pipeline and Hazardous Materials Safety Administration ("PHMSA") already receives almost all of the newly requested information. When discussing the expected burden of reporting the information the agency stated: "HMEP [Hazardous Materials Emergency Preparedness] grant recipients are required to submit performance reports, most of which should include some or all of the information we are requesting."[8] The fact that the PHMSA already has

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[1] Letter from Interested Parties for Hazardous Materials Transportation, to The Honorable Thomas J. Barrett, VADM Ret. Administrator, Pipeline and Hazardous Materials Safety Administration, US Department of Transportation, at 1 (March 23, 2007) [hereinafter *Industry Letter*].
[2] Interagency Hazardous Materials Public Sector Training and Planning Grants, 57 Fed. Reg. 43062, 43064 (Sept. 17, 1992).
[3] *Id.*
[4] *Id.*
[5] 49 U.S.C.A. § 5116(b)(4)(A-E).
[6] *Industry Letter, supra* note 1, at 2.
[7] *Industry Letter, supra* note 1, at 3.
[8] Information Collection Activities, 72 Fed. Reg. 36754, 36757 (July 5, 2007).

most of the information suggest that the proposed information collection effort is to appease industry since "some states were not willing to provide industry with information sufficient to determine whether states with hazmat fees were complying with the limitations of the HMTA."[9] In such cases, the aggrieved industry party should pursue preemption if they think it is appropriate rather than ask PHMSA to do its bidding.

3. "Our petition will not have the effect of denying states or Indian tribes funds they are entitled to receive."[10]

This comment is somewhat disingenuous. By advocating an inappropriate standard for preemption, the effort of collecting information for an invalid purpose will be to deny states and tribes money to which they are entitled.

Whether or not a state or tribe is denied funding depends on the specifics of the fee in question. While there appears to be some disagreement regarding which fees might be preempted – in fact the petitioner and commenters are quite inconsistent on this point - there are some generalities that are useful in this determination.

The specific section discussing fees is § 5125 part (f) which states:

> Fees.--(1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

The key determinations are whether the fee is "fair" and whether used for "a purpose related to transporting hazardous material." Any fee that is not "fair," or that is "used for" purposes other than those specified in the § 5125(f), is preempted under 49 U.S.C. 5125(a)(2) which states:

> (a) General.--Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—
>
> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

Basically there are three categories of preemption under § 5125(a) and (b). First, is the "dual compliance test" which preempts a law when it is not possible to comply with both the non-Federal requirement and the Federal hazmat law or a regulation prescribed under

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[9] *Industry Letter*, *supra* note 1, at 2.
[10] *Id.*, at 3.

federal hazmat law.[11] Second, is the "obstacle test" which preempts a non-Federal requirement if its application or enforcement is an obstacle to accomplishing and carrying out the Federal hazmat law or a regulation prescribed under Federal hazmat law.[12] Third is the "covered subjects test" which preempts a non-Federal requirement if it concerns any of the five covered subjects and is not "substantively the same as" the Federal hazmat law or regulations' requirements.[13]

Using existing information sources, State and tribal fees have been found to be preempted by both courts and the RSPA through the preemption determination process under 49 U.S.C 5125(d)(1). RSPA has found that fees which fail the fairness or "used for" test in 49 U.S.C. 5125(f)(1)[14], create an obstacle to carrying out the Federal hazardous materials transportation law and thus fail the "obstacle test" under 49 U.S.C. § 5125(a)(2). The Supreme Court in Evansville-Vanderburgh came up with a test to determine whether a fee is fair.[15] Under the Evansville test, a fee is fair if it is:

(a) based on fair approximation of use of facilities;
(b) not excessive in relation to benefits conferred;
(c) does not discriminate against interstate commerce[16]

The most common grounds for preemption is when the fee is not based on some fair approximation of the use of facilities as is required under 49 U.S.C. § 5125(f)(1).[17]

A State may impose flat fees when "administrative difficulties make collection of more finely calibrated user charges impracticable."[18] The state bears the burden of demonstrating the practical impossibility of employing any form of apportionment that would render its tax better "calibrated" than a flat tax.[19] The Court has indicated that flat taxes are permissible when they are shown to be "the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens."[20]

Conclusion

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[11] Index to Preemption of State and Local Laws and Regulations Under the Federal Hazardous Material Transportation Law, PHMSA Office of Chief Council, available at http://rspa-atty.dot.gov/preempt/preemption_index.pdf.
[12] *Id.*
[13] *Id.*
[14] (f) FEES. (1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.
[15] Evansville-Vanderburgh Airport Auth. V. Delta Airlines, Inc. 405 U.S. 707 (1972).
[16] *Id.*
[17] *Id.*
[18] American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 297 (1987).
[19] American Trucking Ass'ns v. Secretary of Administration, 613 N.E.2d, 95, 100 (Mass. 1993).
[20] American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S., at 296.

The party challenging the validity of a state statute on Commerce Clause grounds bears the burden of proof.[21] The criteria under which fees will be evaluated are not specific, which justifies the broad discretion given to the Secretary to determine whether the purpose of the fee relates to hazardous materials transportation.

States, tribes and local governments plan, train and exercise to deal with the risks of hazardous materials in transportation. Contrary to the narrative in the current notice, DOT/PHMSA does already require that states and tribes broadly report on their use of funds for planning, training, and exercises. Current reporting is more than adequate for a determination under the second preemption test as evidenced by preemption actions to this point.

As petitioner's comments show, such preemptive powers have been used when necessary. Additionally, the petitioners listed a few instances where parties had taken action against the State to ensure that non-federally assessed fees were not discriminatory or malapportioned. Requiring an increased time-reporting burden on all grant applicants is unfair considering that most fees are assessed in compliance with the law. When fairness is an issue, individual parties are better equipped not only to recognize the unfairness, but also to take legal action in order to dispute the fee.

The petitioner and commenters certainly wish to ease their burden in challenging fees. They mischaracterize the obligations of DOT/PHMSA to collect data to make a preemption evaluation as mandatory. In these entities are unhappy about a specific state fee they should challenge it rather than attempt to shift the burdens of these arguments to states and tribes.

Congress has given the agency broad discretion to evaluate both grants and the question of preemption. Existing data collection would appear to be fully adequate to serve the agency's needs in this regard. Until such time that DOT/PHMSA can articulate a specific use for the information that is consistent with the statute and regulations, the increased burdens should not be imposed.

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[21] American Trucking Ass'ns, Inc. v. State, 180 N.J. 377, 396 (N.J., 2004).

I am Donald Hall the HMEP Grant Manager for the State of Texas.
Absent the HMEP program, almost all of our 270 LEPCs would have no resources for planning and training activities.

I am sensitive to the industry desire not to pay more than its fair share of fees. Of course, when it comes to hazmat incidents on the streets and highway, these very same industries are fully responsible. When they think they are being unfairly charged for the costs of a response and cleanup, they are eager to point the finger at local agencies for a failure to have adequate plans and training.

In the rural parts of the Texas the response groups are almost entirely made up of volunteers. Industry can't have it both ways. Without resources these agencies can't possibly plan and train. As HMEP funding is the bulk of the resources they have, industry's efforts to penalize states by artificially evaluating the use of funds, is ill-conceived at best.

DOT has authority to collect information. They should impose these burdens only when there is a clear intent to use the information for a reasonable purpose that is consistent with the statute and regulations.

The Purpose of State-Tribal Assessed Hazmat Fees

The Interested Party/IME comments characterize Congress' purpose in enacting the 1990 amendments to the Hazardous Materials Transportation Act ("Act") as funding a federal mandate that enables states to "develop emergency response plans" and train "emergency responders." However, this statement oversimplifies and narrows the purpose of the 1990 amendments. The plain language of the Act and the pertinent federal publication list a variety of uses for HMEP grant money that are far broader in scope.

In a federal publication, the Department of Transportation ("DOT") asserted that the overall purpose of the grants is "to *improve the capability of communities to plan for and respond to the full range of potential risks* posed by accidents and incidents involving hazardous materials." 57 Fed. Reg. 43062 (Sept. 17, 1992) (emphasis added). This broad purpose is articulated by the Act through its statutory provisions. For example, section 5116(a) of the Act requires the Secretary of Transportation ("Secretary") to issue grants to states/tribal authorities for "developing, improving, and implementing emergency response plans under EPCRA, including the determination of flow patterns of hazardous materials within a State and between a State and another State; and determining the need for regional hazardous materials response teams." 49 U.S.C. § 5116(a) (2006). Section 5125(f) of the Act states that grant money may be used for "enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(f) (2006). HMEP grant money should be used to train public sector employees to respond to accidents and incidents involving hazardous material. 49 U.S.C. § 5116(b)(1) (2006). Grant money can also be used to pay the tuition costs and travel expenses of both those attending and those providing such training. 49 U.S.C. § 5116(b)(3)(A)(i)-(iv) (2006).

Both the statutory language and the information found in federal publications reveal that the overall intent of this aspect of the Act is one of leniency. The grants

provided by PHMSA are meant to allow states to engage in a wide variety of administrative activities and research, as well as engaged work out in the field, directed towards the safe transport of hazardous materials. A more narrow interpretation would defeat the overall purpose of the grants by restricting the flow of money to activities that the state finds necessary to ensure the safe transport of hazardous materials. Thus, the "required use" of HMEP grant money, as set out by 49 U.S.C. 5125(f), must be based on a broad reading of the Act.

The Factors Used to Evaluate Grant Applicants

Section 5125(f)(1) of the Act states that any information regarding fees assessed by a state/tribal authority from Hazmat transporters should be reported to the Secretary "on the Secretary's request." 49 U.S.C. § 5125(f) (2006). A similar statement is included in Section 5116(d), which states an entity applying for HMEP grant money must "submit an application at the time, and contain information, the Secretary requires." 49 U.S.C. 5116(d) (2006). Through these provisions, the Act gives the Secretary sole discretion over the collection of information from grant applicants. In other words, Congress did not mandate that the Secretary be engaged in the collection of information from grant applicants with a certain level of detail, or with a certain frequency.

The Interested Party/IME comments suggest that the propriety of a state's utilization of non-federally assessed fees is solely dependent on whether the fee collected is used for a purpose related to transporting hazardous material. The plain language of the Act, as well as applicable Federal Register excerpts, state that this is only one factor the Secretary may consider in the awarding of or denial of grants. The Secretary may also consider a variety of other factors, including "the number of hazardous materials facilities, types and amounts of hazardous materials transported, population at risk, frequency and number of incidents recorded in past years, high mileage transportation corridors, whether the State or Indian tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to carry out purposes related to the transportation of hazardous materials." 57 Fed. Reg. 43064 (Sept. 17, 1992). This statement was codified in section 5116 of the Act, which states that in making decisions in regards to the allocation of grants, the Secretary may consider:

> **(A)** the number of hazardous material facilities in the State or on land under the jurisdiction of the tribe;
> **(B)** the types and amounts of hazardous material transported in the State or on that land;
> **(C)** whether the State or tribe imposes and collects a fee on transporting hazardous material;
> **(D)** whether the fee is used only to carry out a purpose related to transporting hazardous material; and
> **(E)** other factors the Secretary decides are appropriate to carry out this subsection.

49 U.S.C. § 5116(b)(4)(A)-(E) (2006).

As this provision shows, a variety of factors come into play when assessing the effective use of HMEP grant money. As a result, it would be improper to state that

PHMSA should measure such effectiveness solely on whether the fee is used solely to carry out a purpose related to the transportation of hazardous material. Thus, IME's statement that PHMSA has never applied the statutory criteria when awarding or denying HMEP grant money is inconclusive.

Proposed Questions for the ICR

The proposed questions included in the IME's comments focus on factors that are inapplicable to PHMSA's evaluation of the usage of HMEP grant money. While IME states that the proposed questions only clarify the question currently listed on the ICR[1], some of IME's questions are outside the scope of this question. In addition to generally asking if a hazmat fee is administered in the state/tribal region, and for what purpose the revenue from the fee is used, IME's proposed questions also ask state/tribal grant applicants to report the name of the agency that administers each fee. Additionally, grant applicants should state whether the size of the company is considered when setting the amount of the fee and disclose the total revenue collected from each fee during the last fiscal year. (*See* proposed questions listed in IME's comments 2(a),(c), & (e)).

In its comments, IME has expressed concern that fees could be being used for purposes not related to the transportation of hazardous materials. However, it is unclear how the addition of the proposed questions to the ICR would enable PHMSA to glean any additional information about how effectively HMEP grant money is being spent. Furthermore, the inclusion of these questions suggests that IME realizes, contrary to its written comments, that other factors besides the purpose for which grant money is used should be considered when the Secretary grants HMEP money to states/tribal authorities.

Likewise, the proposed questions in the Interested Party comments also ask for information that is outside the scope of the current ICR. In addition to the questions included in IME's comments, the Interested Party comments ask the basis upon which each state/tribal hazmat fee is assessed. Again, it is unclear how the addition of the proposed questions will enable PHMSA to learn anything new about the use of the grant moneys assessed by the state/tribal authority.

As already stated, the Act grants the Secretary the discretion to request any information from grant applicants that is deemed necessary to aide in the issuance of HMEP grant money. To exercise this discretion without a legitimate end, such as the IME/Interested Party comments advocate, would be an abuse of the Secretary's discretion. Despite the numerous amendments to the Act over the years, Congress has allowed this discretionary power to remain in the hands of the Secretary. Because the Secretary has not asked for additional information to be included on the current ICR, PHMSA's request for a 3-year extension to the current ICR is appropriate.

Preemptive Powers

Congress granted preemptive powers to DOT/PHMSA through an amendment to the Act to ensure compliance with the Act's guidelines on the assessment of non-federal fees. As IME's comments show, such preemptive powers have been used when necessary. Additionally, the IME comments list instances where parties have taken

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[1] The HMEP grant application currently asks applicants to "Submit a written statement explaining whether the state assess and collects fees on transportation of hazardous materials and whether such assessment of fees are used solely to carryout purposes related to the transportation of hazardous materials."

action against the State to ensure that non-federally assessed fees were not discriminatory or malapportioned. Requiring an increased reporting burden on all grant applicants is unfair considering that many fees are assessed in compliance with the law. When fairness is an issue, individual parties are better equipped not only to recognize the unfairness, but also to take legal action in order to dispute the fee.

Comments to DOT PHMSA Information Collection Activity Notice
Docket PHMSA-2007-27181

Electronically submitted

Dear PHMSA:

Thank you for this opportunity to comment on what we believe to be a very important notice.

We appreciate this opportunity to comment as we are vitally interested in the health and safety of first responders. We are the Local Emergency Planning Committee for Jefferson County, Colorado under the Emergency Planning and Community Right-to-Know Act. In addition we are the Citizen Corp Council for Jefferson County. In these roles we work with local emergency planning committees, first response organizations, facilities, and the public regarding emergency planning, response and community right-to-know. We work extensively with local emergency planning committees both in Colorado and throughout EPA Region VIII.

We are totally dependant on HMEP funding distributed through the states to support our planning, training and exercise activities. The burdens proposed by the current notice will fall on organizations just like us as the users of the funding. These burdens are not trivial. We are a totally volunteer group. Our sister organizations are also volunteer groups. Devoting time and energy to reports detracts from their other very important missions.

We believe that DOT/PHMSA has broad authority to collect information from grant recipients. That authority should not be used absent some actual purpose and proposed use for the information collected especially given the burdens these information requests impose.

The collection of additional information in the manner advocated by petitioner and other commenters is unjustified because their suggested use of that information is improper. In any event, as DOT/PHMSA notes, you already collect a large percentage of the information requested. Data collection for the sake of data collection is unreasonable.

We do not believe that DOT/PHMSA should impose the burden of information collection without a clear plan and purpose to use the information in a fashion that comports with statute and regulation. At this point all we really have is the advocacy of outsiders regarding the use of the information. Until and unless DOT/PHMSA is clear in its plans for the use of the information it appears that the proposed collection activity is simply an increased burden without a purpose.

The petitioner and commenters characterizes Congress' purpose in enacting the 1990 amendments as funding a federal mandate that enables states to "develop emergency response plans" and train "emergency responders." However, this statement oversimplifies and narrows the purpose of the 1990 amendments. Section 117(a) of the HMTA requires the Secretary of Transportation to make grants to States for "developing, improving, and implementing emergency response plans under EPCRA, including the determination of flow patterns of

hazardous materials within a State and between a State and another State; and determining the need for regional hazardous materials response teams." 49 U.S.C. § 117(a). Section 5125(f) of the HMTA also states that grant moneys may be used for "enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(f). In a federal publication, the Agency further explained that the overall purpose of the grants is "to improve the capability of communities to plan for and respond to the full range of potential risks posed by accidents and incidents involving hazardous materials." 57 Fed. Reg. 43062 (Sept. 17, 1992). It is clear from both the statutory language and the information found in federal publications that the overall intent of this aspect of the HMTA is one of leniency. It is meant to allow states to engage in a wide variety of administrative activities and research, as well as engaged work out in the field, directed towards the safe transport of hazardous materials. A more narrow interpretation would defeat the overall purpose of the grants by restricting the flow of money to activities that the state finds necessary to ensure the safe transport of hazardous materials.

Additionally, the petitioner's comments suggest that the propriety of a state's utilization of non-federally assessed fees is solely dependent on whether the fee collected is used for a purpose related to transporting hazardous material. The HMTA, as well as the applicable Federal Register excerpts, state that this is only one factor to be considered in the awarding of or denying of grants. A number of other factors are at the discretion of the Secretary of Transportation, including "the number of hazardous materials facilities, types and amounts of hazardous materials transported, population at risk, frequency and number of incidents recorded in past years, high mileage transportation corridors, whether the State or Indian tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to carry out purposes related to the transportation of hazardous materials." 57 FR 43064 (Sept. 17, 1992). Because a wide variety of factors could come into play when assessing the propriety of grant awards, it would be incorrect to state that PHMSA should have assessed grant awards solely on "whether the fee is used only to carry out a purpose related to transporting hazardous material" and failed to fulfill that duty. 49 U.S.C. 5116(b)(4)(D).

49 USC 5125(f)(1) does state that a fee can only be imposed on a hazardous waste transporter if that fee is used for a purpose related to the transporting of hazardous material. However, this information only need be reported to the Secretary of Transportation "on the Secretary's request" and is not "mandated" by the statute. Petitioner and commenters characterizes this reporting "requirement" as a "congressional mandate," which is not correct. The additional information should only be collected if it serves some specific purpose – Congress did not mandate information collection for the sake of information collection.

There are several other more specific arguments put forth by the petitioner and commenters that need to be addressed in greater detail:

1. "[I]n instances where there is no clear demonstration that State-levied hazardous materials fees are being used as required by [49 U.S.C. 5125(f)], such state[s] should be prohibited from receiving an award."[1]

The above argument was specifically rejected by the Research and Special Programs Administration's ("RSPA") September, 1992 discussion of public comments to the final rule implementing the Public Sector Training and Planning Grants Program ("PTPG")[2]. RSPA responded to the above argument by stating:

> RSPA is sensitive to the issue raised by this commenter and will carefully consider that information in its grants-review process. However, it is not necessary to revise the rule in the manner suggested by the commenter.[3]

RSPA chose not to revise the rule as suggested because whether a state collects a fee and how that fee are only some factors to be considered when allocating funds. Other factors the RSPA considers include: the number of hazardous materials facilities; types and amounts of hazardous materials transported; population at risk; frequency and number of incidents recorded in past years; and high mileage transportation corridors.[4] These factors are also included in the statutory section on monitoring and review of Planning and Training Grants.[5]

Although state fees have been invalidated through either the preemption determination process or by a court, "no state in any year has been denied a PTPG"[6] a fact which demonstrates that the RSPA considers all of the above factors when allocating monies, not just state fee collection and usage. The additional information proposed for collection simply will not inform this analysis in any way relative to the burdens imposed on the grant recipients.

2. "[The newly requested fee information] would provide the data necessary for both the agency and the regulated community to determine if states are in compliance with applicable provisions of the HMTA."[7]

The Pipeline and Hazardous Materials Safety Administration ("PHMSA") already receives almost all of the newly requested information. When discussing the expected burden of reporting the information the agency stated: "HMEP [Hazardous Materials Emergency Preparedness] grant recipients are required to submit performance reports, most of which should include some or all of the information we are requesting."[8] The fact that the PHMSA already has

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[1] Letter from Interested Parties for Hazardous Materials Transportation, to The Honorable Thomas J. Barrett, VADM Ret. Administrator, Pipeline and Hazardous Materials Safety Administration, US Department of Transportation, at 1 (March 23, 2007) [hereinafter *Industry Letter*].
[2] Interagency Hazardous Materials Public Sector Training and Planning Grants, 57 Fed. Reg. 43062, 43064 (Sept. 17, 1992).
[3] *Id.*
[4] *Id.*
[5] 49 U.S.C.A. § 5116(b)(4)(A-E).
[6] *Industry Letter*, *supra* note 1, at 2.
[7] *Industry Letter*, *supra* note 1, at 3.
[8] Information Collection Activities, 72 Fed. Reg. 36754, 36757 (July 5, 2007).

most of the information suggest that the proposed information collection effort is to appease industry since "some states were not willing to provide industry with information sufficient to determine whether states with hazmat fees were complying with the limitations of the HMTA."[9] In such cases, the aggrieved industry party should pursue preemption if they think it is appropriate rather than ask PHMSA to do its bidding.

3. "Our petition will not have the effect of denying states or Indian tribes funds they are entitled to receive."[10]

This comment is somewhat disingenuous. By advocating an inappropriate standard for preemption, the effort of collecting information for an invalid purpose will be to deny states and tribes money to which they are entitled.

Whether or not a state or tribe is denied funding depends on the specifics of the fee in question. While there appears to be some disagreement regarding which fees might be preempted – in fact the petitioner and commenters are quite inconsistent on this point - there are some generalities that are useful in this determination.

The specific section discussing fees is § 5125 part (f) which states:

> Fees.--(1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

The key determinations are whether the fee is "fair" and whether used for "a purpose related to transporting hazardous material." Any fee that is not "fair," or that is "used for" purposes other than those specified in the § 5125(f), is preempted under 49 U.S.C. 5125(a)(2) which states:

> (a) General.--Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—
>
> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

Basically there are three categories of preemption under § 5125(a) and (b). First, is the "dual compliance test" which preempts a law when it is not possible to comply with both the non-Federal requirement and the Federal hazmat law or a regulation prescribed under

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[9] *Industry Letter*, *supra* note 1, at 2.
[10] *Id.*, at 3.

federal hazmat law.[11] Second, is the "obstacle test" which preempts a non-Federal requirement if its application or enforcement is an obstacle to accomplishing and carrying out the Federal hazmat law or a regulation prescribed under Federal hazmat law.[12] Third is the "covered subjects test" which preempts a non-Federal requirement if it concerns any of the five covered subjects and is not "substantively the same as" the Federal hazmat law or regulations' requirements.[13]

Using existing information sources, State and tribal fees have been found to be preempted by both courts and the RSPA through the preemption determination process under 49 U.S.C 5125(d)(1). RSPA has found that fees which fail the fairness or "used for" test in 49 U.S.C. 5125(f)(1)[14], create an obstacle to carrying out the Federal hazardous materials transportation law and thus fail the "obstacle test" under 49 U.S.C. § 5125(a)(2). The Supreme Court in Evansville-Vanderburgh came up with a test to determine whether a fee is fair.[15] Under the Evansville test, a fee is fair if it is:

(a) based on fair approximation of use of facilities;
(b) not excessive in relation to benefits conferred;
(c) does not discriminate against interstate commerce[16]

The most common grounds for preemption is when the fee is not based on some fair approximation of the use of facilities as is required under 49 U.S.C. § 5125(f)(1).[17]

A State may impose flat fees when "administrative difficulties make collection of more finely calibrated user charges impracticable."[18] The state bears the burden of demonstrating the practical impossibility of employing any form of apportionment that would render its tax better "calibrated" than a flat tax.[19] The Court has indicated that flat taxes are permissible when they are shown to be "the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens."[20]

Conclusion

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[11] Index to Preemption of State and Local Laws and Regulations Under the Federal Hazardous Material Transportation Law, PHMSA Office of Chief Council, available at http://rspa-atty.dot.gov/preempt/preemption_index.pdf.
[12] *Id.*
[13] *Id.*
[14] (f) FEES. (1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.
[15] Evansville-Vanderburgh Airport Auth. V. Delta Airlines, Inc. 405 U.S. 707 (1972).
[16] *Id.*
[17] *Id.*
[18] American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 297 (1987).
[19] American Trucking Ass'ns v. Secretary of Administration, 613 N.E.2d, 95, 100 (Mass. 1993).
[20] American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S., at 296.

The party challenging the validity of a state statute on Commerce Clause grounds bears the burden of proof.[21] The criteria under which fees will be evaluated are not specific, which justifies the broad discretion given to the Secretary to determine whether the purpose of the fee relates to hazardous materials transportation.

States, tribes and local governments plan, train and exercise to deal with the risks of hazardous materials in transportation. Contrary to the narrative in the current notice, DOT/PHMSA does already require that states and tribes broadly report on their use of funds for planning, training, and exercises. Current reporting is more than adequate for a determination under the second preemption test as evidenced by preemption actions to this point.

As petitioner's comments show, such preemptive powers have been used when necessary. Additionally, the petitioners listed a few instances where parties had taken action against the State to ensure that non-federally assessed fees were not discriminatory or malapportioned. Requiring an increased time-reporting burden on all grant applicants is unfair considering that most fees are assessed in compliance with the law. When fairness is an issue, individual parties are better equipped not only to recognize the unfairness, but also to take legal action in order to dispute the fee.

The petitioner and commenters certainly wish to ease their burden in challenging fees. They mischaracterize the obligations of DOT/PHMSA to collect data to make a preemption evaluation as mandatory. In these entities are unhappy about a specific state fee they should challenge it rather than attempt to shift the burdens of these arguments to states and tribes.

Congress has given the agency broad discretion to evaluate both grants and the question of preemption. Existing data collection would appear to be fully adequate to serve the agency's needs in this regard. Until such time that DOT/PHMSA can articulate a specific use for the information that is consistent with the statute and regulations, the increased burdens should not be imposed.

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[21] American Trucking Ass'ns, Inc. v. State, 180 N.J. 377, 396 (N.J., 2004).

PHMSA:

Thanks you for allowing this response on this notice. HMEP funding for Oklahoma is almost mandatory, because without it a local level there would be little or no training. This state would have little or no funds to be used for hazardous materials planning and training. LEPC's in Oklahoma are a wonderful because they share information gained in their meetings with other who do not have such a device at there fingertips.

The proposed collection requirement places and unnecessary burden again on the grant recipient. If there are problems then the state should be able step in to provide help if needed in such a case.I for one do not think there will ever be any good out of fighting with the boards members of any corporation, state, or government entity. So the moral of the story if is not broke don't fix it

Comments re Docket# PHMSA-2007-27181 (Notice No. 07-5)- Notice and request for comments

SUBJECT: Information Collection Activities: On Line Submission www.regulations.gov

To the record:

I have been closely associated with the Emergency Planning and Community Right to Know Act, State Emergency Response Commission activities and Local Emergency Planning Committee actions since the inception of the program. I am also a past president of the National Association of SARA Title Three Program Officials, serve as Executive Director to the Arizona Emergency Response Commission and am proud to be associated with grassroots planners and responders throughout the nation. I also recognize and appreciate the value of the Hazardous Materials Emergency Preparedness Grants Program and know that without it, hazardous materials planning and training throughout the nation would be crippled. If burdened by unnecessary reporting and additional requirements, the simplicity of delivering what is statutorily and clearly outlined for grants recipients, will cause planners and responders to take away scarce and valuable resources from their primary missions. These comments are my own and do not necessarily reflect the formal position of the Arizona Emergency Response Commission nor the position of the State of Arizona.

The proposed notice is going to place quite a burden not only on states, but on all funding recipients, to include tribes, locals and others. As you look at the collection of data being suggested, the burden is not small and before demands are placed, extremely careful consideration should be given to placing yourself in the shoes of those you are asking to provide the data so as to fully understand the negative impact on the program that increasing reporting requirements will have. Funds that clearly are productively used for planning and training functions and are now adequately documented will be diverted to administrative burdens, the utility of which is quite questionable.

May I suggest that if needed, PHMSA should have the industries claiming that they pay fees to the states and tribes (and perhaps local entities), identify themselves to PHMSA, at the Secretary of Transportation's request. The facility could identify the state/tribe and agency to which they pay those fees and the amount of those fees, so that USDOT nationally could wrap its arms around the issue to determine if there is, in fact, an identifiable problem. That information can then be provided back through the states and tribes for discussions with the entities collecting and providing fees. I imagine that whatever questions needed to be asked before those fees were paid, were asked, or should have been, by the industry making the payment. I would think that if there were challenges to the fees being made, they would have been addressed and dealt with at the time of billing. The entity paying the fee should clearly be able to be responsive to DOT to explain why that fee was paid. Why is this being asked now? Are there local fees, tribal fees, as well? In support of national public-private partnership goals, let the businesses identify themselves to USDOT so that all the playing cards are clearly on the table. Provision of this information to USDOT/PHMSA directly to establish a central information repository from the

source to the grantor would appear to be the mechanism to be followed without burdening states and tribes. Based on PHMSA's notice, this doesn't appear to impact that many states, so the burden shouldn't be excessive if centralized at PHMSA. States and tribes are pretty busy doing the planning, training, responding and exercising to ensure that those businesses, transporters and communities through which hazardous materials are transported are kept safe.

While some may casually refer to inputs to the program reports as just anecdotal, it is the response community that on a daily basis handles transportation related hazardous materials accidents professionally so as to keep their communities and the environment from being harmed further when there is a release of a hazardous material, whether from a fixed facility or from a transportation related incident. The absolute professionalism and manner in which our responders react perhaps lulls us into thinking it's easy. A skilled aviator makes takeoff, landing and enroute actions appear routine. Let's not forget the planning and training that must be 'under the responder's belt' to ensure community safety. The capabilities demonstrated by the response community are not because they fill out forms, but rather because they attend courses supported by U.S. DOT's Hazardous Materials Emergency Preparedness (HMEP) Grants Program and accomplish the planning activities mandated by grants guidelines. Let's not increase their administrative burden. Keep in mind that grants are frequently pass-through so this new and increased burden being proposed/noticed will ultimately rest on the shoulders of the folks who don't need more administrative requirements levied upon them.

I believe that the statutes and regulations that govern the HMEP grants are clear, relatively simple and designed and implemented to meet mission goals, and have done so remarkably well over the years, under consistently strong management at USDOT as well as at recipient level. The current funding levels sadly fall short of meeting needs and imposition of information collection burdens will only ensure that the program funding recipients will fall shorter of meeting needs and fall short of achieving program goals since sparse resources will be diverted to meet questionable increased requirements. We have enough federal examples of how excessive data collection burdens overburden programs without clearly recognizable value. Reporting begets more reporting. The daily newspapers show that hazmat planning and response is working, albeit shortfalls.

The flexibility of the HMEP funds has enabled grants recipients to shape programs that meet the needs of their citizens. What's broken? The program sure seems to be working; as a matter of fact, the HMEP program is working far better than many other programs in existence. Narrowing the paths that grants recipients can take should not be a consideration as it removes the flexibility that Congress certainly appeared to want grantees to have.

Grants recipients provide reports to PHMSA on a routine basis and this has met the needs for a decade. Of what value is the increased reporting? What might be of great value is looking into the reauthorization of the Emergency Planning and Community Right to Know Act (EPCRA) and requiring transportation entities to be more of an integral part of the process, rather than only be subjected to making the initial emergency notification of a release. Partnering with transportation entities, transporters, rail, and road transporters in a regulated, statutorily governed manner would clearly identify and map out the coordination, planning, and partnerships required, rather than the current, somewhat haphazard manner in which it is now addressed. Removing

the transportation exemptions to EPCRA would serve to clarify regulatory requirements and would improve community safety, and I daresay, national safety and readiness. Bringing the hazardous materials transport entities to the planning table would benefit both the industry and the communities through which hazardous materials are transported. The transportation industry, if at the table and looking directly into the faces of the communities that are impacted, would develop a greater understanding of the planning and training needs within those communities because of the hazardous materials transportation threats. In the long run, this would also be quite responsive to NTSB's recommendations addressed in the section of the notice, HMEP PERFORMANCE REPORTS.

I believe there should be further discussion as to how the additional information required by PHMSA is to be collected before burdening the grantee with that data collection.

I would also be interested in receiving information on how it was determined that only three hours would be added to the total time required for each grant recipient to complete its performance report. (OVERALL PROGRAM EVALUTION). I believe that's quite an underestimation as is often the case in requests such as these.

Before there is an over-reaction to meet a petitioner's request, I believe that this notice should be further studied by PHMSA/DOT before determining that any additional information will be requested beginning in 2008. Perhaps those with comments on this subject should be brought together in a stakeholder's forum supported by the industry and PHMSA to discuss mutual needs, community safety and long-range program goals.

Respectfully submitted,

Dan Roe
DanRoe@aol.com

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STATE OF WISCONSIN \ DEPARTMENT OF MILITARY AFFAIRS
WISCONSIN EMERGENCY MANAGEMENT

2400 WRIGHT STREET
P.O. BOX 7865
MADISON, WISCONSIN 53707-7865
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August 31, 2007

Dept. of Transportation
PHMSA Information Collection Activity Notice
Docket PHMSA-2007-27181 - 6

Dear PHMSA:

Thank you for the opportunity to comment on this notice. HMEP funding provides critical hazardous materials planning and training funds to Local Emergency Planning Committees (LEPC's) and to Wisconsin Emergency Management. There are no other state funds available to replace this funding should it be reduced or eliminated.

The proposed collection requirement places an unnecessary burden on the grant recipient. The collection requirement and how it is interpreted is subjective in determining how a state fee is being used. In the case where the regulated community does not believe that the fee is used appropriately, then legal remedies should be pursued. It would be inappropriate to withhold or reduce a state's HMEP funding not supported by the appropriate legal action. It should be noted that this process worked itself out in Wisconsin when a challenge was made to the Wisconsin Hazardous Materials Transportation Fee. This was determined to be inconsistent with the law and is no longer in place. This is the appropriate mechanism for the regulated community to take is they believe that a fee is inconsistent. Whatever the process or remedies, there is no reason why the emergency management community should be penalized by lost or reduced funding and why essential planning and training should not be performed.

The HMEP grants provide essential funding to the state of Wisconsin and I appreciate the opportunity to provide comments on the notice.

Sincerely,

Johnnie L. Smith
Administrator
Wisconsin Emergency Management

Comments to DOT PHMSA HMEP Notice:

I am James Plum, Chairman of the Jefferson County, Indiana LEPC. Without the HMEP program we would have few resources for doing planning and training in our county.

I am sensitive to the industry desire not to pay more than its fair share of fees. Of course, when it comes to hazmat incidents on the streets and highway, these very same industries are fully responsible. When they think they are being unfairly charged for the costs of a response and cleanup, they are eager to point the finger at local agencies for a failure to have adequate plans and training.

We are a rural county and both the LEPC and the Hazmat response team are made up of volunteers. Without the HMEP resources it would be difficult to accomplish the required training and planning that needs to be done to respond effectively to hazmat incidents. As HMEP funding is the bulk of the resources we have, industry's efforts to penalize the us by artificially evaluating the use of funds, is ill-conceived at best.

DOT has authority to collect information. They should impose these burdens only when there is a clear intent to use the information for a reasonable purpose that is consistent with the statute and regulations.

James J. Plum
Chairman: Jefferson County, Indiana LEPC
jim.plum@grote.com
812-265-8878

I am Arthur D. Paul, Delaware emergency Management Agency. Absent the HMEP program, Delaware LEPCs would not have the resources for planning and training activities.

I am sensitive to the industry desire not to pay more than its fair share of fees. Of course, when it comes to hazmat incidents on the streets and highway, these very same industries are fully responsible. When they think they are being unfairly charged for the costs of a response and cleanup, they are eager to point the finger at local agencies for a failure to have adequate plans and training.

In the rural parts of the country these groups are almost entirely made up of volunteers. Industry can't have it both ways. Without resources these agencies can't possibly plan and train. As HMEP funding is the bulk of the resources they have, industry's efforts to penalize states by artificially evaluating the use of funds, is ill-conceived at best.

DOT has authority to collect information. They should impose these burdens only when there is a clear intent to use the information for a reasonable purpose that is consistent with the statute and regulations.

The Purpose of State-Tribal Assessed Hazmat Fees

The Interested Party/IME comments characterize Congress' purpose in enacting the 1990 amendments to the Hazardous Materials Transportation Act ("Act") as funding a federal mandate that enables states to "develop emergency response plans" and train "emergency responders." However, this statement oversimplifies and narrows the purpose of the 1990 amendments. The plain language of the Act and the pertinent federal publication list a variety of uses for HMEP grant money that are far broader in scope.

In a federal publication, the Department of Transportation ("DOT") asserted that the overall purpose of the grants is "to *improve the capability of communities to plan for and respond to the full range of potential risks* posed by accidents and incidents involving hazardous materials." 57 Fed. Reg. 43062 (Sept. 17, 1992) (emphasis added). This broad purpose is articulated by the Act through its statutory provisions. For example, section 5116(a) of the Act requires the Secretary of Transportation ("Secretary") to issue grants to states/tribal authorities for "developing, improving, and implementing emergency response plans under EPCRA, including the determination of flow patterns of hazardous materials within a State and between a State and another State; and determining the need for regional hazardous materials response teams." 49 U.S.C. § 5116(a) (2006). Section 5125(f) of the Act states that grant money may be used for "enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(f) (2006). HMEP grant money should be used to train public sector employees to respond to accidents and incidents involving hazardous material. 49 U.S.C. § 5116(b)(1) (2006). Grant money can also be used to pay the tuition costs and travel expenses of both those attending and those providing such training. 49 U.S.C. § 5116(b)(3)(A)(i)-(iv) (2006).

Both the statutory language and the information found in federal publications reveal that the overall intent of this aspect of the Act is one of leniency. The grants provided by PHMSA are meant to allow states to engage in a wide variety of

administrative activities and research, as well as engaged work out in the field, directed towards the safe transport of hazardous materials. A more narrow interpretation would defeat the overall purpose of the grants by restricting the flow of money to activities that the state finds necessary to ensure the safe transport of hazardous materials. Thus, the "required use" of HMEP grant money, as set out by 49 U.S.C. 5125(f), must be based on a broad reading of the Act.

The Factors Used to Evaluate Grant Applicants

Section 5125(f)(1) of the Act states that any information regarding fees assessed by a state/tribal authority from Hazmat transporters should be reported to the Secretary "on the Secretary's request." 49 U.S.C. § 5125(f) (2006). A similar statement is included in Section 5116(d), which states an entity applying for HMEP grant money must "submit an application at the time, and contain information, the Secretary requires." 49 U.S.C. 5116(d) (2006). Through these provisions, the Act gives the Secretary sole discretion over the collection of information from grant applicants. In other words, Congress did not mandate that the Secretary be engaged in the collection of information from grant applicants with a certain level of detail, or with a certain frequency.

The Interested Party/IME comments suggest that the propriety of a state's utilization of non-federally assessed fees is solely dependent on whether the fee collected is used for a purpose related to transporting hazardous material. The plain language of the Act, as well as applicable Federal Register excerpts, state that this is only one factor the Secretary may consider in the awarding of or denial of grants. The Secretary may also consider a variety of other factors, including "the number of hazardous materials facilities, types and amounts of hazardous materials transported, population at risk, frequency and number of incidents recorded in past years, high mileage transportation corridors, whether the State or Indian tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to carry out purposes related to the transportation of hazardous materials." 57 Fed. Reg. 43064 (Sept. 17, 1992). This statement was codified in section 5116 of the Act, which states that in making decisions in regards to the allocation of grants, the Secretary may consider:

> **(A)** the number of hazardous material facilities in the State or on land under the jurisdiction of the tribe;
> **(B)** the types and amounts of hazardous material transported in the State or on that land;
> **(C)** whether the State or tribe imposes and collects a fee on transporting hazardous material;
> **(D)** whether the fee is used only to carry out a purpose related to transporting hazardous material; and
> **(E)** other factors the Secretary decides are appropriate to carry out this subsection.

49 U.S.C. § 5116(b)(4)(A)-(E) (2006).

As this provision shows, a variety of factors come into play when assessing the effective use of HMEP grant money. As a result, it would be improper to state that PHMSA should measure such effectiveness solely on whether the fee is used solely to

carry out a purpose related to the transportation of hazardous material. Thus, IME's statement that PHMSA has never applied the statutory criteria when awarding or denying HMEP grant money is inconclusive.

Proposed Questions for the ICR

The proposed questions included in the IME's comments focus on factors that are inapplicable to PHMSA's evaluation of the usage of HMEP grant money. While IME states that the proposed questions only clarify the question currently listed on the ICR[1], some of IME's questions are outside the scope of this question. In addition to generally asking if a hazmat fee is administered in the state/tribal region, and for what purpose the revenue from the fee is used, IME's proposed questions also ask state/tribal grant applicants to report the name of the agency that administers each fee. Additionally, grant applicants should state whether the size of the company is considered when setting the amount of the fee and disclose the total revenue collected from each fee during the last fiscal year. (*See* proposed questions listed in IME's comments 2(a),(c), & (e)).

In its comments, IME has expressed concern that fees could be being used for purposes not related to the transportation of hazardous materials. However, it is unclear how the addition of the proposed questions to the ICR would enable PHMSA to glean any additional information about how effectively HMEP grant money is being spent. Furthermore, the inclusion of these questions suggests that IME realizes, contrary to its written comments, that other factors besides the purpose for which grant money is used should be considered when the Secretary grants HMEP money to states/tribal authorities.

Likewise, the proposed questions in the Interested Party comments also ask for information that is outside the scope of the current ICR. In addition to the questions included in IME's comments, the Interested Party comments ask the basis upon which each state/tribal hazmat fee is assessed. Again, it is unclear how the addition of the proposed questions will enable PHMSA to learn anything new about the use of the grant moneys assessed by the state/tribal authority.

As already stated, the Act grants the Secretary the discretion to request any information from grant applicants that is deemed necessary to aide in the issuance of HMEP grant money. To exercise this discretion without a legitimate end, such as the IME/Interested Party comments advocate, would be an abuse of the Secretary's discretion. Despite the numerous amendments to the Act over the years, Congress has allowed this discretionary power to remain in the hands of the Secretary. Because the Secretary has not asked for additional information to be included on the current ICR, PHMSA's request for a 3-year extension to the current ICR is appropriate.

Preemptive Powers

Congress granted preemptive powers to DOT/PHMSA through an amendment to the Act to ensure compliance with the Act's guidelines on the assessment of non-federal fees. As IME's comments show, such preemptive powers have been used when necessary. Additionally, the IME comments list instances where parties have taken action against the State to ensure that non-federally assessed fees were not discriminatory

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[1] The HMEP grant application currently asks applicants to "Submit a written statement explaining whether the state assess and collects fees on transportation of hazardous materials and whether such assessment of fees are used solely to carryout purposes related to the transportation of hazardous materials."

or malapportioned. Requiring an increased reporting burden on all grant applicants is unfair considering that many fees are assessed in compliance with the law. When fairness is an issue, individual parties are better equipped not only to recognize the unfairness, but also to take legal action in order to dispute the fee.

Comments to DOT PHMSA Information Collection Activity Notice
Docket PHMSA-2007-27181

Electronically submitted

Dear PHMSA:

Thank you for this opportunity to comment on what we believe to be a very important notice.

The Oklahoma Hazardous Materials Emergency Response Commission is composed of representatives from the Oklahoma Department of Environmental Quality, the Oklahoma Emergency Management Agency, The Oklahoma Department of Public Safety, the Oklahoma State Fire Marshall, the Oklahoma Office of Homeland Security, local emergency responders and the regulated community. The Commission works to assist Oklahomans in preparation for possible emergencies and disasters involving hazardous materials, whether they are accidental releases or result from terrorist acts. The Commission oversees the distribution of HMEP grants to Local Emergency Planning Committees specifically for planning for hazardous materials incidents and for training of local responders. The majority of local fire departments in Oklahoma are volunteer departments, the only hazardous materials training available to them is the training provided by HMEP funding. The rural, volunteer fire departments are expected to respond to transportation incidents throughout the state.

Local emergency responders and planning committees are almost entirely dependant on HMEP funding distributed through the state. The burdens proposed by the current notice will fall on not just state agencies. Rather, it will fall primarily on local organizations that are users of the funding. These burdens are not trivial. Our Local Emergency Planning Committees and most of our rural fire departments are volunteer groups. Devoting time and energy to reports detracts from their other very important missions.

We believe that DOT/PHMSA has broad authority to collect information from grant recipients. That authority should not be used absent some actual purpose and proposed use for the information collected.

The collection of additional information in the manner advocated by petitioner and other commenters is unjustified because their suggested use of that information is improper. In any event, as DOT/PHMSA notes, you already collect a large percentage of the information requested. Data collection for the sake of data collection is unreasonable.

We do not believe that DOT/PHMSA should impose the burden of information collection without a clear plan and purpose to use the information in a fashion that comports with statute and regulation. At this point all we really have is the advocacy of outsiders regarding the use of the information. Until and unless DOT/PHMSA is clear in its plans for the use of the information it appears that the proposed collection activity is simply an increased burden without a purpose.

Petitioner and commenters improperly characterizes the 1990 amendments by making it seem as though the only important criteria for evaluating registration fees is whether the fee collected is used for a purpose related to transporting hazardous material. The actual statute and applicable FR excerpts state that this is only one factor to consider, giving the Secretary of Transportation wide discretion in this area. 57 FR 43064 lists many possible factors that could be taken into consideration by the Secretary for this purpose. Any increased data collection effort needs to reflect this broad discretion and be focused upon some specific application of that discretion.

49 USC 5125(f)(1) does state that a fee can only be imposed on a hazardous waste transporter if that fee is used for a purpose related to the transporting of hazardous material. However, this information only need be reported to the Secretary of Transportation "on the Secretary's request" and is not "mandated" by the statute. Petitioner and commenters characterizes this reporting "requirement" as a "congressional mandate," which is not correct. The additional information should only be collected if it serves some specific purpose – Congress did not mandate information collection for the sake of information collection.

There are several arguments put forth by the petitioner and commenters that need to be addressed in greater detail:

1. "[I]n instances where there is no clear demonstration that State-levied hazardous materials fees are being used as required by [49 U.S.C. 5125(f)], such state[s] should be prohibited from receiving an award."[1]

The above argument was specifically rejected by the Research and Special Programs Administration's ("RSPA") September, 1992 discussion of public comments to the final rule implementing the Public Sector Training and Planning Grants Program ("PTPG")[2]. RSPA responded to the above argument by stating:

> RSPA is sensitive to the issue raised by this commenter and will carefully consider that information in its grants-review process. However, it is not necessary to revise the rule in the manner suggested by the commenter.[3]

RSPA chose not to revise the rule as suggested because whether a state collects a fee and how that fee are only some factors to be considered when allocating funds. Other factors the RSPA considers include: the number of hazardous materials facilities; types and amounts of hazardous materials transported; population at risk; frequency and number of incidents recorded in past years; and

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[1] Letter from Interested Parties for Hazardous Materials Transportation, to The Honorable Thomas J. Barrett, VADM Ret. Administrator, Pipeline and Hazardous Materials Safety Administration, US Department of Transportation, at 1 (March 23, 2007) [hereinafter *Industry Letter*].
[2] Interagency Hazardous Materials Public Sector Training and Planning Grants, 57 Fed. Reg. 43062, 43064 (Sept. 17, 1992).
[3] *Id.*

high mileage transportation corridors.[4] These factors are also included in the statutory section on monitoring and review of Planning and Training Grants.[5]

Although state fees have been invalidated through either the preemption determination process or by a court, "no state in any year has been denied a PTPG"[6] a fact which demonstrates that the RSPA considers all of the above factors when allocating monies, not just state fee collection and usage. The additional information proposed for collection simply will not inform this analysis in any way relative to the burdens imposed on the grant recipients.

2. "[The newly requested fee information] would provide the data necessary for both the agency and the regulated community to determine if states are in compliance with applicable provisions of the HMTA."[7]

The Pipeline and Hazardous Materials Safety Administration ("PHMSA") already receives almost all of the newly requested information. When discussing the expected burden of reporting the information the agency stated: "HMEP [Hazardous Materials Emergency Preparedness] grant recipients are required to submit performance reports, most of which should include some or all of the information we are requesting."[8] The fact that the PHMSA already has most of the information suggest that the proposed information collection effort is to appease industry since "some states were not willing to provide industry with information sufficient to determine whether states with hazmat fees were complying with the limitations of the HMTA."[9] In such cases, the aggrieved industry party should pursue preemption if they think it is appropriate rather than ask PHMSA to do its bidding.

3. "Our petition will not have the effect of denying states or Indian tribes funds they are entitled to receive."[10]

This comment is somewhat disingenuous. By advocating an inappropriate standard for preemption, the effort of collecting information for an invalid purpose will be to deny states and tribes money to which they are entitled.

Whether or not a state or tribe is denied funding depends on the specifics of the fee in question. While there appears to be some disagreement regarding which fees might be preempted – in fact the petitioner and commenters are quite inconsistent on this point - there are some generalities that are useful in this determination.

The specific section discussing fees is § 5125 part (f) which states:

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[4] *Id.*
[5] 49 U.S.C.A. § 5116(b)(4)(A-E).
[6] *Industry Letter*, *supra* note 1, at 2.
[7] *Industry Letter*, *supra* note 1, at 3.
[8] Information Collection Activities, 72 Fed. Reg. 36754, 36757 (July 5, 2007).
[9] *Industry Letter*, *supra* note 1, at 2.
[10] *Id.*, at 3.

> Fees.--(1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

The key determinations are whether the fee is "fair" and whether used for "a purpose related to transporting hazardous material." Any fee that is not "fair," or that is "used for" purposes other than those specified in the § 5125(f), is preempted under 49 U.S.C. 5125(a)(2) which states:

> (a) General.--Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—
>
> (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

Basically there are three categories of preemption under § 5125(a) and (b). First, is the "dual compliance test" which preempts a law when it is not possible to comply with both the non-Federal requirement and the Federal hazmat law or a regulation prescribed under Federal hazmat law.[11] Second, is the "obstacle test" which preempts a non-Federal requirement if its application or enforcement is an obstacle to accomplishing and carrying out the Federal hazmat law or a regulation prescribed under Federal hazmat law.[12] Third is the "covered subjects test" which preempts a non-Federal requirement if it concerns any of the five covered subjects and is not "substantively the same as" the Federal hazmat law or regulations' requirements.[13]

Using existing information sources, State and tribal fees have been found to be preempted by both courts and the RSPA through the preemption determination process under 49 U.S.C 5125(d)(1). RSPA has found that fees which fail the fairness or "used for" test in 49 U.S.C. 5125(f)(1)[14], create an obstacle to carrying out the Federal hazardous

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[11] Index to Preemption of State and Local Laws and Regulations Under the Federal Hazardous Material Transportation Law, PHMSA Office of Chief Council, available at http://rspa-atty.dot.gov/preempt/preemption_index.pdf.

[12] *Id.*

[13] *Id.*

[14] (f) FEES. (1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for

materials transportation law and thus fail the "obstacle test" under 49 U.S.C. § 5125(a)(2). The Supreme Court in Evansville-Vanderburgh came up with a test to determine whether a fee is fair.[15] Under the Evansville test, a fee is fair if it is:

(a) based on fair approximation of use of facilities;
(b) not excessive in relation to benefits conferred;
(c) does not discriminate against interstate commerce[16]

The most common grounds for preemption is when the fee is not based on some fair approximation of the use of facilities as is required under 49 U.S.C. § 5125(f)(1).[17]

A State may impose flat fees when "administrative difficulties make collection of more finely calibrated user charges impracticable."[18] The state bears the burden of demonstrating the practical impossibility of employing any form of apportionment that would render its tax better "calibrated" than a flat tax.[19] The Court has indicated that flat taxes are permissible when they are shown to be "the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens."[20]

Summary

The party challenging the validity of a state statute on Commerce Clause grounds bears the burden of proof.[21] The criteria under which fees will be evaluated are not specific, which justifies the broad discretion given to the Secretary to determine whether the purpose of the fee relates to hazardous materials transportation.

States, tribes and local governments plan, train and exercise to deal with the risks of hazardous materials in transportation. Contrary to the narrative in the current notice, DOT/PHMSA does already require that states and tribes broadly report on their use of funds for planning, training, and exercises. Current reporting is more than adequate for a determination under the second preemption test as evidenced by preemption actions to this point.

The petitioner and commenters certainly wish to ease their burden in challenging fees. They mischaracterize the obligations of DOT/PHMSA to collect data to make a preemption evaluation as mandatory. If these entities are unhappy about a specific state fee they should challenge it rather than attempt to shift the burdens of these arguments to states and tribes.

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emergency response.
[15] Evansville-Vanderburgh Airport Auth. V. Delta Airlines, Inc. 405 U.S. 707 (1972).
[16] *Id.*
[17] *Id.*
[18] American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 297 (1987).
[19] American Trucking Ass'ns v. Secretary of Administration, 613 N.E.2d, 95, 100 (Mass. 1993).
[20] American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S., at 296.
[21] American Trucking Ass'ns, Inc. v. State, 180 N.J. 377, 396 (N.J., 2004).

Congress has given the agency broad discretion to evaluate both grants and the question of preemption. Existing data collection would appear to be fully adequate to serve the agency's needs in this regard. Until such time that DOT/PHMSA can articulate a specific use for the information that is consistent with the statute and regulations, the increased burdens should not be imposed.

Sincerely,
Montressa Jo Elder, Chairman
Oklahoma Hazardous Materials Emergency Response Commission

Absent the HMEP program, LEPCs would have no resources for planning and training activities.

I am sensitive to the industry desire not to pay more than its fair share of fees. Of course, when it comes to hazmat incidents on the streets and highway, these very same industries are fully responsible. When they think they are being unfairly charged for the costs of a response and cleanup, they are eager to point the finger at local agencies for a failure to have adequate plans and training.

In the rural parts of the country these groups are almost entirely made up of volunteers. Industry can't have it both ways. Without resources these agencies can't possibly plan and train. As HMEP funding is the bulk of the resources they have, industry's efforts to penalize states by artificially evaluating the use of funds, is ill-conceived at best.

DOT has authority to collect information. They should impose these burdens only when there is a clear intent to use the information for a reasonable purpose that is consistent with the statute and regulations.

The Purpose of State-Tribal Assessed Hazmat Fees

The Interested Party/IME comments characterize Congress' purpose in enacting the 1990 amendments to the Hazardous Materials Transportation Act ("Act") as funding a federal mandate that enables states to "develop emergency response plans" and train "emergency responders." However, this statement oversimplifies and narrows the purpose of the 1990 amendments. The plain language of the Act and the pertinent federal publication list a variety of uses for HMEP grant money that are far broader in scope.

In a federal publication, the Department of Transportation ("DOT") asserted that the overall purpose of the grants is "to improve the capability of communities to plan for and respond to the full range of potential risks posed by accidents and incidents involving hazardous materials." 57 Fed. Reg. 43062 (Sept. 17, 1992) (emphasis added). This broad purpose is articulated by the Act through its statutory provisions. For example, section 5116(a) of the Act requires the Secretary of Transportation ("Secretary") to issue grants to states/tribal authorities for "developing, improving, and implementing emergency response plans under EPCRA, including the determination of flow patterns of hazardous materials within a State and between a State and another State; and determining the need for regional hazardous materials response teams." 49 U.S.C. § 5116(a) (2006). Section 5125(f) of the Act states that grant money may be used for "enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(f) (2006). HMEP grant money should be used to train public sector employees to respond to accidents and incidents involving hazardous material. 49 U.S.C. § 5116(b)(1) (2006). Grant money can also be used to pay the tuition costs and travel expenses of both those attending and those providing such training. 49 U.S.C. § 5116(b)(3)(A)(i)-(iv) (2006).

Both the statutory language and the information found in federal publications reveal that the overall intent of this aspect of the Act is one of leniency. The grants provided by PHMSA are meant to allow states to engage in a wide variety of administrative activities and research, as well as engaged work out in the field, directed towards the safe transport of hazardous materials. A more narrow interpretation would defeat the overall purpose of the grants by restricting the flow of money to activities that the state finds necessary to ensure the safe transport of hazardous materials. Thus, the "required use" of HMEP grant money, as set out by 49 U.S.C. 5125(f), must be based on a broad reading of the Act.

The Factors Used to Evaluate Grant Applicants
Section 5125(f)(1) of the Act states that any information regarding fees assessed by a state/tribal authority from Hazmat transporters should be reported to the Secretary "on the Secretary's request." 49 U.S.C. § 5125(f) (2006). A similar statement is included in Section 5116(d), which states an entity applying for HMEP grant money must "submit an application at the time, and contain information, the Secretary requires." 49 U.S.C. 5116(d) (2006). Through these provisions, the Act gives the Secretary sole discretion over the collection of information from grant applicants. In other words, Congress did not mandate that the Secretary be engaged in the collection of information from grant applicants with a certain level of detail, or with a certain frequency. The Interested Party/IME comments suggest that the propriety of a state's utilization of non-federally assessed fees is solely dependent on whether the fee collected is used for a purpose related to transporting hazardous material. The plain language of the Act, as well as applicable Federal Register excerpts, state that this is only one factor the Secretary may consider in the awarding of or denial of grants. The Secretary may also consider a variety of other factors, including "the number of hazardous materials facilities, types and amounts of hazardous materials transported, population at risk, frequency and number of incidents recorded in past years, high mileage transportation corridors, whether the State or Indian tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to carry out purposes related to the transportation of hazardous materials." 57 Fed. Reg. 43064 (Sept. 17, 1992). This statement was codified in section 5116 of the Act, which states that in making decisions in regards to the allocation of grants, the Secretary may consider:

(A) the number of hazardous material facilities in the State or on land under the jurisdiction of the tribe;
(B) the types and amounts of hazardous material transported in the State or on that land;
(C) whether the State or tribe imposes and collects a fee on transporting hazardous material;
(D) whether the fee is used only to carry out a purpose related to transporting hazardous material; and
(E) other factors the Secretary decides are appropriate to carry out this subsection.

49 U.S.C. § 5116(b)(4)(A)-(E) (2006).

As this provision shows, a variety of factors come into play when assessing the effective use of HMEP grant money. As a result, it would be improper to state that PHMSA should measure such effectiveness solely on whether the fee is used solely to carry out a purpose related to the transportation of hazardous material. Thus, IME's statement that PHMSA has never applied the statutory criteria when awarding or denying HMEP grant money is inconclusive.

Proposed Questions for the ICR
The proposed questions included in the IME's comments focus on factors that are inapplicable to PHMSA's evaluation of the usage of HMEP grant money. While IME states that the proposed questions only clarify the question currently listed on the ICR , some of IME's questions are outside the scope of this question. In addition to generally asking if a hazmat fee is administered in the state/tribal region, and for what purpose the revenue from the fee is used, IME's proposed questions also ask state/tribal grant applicants to report the name of the agency that administers each fee. Additionally, grant applicants should state

whether the size of the company is considered when setting the amount of the fee and disclose the total revenue collected from each fee during the last fiscal year. (See proposed questions listed in IME's comments 2(a),(c), & (e)).
In its comments, IME has expressed concern that fees could be being used for purposes not related to the transportation of hazardous materials. However, it is unclear how the addition of the proposed questions to the ICR would enable PHMSA to glean any additional information about how effectively HMEP grant money is being spent. Furthermore, the inclusion of these questions suggests that IME realizes, contrary to its written comments, that other factors besides the purpose for which grant money is used should be considered when the Secretary grants HMEP money to states/tribal authorities.
Likewise, the proposed questions in the Interested Party comments also ask for information that is outside the scope of the current ICR. In addition to the questions included in IME's comments, the Interested Party comments ask the basis upon which each state/tribal hazmat fee is assessed. Again, it is unclear how the addition of the proposed questions will enable PHMSA to learn anything new about the use of the grant moneys assessed by the state/tribal authority.
As already stated, the Act grants the Secretary the discretion to request any information from grant applicants that is deemed necessary to aide in the issuance of HMEP grant money. To exercise this discretion without a legitimate end, such as the IME/Interested Party comments advocate, would be an abuse of the Secretary's discretion. Despite the numerous amendments to the Act over the years, Congress has allowed this discretionary power to remain in the hands of the Secretary. Because the Secretary has not asked for additional information to be included on the current ICR, PHMSA's request for a 3-year extension to the current ICR is appropriate.

Preemptive Powers

Congress granted preemptive powers to DOT/PHMSA through an amendment to the Act to ensure compliance with the Act's guidelines on the assessment of non-federal fees. As IME's comments show, such preemptive powers have been used when necessary. Additionally, the IME comments list instances where parties have taken action against the State to ensure that non-federally assessed fees were not discriminatory or malapportioned. Requiring an increased reporting burden on all grant applicants is unfair considering that many fees are assessed in compliance with the law. When fairness is an issue, individual parties are better equipped not only to recognize the unfairness, but also to take legal action in order to dispute the fee.

I am Kevin Crawford. Absent the HMEP program, LEPCs would have no resources for planning and training activities. In the nature of my business I am a member of three LEPCs.

I am sensitive to the industry desire not to pay more than its fair share of fees. Of course, when it comes to hazmat incidents on the streets and highway, these very same industries are fully responsible. When they think they are being unfairly charged for the costs of a response and cleanup, they are eager to point the finger at local agencies for a failure to have adequate plans and training.

In the rural parts of the country these groups are almost entirely made up of volunteers. Industry can't have it both ways. Without resources these agencies can't possibly plan and train. As HMEP funding is the bulk of the resources they have, industry's efforts to penalize states by artificially evaluating the use of funds, is ill-conceived at best.

DOT has authority to collect information. They should impose these burdens only when there is a clear intent to use the information for a reasonable purpose that is consistent with the statute and regulations.

The Purpose of State-Tribal Assessed Hazmat Fees

The Interested Party/IME comments characterize Congress' purpose in enacting the 1990 amendments to the Hazardous Materials Transportation Act ("Act") as funding a federal mandate that enables states to "develop emergency response plans" and train "emergency responders." However, this statement oversimplifies and narrows the purpose of the 1990 amendments. The plain language of the Act and the pertinent federal publication list a variety of uses for HMEP grant money that are far broader in scope.

In a federal publication, the Department of Transportation ("DOT") asserted that the overall purpose of the grants is "to *improve the capability of communities to plan for and respond to the full range of potential risks* posed by accidents and incidents involving hazardous materials." 57 Fed. Reg. 43062 (Sept. 17, 1992) (emphasis added). This broad purpose is articulated by the Act through its statutory provisions. For example, section 5116(a) of the Act requires the Secretary of Transportation ("Secretary") to issue grants to states/tribal authorities for "developing, improving, and implementing emergency response plans under EPCRA, including the determination of flow patterns of hazardous materials within a State and between a State and another State; and determining the need for regional hazardous materials response teams." 49 U.S.C. § 5116(a) (2006). Section 5125(f) of the Act states that grant money may be used for "enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(f) (2006). HMEP grant money should be used to train public sector employees to respond to accidents and incidents involving hazardous material. 49 U.S.C. § 5116(b)(1) (2006). Grant money can also be used to pay the tuition costs and travel expenses of both those attending and those providing such training. 49 U.S.C. § 5116(b)(3)(A)(i)-(iv) (2006).

Both the statutory language and the information found in federal publications reveal that the overall intent of this aspect of the Act is one of leniency. The grants provided by PHMSA are meant to allow states to engage in a wide variety of

administrative activities and research, as well as engaged work out in the field, directed towards the safe transport of hazardous materials. A more narrow interpretation would defeat the overall purpose of the grants by restricting the flow of money to activities that the state finds necessary to ensure the safe transport of hazardous materials. Thus, the "required use" of HMEP grant money, as set out by 49 U.S.C. 5125(f), must be based on a broad reading of the Act.

The Factors Used to Evaluate Grant Applicants

Section 5125(f)(1) of the Act states that any information regarding fees assessed by a state/tribal authority from Hazmat transporters should be reported to the Secretary "on the Secretary's request." 49 U.S.C. § 5125(f) (2006). A similar statement is included in Section 5116(d), which states an entity applying for HMEP grant money must "submit an application at the time, and contain information, the Secretary requires." 49 U.S.C. 5116(d) (2006). Through these provisions, the Act gives the Secretary sole discretion over the collection of information from grant applicants. In other words, Congress did not mandate that the Secretary be engaged in the collection of information from grant applicants with a certain level of detail, or with a certain frequency.

The Interested Party/IME comments suggest that the propriety of a state's utilization of non-federally assessed fees is solely dependent on whether the fee collected is used for a purpose related to transporting hazardous material. The plain language of the Act, as well as applicable Federal Register excerpts, state that this is only one factor the Secretary may consider in the awarding of or denial of grants. The Secretary may also consider a variety of other factors, including "the number of hazardous materials facilities, types and amounts of hazardous materials transported, population at risk, frequency and number of incidents recorded in past years, high mileage transportation corridors, whether the State or Indian tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to carry out purposes related to the transportation of hazardous materials." 57 Fed. Reg. 43064 (Sept. 17, 1992). This statement was codified in section 5116 of the Act, which states that in making decisions in regards to the allocation of grants, the Secretary may consider:

> **(A)** the number of hazardous material facilities in the State or on land under the jurisdiction of the tribe;
> **(B)** the types and amounts of hazardous material transported in the State or on that land;
> **(C)** whether the State or tribe imposes and collects a fee on transporting hazardous material;
> **(D)** whether the fee is used only to carry out a purpose related to transporting hazardous material; and
> **(E)** other factors the Secretary decides are appropriate to carry out this subsection.

49 U.S.C. § 5116(b)(4)(A)-(E) (2006).

As this provision shows, a variety of factors come into play when assessing the effective use of HMEP grant money. As a result, it would be improper to state that PHMSA should measure such effectiveness solely on whether the fee is used solely to

carry out a purpose related to the transportation of hazardous material. Thus, IME's statement that PHMSA has never applied the statutory criteria when awarding or denying HMEP grant money is inconclusive.

Proposed Questions for the ICR

The proposed questions included in the IME's comments focus on factors that are inapplicable to PHMSA's evaluation of the usage of HMEP grant money. While IME states that the proposed questions only clarify the question currently listed on the ICR[1], some of IME's questions are outside the scope of this question. In addition to generally asking if a hazmat fee is administered in the state/tribal region, and for what purpose the revenue from the fee is used, IME's proposed questions also ask state/tribal grant applicants to report the name of the agency that administers each fee. Additionally, grant applicants should state whether the size of the company is considered when setting the amount of the fee and disclose the total revenue collected from each fee during the last fiscal year. (*See* proposed questions listed in IME's comments 2(a),(c), & (e)).

In its comments, IME has expressed concern that fees could be being used for purposes not related to the transportation of hazardous materials. However, it is unclear how the addition of the proposed questions to the ICR would enable PHMSA to glean any additional information about how effectively HMEP grant money is being spent. Furthermore, the inclusion of these questions suggests that IME realizes, contrary to its written comments, that other factors besides the purpose for which grant money is used should be considered when the Secretary grants HMEP money to states/tribal authorities.

Likewise, the proposed questions in the Interested Party comments also ask for information that is outside the scope of the current ICR. In addition to the questions included in IME's comments, the Interested Party comments ask the basis upon which each state/tribal hazmat fee is assessed. Again, it is unclear how the addition of the proposed questions will enable PHMSA to learn anything new about the use of the grant moneys assessed by the state/tribal authority.

As already stated, the Act grants the Secretary the discretion to request any information from grant applicants that is deemed necessary to aide in the issuance of HMEP grant money. To exercise this discretion without a legitimate end, such as the IME/Interested Party comments advocate, would be an abuse of the Secretary's discretion. Despite the numerous amendments to the Act over the years, Congress has allowed this discretionary power to remain in the hands of the Secretary. Because the Secretary has not asked for additional information to be included on the current ICR, PHMSA's request for a 3-year extension to the current ICR is appropriate.

Preemptive Powers

Congress granted preemptive powers to DOT/PHMSA through an amendment to the Act to ensure compliance with the Act's guidelines on the assessment of non-federal fees. As IME's comments show, such preemptive powers have been used when necessary. Additionally, the IME comments list instances where parties have taken action against the State to ensure that non-federally assessed fees were not discriminatory

[1] The HMEP grant application currently asks applicants to "Submit a written statement explaining whether the state assess and collects fees on transportation of hazardous materials and whether such assessment of fees are used solely to carryout purposes related to the transportation of hazardous materials."

or malapportioned. Requiring an increased reporting burden on all grant applicants is unfair considering that many fees are assessed in compliance with the law. When fairness is an issue, individual parties are better equipped not only to recognize the unfairness, but also to take legal action in order to dispute the fee.

Comments to DOT PHMSA Information Collection Activity Notice
Docket PHMSA-2007-27181

Electronically submitted

Dear PHMSA:

Thank you for this opportunity to comment on what we believe to be a very important notice.

We are

Our membership is heavily dependant on HMEP funding distributed through the states. The burdens proposed by the current notice will fall on not just state agencies. Rather, it will fall on local, tribal and other organizations that are users of the funding. These burdens are not trivial. Many of our member agencies are volunteer groups. Devoting time and energy to reports detracts from their other very important missions.

We believe that DOT/PHMSA has broad authority to collect information from grant recipients. That authority should not be used absent some actual purpose and proposed use for the information collected.

The collection of additional information in the manner advocated by petitioner and other commenters is unjustified because their suggested use of that information is improper. In any event, as DOT/PHMSA notes, you already collect a large percentage of the information requested. Data collection for the sake of data collection is unreasonable.

We do not believe that DOT/PHMSA should impose the burden of information collection without a clear plan and purpose to use the information in a fashion that comports with statute and regulation. At this point all we really have is the advocacy of outsiders regarding the use of the information. Until and unless DOT/PHMSA is clear in its plans for the use of the information it appears that the proposed collection activity is simply an increased burden without a purpose.

The petitioner and commenters characterizes Congress' purpose in enacting the 1990 amendments as funding a federal mandate that enables states to "develop emergency response plans" and train "emergency responders." However, this statement oversimplifies and narrows the purpose of the 1990 amendments. Section 117(a) of the HMTA requires the Secretary of Transportation to make grants to States for "developing, improving, and implementing emergency response plans under EPCRA, including the determination of flow patterns of hazardous materials within a State and between a State and another State; and determining the need for regional hazardous materials response teams." 49 U.S.C. § 117(a). Section 5125(f) of the HMTA also states that grant moneys may be used for "enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(f). In a federal publication, the Agency further explained that the overall purpose of the grants is "to improve the capability of communities to plan for and respond to the full range of potential risks posed by accidents and incidents involving hazardous materials." 57 Fed. Reg. 43062 (Sept. 17, 1992). It is clear from both the statutory language and the information found in federal publications that the overall intent of this aspect of the HMTA is one of leniency. It is meant to allow states to engage in a wide variety of administrative activities and research, as well as engaged work out in the field, directed towards the safe transport of hazardous

materials. A more narrow interpretation would defeat the overall purpose of the grants by restricting the flow of money to activities that the state finds necessary to ensure the safe transport of hazardous materials.

Additionally, the petitioner's comments suggest that the propriety of a state's utilization of non-federally assessed fees is solely dependent on whether the fee collected is used for a purpose related to transporting hazardous material. The HMTA, as well as the applicable Federal Register excerpts, state that this is only one factor to be considered in the awarding of or denying of grants. A number of other factors are at the discretion of the Secretary of Transportation, including "the number of hazardous materials facilities, types and amounts of hazardous materials transported, population at risk, frequency and number of incidents recorded in past years, high mileage transportation corridors, whether the State or Indian tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to carry out purposes related to the transportation of hazardous materials." 57 FR 43064 (Sept. 17, 1992). Because a wide variety of factors could come into play when assessing the propriety of grant awards, it would be incorrect to state that PHMSA should have assessed grant awards solely on "whether the fee is used only to carry out a purpose related to transporting hazardous material" and failed to fulfill that duty. 49 U.S.C. 5116(b)(4)(D).

49 USC 5125(f)(1) does state that a fee can only be imposed on a hazardous waste transporter if that fee is used for a purpose related to the transporting of hazardous material. However, this information only need be reported to the Secretary of Transportation "on the Secretary's request" and is not "mandated" by the statute. Petitioner and commenters characterizes this reporting "requirement" as a "congressional mandate," which is not correct. The additional information should only be collected if it serves some specific purpose - Congress did not mandate information collection for the sake of information collection.

There are several other more specific arguments put forth by the petitioner and commenters that need to be addressed in greater detail:

1. "[I]n instances where there is no clear demonstration that State-levied hazardous materials fees are being used as required by [49 U.S.C. 5125(f)], such state[s] should be prohibited from receiving an award."

The above argument was specifically rejected by the Research and Special Programs Administration's ("RSPA") September, 1992 discussion of public comments to the final rule implementing the Public Sector Training and Planning Grants Program ("PTPG") . RSPA responded to the above argument by stating:

RSPA is sensitive to the issue raised by this commenter and will carefully consider that information in its grants-review process. However, it is not necessary to revise the rule in the manner suggested by the commenter.

RSPA chose not to revise the rule as suggested because whether a state collects a fee and how that fee are only some factors to be considered when allocating funds. Other factors the RSPA considers include: the number of hazardous materials facilities; types and amounts of hazardous materials transported; population at risk; frequency and number of incidents recorded in past years; and high mileage transportation corridors. These factors are also included in the statutory section on monitoring and review of Planning and Training Grants.

Although state fees have been invalidated through either the preemption determination process or by a court, "no state in any year has been denied a PTPG" a fact which demonstrates that the RSPA considers all of the above factors when allocating monies, not just state fee collection and usage. The additional information proposed for collection simply will not inform this analysis in any way relative to the burdens imposed on the grant recipients.

2. "[The newly requested fee information] would provide the data necessary for both the agency and the regulated community to determine if states are in compliance with applicable provisions of the HMTA."

The Pipeline and Hazardous Materials Safety Administration ("PHMSA") already receives almost all of the newly requested information. When discussing the expected burden of reporting the information the agency stated: "HMEP [Hazardous Materials Emergency Preparedness] grant recipients are required to submit performance reports, most of which should include some or all of the information we are requesting." The fact that the PHMSA already has most of the information suggest that the proposed information collection effort is to appease industry since "some states were not willing to provide industry with information sufficient to determine whether states with hazmat fees were complying with the limitations of the HMTA." In such cases, the aggrieved industry party should pursue preemption if they think it is appropriate rather than ask PHMSA to do its bidding.

3. "Our petition will not have the effect of denying states or Indian tribes funds they are entitled to receive."

This comment is somewhat disingenuous. By advocating an inappropriate standard for preemption, the effort of collecting information for an invalid purpose will be to deny states and tribes money to which they are entitled.

Whether or not a state or tribe is denied funding depends on the specifics of the fee in question. While there appears to be some disagreement regarding which fees might be preempted - in fact the petitioner and commenters are quite inconsistent on this point - there are some generalities that are useful in this determination.

The specific section discussing fees is § 5125 part (f) which states:

Fees.--(1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

The key determinations are whether the fee is "fair" and whether used for "a purpose related to transporting hazardous material." Any fee that is not "fair," or that is "used for" purposes other than those specified in the § 5125(f), is preempted under 49 U.S.C. 5125(a)(2) which states:

(a) General.--Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials

transportation security regulation or directive issued by the Secretary of Homeland Security.

Basically there are three categories of preemption under § 5125(a) and (b). First, is the "dual compliance test" which preempts a law when it is not possible to comply with both the non-Federal requirement and the Federal hazmat law or a regulation prescribed under federal hazmat law. Second, is the "obstacle test" which preempts a non-Federal requirement if its application or enforcement is an obstacle to accomplishing and carrying out the Federal hazmat law or a regulation prescribed under Federal hazmat law. Third is the "covered subjects test" which preempts a non-Federal requirement if it concerns any of the five covered subjects and is not "substantively the same as" the Federal hazmat law or regulations' requirements.

Using existing information sources, State and tribal fees have been found to be preempted by both courts and the RSPA through the preemption determination process under 49 U.S.C 5125(d)(1). RSPA has found that fees which fail the fairness or "used for" test in 49 U.S.C. 5125(f)(1) , create an obstacle to carrying out the Federal hazardous materials transportation law and thus fail the "obstacle test" under 49 U.S.C. § 5125(a)(2). The Supreme Court in Evansville-Vanderburgh came up with a test to determine whether a fee is fair. Under the Evansville test, a fee is fair if it is:

(a) based on fair approximation of use of facilities;
(b) not excessive in relation to benefits conferred;
(c) does not discriminate against interstate commerce

The most common grounds for preemption is when the fee is not based on some fair approximation of the use of facilities as is required under 49 U.S.C. § 5125(f)(1).

A State may impose flat fees when "administrative difficulties make collection of more finely calibrated user charges impracticable." The state bears the burden of demonstrating the practical impossibility of employing any form of apportionment that would render its tax better "calibrated" than a flat tax. The Court has indicated that flat taxes are permissible when they are shown to be "the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens."

Conclusion

The party challenging the validity of a state statute on Commerce Clause grounds bears the burden of proof. The criteria under which fees will be evaluated are not specific, which justifies the broad discretion given to the Secretary to determine whether the purpose of the fee relates to hazardous materials transportation.

States, tribes and local governments plan, train and exercise to deal with the risks of hazardous materials in transportation. Contrary to the narrative in the current notice, DOT/PHMSA does already require that states and tribes broadly report on their use of funds for planning, training, and exercises. Current reporting is more than adequate for a determination under the second preemption test as evidenced by preemption actions to this point.

As petitioner's comments show, such preemptive powers have been used when necessary. Additionally, the petitioners listed a few instances where parties

had taken action against the State to ensure that non-federally assessed fees were not discriminatory or malapportioned. Requiring an increased time-reporting burden on all grant applicants is unfair considering that most fees are assessed in compliance with the law. When fairness is an issue, individual parties are better equipped not only to recognize the unfairness, but also to take legal action in order to dispute the fee.

The petitioner and commenters certainly wish to ease their burden in challenging fees. They mischaracterize the obligations of DOT/PHMSA to collect data to make a preemption evaluation as mandatory. In these entities are unhappy about a specific state fee they should challenge it rather than attempt to shift the burdens of these arguments to states and tribes.

Congress has given the agency broad discretion to evaluate both grants and the question of preemption. Existing data collection would appear to be fully adequate to serve the agency's needs in this regard. Until such time that DOT/PHMSA can articulate a specific use for the information that is consistent with the statute and regulations, the increased burdens should not be imposed.

I chair a local emergency planning committee and am a member of several others. I work with these and dozens of other LEPCs. Absent the HMEP program, these LEPCs would have no resources for planning and training activities.

I am sensitive to the industry desire not to pay more than its fair share of fees. Of course, when it comes to hazmat incidents on the streets and highway, these very same industries are fully responsible. When they think they are being unfairly charged for the costs of a response and cleanup, they are eager to point the finger at local agencies for a failure to have adequate plans and training.

In the rural parts of the country these groups are almost entirely made up of volunteers. Industry can't have it both ways. Without resources these agencies can't possibly plan and train. As HMEP funding is the bulk of the resources they have, industry's efforts to penalize states by artificially evaluating the use of funds, is ill-conceived at best.

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In a federal publication, the Department of Transportation ("DOT") asserted that the overall purpose of the grants is "to *improve the capability of communities to plan for and respond to the full range of potential risks* posed by accidents and incidents involving hazardous materials." 57 Fed. Reg. 43062 (Sept. 17, 1992) (emphasis added). This broad purpose is articulated by the Act through its statutory provisions. For example, section 5116(a) of the Act requires the Secretary of Transportation ("Secretary") to issue grants to states/tribal authorities for "developing, improving, and implementing emergency response plans under EPCRA, including the determination of flow patterns of hazardous materials within a State and between a State and another State; and determining the need for regional hazardous materials response teams." 49 U.S.C. § 5116(a) (2006). Section 5125(f) of the Act states that grant money may be used for "enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. § 5125(f) (2006). HMEP grant money should be used to train public sector employees to respond to accidents and incidents involving hazardous material. 49 U.S.C. § 5116(b)(1) (2006). Grant money can also be used to pay the tuition costs and travel expenses of both those attending and those providing such training. 49 U.S.C. § 5116(b)(3)(A)(i)-(iv) (2006).

Both the statutory language and the information found in federal publications reveal that the overall intent of this aspect of the Act is one of leniency. The grants provided by PHMSA are meant to allow states to engage in a wide variety of administrative activities and research, as well as engaged work out in the field, directed

towards the safe transport of hazardous materials. A more narrow interpretation would defeat the overall purpose of the grants by restricting the flow of money to activities that the state finds necessary to ensure the safe transport of hazardous materials. Thus, the "required use" of HMEP grant money, as set out by 49 U.S.C. 5125(f), must be based on a broad reading of the Act.

The Factors Used to Evaluate Grant Applicants

Section 5125(f)(1) of the Act states that any information regarding fees assessed by a state/tribal authority from Hazmat transporters should be reported to the Secretary "on the Secretary's request." 49 U.S.C. § 5125(f) (2006). A similar statement is included in Section 5116(d), which states an entity applying for HMEP grant money must "submit an application at the time, and contain information, the Secretary requires." 49 U.S.C. 5116(d) (2006). Through these provisions, the Act gives the Secretary sole discretion over the collection of information from grant applicants. In other words, Congress did not mandate that the Secretary be engaged in the collection of information from grant applicants with a certain level of detail, or with a certain frequency.

The Interested Party/IME comments suggest that the propriety of a state's utilization of non-federally assessed fees is solely dependent on whether the fee collected is used for a purpose related to transporting hazardous material. The plain language of the Act, as well as applicable Federal Register excerpts, state that this is only one factor the Secretary may consider in the awarding of or denial of grants. The Secretary may also consider a variety of other factors, including "the number of hazardous materials facilities, types and amounts of hazardous materials transported, population at risk, frequency and number of incidents recorded in past years, high mileage transportation corridors, whether the State or Indian tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to carry out purposes related to the transportation of hazardous materials." 57 Fed. Reg. 43064 (Sept. 17, 1992). This statement was codified in section 5116 of the Act, which states that in making decisions in regards to the allocation of grants, the Secretary may consider:

> **(A)** the number of hazardous material facilities in the State or on land under the jurisdiction of the tribe;
> **(B)** the types and amounts of hazardous material transported in the State or on that land;
> **(C)** whether the State or tribe imposes and collects a fee on transporting hazardous material;
> **(D)** whether the fee is used only to carry out a purpose related to transporting hazardous material; and
> **(E)** other factors the Secretary decides are appropriate to carry out this subsection.

49 U.S.C. § 5116(b)(4)(A)-(E) (2006).

As this provision shows, a variety of factors come into play when assessing the effective use of HMEP grant money. As a result, it would be improper to state that PHMSA should measure such effectiveness solely on whether the fee is used solely to carry out a purpose related to the transportation of hazardous material. Thus, IME's

statement that PHMSA has never applied the statutory criteria when awarding or denying HMEP grant money is inconclusive.

Proposed Questions for the ICR

The proposed questions included in the IME's comments focus on factors that are inapplicable to PHMSA's evaluation of the usage of HMEP grant money. While IME states that the proposed questions only clarify the question currently listed on the ICR[1], some of IME's questions are outside the scope of this question. In addition to generally asking if a hazmat fee is administered in the state/tribal region, and for what purpose the revenue from the fee is used, IME's proposed questions also ask state/tribal grant applicants to report the name of the agency that administers each fee. Additionally, grant applicants should state whether the size of the company is considered when setting the amount of the fee and disclose the total revenue collected from each fee during the last fiscal year. (*See* proposed questions listed in IME's comments 2(a),(c), & (e)).

In its comments, IME has expressed concern that fees could be being used for purposes not related to the transportation of hazardous materials. However, it is unclear how the addition of the proposed questions to the ICR would enable PHMSA to glean any additional information about how effectively HMEP grant money is being spent. Furthermore, the inclusion of these questions suggests that IME realizes, contrary to its written comments, that other factors besides the purpose for which grant money is used should be considered when the Secretary grants HMEP money to states/tribal authorities.

Likewise, the proposed questions in the Interested Party comments also ask for information that is outside the scope of the current ICR. In addition to the questions included in IME's comments, the Interested Party comments ask the basis upon which each state/tribal hazmat fee is assessed. Again, it is unclear how the addition of the proposed questions will enable PHMSA to learn anything new about the use of the grant moneys assessed by the state/tribal authority.

As already stated, the Act grants the Secretary the discretion to request any information from grant applicants that is deemed necessary to aide in the issuance of HMEP grant money. To exercise this discretion without a legitimate end, such as the IME/Interested Party comments advocate, would be an abuse of the Secretary's discretion. Despite the numerous amendments to the Act over the years, Congress has allowed this discretionary power to remain in the hands of the Secretary. Because the Secretary has not asked for additional information to be included on the current ICR, PHMSA's request for a 3-year extension to the current ICR is appropriate.

Preemptive Powers

Congress granted preemptive powers to DOT/PHMSA through an amendment to the Act to ensure compliance with the Act's guidelines on the assessment of non-federal fees. As IME's comments show, such preemptive powers have been used when necessary. Additionally, the IME comments list instances where parties have taken action against the State to ensure that non-federally assessed fees were not discriminatory or malapportioned. Requiring an increased reporting burden on all grant applicants is unfair considering that many fees are assessed in compliance with the law. When

[1] The HMEP grant application currently asks applicants to "Submit a written statement explaining whether the state assess and collects fees on transportation of hazardous materials and whether such assessment of fees are used solely to carryout purposes related to the transportation of hazardous materials."

fairness is an issue, individual parties are better equipped not only to recognize the unfairness, but also to take legal action in order to dispute the fee.