

April 2, 2007

Mr. John W. Hill, Administrator
Federal Motor Carrier Safety Administration
400 7th Street, S.W.
Washington, D.C. 20590

Re: Petition for Rulemaking
Hazardous Materials Safety Permits
49 C.F.R. § 385, Subpart E

Dear Administrator Hill:

Pursuant to 49 C.F.R. § 389.31, I am writing on behalf of the International Society of Explosives Engineers (ISEE) to respectfully request immediate modification of the Hazardous Materials Safety Permit regulations. 49 C.F.R. § 385, Subpart E.

Interest of Petitioner

The International Society of Explosives Engineers (ISEE) was formed in 1974 as a professional society dedicated to promoting the safety, security and the controlled use of explosives in mining, quarrying, construction, manufacturing, demolition, aerospace, forestry, avalanche control, art, automotives, special effects, exploration, seismology, agriculture, law enforcement, and many other peaceful uses of explosives.

With more than 4,600 members from 90 countries and with 34 Chapters in the US, Canada, and South America, the Society is recognized as a world leader in providing explosives technology, education, and information, and promoting public understanding of the benefits of explosives. In addition, ISEE, with individual members acting as resources, has consistently been at the forefront of efforts to address legislation and regulation on the use of explosives at the international, federal and state

level. The ISEE has many members who have been adversely impacted by the Federal Motor Carrier Safety Administration's (Agency) Hazardous Materials Permit rule or are potentially impacted by the rule.

The ISEE is aware that a prior Petition for Rulemaking was submitted by the Institute of Makers of Explosives (IME) on December 2, 2005 and joined by the American Pyrotechnic Association (APA) on December 19, 2005. To the extent that the ISEE's interests are similar, we support the prior petition and incorporate those challenges herein. While many of the issues and concerns addressed in this Petition are similar to those raised in the IME Petition, the ISEE wishes to offer further information and reasons to amend, modify, or repeal 49 C.F.R. § 385.407(a)(2)(iii) which denies an HM Permit if a motor carrier:

(iii) Has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average as indicated in the MCMIS.

The ISEE believes that Agency's use of the MCMIS data as a dispositive reason to deny a motor carrier an HM Permit is not only unprecedented within the Agency, but fundamentally fails to withstand constitutional due process scrutiny and fails to comport with the Administrative Procedures Act.

Information and Arguments in Support of Petition

A. Impact of Denial of HM Permit

The denial of an HM Permit constitutes a deprivation of a significant property interest entitled to due process protections of the Fourteenth Amendment. See General Electric Company v. EPA, 53 F.3d 1324 (D.C. Cir. 1995). The impact of the denial cannot be underestimated. For example, there are three major manufacturers/suppliers for the blasting industry. If one of these companies is denied, the other two suppliers

could not meet the supply demands of users of explosives. All three major suppliers are currently peaked in capacity in fulfilling customers' requests for products. If any of the three major companies were denied, the potential of stopping operations of all customers would be a very real possibility. In the U.S., this includes one third of all mining operations, quarries, construction (including highways), subdivisions, and retail as well as wholesale outlets. The mining and construction industries represented over 840 billion dollars of the national income in 2006.

In turn this would have a domino effect upon the entire U.S. economy including manufacturers, customers, and transportation industries involved in getting materials from market to the end users. The denial of a single company would result in higher costs of consumer goods due to the higher costs created when overworked available companies are required to pay overtime and delay job completions due to the expected shortages. Energy costs would be increased due to the higher cost of production and the demand for utilities and electricity exceeding supply. The impact on the agricultural industry would result in higher food costs as the costs to farmers are increased to purchase fertilizers that are also used in the explosives industries are increased due to demand exceeding supply. Finally, the denial of a major manufacturer would have a tremendous impact on the production of explosives and other materials used by the military. The demand again would exceed the available supply. Similarly, all federal projects including projects by the Federal Highway Administration and Army Corps or Engineers would be impacted as the materials needed to clear land for construction would not be available.

Smaller companies are impacted disproportionately to larger businesses. They obtain fewer inspections overall and are more likely to be placed out-of-service due to smaller compartment sizes being evaluated during inspections. Smaller companies cannot absorb shortages and resulting shutdowns. About two out of three ISEE members work for smaller companies that will be adversely and unfairly impacted by the regulation. Most of those companies represent the construction industry and quarries that supply the construction industry. If these companies are denied it would be equally as devastating to the industry as they are the end users of the explosives and the ones that perform blasting operations. A major supplier would still be faced with a negative impact because their customers would be placed out of business and the domino effect would be the same for all industries in the United States.

B. Due Process Considerations

1. Overview

Due process requires that parties receive fair notice before being deprived of property. General Electric at 1328. Depriving a person of his or her livelihood is one of the severest sanctions imposed by the government. Mathews v. Eldridge, 424 U.S. 319 (1976.) The ISEE is most concerned about the use of the MCMIS roadside inspection data as the sole reason for denying an HM Permit.

The Federal Motor Carrier Safety Administration (Agency)'s use of "the MCMIS" data as a basis for denial of an HM Permit fails to comport with fundamental due process requirements. To understand the system imposed by the Agency relative to HM Permitting and thus to understand its complete failure to provide adequate procedural due process protections, one must first understand the myriad of data

systems injected by the Agency into the HM Permitting process. Definitions of certain systems relevant to this understanding are published on the Agency's website:

MCMIS stands for the Motor Carrier Management Information System. MCMIS is an information system that captures data from field offices through SAFETYNET, CAPRI , and other sources. MCMIS utilizes an Oracle database with a web front-end access (mcmis.fmcsa.dot.gov). It is a source for FMCSA inspection, crash, compliance review, safety audit, and registration data. SAFER consists of a web site (safer.fmcsa.dot.gov) that displays carrier information available to the public, a store and forward mailbox system, secondary databases, and communication links. It handles user queries, database refreshes, and inbound data transfers.

SAFER is currently an integral communication link for most FMCSA data transfers.

ASPEN is an application that collects all the commercial driver/vehicle roadside inspection details. It utilizes several other applications that pull data from remote sources - ISS, PIQ, CDLIS Access, and QC. It also includes communication features to electronically transfer inspection details to SAFER and/or SAFETYNET.

The relevant data used by the Agency and maintained by MCMIS are the results from roadside inspections conducted by various state and local agencies uploaded through ASPEN and SAFER.

Data from the roadside inspections and the out-of-service criteria have not been published by the Agency at all, let alone through notice and comment rulemaking. The inspections are conducted on various levels according to the North American Standard Truck Inspection procedures which, according to the Agency's website, "are comprised of six levels of inspections (A&I Online only reports on inspection Levels I -V.)" The inspection criteria are developed by the Agency in conjunction with the Commercial Motor Vehicle Safety Alliance (CVSA).

CVSA is not a federal government agency. CVSA has adopted the North American Standard Out-of-Service Criteria (CVSA OOS Criteria) and designated certain

violations as “out-of-service” violations categorized by Driver, Vehicle, and Hazardous Materials. These standards have never been published in the Federal Register nor have they been published through notice and comment rulemaking. According to the CVSA OOS Criteria “except where state, provincial, or federal laws preclude enforcement of a named item, motor carrier safety enforcement personnel and their jurisdictions shall comply with these Out-of-Service violation standards.”

Although when adopting the HM Permitting rule the Agency incorporated the “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials...” it failed to adopt any of the other CVSA out-of-service inspection procedures or out-of-service criteria. Thus the CVSA out-of-service criteria used to deny HM Permits have never been through the rulemaking process, have not been published in the Federal Register, and were not incorporated by the Agency in its rulemaking.

Out-of-service is defined only in the context of 49 C.F.R. Part 383 (relating to commercial motor vehicle drivers) and in 49 C.F.R. Part 390. Under those provisions an out-of-service order “means a declaration by an authorized enforcement officer of a Federal, State, Canadian, Mexican, or local jurisdiction that a driver, a commercial motor vehicle, or a motor carrier operation, is out of service pursuant to §§ 386.72, §392.5, §395.13, §396.9, or compatible laws, or the North American Uniform Out-of-Service Criteria.” No document has been published in the Federal Register listing the violations which have been deemed out-of-service violations.

2. Roadside Inspection Findings Not Subject to Challenge Comporting with Procedural Due Process Requirements

Perhaps most importantly, there is absolutely no adequate means to challenge the findings of an inspector contained in a roadside inspection and ultimately uploaded into the MCMIS system. Thus, a carrier cited for an out-of-service violation during a roadside inspection has no opportunity to contest the findings of the inspector. Although the Agency advocates the use of its recently developed “Data Q’s” website to challenge “inaccurate information,” the CVSA website also directs carriers to contact the various state agencies directly. None of the states conducting roadside inspections affords motor carriers receiving roadside inspections with a procedure to challenge the findings of the roadside inspection officer. There are no hearings, no secondary review of the roadside officer’s findings, and no appeal rights recognized in the roadside inspection process. A carrier’s sole option when receiving an unfavorable roadside inspection is to correct the purported violations discovered, maintain a copy of the report in its files, and return a copy of the report to the issuing agency.

Because there are no formal procedures to challenge the roadside inspection findings, attempts to challenge the roadside inspection findings through the state channels is futile. The Data Q’s system similarly lacks any procedural due process functionality. The Data Q’s system is merely a system for forwarding a carrier’s challenge to the appropriate state agency. The Agency does not rule on a carrier’s challenge. The Data Q’s system is not an independent means to challenge the roadside inspection findings nor does it provide procedural due process protections. In all likelihood the state agency will simply “rubber stamp” its findings during the roadside inspection.

The lack of appeal rights to roadside inspection findings is particularly problematic when the alleged out-of-service violation is based upon a subjective finding by a roadside inspector. For example, a finding that a motor carrier has failed to “block or brace a package” in violation of 49 C.F.R. § 177.804 is particularly subject to differing levels of enforcement. Section 177.804 merely states that “any package containing any hazardous material, not permanently attached to a motor vehicle, must be secured against shifting, including relative movement between packages, within the vehicle on which it is being transported under conditions normally incident to transportation.” The entire regulation is clearly susceptible to many interpretations and subjective application by roadside inspectors. For example, roadside inspection officers have been observed placing a dollar bill between the wall of the trailer and the load to determine whether the load is properly blocked and braced. The criteria identified in the CVSA North American Standard Out-of-Service Criteria relating to categorizing an HM blocking and bracing violation as an out-of-service violation states “Transporting HM/DG not blocked, braced, or secured as required by applicable regulation constitutes an Out-of-Service condition.”

Thus, because both the regulation and the out-of-service criteria are general, the violation is clearly susceptible to subjective enforcement. Despite the risk of subjective enforcement, the carrier never has a meaningful opportunity to dispute the findings of a roadside inspector who has identified this violation as an out-of-service violation. It is unlikely that a roadside inspector will change his subjective evaluation in a challenge brought by a carrier through Data Q's. The carrier never has an opportunity to question the inspector, to call its own witnesses or perform any other task which is normally incident to challenges of regulatory violations which are penal in nature. Its sole remedy

is to “correct” the so-called “violation” and submit a copy of the report to the state agency certifying that the out-of-service defects have been repaired or remedied. How does one remedy a situation where he or she does not agree with the violation or where the out-of-service defies logic?

Without procedural safeguards in place to ensure that a carrier may challenge violations noted on a roadside inspection report, the data cannot be used to penalize a carrier by denying it a license. Although in other HM Permitting cases challenging the denial of an HM Permit, the Agency has argued that the carrier is required to obtain a copy of the report and maintain it in its files pursuant to 49 C.F.R. § 496.9(d)(1), that argument misses the mark.¹ The constitutional infirmity suffered by the roadside out-of-service inspections is that they are being used to deny a license but are not subject to any procedural review which would withstand constitutional scrutiny. Unlike any use made of the out-of-service inspections in the past, the Agency has now elevated the importance of the roadside inspection to a level where it and it alone, is the basis for denial of a carrier’s HM Permit license. The Agency has done so without notice, comment, or formal rulemaking. Such practice cannot withstand constitutional scrutiny.

3. The Inspection Process Is Being Used in An Unintended Manner.

The Agency has traditionally advised carriers to “obtain more so called ‘good’ inspections” to improve deficient out-of-service rates. See e.g., In the Matter of S. Vitale Pyrotechnic dba Pyrotecnico, FMCSA-2007027395 (Response of Office of Enforcement and Compliance March 28, 2007). Because of the severe economic impact of the

¹ See e.g., In the Matter of Con-way Freight Inc., FMCSA-2006-26619-3 (Response of the Office of Enforcement and Compliance to Con-Way Freight Inc.’s Request for Administrative Review December 22, 2006), Pages 10-11.

denial most companies have, in fact, done just. See e.g. In the Matter of: S. Vitale Pyrotechnic Industries, Inc. d/b/a Pyrotecnico, FMCSA-2007-27395 (Agency's Motion to Dismiss, March 28, 2007).

This practice is abhorrent to the Agency's argument that the out-of-service rate bears any real relationship to safety. The practice of encouraging companies to unnecessarily put additional vehicles on the road and through the inspections process, in an effort to improve their "numbers", actually puts the motoring public at a greater risk. The Agency must review how many denials are subsequently approved based on "improved" MCMIS data.

Furthermore, this option is not available to every motor carrier or company. Under the CVSA criteria if a vehicle has been inspected and found to qualify for a CVSA decal, it is not subject to inspection for 90 more days. Thus, if all of a carrier's vehicles had CVSA decals, it is impossible for the motor carrier to obtain "more inspections" to improve its data set.

Moreover, if a carrier has seasonal operations, it will be unfairly penalized due to the fluctuation and reduced likelihood of inspection during the peak times during which Company operates. Additionally, smaller companies receiving fewer inspections are more likely to have higher percentage scores, e.g. 1 out of 3 out-of-service HM inspections = 33%. See e.g. J. Fletcher Creamer & Son, Inc. FMCSA-2006-25875 (Response of Office of Enforcement & Compliance). On the other hand, companies with large numbers of inspections may have difficulty tracking out-of-service violations and obtaining enough additional favorable inspections to affect its "average." Furthermore, the location of a company may dramatically impact the number and quality

of inspections conducted as certain jurisdictions conduct substantially more inspections than others. There are simply too many variables in the inspection process to rely solely upon those inspections as a basis for denial of such an important right.

4. MCMIS Data Used to Deny HM Permit Not Available Prior to Denial of License

The roadside data inspection information which has been based on unpublished standards and which are not subject to any meaningful judicial review, are uploaded and incorporated into the Agency's MCMIS system. This data is then used to provide various analyses to the Agency, its state partners, and the public regarding the carrier. Various reports and systems are available online to the carrier, but the MCMIS data itself is not freely available to the carrier. According to the Agency's HM Permit regulation, the MCMIS is used to calculate the national average out-of-service rates.

The carrier can obtain various reports based upon its MCMIS data but it must do so by paying a fee. It does not have free access to MCMIS. For example, it can request a copy of its "carrier profile" at a cost of \$27.50 per profile. http://mcmiscatalog.fmcsa.dot.gov/beta/Catalogs&Documentation/Catalogs/chap3.asp#_cfe. The carrier's profile contains an average out-of-service rate for the carrier for the prior 24 months from the date the profile was run.

However, the Agency does not make the data available to the applicant either before the denial of its Permit or at the time of the denial. Thus, the regulations reference to the MCMIS is meaningless from the carrier's perspective. The carrier does not know what MCMIS data the Agency is using to calculate its out-of-service rates, does not know when the Agency is reviewing the MCMIS data, nor does the carrier have an opportunity prior to being deprived of its license to challenge the data used in

MCMIS. Such lack of clarity and transparency is fatal to the regulation and to the Agency's procedures for implementing the regulation.

5. "Out-of-Service" and "Out-of-Service Rates"

The Agency's Analysis and Information website defines "out-of-service" rate as "the percentage of all inspections that resulted in OOS orders. According to the Agency's Analysis and Information System, the roadside "out-of-service" rates are defined by "roadside inspection activity for all three calendar years for all inspections."

Out-of-service rates are calculated based for each of the three calendar years: the driver OOS rate (calculated using inspection levels 1, 2, and 3); the vehicle OOS rate (calculated using inspection levels 1, 2, and 5); and the Hazardous Material (HM) OOS rate (calculated using inspection levels 1, 2, and 3 where HM is present).

<http://ai.volpe.dot.gov/ProgramMeasures/RI/NR/NAS/Report.asp?FC=C&RF=T>

There are a number of interesting reports available on the Agency's Analysis and Information website. But while this portion of the Agency's website may be useful for statisticians, politicians, regulators, it provides no useful information on what the Agency means when it says in its regulation that it intends to deny carriers an HM Safety Permit based on whether its "has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average as indicated in the MCMIS." While those words appear on the Agency's Analysis and Information website in various fashions, they are not tied to the HM Permitting regulation or denials.

For example, the Agency publishes a summary of roadside inspection activity on a state by state basis and provides detailed summaries of the data. Some of this data includes data reporting times; e.g. presumably the time it takes from the inspection until

the inspection is uploaded into MCMIS and calculation of out-of-service rates based on the level of inspection performed on a state by state basis as well as a comparison with a national rate.

Of course, this raises another due process defect in the regulation because a carrier's data, at the time the application is purportedly "reviewed" by the Agency may be incomplete. While a carrier receiving a denial of an HM permit may, after the fact, discover that inspections had not been uploaded and considered by the Agency in determining its "out-of-service" rate, that subsequent discovery is too late. The Agency has already denied the permit and the damage has been done. Deprivation of a license is not something that can be corrected after the fact. Mathews v. Eldridge, 424 U.S. 319, 342 (1976).

Interestingly enough, rather than clarify the meaning of the terms "top 30 percent of the national average as indicated in the MCMIS," the Agency's available reports only confuse the issue further. Is the 30 percent based on grouping the levels of roadside inspection data together as in the state roadside inspection reports? For example, for Pennsylvania the report provides the user with the ability to view HM "out-of-service rates" based on whether the placard was present or not present and then provides a comparison to a national rate. There are two "national rates" posted. One states that "HM placard present" (3.77%) and the other "HM placard not present" (6.44%). Then there is the mysterious "total" printed directly below the two numbers which somehow is 4.02%. In another area of the Agency's website, the HM "out-of-service" rate for 2005 was 5.46%. According to the Agency's website, this information is obtained from MCMIS data snapshot on March 31, 2006. It is impossible to reconcile these figures

with the averages posted relative to the HM Permitting regulation absent further information from the Agency.

Fundamental due process considerations as well as the Administrative Procedures Act require that an Agency's regulations be subject to meaningful interpretation. The HM Permit regulation is subject to so many potential interpretations and variations that it provides no meaningful guidance to a company attempting to comply with the regulation. What constitutes the "worst 30%" today may not be the "worst 30% tomorrow" because of the Agency's use of a relative score. Therefore how "good" a company's inspection record must be, will only be determined after the inspections have already been completed and at such time as the Agency deems it necessary to "publish" what it considers to be the acceptable levels of non-compliance. A company cannot be expected to model its conduct to a standard which will only be determined in the future on some as yet undetermined date. It is impossible.

6. Agency Fails to Provide Adequate Procedural Due Process Protections Prior to Denying License

The Fourteenth Amendment clearly applies to the denial or revocation of a license. Once the Court has determined that the Fourteenth Amendment applies, then it must decide what process is due. Matthews at 334-335. To determine what process is due, the court must generally consider three factors:

(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

The private interest that will be affected by the Agency's official action is significant. The denial of an HM Permit is clearly a significant deprivation of a private interest. Under the second prong of the Matthews test, it is clear that the procedures used to deprive a motor carrier of its license, run a substantial risk of error. As set forth in this Petition, the underlying data used by the Agency in denying a license are frequently incorrect or incomplete and most importantly, not subject to judicial review. See e.g. In the Matter of Con-Way Freight, Inc. Docket No. FMCSA-2006-26619 (Verified Request for Administrative Review of Denial of HM Permit December 13, 2006).

The Agency will likely counter that its data is good, that errors are infrequent, and that a carrier can correct such errors. See e.g. In the Matter of: Con-Way Freight, Inc., FMCSA-2006-26619-3, (Response of Office of Enforcement and Compliance to Con-Way Freight Inc.'s Request for Administrative Review December 22, 2006). For the reasons set forth herein, it is clear that the Agency ignores its own acknowledgement of the data issues associated with the use of the MCMIS data, misunderstands the importance of using incorrect data to deny a license, and has a complete misunderstanding of the lack of available means to challenge the data being used by the Agency.

The administrative burden which would be required by the Agency to remedy the procedural defects inherent in the HM permitting process is slight relative to the severe sanction imposed by the denial. The agency could easily verify data, provide companies with notification of the data on which it is relying, and the methodology used to calculate its score, and provide a meaningful way to challenge the out-of-service

roadside inspections before they are used to deny an HM Permit. See Richardson v. Perales, 402 U.S 389, 406 (1971). In fact this information could be incorporated into the initial letter already received by the applicant as an acknowledgement by the Agency of receipt of a carrier's HM Permit application. Furthermore, the Agency must, if it intends to rely on roadside inspection data to impose sanctions against a carrier, publish the roadside inspection and out-of-service criteria through notice and comment rulemaking and implement meaningful procedures comporting with due process and the Administrative Procedures Act for carriers to challenge the out-of-service violations cited during a roadside inspection.

There is no other comparable rule or regulation from any other agency which automatically denies a license based upon similar data. In this sense, the Agency's HM Permit regulation is unique and, ultimately ill conceived, because it lacks fundamental due process protections. For these reasons, the Agency's regulation and its implementing policies and procedures fail to comport with the due process requirements set forth in Matthews and must be re-evaluated.

C. Agency Exceeded Statutory Authority in Enacting the Regulations

Were it not for the other procedural due process defects inherent in the HM permitting regulation, one may lose sight of yet another issue to the regulation itself --- the Agency clearly exceeded the scope of its authority by incorporating the "MICMIS" data in the regulation. The scope of an Agency's authority for its rulemaking is limited by the statutory language. 49 U.S.C. § 5109 provides:

Motor carrier safety permits:

(a) Requirement. A motor carrier may transport or cause to be transported by motor vehicle in commerce hazardous material only if the carrier holds a safety

permit the Secretary issues under this section authorizing the transportation and keeps a copy of the permit, or other proof of its existence, in the vehicle. The Secretary shall issue a permit if the Secretary finds the carrier is fit, willing, and able--

- (1) to provide the transportation to be authorized by the permit;
- (2) to comply with this chapter [49 USCS §§ 5101 et seq.] and regulations the Secretary prescribes to carry out this chapter [49 USCS §§ 5101 et seq.]; and
- (3) to comply with applicable United States motor carrier safety laws and regulations and applicable minimum financial responsibility laws and regulations.

The statute plainly compels the Agency to issue a permit if it finds that the carrier is (1) fit, willing, and able to provide the transportation to be authorized by the permit; (2) to comply with the hazardous materials regulations; and (3) to comply with the motor carrier safety laws and minimum financial responsibility laws and regulations.

To implement the statute, the Agency promulgated 49 C.F.R. § 385.407 which requires a motor carrier to certify that it has a satisfactory security program, to have a satisfactory safety rating, and to be registered with the Research and Special Programs Administration (“RSPA”).

Therefore, the Agency’s decision to use the MCMIS data as the sole criteria upon which to deny a license is not authorized. The plain language of the statute does not authorize the Agency to deny an HM Permit on this basis. The HM out-of-service rate is plainly put, not a motor carrier safety (or any other type of) regulation or law. The use of this information is clearly not contemplated in the statute. However, it is being used by the Agency to deny a substantive property right – an HM Permit. See Natural Resources Defense Council v. Nuclear Regulatory Commission, 666 F.2d 595 (D.C. Cir. 1981). Therefore, the Agency’s implementation of the HM Permit regulation is without authority under the statute.

D. Agency’s Rulemaking Process Defective

The Supplemental Notice of Proposed Rulemaking published on August 19, 2003 (68 Fed. Reg. 49737) did not provide adequate notice that the Agency was contemplating requiring motor carriers with satisfactory safety ratings to meet the so called “national out-of-service” rates included in the Final Rulemaking. McLouth Steel Products v. EPA, 838 F.2d 1317 (D.C. Cir. 1987). In the August 19, 2003, SNPRM, the Agency indicated that it would issue an HM Permit to motor carriers that have a satisfactory safety rating and a satisfactory security program. Carriers that were unrated could only receive a temporary HM Permit if they met the threshold so-called out-of-service rates. 68 Fed. Reg. 49752.

However, when the final rule was published on June 30, 2004, the Agency had added two entirely new requirements to the HM Permitting process for carriers holding a satisfactory safety rating: the so called out-of-service rate thresholds for driver, vehicle, hazardous materials, total and accidents. The Agency did not explain its decision much less clarify the rationale for its decision in the comments accompanying the final rule. In the background for the final rule the Agency stated that: “until we complete a compliance review, FMCSA will not issue a safety permit to a motor carrier that has, as indicated in the agency’s Motor Carrier Management Information System (MCMIS), a crash rate in the top 30 percent of the national average, or a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average.” 69 Fed. Reg. 39350. Clearly, the Agency failed to provide appropriate notice of its intent to inject the out-of-service criteria into the final rule. McLouth at 1323. Had there had been notice and comment rulemaking, these procedures would never have been adopted and the economic impact on small business would have been thoroughly reviewed.”

E. Conclusion

We recognize that many of the arguments advanced have been rejected during challenges to HM Permit denials. However, the Agency must recognize that the HM Permit regulations as applied are unfairly affecting a small percentage of companies that could significantly impact this country's economy and defense. It is our hope that this proposal has demonstrated the perhaps "unintended consequences" of the HM Permit regulations as applied by the Agency. We urge you to act quickly on this Petition as each and every day, the regulation is applied, and each and every day motor carriers and others are subjected to regulation which unfairly impacts a small segment of the industry.

We would welcome the opportunity to meet with you to discuss these issues further and to explore our concerns at your earliest convenience.

Very truly yours,

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