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Subject: Draft 2004 Report to Congress on Costs and Benefits of Federal Regulations

Lorraine Hunt -

Attached are the comments of the HM-223 Coalition.

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Chlorine Institute

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HM-223 Coalition

May 20, 2004

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Office of Management and Budget
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SUBJECT: Draft 2004 Report to Congress on the
Costs and Benefits of Federal Regulations

Introduction

The HM-223 Coalition appreciates the opportunity to submit these comments to the White House Office of Management and Budget (OMB) as part of its *Draft 2004 Report to Congress on the Costs and Benefits of Federal Regulations* (69 FR 7987). The HM-223 Coalition represents leading trade associations opposed to the U.S. Department of Transportation's (DOT) final ruling on HM-223, the *Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage* (68 Fed. Reg. 61906).

The Hazardous Materials Transportation Act (HMTA), as amended and recodified, and the DOT's attendant hazardous materials regulations (HMR) have long recognized that the movement of hazardous materials includes loading, unloading and storage incidental to the movement. In enacting the HMTA, Congress noted that the uniform federal regulation of hazardous materials transportation is essential to the safe and efficient movement of many products that reach across all sectors of the economy. This uniform federal regulation is so vital to the free flow of commerce that Congress has specifically preempted any state or local regulation that is inconsistent with or goes beyond the federal regulations. Historically, DOT has regulated the loading, unloading and temporary storage of transport vehicles and other containers holding hazardous materials irrespective of who performs these activities. In its final ruling on HM-223, DOT has redefined transportation to exclude unloading and temporary storage unless performed in the presence of or by carrier personnel.

The final rule is contrary to the expressed will of Congress. It misconstrues DOT's responsibilities to issue adequate regulations to protect the public and is wholly inconsistent with DOT's HM-232 security regulations issued under the same statutory

provisions. It has been opposed by virtually all of hazardous materials shippers, carriers and receivers, as well as the National Transportation Safety Board.

Status of the Rulemaking

HM-223 was published as a final rule by DOT on October 30, 2003, with an effective date of October 1, 2004. A total of 14 administrative appeals of the final rule are pending. The Department has stated that it hopes to address the issues outlined in the appeals and publish a notice of the adjustments (if any) to the final rule in the Federal Register by August 2004.

At the same time, a number of parties representing shippers, receivers and carriers of hazardous materials have initiated litigation in the US Court of Appeals for the D.C. Circuit. The litigation asks the court to determine (1) if the rule offers a new interpretation of the HMTA and, if so, how can that interpretation stand in the light of clear congressional intent to the contrary, or (2), if the rule is a discretionary exercise of regulatory authority, does such discretion to no longer regulate non-carrier unloading and storage exist under the terms of the statute and, in the absence of any findings regarding the safety and security consequences of such exercise of discretion, is the rule arbitrary and capricious and not in accordance with law. Other questions for the court include the extent to which DOT assertion is correct that other federal statutes prevent the regulation of non-carrier employees, whether DOT's failure to articulate the legal basis for the final rule is justification to remand the rule for further explanation, and whether DOT's refusal to adopt suggestions to incorporate by reference OSHA and EPA requirements that may be applicable to transportation facilities is a misinterpretation of DOT's statutory obligations under the HMTA or an arbitrary and capricious action.

Regulatory Impacts

DOT claims that HM-223 will result in a lesser burden on industry because the Department is giving up jurisdiction over certain loading, unloading and storage areas. The Department's logic is flawed because it does not follow fundamental economic principles and including unintended economic effects. The impact analysis for HM-223 should include effects due to the regulatory vacuum that will result upon implementation of final rule. The analysis should have included the fact that other regulatory authorities have been mandated by Congress to regulate those areas not under DOT jurisdiction. Therefore, OSHA and EPA must, by statute, impose their own regulations, which are typically more burdensome than the current DOT regulations. Additionally, since OSHA and EPA do not have federal preemptive authority, it is reasonable to assume that many state and local authorities will also impose new regulatory requirements. Any benefit gained by reducing DOT burdens will be vastly outweighed by the costs imposed by other authorities filling the regulatory void created by HM-223.

Paperwork Burden

Just the paperwork provisions of OSHA and EPA regulations will result in a marked increase in burden. EPA and DOT had a memorandum of understanding (MOU) regarding storage incidental to transportation. HM-223 will make that MOU moot, which will allow EPA to regulate the transportation storage areas of processors, distributors, retailers and downstream users as temporary stationary sources. EPA is already looking at areas that will fall under its jurisdiction when HM-223 goes into effect. It is expected that OSHA will do the same, especially in the area of hazard communication.

Capital Costs

In addition to the increased paperwork burdens resulting from the vacuum left by implementing HM-223, other incidental costs that were not captured in DOT's impact analysis could be even more substantial. For instance, over the years there have been attempts by states and local governments to limit the amount of time that bulk transportation containers can be stored at certain facilities. In fact, EPA Region 5 is now considering the action it will take when HM-223 goes into effect. This will force companies to immediately off-load materials into permanent storage units or constantly move the materials around so as not to stay in one place for too long.

Constructing new storage tanks comes at a significant capital cost, not to mention costs associated with maintenance. Constantly moving materials will result in a total disruption of interstate commerce and actually increase the overall risk that certain chemicals may pose to human health and the environment. For companies dealing with a large number of different products throughout the year, many of which are small enterprises, the situation becomes even more challenging. For instance, batch chemical manufacturers produce and use many different chemicals for short periods of time. If bulk transport containers had to be off-loaded within a short period, storage tanks would have to be cleaned out each time the products change, at an approximate cost of \$5,000 per change (to include waste disposal). It is quite typical for a single small batch chemical manufacturer to make several hundred different compounds per year. A rough, conservative estimate of the potential cost is between \$500,000 and \$1,000,000 per year, per facility. There are well over 1,000 batch facilities in the U.S., which would place the aggregate burden to small companies in the hundreds of millions of dollars per year.

These are not the only examples of costs. There are other types of legislation and regulation at the local and state level that have been preempted over the years. Each of these is expected to resurface if HM-223 is allowed to go into effect.

Interstate Commerce Impacts

As mentioned in the example above, fixed sites will be forced to make decisions on whether to outlay enormous capital expenditures for unnecessary new storage facilities or ensure that materials are never in one particular place for an extended period. The latter scenario will bring chaos to the flow of interstate commerce because it will require constant movement of materials. There is also a potential for conflicting requirements

from jurisdiction to jurisdiction, which will further impede commercial flow of materials. Because hazardous materials are used as building blocks for most everything else that is manufactured in the U.S.—including medicine, consumer products, safety devices, military hardware and material for homeland defense—it is essential that the flow of these materials continue unimpeded. Any disruption to the interstate flow of raw materials will certainly disrupt the flow of finished goods.

Conclusion

Contrary to DOT's assertion that reducing their jurisdiction will not have an impact on the regulated community, allowing HM-223 to come into effect will have significant adverse effects. By existing statute, the regulatory void will have to be filled by EPA and OSHA, neither of which have federal preemptive authority, opening the regulatory landscape to the whims of local and state politicians. Not only will the costs be significant, there are no net benefits. The potential disruption to the flow of interstate commerce could have insurmountable impacts to our nation's ability to appropriately manage chemical risks, ensure the health and safety of its citizens and defend itself from adversaries. The HM-223 Coalition urges the White House Office of Management and Budget to intervene and prevent this regulatory mistake from taking effect.

Please contact Michael E. Lyden of The Chlorine Institute, Inc., Arlington, VA (703)741-5767 Email: mlyden@CL2.com who serves as facilitator for the HM-223 Coalition. We look forward to answering any question your office has on this issue.

Submitted by:

The HM-223 Coalition

on behalf of

American Chemistry Council
American Petroleum Institute
American Trucking Associations, Inc.
The Chlorine Institute, Inc.
Compressed Gas Association
Institute of Makers of Explosives
National Association of Chemical Distributors
National Industrial Transportation League
National Paint & Coatings Association
National Tank Truck Carriers, Inc.
Synthetic Organic Chemical Manufacturers Association