



Driving Trucking's Success

April 28, 2005

Via Electronic Filing: DMS

Dockets Management System
U.S. Department of Transportation
400 Seventh Street, S.W.
Nassif Building, Room PL-401
Washington, DC 20590-0001

Re: Docket No. RSPA-99-6223 (HM-213B)

Dear Sir or Madam:

The American Trucking Associations, Inc. ("ATA") is pleased to submit the following comments in response to the Pipeline and Hazardous Materials Safety Administration's ("PHMSA") notice of proposed rulemaking entitled *Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquids* (hereinafter "Proposed Rule").¹ The Proposed Rule would amend the hazardous materials regulations to prohibit flammable liquids from being transported in external product piping ("wetlines") on cargo tanks. The goal of this regulatory revision is to "reduce fatalities and injuries that result from accidents involving unprotected product piping."²

ATA is a national trade association representing the interests of the trucking industry.³ ATA supports efforts and programs that improve the safety of motor carrier operations while helping ensure that trucking companies meet the needs of the American economy efficiently. Unfortunately, as these comments demonstrate, the costs associated with the Proposed Rule far exceed the safety benefits. The comments focus upon the costs associated with the recommended technology to remove product from wetlines prior to transportation; the predicted benefits from prohibiting the transportation of flammable liquids in wetlines; and the agency's failure to investigate fully the available alternatives to the recommended technology. We address each of these issues below:

¹ See 69 *Federal Register* 78375 (December 30, 2004).

² Proposed Rule at 78375/3.

³ ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation.

I. PHMSA Underestimated the Costs of the Proposed Technology

PHMSA has underestimated the cost of the wetlines purging technology. PHMSA has not adequately predicted the cost of the hardware, its installation cost, employee training, maintenance and repair, and lost operating productivity. PHMSA's discussion of the costs and benefits associated with this Proposed Rule contains several erroneous assumptions and its conclusions are in violation of the Data Quality Act, which was enacted by Congress to maximize the quality, objectivity, utility and integrity of information disseminated by each federal agency.⁴

a. Cost of the technology. PHMSA has relied upon the representations of a single manufacturer (*i.e.*, Cargo Tank Concepts ("CTC")) to estimate the cost of the wetlines purging technology. These representations resulted in PHMSA assuming that the cost of the technology is \$1,760 per tank, which represents the hardware cost of a manually operated wetlines purging system.⁵ CTC also makes an automatic purging system, which PHMSA assumes costs \$3,500 per unit.⁶ PHMSA has mistakenly assumed that every cargo tank would be retrofitted with a manual system.⁷ This is an unreasonable assumption, as CTC has already sold several automated systems, indicating that some percentage of carriers will select the automated system in the face of a regulatory requirement to ensure that no product remains in the wetlines.⁸

We note that in assessing the costs of this technology, PHMSA has ignored the fact that CTC has a patent on the wetlines purging technology. This patent places CTC in the position of a monopolist, and as a monopolist, CTC likely will price its product to yield the maximum amount of profit. Accordingly, once the performance standard is established, CTC will behave rationally by increasing its prices to a level just below that of any available substitute technology.

We support the comments of the National Tank Truck Carriers ("NTTC"), which go into detail on the cost of installation and the time required to install the CTC purging systems. We do not restate these costs herein; however, we note that to comply with the Administrative Procedures Act, PHMSA must do a better job of incorporating these issues into its regulatory flexibility analysis.

⁴ See Public Law 106-554 section 515.

⁵ Research and Special Programs Administration, Office of Hazardous Materials Safety *Regulatory Assessment and Initial Regulatory Flexibility Analysis*, p. 9 (March 2004) (hereinafter "RFA").

⁶ *Id.*

⁷ Proposed Rule at 78382/1.

⁸ PHMSA's assumption that there is zero risk of injury to welders installing the purging system is based upon its faulty assumption that all companies will choose a non-welded system. The costs associated with these injuries also must be corrected.

b. Installation Downtime. One of the more significant erroneous cost assumptions is that the owner of the cargo tanks will not experience any loss in profits during the time necessary to install the technology. This assumption rests upon PHMSA's conclusion that the purging system will occur during the normally scheduled maintenance and inspection period and will not result in the tank truck being kept out of service for any additional time. This simply is not the case. PHMSA estimates that installation of even the manually operated, non-welded system will take 10 hours to complete.⁹ This installation will not occur at the same time that the pressure test is performed, as no competent tank repair facility would consider drilling holes in the truck while it is filled with liquid in accordance with the hydrostatic pressure test, required by regulations. As a result the tank truck will remain unproductive for an additional 10 - 30 hours. The cost associated with this extra down time must be included in the cost benefit analysis. We estimate this cost to be approximately \$70 per hour, which must be factored into the cost estimates.

The RFA also assumes that no modifications to the tank truck will be required prior to installation. This assumption also may prove erroneous as valves may require changing prior to installation.

c. Employee Training. It is unreasonable to assume that drivers of tank trucks will understand how to operate the wetlines purging system simply by virtue of it having been installed on the tank truck. Yet, PHMSA has assumed that no employee training is necessary. This assumption is unrealistic, as drivers will have to be trained on the operation of the purging system, recognizing purging system malfunctions, the new regulatory requirements prohibiting transportation of flammable products in the wetlines, and how to respond to purging system malfunctions (*i.e.*, what to do if product remains in the wetlines). We believe that drivers will require between 1 and 2 hours of training on these issues. The cost of training a driver will vary depending upon the drivers' compensation, which we estimate to be between \$18 and \$23 per hour and the compensation of a safety director who will conduct the training, which we estimate to be approximately \$30 per hour. With many carriers facing driver turnover rates in excess of 100% annually, these training costs are significant and must not be overlooked.

d. Maintenance and Repair. Tank trucks have an average useful life of 20 to 30 years. Therefore, any wetlines purging system must function for an equivalent period. The administrative record contains no information on the likelihood of the CTC system lasting for such a long period of time. In fact, PHMSA's cost estimates assume that 100% of the purging systems installed will function flawlessly for the life of the tank truck. Although there is no information describing the system's failure rate or useful life, we do have anecdotal evidence that even with the small number of units presently in service, repairs involving the services of professional tank engineers have been necessary. Yet, PHMSA fails to include in its cost analysis any expense associated with replacing or repairing the system. Indeed, the only maintenance cost included in the RFA

⁹ RFA at 13. We understand that the time needed to retrofit tank trucks is closer to 30 hours than 10. *See* comments of NTTCC.

is a \$3 annual cost, which was estimated “by an [unnamed] industry source.”¹⁰ As such, PHMSA has underestimated the true costs of maintaining the purging system over its useful life.

e. Productivity Impacts. PHMSA has calculated lost productivity as a result of the weight penalty associated with the installation of the wetlines purging system. ATA believes that the inclusion of this cost is proper. There are, however, additional productivity impacts that PHMSA has overlooked in the RFA. We address these productivity impacts below:

PHMSA estimates that each tank truck performs an average of five trips per day. This means that the purging system would have to be engaged five times per day. If it is reasonable to assume that the system requires only 6 minutes to perform its intended function, then PHMSA must account for the additional 30 minutes per day that the driver is operating the system and is not hauling product. PHMSA failed to account for this time in its RFA.¹¹

A related productivity cost will be borne by those fuel terminals and chemical distribution facilities that do not have enough truck parking space for multiple trucks to perform the purging process after loading is complete. We do not attempt to quantify this cost; however, PHMSA must.

II. PHMSA Overestimated the Benefits of the Proposed Technology

ATA has reviewed the analysis performed by the National Tank Truck Carriers (NTTC), which indicates that PHMSA has grossly overestimated the number of wetlines accidents that would be prevented by this rulemaking. We incorporate NTTC’s comments by reference herein. PHMSA’s discussion of the benefits associated with this Proposed Rule contains several erroneous assumptions and its conclusions are in violation of the Data Quality Act.¹²

PHMSA’s wetline incident database overestimates the anticipated benefits of the Proposed Rule. For example, the Proposed Rule would not apply to tank trucks transporting combustible liquids and exempt tanks, such as those mounted upon straight trucks; however, the benefits from preventing incidents involving these exempt trucks or

¹⁰ RFA at 14.

¹¹ We are not entirely comfortable with the 6 minute operation time, as this information also was furnished by the vendor of the technology with a vested interest in this rulemaking and may represent a best case scenario. Indeed when considering the time the driver will spend walking around the truck to turn it on and off and the time the driver spends to confirm that the system has functioned in its intended manner, 6 minutes may underestimate the time actually needed to operate the system.

¹² See Public Law 106-554 section 515.

excluded products are included in the benefit analysis. Similarly spills in excess of 50 gallons are *prima facie* evidence that the tank itself was breached, and therefore should not be classified as a wetlines incident that would be prevented by the Proposed Rule. PHMSA must reexamine the benefits associated with this rulemaking and ensure that it does not include incidents involving tank trucks that are not subject to the Proposed Rule and injuries that would not be avoided by implementation of a wetlines purging system.

In addition to the NTTC analysis of the incident reports underlying PHMSA's estimates of benefits, ATA notes that it is improper to include in the estimate of benefits any costs associated with "minor, non hospitalized injuries." These types of injuries are caused by the crash itself and not from the release of product from the wetlines. Accordingly, these types of injuries would continue unabated as a result of the enactment of the Proposed Rule. Similarly, most injuries that are not the result of burns associated with product release from the wetlines should be excluded from PHMSA's benefit analysis.

III. PHMSA Failed to Adequately Consider Alternatives

The trucking industry consists mostly of small businesses.¹³ As such, PHMSA has an obligation to examine alternatives to a wetlines purging system that will not adversely impact the trucking industry.

Congress passed the Regulatory Flexibility Act (the "Act") to ensure that small businesses are not unnecessarily burdened by federal regulations. The Act sets forth specific regulatory procedures requiring federal agencies to make special efforts to hear the concerns of small businesses and minimize the significant economic impacts that regulatory proposals might have on them. Specifically, the Act requires agencies to prepare initial and final regulatory flexibility analyses that discuss, explain, and justify small business impacts as follows:

Each initial regulatory flexibility analysis shall also contain a description of any *significant alternatives* to the proposed rule which accomplish the stated objectives of applicable statutes and which *minimize any significant economic impact of the proposed rule on small entities*.¹⁴

In connection with this Proposed Rule, PHMSA concluded that the rulemaking may have a significant impact on a substantial number of small entities and proceeded to prepare a Regulatory Assessment and Initial Regulatory Flexibility Analysis, as required

¹³ The Bureau of Transportation Statistics estimates that more than 90% of the trucking industry is comprised of small businesses according to the definition promulgated by the U.S. Small Business Administration.

¹⁴ 5 U.S.C. § 603(c) (emphasis added).

by law.¹⁵ Unfortunately, PHMSA failed to include any discussion of alternatives that could be implemented to minimize the impact of this rule upon the trucking industry. As such, PHMSA's analysis is incomplete and PHMSA should not move to the final rule stage until it carefully examines available alternatives to the wetlines purging retrofit requirement.

The NPRM itself does contain a discussion of four regulatory alternatives, but fails to consider the one alternative that would effectively shift the cost of wetlines product removal from small businesses (*i.e.*, trucking companies) to large businesses (*e.g.*, petroleum and chemical companies). This alternative is to require offerors of bulk flammable materials to allow tank trucks to drain their wetlines at the loading rack. This alternative is technologically feasible to implement, affects a far smaller universe of regulated entities, costs less than the current proposal, and would reallocate the costs of wetlines product removal from small businesses to large businesses.

Tax issues associated with the return of motor fuels to the rack could be dealt with as product entering separate discharge tanks or recirculated to the original product tank could easily be measured and the appropriate tax adjustment made at the time of loading.¹⁶

A properly performed regulatory flexibility analysis must include a discussion of this alternative. Such a discussion is required by statute and, even if not required, should be included as part of government's obligation to accomplish its goals in the least burdensome manner possible.

Upon promulgation of a final rule implementing the wetlines proposal, PHMSA will have an opportunity to complete and publish a final regulatory flexibility analysis. The final regulatory flexibility analysis must contain the following explanations of PHMSA's deliberations:

[A] description of the steps the agency has taken to *minimize the significant economic impact on small entities* consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.¹⁷

¹⁵ Proposed Rule at 78383/1. *See also* RFA at pp. 49-54.

¹⁶ Calculating the amount of returned product could be accomplished by marking each tank with its wetline capacity and deducting this amount at the time the wetlines are drained or by actually measuring the amount of product returned.

¹⁷ 5 U.S.C. § 604(a)(5) (emphasis added).

We hope that PHMSA will take this requirement seriously, especially in light of these comments pointing out the adverse impact that this rule will have upon the small businesses that comprise the trucking industry.

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These comments demonstrate that PHMSA has overstated the benefits to society from a regulatory action requiring the removal of flammable liquids from wetlines and grossly underestimated the costs associated with the CTC wetlines purging system. The comments also put PHMSA on notice to investigate the merits of requiring product to be drained from wetlines at the shippers' loading facilities as a means to accomplish the goal of this rulemaking while mitigating the adverse impacts upon small businesses, such as trucking companies.

If you have any questions concerning these comments, please contact the undersigned at 703-838-1910.

Respectfully submitted,



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American Trucking Associations