



September 1, 2010

Via Email with paper copy to follow

Deborah Hersman, Chairman
National Transportation Safety Board
Washington DC 20594

Dr. Magdy El-Sabaie
Associate Administrator
Pipelines and Hazardous Materials Safety Administration
Washington DC 20590

Regarding: NTSB Public Hearing into Cargo Tank Crash in Indianapolis IN, 10/22/09

Dear Chairman Hersman and Dr. El-Sabaie:

I am writing to follow up on comments I made at the August 4 public hearing on the cargo tank rollover incident which occurred in Indianapolis in 2009. I found the hearings to be very informative and hope that we all can continue to work together to reduce cargo tank rollovers.

While I had not expected the issue of PHMSA's intention to incorporate Section XII of the ASME Code by reference in lieu of developing cargo tank design and construction regulations through the current regulatory process to arise, I did feel it necessary to express my grave concerns about the negative impact of such an action on cargo tank safety. This concern is even greater if and when a similar approach is taken for the test, inspection and repair of cargo tanks now governed by CFR49 Part 180.

At the beginning, I fully understand why PHMSA might wish to "farm out" the task of writing regulations for the design, manufacture, test, inspection or repair of specification cargo tanks. PHMSA continues to be given more and more responsibility without being provided the resources it needs. PHMSA has a need for qualified engineers and the federal pay level to attract engineers to the Washington DC area with its high cost of living puts the agency at a disadvantage. I do believe, though, that there are options to this draconian solution that essentially removes the regulated public from the process.

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Likewise, I have no doubt that ASME is one of many qualified third party entities that PHMSA could retain to assist in its responsibility to write regulations governing hazardous materials transportation. I have attended meetings of the Section XII work group that is writing the section and have taken part in several conference calls with that group. We have been pleased to have representatives of PHMSA make presentations on the objectives of Section XII at our annual Cargo Tank Maintenance Seminars. We have both carrier and associate members who serve on the Section XII Committee. Finally, I have met as recently as this year with top officials at PHMSA on this issue.

At every gathering I have made the same point.: *The regulated parties, the regulators, and the general public must have the same free and immediate access to the regulations governing the design, manufacture, test, inspection and/or repair of specification cargo tanks for the transportation of hazardous materials that they do now. To copyright regulations governing hazardous materials transportation and to restrict access of the public to the process for amending or obtaining interpretations of those regulations will be counterproductive to hazardous materials transportation safety.*

While I have been told on several occasions that PHMSA is aware of, and in some cases shares, my concerns, I have heard or seen nothing to suggest that this project does not continue to proceed without a provision to guarantee the same public access which currently exists. I understand we might even see this proposal reach the ANPRM stage this fall.

ASME staff, engineer consultants and others working on this project point out that the U. S. Department of Transportation regulations already reference Section VIII of the ASME Code. That is a true statement, but the impact of Section VIII is limited primarily to manufacturers of pressure vessels. That is a fairly small community. The current price for Section VIII is \$630. It is worth noting that the regulations for constructing pressure cargo tanks, including MC331 and MC338 are currently included in 49 CFR 178.

PHMSA's essential turning over of regulation writing to a third party private enterprise and adopting the copyrighted product of that venture would have a profound impact far beyond that of its current adoption by reference of pressure vessel provisions in Section VIII. Every cargo tank operator, shipper, test and inspection facility and repair facility, and even federal and state regulators would no longer have free and immediate access to the regulations under which they are required to operate. This transfer of regulation writing would impact literally thousands of companies.

Again these are not new concerns. Here is a portion of a letter sent to PHMSA in 2007.

1. *How will the public get access to the information that will be written by ASME/NBIC and adopted by reference by the Department of Transportation? Currently, the regulations are available on various websites and through commercial publications and Title 49. Will PHMSA make available to the public the material it adopts by reference? If not, will the public have to subscribe to or join ASME or purchase a Code Book or similar publication? Will the material developed by ASME/NBIC be copyrighted?*

We believe that the fact that PHMSA is “farming out” this important function to a Third Party should in no way restrict the public access to these regulations which is now available at no cost and with minimal effort. Anything else will have a detrimental impact on safety, and could undermine the many improvements brought about by Parts 180 and 178.

2. *How will changes to the “regulations” be accomplished? There now is an established process where industry can petition for a rulemaking, or where industry input is sought through Notices of Proposed Rulemaking, etc. Will this continue to be the process, or will the public again have to establish some standing with the Third Party provider of development of cargo tank regulations?*
3. *NTTC has several Canadian carriers and cargo tank manufacturers as members. Currently, Canadian regulations essentially mimic US regulations. What impact will PHMSA adopting by reference language developed by a Third Party have on the Canadian regulations?*

No satisfactory answer, in fact no answer, has been given to these questions.

National Tank Truck Carriers receives several questions a week from carriers, shippers repair facilities and law enforcement agencies regarding cargo tank equipment regulations, especially those found in Part 180. We make every effort to answer the question and direct the person either to the PHMSA or other available websites where the language is posted, or scan and email or fax the relevant language. We do this for anyone who calls, including non-members since we are in the safety business for the whole tank truck industry.

If this proposed transfer of regulatory rule writing is passed to a third party and copyrighted, is our answer supposed to be: “Here is a phone number. Buy a book. Hire a consultant to advance your concerns”? I know there is an army of ASME engineers and consultants who will be most ready to “help” the regulated industry navigate the new system as proposed.

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Over the past several years, NTTC and FMCSA have conducted Cargo Tank Test and Inspection Workshops that have been attended by hundreds of industry and government personnel. Several other groups have worked with FMCSA on similar training outreach programs. Both FMCSA and NTTC instructors at those workshops use copies of cargo tank regulations that are provided to all students. Uncle Sam does not copyright this important information. Would NTTC, FMCSA and other organizations that provide cargo tank safety training be able to continue to make this information available, or would copyrights held by private entities restrict this training?

If PHMSA has determined that it no longer can write these important safety regulations through the current process, I suggest it write a Request for Proposals and publish it in the *Federal Register*. The RFP could ask the contractor to review and revise the current Part 178, Part 180 and other sections impacting cargo tank manufacture, testing, inspection and repair and report back to PHMSA. The agency could then publish the revised regulations and an NPRM and follow the existing process. The regulations would still be PHMSA's own work product, free and immediate access to the regulations would continue, and the regulated public would not have to purchase an expensive Code book to comply or join an organization, or hire a consultant to have input into the process.

I am very confident that private companies such as Battelle or SAIC or universities such as the University of Michigan and Virginia Tech would be interested in bidding on this work. ASME, NBIC and other organizations also could compete for the contract, as long as they agreed that the work product would be used by PHMSA as part of the existing regulatory process. I don't recall a competitive bid on the very lucrative opportunity that is currently being considered. As a "nonprofit" organization manager, I would be delighted to have the government mandate that the regulated public purchase publications that only I produce.

National Tank Truck Carriers will continue to oppose the abandonment of this important rulemaking process and access to the material at every level possible, including regulatory, legislative, and judicial. We strongly believe that placing barriers to the regulated public to compliance with hazardous materials transportation regulations is poor public policy and harmful to the safety system we all work so hard to provide the public.

Thank you for your consideration of our very serious concerns. NTTC as an organization and I as an individual are most willing to work with PHMSA to resolve this issue.

Sincerely,



John L. Conley
President

