



Billing Code: 4910-60-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 172 and 173

[Docket No. PHMSA-2009-0151(HM-218F)]

RIN 2137-AE84

Hazardous Materials: Miscellaneous Amendments; Response to Appeals; Corrections

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Correcting amendments.

SUMMARY: On July 20, 2011, PHMSA published a final rule under Docket Number PHMSA-2009-0151 (HM-218F) making miscellaneous amendments to the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). The amendments made by PHMSA in the July 20, 2011 final rule promote safer transportation practices; eliminate unnecessary regulatory requirements; finalize outstanding petitions for rulemaking; facilitate international commerce; and simplify the regulations. This final rule corrects errors in the pictorial display of labels, eliminates references to transitional provisions that were previously removed from the HMR, clarifies shipping paper amendments, corrects an editorial error, and extends the effective date of certain shipping paper amendments adopted in the July 20, 2011 final rule.

DATES: These correcting amendments are effective [Insert date of publication in the Federal Register]. A delayed compliance date of August 19, 2012 is authorized for shipping paper amendments in this final rule.

FOR FURTHER INFORMATION CONTACT: Deborah L. Boothe, Standards and Rulemaking Division, (202) 366-8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:

I. Background

A. Notice of Proposed Rulemaking

On September 29, 2010, PHMSA published a Notice of Proposed Rulemaking (NPRM) under this docket HM-218F (74 FR 16135). The NPRM proposed amendments to the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) based on PHMSA initiatives and petitions for rulemaking submitted in accordance with 49 CFR § 106.95. The amendments proposed in the NPRM were intended to provide relief to industry by eliminating, revising, clarifying, or relaxing regulatory requirements.

The comment period for the NPRM closed on November 29, 2010. Eleven commenters provided comments in response to the NPRM. PHMSA received comments from the following companies, and organizations:

- United Parcel Service (UPS)
- Worthington Cylinder Corporation (Worthington)
- Veolia Environmental Services
- Institute of Makers of Explosives (IME)
- PPG Industries, Inc.

- Barlen and Associates, Inc.
- Arrowhead Industrial Services USA, Inc.
- New England Fuel Institute
- Stericycle, Inc.
- Truck Trailer Manufacturers Association (TTMA)
- American Trucking Associations (ATA)

B. Final Rule

On July 20, 2011, PHMSA issued a final rule titled “Hazardous Materials: Miscellaneous Amendments” under Docket Number PHMSA-2009-0151(HM-218F) (76 FR 43510) amending the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) by making miscellaneous amendments to update and clarify certain regulatory requirements. Based on an assessment of the proposed changes and the comments received, PHMSA’s July 20, 2011 final rule covered the following topics:

- Materials incorporated by reference
- Definition of “person”
- Consolidation bins
- Transitional provisions
- Reporting infectious substances incidents
- Hazard communication for IBCs
- Hazardous Materials Table Revisions
- Hazard Communication
- Exclusive use vehicles for regulated medical waste (RMW)

- Fireworks
- Explosives
- Rail Transloading Operations
- Cylinders
- Cargo Tanks
- Permeation Devices
- Alcoholic beverage exception
- Special Permits
- Lab Packs
- Batteries containing sodium or cells containing sodium

II. Appeals to the Final Rule

A. List of Appellants

In this final rule, we respond to appeals submitted in response to the July 20, 2011 final rule. The following organizations submitted appeals:

- The Dangerous Goods Advisory Council (DGAC)
- Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA)
- Dangerous Goods Management USA Atlanta (DGM USA Atlanta)
- Bureau of Explosives (BOE) Publications.

B. Discussion of Appeals by Section

The specific concerns raised by the appellants are outlined below by section:

Section 172.203

Section 172.203 of the HMR provides additional shipping paper description requirements for hazardous materials. On May 30, 2005, PHMSA received a petition for rulemaking from the Association of American Railroads (petition number P-1456; Docket Number PHMSA-2005-21198) requesting that we require shipping papers to include a notation for shipments of non-odorized liquefied petroleum gas (LPG). Due to safety risks posed by non-odorized LPG, PHMSA agreed with the petition.

On September 29, 2010, PHMSA published a Notice of Proposed Rulemaking (NPRM) (74 FR 16135) proposing to incorporate the AAR petition. To ensure that emergency responders are made aware when a shipment of LPG is not odorized, PHMSA proposed to add a new paragraph (p) to § 172.203 to require the words “non-odorized” to precede the proper shipping name when a non-odorized LPG is offered for transportation. PHMSA received one comment from New England Fuel Institute (NEFI) supporting this proposed amendment. PHMSA received no comments opposing the requirement.

On July 29, 2011, DGAC submitted an appeal addressing the new § 172.203(p). In its appeal, DGAC requests that PHMSA provide a delayed compliance date for the amendment; authorize the wording to be located in association with the proper shipping description (rather than preceding) to facilitate international commerce; and, consistent with §§ 172.328(d) and 172.330(c), authorize the use of the words “not-odorized” or “non-odorized.”

DGAC indicates that persons with preprinted shipping papers will need more time beyond the August 19, 2011 effective date of the July 20, 2011 final rule to comply with the new

§ 172.203(p). DGAC's requests at least a one-year transition period for compliance to be fully accomplished. We agree. Section 172.101(1)(1)(ii) provides delayed compliance of up to one year from the effective date of the rule. This ensures that individuals are provided sufficient time to deplete existing stocks of preprinted shipping papers and package markings. Therefore, this preamble discussion clarifies that mandatory compliance with the provision in new § 172.203(p) is delayed until August 19, 2012. Further, PHMSA is correcting the final rule to clarify that the words "not-odorized" or "non-odorized" may be used and must be located in association with the proper shipping description.

Sections 172.432 and 172.446

Section 172.432 describes the INFECTIOUS SUBSTANCE label size and color and provides an illustration of how it must appear. References to the Centers for Disease Control (CDC) are no longer required on this label. Therefore, in the September 29, 2010 NPRM, PHMSA proposed to remove the text that refers to the CDC on the label. The text states "In U.S.A. Notify Director—CDC, Atlanta, GA 1-800-232-0124." PHMSA proposed to allow three years from the effective date of the final rule to use up existing stocks of preprinted labels. PHMSA received no comments on this proposed amendment and adopted it as proposed in the July 20, 2011 final rule.

Section 172.446 describes the Class 9 (miscellaneous hazardous materials) label specifications, including size, color, and an illustration. The illustration in § 172.446 shows a thin, horizontal line running across the label at its midpoint (just at the bottom of the vertical black bars). The line does not exist in the International Civil Aviation Organization (ICAO) Technical Instructions or the International Maritime Dangerous Good (IMDG) Code. The

difference has resulted in some international shipments being relabeled in transit, causing delays. In an effort to avoid continued frustrated or delayed shipments, PHMSA proposed, in the September 29, 2010 NPRM, to revise the Class 9 (miscellaneous hazardous materials) label specifications by removing the horizontal line running across the label at its midpoint. PHMSA proposed a three-year transition period from the effective date of the final rule to deplete existing stocks. PHMSA received one comment from the United Parcel Service, Inc. supporting the amendment for its potential to eliminate shipment delays. Therefore, in the July 20, 2011 final rule the amendment was adopted as proposed.

On August 5, 2011, COSTHA submitted an appeal expressing concerns about the redesigned INFECTIOUS SUBSTANCE and Class 9 (miscellaneous hazardous materials) labels and continued lack of consistency with the international labels. COSTHA also expressed concerns regarding the August 19, 2011 effective date of the final rule. COSTHA expressed concern that because the text in the INFECTIOUS SUBSTANCE label is located in the center of the label instead of just below the center line, as currently shown in the HMR, would create problems when shipping internationally. COSTHA requests PHMSA relocate the text below the center line of the label to avoid problems when shipping internationally. Additionally, COSTHA is appealing the Class 9 label design stating that the vertical bars on either side of the label are incorrectly shown in the label illustration. PHMSA agrees with COSTHA's appeal and is correcting the INFECTIOUS SUBSTANCE and Class 9 (miscellaneous hazardous materials) label designs, as requested, in this final rule.

COSTHA also expressed concerns regarding the August 19, 2011 effective date of the final rule and the September 30, 2011 grandfather date for use of labels previously in effect. PHMSA agrees with COSTHA's appeal. PHMSA corrected the compliance date under a final

rule titled, “Hazardous Materials: Minor Editorial Corrections and Clarifications,” issued on September 13, 2011 under docket PHMSA-2011-0134 (HM-244D) (76 FR 56304). The September 13, 2011 final rule amended the compliance date for the INFECTIOUS SUBSTANCE and Class 9 (miscellaneous hazardous materials) labels to authorize labels in effect on August 18, 2011 to continue to be used until January 1, 2014.

Section 173.32

Section 173.32 prescribes requirements for the use of portable tanks. As amended by the July 20, 2011 final rule, the transitional provisions in § 171.14 were removed and relocated to the appropriate section. However, PHMSA did not remove the text “(see § 171.14(d)(4) for transitional provisions applicable to T codes)” in § 173.32(c)(2). Therefore, we are correcting the section by removing this reference to § 171.14(d)(4) transitional provisions for T codes.

Section 175.10

Section 175.10 specifies the conditions for which passengers, crew members, or an operator may carry hazardous materials aboard an aircraft. In an international harmonization final rule published on January 19, 2011 (Docket PHMSA-2009-0126) (76 FR 3308), PHMSA added a new paragraph (a)(17) to permit a mobility aid such as a wheelchair, containing a lithium ion battery, to be transported in accordance with specific conditions. Since publication of the January 19, 2011 final rule, PHMSA has noted an inconsistency between the requirements of the ICAO Technical Instructions and the requirements of the HMR in relation to the acceptance of lithium battery powered mobility aids for transportation by aircraft. In particular, the HMR require the removal of the battery under certain conditions prior to transportation by aircraft. It is not our intent to be inconsistent with the requirements of the ICAO Technical

Instructions in this regard. Thus, in the July 20, 2011 final rule, we corrected the inconsistency in § 175.10(a)(17) to clearly indicate that batteries are not required to be removed.

However, on August 29, 2011 PHMSA received an appeal from DGM USA Atlanta stating this amendment continues to be inconsistent with international standards. DGM indicates that batteries should not be removed if not necessary as many wheelchair and mobility aid manufacturers design the devices so that the batteries are not accessible and are constructed to prevent the battery from being removed. DGM requests PHMSA fully adopt the current ICAO Technical Instructions language in order to harmonize and reduce complexity of compliance with the regulations.

PHMSA considers this requested change outside the scope of this rulemaking. Nonetheless, PHMSA believes that the request has merit and will address the concerns raised by DGM's appeal in a future rulemaking.

Section 174.104

This section prescribes the general requirements for car selection, preparation, inspection, and certification of rail cars containing Division 1.1 or 1.2 (explosive) materials. We are revising paragraph (f) where the year on the certificate is referred to as "19____" to update it to reflect the year "20____." This update to the certificate was not included in the corrections and clarifications in the final rule, Docket No. PHMSA-2011-0134 (HM-244D), Minor Editorial Corrections and Clarifications, published September 13, 2011 (76 FR 56304).

III. Corrections and Amendments

As indicated above, based on appeals submitted to the July 20, 2011 final rule, this final rule is:

1. Clarifying that the shipping paper amendments adopted in the July 20, 2011 final rule are provided a delayed compliance date of August 19, 2012 based on the provisions in § 172.101(l)(1)(ii);
2. Correcting the shipping paper amendments to allow the use of the words “not-odorized” or “non-odorized” in association with the proper shipping description for non odorized LPG shipments;
3. Revising the erroneous display of the Class 9 (miscellaneous hazardous materials) label by correcting the width of the vertical lines on either side of the label in the graphic display;
4. Revising the erroneous display of the INFECTIOUS SUBSTANCE label by moving the text below the center line of the label; and
5. Correcting § 173.32(c)(2) by removing the reference to “(see § 171.14(d)(4) for transitional provisions applicable to T codes).”
6. Correcting § 174.104(f) by removing the references to the year “19__” on the certificate to the year “20__.”

IV. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

1. This final rule is published under authority of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 et seq.). Section 5103(b) of Federal

hazmat law authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, hazardous materials in intrastate, interstate, and foreign commerce.

2. 49 U.S.C. 5120(b) authorizes the Secretary of Transportation to ensure that, to the extent practicable, regulations governing the transportation of hazardous materials in commerce are consistent with standards adopted by international authorities.

B. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget (OMB). The final rule is not considered a significant rule under the Regulatory Policies and Procedures order issued by the U.S. Department of Transportation (44 FR 11034).

Executive Orders 12866 and 13563 require agencies to regulate in the “most cost-effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.” As discussed in this rulemaking, PHMSA amends various provisions in the HMR to clarify the provisions and to relax overly burdensome requirements. This final rule responds to appeals from industry associations to correct the label pictorial displays and extend the effective date of the shipping paper amendments. PHMSA anticipates the amendments contained in this rule generate economic benefits to the regulated community. This final rule is designed to increase the clarity of the HMR, thereby increasing voluntary compliance while reducing compliance costs.

C. Executive Order 13132

This final rule was analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). This final rule would preempt state, local and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This final rule concerns the classification, packaging, marking, labeling, and handling of hazardous materials, among other covered subjects. As adopted, this rule preempts any state, local, or Indian tribe requirements concerning these subjects unless the non-Federal requirements are “substantively the same” (see 49 CFR 107.202(d) as the Federal requirements.)

D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Since this final rule does not have tribal implications and does not impose substantial direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines the rule is not expected to have a significant impact on a substantial number of small entities. This final rule

would respond to appeals and correct label pictorial displays and extend the effective date of the shipping paper amendments from the July 20, 2011 final rule.

Consideration of alternative proposals for small businesses. The Regulatory Flexibility Act directs agencies to establish exceptions and differing compliance standards for small businesses, where it is possible to do so and still meet the objectives of applicable regulatory statutes. In the case of hazardous materials transportation, it is not possible to establish exceptions or differing standards and still accomplish our safety objectives.

The impact of this final rule is not expected to be significant. The changes are generally intended to provide relief to shippers, carriers, and packaging manufacturers and testers, including small entities. The majority of entities affected by this rule are small entities. Although the rule will create less burden, the overall effect of this positive change is not significant. Therefore, this final rule will not have a significant economic impact on a substantial number of small entities.

This final rule has been developed in accordance with Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

F. Paperwork Reduction Act

This final rule imposes no new information collection and recordkeeping requirements.

G. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

H. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$141,300,000 or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

I. Environmental Assessment

The National Environmental Policy Act of 1969 (NEPA) requires Federal agencies to consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. In the July 20, 2011 final rule, we developed an assessment to determine the effects of these revisions on the environment and whether a more comprehensive environmental impact statement may be required. Our findings conclude that there are no significant environmental impacts associated with this final rule. The amendments are intended to: update, clarify, or provide relief from certain existing regulatory requirements to promote safer transportation practices; eliminate unnecessary regulatory requirements; finalize outstanding petitions for rulemaking; facilitate international commerce; and make these requirements easier to understand. For interested parties, a detailed environmental assessment is included with the July 20, 2011 final rule available in the public

docket.

J. Privacy Act.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477) or you may visit <http://www.regulations.gov/search/footer/privacyanduse.jsp>.

K. International Trade Analysis

The Trade Agreements Act of 1979 (Public Law 96-39), as amended by the Uruguay Round Agreements Act (Public Law 103-465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standards have a legitimate domestic objective, such as the protection of safety, and do not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. PHMSA notes the purpose is to ensure the safety of the American public, and has assessed the effects of this rule to ensure that it does not exclude imports that meet this objective. As a result, this rule is not considered as creating an unnecessary obstacle to foreign commerce.

List of Subjects

49 CFR Part 172

Education, Hazardous materials transportation, Hazardous waste, Labeling, Markings, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Incorporation by reference, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 174

Hazardous materials transportation, Radioactive materials, Rail carriers, Railroad safety, Reporting and recordkeeping requirements.

Accordingly, 49 CFR parts 172, 173, and 174 are corrected by making the following correcting amendments:

Part 172 – HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, TRAINING REQUIREMENTS, AND SECURITY PLANS

1. The authority citation for Part 172 continues to read as follows:

Authority: 49 U.S.C. 5101-5128, 44701; 49 1.53

2. In § 172.203, paragraph (p) is revised to read as follows:

§ 172.203 Additional description requirements.

* * * * *

(p) Liquefied petroleum gas (LPG). The word “non-odorized” or “not-odorized” must be included in association with the proper shipping description on a shipping paper when non-odorized liquefied petroleum gas is offered for transportation.

3. In § 172.432, paragraph (a) is revised to read as follows:

§ 172.432 INFECTIOUS SUBSTANCE label.

(a) Except for size and color, the INFECTIOUS SUBSTANCE label must be as follows:

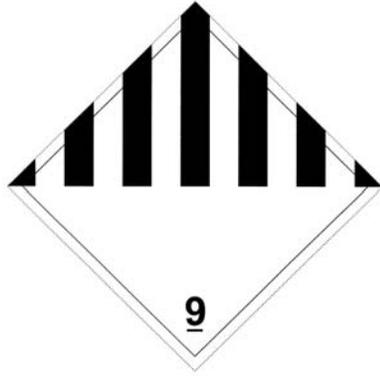


* * * * *

4. In § 172.446, paragraph (a) is revised to read as follows:

§ 172.446 CLASS 9 label.

(a) Except for size and color, the “CLASS 9” (miscellaneous hazardous materials) label must be as follows:



* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

5. The authority citation for part 173 continues to read as follows:

Authority: 49 U.S.C. 5101-5128, 44701; 49 CFR 1.45 and 1.53.

6. In § 173.32, in paragraph (c)(2), the wording “(see § 171.14(d)(4) for transitional provisions applicable to T codes)” is removed.

PART 174—CARRIAGE BY RAIL

7. The authority citation for part 174 continues to read as follows:

Authority: 49 U.S.C. 5101-5128; 49 CFR 1.53.

8. In §174.104, in paragraph (f), each reference to the year “19__” on the certificate is removed and replaced with the year ”20__.”

Issued in Washington, DC, on December 21, 2011 under authority delegated in 49 CFR

Part 1.

Cynthia L. Quarterman

Administrator

Pipeline and Hazardous Materials Safety Administration

[FR Doc. 2011-33193 Filed 12/27/2011 at 8:45 am; Publication Date: 12/28/2011]