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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 173

[Docket No. PHMSA-2011-0157; Notice No. 11-6]

Clarification on the Division 1.1 Fireworks Approvals Policy

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

ACTION: Clarification.

SUMMARY: In this document, PHMSA is responding to comments received from its initial Notice No. 11-6 clarifying PHMSA's policy regarding the fireworks approvals program.

Furthermore, in this document PHMSA is restating its policy clarification that it will accept only those classification approval applications for Division 1.1 fireworks that have been examined and assigned a recommended shipping description, division, and compatibility group by a DOT-approved explosives test laboratory, or those that have been issued an approval for the explosive by the competent authority of a foreign government acknowledged by PHMSA's Associate Administrator. This policy clarification is intended to enhance safety by ensuring that fireworks transported in commerce meet the established criteria for their assigned classification, thereby minimizing the potential shipment of incorrectly classified or forbidden fireworks.

DATES: The policy clarification discussed in this document is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Paquet, Director, Approvals and Permits Division, Office of Hazardous Materials Safety, (202) 366-4512, PHMSA, 1200 New Jersey Avenue, S.E., Washington, DC 20590.

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I. Introduction

The Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) require that Division 1.1 fireworks must be examined by a DOT-approved explosives test laboratory and assigned a recommended shipping description, division, and compatibility group in accordance with § 173.56(b). The tests provided for the classification of Division 1.1 fireworks specified in §§ 173.57 and 173.58 describe the procedures used to determine the acceptance criteria and assignment of class and division for all new explosives. Further, the HMR also permit Division 1.1 firework devices that have been approved by the competent authority of a foreign government that PHMSA's Associate Administrator has acknowledged in writing as acceptable in accordance with § 173.56(g).

On September 27, 2011, PHMSA published the initial Notice No. 11-6 (76 FR 59769) clarifying its policy, consistent with the HMR, that all Division 1.1 fireworks must undergo examination by a DOT-approved explosives examination laboratory or be issued an approval for the explosive by the competent authority of a foreign government acknowledged by PHMSA's Associate Administrator. In today's document, PHMSA is responding to comments received as a result of this notice and is restating its policy clarification on the fireworks approval program.

II. Background

The HMR require that Division 1.1 fireworks must be examined by a DOT-approved explosives test laboratory and assigned a recommended shipping description, division, and compatibility group in accordance with § 173.56(b). The HMR also permit Division 1.1 firework devices that have been approved by the competent authority of a foreign government that PHMSA's Associate Administrator has acknowledged in writing as acceptable in accordance with § 173.56(g).

According to § 173.56(j), manufacturers of Division 1.3 and 1.4 fireworks, or their designated U.S. agents, may apply for an explosives (EX) classification approval without prior examination by a DOT-approved explosives test laboratory if the firework device is manufactured in accordance with APA Standard 87-1 (IBR, see § 171.7), and the device passes the thermal stability test. Additionally, the applicant must certify that the firework device conforms to the APA Standard 87-1 and that the descriptions and technical information contained in the application are complete and accurate. PHMSA has in the past, on a case-by-case basis, in accordance with § 173.56(i), approved some Division 1.1G fireworks without requiring testing by a DOT-approved explosives examination laboratory. PHMSA evaluates each EX approval application independently and has also required Division 1.1G fireworks to undergo examination testing by a DOT-approved explosive examination lab prior to issuing the EX approval.

While APA Standard 87-1 contains two instances where Division 1.1 fireworks may be approved under the standard, it does not call for the level of testing required in the HMR, nor does it provide testing and criteria to determine when a firework ceases to be a Division 1.1 and becomes forbidden for transport.

In this document, PHMSA is clarifying its policy that all Division 1.1 fireworks must undergo examination by a DOT-approved explosives examination laboratory or be approved by a competent authority. Division 1.1 fireworks will not require UN Test Method 6, as testing will be limited to UN Test Method 4a(i) and 4b(ii), as is specified in § 173.57(b). The examination laboratory may request additional information to make its classification recommendation. Additionally, PHMSA allows the laboratory to make a classification recommendation for Division 1.1 fireworks based on analogy.

PHMSA believes that by issuing Division 1.1 fireworks approvals only after a DOT-approved explosive laboratory has examined and recommended a classification, or an approval has been issued by a competent authority of a foreign government acknowledged by PHMSA's Associate Administrator, it is ensuring that fireworks transported in commerce meet the established criteria for their assigned classification, thereby minimizing the potential shipment of incorrectly classified or forbidden fireworks.

III. List of Commenters, Beyond-the-Scope Comments, and General Comments

PHMSA received three comments in response to the initial Notice No. 11-6. The comments covered various topics including, but not limited to, transportation safety, general comments, and economic impacts. One commenter supported the clarification to the fireworks policy in initial Notice 11-6, while two commenters had reservations about it. A summary of the comments received is discussed below. The comments, as submitted to the docket for the initial Notice No. 11-6 (Docket No. PHMSA-2011-0157), may be accessed via <http://www.regulations.gov> and were submitted by the following:

- (1) Veolia ES Technical Solutions, L.L.C.; PHMSA-2011-0157-0002

- (2) American Pyrotechnics Association (APA); PHMSA-2011-0157-0003
- (3) Kellner's Fireworks Inc.; PHMSA-201-0157-0004

Beyond-the-Scope Comments

One commenter requests PHMSA consider waste management of used or defective fireworks when proposing any amendments to regulations related to the transport of fireworks. In this document, PHMSA does not propose any regulatory amendments; rather, we are clarifying existing policy. While PHMSA agrees environmental impacts should be considered when proposing amendments to regulations, no regulatory changes were proposed in the initial Notice; therefore, waste management of fireworks is beyond the scope of this document.

Another commenter acknowledges the current prohibition in the HMR to classify Division 1.1 fireworks under § 173.56(j), but requests that PHMSA remove the terminology “Division 1.3 and Division 1.4” in § 173.56(j) to allow PHMSA to grant approvals for all fireworks manufactured in accordance with APA Standard 87-1, regardless of their classification. This document is a clarification of current requirements and does not propose any regulatory amendments, rather, PHMSA is clarifying existing policy; therefore this request will be handled as a petition for rulemaking and responded to accordingly.

General Comments

Transportation Safety

With regard to transportation safety, PHMSA received one comment in support of its effort to clarify the classification of Division 1.1 fireworks. Specifically, this commenter noted that PHMSA’s oversight of the classification of Division 1.1 fireworks is preferable due to the increased safety hazards involved in the management of Division 1.1 fireworks.

Another commenter opposes PHMSA's clarification and indicates that Division 1.1 fireworks approved under APA Standard 87-1 have not resulted in any incidents that would cause it to reconsider its practice. Although to date there have been no known incidents involving the transportation of Division 1.1 fireworks, there are known occurrences of fireworks being transported that contain chemical compositions rendering them forbidden from transportation. The APA Standard 87-1 does not provide the testing and criteria to determine when a device ceases to be a Division 1.1 firework device and becomes forbidden from transportation. Testing Division 1.1 fireworks devices as prescribed in the HMR, enables a determination when a firework device ceases to be a Division 1.1 device and becomes forbidden. Furthermore, this clarification will provide oversight to ensure that Division 1.1 fireworks meet the established criteria for their assigned classification, thereby minimizing the potential shipment of incorrectly classified or forbidden fireworks.

Economic Impact

One commenter opposes the policy clarification because they indicate that fireworks currently classified as Division 1.1G devices have not changed in many years, even though the regulations governing their transportation have changed. The commenter states that a fireworks device that was previously considered to be 1.3G under APA Standard 87-1 is now considered a 1.1G, but the device is still manufactured the same way as it was when the device was classed as a 1.3G.

In December 1991, PHMSA (Research and Special Programs Administration) revised the HMR to align its classification system for fireworks with the U.N. Recommendations on the Transport of Dangerous Goods. Under the previous system, fireworks were classified as Class A, B, or C—Class A fireworks were considered to be the most hazardous and Class C fireworks

were considered to be least hazardous. For the most part, Class A fireworks were reclassified as Division 1.1, Class B fireworks were reclassified as Division 1.3, and Class C fireworks were reclassified as Division 1.4. This resulted in some fireworks with shell diameters as great as 16 inches being classed as Division 1.3 fireworks. In the 2001-2002 edition of the APA Standard 87-1, fireworks with diameters greater than 10 inches were all classified as Division 1.1 fireworks. Prior to that edition of the APA Standard 87-1, aerial shell firework devices not classed as a 1.4G were classed as a 1.3G regardless of size or quantity of flash composition. This change was made in the interest of safety.

While PHMSA has approved Division 1.1G fireworks manufactured in accordance with the APA Standard 87-1, it evaluates each EX approval independently and has also required Division 1.1G fireworks to be examined.

Further, the commenter states that the testing for these items can cost upwards of \$8,000 and that the cost will put fireworks companies intending to sell Division 1.1G fireworks devices at a major loss before the product is available for sale. To the contrary, third-party labs have indicated that the cost of performing these tests is considerably less--depending on a number of variables, PHMSA estimates that required tests would cost less than \$5,400.

Also, as indicated in the initial document, if a fireworks device is classed and approved as a Division 1.1 firework, the UN Test Method 6 is not required; rather, testing will be limited to UN Test Method 4a(i) and 4b(ii), as is specified in § 173.57(b). Further, PHMSA allows the laboratory to make a classification recommendation for Division 1.1 fireworks based on analogy.

This document is intended to clarify current regulations: that only Division 1.3 and 1.4 fireworks devices may be approved in accordance with the APA Standard 87-1.

IV. Summary of Policy Clarification

Based on the comments received and PHMSA's responses to those comments, henceforth, PHMSA will not accept Division 1.1 fireworks approval applications submitted under the APA Standard 87-1. Division 1.1 fireworks must be examined and assigned a recommended shipping description, division, and compatibility group by a DOT-approved explosives test laboratory, or issued an approval for the explosive by the competent authority of a foreign government acknowledged by PHMSA's Associate Administrator. On a case-by-case basis under 173.56(i), PHMSA will evaluate them for approval without testing.

Issued in Washington, DC on February 14, 2012 under authority delegated in 49 CFR part 1.

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Pipeline and Hazardous Materials Safety Administration

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