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**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**49 CFR Part 109**

**[Docket No. PHMSA-2012-0259 (HM-258B)]**

**RIN 2137-AE98**

**Hazardous Materials: Enhanced Enforcement Procedures – Resumption of Transportation**

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** PHMSA is proposing to address certain matters identified in the Hazardous Materials Transportation Safety Act of 2012 related to the Department's enhanced inspection, investigation, and enforcement authority. Specifically, we are proposing to amend the opening of packages provision to include requirements for perishable hazardous material; add a new notification section; and add a new equipment section to the Department's procedural regulations. For the mandates to address certain matters related to the Department's enhanced inspection, investigation, and enforcement authority, we are proposing no additional regulatory changes. We believe that the Department's current rules that were previously established through notice and comment rulemaking and existing policies and operating procedures thoroughly address the hazmat transportation matters identified by Congress. These inspection and enforcement procedures will not change the current inspection procedures for DOT, but will augment DOT's existing enforcement procedures and allow the Department to respond

immediately and effectively to conditions or practices that pose serious threats to life, property, or the environment. As this rule affects only agency enforcement procedures, it therefore results in no additional burden of compliance costs to industry.

**DATES:** Comments must be received by [INSERT 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. To the extent possible, PHMSA will consider late-filed comments as a final rule is developed.

**ADDRESSES:** You may submit comments by identification of the docket number (PHMSA-2012-0259 (HM-258B)) by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Fax: 1-202-493-2251.
- Mail: Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, Routing Symbol M-30, 1200 New Jersey Avenue, S.E., Washington, DC 20590.
- Hand Delivery: To Docket Operations, Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue, S.E., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this notice at the beginning of the comment. All comments received will be posted

without change to the Federal Docket Management System (FDMS), including any personal information.

Docket: For access to the dockets to read background documents or comments received, go to <http://www.regulations.gov> or DOT's Docket Operations Office (see ADDRESSES).

**FOR FURTHER INFORMATION CONTACT:** Vincent Lopez or Shawn Wolsey, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, at (202) 366-4400.

**SUPPLEMENTAL INFORMATION:**

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## **I. Executive Summary**

On July 6, 2012, the President signed the Moving Ahead for Progress in the 21<sup>st</sup> Century Act, or the MAP-21, which included the Hazardous Materials Transportation Safety Improvement Act of 2012 (HMTSIA) as Title III of the statute. Public Law 112-141, 126 Stat. 405, July 6, 2012. Section 33009 of HMTSIA revised 49 U.S.C. § 5121 to include a notification requirement. Congress also directed the Department to address certain hazmat transportation matters through rulemaking:

- The safe and expeditious resumption of transportation of perishable hazardous material, including radiopharmaceuticals and other medical products that may require timely delivery due to life-threatening situations;
- The means by which non-compliant packages that present an imminent hazard are placed out-of- service until the condition is corrected;
- The means by which non-compliant packages that do not present a hazard are moved to their final destination;
- Appropriate training and equipment for inspectors; and
- The proper closure of packaging in accordance with the hazardous material regulations.

We are proposing in this rulemaking, as described further below, to clarify the Department's position with respect to perishable hazardous material, by amending the opening of packages provision of the Department's hazardous materials procedural regulations for the opening of packages, emergency orders, and emergency recalls. The amendment recognizes the special characteristics and handling requirements of

perishable hazardous material by clarifying that an agent will stop or open a package containing a perishable hazardous material only after the agent has utilized appropriate alternatives. We are also proposing to codify the statutory notification requirement in HMTSIA by incorporating into the regulations the Department's current notification procedures from the operations manual. Finally, we are proposing to add a new provision to address appropriate equipment for inspectors. For the remaining mandates to address certain matters related to the Department's enhanced inspection, investigation, and enforcement authority, we are proposing no additional regulatory changes. We believe that the Department's current rules that were previously established through notice and comment rulemaking and existing policies and operating procedures thoroughly address the hazmat transportation matters identified by Congress as requiring additional regulations. For instance, in a prior rulemaking, the Department established, in Part 109, procedural regulations for opening packages, removing packages from transportation, and closing packages. These regulations include the definition of key terms, including perishable hazardous material. The regulations address how the Department's agents will handle non-compliant packages that present an imminent hazard and those that do not. Moreover, the rules address when and how the Department's agents will open a package. And, if an agent opens a package, there are procedural rules for closing the package and ensuring its safe resumption of transportation, if applicable. In addition, the Department developed an internal operations manual for training and use by its hazmat inspectors and investigators across all modes of transportation. The operations manual's guidance is intended to target and manage the use of the enhanced inspection and enforcement

authority in a uniform and consistent manner within the Department. At this time, we do not have any data or other information that indicate the rules, policies, and operating procedures currently in place are inadequate or that additional regulations are necessary.

## **II. Background**

On March 2, 2011, we issued a final rule under Docket No. PHMSA-2005-22356 (PHM-7), “Hazardous Materials: Enhanced Enforcement Procedures.” 76 FR 11570. The final rule became effective on May 2, 2011. The rule implemented enhanced inspection, investigation, and enforcement authority conferred on the Secretary of Transportation (Secretary) by the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (HMTSSRA). The final rule established procedures for issuance of emergency orders (restrictions, prohibitions, recalls, and out-of-service orders) to address unsafe conditions or practices posing an imminent hazard; opening of packages to identify undeclared or non-compliant shipments, when the person in possession of the package refuses a request to open it; and the temporary detention and inspection of potentially non-compliant packages. 76 FR 11570 (codified at 49 CFR, Part 109). In conjunction with the final rule, the Department of Transportation (Department or DOT) developed an internal operations manual for training and use by its inspectors and investigators (collectively agents). The operations manual is a joint document created by the operating administrations that enforce the Hazardous Materials

Regulations, 49 CFR Parts 171 -180 (HMR)<sup>1</sup>, to provide guidance to agents who, in the course of conducting inspections, determine that they need to open a package, remove a package from transportation, or perform any other authorized function in Part 109. The manual seeks to establish baseline conditions that will ensure consistent application of the authorities exercised under 49 CFR Part 109 at a minimum threshold. The guidance is intended to target and manage the use of enhanced inspection and enforcement authority in a manner that minimizes burdens on the transportation system while, at the same time, meets the overriding mission of transportation safety. The operations manual was made available to the public on the PHMSA Web site, <http://www.phmsa.dot.gov>.

On July 6, 2012, the President signed the Moving Ahead for Progress in the 21<sup>st</sup> Century Act, or the MAP-21, which included the Hazardous Materials Transportation Safety Improvement Act of 2012 (HMTSIA) as Title III of the statute. Public Law 112-141, 126 Stat. 405, July 6, 2012. Section 33008 of HMTSIA created a mandate for the Department to develop uniform performance standards for hazmat inspectors and investigators:

(a) In General—Not later than 18 months after the date of enactment of this Act, the Secretary shall develop uniform

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<sup>1</sup> Under authority delegated by the Secretary of Transportation, four agencies within DOT enforce the Hazardous Materials Regulations, 49 CFR Parts 171 – 180 and other regulations, approvals, special permits, and orders issued under Federal Hazardous Materials Transportation Law, 49 U.S.C. §§ 5101 et seq.: (1) Federal Aviation Administration, 49 CFR 1.83(d)(1); (2) Federal Railroad Administration, 49 CFR 1.89(j); (3) Federal Motor Carrier Safety Administration, 49 CFR 1.87(d)(1); and (4) The Pipeline and Hazardous Materials Safety Administration, 49 CFR 1.97(b). The secretary has delegated authority to each respective operating administration to exercise the enhanced inspection and enforcement authority conferred by HMTSSRA. 71 FR 52751, 52753 (Sept. 7, 2006). The United States Coast Guard is authorized to enforce the Hazardous Materials Regulations in connection with certain transportation or shipment of hazardous materials by water but does not have Congressional/delegated authority to carry out the enhanced inspection, investigation, and enforcement authority.

performance standards for training hazardous material inspectors and investigators on—

(1) how to collect, analyze, and publish findings from inspections and investigations of accidents or incidents involving the transportation of hazardous material; and

(2) how to identify noncompliance with regulations issued under chapter 51 of title 49, United States Code, and take appropriate enforcement action.

(b) Standards and Guidelines- The Secretary may develop—

(1) guidelines for hazardous material inspector and investigator qualifications;

(2) best practices and standards for hazardous material inspector and investigator training programs; and

(3) standard protocols to coordinate investigation efforts among Federal, State, and local jurisdictions on accidents or incidents involving the transportation of hazardous material.

(c) Availability- The standards, protocols, and guidelines established under this section—

(1) shall be mandatory for—

(A) the Department of Transportation's multimodal personnel conducting hazardous material enforcement inspections or investigations; and

(B) State employees who conduct federally funded compliance reviews, inspections, or investigations; and

(2) shall be made available to Federal, State, and local hazardous material safety enforcement personnel.

126 Stat. at 836.

Section 33009 of HMTSIA revised 49 U.S.C. § 5121, to include a notification requirement. Congress also directed the Department to address certain hazmat transportation matters through rulemaking:

(a) Notice of Enforcement Measures—Section 5121(c)(1) is amended—

(1) in subparagraph (E), by striking 'and' at the end;

(2) in subparagraph (F), by striking the period at the end and inserting '; and'; and

(3) by adding at the end the following:

`(G) shall provide to the affected offeror, carrier, packaging manufacturer or tester, or other person responsible for the package reasonable notice of—

`(i) his or her decision to exercise his or her authority under paragraph (1);

`(ii) any findings made; and

`(iii) any actions being taken as a result of a finding of noncompliance.'.

(b) Regulations—

(1) Matters To Be Addressed—Section 5121(e) is amended by adding at the end the following:

`(3) Matters To Be Addressed—The regulations issued under this subsection shall address—

`(A) the safe and expeditious resumption of transportation of perishable hazardous material, including radiopharmaceuticals and other medical products, that may require timely delivery due to life-threatening situations;

`(B) the means by which—

`(i) noncompliant packages that present an imminent hazard are placed out-of-service until the condition is corrected; and

`(ii) noncompliant packages that do not present a hazard are moved to their final destination;

`(C) appropriate training and equipment for inspectors; and

`(D) the proper closure of packaging in accordance with the hazardous material regulations.'.

(2) Finalizing Regulations—In accordance with section 5103(b)(2) of title 49, United States Code, not later than 1 year after the date of enactment of this Act, the Secretary shall take all actions necessary to finalize a regulation under paragraph (1) of this subsection.

\* \* \*

126 Stat. at 836-7.

As described further below, we believe that the Department's current rules that were previously established through notice and comment rulemaking and existing policies and operating procedures thoroughly address the congressional mandates to

address certain hazmat transportation matters. In PHM-7, the Department established procedural regulations for opening packages, removing packages from transportation, and closing packages. These regulations include the definition of key terms, including perishable hazardous material. The regulations address how the Department's agents will handle non-compliant packages that present an imminent hazard and those that do not. Moreover, the rules address when and how the Department's agents will open a package. And, if an agent opens a package, there are procedural rules for closing the package and ensuring its safe resumption of transportation, if applicable. In addition, the Department developed an internal operations manual for training and use by its hazmat inspectors and investigators across all modes of transportation. The operations manual's guidance is intended to target and manage the use of the enhanced inspection and enforcement authority in a uniform and consistent manner within the Department. At this time, we do not have any data or other information that indicate the rules, policies, and operating procedures currently in place are inadequate or that additional regulations are necessary.

### **III. Summary of Proposals in this NPRM**

In MAP-21 Congress directed the Secretary to address certain transportation matters related to the Department's enhanced inspection, investigation, and enforcement authority. The relevant MAP-21 mandates for this rulemaking are:

- Notice of enforcement measures;
- The safe and expeditious resumption of transportation of perishable hazardous material, including radiopharmaceuticals and other medical products that may require timely delivery due to life-threatening situations;

- The means by which non-compliant packages that present an imminent hazard are placed out-of- service until the condition is corrected;
- The means by which non-compliant packages that do not present a hazard are moved to their final destination;
- Appropriate training and equipment for inspectors; and
- The proper closure of packaging in accordance with the hazardous material regulations.

We are proposing in this rulemaking, as described further below, to clarify the Department's position with respect to perishable hazardous material, by amending the opening of packages provision of the Department's hazardous materials procedural regulations for the opening of packages, emergency orders, and emergency recalls. The amendment recognizes the special characteristics and handling requirements of perishable hazardous material by clarifying that an agent will stop or open a package containing a perishable hazardous material only after the agent has utilized appropriate alternatives. We are also proposing to codify the statutory notification requirement in HMTSIA by incorporating into the regulations the Department's current notification procedures from the operations manual that was developed in conjunction with the PHM-7 final rule. Finally, we are proposing to add a new provision to address appropriate equipment for inspectors.

For the remaining mandates to address certain matters related to the Department's enhanced inspection, investigation, and enforcement authority, we are proposing no additional regulatory changes. We believe that the Department's current rules that were

previously established through notice and comment rulemaking and existing policies and operating procedures thoroughly address the hazmat transportation matters identified by Congress. For instance, in a prior rulemaking, the Department established, in Part 109, procedural regulations for opening packages, removing packages from transportation, and closing packages. These regulations include the definition of key terms, including perishable hazardous material. The regulations address how the Department's agents will handle non-compliant packages that present an imminent hazard and those that do not. Moreover, the rules address when and how the Department's agents will open a package. And, if an agent opens a package, there are procedural rules for closing the package and ensuring its safe resumption of transportation, if applicable. In addition, the Department developed an internal operations manual for training and use by its hazmat inspectors and investigators across all modes of transportation. The operations manual's guidance is intended to target and manage within the Department the use of the enhanced inspection and enforcement authority in a uniform and consistent manner. At this time, we do not have any data or other information that indicate the rules, policies, and operating procedures currently in place are inadequate or that additional rulemaking is necessary.

#### Notice of Enforcement Measures

In PHM-7, we established procedures to implement the enhanced inspection, investigation, and enforcement authority conferred on the Secretary through HMTSSRA. In the NPRM for that rule, in response to commenters' concerns about notifying offerors and consignees about a possible delay in arrival, we agreed that all parties responsible for

a shipment that is opened or removed from transportation need to be notified of the action taken. We said that “DOT inspectors will be required to communicate the findings made and enforcement measures taken to the appropriate offeror, recipient, and carrier of the package . . .”. 73 FR 57288. In the final rule, we outlined how we would notify affected parties when an agent exercises one of the new authorities. 76 FR 11580. In the preamble to the final rule, we explained that the notification procedures would be incorporated into the Department’s joint operations manual. *Id.* The notification procedures that we developed for the joint operations manual address situations where an agent may exercise a 49 CFR Part 109 authority for a package that is in transit. In this case, the person in possession of the package, such as a carrier, may not be the person responsible for the package, i.e. the offeror. Therefore, we set out separate procedures for immediately notifying the person in possession and the original offeror. Generally, the agent will verbally notify the person in possession. If the person in possession is not the original offeror, the agent will also take reasonable measures to notify the original offeror.

In MAP-21 Congress added a notification requirement to the Department’s inspection and investigation authority. Specifically, Section 5121(c)(1) was amended to include new subparagraph (G). Section 5121(c)(1) now reads:

“(c) Inspections and investigations.—

(1) In general.—A designated officer, employee, or agent of the Secretary—

...

(G) shall provide to the affected offeror, carrier, packaging manufacturer or tester, other person responsible for the package reasonable notice of—

(i) his or her decision to exercise his or her authority under paragraph (1);

(ii) any findings made; and

(iii) any actions being taken as a result of a finding of noncompliance.

126 Stat. at 836-7.

We are proposing in this rulemaking to codify this statutory notification requirement by incorporating into the regulations the Department’s current notification procedures from the joint operations manual. As discussed above, the joint operations manual includes procedures and guidance to agents for providing notice of enforcement measures taken under 49 CFR Part 109. The procedures in the manual are comprehensive and comport with the statutory mandate. As such, under this proposal, a new notification section will be added to Part 109, Subpart B of 49 CFR. It will require that an agent, after exercising a 49 CFR Part 109 inspection or investigation authority, immediately take reasonable measures to notify the appropriate person of the reason for the action being taken, the results of any preliminary investigation including apparent violations of the HMR, and any further action that may be warranted.

#### The Safe and Expeditious Resumption of Transportation of Perishable Hazardous Material

We addressed the opening, reclosing, and resumption of transportation of perishable hazardous material in a previous rulemaking. In PHM-7, we defined “perishable hazardous material” as “a hazardous material that is subject to significant risk

of speedy decay, deterioration, or spoilage, or hazardous materials consigned for medical use, in the prevention, treatment, or cure of a disease or condition in human beings or animals where expeditious shipment and delivery meets a critical medical need.” 76 FR 11592 (codified at 49 CFR § 109.1). Further, we established procedures for reclosing a package containing a perishable hazardous material and its safe and expeditious resumption of transportation. Section 109.13 contains the requirements for the closing of packages and the safe resumption of transportation, including a specific requirement pertaining to perishable hazardous material.

We believe the definition of perishable hazardous material and the rules, current procedures, and guidance already developed for reclosing packages, sufficiently address Congress’ concern and the need for expeditious treatment of these types of materials. We also note that in the Department’s joint operations manual, we have significantly restricted an agent’s ability to handle or open a package containing perishable hazardous material. For example, an agent must have been trained in the handling of the specific material and may only open a perishable hazardous material package in a designated facility, if required, and have all safety equipment, handling equipment, and materials to properly close the package. Notwithstanding, in order to clarify the Department’s position with respect to perishable hazardous material, we are proposing to amend the opening of packages provision of the Department’s hazardous materials procedural regulations for the opening of packages, emergency orders, and emergency recalls. The amendment recognizes the special characteristics and handling requirements of perishable hazardous material by clarifying that an agent will stop or open a package

containing a perishable hazardous material only after the agent has utilized appropriate alternatives.

In consideration of the special characteristics and handling requirements of perishable hazardous material, we are proposing to establish a Department policy that its agents will not intentionally open packages containing perishable hazardous material unless a compelling safety need exists. However, in accordance with our current procedures, an agent may stop, remove, or have a package containing these types of materials transported to a facility for further examination and analysis. We solicit comments from the public whether excluding these types of materials is appropriate.

Handling of non-compliant packages

In MAP-21 Congress mandated that the Department take all actions necessary to finalize a regulation addressing the means by which non-compliant packages are processed when an agent exercises an authority under Part 109. Specifically, Section 5121(e) was amended to include new paragraph (3). The relevant amendment to Section 5121(e) includes the following language:

\* \* \* \* \*

(3) Matters to be addressed.—The regulations issued under this subsection shall address—

...

(B) the means by which—

(i) noncompliant packages that present an imminent hazard are placed out-of-service until the condition is corrected; and

(ii) noncompliant packages that do not present a hazard are moved to their final destination.

...

126 Stat. at 837.

The Department's procedural rules for opening of packages, emergency orders, and emergency recalls are in 49 CFR, Part 109. These procedures address the means by which a non-compliant package that is found to be an imminent hazard is placed out-of-service. Specifically, in § 109.13, if an imminent hazard is found to exist after an agent opens a package, the operating administration's authorized official may issue an out-of-service order prohibiting the movement of the package. 49 CFR § 109.13(b). The package must be removed from transportation until it is brought into compliance. *Id.* An out-of-service order is a type of emergency order. In 49 CFR, Subpart C of Part 109 contains the procedural regulations for issuing an out-of-service emergency order, including procedures for administrative review, reconsideration, and appellate review of an emergency order. Furthermore, the joint operations manual provides inspection personnel with step-by-step procedures and additional guidance for issuing an out-of-service order. For example, at least two levels of review and consultation with the operating administration's legal office is required before an emergency order can be issued. Moreover, the operations manual addresses documentation requirements, notification, service, publication, and termination requirements.

Regarding non-compliant packages that do not present a hazard, it is important to note that a non-compliant package may not continue in transportation until all identified

non-compliant issues are resolved. 49 CFR § 109.13(d). In the PHM-7 final rule where we established the enhanced enforcement procedures, we stated that for a non-compliant package, the agent would not close the package and that there is no obligation to bring that package into compliance. 76 FR 11587. Further, we stated, “[t]he Department’s operating administrations will not be responsible for bringing an otherwise non-compliant package into compliance and resuming its movement in commerce.” Id. We reasoned that if the package does not conform to the HMR at the time of inspection, the act that a DOT official opened it in the course of an inspection or investigation will not make DOT or its agent responsible for bringing the package into compliance. Id.

In light of the above, we have already fulfilled the applicable mandate for the handling of non-compliant packages and no further action is required.

#### Appropriate Training and Equipment for Inspectors

Congress recognized that “[t]here is currently no uniform training standard for hazardous materials (‘hazmat’) inspectors and investigators.” H. Conf. Rep. No. 112-557 at 610 (2012). To address this problem, it mandated in MAP-21 that the Secretary establish uniform performance standards for training hazmat inspectors and investigators no later than eighteen months from the date of enactment of the Act. 126 Stat. at 836. The mandate authorizes the development of guidelines for hazmat inspector and investigator qualifications; best practices and standards for hazmat inspector and investigator training programs; and standard protocols to coordinate investigation efforts among Federal, State, and local jurisdictions on accidents or incidents involving the

transportation of hazardous material. In order to achieve a uniform hazmat training standard, Congress required that the standards, protocols, and guidelines developed would be mandatory to the Department’s multimodal personnel conducting hazmat enforcement inspections and investigations.

Additionally, Congress mandated that the Department take all actions necessary to finalize a regulation, no later than one year from the date of enactment of the Act, addressing appropriate training and equipment for inspectors when exercising an authority under 49 CFR Part 109. Specifically, Section 5121(e) was amended to include new paragraph (3). The relevant amendment to Section 5121(e) includes the following language:

\* \* \* \* \*

(3) Matters to be addressed.—The regulations issued under this subsection shall address—

...

(C) appropriate training and equipment for inspectors; and

...

126 Stat. at 837

Although the MAP-21 mandates here are training related, it is evident that the development of a uniform training scheme is essential because it will establish the foundation upon which future training for hazmat inspectors and investigators is expected to follow. As such, it is premature to require the Department to promulgate enforcement

procedural regulations for hazmat training and equipment before the Department has had the opportunity to develop uniform performance training standards. This approach does not appear to be the best way to meet Congress' objective to ensure that all hazmat inspectors and investigations receive uniform and standardized training. It would be more appropriate for the Department to establish the uniform performance training standards, best practices, and protocols before it develops additional training regulations for its hazmat personnel. This would ensure that new training rules are consistent with the uniform training scheme.

Notwithstanding, we understand that proper training of inspectors and investigators is essential to ensure that the enhanced enforcement authority is used effectively and judiciously. In the NPRM for PHM-7, we explained that the operating administrations responsible for enforcement of the HMR—PHMSA, FMCSA, FAA, and FRA—worked together to develop the rule and a joint operations manual. 73 FR 57285. We further explained that the proposed regulations set out a framework for the procedures the operating administrations will employ when conducting inspections or investigations, thus ensuring consistency in approaches and enforcement measures among modes of transportation. Moreover, we stated that the final rule, implemented with the guidance of an operational manual, would ensure that this authority was properly used. *Id.* We expressed our confidence in this approach because with the cooperation of the operating administrations in the development of the rule, and the accompanying operations manual, it meant that all Department inspectors and investigators would have the same general training and modal specific instruction. 73 FR 57288.

Regarding equipment, we are proposing to add a new provision to address appropriate equipment for inspectors when they exercise a Part 109 authority. Under this proposal, a new equipment section will be added to new Subpart D—Equipment, requiring an agent to use the appropriate safety, handling, and other equipment authorized by his or her operating administration’s equipment requirements for hazardous material inspectors and investigators.

Consequently, we do not believe that we should develop rules for appropriate training in this rulemaking. Instead, we advocate addressing any performance standards as part of the larger hazardous materials performance standard development activity currently underway. In the meantime, we believe the existing rules in 49 CFR Part 109 and the attendant operational procedures in the joint operations manual, as well as each operating administration’s specific guidance for its enforcement staff, sufficiently address the training concern identified by Congress in the MAP-21 directive. Therefore, PHMSA does not believe that further action is necessary at this time.

#### The Proper Closure of Packaging in Accordance with HMR

In MAP-21 Congress mandated that the Department take all actions necessary to finalize a regulation addressing “the proper closure of packaging in accordance with the hazardous material regulations.” 126 Stat. at 837.

In PHM-7 we addressed reclosing of packages opened under the enhanced inspection, investigation, and enforcement authority. In several of the comments that we received about that rulemaking, the regulated community raised concerns about how we

were going to reclose packages after they have been opened under the new authority. In the NPRM, we responded by stating that the Department was developing internal operational procedures and guidance to address the proper closure of packaging in accordance with the HMR. We also solicited further comment from the public on the factors that should be considered in the development of these procedures and guidance. 73 FR 57286. However, we also stated that an agent's obligation to reclose a package only arose if, after opening the package, an imminent hazard was found not to exist and the package otherwise complied with the HMR. 76 FR 11587. More importantly, we also said that the Department's operating administrations would not be responsible for bringing an otherwise non-specification or non-compliant package into compliance and resuming its movement in commerce. *Id.* If the package did not comply with the HMR the fact that a DOT official opened it in the course of an inspection or investigation would not make DOT or its inspector responsible for bringing the package into compliance. *Id.* In the final rule, we significantly revised the new rule for closing packages to cover each possible re-closure scenario: no imminent hazard found; imminent hazard found; package does not contain a hazardous material; and package contains a hazardous material not in compliance with the HMR. *Id.* Further, we stated that the inspector would only be required to reclose a package in accordance with the packaging manufacturer's closure instructions or other appropriate method when a package was opened and no imminent hazard was found. *Id.* In the joint operations manual we developed procedures for properly closing a package. These procedures include steps for reclosing a package. It also includes additional requirements and

procedures to complete the re-closure process, including methods to thoroughly document the activities performed.

In light of the above, we believe the existing requirements in 49 CFR Part 109 for closing opened packages (Section 109.13) and the attendant operational procedures in the joint operations manual sufficiently address the matter identified by Congress in the MAP-21 directive. Therefore, no further action is necessary.

#### **IV. Summary Review of Proposed Amendments**

We are proposing to amend the opening of packages provision of the Department's hazardous materials procedural regulations for the opening of packages, emergency orders, and emergency recalls. The amendment recognizes the special characteristics and handling requirements of perishable hazardous material by clarifying that an agent will stop or open a package containing a perishable hazardous material only after the agent has utilized appropriate alternatives. We are also proposing to add a notification provision to 49 CFR under Part 109 Subpart B—Inspections and Investigations. The provision will provide for the immediate and reasonable notification of enforcement action taken by an inspector or investigator whenever he or she exercises one of the inspection and investigation authorities under 49 CFR Part 109, Subpart B, which includes the opening of packages; removing a package and related packages in a shipment from transportation; directing a package to be transported to a facility for examination and analysis; and authorizing properly qualified personnel to assist in activities conducted under Subpart B. The notice will include the reason for the action being taken, the results of any preliminary investigation including apparent violations of

the HMR, and any further action that may be warranted. Finally, we are proposing to add a new provision to address appropriate equipment for inspectors when they exercise a Part 109 authority. The new equipment section will be added to 49 CFR under new Subpart D—Equipment. The provision will require an agent to use the appropriate safety, handling, and other equipment authorized by his or her operating administration’s equipment requirements for hazardous material inspectors and investigators.

**V. Regulatory Analyses and Notices**

**A. Statutory/Legal Authority for This Rulemaking**

This notice of proposed rulemaking (NPRM) is published under the authority of the Federal Hazardous Materials Transportation Law, 49 U.S.C. § 5101 *et seq.* Section 5103(b) authorizes the Secretary to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. This NPRM would revise PHMSA’s procedural regulations for opening of packages, emergency orders, and emergency recalls to address certain matters identified in the Hazardous Materials Transportation Safety Act of 2012 related to Department’s enhanced inspection, investigation, and enforcement authority. The NPRM carries out the statutory mandate and clarifies DOT’s role and responsibilities in ensuring that hazardous materials are being safely transported and promoting the regulated community’s understanding and compliance with regulatory requirements applicable to specific situations and operations.

**B. Executive Order 13610, Executive Order 13563, Executive Order 12866, and DOT Regulatory Policies and Procedures**

This NPRM 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 proposed 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 Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review that were established in Executive Order 12866 Regulatory Planning and Review of September 30, 1993. Executive Order 13563, issued January 18, 2011, notes that our nation's current regulatory system must not only protect public health, welfare, safety, and our environment but also promote economic growth, innovation, competitiveness, and job creation.<sup>2</sup> Further, this executive order urges government agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. In addition, federal agencies are asked to periodically review existing significant regulations, retrospectively analyze rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and modify, streamline, expand, or repeal regulatory requirements in accordance with what has been learned.

Executive Order 13610, issued May 10, 2012, urges agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and

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<sup>2</sup> See <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>

whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.<sup>3</sup>

By building off of each other, these three Executive Orders 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.”

This proposed rule revises 49 CFR Part 109, which contains regulations on DOT inspection and investigation procedures. These regulations are not part of the HMR, which govern the transportation of hazmat, thus they do not carry any additional compliance requirements or costs for entities that must comply with the HMR. It is possible, however, that some carriers or shippers, who in the absence of this rule would have refused to open a package when requested, may experience delays that they would not have otherwise faced. DOT is not aware of any cases of shippers or carriers refusing to open packages and so anticipates that these costs will be minimal.

C. Executive Order 13132

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). 49 U.S.C. § 5125(h) provides that the preemption provisions in Federal hazardous material transportation law do “not apply to any procedure . . . utilized by a State, political subdivision of a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material.” Accordingly, this proposed rule has no preemptive effect on State, local, or

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<sup>3</sup> See <http://www.gpo.gov/fdsys/pkg/FR-2012-05-14/pdf/2012-11798.pdf>

Indian tribe enforcement procedures and penalties, and preparation of a federalism assessment is not warranted.

D. Executive Order 13175

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”). Because this NPRM does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

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 that a rule is not expected to have significant impact on a substantial number of small entities. I hereby certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule applies to offerors and carriers of hazardous materials, some of which are small entities; however, there will not be any economic impact on any person who complies with Federal hazardous materials law and the regulations and orders issued under that law.

*Potentially affected small entities.* The provisions in this proposed rule will apply to persons who perform, or cause to be performed, functions related to the transportation

of hazardous materials in transportation in commerce. This includes offerors of hazardous materials and persons in physical control of a hazardous material during transportation in commerce. Such persons may primarily include motor carriers, air carriers, vessel operators, rail carriers, temporary storage facilities, and intermodal transfer facilities. Unless alternative definitions have been established by the agency in consultation with the Small Business Administration, the definition of “small business” has the same meaning as under the Small Business Act (15 CFR parts 631–657c). Therefore, since no such special definition has been established, PHMSA employs the thresholds (published in 13 CFR 121.201) of 1,500 employees for air carriers (NAICS Subgroup 481), 500 employees for rail carriers (NAICS Subgroup 482), 500 employees for vessel operators (NAICS Subgroup 483), \$18.5 million in revenues for motor carriers (NAICS Subgroup 484), and \$18.5 million in revenues for warehousing and storage companies (NAICS Subgroup 493). Of the approximately 116,000 entities to which this proposed rule would apply (104,000 of which are motor carriers), we estimate that about 90 percent are small entities.

*Potential cost impacts.* This proposed rule revises 49 CFR Part 109, which contains regulations on DOT inspection and investigation procedures. These regulations are not part of the HMR, which govern the transportation of hazmat, thus they do not carry any additional compliance requirements or costs for entities that must comply with the HMR. It is possible, however, that some carriers or shippers, who in the absence of this rule would have refused to open a package when requested, may experience delays

that they would not have otherwise faced. DOT is not aware of any cases of shippers or carriers refusing to open packages and so anticipates that these costs will be minimal.

*Alternate proposals for small business.* Because this proposed rule addresses a Congressional mandate, we have limited latitude in defining alternative courses of action. The option of taking no action would be both inconsistent with Congress' direction and undesirable from the standpoint of safety and enforcement. Failure to implement the new authority will perpetuate the problem of undeclared hazardous material shipments and resulting incidents or releases. It will also leave PHMSA and other operating administrations without an effective plan to abate an imminent safety hazard.

F. Paperwork Reduction Act

PHMSA has analyzed this final rule in accordance with the Paperwork Reduction Act of 1995 (PRA). The PRA requires Federal agencies to minimize the paperwork burden imposed on the American public by ensuring maximum utility and quality of federal information, ensuring the use of information technology to improve government performance, and improving the federal government's accountability for managing information collection activities. This final rule contains no new information collection requirements subject to the PRA.

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

contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

H. Unfunded Mandates Reform Act of 1995

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$141.3 million 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), as amended (42 U.S.C. 4321–4347), and implementing regulations by the Council on Environmental Quality (40 CFR part 1500) require Federal agencies to consider the consequences of Federal actions and prepare a detailed statement on actions that significantly affect the quality of the human environment.

The purpose of this rulemaking is to amend the Department’s existing enforcement procedures to (1) to clarify the Department’s position with respect to perishable hazardous material, by amending the opening of packages provision; (2) provide notice of enforcement measures to affected parties; and (3) address appropriate equipment for inspectors. Because this NPRM addresses Congressional mandates, we have limited latitude in defining alternative courses of action. The option of taking no action would be both inconsistent with Congress’ direction and undesirable from the standpoint of safety and enforcement. These inspection and enforcement procedures will not change the current inspection procedures for DOT, but will augment DOT’s existing

enforcement procedures and allow the Department to respond immediately and effectively to conditions or practices that pose serious threat to life, property, or the environment. PHMSA has initially determined that the implementation of the proposed rule will not have any significant impact on the quality of the human environment. PHMSA, however, invites comments about environmental impacts that the proposed rule might pose.

J. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, 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 (Volume 65, Number 70; Pages 19477-78) which may be viewed at:

<http://www.gpo.gov/fdsys/pkg/FR-2000-04-11/pdf/00-8505.pdf>.

**VI. List of Subjects**

49 CFR Part 109

Inspections and investigations.

Equipment.

In consideration of the foregoing, 49 CFR Chapter I is proposed to be amended as follows:

PART 109—DEPARTMENT OF TRANSPORTATION HAZARDOUS MATERIALS  
PROCEDURAL REGULATIONS FOR OPENING OF PACKAGES, EMERGENCY  
ORDERS, AND EMERGENCY RECALLS

1. The authority citation for part 109 is revised to read as follows:

Authority: 49 U.S.C. §§ 5101-5128, 44701; Pub. L. 101-410 § 4 (28 U.S.C. § 2461 note); Pub. L. 104-121 §§ 212-213; Pub. L. 104-134 § 31001; 49 CFR 1.81, 1.97.

2. In § 109.5, a new paragraph (b) is added to read as follows:

§ 109.5 Opening of packages.

\* \* \* \* \*

(b) Perishable hazardous material. To ensure the expeditious transportation of a package containing a perishable hazardous material, an agent will utilize appropriate alternatives before exercising an authority under paragraph (a).

3. Section 109.16 is added to read as follows:

§ 109.16 Notification of Enforcement Measures.

In addition to the notification requirements in §109.7, an agent, after exercising an authority under this Subpart, will immediately take reasonable measures to notify the offeror and the person in possession of the package, providing the reason for the action being taken, the results of any preliminary investigation including apparent violations of subchapter C of this chapter, and any further action that may be warranted.

4. Subpart D is added to read as follows:

Subpart D—Equipment

§ 109.25 Equipment.

When an agent exercises an authority under Subpart B, the agent shall use the appropriate safety, handling, and other equipment authorized by his or her operating administration's equipment requirements for hazardous material inspectors and investigators.

Issued in Washington, DC on May 13, 2013, under authority delegated in 49 CFR Part 106.

Magdy El-Sibaie  
Associate Administrator for Hazardous Materials Safety  
Pipeline and Hazardous Materials Safety Administration

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