



Billing Code: 4910-60-P

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: Final rule.

SUMMARY: PHMSA is addressing certain matters identified in the Hazardous Materials Transportation Safety Improvement Act of 2012 related to the Department's enhanced inspection, investigation, and enforcement authority. Specifically, PHMSA is amending the package opening provision to include procedures for an agent of the Secretary of Transportation to open packages of perishable hazardous materials and to provide notification to the responsible party that an agent has exercised a safety inspection or investigation authority. In addition, we are establishing equipment requirements for agents. The Department's enhanced inspection, investigation, and enforcement procedures were previously established through notice and comment rulemaking and thoroughly address the hazardous material transportation matters identified by Congress. This final rule is required to codify changes to Federal hazardous materials transportation law and to ensure transparency and consistency for hazardous materials inspectors across all modes of transportation. As it affects only agency

enforcement procedures, there are no additional compliance costs to industry associated with this final rule.

DATES: This Final rule is effective [INSERT 30 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

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.

SUPPLEMENTARY INFORMATION:

Table of Contents of Supplementary Information

- I. Executive Summary
- II. Background
- III. Discussion of the Comments on the NPRM
- IV. Summary of MAP-21 and Final Rule
- V. Summary Review of Amendments
- VI. Regulatory Analyses and Notices
 - A. Statutory/Legal Authority for this Rulemaking
 - B. Executive Orders 12866, 13563, 13610, and DOT Regulatory Policies and Procedures
 - C. Executive Order 13132
 - D. Executive Order 13175
 - E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies
 - F. Paperwork Reduction Act
 - G. Regulatory Identifier Number (RIN)
 - H. Unfunded Mandates Reform Act
 - I. Environmental Assessment
 - J. Privacy Act

I. Executive Summary

On July 6, 2012, the President signed the Moving Ahead for Progress in the 21st Century Act, or the MAP-21, which included the Hazardous Materials Transportation Safety Improvement Act of 2012 (HMTSIA) as Title III of Division C 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 hazardous material (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 clarifying in this rulemaking, as described further below, 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, for emergency orders, and for emergency recalls. 49 CFR 109.5. 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 codifying the statutory notification requirement in HMTSIA by incorporating into the regulations the Department's current notification procedures from the operations manual. Finally, we are adding 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, no additional regulatory changes will be made. 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 procedural regulations for opening packages, removing packages from transportation, and closing packages in part 109 of title 49, Code of Federal Regulations (CFR). 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. Specifically, under 49 CFR 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. The package must be removed from transportation until it is brought into compliance. An out-of-service order is a type of emergency order. The procedural regulations also include procedures for administrative review, reconsideration, and appellate review of an out-of-service order. 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),¹ 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 function authorized 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 MAP-21, which included the HMTSIA as Title III of Division C of the statute. Section 33008 of HMTSIA created a mandate for

¹ Under authority delegated by the Secretary, the Administrators of 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) Pipeline and Hazardous Materials Safety Administration, 49 CFR 1.97(b). The Secretary has delegated authority to the Administrator of 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.

the Department to develop uniform performance standards for hazmat inspectors and investigators. . The standards shall be established as mandatory training guidelines in the following areas:

- The collection, analysis, and publication of findings from hazmat accidents or incidents; and
- The identification of noncompliance with the HMR, and the initiation of appropriate enforcement action.

See 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:

- 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.

See 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.

III. Discussion of Comments on the NPRM

On May 22, 2013, we published a notice of proposed rulemaking (NPRM) dealing with these statutory mandates. 78 FR 30258. We received comments from the National Association of Chemical Distributors (NACD) and the American Trucking Associations (ATA). In this section we summarize and discuss the NACD and ATA comments. You may access the docket and the comments and other documents in this rulemaking by visiting the Federal eRulemaking Portal at <http://www.regulations.gov>, under Docket No. PHMSA-2012-0259.

National Association of Chemical Distributors (NACD)

NACD expressed its overall support for the proposed rule's focus on clarifying the procedures related to the Department's hazardous materials procedural regulations for the opening of packages, for emergency orders, and for emergency recalls. NACD believes we should use this authority sparingly, and as such, it supports our proposal to establish a policy that Departmental agents will not intentionally open packages containing perishable hazardous material unless a compelling safety need exists.

Furthermore, NACD recommends that we extend the rule's proposed procedures to include temperature-sensitive materials. NACD asserts that its members frequently transport materials that, although they may not be completely perishable, are temperature-sensitive. According to NACD, the materials' properties may change and make the product less effective if delayed and exposed to extreme temperatures for a period of time. This could result in substantial negative impacts for its members and their customers.

When we developed the definition for "perishable hazardous material," we envisioned etiological agents, such as biological products, infectious substances, medical waste, and toxins as perishable commodities that will require special handling. In response to comments received during the PHM-7 rulemaking, we modified the definition to include "hazardous materials consigned for medical use." We adopted the modified definition because we believed it was broad enough to capture the types of hazardous material requiring expedited handling as prescribed by the statute. In MAP-21, Congress reinforced that we had correctly defined the term when it identified "radiopharmaceuticals and other medical products" as the types of perishable hazardous materials requiring special handling.

We note that the current definition of "perishable hazardous material" includes a "hazardous material that is subject to significant risk of speedy decay, deterioration, or spoilage." NACD, in its comments, provided only general information regarding temperature-sensitive materials, indicating they may not be completely perishable.

Moreover, it did not identify specific materials of concern nor did it provide any information on the rate of decay, deterioration, or spoilage of any temperature-sensitive materials. Based on this limited information, it appears the materials contemplated in NACD's comments are beyond the scope of this rulemaking.

Nevertheless, we are mindful of the concerns of NACD, and other industry stakeholders, about unnecessary delays that may occur when an agent exercises one of the enhanced inspection, investigation, and enforcement authorities. It is important to note that properly prepared packages will not be opened by DOT agents because in the final rule we have limited the scope of the authority to open packages, to guard against unwarranted opening and delay and the unnecessary disruption of commerce. Moreover, we believe the definition of "perishable hazardous material" and the rules, current procedures, and guidance already developed are adequate safeguards. However, for additional clarity, we are amending the opening of packages provision of the Department's hazardous materials procedural regulations for the opening of packages, for emergency orders, and for emergency recalls as proposed. 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.

American Trucking Associations (ATA)

ATA expressed its overall support of our mission to safeguard the transportation of hazardous materials and indicated that it has a favorable view our proposals for the

handling of perishable hazardous materials and notice of enforcement measures. However, ATA also made it clear that it did not support our prior rulemaking, PHM-7, in which we implemented the enhanced inspection and investigation, and enforcement authority. Moreover, ATA believes the current rulemaking suffers from many of the same perceived deficiencies that it identified in the comments it filed in the PHM-7 rulemaking. As such, ATA encourages us to reconsider its previous comments in the context of this rulemaking. Further, ATA expresses a number of concerns and recommendations. As a preliminary matter, it is important to note that we previously addressed the significant concerns reiterated here by ATA in the final rule in PHM-7. In that rulemaking, we provided our analysis of the comments received on the topics presented by the commenters. We therefore recommend that ATA, other interested parties, and the public, reexamine the PHM-7 final rule and our comprehensive discussion of the comments and our responses.

ATA presented numerous areas for our consideration in its most recent comments. However, as discussed earlier, we have, in a previous rulemaking, already addressed the significant concerns raised again by ATA in its comments to this rulemaking. Nevertheless, we feel it is important to summarize the agency's positions on the significant concerns raised, which include the scope of the rule, liability for delays and injuries, and the opening of packages.

The Scope of the Rule. ATA contends that the enhanced inspection, investigation, and enforcement authority applies only to undeclared hazmat shipments. However, as we

explained in our response to this concern in the PHM-7 final rule, the Department interprets the statute broadly because the plain language of the statute does not limit the Department's authority to undeclared shipments. Moreover, the legislative history indicates that Congress intended to promote the Department's authority to ensure that hazardous materials shipments are made in accordance with the HMR. Still, in consideration of commenters' concerns regarding the package opening authority, we narrowed the scope of this authority by limiting its use to only packages that may contain hazardous material and are not in compliance with the HMR or Federal hazmat law. We said that limiting this authority to packages that may be non-compliant will guard against unwarranted opening or delay of declared packages that are in compliance with the HMR. At this time, we are unaware of any instances of unwarranted package opening or delays.

Liability for Delays and Injuries. ATA believes that the agency should be responsible for curing any losses incurred by the carrier related to late deliveries of inspected packages or other non-related packages that are part of the same load. Further, ATA advocates motor carrier liability protection from damages that could result from injuries sustained in opening packages. As we noted in the PHM-7 final rule, liability for delays is a contractual matter between the motor carrier and the shipper. As a Federal agency charged with a safety mission, PHMSA does not endeavor to regulate private contractual matters between carriers and shippers. Moreover, we do not expect the Department to bear financial responsibility for private costs related to our exercise of these authorities. Under the discretionary function exception, the Federal Tort Claims Act (FTCA) would bar any common law tort action against the Department or operating

administration based on such activities. See 28 U.S.C. 2680(a). For a more information on this issue and the FTCA, see our detailed discussion in the PHM-7 NPRM. 73 FR 57287.

The Opening of Packages. ATA believes that opening packages during transport is too risky. Although ATA's primary concern is presented in the context of the packaging opening authority, its comments implicate all of the part 109 authorities, including the removal from transportation, the transportation for examination and analysis, the assistance of properly qualified personnel, the closing of packages, and the safe resumption of transportation. Fundamentally, ATA believes that opening hazardous materials packages should only occur in a controlled environment, preferably at the consignor's or consignee's facility, and performed only by trained and certified Federal agents wearing the appropriate personal protective equipment, and without any involvement of the motor carrier's driver. ATA also suggests an alternative inspection process with components addressing these issues. For the following reasons, we respectfully disagree with ATA's view of the package opening authority.

First, we agree with ATA's premise that transporting hazardous materials is inherently risky. And, as we stated in the PHM-7 final rule, we agreed that moving the inspection to the consignor/consignee's facility, if practicable, may be beneficial if it can be accomplished safely. Also, it is worth reiterating that, in practice, the location of inspections has not changed since we implemented this authority. All enforcement activities have continued to proceed as they have in the past. The package opening

authority is merely an extra compliance inspection tool for DOT agents, but the premise for conducting inspections, the locations at which they are conducted, and the regulations under which the industry must comply remained unchanged. Additionally, we note that the proposed changes in the current rulemaking align with ATA's other concerns and recommendations, which include appropriate equipment for inspectors and notice of enforcement measures to affected parties.

Next, we again point to our discussion of the comments we received in the PHM-7 rulemaking. For example, in the PHM-7 final rule, we provided detailed explanations of each of the part 109 authorities and the issues raised by the commenters, and our responses. During that rulemaking, many commenters expressed many of the same concerns regarding the package opening authority that ATA has expressed here. Accordingly, we took measures to implement the enhanced inspection and investigation, and enforcement authority with appropriate safeguards that control risk and minimize burdens on the transportation system, while at the same time, meeting the Department's overriding mission of transportation safety.

Last, the safety standards mandated by the Department and the HMR are risk controls that provide a high degree of protection. We believe the enhanced inspection, investigation, and enforcement authority and the procedures being codified by this final rule are necessary risk controls. 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, other than those proposed here, are necessary.

In light of the above, we intend to proceed with the amendments and additions to the Department's hazardous materials procedural regulations for the opening of packages, for emergency orders, and for emergency recalls, as proposed in the NPRM.

IV. Summary of MAP-21 and Final Rule

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 clarifying in this rulemaking, as described further below, 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, for emergency orders, and for 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 codifying 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 adding 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, no additional regulatory changes will be made. 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. In PHM-7, the Department established regulations in part 109 to provide procedures 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. Under this mandate, an agent shall provide to the affected person reasonable notice of the agent's exercise of authority, any findings made, and any actions being taken for noncompliance. See 126 Stat. at 836-7.

We are codifying in this final rule the 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, 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 Expedient 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 these restrictions, in order to clarify the Department’s position with respect to perishable hazardous materials, we are amending the opening of packages provision of the Department’s hazardous materials procedural

regulations for the opening of packages, for emergency orders, and for 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.

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. Per 126 Stat. 837, the matters to be addressed include how packages that present an imminent hazard are placed out-of-service, until corrected, and the means by which noncompliant packages that do not present a hazard are moved to their final destination.

The Department's procedural rules for opening of packages, for emergency orders, and for 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 49 CFR 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. 49 CFR 109.1. Subpart C of part 109 contains the procedural regulations for issuing an out-of-service

order and procedures for administrative review, reconsideration, and appellate review of an emergency order. For example, a recipient of an out-of-service order may appeal the order to PHMSA's Chief Safety Officer, under 49 CFR 109.17(b)(4), pursuant to procedures in 49 CFR 109.19. 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 may be issued. Moreover, the operations manual addresses documentation requirements, notification, service, publication, and termination requirements.

It is important to note that a non-compliant package that does not present a hazard 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 fact 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. See 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 based. 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 the discussion above, 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 adding a new provision to address appropriate equipment for inspectors when they exercise a part 109 authority. 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 in response to that rulemaking, the regulated community raised concerns about how we were going to reclose packages after they have been opened under the new authority. 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 (§ 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.

V. Summary Review of Amendments

In this final rule we are amending the opening of packages provision of the Department's hazardous materials procedural regulations for the opening of packages, for emergency orders, and for 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 adding a notification provision to 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 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 adding a new provision to address appropriate equipment for inspectors when they exercise a part 109 authority. The new equipment section will be added to part 109 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.

VI. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule 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 final rule would revise the Department's procedural regulations for opening of packages, for emergency orders, and for 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 final rule 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 Orders 12866, 13563, 13610, and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of 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, February 26, 1979).

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 (76 FR 3821, January 21, 2011). 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 whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies (77 FR 28469, May 14, 2012).

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 final rule augments 49 CFR part 109, which contains regulations on DOT inspection and investigation procedures. These regulations are not part of the HMR, which governs the transportation of hazardous materials, thus they do not carry any additional compliance requirements or costs for entities that must comply with the HMR. The benefits of the rule are that the procedures being incorporated are transparent to the regulated community, and ensure that the shipper is notified of an enforcement action. This will eliminate any suspicion of malice on the part of the agency or any specific inspector, and provide information to the shipper that could be used to modify any remaining defective operations that led to the removal. Also, the operations manual ensures that DOT’s procedures are consistent across all modes.

C. Executive Order 13132

This final 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 final rule has no preemptive effect on State, local, or Indian tribe enforcement procedures and penalties.

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“). Because this final rule 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 final rule will not have a significant economic impact on a substantial number of small entities. This final 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 final 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 (North American Industry Classification System [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 final rule applies (104,000 of which are motor carriers), we estimate that about 90 percent are small entities.

Potential cost impacts. This final 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.

Alternate proposals for small business. Because this final 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 these amendments 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. Regulatory Identifier Number (RIN)

A regulatory 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 final 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 final rule 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.

PHMSA sought comment on the environmental assessment in the NPRM. PHMSA did not receive any comments regarding the environmental assessment contained in that rulemaking. This action has been thoroughly reviewed by PHMSA. Given that the inspection and enforcement procedures in this final rule will not change

the current inspection procedures for DOT, but will provide transparency into our existing operations and procedures, PHMSA concludes that the rule will not result in significant environmental impacts.

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>.

List of Subjects in 49 CFR Part 109

Equipment, Inspections and investigations.

The Final Rule

In consideration of the foregoing, part 109 of chapter I, subtitle B of title 49 of the Code of Federal Regulations is amended as follows:

**PART 109—DEPARTMENT OF TRANSPORTATION HAZARDOUS
MATERIALS PROCEDURAL REGULATIONS FOR OPENING OF PACKAGES,
FOR EMERGENCY ORDERS, AND FOR 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 Sec. 4 (28 U.S.C. 2461 note); Pub. L. 104-121 Secs. 212-213; Pub. L. 104-134 Sec. 31001; 49 CFR 1.81, 1.97.

2. In § 109.5, paragraph (a) introductory text is revised, and paragraph (b) is added to read as follows:

§ 109.5 Opening of packages.

(a) In general. Except as provided in paragraph (b):

* * * * *

(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) of this section.

3. Add § 109.16 to subpart B as follows:

§ 109.16 Notification of enforcement measures.

In addition to complying with the notification requirements in § 109.7 of this part, 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. Add subpart D, consisting of § 109.25, to read as follows:

Subpart D—Equipment

§ 109.25 Equipment.

When an agent exercises an authority under subpart B of this part, 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 September 26, 2013 under authority delegated in 49 CFR part 1.97.

Timothy P. Butters

Deputy Administrator

Pipeline and Hazardous Materials Safety Administration

[FR Doc. 2013-23894 Filed 10/01/2013 at 8:45 am; Publication Date: 10/02/2013]