

## Subject 5242.90—Refunds Requirements (Spares and Support Equipment)

### 5242.9000 Requests for refunds.

(a) *Policy.* (1) This subpart establishes uniform policy and procedures on requesting refunds for spare parts or items of support equipment. This policy is not intended to diminish the responsibility of Navy contracting personnel to properly price spare parts and items of support equipment. Further, it is not intended to serve as a mechanism for the recovery of excess profits.

(2) In accordance with the guidance set forth in paragraph (c) below, contracting activities shall request a refund whenever the contract price of any spare part or item of support equipment significantly exceeds the item's intrinsic value as defined in the clause at 5252.242-9000. Refunds shall be requested only for the difference between the intrinsic value of the item at the time an agreement on price was reached and the contract price. Refunds will not be requested to recoup the amount of cost decreases that occur over time due to productivity gains (beyond economic quantity considerations) or changes in market conditions.

(b) *Examples.* The following are examples of circumstances which may establish a basis for a refund request or pricing adjustment:

(1) A technical or engineering analysis results in a determination that the intrinsic value is significantly lower than the historical price.

(2) The price paid for an item bought competitively in similar quantity and circumstances (e.g., urgency, delivery terms) is significantly less than the former sole source price.

(3) Prices paid to the manufacturer of an item indicate the amount previously charged by the prime contractor for the item significantly exceeded the intrinsic value of the prime contractor's efforts in providing the item.

(c) *Solicitation provisions.* The contracting officer shall insert the clause at 5252.242-9000 in solicitations, Basic Ordering Agreements, and contracts (as defined in FAR 2.101) which contain or may contain requirements for spare parts or items of support equipment, except those contracts awarded as a result of competitive small purchase procedures and orders under federal supply schedules. If added to existing contracts, the clause will not apply to items or components ordered by the Government prior to the date of incorporation of the clause into the contract. Heads of Contracting

Activities (HCAs) are delegated, without power of redelegation, authority to establish monetary thresholds below which refunds will not be requested.

2. Part 5252 is revised to read as follows:

### PART 5252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DOD Directive 5000.35

#### Subpart 5252.2—Texts of Provisions and Clauses

##### 5252.242-9000 Refunds.

As prescribed in 5242.9000 insert the following clause:

#### Refunds (Spares and Support Equipment) (Dec. 86)

(a) In the event that the price of a spare part or item of support equipment delivered under this contract significantly exceeds its intrinsic value, the contractor agrees to refund the difference. Refunds will only be made for the difference between the intrinsic value of the item at the time an agreement on price was reached and the contract price. Refunds will not be made to recoup the amount of cost decreases that occur over time due to productivity gains (beyond economic purchase quantity considerations) or changes in market conditions.

(b) For purposes of this clause, the intrinsic value of an item is defined as follows:

(1) If the item is one which is sold, or is substantially similar or functionally equivalent to one that is sold in substantial quantities to the general public, intrinsic value is the established catalog or market price, plus the value of any unique requirements, including delivery terms, inspection, packaging, or labeling.

(2) If there is no comparable item sold in substantial quantities to the general public, intrinsic value is defined as the price an individual would expect to pay for the item based upon an economic quantity as defined in FAR 52.207-4, plus the value of any unique requirements, including delivery terms, inspection, packaging, or labeling.

(c) At any time up to two years after delivery of a spare part or item of support equipment, the contracting officer may notify the contractor that based on all information available at the time of the notice, the price of the part or item apparently exceeds its intrinsic value.

(d) If notified in accordance with paragraph (c) above, the contractor agrees to enter into good faith negotiations with the Government to determine if, and in what amount, the Government is entitled to a refund.

(e) If agreement pursuant to paragraph (d) above cannot be reached, and the Navy's return of the new or unused item to the contractor is practical, the Navy, subject to the contractor's agreement, may elect to return the item to the contractor. Upon return of the item to its original point of government acceptance, the contractor shall refund in full the price paid. If no agreement pursuant to

paragraph (d) above is reached, and return of the item by the Navy is impractical, the contracting officer may, with the approval of the Head of the Contracting Activity, issue a contracting officer's final decision on the matter, subject to contractor appeal as provided in the Disputes clause.

(f) The contractor will make refunds, as required under this clause, in accordance with instructions from the contracting officer.

(g) The contractor shall not be liable for a refund if the contractor advised the contracting officer in a timely manner that the price it would propose for a spare part or item of support equipment exceeded its intrinsic value, and with such advice, specified the estimated proposed price, the estimated intrinsic value, and known alternative sources or items, if any, that can meet the requirement.

(h) This clause does not apply to any spare parts or items of support equipment whose price is determined through adequate price competition. This clause also does not apply to any spare part or item of support equipment with a unit price in excess of \$100,000; or in excess of \$25,000 if the contractor submitted, and certified the currency, accuracy and completeness of, cost or pricing data applicable to the item.

(End of Clause)

December 17, 1986.

Harold L. Stoller, Jr.,  
CDR, JAGC, U.S. Navy, Federal Register  
Liaison Officer.

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## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

#### 49 CFR Parts 171 and 172

[Docket HM-145F, Amdt. Nos. 171-90, 172-108]

#### Hazardous Substances; Delay of Effective Date

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule; delay of effective date.

**SUMMARY:** This document changes the effective date for compliance with the final rule issued under Docket HM-145F, Amendment Numbers 171-90 and 172-108, entitled *Hazardous Substances*, which was published in the *Federal Register* on Friday, November 21, 1986 (51 FR 42174), by delaying its effective date to afford shippers sufficient time to comply with the rule and to permit continued use, for a limited period of time, of preprinted shipping paper descriptions and package markings which would otherwise be rendered obsolete by the final rule. The effect of

this action is to relieve shippers of some of the costs associated with complying with new requirements for hazardous substances.

**EFFECTIVE DATE:** July 1, 1987, except as follows: Any material which is subject to the Hazardous Materials Regulations as a hazardous substance under the regulations in effect on December 31, 1986, for which the reportable quantity was not changed by Amendment No. 172-108, may be offered for transportation and transported in accordance with the regulations in effect on December 31, 1986, until January 1, 1988. However, immediate compliance with Amendment Nos. 171-90 and 172-108 is authorized.

The provisions of 49 CFR 172.101(j) do not apply to Amendment No. 172-108.

**FOR FURTHER INFORMATION CONTACT:** Lee Jackson (202) 366-4488 or George Cushmac (202) 366-4545, Office of Hazardous Materials Transportation, RSPA, Washington, DC 20590. Questions about hazardous substance designations or reportable quantities should be directed to the Environmental Protection Agency (EPA). Call the RCRA/Superfund hotline at (800) 424-9346 or, in Washington, DC (202) 382-3000.

**SUPPLEMENTARY INFORMATION:** On November 17, 1986, RSPA issued a final rule amending the Hazardous Materials Regulations (HMR) to incorporate into the HMR, as hazardous materials, all substances designated as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). This action was necessary to comply with the Superfund Amendments and Reauthorization Act of 1986. In the final rule, hazardous substances and their reportable quantities (RQs) were listed in an Appendix to § 172.101. In addition, the final rule contained amendments making the HMR applicable to these hazardous substances. The effective date in the rule was January 1, 1987.

At the time of the adoption of the final rule, there were approximately 300 hazardous substances with their reportable quantities, designated by EPA in 1978 pursuant to section 311 of the Federal Water Pollution Control Act (FWPCA), which were placed in the HMR in 1980. Under CERCLA, additional hazardous substances and reportable quantities were designated, and the original substances that were designated under the FWPCA were retained, but some of their reportable quantities were changed.

The final rule changes the requirements for designating hazardous substances on shipping papers and for

package markings for the original hazardous substances (those designated under the FWPCA), as well as for hazardous substances more recently designated under CERCLA. The final rule under Docket HM-145F allows, under the provisions of § 172.101(j), the continued use of shipping papers prepared, and packages marked, under existing requirements in the HMR (i.e., for the original FWPCA hazardous substances) for up to one year *provided that the RQ designation had not changed* (see discussion at 51 FR 42175).

The RQs for several widely used chemicals, which were hazardous substances under the FWPCA, have been adjusted (changed) by EPA under section 102 of CERCLA. For example, the RQ for calcium hypochlorite has been lowered from 100 pounds to 10 pounds. Other chemicals which were not designated hazardous substances under the FWPCA are designated hazardous substances under CERCLA and would otherwise be subject to the new requirements after January 1, 1987. However, RSPA has learned that many thousands of packages of chemicals, whose RQ's were changed, or which were not designated hazardous substances, have been prepared, overpacked, and palletized. To require compliance with the new requirements by January 1, 1987, would require that these overpacked units be broken down and the individual boxes be marked and re-overpacked. RSPA believes that this burden is unreasonable and is extending until July 1, 1987, the effective date of the final rule adopted under Docket HM-145F for hazardous substances whose RQ's have changed or which are newly designated. However, shipping descriptions for hazardous substances whose RQ's were not changed and which conform to the regulations in effect on December 31, 1986, may be used until January 1, 1988.

These provisions allow shippers to use up existing stocks of preprinted shipping papers and package markings which would otherwise be rendered obsolete. If RSPA were to provide relief only from shipping papers and package marking requirements, similar to that provided under § 172.101(j), then carriers would be faced with the possibility of being offered materials which are regulated as hazardous substances without their being identified as such. For this reason, RSPA believes it necessary to provide temporary relief from all provisions of the final rule that pose a new burden. It should be noted that the effective date permits immediate compliance with the final rule even though not required until the dates specified.

## Administrative Notices

1. The relief adopted herein is applicable to regulations mandated by the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499, October 17, 1986). Because those regulations were to be adopted within 30 days of enactment, I find under 5 U.S.C. 553, that notice and public procedure on the rule and the delay in effective date are contrary to the public interest. In addition, due to the limited time available to prepare the final rule and this delay in effective date, no determinations have been made under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*).

2. Under the terms of "DOI Regulatory Policies and Procedures" (44 FR 11034, February 26, 1979), I have determined that the rulemaking was an emergency rulemaking because it was governed by a short-term statutory deadline, therefore, no determination is made as to whether it is "significant".

3. I certify that neither this rulemaking nor the delay in effective date requires an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*).

Although the provisions of Pub. L. 99-499 provide insufficient time for RSPA to perform required analyses and make required findings under the statutory, regulatory, and executive authorities noted above, the agency is aware that a rulemaking of such broad and immediate applicability may produce significant impacts on industry segments, a substantial number of which may be small enterprises. In order to comply with the mandate of Pub. L. 99-499, RSPA has chosen a regulatory approach which both complies with the purpose of the Congress and presents the least possible disruption to the regulatory scheme of the HMR.

Because RSPA's role in regulating hazardous substances is directly tied to EPA's ongoing hazardous substances responsibility, primarily through that agency's determination of reportable quantities, there will be a mechanism for RSPA's oversight of the transportation impacts of these amendments as the agency conducts rulemaking to provide concordance with EPA requirements. As the need for adjustments to these amendments is demonstrated, RSPA will modify the requirements to the extent consistent with the intent of Congress expressed in Pub. L. 99-499.

A number of errors in the List of Hazardous Substances and Reportable Quantities have been brought to RSPA's attention. RSPA is preparing a correction document on the final rule

which will correct errors in the List and in the regulatory language of the rule. It is planned for publication before the end of January, 1987.

Issued in Washington, DC on December 19, 1986 under authority delegated in 49 CFR 1.53.

M. Cynthia Douglass,

Administrator, Research and Special Programs, Administration.

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#### 49 CFR Part 173

[Docket No. HM-166V; Amdt. No. 173-198]

#### Hazardous Materials: Uranium Hexafluoride: Petitions for Reconsideration; Notice of Public Meeting

**AGENCY:** Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Revision to the final rule (Amendment No. 173-198).

**SUMMARY:** This document revises the final rule published on November 18, 1986, in the *Federal Register* (51 FR 41631) under Docket HM-166V, Amendment Nos. 172-107 and 173-198, regarding the transportation of uranium hexafluoride (UF<sub>6</sub>) to permit the continued use of all packagings for UF<sub>6</sub> until June 30, 1987 after which time UF<sub>6</sub> packaging must meet the design, fabrication and marking requirements specified in American National Standards Institute (ANSI) Standard N14.1-1982 or an earlier edition thereof. Also, RSPA is announcing a public meeting and soliciting comments on the standards applicable to, and the use of, packaging that do not meet these ANSI standards, the effect of requiring these packagings to meet these ANSI standards or other restrictions, and information on standards to which these packagings may have been manufactured. This action is in response to petitions for reconsideration which have been received by RSPA and is necessary to avoid a potential disruption in defense and civilian nuclear activities that would be caused by immediate implementation of the packaging standards promulgated under Docket 166V for all UF<sub>6</sub> shipments.

**DATES:** The effective date is January 1, 1987. The public meeting will be held on March 2, 1987, beginning at 9:00 a.m. Comments for use at the public meeting should be received by February 15, 1987.

**ADDRESSES:** The public meeting will be held at the U.S. Department of Transportation, Nassif Building, Room 2230, 400 Seventh Street SW.,

Washington, DC. Address comments to Dockets Branch, Office of Hazardous Materials Transportation (DHM-53), U.S. Department of Transportation, Washington, DC 20590. Comments should identify the docket and be submitted in five copies. The Dockets Branch is located in Room 8426 of the Nassif Building, 400 Seventh Street SW., Washington, DC. Office hours are 8:30 a.m. to 5:00 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Michael E. Wangler, Technical Division, Office of Hazardous Materials Transportation, 400 Seventh Street SW., Washington, DC 20590, (202) 366-4545.

**SUPPLEMENTARY INFORMATION:** On November 18, 1986, RSPA published a final rule under Docket HM-166V, Amendment Nos. 172-107 and 173-198, in the *Federal Register* (51 FR 41632), which adopted standards for the design, fabrication, inspection, testing and marking of packagings used for the transport of UF<sub>6</sub>. The final rule followed a notice of proposed rulemaking (NPRM) under Docket HM-166V, which was published on April 11, 1986 (51 FR 12529). Since the publication of the final rule, RSPA has received 5 petitions for reconsideration in accordance with the provisions of 49 CFR 106.35. The petitioners requested reconsideration of the application of packaging standards and extension of the effective date of the final rule. This document modifies a requirement addressing design and fabrication of packaging used for the transport of UF<sub>6</sub> (§ 173.420(a)(2)). Packaging not manufactured in accordance with ANSI Standard N14.1-1982 or an earlier edition of this standard may not be used after June 30, 1987. All other provisions of the final rule will remain unchanged.

Two petitioners have indicated that approximately 50,000 cylinders are currently being used as packaging for the transport of UF<sub>6</sub>. Most of these cylinders were manufactured before the publication of ANSI Standard N14.1-1982. Most of these cylinders are owned by the U.S. Department of Energy (USDOE), whose uranium enrichment program provides UF<sub>6</sub> for national defense programs as well as the domestic and foreign nuclear power industry. RSPA acknowledged in the final rule that some cylinders, manufactured before 1982, would not meet the new requirement. RSPA proposed to permit continued use of the cylinders through exemptions granted under the provisions of Part 107 of the Hazardous Materials Regulations (HMR). However, all petitioners have noted that the time period between the

publication date and the effective date of the final rule is too short to obtain exemptions. RSPA agrees with the petitioners. A delay in the implementation of the requirement for design and fabrication of all UF<sub>6</sub> packaging is justified.

Although RSPA acknowledged in the final rule that some packagings may not conform to the packaging requirements and, therefore, could be continued in use only under the terms of exemptions, RSPA believed that the number would be small and promulgation of the design and fabrication requirement covering all other cylinders would enhance safety. RSPA had received comments on the NPRM addressing the potential impact on existing cylinders, but RSPA was not aware of the degree of impact. Based upon the new information submitted by the petitioners for reconsideration, RSPA now believes that § 173.420(a)(2) of the final rule could have an adverse effect on the entire industry and requires further consideration before its implementation. RSPA also believes that the transport of UF<sub>6</sub> cylinders is a matter of such general applicability and future effect that it should be addressed by means of the rulemaking process rather than the exemption process. In addition, upon reexamination of packaging standards, RSPA believes that packagings manufactured in accordance with ANSI Standard 14.1-1971 are acceptable for transportation UF<sub>6</sub>.

To facilitate RSPA reevaluation of the requirements of UF<sub>6</sub> cylinders not manufactured in accordance with ANSI Standard 14.1-1982 or an earlier edition of the standard, the public is invited to submit information regarding (1) the effects of the requirement that all packagings be designed and fabricated in accordance with ANSI standards, including the technical and economic impacts of implementing the requirements; (2) the effect of permitting continued use of existing cylinders that do not conform to ANSI standards (grandfathering) and any restrictions or conditions that should be placed on their continued use; (3) all of the standards to which existing cylinders have been manufactured; and (4) any other relevant information regarding design and fabrication of non-ANSI packagings. Comments should be submitted to RSPA by February 15, 1987. Additionally, RSPA will hold a public meeting on March 2, 1987, beginning at 9 a.m. at the U.S. Department of Transportation (Room 2230 of the Nassif Building, 400 Seventh Street SW., Washington, DC) to explore more fully the information submitted by the public.