DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 106, 107, 171, and 173

[Docket No. HM-138A; Amdt. Nos. 106-4, 107-11, 171-70, 173-161]

Exemption and Enforcement Procedures and Related Miscellaneous Provisions

AGENCY: Materials Transportation Bureau (MTB), Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: The amendments adopted herein make changes, both substantive and editorial, in the procedures used by MTB in administering its exemption and enforcement programs. Principal changes involve enhancing the enforcement of exemptions; recodifying the enforcement procedures to remove redundancies and improve the process for both respondents and MTB; and clarifying definitions, statements of applicability, and key terms, prohibitions, and sanctions.

DATE: The changes adopted in these amendments are effective on March 1, 1983.

FOR FURTHER INFORMATION CONTACT: George W. Tenley, Jr. Office of the Chief Counsel, Research and Special Programs Administration, Washington, D.C. 20590, Telephone (202) 755-4973.

SUPPLEMENTARY INFORMATION: These amendments are based on proposals made in Notice 81-6 (46 FR 47091; September 24, 1981). A Total of 21 commenters responded to the Notice, representing 10 trade associations, 7 corporations, 3 Federal agencies, and one state agency. The majority of the comments were well developed and in several cases offered alternative approaches or language. Consequently, several important changes have been made to the proposals in the Notice. These changes take the form of additional clarifying information, or a return to previous provisions in lieu of specific proposals. The following section-by-section analysis discusses the comments, the changes made in response to them, and reason for not making some of the changes suggested.

Part 107

Subpart A—General Provisions

Section 107.13. One commenter suggested that the reference in paragraph (a) to the "official designated to preside over a hearing" be changed to include a reference to an administrative law judge. The change has not been made since § 107.13 is a general section which includes other proceedings, in addition to enforcement hearings, which would not necessarily be conducted by an administrative law judge.

The same commenter stated that paragraph (h) should provide that an application to quash or modify an administrative subpoena issued under § 107.13 be submitted to an official other than the person who issued the subpoena. MTB does not agree. The person who issued the subpoena is in the best position to correctly and expeditiously weigh the reasons to quash or modify against the reasons on which he or she relied in issuing the subpoena.

Subpart B—Exemptions

Section 107.109. In responding to paragraph (c)(1), three commenters expressed concern that MTB's efforts to cull out at the application stage exemption requests based on false or misleading statements could lead to denials where the statements or omissions were the result of inadvertency or were so inconsequential as to have no bearing on the merits of the application. MTB agrees that the proposed language could be misunderstood and has adopted the change suggested by two commenters that the words "false" and "misleading" be qualified by the word "materially," so that an exemption will be denied under paragraph (c)(1) only when the information in question relates directly and substantially to the requirements prescribed in § 107.103.

Section 107.119. Of all the proposals in the Notice, none received more adverse comments than those relating to exemption amendment and suspension (paragraph (b)(2)) and exemption termination (paragraph (c)(4)). After reviewing the 11 comments received, in light of the intent of the proposals and the enforcement needs of MTB, § 107.119 has been changed substantially from the proposals in the Notice.

Recognizing, as the comments point out, the potential unfairness and operational hardship that could result from action against an exemption holder based on enforcement actions not necessarily involving the exemption or not yet resolved, proposed paragraphs (b) and (c) have been redone to substantially reflect current language. A new paragraph (e) has been added to provide the Associate Director for HMR with the enforcement tool which MTB still believes is necessary for oversight of operations conducted under exemptions. As adopted, paragraph (e) permits the Associate Director for HMR to refer an exemption to the Associate Director for OOE for initiation of an enforcement case based on that exemption. If the enforcement case results in a finding of violation against the holder or a party to the exemption, the Associate Director for HMR could use that finding as a basis for amending, suspending, or terminating the exemption as to the exemption holder or party involved.

This approach should be an appropriate response to those commenters who felt that paragraphs (b) and (c) would have permitted the Associate Director for HMR to take action against one exemption for alleged failure to comply with other exemptions or other unrelated regulatory provisions.

Subpart D—Enforcement

Section 107.229. Although only four comments were addressed to the proposed definition of "knowledge" or "knowingly," they reflect generally a disagreement either as to the need for the definition or the approach used. Two commenters stated that basing the definition in part on *United States v. International Minerals and Chemical Corporation,* 402 U.S. 558 (1971), was improper because, as one commenter argued, under that case ignorance could be a defense, or as stated by the other commenters, the Hazardous Materials Transportation Act was not involved in the *International Minerals* case.

Notwithstanding those comments opposed to the definition, MTB believes that it is appropriate to include a definition of this critical concept in the enforcement procedures. However, MTB recognizes that modification of the proposed definition is necessary. Accordingly, these amendments to Part 107 adopt a definition of these key terms which is simpler than that proposed while still addressing a point raised in the vast majority of enforcement proceedings held to date, i.e., the respondent's inadvertency and lack of intent to violate the regulations.

Section 107.301. Although the proposed change to paragraph (e) was not discussed in the preamble to the Notice, and was only provided to describe the jurisdiction of the various modal administrations in DOT having hazardous materials enforcement responsibilities, three commenters opposed its adoption. The proposal was included to reflect the fact that MTB has an overlapping and secondary jurisdiction over shipments which move by more than one mode of transportation. Although the range of this jurisdiction is theoretically large due to the fact that a large number of

hazardous materials shipments move by more than one mode of transportation, in fact and in practice the overlap is quite small, and through coordination with other DOT elements, does not burden regulated persons unreasonably. In response to the comments, and to clarify the enforcement jurisdiction of the MTB, this section has been changed to reference the delegation of authority cited in 49 CFR Part 1 (§ 1.53).

Section 107.305. One commenter contended that paragraph (a) relating to the authority of OOE to conduct investigations was overboard in its statement of OOE's investigative jurisdiction. In linking the actual extent of OOE's investigative jurisdiction with OOE's enforcement jurisdiction, the commenter states that OOE cannot investigate what it is not authorized to enforce. Although paragraph (a) was intended to reflect the investigation-enforcement relationship suggested by the commenter, MTB agrees that the clarity of this relationship could be improved. Accordingly, paragraph (a) has been emended to make specific reference to the delegations cited in 49 CFR Part 1.

Another suggestion by the same commenter concerning termination of an investigation under paragraph (d) also has been adopted. As amended, paragraph (d) requires OOE to notify a person who has been the subject of an investigation when the investigation is terminated.

Four comments were received concerning the confidentiality provision of paragraph (e). Three of those comments stated that the protection afforded respondents during the pendency of a case is undermined by the statement that confidentiality will be granted "unless otherwise determined by the OOE." Despite the fact that this language is currently in paragraph (e) and was thus not a part of the Notice, MTB agrees with the commenters that the provision should be amended to remove any reference to a discretion in OOE to deny confidentiality of information or persons identified in an investigation. However, it should be noted that OOE could be directed by a court in a given case to reveal information or identities granted confidentiality under paragraph (e).

Finally, MTB rejects the suggestion of one commenter that reference should be made in paragraph (e) to 18 U.S.C. 1905 concerning criminal sanctions for government employees who unlawfully disclose information arising out of investigations such as those authorized by § 107.305. It is not appropriate to place in these procedural requirements a citation to sanctions against Federal employees where such requirements apply independently of the enforcement program of MTB.

Section 107.307. MTB's reference in paragraph (a) to violation of an approval as a basis for enforcement action was criticized by two commenters. Arguing that failure to comply with the requirements of an approval is in essence noncompliance with the underlying regulation requiring the approval, these commenters contend that a person does not violate the approval and thus cannot be the subject of an enforcement action for an alleged failure to comply with an approval. MTB has reevaluated this proposal in light of these comments and believes that there is merit to their position. Recognizing that there is a fundamental difference between exemptions and approvals, MTB is persuaded that they cannot be treated in the same manner. As noted by one commenter, an approval is merely an extension of the regulation that establishes it, and as such the responsibility to comply is based on the regulation not the approval. Accordingly, it is appropriate as recommended by these commenters to delete the reference to approvals where appropriate throughout the proposals, and these changes have been adopted herein. However, it is important to note that failure to comply with a condition or term prescribed in an approval would be considered failure to comply with the underlying regulation requiring the approval, and could be the basis for an enforcement action.

Another commenter objected to paragraph (a) because "The revision essentially permits OHMR (sic) to assess a civil penalty or issue an order directing compliance without first taking the time to evaluate the nature of the violation." The point raised by this comment does not address a revision to paragraph (a), but rather deals with existing language. In addition, the commenter is incorrect in its view of what paragraph (a) authorizes the Associate Director for OOE to do. The paragraph merely authorizes the conduct of proceedings by which appropriate sanctions are determined and applied. Section 110(a) of the Hazardous Materials Transportation Act (HMTA) (49 U.S.C. 1809(a)) mandates the consideration of several assessment criteria before an order imposing a civil penalty may be issued. It is the proceeding which establishes the record on which a sanction is based.

Section 107.309. Only one commenter expressed any reservation concerning the proposal dealing with the issuance of warning letters. The commenter contends that the proposal is deficient because it provides no guidance to regulated persons as to circumstances under which warning letters would be issued in lieu of compliance orders or civil penalties. The preamble discussion of this proposal in the Notice gave an example of a typical situation in which a warning letter is frequently used. MTB believes that the preamble language is sufficient to describe generally how warning letters are used, and accordingly, has not made any changes to the proposal.

Section 107.311. One commenter recommended that this section be amended to include language requiring issuance of notices in a timely manner. The commenter states that delays between inspection and issuance of notices can exceed a year, and that such delays are per se prejudicial to the respondent. MTB disagrees strongly that delay between inspection and notice is "per se prejudicial." Clearly if a delay does adversely affect a respondent's ability to respond, that fact would be a relevant part of the respondent's defense to the allegations in the notice. At the conclusion of every inspection, the person inspected is put on notice during an exit interview as to any probable violations noted and the possible sanctions that could result. Given the small staff available to conduct inspections and the technical nature of the subject matter, delays are inevitable, but the OOE strives to keep them to a minimum. Accordingly, the suggested change to § 107.311 has not been made.

Another commenter argued that under paragraph (c), amendments to notices should be allowed only where the new information relates directly to the allegations in the original notice. In all other cases, OOE should have to issue a new notice based on new allegations. MTB believes this recommendation has merit, and paragraph (c) has been changed accordingly.

Section 107.313. As noted in the preamble to the Notice, one of the primary features of the proposals was elimination of redundancies between the procedures applicable to compliance orders and civil penalties. One aspect of that consolidation was the combining in one enforcement case of both a civil penalty and a compliance order. However, that proposal in paragraph (b) was objected to by a commenter who argued that even if such action was legal (which the commenter doubted), use of the proposed standard "where appropriate" was unclear and unreasonable. Furthermore, the commenter argued that in no event "should it be deemed 'appropriate' to

assess a civil penalty if the notice of probable violation has not proposed such penalty."

The decision as to which enforcement sanction to apply in a given matter can only be determined on a case-by-case basis. The responsibility of MTB in each case is to provide an adequate basis in the notice of probable violation to inform the respondent of the nature of the allegations and sanctions selected so he can respond effectively. As to the commenter's second point, the intent of the proposal was to provide for a double sanction in the notice, and MTB agrees that it should be made clear that in no case should a double sanction be applied at the order stage without having first been proposed at the time of the notice (or amended notice under § 107.311). Accordingly, a clarification has been added to paragraph (b).

Another commenter, noting the variation in enforcement procedures between the five administrations in DOT having enforcement responsibility under the HMTA, contends that the enforcement procedures proposed in Notice 81–6 do not make it clear that failure to request a hearing under this section and § 107.319 constitutes a waiver of the right to request a hearing. The commenter is correct in stating that any reply other than under paragraph (a)(3) and § 107.319 constitutes a waiver of the right to request a hearing. To clarify this fact, express waiver language has been added to paragraph (b).

Section 107.315. The only comment addressed to this proposal argued that it was deficient because it failed to deal with the possibility that a respondent may wish to admit some probable violations while denying others. MTB believes that a respondent in this position could, and is encouraged to, respond under §§ 107.313(a)(2) and 107.317 by making an informal response, or under §§ 107.313(a)(3) and 107.319 by requesting a hearing. Under either course, the case would proceed only with respect to those probable violations put at issue by the respondent.

Section 107.317. Although not specifically identifying the proposal, one commenter apparently opposed the provision that would require a respondent, as part of its request for an informal conference, to state which allegations are admitted and which are denied, as well as the issues that will be raised at the conference. The commenter stated that this requirement would frustrate what the commenter described as "settlement conferences."

It should be noted that the informal conference is not intended to be a settlement conference, although the discussion of that point could be relevant. Rather, the informal conference is an aspect of the informal response that is designed to allow an effective and less costly alternative to a hearing. However, MTB does believe that this purpose could be served without a need for the respondent to state which allegations are admitted or denied, and that proposal has been deleted. The proposal to require a statement of the issues to be raised has been retained, however.

Finally, pursuant to a comment received, language has been added to paragraph (c) enabling a respondent to request that an informal conference be held by telephone.

Section 107.319. As proposed in the Notice, paragraph (b)(2) of this section contained a typographical error which stated that issues in a case that was to be the subject of hearing had to be admitted or denied. Under current language to which no proposed change was to be made, paragraph (b)(2) requires that a respondent requesting a hearing "state with respect to each allegation (made in the Notice) whether it is admitted or denied."

In commenting on this erroneous proposal, one commenter pointed out the burden it would place on a respondent at the notice stage of the proceeding. Because the comment deals primarily with what the commenter believes to be an unfair demand for detail at the earliest stage in the proceeding, it is relevant to paragraphs (b)(2) and (b)(3) which do require the respondent to "state with particularity the issues to be raised by the respondent at the hearing." MTB believes that there is merit to the points raised by the commenter to the extent they suggest changes that would enable MTB to know generally with what issues the hearing will deal, while at the same time not prejudicing the respondent's case at the hearing. Accordingly, the language of paragraphs (b)(2) and (b)(3) has been modified to require the respondent to identify which allegations of violation, if any, it admits, generally what issues it will raise at the hearing, and provides that issues not raised in the hearing request will not be barred from presentation later.

Section 107.321. In response to the points made by one commenter, two important changes have been made to the procedural requirements of this proposal. In order to achieve the consistency between cases, cited by the commenter as being valuable in establishing precedents and providing a more uniform record, paragraph (b) has been modified to require that all hearings are held in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Authority has been granted the Administrative Law Judge (ALJ) to modify their application where the ALJ determines modification is necessary in a given case. As noted by the commenter, this change will avoid problems that have arisen where non-DOT ALJs, with varying backgrounds, use procedures with which they are familiar but which may appear awkward for practitioners who are not familiar with them.

Another change recommended by the commenter, and adopted herein, is deletion of the requirement that all testimony be given orally. To the extent that written testimony can contribute to a more orderly process, more effective determination of the issues and facts in a case, and a better record for appellate review, its use should not be discouraged. Accordingly, the procedures have been amended to remove the provision, and thereby leave to the ALJ and parties the determination as to the type of testimony to be used.

Proposed paragraph (c) has been modified to remove, as superfluous, the reference to OOE offering information "necessary to fully inform the presiding officer * * *." Reference to OOE having the burden of proof is all that is necessary in addressing its responsibility to provide information in support of its allegations.

Another commenter suggested that the phrase "in defense of the allegations" appearing in paragraph (d) be changed to reflect the fact that the repondent is not providing a defense of the allegations, but rather is disputing those allegations. MTB agrees with this point and an appropriate change to paragraph (d) has been made.

Section 107.323. One commenter noted that paragraph (a) states that the decision by an ALJ in a hearing proceeding represents "the final decision" in the proceeding. The commenter questions how the decision of the ALJ can be considered final when an appeal to the Director, MTB is available to both parties under proposed § 107.325. The commenter's point is well taken and an appropriate change to paragraph (a) has been made to remove the reference to "final decision."

The same commenter noted what it considered other inappropriate language in paragraph (a). The commenter contends that the reference to "the relief sought by the OOE" should be changed to more accurately reflect what OOE seeks to obtain through the proceeding. MTB agrees that the language should be

clarified, and accordingly, the word "relief" has been changed to "sanction."

Section 107.325. The proposal to permit the OOE to appeal an adverse ruling by an ALJ to the Director, MTB was objected to by three commenters. Basing their opposition primarily on the view that since OOE is in effect a "prosecutor," and should not, therefore, be able to appeal an adverse ruling, these commenters argue that if an appeal is to be granted due process dictates that the appeal be to someone other than the person who has ultimate responsibility over OOE's program.

As to the contention that OOE should not be able to appeal an adverse ruling by an ALJ, MTB does not agree that due process considerations preclude this right of appeal. The enforcement program of the OOE is clearly civil in nature—both in practice and as contemplated by Congress in passage of the HMTA, and consequently, OOE is not precluded from appealing adverse rulings.

The commenter's argument against OOE's right to appeal to the Director, MTB, however, is sound. To avoid, to the degree practicable, the appearance of a conflict of interest, these amendments adopt the approach used by the Federal Railroad Administration, and permit an aggrieved party to appeal an adverse decision of an ALJ to the administrator, Research and Special Programs Administration. This action elevates consideration of issues on appeal to the highest level in the agency and represents a desired separation between the office presenting the case and the ultimate decision maker on appeal. In non-hearing cases, the Director, MTB would continue to decide all appeals.

Another commenter argued that the proposal in paragraph (f) to make violation of the terms of a compliance order the basis for an enforcement proceeding, was contrary to the HMTA. A review of the HMTA and the comment confirms the correctness of the commenter's argument, and the proposal has been deleted accordingly. Also, the identical language in § 107.327(b)(3) has been deleted.

The same commenter objected to language in proposed paragraph (e) authorizing the Director, MTB to maintain an order in effect despite an appeal to the order if he determines that action to be necessary "in the public interest." MTB agrees with the commenter that standards for making that decision should be stronger, and has adopted the commenter's suggestion that it be based on a finding of immediate danger to the public."

Section 107.327. Two commenters objected to the failure of the compromise procedures to provide for settlement of an enforcement proceeding with no admission by the respondent of violation. One commenter argued that without a provision for settlement resulting in no finding of violation, amicable resolutions of enforcement proceedings will be frustrated and respondents will be required to bear the expense of fighting allegations of violations to conclusion. The other commenter contended that without a provision for settlement accompanied by no finding of violation, respondents will be unreasonably exposed to "private challenges based upon an admission of guilt."

To the extent that these arguments establish a need for providing for the settlement of cases without a finding of violation, MTB believes they have merit. In fact, settlements of the type contemplated by the commenters have been reached in a few cases. However, these amendments retain the concept of compromise currently in use in MTB's hazardous materials enforcement program. In the vast majority of cases to date, the facts upon which the allegations of violation have been based have not been in dispute. As such, the commission of those violations is pertinent under the assessment criteria in the HMTA and the HMR in subsequent cases involving the same respondent.

On the other hand, there have been cases where a settlement involving only the payment of money by the respondent is the most reasonable solution. Consequently, these amendments adopt a specific provision for settlement without a finding of violation. However, discretion remains with the Associate Director for OOE to reject settlement offers, and this discretion would most likely be exercised in cases where only the amount of civil penalty is in dispute.

In response to comments, two other changes have been made to this section. The proposal that a compromise offer be in the form of a certified check or money order submitted prior to an agreement accepting the offer has been deleted, since the language of new paragraph (a)(1) now speaks to the compromise offer being initiated by either respondent or OOE. The requirement that the respondent include, as part of a proposed consent agreement, an acknowledgement that the notice of probable violation may be used to construe the terms of the compliance order resulting from the agreement, has been deleted as being unnecessary as a rule of general applicability.

Section 107.329. Although not representing a new proposal in Part 107, this section was objected to by one commenter who contended that provision in the HMR for a compliance order for immediate compliance has no legal basis in the HMTA. Viewing § 107.329 as a means of addressing imminent hazard situations through the administrative process, the commenter argues that the HMTA provides for imminent hazard situations in section 111(b) [49 U.S.C. 1810(b)] by requiring DOT to proceed judicially, either on its own motion or through the Attorney General. Consequently, this section, which enables the waiving by OOE of the administrative procedures otherwise applicable to compliance order proceedings, represents, argues the commenter, a denial of due process.

MTB agrees that, with respect to cases involving imminent hazard situations as defined in section 111(b) of the HMTA, use of § 107.329 would operate to abrogate the due process rights of the respondent by denying it the right to be heard. However, § 107.329 was designed to reach cases falling short of the imminent hazard standard, but which are of sufficient potential safety impact to warrant extraordinary treatment.

Notwithstanding the purpose and intent of § 107.329, experience does not indicate a need to retain it. With the range of legal and equitable remedies available under the HMTA, particularly the imminent hazard provisions of section 111(b), as implemented in § 107.341, all factual situations likely to occur are provided for. Accordingly, § 107.329 has been deleted.

Section 107.331. [§ 107.329, as adopted). The proposal to amend the maximum penalty provision applicable to container manufacturers, reconditioners, repairers, and retesters received numerous adverse comments due to the interpretation given the proposal in the preamble. Although the amendment to this section merely adopts the language of section 110(a) of the HMTA, the preamble noted that ". . . each violation means each container found to have been in violation of an applicable requirement."

A common thought expressed in most of the comments was that the above view was not possible under the HMTA, since Congress has applied the concept of a continuing violation only to violations involving shippers and carriers of hazardous materials and not to the manufacturers, rebuilders, reconditioners, and retesters of the containers in which those materials are transported. Consequently, those commenters argue that it would be

unlawful for MTB to cite, for example, each of 200 cylinders in a given lot for a violation common to that lot, e.g., improper marking. To do so would be to cite a continuing violation.

MTB has reviewed thoroughly the questions posed by the commenters regarding this issue, particularly the contention that to cite each container in a lot would be to cite a continuing violation, and although not agreeing totally with the analyses offered by the commenters, does believe that adjustments to its interpretation are warranted. Moreover, these changes will not, based on experience gained under the HMTA, frustrate the purposes of the enforcement policy, since the actual amendment merely reflects the language of the HMTA.

Throughout the container specifications in Part 178, there are numerous requirements for sample testing where one container, or a portion of one container, is authorized to represent the compliance status of all other containers of the same lot. Similarly, there are certain testing requirements which must be performed at regular intervals, e.g., every four months or at the start or restart of production. Violations involving groups of containers which are permitted to be certified, marked, and sold based on representative functions being performed on a certain number of samples of those groups, are considered as a single violation. Thus, if a leakage test for 17E drums under § 178.116–13 is improperly performed and constitutes the basis for a violation, only one violation has been committed regardless of how many 17E drums of a given size and type are produced during the four months covered by the leakage test. Similarly, the physical test requirements of § 178.37–16, if improperly performed, would result in one violation for each type of test and not for each of the 200 cylinders for which the sample (coupon) is representative.

In stating this enforcement position on the issue, it is MTB's intent to reflect a level of regulation appropriate to observed enforcement needs. If in the future it should appear that those needs require the expanded civil penalty authority possible under section 110 of the HMTA, that authority would be asserted through additional rulemaking.

Part 171

Section 171.2. Several changes have been made in the proposals in this section based on the views of a commenter. First, as noted in the discussion of § 107.307, the references to approvals have been deleted, since, as the commenter pointed out, an approval is merely an aspect of an underlying substantive regulation, and any failure to comply with the terms of an approval would constitute a failure to comply with the underlying regulation.

Secondly, paragraph (d)(4) has been deleted as being vague. Should cases of misleading marking involving marks other than those described in subparagraphs (d)(1), (d)(2), and (d)(3) arise, such marks could be identified in subsequent rulemaking. Finally, paragraph (e) has been deleted as superfluous because the provisions of paragraphs (c) and (d) adequately address container manufacturers, reconditioners, repairers, fabricators, and retesters.

Section 171.8. The proposal to amend the definition of person to include governmental entities received several comments, each of them opposed to the provision as proposed. The two Federal agencies that responded to the expansion of the definition both argued that since the HMTA did not define the term person, the regulations cannot create a definition. Furthermore, since the current definition in § 171.8 was carried over from predecessor regulations adopted pursuant to 18 U.S.C. 831 *et seq.*, where the statutory definition did not include governmental entities, there is no basis in law to include them in this rulemaking. In light of the comments received, and based on a review of interpretative difficulties that have arisen over the absence of a definition of "person" in the HMTA, the MTB has decided to withdraw the proposal to adopt one in this rulemaking, and pursue instead a statutory amendment to the HMTA. This effort will commence with a proposal in the Department's legislative initiatives submitted to the 98th Congress.

Miscellaneous changes. In addition to the amendments discussed above, two other changes have been adopted in this rulemaking. These changes, neither of which appeared in the Notice, are designed to facilitate activities under the HMR and impose no regulatory burden on persons operating thereunder.

Section 171.19 has been amended to delete the termination date applicable to approvals and authorizations issued by the Bureau of Explosives of the Association of American Railroads. Section 171.19 was adopted pursuant to MTB's phased program to withdraw preexisting approvals and authorizations issued by the Bureau of Explosives, and recognized the need to provide for transition between the elimination of such approvals and authorizations and the issuance thereof by MTB. However, it now appears that numerous Bureau of Explosives approvals and authorizations were issued without termination dates. Consequently, to withdraw them on December 31, 1984, would place a prohibitive administrative burden on MTB, and a concomitant burden on affected industries. Accordingly, in lieu of the current termination date, MTB has adopted all written approvals previously issued by the Bureau of Explosives as if they had been issued by MTB. This action in no way precludes MTB from taking future rulemaking action to terminate specific classes of approvals and authorization if it determines that conditions of safety and administrative efficiency warrant. It must be stressed that as conditions to the conduct of operations under such preexisting approval, the approval must be in writing, be available for inspection by personnel from the Department on demand, and must have been issued without a termination date. If any or all of these conditions are not met, the approval is a nullity and operations under the invalid "approval" would subject the person conducting them to all applicable sanctions under the HMTA. Furthermore, it should be noted that these approvals are viewed as equivalent to MTB issued approvals from an enforcement standpoint, and enforcement action may be taken against a person who fails to comply with all terms and conditions prescribed in the approval.

Another change, to § 173.22, has been made to enable a shipper to rely on exemption or approval markings in discharging its responsibility under that section to determine that a packaging or container is in compliance with an applicable specification in Part 178 or 179, or, as adopted herein, an approval or exemption. This change is necessary to clearly articulate the shipper's duty, while enabling it to rely on the most immediate evidence of compliance. Absent this change, the shipper would be technically in violation if he used a packaging or container, that bore no specification marking under Parts 178 and 179 (this does not abrogate any exception authorized by this subchapter). It should be noted, however, that compliance with these requirements, and reliance on the actions of others permitted by this section do not in any way relieve a person from complying with all other applicable requirements or conditions of use.

In addition, the shipper may also rely on specification markings which were, at the time of manufacture of the container, the appropriate markings,

although at the time of the offering for transportation are no longer in effect.

List of Subjects

49 CFR Part 106

Rulemaking procedures.

49 CFR Part 107

Hazardous materials program procedures.

49 CFR Part 171

Hazardous materials transportation, regulations and definitions.

49 CFR Part 173

Hazardous materials transportation, packaging and containers.

In consideration of the foregoing, 49 CFR Parts 106, 107, 171, and 173 are amended as follows:

PART 106—RULEMAKING PROCEDURES

1. In § 106.17, a new paragraph (c) is added to read as follows:

§ 106.17 Particpation by interested persons.

* * * * *

(c) For the purposes of this part, an interested person includes any Federal or State government agency or any political subdivision of a State (as defined in § 107.201(b) of this subchapter).

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

2. The table of Contents for Part 107 is amended by revising Subpart D to read as follows:

* * * * *

Subpart D—Enforcement

Sec.

107.299 Defintions.
107.301 Delegated authority for enforcement.
107.303 Purpose and scope.
107.305 Investigations.

Compliance Orders and Civil Penalties

107.307 General.
107.309 Warning letters.
107.311 Notice of probable violation.
107.313 Reply.
107.315 Admission of violations.
107.317 Informal response.
107.319 Request for a hearing.
107.321 Hearing.
107.323 ALJ's decision.
107.325 Appeals.
107.327 Compromise and settlement.
107.329 Maximum penalties.
107.331 Assessment considerations.

Criminal Penalties

107.333 Criminal penalties generally.
107.335 Referral for prosecution.

Injunctive Action

107.337 Injunctions generally.
107.339 Imminent hazards.

Subpart A—General Provisions

3. In § 107.13, the portion of the first sentence through the word "hearing" of paragraph (a), and paragraph (h) are revised to read as follows:

§ 107.13 Subpoenas, witness fees.

(a) The Director, MTB, the Chief Counsel, Research and Special Programs Administration, or the Official designated to preside over a hearing * * *

* * * * *

(h) Any person to whom a subpoena is directed may apply no later than 10 days after service thereof, to the person who issued the subpoena to quash or modify it. The application shall contain a brief statement of the reasons relied upon in support of the action sought therein. The person who issued the subpoena may:

* * * * *

Subpart B—Exemptions

4. In 107.109, paragraph (c) is revised to read as follows:

§ 107.109 Processing of application.

* * * * *

(c) The Associate Director for HMR denies an application in accordance with the following:

(1) The application is denied if it does not contain adequate justification or if it contains any materially false or materially misleading statements, or fails to state a material fact.

(2) If the Associate Director for HMR denies an application under this paragraph, he notifies the applicant in writing of his reason therefore and publishes notice of the denial in the Federal Register.

* * * * *

5. Section 107.119 is revised to read as follows:

§ 107.119 Amendment, suspension, termination, and referral for enforcement action.

(a) An exemption and any renewal thereof terminates according to its terms but not later than two years after the date of issuance unless terminated sooner under paragraph (c) of this section.

(b) The Associated Director for HMR may amend or suspend an exemption if—

(1) He determines that an activity under the exemption is not being performed in accordance with the terms of the exemption; or

(2) On the basis of information not available at the time the exemption was granted or renewed, such action is necessary to protect against risk to life or property.

(c) The Associate Director for HMR may terminate an exemption if—

(1) He determines that the exemption is no longer consistent with the public interest;

(2) The exemption is no longer necessary because of an amendment to the regulations; or

(3) The exemption was granted on the basis of false or misleading material information.

(d) Unless the Associate Director for HMR determines that immediate amendment, suspension, or termination of an exemption is necessary to abate the risk of an imminent hazard, he notifies the holder of the exemption or a party thereto in writing of the reasons therefore and provides that person an opportunity to show cause why the exemption should not be amended, suspended, or terminated under paragraph (b) or (c) of this section.

(e) Notwithstanding paragraphs (b), (c) and (d) of this section, the Associate Director for HMR may refer an exemption to the Associate Director for OE for initiation of an enforcement case under Subpart D of this part. If, as the result of the enforcement proceeding, the holder of the exemption or a party thereto is determined to have violated the terms of the exemption, the Associate Director for HMR may amend, suspend, or terminate the exemption.

Subpart C—Preemption

6. In Subpart C, the designations "OE" and "OOE" are changed to read "HMR" and "OHMR", respectively, wherever they appear.

§§ 107.203 and 107.215 [Amended]

7. In §§ 107.203 and 107.215, paragraph (b)(1) is amended by changing the words "Office of Operations and Enforcement" to read "Office of Hazardous Materials Regulation."

8. Subpart D is revised to read as follows:

Subpart D—Enforcement

§ 107.299 Definitions.

In this subpart, and in enforcement actions initiated thereunder, "Investigation" includes investigations authorized under 49 U.S.C. 1809(a) and inspections authorized under 49 U.S.C. 1809(c).

"Knowledge" or "knowingly" means that a person who commits an act which is a violation of the Act or of the

requirements of this subchapter or Subchapter C of this chapter commits that act with knowledge or knowingly when that person (1) has actual knowledge of the facts that give rise to the violation, or (2) should have known of the facts that give rise to the violation. A person knowingly commits an act if the act is done voluntarily and intentionally. Knowledge or knowingly means that a person is presumed to be aware of the requirements of the Act and this subchapter and Subchapter C of this chapter. Knowledge or knowingly does not require that a person have an intent to violate the requirements of the Act or the requirements of this subchapter or Subchapter C of this chapter.

§ 107.301 Delegated authority for enforcement.

Under redelegation from the Administrator, Research and Special Programs Administration, the MTB exercises its authority for enforcement of the Act, this subchapter, and Subchapter C of this subchapter, in accordance with § 1.53 of this Title.

§ 107.303 Purpose and scope.

This subchapter describes the various enforcement authorities exercised by the OOE and the associated sanctions and prescribes the procedures governing the exercise of those authorities and the imposition of those sanctions.

§ 107.305 Investigations.

(a) *General.* In accordance with its delegated authority under Part 1 of this title, the OOE may initiate investigations relating to compliance by any person with any provisions of this subchapter or Subchapter C of this chapter, or any exemption, approval, or order issued thereunder, or any court decree relating thereto. The OOE encourages voluntary production of documents in accordance with and subject to § 107.13, and hearings may be conducted, and depositions taken pursuant to section 109(a) of the Act. The OOE may conduct investigative conferences and hearings in the course of any investigation.

(b) *Investigators.* Investigations under Section 109(a) of the Act are conducted by MTB personnel duly authorized for that purpose by the Director, MTB. Inspections under Section 109(b) of the Act, are conducted by OOE Hazardous Materials Enforcement Specialists who are duly designated for that purpose. Each official so designated may administer oaths and receive affirmations in any matter under investigation by the MTB.

(c) *Notification.* Any person who is the subject of an OOE investigation and who is requested to furnish information or documentary evidence is notified as to the general purpose for which the information or evidence is sought.

(d) *Termination.* When the facts disclosed by an investigation indicate that further action is unnecessary or unwarranted at that time, the person being investigated is notified and the investigative file is closed without prejudice to further investigation by the OOE.

(e) *Confidentiality.* Information received in an investigation under this section, including the identity of the person investigated and any other person who provides information during the investigation, shall remain confidential under the investigatory file exception, or other appropriate exception, to the public disclosure requirements of 5 U.S.C. 552.

Compliance Orders and Civil Penalties

§ 107.307 General.

(a) When the OOE has reason to believe that a person is knowingly engaging or has knowingly engaged in conduct which is a violation of the Act or any provision of this subchapter or Subchapter C of this chapter, or any exemption, or order issued thereunder, for which the OOE exercises enforcement responsibility, and if time, the nature of the violation, and the public interest permit, the OOE may conduct proceedings to assess a civil penalty or to issue an order directing compliance, or both, or seek any other remedy available under the Act.

(b) In the case of a proceeding initiated for failure to comply with an exemption, the allegation of a violation of a term or condition thereof is considered by the OOE to constitute an allegation that the exemption holder or party to the exemption is failing, or has failed to comply with the underlying regulations from which relief was granted by the exemption.

§ 107.309 Warning letters.

(a) In addition to the initiation of proceedings under § 107.307 for the imposition of sanctions or other remedies, the OOE may issue a warning letter to any person whom the OOE believes to have committed a probable violation of the Act or any provision of this subchapter, Subchapter C of this chapter, or any exemption issued thereunder.

(b) A warning letter issued under this section includes—

(1) A statement of the facts upon which the OOE bases its determination that the person has committed a probable violation;

(2) A statement that the recurrence of the probable violations cited may subject the person to enforcement action; and

(3) An opportunity to respond to the warning letter by submitting pertinent information or explanations concerning the probable violations cited therein.

§ 107.311 Notice of probable violation.

(a) The OOE begins an enforcement action under § 107.307, by serving a notice of probable violation on a person alleging the violation of one or more provisions of the Act, this subchapter, or Subchapter C of this chapter, or any exemption issued thereunder.

(b) A notice of probable violation issued under this section includes the following information:

(1) A citation of the provisions of the Act, this subchapter, Subchapter C of this chapter, or the terms of any exemption issued thereunder which the OOE believes the respondent is violating or has violated.

(2) A statement of the factual allegations upon which the demand for remedial action, a civil penalty, or both, is based.

(3) A statement of the respondent's right to present written or oral explanations, information, and arguments in answer to the allegations and in mitigation of the sanction sought in the notice of probable violation.

(4) A statement of the respondent's right to request a hearing and the procedures for requesting a hearing.

(5) In addition, in the case of a notice of probable violation proposing a compliance order, a statement of the proposed actions to be taken by the respondent to achieve compliance.

(6) In addition, in the case of a notice of probable violation proposing a civil penalty—

(i) A statement of the maximum civil penalty for which the respondent may be liable;

(ii) The amount of the preliminary civil penalty being sought by OOE, which constitutes the maximum amount OOE may seek throughout the proceeding; and

(iii) A description of the manner in which the respondent makes payment of any money due the United States as a result of the proceeding.

(c) The OOE may amend a notice of probable violation at any time before issuance of a compliance order or an order assessing a civil penalty. If OOE alleges any new material facts or seeks new or additional remedial action or an increase in the amount of the proposed

civil penalty, it issues a new notice of probable violation under this section.

§ 107.313 Reply.

(a) Within 30 days of receipt of a notice of probable violation, the respondent must either—

(1) Admit the violation under § 107.315;

(2) Make an informal response under § 107.317; or

(3) Request a hearing under § 107.319.

(b) Failure of the respondent to file a reply as provided in this section constitutes a waiver of the respondent's right to appear and contest the allegations and authorizes the Associate Director for OE, without further notice to the respondent, to find the facts to be as alleged in the notice of probable violation and issue an order directing compliance or assess a civil penalty, or, if proposed in the notice, both. Failure to request a hearing under paragraph (a)(3) of this section constitutes a waiver of the respondent's right to a hearing.

(c) Upon the request of the respondent, the OOE may, for good cause shown and filed within the 30 days prescribed in the notice of probable violation, extend the 30-day response period.

§ 107.315 Admission of violations.

(a) In responding to a notice of probable violation issued under § 107.311, the respondent may admit the alleged violations and agree to accept the terms of a proposed compliance order or to pay the amount of the preliminarily assessed civil penalty, or, if proposed in the notice, both.

(b) If the respondent agrees to the terms of a proposed compliance order, the Associate Director for OE issues a final order prescribing the remedial action to be taken by the respondent.

(c) Payment of a civil penalty must be made by certified check or money order payable to the Treasurer of the United States and sent to the Chief Counsel, Research and Special Programs Administration, 400 Seventh Street, S.W., Room 8420, Washington, D.C. 20590.

§ 107.317 Informal response.

(a) In responding to a notice of probable violation under § 107.311, the respondent may submit to the OOE official who issued the notice, written explanations, information, or arguments in response to the allegations, the terms of a proposed compliance order, or the amount of the preliminarily assessed civil penalty.

(b) The respondent may include in his informal response a request for a conference. Upon the request of the respondent, the conference may be either in person or by telephone. A request for a conference must set forth the issues the respondent will raise at the conference.

(c) Upon receipt of a request for a conference under paragraph (b) of this section, the OOE, in consultation with the Chief Counsel's Office, arranges for a conference as soon as practicable at a time and place of mutual convenience.

(d) The respondent's written explanations, information, and arguments as well as the respondent's presentation at a conference are considered by the Associate Director for OE in reviewing the notice of probable violation. Based upon a review of the proceeding, the Associate Director for OE may dismiss the notice of probable violation in whole or in part. If he does not dismiss it in whole, he issues an order directing compliance or assessing a civil penalty, or, if proposed in the notice, both.

§ 107.319 Request for a hearing.

(a) In responding to a notice of probable violation under § 107.311, the respondent may request a formal administrative hearing on the record before an Administrative Law Judge (ALJ) obtained by the Office of the Chief Counsel.

(b) A request for a hearing under paragraph (a) of this section must—

(1) State the name and address of the respondent and of the person submitting the request if different from the respondent;

(2) State which allegations of violations, if any, are admitted; and

(3) State generally the issues to be raised by the respondent at the hearing. Issues not raised in the request are not barred from presentation at the hearing.

(c) After a request for a hearing that complies with the requirements of paragraph (b) of this section, the Chief Counsel obtains an ALJ to preside over the hearing and notifies the respondent of this fact. Upon assignment of an ALJ, all further matters in the proceeding are conducted by and through the ALJ.

§ 107.321 Hearing.

(a) To the extent practicable, the hearing is held in the general vicinity of the place where the alleged violation occurred or at a place convenient to the respondent. Testimony by witnesses shall be given under oath and the hearing shall be recorded verbatim.

(b) Hearings are conducted in accordance with the Federal Rules of Evidence and Federal Rules of Civil Procedure; however, the ALJ may modify them as he determines necessary in the interest of a full development of the facts. In addition, the ALJ may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by § 107.13;

(3) Adopt procedures for the submission of motions, evidence, and other documents pertinent to the proceeding;

(4) Take or cause depositions to be taken;

(5) Rule on offers of proof and receive relevant evidence;

(6) Examine witnesses at the hearing;

(7) Convene, recess, reconvene, adjourn and otherwise regulate the course of the hearing;

(8) Hold conferences for settlement, simplification of the issues, or any other proper purpose; and

(9) Take any other action authorized by, or consistent with, the provisions of this subpart and permitted by law which may expedite the hearing or aid in the disposition of an issue raised therein.

(c) The OOE official who issued the notice of probable violation, or his representative, has the burden of proving the facts alleged therein.

(d) The respondent may appear and be heard on his own behalf or through counsel of his choice. The respondent or his counsel may offer relevant information including testimony which he believes should be considered in opposition to the allegations or which may bear on the sanction being sought and conduct such cross-examination as may be required for a full disclosure of the facts.

§ 107.323 ALJ's decision.

(a) After consideration of all matters of record in the proceeding, the ALJ shall issue an order dismissing the notice of probable violation in whole or in part or granting the sanction sought by the OOE in the notice. If the ALJ does not dismiss the notice of probable violation in whole, he issues an order directing compliance or assessing a civil penalty, or, if proposed in the notice, both. The order includes a statement of the findings and conclusions, and the reasons therefore, on all material issues of fact, law, and discretion.

(b) If, within 20 days of receipt of an order issued under paragraph (a) of this section, the respondent does not submit in writing his acceptance of the terms of an order directing compliance, or, where appropriate, pay a civil penalty, or file an appeal under § 107.325, the case may be referred to the Attorney General with a request that an action be brought in the appropriate United States District Court to enforce the terms of a

compliance order or collect the civil penalty.

§ 107.325 Appeals.

(a) *Hearing proceedings.* A party aggrieved by an ALJ's decision and order issued under § 107.323, may file a written appeal in accordance with paragraph (c) of this section with the Administrator, Research and Special Programs Administration (RSPA), 400 Seventh Street, S.W., Washington, D.C. 20590.

(b) *Non-Hearing proceedings.* A respondent aggrieved by an order issued under § 107.317, may file a written appeal in accordance with paragraph (c) of this section with the Director, MTB, 400 Seventh Street, S.W., Washington, D.C. 20590.

(c) An appeal of an order issued under this subpart must—

(1) Be filed within 20 days of receipt of the order by the appealing party; and

(2) State with particularity the findings in the order that the appealing party challenges, and include all information and arguments pertinent thereto.

(d) If the Administrator, RSPA or Director, MTB, as appropriate, affirms the order in whole or in part, the respondent must comply with the terms of the decision within 20 days of the respondent's receipt thereof, or within the time prescribed in the order. If the respondent does not comply with the terms of the decision within 20 days of receipt, or within the time prescribed in the order, the case may be referred to the Attorney General for action to enforce the terms of the decision.

(e) The filing of an appeal stays the effectiveness of an order issued under § 107.317 or § 107.323. However, if the Administrator, RSPA or the Director, MTB, as appropriate, determines that it is in the public interest, he may keep an order directing compliance in force pending appeal.

§ 107.327 Compromise and settlement.

(a) At any time before an order issued under § 107.317 or § 107.323 is referred to the Attorney General for enforcement, the respondent or the OOE may propose a compromise as follows:

(1) In civil penalty cases, the respondent or the OOE may offer to compromise the amount of the penalty by submitting an offer for a specific amount to the other party. An offer in compromise by the respondent shall be submitted to the Chief Counsel who may, after consultation with OOE, accept or reject it.

(i) A compromise offer stays the running of any response period then outstanding.

(ii) If a compromise is agreed to by the parties, the respondent is notified in writing. Upon receipt of payment by OOE, the respondent is notified in writing that acceptance of payment is in full satisfaction of the civil penalty proposed or assessed, and OOE closes the case with prejudice to the respondent.

(iii) If a compromise cannot be agreed to, the respondent is notified in writting and is given 10 days or the amount of time remaining in the then outstanding response period, whichever is longer, to respond to whatever action was taken by the OOE or the Director, MTB.

(2) In compliance order cases, the respondent may propose a consent agreement to the Associate Director for OE. If the Associate Director for OE accepts the agreement, he issues an order in accordance with its terms. If the Associate Director for OE rejects the agreement, he directs that the proceeding continue. An agreement submitted to the Associate Director for OE must include—

(i) A statement of any allegations of fact which the respondent challenges;

(ii) The reasons why the terms of a compliance order or proposed compliance order are or would be too burdensome for the respondent, or why such terms are not supported by the record in the case;

(iii) A proposed compliance order suitable for issuance by the Associate Director for OE;

(iv) An admission of all jurisdictional facts; and

(v) An express waiver of further procedural steps and all right to seek judicial review or otherwise challenge or contest the validity of the order.

(b) Notwithstanding paragraph (a)(1) of this section, the respondent or OOE may propose to settle the case. If the Associate Director for OE agrees to a settlement, the respondent is notified and the case is closed without prejudice to the respondent.

§ 107.329 Maximum penalties.

(a) A person who knowingly violates a requirement of the Act, this chapter or an exemption issued under Subchapter B of this chapter applicable to the transporting of hazardous materials or the causing of them to be transported or shipped is liable for a civil penalty of not more than $10 000 for each violation. When the violation is a continuing one, each day of the violation constitutes a separate offense.

(b) A person who knowingly violates a requirement of the Act, this chapter or an exemption issued under Subchapter B of this Chapter applicable to the manufacture, fabrication, marking, maintenance, reconditioning, repair, or testing of a packaging or container which is represented, marked, certified or sold by that person as being qualified for use in the transportation of hazardous materials in commerce is liable for a civil penalty of not more than $10,000 for each violation.

§ 107.331 Assessment considerations.

In assessing a civil penalty under this subpart, the Associate Director for OE takes into account:

(a) The nature and circumstances of the violation;

(b) The extent and gravity of the violation;

(c) The degree of the respondent's culpability;

(d) The respondent's history of prior offenses;

(e) The respondent's ability to pay;

(f) The effect on the respondent's ability to continue in business; and

(g) Such other matters as justice may require.

Criminal Penalties

§ 107.333 Criminal penalties generally.

Section 110(b) of the Act (49 U.S.C. 1809(b)) provides a criminal penalty of a fine of not more than $25,000 and imprisonment for not more than five years, or both, for any person who willfully violates a provision of the Act or a regulation issued under the Act.

§ 107.335 Referral for prosecution.

If the OOE becomes aware of a possible willful violation of the Act, this chapter, Subchapter C of this chapter, or any exemption, or order issued thereunder, for which the OOE exercises enforcement responsibility, it shall report it to the Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, D.C. 20590. If appropriate, the Chief Counsel refers the report to the Department of Justice for criminal prosecution of the offender.

Injunctive Action

§ 107.337 Injunctions generally.

Whenever it appears to the OOE that a person has engaged, or is engaged, or is about to engage in any act or practice constituting a violation of any provision of the Act, this subchapter, Subchapter C of this chapter, or any exemption, or order issued thereunder, for which the OOE exercises enforcement responsibility, the Director, MTB, or his delegate, may request the Attorney General to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or

prohibitive injunctive relief, interim equitable relief, and punitive damages as provided by section 111(a) of the Act.

§ 107.339 Imminent hazards.

Whenever it appears to the OOE that there is a substantial likelihood that death, serious illness, or severe personal injury will result from the transportation of a particular hazardous material or hazardous materials container, before a compliance order proceeding or other administrative hearing or formal proceeding to abate the risk of that harm can be completed, the Director, MTB, or his delegate, may bring an action under section 111(b) of the Act in the appropriate United States District Court for an order suspending or restricting the transporation of that hazardous material or those containers or for such other equitable relief as is necessary or appropriate to ameliorate the hazard.

PART 171—HAZARDOUS MATERIALS TRANSPORTATION, REGULATIONS AND DEFINITIONS

9. Section 171.2 is revised to read as follows:

§ 171.2 General requirements.

(a) No person may offer or accept a hazardous material for transportation in commerce unless that material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by this subchapter (including §§ 171.11, 171.12, and 176.11), or

(b) No person may transport a hazardous material in commerce unless that material is handled and transported in accordance with this subchapter, or an exemption issued under Subchapter B of this chapter.

(c) No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of this subchapter or an exemption issued under Subchapter B of this chapter, governing its use in the transportation in commerce of a hazardous material, whether or not it is used or intended to be used for the transportation of a hazardous material, unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, or retested, as appropriate, in accordance with this subchapter, an approval issued thereunder, or an exemption issued under Subchapter B of this chapter.

(d) The representations, markings, and certifications subject to the prohibitions of paragraph (c) of this section include:

(1) Specification identifications that include the letters "DOT" or "UN";

(2) Exemption, approval, and registration numbers that include the letters "DOT;" and

(3) Test dates displayed in association with specification, registration, approval, or exemption markings indicating compliance with a test or retest requirement of this subchapter, an approval issued thereunder, or an exemption issued under Subchapter B of this chapter.

10. Section 171.19 is revised to read as follows:

§ 171.19 Approvals or authorizations issued by the Bureau of Explosives.

Unless otherwise specifically restricted by other requirements of this subchapter, any written approval or authorization issued by the Bureau of Explosives that is valid at the time the Bureau of Explosives authority to issue that approval or authorization is withdrawn or assumed by the Associate Director for HMR and which is available for inspection by representatives of the Department of Transportation, will be considered as having the same validity as if issued by the Associate Director for HMR, and remains valid under the conditions and for the period established by the Bureau of Explosives.

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

11. In § 173.1, paragraph (a) is revised to read as follows:

§ 173.1 Purpose and scope.

(a) This part includes—

(1) Definitions of hazardous materials for transportation purposes;

(2) Requirements to be observed in preparing hazardous materials for shipment by air, highway, rail, or water, or any combination thereof; and

(3) Inspection, testing, and retesting responsibilities for persons who retest, recondition, maintain, repair and rebuild containers used or intended for use in the transportation of hazardous materials.

* * * * *

12. In § 173.22, paragraph (a) is revised, paragraphs (b) and (c) are redesignated (c) and (d) respectively, and a new paragraph (b) is added, to read as follows:

§ 173.22 Shipper's responsibility.

(a) Except as otherwise provided in this part, a person may offer a hazardous material for transportation in a packaging or container required by this part only in accordance with the following:

(1) The person shall class and describe the hazardous material in accordance with Parts 172 and 173 of this subchapter, and

(2) The person shall determine that the packaging or container has been manufactured, assembled, and marked in accordance with—

(i) Part 178 or 179 of this subchapter;

(ii) A specification of the Department in effect at the date of manufacture of the packaging or container;

(iii) An approval issued under this subchapter; or

(iv) An exemption issued under Subchapter B of this chapter.

(3) In making the determination under paragraph (a)(1) of this section, the person may accept—

(i) The manufacturer's certification, specification, approval, or exemption marking (see §§ 178.0–2 and 179.1 of this subchapter); or

(ii) With respect to cargo tanks provided by a carrier, the manufacturer's identification plate or a written certification of specification or exemption provided by the carrier.

(b) When a person performs a function covered by or having an effect on a specification prescribed in Part 178 or 179 of this subchapter, an approval issued under this subchapter, or an exemption issued under Subchapter B of this chapter, that person must perform the function in accordance with that specification, approval, or exemption, as appropriate.

* * * * *

(49 U.S.C. 1803, 1804, 1808, and 1809; 49 CFR 1.53, App. A. to Part 1)

Note.—Because these amendments relate to: (a) Agency practices and procedures; or (b) clarifications of existing regulations and policies, the Materials Transportation Bureau has determined that these amendments: (1) Are not "major" under Executive Order 12291; (2) are not "significant" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1976); (3) do not warrant preparation of a regulatory evaluation as the anticipated impact would be so minimal; (4) will not have a significant effect on a substantial number of small entities under the criteria of the Regulatory Flexibility Act; and (5) do not require an environmental impact statement under the National Environment Policy Act (49 U.S.C. 4321 et seq.)

Issued in Washington, D.C., on January 11, 1983.

L. D. Santman,

Director, Materials Transportation Bureau.

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