

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 107, 171, and 173

[Docket No. HM-138A; Notice No. 81-6]

Enforcement Procedures and Related Miscellaneous Proposals

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The MTB proposes to make the following changes to Parts 107, 171, and 173 concerning primarily the procedural requirements of its hazardous materials exemption, approval, preemption, and enforcement programs:

1. Several substantive and non-substantive changes would be made to the enforcement procedures dealing with initiation of cases, their administrative handling, determination of appropriate sanctions, and the right of appeal of the parties.

2. Changes are proposed to the exemption procedures in Part 107 to make enforcement action a basis for taking action against an exemption holder or party to an exemption, and to clarify, by a related amendment to § 171.2 the fact that violation of a term or condition of an exemption can be the basis for an enforcement action.

3. In association with the changes cited in 2, above, the enforcement procedures would also be amended to include violation of the terms of an approval issued under Part 173 as a basis for enforcement action.

4. Section 171.2 would be amended further to provide a more specific prohibition against the improper use of DOT authorized and required markings associated with specification identifications, and exemption, approval and registration numbers.

5. For clarification, § 173.1 would be amended to highlight the fact that Part 173 contains, in addition to shupper requirements applicable to reconditioners (§ 173.28) and restesters, repairers, and rebuilders (§ 173.34).

6. The procedures relating to inconsistency rulings and non-preemption determinations would be amended to reflect the fact that responsibility for those functions has been transferred within the MTB from the Associate Director for Operations and Enforcement to the Associate Director for Hazardous Materials Regulation.

7. The definition of the term "person" would be amended to clarify the fact that the term includes governmental entities when those entities engage in commercial transportation of hazardous materials.

DATE: Comments must be received by October 22, 1981.

ADDRESS: Address comments to the Dockets Branch, Materials Transportation Bureau, U.S. Department of Transportation, Washington, D.C. 20590. Comments should identify the docket and notice number and be submitted in five copies. The Dockets Branch is located in Room 8428 of the Nassif Building, 400 7th Street, SW., Washington, D.C. Public dockets may be reviewed between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: George W. Tenley, Jr., Office of the Chief Counsel, Research and Special Programs Administration, 400 7th Street, SW., Washington, D.C. 20590, telephone (202) 755-4973.

SUPPLEMENTARY INFORMATION: On September 9, 1976, the MTB published Amendment No. 107-3 (41 FR 38167) prescribing, as pertinent here, the procedures to be followed by the MTB in carrying out its enforcement responsibilities under sections 109, 110, and 111 of the Hazardous Materials Transportation Act (HMTA) (49 U.S.C. 1808, 1809, and 1810). Because the provisions adopted therein related to the practices and procedures of the MTB, Amendment 107-3 was issued as a final rule without prior notice and comment.

However, the MTB stated in the preamble its intention to review the procedures based on experience gained in their operation and invited public participation in that review through the submission of comments. No written comments were ever received in response to that solicitation.

Notwithstanding the absence of public comments in response to the requirements adopted in 1976, the MTB has had extensive dealings with persons subject to its hazardous materials enforcement jurisdiction through individual enforcement cases. This experience, together with the ongoing evaluation of the effectiveness, efficiency, and fairness of the hazardous materials enforcement program, form the bases for the proposals made in this notice of proposed rulemaking. Many of the changes proposed herein are merely editorial in nature, others seek to remove redundancies, and the remainder actually alter the substance of, or add to, existing requirements. With respect to due process protections existing in current requirements, the

proposals made herein would not detract from them, but rather add thereto. There follows an analysis by section of those proposed changes which would alter the substance of current requirements or add new ones.

Part 107

Subpart A—General Provisions

Section 107.13. Two minor changes would be made in paragraphs (a) and (h) to clarify who may issue a subpoena and the related area of how a subpoena is modified or quashed. Paragraph (a) would be amended to substitute a reference to an "official presiding over a hearing" for the current reference to "the MTB official designated to preside over a hearing." This change would reflect the fact that, although not required by statute to do so, it has been an MTB practice to obtain the services of non-MTB personnel (i.e., Administrative Law Judges) to preside over hearings.

The proposed change to paragraph (h) would make it consistent with paragraph (a) by correctly identifying to whom a subpoena recipient should apply in order to have a subpoena modified or quashed. As proposed, an application to modify or quash would be sent to the official who issued the subpoena.

Subpart B—Exemptions

Section 107.109. This proposal would add as a basis for denying an application for exemption false statements, misrepresentations, or omissions of material fact used to support the application. This authority in the Associate Director for HMR to terminate further consideration of application for the stated reasons, would be consistent with current authority under § 107.119 allowing the Associate Director for HMR to terminate existing exemptions for the same reasons. By providing this authority at the application stage, administrative time and money can be saved in these cases where misrepresentation is a problem.

Section 107.119. Two important proposals made in this Notice relate to the enforcement of the terms and conditions of an exemption. This section contains proposals regarding the impact of enforcement actions against exemption holders and parties to exemptions on the right to continue activities under the exemption. Associated with this proposal is a proposal in § 107.307 providing for initiation of an enforcement case for

failure to comply with the terms of an exemption or an approval.

Under the § 107.119 proposal, the Associate Director, Office of Hazardous Materials Regulation (OHMR), could suspend the authority to operate under an exemption during the pendency of an enforcement action against the holder thereof or party thereto. This would apply when action is brought against the holder or party in cases where the exemption itself is involved as well as in cases where it is not. In a like manner, the Associate Director, OHMR could terminate an exemption when the holder or party has been found to be in violation in accordance with the enforcement procedures in Subpart D, or when the holder or party submitted false information in its application, or if it misrepresented or failed to reveal a material fact.

The § 107.307 proposal is based on the premise that a failure to comply with the terms or conditions of an exemption or approval in effect renders the exemption or approval a nullity, and places the holder or party in the position he would have been in absent the exemption or approval, i.e., he is required to comply with the underlying regulations to which the exemption or approval was addressed. In addition to the proposals herein, language would be added to each exemption and approval to reflect this procedure. In addressing exemption and approval enforcement in this manner, the respondent would be able to avail itself of the procedural protections of the enforcement procedures.

Subpart D—Enforcement

Section 107.229. Because establishing knowledge is fundamental to a finding of violation under the HMTA and these regulations, it is proposed to add a definition of the term "knowledge" or "knowingly".

As developed by the Supreme Court in *United States v. International Minerals and Chemical Corporation*, 402 U.S. 558 (1971), knowledge, as proposed herein, means that a person who is engaged in activity subject to the HMTA and the hazardous materials regulations is presumed to be aware of that statute and those regulations, as applicable to the particular activity in question. Actual knowledge that a given act is a violation of a particular requirement is not required, and the concept includes, with respect to the facts which establish a violation, what the person *should have known* in the proper exercise of its responsibilities. This definition is of course subject to the limitation prescribed in section 110(a) of the HMTA that excepts from liability for

imposition of a civil penalty an employee who acts without knowledge (thus placing the onus solely on the employer).

In addition, it is proposed to add a definition of the term "investigation" which would encompass the inspection activity of the MTB authorized under section 109(c) of the HMTA, as well as the investigation authority granted under section 109(a). This addition is considered appropriate because the majority of the MTB hazardous materials field effort involves compliance inspections.

Compliance Orders and Civil Penalties

To the extent possible, the requirements and procedures applicable to both civil penalty actions and compliance order actions would be merged to avoid redundancy.

Section 107.307. One of the more significant substantive changes proposed in this Notice, and reflected in the merged civil penalty and compliance order provisions, is the authority of the MTB's Office of Operations and Enforcement (OOE) to seek in one notice of probable violation, both a civil penalty and a compliance order. Although the OOE has historically had this authority under the HMTA, it had never been implemented in the regulations, and thus has never been exercised. The provision for a dual notice of probable violation is proposed as an enforcement tool in those cases where the OOE has reason to believe that either a civil penalty or a compliance order alone would not achieve the desired level of compliance.

Section 107.309. A new section would be added to Subpart D covering use by the OOE of warning letters as an enforcement tool. Although this form of enforcement imposes no sanctions, its use is appropriate where an inspection reveals that a person's compliance status is generally good and that any probable violations noted are minor in nature and clearly present an aberration to an otherwise sound program.

The OOE has used the warning letter for approximately three years, and its use has demonstrated its effectiveness. Although the letter does not require a response most persons who receive one submit information explaining the cause of the problems observed or demonstrating why the observed conduct was not in violation. This form of communication between the OOE and regulated persons serves the dual purposes of informing those persons of deficiencies and also educating them as to the requirements of the Hazardous Materials Regulations applicable to their operations.

Section 107.311(c). The change proposed in this paragraph would allow the OOE to amend a notice of probable violation already issued to a respondent. This provision would enable the OOE to take action on new information that it may discover, as in the case of an inspection of a separate facility of the respondent, without having to issue a new notice. Should the OOE amend a notice of probable violation under this proposal, the respondent would be given 30 days to respond and could treat the amended notice as an initial notice for the purpose of choosing his response option (i.e., informal, hearing, or payment/compliance).

Section 107.317(b). This proposal would require a respondent, as part of his request for an informal conference, to state which of the allegations made by OOE in the notice of probable violation he admits and which ones he demes, as well as the issues the respondent will raise at the conference. This proposal is designed to identify at the outset what the conference will entail and thus enable a fuller discussion of salient points.

Section 107.319(a). The proposal in this section providing for an Administrative Law Judge (ALJ) to preside over hearings convened at the request of a respondent under proposed § 107.313(a)(3), reflects the current practice of the MTB. Although it has been determined in an opinion by the DOT General Counsel that a hearing of the type provided for in 5 U.S.C. 554 (formerly, the Administrative Procedure Act) is not required by the HMTA, the MTB has provided APA-type hearings before an ALJ and believes it is in the interest of administrative due process to continue to do so. Since the DOT does not maintain a staff of ALJs, it is necessary for the Chief Counsel of RSPA to obtain them on a case-by-case request to the Office of Administrative Law Judges, Office of Personnel Management, or through contractual arrangement with retired or otherwise inactive ALJs. Consequently, minor delays can be expected between the time of the respondent's request and the assignment of an ALJ.

It should be noted that a request for a hearing would have to be made by a respondent in both civil penalty and compliance order cases. Under current § 107.315, a hearing is automatically invoked whenever a respondent challenges an allegation in a notice of probable violation proposing a compliance order. There is no reason why the compliance order case should differ from a civil penalty case, and the MTB believes that the affirmative

election for a hearing is the better procedure.

Section 107.321(a). Although the proposals in this Notice do not prescribe a full complement of procedural requirements governing the conduct of a hearing, the MTB does believe, and has proposed, that testimony offered during a hearing should be oral. With respect to other procedural requirements governing the proceeding, the ALJ would have discretion to impose whatever format he chose.

Section 107.325. Under the current regulations there are two deficiencies relating to appeals that need to be corrected. One, relating to the respondent, is dealt with in paragraph (b) and provides that in cases not involving a hearing the respondent may appeal an order of the Associate Director for OOE to the Director, MTB. Although not currently provided in the regulations, this right of appeal has been provided to each respondent since the inception of the hazardous materials enforcement program of the MTB.

The other deficiency is the failure of the regulations to permit the OOE to appeal an adverse decision of an ALJ to the Director of MTB, thereby placing OOE in a procedural position inferior to the respondent. Accordingly, paragraph (a) permits either party to an enforcement hearing to appeal an adverse final order of an ALJ.

In addition, paragraph (c) provides basic requirements that an appeal must conform to, and is designed to assist the Director of MTB in making a thorough and expeditious decision.

Finally, a new paragraph (f) would make failure to comply with a term or condition of a compliance order a basis for OOE initiating an enforcement case.

Section 107.327. This section would prescribe the mechanisms governing an offer in compromise by the respondent in both civil penalty cases and compliance order cases. An offer of an amount in compromise of a civil penalty proposed or assessed would stay the running of any response period then outstanding. This proposal would merely formalize current practice. If accepted, an amount in compromise would constitute a full satisfaction of the civil penalty and would have no effect on the finding of a violation. Thus, the compromise would go only to the amount of the penalty, and not to the underlying violations on which the penalty is based.

The proposals concerning compliance orders in this section are designed to be more specific than current language. For example, under current language there is no requirement that the respondent identify the facts or proposed

compliance order terms and conditions he challenges. The proposal would require a statement as to both. In addition, language would be added in paragraph (b)(3) establishing an administrative cause of action for failure to comply with the terms of an executed consent order (this provision would thus be consistent with the proposed requirement in § 107.325 that would make failure to comply with the terms of a compliance order a basis for the MTB to initiate an enforcement case).

Section 107.331. An amendment to paragraph (b) is necessary in order to make clear that civil penalties for up to the \$10,000 maximum provided in the HMTA, may be assessed for each violation of a requirement relating to the manufacture, fabrication, marking, maintenance, reconditioning, repair, or testing of a container or package. In this context, each violation means each container found to have been in violation of an applicable requirement.

Section 107.333. Although no changes are proposed in the statutorily prescribed assessment criteria, this rulemaking provides an opportunity to state the MTB position regarding use of these criteria (currently prescribed in § 107.359). It has been the practice of the MTB, and this practice would continue under these proposals, to use the assessment criteria merely as general guidelines in establishing the preliminary civil penalties proposed in the Notice of Probable Violation. The MTB believes this to be appropriate since at the Notice stage no assessment of a final civil penalty has been made.

In addition, with respect to the assessment criteria relating to the economic impact of a civil penalty on a respondent, the MTB believes that that is a matter best raised by the respondent if that factor is to have the greatest effect on penalty mitigation. Only the respondent can gauge, and provide pertinent and current information concerning, its ability to pay and its ability to continue in business in the face of the civil penalty proposed in the notice of probable violation or assessed under an order.

Part 171

The definition of "person" in § 171.8 would be amended in this proposal to correct an error that occurred in the final rule consolidating the Hazardous Materials Regulations (HM-112, 41 FR 15995, April 15, 1976). In that rule, where "person" was first defined, the MTB's predecessor excluded governmental agencies from the definition to reflect the fact that the Hazardous Materials Regulations have never been applied directly to regulate customary

governmental activity. Such activity as the transportation, for governmental purposes, of hazardous materials by an agency of the Federal, State or local governments is not regulated. However, the act of offering such materials to a commercial carrier for transportation has always been considered subject to the regulations. This fact is witnessed by the existence of exceptions for certain Federal activities (see, for example, 49 CFR 173.7). Similarly, a governmental agent boarding a commercial passenger aircraft with a hazardous material in his possession is employing a commercial activity subject to the regulations.

Where governmental functions may be mixed with commercial activity, such as where an employee of a State university transports a hazardous material, the facts of the specific activity will have to be examined to determine whether the transportation is for a governmental purpose and therefore not subject to the regulations.

As noted previously, § 171.2 would be revised to indicate that not only do the specific requirements prescribed in subchapter C apply to the activities of persons engaged in hazardous materials transportation, but also the requirements imposed through exemptions and approvals issued under the Hazardous Materials Regulations. This proposal is a necessary adjunct to the language proposed in § 107.307 (discussed above in connection with § 107.119) establishing the violation of the term of an exemption, approval, or order as a basis for asserting the enforcement jurisdiction of section 110 of the HMTA.

In addition, it is proposed to add language to § 171.2, to clarify the fact that DOT markings and designations may not be used on any container, or in connection with any shipment, that is not in full compliance with all applicable provisions in the Hazardous Materials Regulations. Thus, for example, this language is intended to make clear the fact that a drum reconditioner may not place his drum reconditioner's registration number bearing the letters DOT, on a drum which is not a fully complying DOT specification container (including all required embossment markings).

In consideration of the foregoing, the MTB proposes to amend 49 CFR Parts 107, 171, and 173 as follows:

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

Subpart A—General Provisions

1. In § 107.13, the first sentence of paragraph (a), and paragraph (h) would be revised 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, no later than 10 days after service thereof, apply 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

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

§ 107.109 Administrative review.

(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 false or 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 reasons therefor and publishes notice of the denial in the Federal Register.

3. In § 107.119, the title would be revised, paragraph (b) would be revised, and paragraph (c) (1) and (4) would be revised as follows:

§ 107.119 Amendment, suspension and termination.

(b) The Associate 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;

(2) He is notified by the Associate Director for OE that the exemption holder is the subject of an enforcement proceeding being conducted under Subpart D of this part; or

(3) On the basis of information not available at the time it was granted, an

amendment to the terms of the exemption is necessary to adequately protect against risks to life or property.

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

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

(4) As the result of an enforcement proceeding conducted and concluded under Subpart D of this part, the exemption holder has been found to have violated a regulation to which the exemption related.

Subpart C—Preemption

4. In Subpart C, the designations "OE" and "OOE" would be changed to read "OHMR" wherever they appear.

§§ 107.203 and 107.215 [Amended]

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

6. Subpart D would be revised in its entirety as follows:

Subpart D—Enforcement

Sec.

- 107.299 Definitions.
- 107.301 Responsibility 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.
- 107.329 Compliance order for immediate compliance.

- 107.331 Maximum penalties.
- 107.333 Assessment considerations.

Criminal Penalties

- 107.335 Criminal penalties generally.
- 107.337 Referral for prosecution.

Injunctive Action

- 107.339 Injunctions generally.
- 107.341 Imminent hazards.

Authority: 49 U.S.C. 1804, 1808 and 1809; 49 CFR 1.53, App. A to Part 1.

Subpart D—Enforcement

§ 107.229 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 performs functions described in Section 105(a) of the Act (49 U.S.C. 1804(a)) is presumed to be aware of the requirements of the Act and the requirements of this subchapter and subchapter C governing those functions. Knowledge includes both actual knowledge of the facts that give rise to a violation, as well as what a person should have known as a result of the proper performance of its responsibilities. In making a finding that an act constitutes a knowing violation, the Associate Director for OE is not required to show that a respondent was aware that the act constituted a violation.

§ 107.301 Responsibility for enforcement.

In accordance with delegations of authority from the Secretary of Transportation set forth in Part 1 of this title, responsibility for enforcement of this subchapter and Subchapter C of this chapter is exercised by:

(a) The Federal Aviation Administration with respect to the transportation or shipment of hazardous materials by aircraft;

(b) The United States Coast Guard with respect to the transportation or shipment of hazardous materials by vessels;

(c) The Federal Highway Administration with respect to the transportation or shipment of hazardous materials by highway vehicles;

(d) The Federal Railroad Administration with respect to the transportation or shipment of hazardous materials by railroad; and

(e) The MTB with respect to shipments of hazardous materials involving more than one mode of transportation, and the manufacture, fabrication, marking, maintenance, reconditioning, repair, or testing of containers which are represented, marked, certified, or sold for use in the transportation of hazardous materials, other than in bulk form.

§ 107.303 Purpose and scope.

This subpart 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.* The OOE may initiate investigations relating to compliance by any person with any provision 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 cooperation with its investigations. When circumstances warrant, however, subpoenas may be issued to compel the attendance of witnesses or the 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 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 OOE.

(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 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, unless otherwise determined by the OOE, remain confidential under the investigatory file exception to the public disclosure requirements of 5 U.S.C. 552.

§ 107.307 General

(a) When the OOE has a 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, approval, 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 or an approval, or for performance of a function not permitted in an approval, the allegation of a violation of a term or condition thereof, is considered by the OOE to constitute

an allegation that the exemption or approval holder is failing, or has failed, to comply with the underlying regulations from which relief was granted by the exemption or approval.

§ 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, approval, or order 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, approval, or order 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, approval, or order 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 or a civil penalty 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 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, except as provided in paragraph (c) of this section, 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 an amendment includes any new material allegation of fact or seeks new or additional remedial action or an increase in the amount of the proposed civil penalty, the respondent has 30 days from receipt of the amended notice of probable violation to respond under § 107.313(a).

§ 107.313 Reply.

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

(1) Admit the violations 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 OOE, 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, where appropriate, assess a civil penalty, or both.

(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.

(b) If the respondent agrees to the terms of a proposed compliance order, the Associate Director for OOE 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 Treasury 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. A request for a conference must include which allegations are admitted and which are denied, and must set forth the issues the respondent will raise at the conference.

(c) Upon receipt of a request for a conference conforming with 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 OOE in reviewing the notice of probable violation. Based upon a review of the proceeding, the Associate Director for OOE 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 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 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 that the respondent;

(2) State with particularity the issues whether it is admitted or denied; and

(3) State with particularity the issues to be raised by the respondent 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 Administrative Law Judge (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 orally under oath and the hearing shall be recorded verbatim.

(b) 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 of 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 and may offer such relevant information as may be necessary to fully inform the presiding officer as to the matter concerned.

(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 defense of 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 representing the final decision in the proceeding. The ALJ may dismiss the notice of probable violation in whole or in part or grant the

relief 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 both. The order includes a statement of the findings and conclusions, and the reasons therefor, 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 an appeal with the Director, MTB, in accordance with paragraph (c) of this section.

(b) *Non-hearing proceedings.* A respondent aggrieved by an order issued under § 107.317, may file an appeal with the Director, MTB, in accordance with paragraph (c) of this section.

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

(1) Be in writing and addressed to the Director, Materials Transportation Bureau, 400 Seventh Street, SW., Washington, D.C. 20590;

(2) Be filed within 20 days of the respondent's receipt of the order;

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

(d) If the Director, MTB affirms the order in whole or in part, the respondent must comply with the terms of the Director's 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 Director's 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 Director's decision.

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

(f) The failure of a respondent to comply with the terms of a compliance order after an appeal, if any, has been finally affirmed by the Director, MTB, constitutes a basis for the OOE to initiate an enforcement action under § 107.311 for violation of the specific terms of the agreement alleged by the OOE to have been violated or not otherwise complied with.

§ 107.327 Compromise.

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

(a) In civil penalty cases, the respondent may offer to compromise the amount of the penalty by submitting a certified check or money order for a specific amount to the Chief Counsel who may, after consultation with OOE, accept or reject it.

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

(2) If a compromise offer is accepted, the respondent is notified in writing that the acceptance is in full satisfaction of the civil penalty, and OOE closes the case.

(3) If a compromise offer is rejected, the respondent is notified in writing 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 of the OOE or the Director is then outstanding.

(b) In compliance order cases, the respondent may propose a consent agreement to the Associate Director for OOE. If the Associate Director for OOE accepts the agreement, he issues an order in accordance with its terms. If the Associate Director for OOE rejects the agreement, he directs that the proceeding continue.

(1) An agreement submitted to the Associate Director for OOE must be accompanied by—

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

(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.

(2) An agreement submitted to the Associate Director for OOE under this paragraph must include—

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

(ii) An admission of all jurisdictional facts;

(iii) An express waiver of further procedural steps and of all right to seek judicial review or otherwise challenges or contest the validity of the order; and

(iv) An acknowledgment that the notice of probable violation may be used to construe the terms of the order.

(3) The failure of a respondent to comply with the terms of an agreement executed under this section, constitutes a basis for the OOE to initiate an enforcement action under § 107.311 for the violation of the specific terms of the agreement alleged by the OOE to have been violated or not otherwise complied with.

§ 107.329 Compliance order for immediate compliance.

(a) Notwithstanding § 107.311, the Associate Director for OOE may issue a compliance order for immediate compliance, which is effective upon issuance and remains in effect until rescinded or suspended, if he finds—

(1) There is a strong probability that a violation is occurring or is about to occur;

(2) The violation poses an unreasonable risk to health or to safety or life or property; and

(3) The public interest requires the avoidance or amelioration of the risk through immediate compliance and waiver of the procedures afforded under §§ 107.311 through 107.325.

(b) A compliance order for immediate compliance is served promptly upon the person against whom the order is issued by the fastest practicable means, with a copy served in the manner provided in § 107.11. The copy contains a written statement of the relevant facts and the legal basis for the order, including the findings required by paragraph (a) of this section.

(c) The Associate Director for OOE may rescind or suspend a compliance order for immediate compliance if it appears that the criteria set forth in paragraph (a) of this section are no longer satisfied. When appropriate, however, a suspension or rescission may be accompanied by a notice of probable violation issued under § 107.311.

(d) If at any time in the course of a proceeding commenced by a notice of probable violation issued under § 107.311 the criteria set forth in paragraph (a) of this section are satisfied, the Associate Director for OOE may issue a compliance order for immediate compliance, even if any applicable response period has not expired.

(e) At any time after a compliance order for immediate compliance has become effective, the Director, MTB, or

his delegate may request the Attorney General to bring an action for appropriate relief in accordance with § 107.339.

§ 107.331 Maximum penalties.

(a) A person who knowingly violates a requirement of this subchapter applicable to the transporting of hazardous materials or to the causing of them to be transported or shipped is liable of 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 this subchapter applicable to the manufacture, fabrication, marketing, maintenance, reconditioning, repair, or testing of a package or container which is represented, marked, certified or sold by that person 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.

§ 107.333 Assessment considerations.

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

(a) The nature and circumstances of the violations;

(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

§ 107.335 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.

§ 107.337 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, approval, 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

§ 107.339 Injunctions generally.

Whenever it appears to the OOE that a person has engaged, 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, approval, 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.

§ 107.341 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 particular hazardous materials containers 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 in the appropriate United States District Court for an order suspending or restricting the transportation of that hazardous material or those containers or for such other equitable relief as is necessary or appropriate to ameliorate the hazard as provided by section 111(b) of the Act.

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

7. Section 171.2 would be revised to read as follows:

§ 171.2 General requirements.

(a) No person may offer or accept a hazardous material for transportation in commerce within the United States unless that material is properly classed, described, packaged, marked, labeled, and in the condition for shipment as required or authorized by this subchapter (including §§ 171.12 and 176.11), an approval issued thereunder, or an exemption issued under Subchapter B of this chapter.

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

(c) No person may represent, mark, certify, or sell a packaging or container as meeting the requirements of this subchapter, an approval issued thereunder, 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, or repaired, as the case may be, 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";
- (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; and
- (4) Any other marking indicating a packaging or container meets a requirement of this subchapter, an approval issued thereunder, or an exemption issued under Subchapter B of this chapter, when the packaging or container does not meet that requirement.

(e) No person may offer a package for transportation in commerce within the United States bearing a marking that is specified by this subchapter, an approval issued thereunder, or an exemption issued under Subchapter B of this chapter, for the transportation of a hazardous material unless that marking is as specified or authorized by this subchapter, an approval issued thereunder, or an exemption issued under Subchapter B of this chapter for the hazardous material in the package. Markings subject to the prohibitions of this paragraph include:

- (1) Any marking required by Subchapter D of Part 172 of this subchapter; and
- (2) Exemption, approval, and registration numbers issued under this subchapter or Subchapter B of this chapter.

8. In § 171.8, the definition of "person" would be revised to read as follows:

§ 171.8 Definitions.

* * * * *

"Person" means—

(1) Any individual, firm, co-partnership, corporation, company, association, or joint-stock association; and

(2) Any Federal or State government agency or any political subdivision of a State (as defined in § 107.201(b) of this chapter), when that agency or political subdivision offers for transportation or transports hazardous materials in commerce.

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

9. In § 173.1, paragraph (a) would be revised to read as follows:

§ 173.1 Purpose and scope.

(a) This part—

- (1) Defines hazardous materials for transportation purposes;
- (2) Prescribes requirements to be observed in preparing hazardous materials for shipment by air, highway, rail, or water, or any combination thereof; and

(3) Prescribes the 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.

* * * * *

(49 U.S.C. 1804, 1808, and 1809; 49 CFR 1.59, App. A. to Part 1)

Note.—Because the proposals made in this Notice relate to (a) agency practices and procedures or (b) clarifications of existing regulations and policies, the Materials Transportation Bureau has determined that the Notice—(1) is not "major" under Executive Order 12291; (2) is not "significant" under DOT Regulatory Policies and Procedures (44 FR 11034; February 20, 1979); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact would be so minimal; (4) would not have a significant effect on a substantial number of small entities under the criteria of the Regulatory Flexibility Act; and (5) does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321 *et seq.*).

Issued in Washington, D.C., on September 15, 1981.

A. I. Roberts,
Associate Director for Hazardous Materials Regulation.

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