Section 171.21 Assistance in Investigations and Special Studies

As proposed in the NPRM, paragraph (a) of § 171.21 would require that hazardous materials carriers make all records and information pertaining to any incident available, upon request, to an authorized representative of the Department of Transportation. Further, under this paragraph, a carrier of hazardous materials is required to give an authorized representative or special agent of the Department all reasonable assistance in the investigation of any incident. One commenter expressed concern about the interpretation of the phrase "reasonable assistance," pointing out that it is possible that a carrier's understanding of this phrase could differ from that of the representative or agent of the Department. In order to avoid such differences of opinion, the commenter suggested that paragraph (a) of § 171.21 be limited to the requirement that carriers make any existing records available to authorized representatives of the Department. RSPA has not accepted this comment. The language of § 171.21 is virtually identical to the language of § 394.15 of the Federal Motor Carrier Safety Regulations (49 CFR Parts 390–397). Section 394.15 has been in force for a number of years, and the Federal Highway Administration (FHWA) reports that the interpretation of the term "reasonable assistance" has not been a source of contention between the FHWA and motor carriers subject to its jurisdiction. Moreover, the requirement establishes a "reasonableness" test which has wide currency and broad judicial acceptance concerning matters that cannot be specified in advance.

As proposed in the NPRM, under paragraph (b)(1) of § 171.21, carriers would be required to respond with 15 days, or within such other time as specified by the Department, to inquiries by the Department in connection with any Department studies of hazardous material incidents. A number of commenters urged that this paragraph be changed to permit a 30-day or longer response period. These commenters point to the possibility that a carrier might be unable to respond to such an inquiry within 15 days, especially if the inquiry involved a large number of documents. RSPA believes that the proposed 15 day limitation could be too restrictive, and a 30 day period has been adopted in the final rule.

Since the incident report forms will be of significant importance in any investigations or special studies conducted by the Department under § 171.21, the NPRM had proposed to revise § 171.16 to require all carriers to maintain a copy at their principal places of business of each incident report form submitted to the Department for a period of two years. The American Trucking Association (ATA) was joined by another commenter in taking strong exception to this proposed requirement on the grounds that this imposes an unreasonable paperwork burden on carriers, that the absence of such a requirement in the current regulations has created no apparent problem, that the retention of the incident report form by the carrier serves no useful purpose to the carrier or to the Department, and that the requirement results in the duplication of information. RSPA disagrees with these comments for several reasons.

First, regarding the paperwork burden on carriers, in general, given that failure to comply with the hazardous materials incident reporting requirements can result in a civil penalty, it is doubtful that prudent carriers would not keep copies of the reports they submit to the Department in their own files. Moreover, 49 CFR 394.13 requires motor carriers to maintain "* * * a copy of each report that the carrier has filed pursuant to § 394.9, with a state agency, or with an insurer, with respect to any reportable accident entered in the accident register." Some of these accident reports will also entail hazardous materials incidents that are required to be kept by motor carriers under § 394.13(c) for a period of three years. It should also be noted that the Federal Railroad Administration (FRA) requires each railroad to maintain a duplicate of each form it submits to the FRA under 49 CFR 225.21 for at least two years.

Second, § 171.16 requires that the hazardous materials incident report form be provided to the Department in duplicate. The incremental paperwork burden of a carrier's preparing the incident report form in triplicate, with one copy for the carrier's own records, is minimal.

Third, hazardous materials incident report forms can be and have been used as evidence in court. RSPA does not believe that carriers can or would be content with the idea that RSPA be the sole possessor of such records. This disposes of the claim that the retention of the incident report form by the carrier is of no use to the carrier, even apart from the insight and benefit a carrier can derive from studying its own record of hazardous materials incidents.

Fourth, the contention that the absence of a record retention requirement in the current regulations has created no apparent problems is beside the point; it is precisely to prevent future problems, especially in terms of the enforceability of § 171.21, that is the principal reason for the record retention requirement. Without such a requirement, the investigations and special studies envisioned in § 171.21 would be very difficult, if not impossible, to implement. This requirement will also aid in the verification of the accuracy of the reports submitted to RSPA, thus demonstrating that the requirement is not only useful, but necessary.

Finally, while the requirement does result in a duplication of information, this duplication has the result of increasing the availability and accessibility of information. It does not duplicate efforts to obtain information.

As proposed in the NPRM, a copy of each incident report was to be retained at the carrier's principal place of business. However, as pointed out by the ATA, under 49 CFR 394.13, motor carriers may maintain their accident registers at regional or terminal offices, upon written request to, and with the approval of, Director, Regional Motor Carrier Safety, FHWA. At the urging of the ATA, RSPA has modified the requirement that a copy of the incident report form be retained at the carrier's principal place of business to include "other places as authorized and approved in writing by an agency of the Department of Transportation."

Additional Public Comments

In response to the NPRM, RSPA also received a number of comments on issues which, although they concern RSPA's Hazardous Materials Information System (HMIS), were either fully discussed and resolved in the preamble to the NPRM or were not the subject of any particular proposed amendments in the NPRM. Although it is not obligated to respond to such comments, RSPA believes that the acknowledgment and a short discussion of these comments are worthwhile.

The Air Transport Association of America commented that the NPRM included no proposal to exempt air carriers from the current requirement under paragraphs (c) and (d) of § 171.16 to report a hazardous material incident involving a consumer commodity; a battery, electric storage, wet, filled with acid or alkali; or paint and paint-related material when shipped in packagings of five gallons or less. This commenter could find no justification that supports the "continued requirements to report incidents that occur aboard aircraft which under all other circumstances