

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration**

49 CFR Parts 106, 107, 108, 110, 121, 171, 173, 178, and 180

[Docket No. FS-1; Notice No. 93-13]

RIN 2137-AC00

Safeguarding Food From Contamination During Transportation

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: RSPA is proposing regulations addressing the safe transportation of food products in highway and rail transportation. This action is required by the Sanitary Food Transportation Act of 1990 (SFTA). The intended effect of this rulemaking is to increase the level of safety associated with the transportation of food products. This proposal would restrict a cargo tank, tank car, or portable tank to the carriage of either food products or non-food products. RSPA has not identified any nonfood products that are acceptable to be carried in a tank vehicle that carries food products and, therefore, is not proposing an "acceptable nonfood product list." For other motor and rail vehicles, the proposal would forbid the transportation of food products in the same vehicle with poisons, infectious substances, hazardous wastes, or solid wastes (i.e., "unacceptable nonfood products"). However, such vehicles would be allowed to carry unacceptable nonfood products before or after the carriage of food products provided that the vehicle is free of any contaminating residues. The proposal would require any motor vehicle or rail vehicle that has transported unpackaged friable asbestos to be dedicated to the transportation of asbestos and refuse. These Food Safety Regulations (FSR) would not apply to: The transportation of products in farm vehicles, considered implements of husbandry, operated by a private carrier exclusively for agricultural purposes; the offering or accepting for transportation of cardboard, pallets, beverage containers, and other food packaging materials; or the transportation of food products which are packaged in two fully enclosed packagings.

DATES: *Comments.* Comments must be received on or before October 18, 1993.

Public Hearings. Public hearings will be held on (1) June 29, 1993, from 9:30

a.m. till 5 p.m. in Washington DC; and on (2) September 13 and 14 1993, from 2 p.m. till 5 p.m. on September 13, 1993, and from 9 a.m. till 5 p.m. on September 14, 1993, in Chicago, IL. Hearings may conclude before 5 p.m. and the second day of the hearing (September 14, 1993) may be cancelled if all persons wishing to give oral comments have been heard.

ADDRESSES: *Comments.* Copies of SFTA may be obtained from the Superintendent of Documents, Government Printing Office, Washington, DC 20402-9371 (202) 275-2091. Comments to this NPRM should be addressed to the Dockets Unit, Research and Special Programs Administration, U.S. Department of Transportation, Washington DC 20590-0001. Comments should identify the docket and be submitted, if possible, in five copies. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed stamped postcard showing the docket number (i.e., Docket FS-1). The Dockets Unit is located in room 8421 of the Nassif Building, 400 Seventh Street, SW., Washington DC 20590-0001. Telephone: (202) 366-5046. Public dockets may be reviewed between the hours of 8:30 a.m. to 5 p.m., Monday through Friday.

Public Hearings. The public hearings will be held in the following locations: (1) June 29, 1993, at the Federal Aviation Administration's Auditorium, 3rd Floor, 800 Independence Avenue SW., Washington DC 20591; (2) September 13 and 14, at the Federal Aviation Administration Building, 2300 East Devon Ave., room 166-170, Des Plaines, Illinois, 60018.

Any person wishing to present an oral statement at the public hearing should notify John A. Gale, by telephone or in writing, at least two working days prior to the public hearing. Each request must identify the speaker; organization represented, if any; daytime telephone number; and the anticipated length of the presentation, not to exceed 10 minutes. Written text of the oral statement should be presented to the hearing officer prior to the oral presentation.

FOR FURTHER INFORMATION CONTACT: Edmund J. Richards, (202) 366-0656, Interagency Coordinator for Hazardous Materials Safety, or John A. Gale, Office of Hazardous Materials Standards (202) 366-8553, RSPA, U.S. Department of Transportation, 400 Seventh Street SW., Washington DC 20590-0001.

SUPPLEMENTARY INFORMATION:**I. Background**

On November 3, 1990, the President signed the "Sanitary Food Transportation Act of 1990" (SFTA; 49 App. U.S.C. 2803-2812), which requires the Secretary of Transportation (Secretary) to promulgate regulations to promote the safe transportation of food products. SFTA was enacted in response to Congressional findings that: (1) Americans are entitled to receive food and other consumer products that are not made unsafe as a result of certain transportation practices; (2) the American public is threatened by the transportation of products potentially harmful to consumers in motor vehicles and rail vehicles that are used to transport food and other consumer products; and (3) the risks posed by such transportation practices are unnecessary, and such practices must be terminated. Congress expressed concern relative to practices including the transportation of wastes or potentially harmful nonfood products in the same vehicles that carry food, food additives, drugs, devices, and cosmetics, as defined in the Federal Food, Drug, and Cosmetic Act (hereinafter referred to collectively as "food products"), and the backhauling of chemicals or other potentially harmful nonfood products in cargo tank motor vehicles, rail tank cars, and tank trucks that also haul food products.

On February 20, 1991, DOT published a final rule in the *Federal Register* (56 FR 6810) which delegated the authority to issue the regulations to be promulgated under SFTA (i.e., sections 4, 5, 6, 7, and 8) to the Administrator of RSPA. In addition, the Federal Highway Administration (FHWA) and the Federal Railroad Administration (FRA) were delegated the authority to enforce, in their respective modes of transportation, SFTA and the regulations issued under SFTA (i.e., sections 9, 10, 11, 12 and 13 of SFTA).

On February 20, 1991, RSPA also published an advance notice of proposed rulemaking (ANPRM) in the *Federal Register* under Docket No. FS-1 (Notice No. 91-1; 56 FR 6934). The purpose of this notice was to solicit public comments on regulatory options concerning SFTA. RSPA received over 125 comments in response to Notice No. 91-1 from a wide range of entities likely to be affected by the requirements of SFTA. The ANPRM included more than 40 questions, but commenters were not limited to responding to those questions. The questions posed in the ANPRM and the comments received in response to the ANPRM concerned (1)

scope; (2) acceptable nonfood products; (3) unacceptable nonfood products; (4) dedicated vehicle products; (5) communication standards; (6) materials of construction for cargo tanks, rail tank cars and tank trucks; (7) minimum insurance or liability requirements; (8) waivers; and (9) other related issues.

In response to the President's January 28, 1992 announcement of a Federal regulatory review, DOT published a notice on February 7, 1992 (57 FR 4744, Docket RR-1) to solicit comments on the Department's regulatory programs. RSPA received several comments to Docket RR-1 concerning the FS-1 ANPRM.

The underlying theme of most of the comments received to the ANPRM and Docket RR-1 was for RSPA to focus on only the specific issues identified in SFTA and not burden the various affected industries with additional, cumbersome, unnecessary, and costly regulations. They also pointed out that there are many policies and procedures already in place that are consistent with the objectives of SFTA and that they should be used as a starting point wherever possible and practicable. In developing this NPRM, RSPA has considered these comments as they affect costs and operational requirements.

This proposal focuses on those areas where contamination can occur if proper precautions (e.g., cleaning, packaging, commodity separation) are not taken and where sufficient guidelines are not available. These precautions are necessary when there is the potential for a residue being left in reusable bulk packagings that could contaminate a load of food products, or have surface contact with food products.

II. Proposal

1. Scope

In accordance with SFTA, the Secretary is to issue regulations with respect to the transportation of food products in "motor vehicles and rail vehicles" which are used to transport either refuse or other nonfood products which are unsafe to the health of humans or animals. In section 5 of SFTA, the Secretary is to issue regulations with respect to the transportation of food products in "tank trucks, rail tank cars, and cargo tanks." In issuing regulations, the Secretary is to consider the extent to which packaging or similar means of protecting and isolating commodities are adequate to minimize or eliminate the potential risks of transporting food products in vehicles used for nonfood products. In addition, section 6(b)(2) of SFTA

provides that the regulations issued under SFTA shall not include cardboard, pallets, beverage containers, and other food packagings, except to the extent that the Secretary determines that the transportation of such items would make food products unsafe.

In the ANPRM, RSPA requested comments on those industry practices that should be excepted from the regulations that are to be promulgated under SFTA. RSPA also asked if the industry-accepted terms of "cargo tank, tank car, and portable tank", as defined in 49 CFR part 171, should be used in lieu of the terms tank trucks, rail tank cars, and cargo tanks.

Many motor carriers of food products which also transport cardboard and other packaging materials, equipment, and supplies used in the manufacture and distribution of food products asserted that two-way utilization of food vehicles promotes the efficient use of equipment and is a key factor in maintaining transportation by highway of food products at reasonable levels. Commenters pointed out that section 6(b)(2) of SFTA states that DOT shall not include cardboard, pallets, beverage containers, and other food packaging as "unacceptable nonfood products," unless DOT specifically determines these products to be unacceptable. One commenter added that shippers with USDA inspectors on site should be granted an exception from any regulations promulgated under SFTA.

One commenter stated that the container leasing industry, including the portion headquartered in the United States, leases to ship lines of every nationality moving in every direction from hundreds of ports throughout the world, without having knowledge of, or control over, what products are transported in the containers while they are in the possession of the ship lines. The commenter stated that the leasing companies have no knowledge of the condition of a container until it is returned to a depot agent of a leasing company somewhere in the world. One commenter recommended that containers used in international transport, tank containers protected by commercial practice, and reefers (refrigerated vehicles) be excepted from SFTA requirements.

Commenters addressing intermodal shipments agreed that there is virtually no way to know the prior use or movements of a container. Some commenters questioned whether the statute intended for freight containers to be covered or just "motor vehicle" and "rail vehicle" (secs. 3(b), 4(a), (c), 5(a), 6(a)). The commenters contended that containers are primarily marine

instruments, although intermodal, and can be carried on a chassis over the road and on a railroad flatcar or special purpose car. These commenters stated that there is no suggestion in the legislation that the container transport industry was within the legislative intent. No reference is made to transportation between the United States and other countries or to marine cargo containers. Accordingly, the commenters recommended that containers used in international transport be excepted.

The majority of commenters addressing truck renting and leasing explained that it is important to recognize that at no time during truck rental and leasing, either long- or short-term, are truck renting and leasing firms actually engaged in the transportation of goods and products. Operation and control of the vehicle always remains in the hands of the lessee or lessor. Therefore, they recommended that the commercial users of rented or leased vehicle be required to comply with SFTA regulations.

The regulations proposed under this NPRM would apply to persons who offer for transportation, except for transportation and transport food products and nonfood products by motor vehicles and railroad freight cars (i.e., transport vehicles). This proposal also applies to persons who offer for transportation, except for transportation, and transport food products and nonfood products in portable tanks, freight containers, bulk packagings, or international commerce that are transported by highway or rail. In addition, this proposal applies to persons who receive food products and nonfood products transported in cargo tanks.

Section 5 of SFTA requires regulation of cargo tanks, tank trucks, and rail tank cars that transport food products. In this NPRM, RSPA is proposing to use the phrase "cargo tank" to encompass both cargo tanks and tank trucks because these two terms are synonymous. In addition, this NPRM proposes to regulate the transportation of food products in portable tanks, freight containers, and other bulk packagings. Such bulk packagings are used to transport large quantities of food products which, if not free from contaminating residues, could make food products unsafe to the health of humans or animals. RSPA believes that food product contamination is as likely in such bulk packagings as it is when food products are transported in cargo tanks or van trailers. In fact, many portable tanks, freight containers, and other bulk packagings can transport

quantities equaling or exceeding those found in cargo tanks, van trailers or railroad freight cars. Therefore, RSPA is proposing to regulate food products that are transported in bulk packagings, freight containers, portable tanks, and in international commerce when such products are transported in the U.S. by highway or rail because of the Secretary's responsibility to ensure the safety of food products in all motor and rail transportation.

RSPA is proposing the following exceptions from the FSR: (1) Farm vehicles that are considered an implement of husbandry, operated by a private motor carrier, exclusively for agricultural purposes. (Because of the nature of such activities and because of their early position in the food processing and distribution chain, they do not pose a danger to the safety of humans and animals. In addition, subjecting farm vehicles to the regulations issued under SFTA, which are to be entitled the Food Safety Regulations (FSR; 49 CFR part 121), would impose a substantial burden on farm operations disproportionate to any benefit likely to be achieved.); (2) Food products packaged in two fully enclosed packagings, one of which is inside the other, except that such packagings may not be transported in vehicles used for dedicated vehicle products. (The integrity of such packagings is sufficient to protect the enclosed food from contamination during transportation and is consistent with the authority granted to the Secretary in section 4(c)(1) regarding decisions involving the adequacy of packaging standards.); and (3) Cardboard, pallets, crates, beverage containers, and other food packaging materials used in the transportation of food products. (Under normal transportation conditions such materials do not present a contamination threat to food products during transportation.).

Excepting food products packed in two fully enclosed packagings is consistent with RSPA's objective in minimizing the burden on the food industry while assuring our Nation's food supply. RSPA believes that several issues remain to be resolved on the topic of "double packed" foods and is, therefore, asking the following questions:

- (1) Should a mesh bag be considered a fully enclosed packaging?
- (2) Should a cardboard box or shrink wrap that has small openings on its top or sides be considered a fully enclosed packaging?
- (3) Should the outer packaging be subjected to a performance standard?

2. Acceptable Nonfood Products/Tank Vehicles

Section 5 of SFTA prohibits the transportation of food products in cargo tanks, rail tank cars, and tank trucks ("tank vehicles") that are used to transport nonfood products that would make food products unsafe to the health of humans or animals. The Secretary is required to publish a list of acceptable nonfood products that may be transported in tank vehicles that are suitable for the carriage of food products. Section 3 of SFTA defines "nonfood product" as any material, substance or product including refuse and solid waste, as such term is defined in the Solid Waste Disposal Act, that is not a food product.

Many commenters expressed concern about allowing food grade tank vehicles to carry any nonfood products. Some commenters expressed the opinion that tank vehicles used to carry food products should be dedicated to that purpose. One person stated that even a "DOT approved nonfood product" shipped in a food grade tank vehicle could result in adulteration of the food shipment. Another commenter stated that the list of acceptable nonfood products should be kept at a minimum and only those nonfood products which can be absolutely guaranteed not to contaminate food products should be included on the list. One commenter did suggest that food products should be allowed to be transported in tank vehicles that were used to carry detergents, soaps, sanitizers, alkalies, and acids commonly used in the food industry. Other products that could be moved with food products were reported to be substances described in the Food and Drug Administration (FDA) Food Additive Rules; the U.S. Department of Agriculture (USDA) approved list of substances of meat and poultry plants; and the International Codex Alimentarius.

Food products are at their greatest risks in transportation when placed in a tank vehicle that contains a residue from its previous load. Although this risk is compounded when the previous load was a nonfood product, even tank vehicles that are dedicated to food product service can pose a serious contamination threat if not properly cleaned. This risk arises from the fact that when placed in a tank vehicle, large volumes of food product are placed in direct contact with potentially contaminating residues. This risk is offset, however, by the fact that the food industry—shippers, carriers and consignees—generally does not allow its tank vehicles to be used for nonfood

products. Although food product safety is an important objective to food manufacturers, for product integrity and quality control purposes (e.g., flavor and texture), most companies have specific policies and procedures which require tank vehicles to be dedicated to a specific type of food product service and to be cleaned under very specific guidelines.

RSPA has determined that there are no nonfood products that are acceptable to be carried in a tank vehicle that carries food products and is, therefore, not proposing an "acceptable nonfood product list." There are numerous factors that must be considered in order to allow a nonfood product to be carried in a food tank vehicle, such as—the type of nonfood product, the type of food product to be carried, the type of tank vehicle and its materials of construction, and the cleaning procedure. However, RSPA is requesting further comments regarding which, if any, nonfood products should be allowed in food tanks, with appropriate rationale, and the conditions applicable to such transport.

3. Unacceptable Nonfood Products/Other Vehicles

Section 6 of SFTA prohibits the transportation of food products in motor vehicles and rail vehicles, other than tank vehicles, that are used to transport unacceptable nonfood products. The Secretary is required to publish a list of unacceptable nonfood products that may not be transported in vehicles used to transport food products. In the ANPRM, RSPA requested comments on what products should be placed on the "list of unacceptable nonfood products" and to what extent packaging removes the threat of contamination from these unacceptable nonfood products.

Those products that were described by commenters as being unacceptable to be transported in the same vehicle with food products were poisons, irritating substances, etiologic agents, radioactive materials, and certain miscellaneous commodities such as green salted hides, fish meal, or fish scraps. In addition, almost all commenters included some form of "solid waste" in this final list. RSPA received many comments on the ability of packaging to minimize the threat of food contamination. One commenter wrote " * * * the entire issue calls for a reasonable approach which recognizes the significant role that packaging plays. If the packaging is adequate and the integrity of the commodities are not compromised, then there is no problem in moving a load of packaged food items with packaged nonfood items that are overpacked or

double-packed." Other commenters thought that hazardous materials that are packaged in accordance with the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) are packaged well enough to travel in the same vehicles with food products, whereas some felt that certain hazardous materials, i.e., poisons in Packing Group I, packaged or not, should not travel with foods. A number of commenters see the HMR packaging requirements as being essentially leakproof, and see possible separation and isolation of the cargoes to be the only possible necessity. In contrast, one commenter noted that "no type of packaging can totally prevent leakage of the contents." Several commenters indicated that no hazardous material should be allowed to travel with foods. From another standpoint, a few commenters looked at the integrity of packagings for food products as being adequate enough to allow food products to be carried "in almost any trailer regardless of what it has carried and still be safe."

Many commenters stated that the following products should be allowed to be transported with food products: Crushed or broken cans and bottles, cardboard and other food packagings, pallets, truck cleaning products, out-of-date foods, dented cans, milk cases, lubricants, fertilizers, raw materials for food processing, product returns, plastics, lumber, and small tanks of compressed gases (oxygen and acetylene) used for emergency welding by truckers.

The HMR currently forbid the transportation of food products with materials bearing a POISON label. However, with the enactment of SFTA, there are additional hazardous materials and other products, packaged or unpackaged, that should never be transported with food products because of the threat they present to food products. As a result, RSPA is proposing to forbid the transport of food products in the same transport vehicle with materials meeting the definition of: (1) Division 6.1, Packing Group I and II (poisonous materials); (2) Division 6.2 materials (infectious substances); (3) Hazardous waste; or (4) Solid waste. However, a transport vehicle would be allowed to transport food products before and after the carriage of these materials, provided the vehicle is free from any contaminating residues. If a transport vehicle does contain a residue from one of these materials or from any material that could contaminate (i.e., corrupt, debase, or make impure) the food product to be loaded therein, as a result of their admixture, then the transport vehicle must be appropriately

cleaned prior to loading the food products. RSPA is not proposing any specific cleaning standard but is instead providing a performance-based safety requirement, thereby allowing industry to develop appropriate cleaning standards for the numerous types of materials and transport vehicles that are transported and used in our Nation's transportation system. RSPA is applying the responsibility of assuring such cleaning on both the shipper and carrier thereby establishing a partnership between these two parties to assure the cleanliness of the transport vehicle. However, in the event of a violation of the regulations due consideration will be given to any person who unknowingly violates the regulations (i.e., a carrier who accepts for transportation a sealed transport vehicle). Consistent with Section 3 of SFTA, RSPA is proposing to use the definition of "solid waste" as defined in the Solid Waste Disposal Act, except that RSPA is including "domestic sewage" in the definition. There are potential safety problems that could be experienced if food products were transported in the same vehicle with "domestic sewage."

D. Dedicated Vehicles Products

Section 7 of SFTA requires that the Secretary issue regulations prohibiting any person from using a motor vehicle or rail vehicle for the transportation of asbestos, in forms or quantities determined by the Secretary to be necessary, or of products that present an extreme danger to human or animal health despite any decontamination, removal, disposal, packaging or other isolation procedures, unless such vehicle is dedicated to transportation of asbestos, such extremely dangerous products, or refuse. In the ANPRM, comments were requested as to the materials that should be included on the "List of Dedicated Vehicle Products" and in what quantity and form asbestos should be regulated.

Very few commenters recommended that any products be added to the dedicated vehicle products list. However, one commenter did state that some 1,600 materials in the HMR should be included, e.g., white phosphorus, highly flammable butane, liquid chlorine, sodium hydroxide, flammable solids that are dangerous when wet, and insecticides.

Unpackaged, friable asbestos was identified by many commenters as extremely dangerous. Also, asbestos containing wastes, and water-soaked asbestos waste materials were mentioned as needing extremely good packaging to be safe (air tight and leak-

proof). However, most commenters agreed that vehicles carrying packaged asbestos, could still safely carry other materials, e.g., rock, sand, and the like. One commenter stressed that commercial asbestos fibers packaged in accordance with the HMR should not be required to be transported in dedicated vehicles.

RSPA has not identified any material that presents such a hazard that, despite any decontamination, removal, or packaging, should restrict that vehicle from carrying any product except asbestos, other dedicated vehicle products, or refuse. RSPA is proposing to require that asbestos, as mandated by SFTA, be carried in vehicles that are dedicated to the transport of asbestos and refuse. However, RSPA is limiting this proposal to those forms of asbestos that meet the definition of a hazardous substance in 49 CFR 171.8 and are carried in bulk in a transport vehicle (i.e., unpackaged). Consistent with section 3 of SFTA, RSPA has defined "refuse" as any discarded material to be transported to or disposed of in a landfill or incinerator, or required by law to be transported to or disposed of in a landfill or incinerator.

E. Communication Standards

Section 4 of SFTA requires, for motor and rail vehicles, the issuance of regulations for appropriate recordkeeping, identification, marking, certification or other means of verifying compliance with the regulations to be issued under SFTA. Section 5 of SFTA specifies that a tank truck or a cargo tank may not be used to transport food products or acceptable nonfood products unless the tank truck or cargo tank is identified by a permanent marking. Section 5 also requires persons who arrange for the use of a tank truck or a cargo tank to transport food or nonfood products, to disclose to the motor carrier if the product being transported is to be used as, or in the preparation of, a food or food additive, or as a nonfood product listed on the "acceptable nonfood product list."

In the ANPRM, RSPA requested comments on the types of recordkeeping, identification, marking, certification or other means of verification currently in place that could be used to promote compliance with the regulations issued under SFTA. Most of the commenters claimed that there is no comprehensive system in place to ensure the safe transportation of food products, but asserted that current industry practices generally provide adequate means of preventing adulteration of food products. Types of verification suggested by commenters

included verification of prior cleaning, identification of prior loads, basic construction guidelines for containers in direct contact with food, and standardized markings for cargo tanks.

The majority of commenters discussed whether a "cradle to grave" (grower to retailer) system should be developed to track the transportation of food products, and strongly discouraged the development of such a system. The commenters' responses ranged from "most companies presently maintain such records to be in a position to track and account for any shipment," to such a system being considered as "unreasonable, costly, and burdensome."

Commenters discussed different types of communication standards and whether the standards should apply to offerors, carriers, consignees, users and owners of vehicles subject to SFTA. The majority agreed that all communication standards should be minimal and standardized throughout the system.

Several commenters discussed the need for consistent methods of permanently marking vehicles (i.e., multi-purpose trucks could be marked "Food," "Food Products," "Nonfood," or "Nonfood products") near loading/unloading fittings and connections to identify a vehicle's acceptability or unacceptability for food products. One commenter supported identification requirements for all bulk shipments. Another commenter stated that it was aware that certain tank vehicles are currently marked "Food Grade" and recommended that only vehicles dedicated to food grade products be marked. One commenter stated that the marking requirement in section 5(c)(1) of SFTA only applies to cargo tanks. The commenter went on to state that since tank cars are owned by private parties who carefully control what moves in their tank cars, permanent markings are not necessary.

Several commenters recommended that a carrier notify an offeror of the acceptability of the vehicle. For example, one commenter wrote "that a certificate or letter of guarantee from the carrier that the vehicle complies with SFTA, the last three bills of lading, a wash certificate, and permanent marking of the vehicle should be made available where requested or required." Another commenter stated that certification by a carrier would effectively communicate acceptability of a vehicle for food products.

Many commenters stated that a written certification on the bill of lading regarding whether the load is a food product or not would be sufficient. Some persons suggested that both the

carrier and the offeror should certify to the consignee that the food product will be transported in accordance with SFTA. They stated that this method would equitably distribute liability to the appropriate parties. Many commenters believed that communication requirements should be kept to a minimum. One commenter stated that there is no reason to drastically change current communication standards as adequate safeguards are in place to promote compliance with the regulations to be promulgated under SFTA. Other commenters pointed out that tank cars are owned and operated by shippers and lessors who specify their use in the functional equivalent of dedicated service. The commenters went on to state that there are also car tracking and car assignment/car grading systems and policies in place that provide effective communication to both shippers and carriers and restrict the possibility of tank cars switching from food to nonfood product service.

Based on the comments received, RSPA does not find that elaborate communication requirements are necessary to comply with the other requirements proposed under this NPRM and are not justified considering the minimal benefit that may be derived. With respect to shipping paper disclosures, RSPA is proposing to limit disclosures to those shippers who offer food products for highway carriage in a cargo tank, as specified in SFTA. RSPA agrees with the many commenters to the ANPRM who stated that other communication requirements such as "cradle-to-grave" manifesting or a daily log would provide a limited benefit with enormous costs. However, RSPA requests comments on the need to establish additional shipping paper disclosures/certifications to assure compliance with the regulations to be promulgated under SFTA.

In accordance with section 5(c)(1) of SFTA, RSPA is proposing to require cargo tanks to be permanently marked Food Grade or with a recognized food or food type name (e.g., "milk," "sugar"). Consistent with the requirement in section 5(c)(3) of SFTA, RSPA is also proposing to forbid consignees from (1) accepting food products in a cargo tank unless it is so marked; or (2) accepting nonfood products, except spoiled food products transported for disposal, in a cargo tank marked for food grade service. However, RSPA is requesting specific comments on the possible ramifications of prohibiting consignees from accepting food or nonfood products in unauthorized tank vehicles.

Although certification by the carrier that a vehicle is clean is not a specific requirement of SFTA, the question was raised by RSPA in the ANPRM because it does represent an option for addressing the cleanliness of the vehicle when transporting food, especially if backhaul operations are involved. Several commenters supported some form of certification by the carrier, but there were also many commenters who were concerned about the additional costs involved as well as the fact that many companies have an inspection or "checkout" procedure to ensure the cleanliness of the vehicle prior to loading. Since the present system appears to be working well, RSPA has decided not to propose a written certification requirement at this time.

6. Materials of Construction for Cargo Tanks, Rail Tank Cars and Tank Trucks

Section 4 of SFTA requires the issuance of regulations for appropriate materials of construction for cargo tanks, rail tank cars and tank trucks, and their accessory equipment, that transport food products. In the ANPRM, RSPA requested comments as to the existence of any industry standards for the construction of food grade tank vehicles.

Commenters recommended that existing industry standards for the construction of cargo tanks, rail tank cars, and tank trucks be utilized for the purposes of SFTA. The standards already in place include the "3A Sanitary Standards" for milk containers, the International Maritime Organization's container specifications, the specifications in the United Nations Recommendations for the Transport of Dangerous Goods, and the container specifications in 49 CFR parts 178-180. Most commenters indicated that existing standards for materials and methods of construction are adequate and that little or no modification to existing standards is necessary.

Some commenters wrote that new or modified requirements for materials of construction would have little or no impact on current carriers since most of them are already utilizing food grade containers. If RSPA decides to impose new materials of construction requirements, most of the commenters suggested a grandfather clause be granted to allow continued use of existing trailers to reduce the costs associated with this change.

RSPA is proposing that cargo tanks, tank cars, and portable tanks that transport food (including their accessory equipment) be constructed so that they are compatible with, and will not contaminate the food products carried.

There are many current standards and industry practices in use regarding construction materials that provide adequate protection of food products in cargo tanks, tank trucks, and rail tank cars. Specifying new materials of construction standards would have little or no impact in improving safety over current practices, and shippers, carriers, and lessors should have the flexibility to choose their own combinations of construction materials and food products as long as the safety of the public is not jeopardized. Therefore, RSPA is proposing a performance standard to require that tank vehicles have food contact surfaces constructed of materials that will not contaminate the food products. Suitable food contact materials would be those approved by the FDA, in accordance with the Food, Drug and Cosmetic Act, or by the USDA under the Meat Inspection Act or the Poultry Inspection Act.

7. Minimum Insurance and Liability Requirements

Section 4 of SFTA states that the Secretary may establish provisions for minimum levels of financial responsibility. In the ANPRM, RSPA requested comments concerning whether the current insurance requirements of the Federal government are adequate for the risks addressed by SFTA and, if not, at what level should the financial responsibility requirements be set.

Overall, the majority of commenters agreed that the minimum levels of financial responsibility currently in effect for motor carriers (49 CFR part 387) are adequate for the risks addressed by SFTA. On the other hand, some commenters urged RSPA to increase the current minimum levels. Moreover, commenters expressed the opinion that all modes should be required to have financial responsibility at least equal to that of motor carriers. Several commenters were against the imposition of financial responsibility requirements on rail carriers. Commenters stated that the costs to obtain these levels of financial responsibility are dependent upon functions of risk, location, deductibles, and other variables.

The comments received concerning the kinds and levels of financial responsibility for offerors and freight forwarders potentially subject to SFTA were varied. A few commenters stated that insurance or other liability requirements, like that of motor carriers, should not be imposed on freight forwarders. Commenters also argued that shippers, brokers, and freight forwarders should bear a greater portion of the financial responsibility. There

were comments recommending that all entities subject to SFTA requirements should have the same level of financial responsibility.

Many commenters claimed that carriers, if not self-insured, maintain some form of product liability insurance which would meet or exceed the reasonable requirements for protecting food from contamination during transportation. Therefore, their view is that there is no need for additional coverage. However, one commenter argued that many small carriers and brokers do not have adequate financial responsibility levels. Another commenter, supporting the idea of self-insurance, stated that most first class railroads are self-insured up to \$5 million, and that short-line railroads carry liability insurance.

RSPA is not proposing additional insurance requirements. In order to protect themselves from the inherent risks in today's market place, companies have secured significant levels of financial liability insurance. RSPA believes, as was stated by a majority of the commenters, that the current insurance requirements and company policies are adequate for the risks addressed by SFTA.

8. Waivers

Section 8 of SFTA authorizes the Secretary to waive, in whole or in part, application of SFTA if the Secretary determines that such waiver would not result in the unsafe transportation of food products. The waiver authority provides the Secretary the flexibility to adjust a broad rule to the myriad of special cases and accepted safe practices that already exist in the food industry. Waivers are meant to encourage innovation in better, more efficient ways to transport food products safely. In order to be granted a waiver, a petitioner must propose substitute measures that will provide the same level of safety as the regulations. Because section 8 of SFTA requires that any such waiver be published in the Federal Register and the fact that in 49 CFR part 107 RSPA has already established procedures for the issuing of exemptions from the HMR, RSPA is proposing to establish the waiver program in the same manner that the current exemption program is handled under the HMR for hazardous materials.

9. Other Related Issues

a. Incident Reporting

Section 4 of SFTA requires the Secretary to issue regulations with respect to the transportation of food products in motor vehicles and rail

vehicles which are used to transport nonfood products that could make food products unsafe to the health of humans or animals as a result of such transportation. In the ANPRM, RSPA requested comments on the need for an incident reporting system in order to evaluate the extent of the problem, the effectiveness of the regulatory program, and the need for any legislative or regulatory changes.

Approximately half of the commenters advocated the development of an incident reporting system to evaluate the extent of the perceived problem, effectiveness of the regulatory program, and the need for any changes. The other half opposed the development of any incident reporting system. Some of these opponents argued that incident reporting would be too costly and cumbersome for the small number of incidents that occur.

RSPA is proposing an incident report form that would be tailored to special informational needs such as the type of food product contaminated and the source of contamination. Some form of written incident reporting is necessary to develop a data base to properly manage the program, monitor compliance, determine deficiencies in the regulations, and identify those persons and practices that place our Nation's food supply at risk. Costs to the industry should be minimal. RSPA proposes to require that a carrier notify RSPA if that carrier has specific knowledge that its load of food products was contaminated during transportation. In addition, any person offering a food product who rejects a carrier's transport vehicle because of its potential to contaminate the food products would be required to report to RSPA. Furthermore, any person that receives a load of food or nonfood products in a cargo tank that is not authorized to carry food or nonfood products would be required to report such a receipt to RSPA.

A copy of the proposed incident report is published as an attachment to this notice. Part (A) of the form would require the date of the incident and part (B) would request the address where the incident occurred. Part (C) of the form would require the address, and a point of contact, for each party involved. Part (D) would require information on the packaging of the food product involved, if applicable, such as the type of packaging (e.g., cargo tank, metal drum, fiberboard box) and the capacity of the packaging. Part (E) of the form would require information on the food product involved, if applicable, such as the type of food product and the quantity involved. In Part (F), RSPA is requesting

information on the contaminant, if applicable. The type of contaminant and its packaging, and the quantity involved should be noted. Part (G) of the form is requesting information on those vehicles, food products or nonfood products that are rejected. RSPA is requesting information for the reason for the rejection, the last load transported in the transport vehicle, and if the transport vehicle had been cleaned subsequent to its last load. In Part (H) of the form, RSPA is requesting information as to the monetary cost of the incident. In Part (I) of the form, RSPA is requesting a description of the incident. This information should provide a clear understanding to RSPA of the incident and the reason for the contamination, for the rejection of the transport vehicle, or for the rejection of the product. Part (J) of the form is to be signed by the person filling out the form, including their company name and address.

b. Cleaning Standards

In the ANPRM, RSPA requested comments on what, if any, cleaning standard should be required for tank vehicles and other transport vehicles prior to the carriage of food products. Generally, commenters recommended cleaning procedures for decontaminating vehicles between loads. Suggestions included water and/or hot pressure wash of the interior and exterior of the vehicle with careful inspection to ensure it is clean for food service. Transporters of sweeteners and syrups stated that they have dedicated vehicles and do not use detergents or sanitizers to clean their tankers. Instead, they use hot pressure wash and suggest a wash ticket system. One commenter stated that detergent and hot water wash is adequate for food products, but an additional steam cleaning is required for nonfood products.

The majority of commenters suggested that the previous cargo carried should determine the type of cleaning necessary to prepare for the next food product. A few commenters indicated that a laboratory analysis to detect unacceptable residues was desirable and feasible, but most commenters indicated an "organoleptically" conducted inspection was most practical. This type of inspection requires the inspector to use senses of sight, smell, and touch to check for films, residues, loose objects, or other unsafe conditions that might lead to food contamination. Other factors influencing the type of cleaning necessary were suggested to be: the structure of a tank, how long a vehicle has been out of service, and the extent of contamination.

One commenter suggested that performance rather than procedural cleaning standards should be emphasized: "Emphasize inspection of cleaning results by the offeror of the food and a system of certification for tank/container wash facilities." Another commenter suggested that sanitization be required prior to transporting food. Several commenters wrote that effective washing of the inside unit with 180 °F water for a minimum of 30 minutes for rail and 15 minutes for truck should prepare a tank to carry food products. One commenter referred to the House of Representatives Report on SFTA (H.R. No. 390, Pt. 2, 101st Cong., 2d Sess. (1990)) which stated that a washout is adequate to prevent contamination. One commenter included an example of cleaning used by the corn wet milling and soft drink industries. These methods are designed for use with loads of sugars and syrups. Cleaning is conducted between each load or at least every 24 hours.

Two other commenters suggested that cleaning sites and/or equipment should be dedicated to food service because tank rinse water could be recirculated and re-utilized between a contaminating cargo and a food cargo. Commenters mentioned that some cleaning fluids might themselves taint foods in a food grade vehicle.

Because tank vehicles that transport food products would not be allowed to transport nonfood products RSPA is not proposing a cleaning standard for tank vehicles in such service. However, for the cleaning of tank vehicles in food product service and other transport vehicles that carry food product (e.g., reefers and rail box cars) RSPA is not proposing a specific cleaning standard but is requiring that vehicles be free from potential contaminating residues. Faced with tens of thousands of nonfood and food products and a myriad of vehicle types, materials of construction, and cleaning procedures, RSPA is not proposing a single cleaning/decontamination procedure. RSPA believes that the individual companies are best suited to determine the appropriate cleaning method for the removal of harmful residues.

c. Training and Enforcement

Like other rules issued by the Department, these regulations will be enforced in a variety of ways. The NPRM proposes an incident reporting system that should provide important information upon which to base enforcement activities. In some cases, the highway vehicles and railroad crews will be carrying documentation that will allow roadside or railyard inspection

and enforcement. In addition, we anticipate that members of the public will voluntarily alert federal and state inspectors to potential violations.

Under SFTA, Motor Carrier Safety Assistance Program (MCSAP) agencies may enforce the provisions of the Act, with the DOT providing training to the State enforcement agencies. In addition, enforcement of SFTA is a reimbursable MCSAP expense (49 CFR 350.79(c)(4)).

Request for Comments on State Enforcement and Training Requirements

Section 8(c) of SFTA requires the DOT "to develop and carry out a training program for inspectors to conduct vigorous enforcement [of the statute] * * *". Based on this requirement, comments are requested on the following questions:

1. In order for the States to adequately enforce SFTA requirements, is additional documentation necessary (shipping paper, record retention requirements, etc.)?

2. Comments are requested on the methods and procedures the States would utilize to enforce SFTA requirements during reviews and roadside inspection if additional documentation is not required.

3. What kind of training would be required in order for inspectors to recognize, as required by section 8(c) of SFTA, "adulteration problems associated with the transportation of food, food additives, drugs, devices, and cosmetics * * *"?

Request for Comments on Enforcement Policy

It should be noted that although document tracking requirements are not being proposed in this rulemaking, the individual modal administrations may propose such paperwork requirements to the RSPA at a later time.

1. Commenters to the ANPRM stated that both the carrier and the shipper (offeror) of the food product should certify to the consignee that the products will be transported in accordance with SFTA. Accordingly, should additional shipping paper disclosures or certifications be required under SFTA?

2. If some form of certification is required, should these requirements adopt verbatim or closely parallel the current certification requirements specified in § 172.204 of the Hazardous Materials Regulations?

Consideration will be given to imposing additional recordkeeping requirements in a future rulemaking, if comments received to this proposal or future enforcement activity indicate that

additional documentation is required to enable the FHWA to adequately track as well as enforce SFTA requirements. If such documentation is proposed, a document may be required to be maintained by the shipper and at the carrier's principal place of business. Such a document may be required to accompany the vehicle while the food product is being transported. The document would contain, at a minimum, the signatures of both the carrier and shipper representatives, the cargo tank manufacturer's name, serial number, and unit number (if applicable), date, time, and name and address where the vehicle was last sanitized or cleaned, and the technical name of the product or the proper shipping name of the material that the vehicle last contained. The document maintained on the vehicle may be required to be on the vehicle until a non-edible product or hazardous materials are transported. Such documentation would assist the MCSAP agencies during enforcement of SFTA requirements during a roadside inspection.

III. Review by Section

Subchapter A's title would be revised to identify that it covers food safety, hazardous materials transportation, and pipeline safety.

Part 106 would be moved from subchapter B into subchapter A. The rulemaking procedures that are currently found in part 106 would also apply to the Food Safety Regulations.

Appendix A of Part 106 would be revised to delegate certain rulemaking procedures under SFTA to the Associate Administrator for Hazardous Materials Safety.

Part 107 would be moved from subchapter B to subchapter A. In addition, part 107 would be editorially revised to correctly reference the changed subchapters.

A new *Part 108—Food Safety Program Procedures* would be added with the following sections:

Subpart A—General Requirements

Section 108.1 Purpose and scope. This section would state the purpose and scope of this new part. This part would specify the procedures related to waivers, and OMB information collection requirements for the Food Safety Regulations (FSR; 49 CFR part 121).

Section 108.3 Definitions. This section would define certain terms that would be used in part 108.

Section 108.5 Request for confidential treatment. This section would specify the conditions under

which material will be treated as confidential.

Subpart B—Waivers

Section 108.101 Purpose and scope. This section would prescribe the procedure for applying for a waiver from the FSR.

Section 108.103 Application for waiver. This section would prescribe the specific information that RSPA will need in order to process a waiver application. Information needed will include the regulations from which relief is being sought and how the proposed variation will be as safe as the regulations in the FSR.

Section 108.105 Application for renewal. This section would prescribe the condition for renewing a waiver. RSPA proposes to have a five year expiration date for waivers. In order that renewals are processed in a timely fashion, RSPA proposes to require waiver renewals to be submitted 60 days before the expiration date of the waiver.

Section 108.107 Administrative review. Upon receipt of a waiver request, RSPA would review it and identify to the requesting party if the request is lacking any supporting information. If the request is complete, RSPA will begin processing the waiver request.

Section 108.109 Processing of application. Each complete application for a waiver would be published in the Federal Register for public comment. In addition, this section would prescribe conditions under which RSPA could deny a waiver request.

Section 108.111 Party to a waiver. This section proposes that if a waiver would also be beneficial to a company other than the original applicant, other companies could become party to the already existing waiver.

Section 108.119 Amendment, suspension, termination, and referral for enforcement action. Every waiver will be granted for a maximum of five years. However, if RSPA has just cause, it will revoke any waiver prior to the expiration date of the waiver.

Section 108.121 Petition for reconsideration. If a person believes that a waiver has been denied or revoked for unjust reasons, that person may petition the Associate Administrator of Hazardous Materials Safety in accordance with the provisions of this section.

Section 108.123 Availability for public inspection. Except for materials determined to be treated in a confidential manner, all information related to a waiver application is available for public inspection in RSPA's Dockets room.

Subchapter B—Food Safety Regulations

Part 121—General Information, Regulations, Communication Standards, and Definitions

Subpart A—General Information, Regulations, Communication Standards and Definitions

Section 121.1 Purpose and scope. This section would prescribe the purpose and scope of Subchapter B. The purpose of these regulations will be to ensure the safe transportation of food products. The regulations will cover the transportation of food products, and of materials which pose a hazard to the safety of food products (e.g., solid waste and asbestos), by railroad freight car and motor vehicle in commerce.

In response to a comment made by the USDA, RSPA is proposing to except from the FSR those farm vehicles, that are considered an implement of husbandry, operated by a private motor carrier, exclusively for agricultural purposes. USDA stated that subjecting farm vehicles to the FSR would not increase food safety because farmers have a vested interest in maintaining the quality of their products and are in such an early position in the food processing chain as not to pose a danger to human or animal health. This section would also except food products packaged in two fully enclosed packagings, one of which is inside the other, from the FSR, with the exception of the dedicated vehicle requirements. In addition, this section would except from the FSR the offering or acceptance for transportation of cardboard, pallets, beverage containers, and other food packing materials.

Section 121.3 General requirements. This section would specify that no food products may be transported with materials which pose a hazard to the safety of food products (e.g., solid waste and asbestos), by railroad freight car and motor vehicle in commerce. In addition, this section would prescribe that persons subject to the requirements of the FSR instruct each of their officers, agents, and employees having any responsibility for preparing for transportation a material subject to the requirements of this subchapter as to the applicable regulations.

Section 121.5 Definitions. This section would define several terms that would be used in subchapter B. Several of these terms are defined as in SFTA. One term defined in this section that was not defined in SFTA is "person." RSPA is proposing a generally accepted definition of person which is similar to the definition found in the HMTA. However, because Congress did not

expressly mention government entities in the passage of SFTA, RSPA is not proposing to include government entities in the definition of person.

Section 121.11 Incident reporting. This section would require that a carrier notify RSPA if that carrier has specific knowledge that its load of food products was contaminated during transportation. In addition, any person offering a food product who rejects a carrier's transport vehicle from carrying its food products because of the transport vehicle's potential to contaminate the food products would be required to report to RSPA.

Furthermore, any person that receives a load of food or nonfood products in a cargo tank that is not authorized to carry food or nonfood products would be required to report such a receipt to RSPA. All notifications to RSPA would be accomplished by submitting a food safety incident report, a copy of which would be required to be maintained at the person's principal place of business for a period of two years. A copy of the proposed form is published as an attachment to this notice.

Section 121.13 Communication requirements. This section would require that cargo tanks, authorized to transport food products, be permanently marked with the words "Food Grade" or with a recognized food or food type name such as "milk" or "sugar." If the cargo tank is removed from food service, the marking would have to be removed because it would also be a violation of the FSR to transport a nonfood product, except for lawful disposal purposes, in a cargo tank that is marked for food grade use. In addition, except for private carriage, a person offering food products for transportation in a cargo tank must notify the carrier that the materials being offered for transportation are food products. This disclosure can be accomplished by a one-time notification, in writing, to the carrier that both the shipper and the carrier must sign, that covers a specific time period, and that the shipper maintains on file for three months following the last shipment. Otherwise, the shipper would have to provide the carrier a shipping document, at the time of pick-up, that the carrier must maintain in the cab of the cargo tank motor vehicle, stating that the product being offered for transportation is a food product.

This section proposes to require that any person attempting to sell or lease a transport vehicle that has transported a dedicated vehicle product to notify, in writing, potential buyers or lessors, that the transport vehicle is only allowed to carry other dedicated vehicle products and refuse. This section also proposes to

require that carriers notify consignees and consignors when a load of their food product has been contaminated in transportation. This notification must be done as soon as practicable so as to assure that prompt actions are taken to protect the public.

Subpart B—General Requirements for Shippers and Carriers of Food Products

Section 121.101 Food products in cargo tanks, tank cars, and portable tanks. This section would prohibit a person from offering for transportation or transporting a food product in a cargo tank, portable tank, or tank car that previously contained a nonfood product. In addition, this section would require a cargo tank, portable tank, or tank car, authorized to carry a food product, to be cleaned before loading a food product if the residue from the prior load has the potential to contaminate the subsequent load. This would reduce the risk of contamination to food products from the residue of a prior load of food products. Furthermore, this section would forbid a person from accepting a food product in a cargo tank that is not marked "FOOD GRADE" or other equivalent marking. Likewise, a person would be forbidden from accepting a nonfood product in a cargo tank that is marked "FOOD GRADE". The intent of this section is to prohibit those practices that have the potential to contaminate food products and are not otherwise specifically covered by the Food Safety Regulations (FSR; 49 CFR part 121).

Section 121.103 List of unacceptable nonfood products. This section would list those products that have been determined to be unacceptable nonfood products. This list includes materials that meet the definition of Division 6.1, Packing Groups I and II; Division 6.2; or hazardous waste; as these terms are defined in the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180); and solid waste.

Section 121.105 Food products in transport vehicles, freight containers, and bulk packagings other than cargo tanks, tank cars or portable tanks. This section would forbid any person from offering for transportation or transporting a food product in a transport vehicle, freight container or bulk packaging, other than a cargo tank, portable tank, or tank car, unless the vehicle is free from residues that are potentially contaminating to the food product. In addition, this section would forbid any person from offering for transportation or transporting a food product in a transport vehicle, freight container or bulk packaging with a material that is found in the list of

unacceptable nonfood products in § 121.103. This section would also require persons to clean each transport vehicle, freight container or bulk packaging prior to the loading of any food product if it contains a residue of an unacceptable nonfood product or from a prior load that has the potential to contaminate the food product to be loaded.

Section 121.107 List of dedicated vehicle products. This section would list those products that have been determined to be dedicated vehicle products. The only product RSPA has identified as a dedicated vehicle product at this time is asbestos—which was specifically identified in SFTA as a dedicated vehicle product. However, as authorized by SFTA, RSPA is limiting the restriction of transporting asbestos in dedicated vehicles to that asbestos which meets the definition of a hazardous substance in 49 CFR 171.8 and is placed in a transport vehicle without any intermediate forms of containment (i.e., unpackaged).

Section 121.109 Dedicated vehicle products. This section would restrict those transport vehicles that transport a dedicated vehicle product to the carriage of dedicated vehicle products and refuse.

Subchapter C

The HMR, subchapter C of chapter I of title 49, would be revised editorially to replace the words "Subchapter B" with the words "Subchapter A," where appropriate.

IV. Regulatory Analyses and Notices

A. Executive Order 12291 and DOT Regulatory Policies and Procedures

This rule, as proposed, does not meet the criteria specified in section 1(b) of Executive Order 12291 and is, therefore, not a major rule, but is a significant rule under the regulatory procedures of the Department of Transportation [44 FR 11034] because of significant public interest. A regulatory evaluation is available for review in the Docket.

RSPA estimates the potential benefits of this proposal at \$69.4 million annually. Of this total, \$12.7 million is from known sources of contamination (i.e., those directly attributable to contamination that occurred during transportation and were detected before being consumed), and \$56.7 million in undetected contaminated shipments. The cost of the proposal is estimated to be \$5.3 million annually. RSPA seeks comments on the magnitude of these estimates as well as the methodologies used to derive them. One category of benefits, "averted property damage",

accounts for nearly 90 percent of the total estimated benefits, and includes \$6 million in food that spoils as a direct result of contamination during transportation and is detected and thus never consumed, and \$56.7 million in contaminated food that goes undetected and is consumed.

Under most circumstances where the consumer is able to detect contaminated or defective goods, the cost of property damage is likely to be borne by one or more of the following four parties: the producer, the shipper, the carrier, or the retailer. When the property damage is known, a rational retailer, carrier, or consumer would not accept the shipment or would seek recourse against one or more of the parties responsible for the contaminated product. Profit-seeking shippers, carriers, or retailers would find it in their interest to reduce contamination as long as it cost less to do so than the lost value of contaminated shipments. Consequently, in order for the true cost of the proposal (estimated at \$5.3 million) to be less than the known property damage (\$6 million), that the proposal would prevent, at least some shippers, carriers, or retailers would have to be missing opportunities to increase their net earnings.

In addition, consumers are likely to bear a substantial portion of the cost of property damage that falls into the "undetected" category. This may occur as a result of retailers not detecting spoilage before the food is sold or, worse, consumers not detecting it after purchase and not demanding a refund. In the event that the contamination is detected or can be detected by the consumer, the retailer, the carrier, or the shipper has incentives to identify the source of the contamination and seek appropriate compensation. To the extent the "undetected" contamination costs are borne ultimately by the consumer, the incentive to minimize the problem is reduced. RSPA is particularly interested in comments regarding the question of whether sufficient incentives already exist for shippers, carriers, and retailers to reduce property damage when it is cost-effective, and if not, why not? For example, is there reason to believe or evidence to suggest that shippers, carriers, or retailers do not ultimately bear the cost of property damage due to contamination occurring during the transportation process?

B. Executive Order 12612

The proposed rule has been reviewed in accordance with Executive Order 12612 ("Federalism"). Section 12 of SFTA provides that the provisions of the Hazardous Materials Transportation

Act (HMTA; 49 App. U.S.C. 1801 *et seq.*) relating to the relationship of the HMTA to State, political subdivision, or Indian tribe laws, regulations, or other requirements shall apply with respect to the relationship of SFTA to non-Federal laws and regulations that concern a subject covered by SFTA.

The Hazardous Materials Transportation Act contains express preemption provisions (49 App. U.S.C. 1811) that preempt a non-Federal requirement if (1) compliance with both the non-Federal and the Federal requirement is not possible; (2) the non-Federal requirement creates an obstacle to accomplishment of the Federal law or regulations; or (3) it is preempted under section 105(a)(4), concerning certain covered subjects, or section 105(b), concerning highway routing. This proposed rule, if adopted as final, would preempt any State, local, or Indian tribe requirements concerning subjects covered by SFTA and the Federal regulations, as provided by section 12 of SFTA. However, persons subject to this rule would not include State or local governments. RSPA lacks discretion in this area, and has determined that preparation of a federalism assessment is not warranted.

C. Impact on Small Entities

Based on limited information concerning size and nature of entities likely affected by this proposed rule, I certify this proposal will not, if promulgated, have a significant economic impact on a substantial number of small entities under criteria of the Regulatory Flexibility Act because the major impacts of this rule center on the dedication of tank vehicles which are primarily owned and operated by large corporations. This certification is subject to modification as a result of a review of comments received in response to this proposal.

D. Paperwork Reduction Act

The information collection requirements contained in proposed §§ 121.11 and 121.13 are being submitted to the Office of Management and Budget (OMB) for review under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection of information should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC, Attention: Desk Officer for the Department of Transportation. All comments must reference the title for this notice "Safeguarding Food From Contamination During Transportation."

List of Subjects

49 CFR Part 106

Administrative practice and procedure, Foods, Hazardous materials transportation, Pipeline safety.

49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Packaging and containers, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 108

Administrative practice and procedure, Confidential business information, Foods, Reporting and recordkeeping requirements, Transportation.

49 CFR Part 110

Disaster assistance, Education, Emergency preparedness, Grant programs—Environmental protection, Grant programs—Indians, Hazardous materials transportation, Hazardous substances, Indians, Reporting and recordkeeping requirements.

49 CFR Part 121

Foods, labeling, Reporting and recordkeeping requirements, Transportation.

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 178

Hazardous materials transportation, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 180

Hazardous material transportation, Motor carriers, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

In consideration of the foregoing, and under the authority of 49 App. U.S.C. 2804–2807, 49 CFR parts 106, 107, 108, 110, 121, 171, 173, 178, and 180 would be amended as follows:

1. The heading for subchapter A of title 49 subtitle B, chapter I, is revised to read as follows:

SUBCHAPTER A—HAZARDOUS MATERIALS TRANSPORTATION, SANITARY FOOD TRANSPORTATION, AND PIPELINE SAFETY

PART 106—RULEMAKING PROCEDURES

2. The authority citation for part 106 is revised to read as follows:

Authority: 49 App. U.S.C. 11472(h)(1); 49 App. U.S.C. 1672; 49 App. U.S.C. 1803, 1804, 1808; 49 App. U.S.C. 1653, 1657(e); 49 App. U.S.C. 2803; 49 App. U.S.C. 2002.

3. Part 106 is transferred from subchapter B to subchapter A of subtitle B, chapter I of 49 CFR.

4. Appendix A to part 106 is amended by adding paragraph (a)(4) to read as follows:

Appendix A to Part 106

* * * * *

(a) * * *
(4) The Sanitary Food Transportation Act of 1990, 49 App. U.S.C. 2803-2807.

* * * * *

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

5. The authority citation for part 107 is revised to read as follows:

Authority: 49 App. U.S.C. 1421(c), 1653(d), 1655, 1802, 1804, 1805, 1806, 1808-1811, 1815; 49 CFR 1.45 and 1.53 and app. A of 49 CFR part 1.

6. Part 107 is transferred from subchapter B to subchapter A of chapter I of 49 CFR.

7. A new part 108 is added to subchapter A of chapter I of Title 49 to read as follows:

PART 108—FOOD SAFETY PROGRAM PROCEDURES

Subpart A—General Provisions

Sec.

- 108.1 Purpose and scope.
- 108.3 Definitions.
- 108.5 Request for confidential treatment.
- 108.7 Service of process on non-residents of the United States.
- 108.9 Public docket room.

Subpart B—Waivers

Sec.

- 108.101 Purpose and scope.
- 108.103 Application for waiver.
- 108.105 Application for renewal.
- 108.107 Administrative review.
- 108.109 Processing of application.
- 108.111 Party to a waiver.
- 108.117 Withdrawal.
- 108.119 Amendment, suspension, termination, and referral for enforcement action.
- 108.121 Petitions for reconsideration.
- 108.123 Availability for public inspection.

Authority: 49 App. U.S.C. 2807.

Subpart A—General Provisions

§ 108.1 Purpose and scope.

(a) This part prescribes procedures utilized by the Research and Special Programs Administration, the Associate Administrator for Hazardous Materials Safety and the Office of Chief Counsel in carrying out their duties under the Act, pertaining to the safe transportation of food products.

(b) This subpart defines certain terms and prescribes procedures that are applicable to each proceeding described in this part.

§ 108.3 Definitions.

All terms defined in 49 App. U.S.C. 2802 of the Act are used in their statutory meaning. Other terms used in this part are defined as follows:

Act means the Sanitary Food Transportation Act of 1990, 49 App. U.S.C. 2803-2812.

Person means an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof.

Transport or transportation means any movement of property in commerce (including intrastate commerce) by motor vehicle or railroad freight car, and any loading, unloading, or storage incidental thereto.

§ 108.5 Request for confidential treatment.

(a) If any person filing a document with the Associate Administrator for Hazardous Materials Safety claims that some or all the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure, and if that person requests the Associate Administrator for Hazardous Materials Safety not to disclose the information, that person shall file together with the document a second copy of the document from which has been deleted the information for which confidential treatment is claimed. The person shall indicate in the original document that it is confidential or contains confidential information and may file a statement specifying the justification for which confidential treatment is claimed. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, that person must include a statement as to why the information is privileged or confidential. If the person filing a document does not submit a second

copy of the document with the confidential information deleted, the Associate Administrator for Hazardous Materials Safety may assume that there is no objection to public disclosure of the document in its entirety.

(b) The Associate Administrator for Hazardous Materials Safety may grant or deny any claim of confidentiality. Notice of a decision by the Associate Administrator for Hazardous Materials Safety to deny the claim, in whole or in part, and an opportunity to respond shall be given to a person claiming confidentiality of information no less than five days prior to its public disclosure.

§ 108.7 Service of process on non-residents of the United States.

(a) **Designation of agent for service.** When a person who is not a resident of the United States is required by this subchapter or Subchapter B of this chapter to designate a permanent resident of the United States as his agent upon whom service of process may be made for him and on his behalf, the agent may be an individual, a firm, or a domestic corporation. Any number of principals may designate the same person as agent. A designation is binding on a principal even if the designation is not in compliance with all the requirements of this section, until rejected by the Associate Administrator for Hazardous Materials Safety. A designated agent may not assign performance of his functions under the designation to another person.

(b) **Form and contents of designation.** A designation of agent for service shall:

- (1) Be written in English and dated;
- (2) Be made in the legal form required to make it valid and binding on the principal under the laws, corporate bylaws, or other requirements governing the making of the designation by the principal at the place and time where it is made and the person or persons signing the designation shall certify that it is so made;

(3) State the full legal name, principal name of business, if any, and mailing address of the principal;

(4) Provide that it remains in effect until withdrawn or replaced by the principal;

(5) State the legal name and mailing address of the agent; and

(6) Bear a declaration of acceptance duly signed by the designated agent.

(c) **Method of service.** Service of any process, notice, order, decision, or requirement of the Associate Administrator for Hazardous Materials Safety may be made by registered or certified mail addressed to the agent with return receipt requested or in any

other manner authorized by law. If service cannot be effected because the agent has died (or, if a firm or a corporation ceases to exist) or moved, or otherwise does not receive correctly addressed mail, service may be made by publication in the **Federal Register**.

§ 108.9 Public docket room.

The public docket room in the RSPA offices at 400 7th Street, SW., Washington, DC provides for public inspection and copying:

(a) Copies of notices of proposed rulemaking issued by the RSPA, including advance notices, together with the comments received during rulemaking proceedings, copies of any related **Federal Register** notices, final rules, petitions for reconsideration, and decisions issued in response to petitions for reconsideration;

(b) Applications for waivers from the RSPA's regulations governing the transportation of food products, including supporting data, memoranda of any informal meetings with applicants, related **Federal Register** notices, comments received during the public comment period, and copies of decisions issued granting or denying applications for waivers; and

(c) Such other information pertaining to the RSPA's food safety program required by statute to be made available for public inspection and copying and any information which the RSPA determines should be made available to the public.

Subpart B—Waivers

§ 108.101 Purpose and scope.

This subpart prescribes procedures by which persons who are subject to the requirements of this subchapter, or subchapter B of this chapter, may obtain a waiver by proposing alternative measures or practices that will achieve equivalent levels of safety or levels of safety consistent with the public interest and the Act.

§ 108.103 Application for waiver.

(a) Any person who is subject to the requirements of this subchapter or subchapter B of this chapter, may apply to the Associate Administrator for Hazardous Materials Safety for a waiver from those requirements.

(b) Each application filed under this section for a waiver must:

(1) Be submitted in triplicate to: Associate Administrator for Hazardous Materials Safety, U.S. Department of Transportation, Washington, DC 20590-0001, Attention: Office of Exemptions and Approvals;

(2) Set forth the text or substance of the regulation from which the waiver is sought;

(3) State the name, street address, and telephone number of the applicant;

(4) Include a detailed description of the proposal, including when appropriate, plans, procedures, test results, previous waivers, if any, to be used;

(5) Describe all relevant shipping experience;

(6) Specify the proposed mode of transportation, identify any increased risks to food safety that are likely to result if the waiver is granted, and specify the control measures which the applicant considers necessary or appropriate to compensate for those increased risks;

(7) Specify the proposed duration or describe the proposed schedule of events for which the waiver is sought;

(8) Provide documentation explaining why the applicant believes the proposal including any control measures specified by the applicant will achieve a level of safety which:

(i) Is at least equal to that specified in the regulation from which the waiver is sought; or

(ii) If the regulations do not contain a specified level of safety, will be consistent with the public interest and will adequately protect against the risks to health and life which are inherent in the transportation of food products and unacceptable food products;

(9) If the applicant seeks to have the application processed on a priority basis, set forth the facts and reasons supporting priority handling; and

(10) If the applicant is not a resident of the United States, include a designation of a permanent resident of the United States as agent for service of process in accordance with § 108.7.

(c) Unless the Associate Administrator for Hazardous Materials Safety finds that there is good reason for priority processing of an application, each application is processed in the order in which it is received. To permit timely consideration, an application should be submitted at least 120 days before the requested effective date.

(d) If the applicant wishes to claim confidential treatment for any information contained in the application, the procedures set forth in § 108.5 apply.

§ 108.105 Application for renewal.

(a) Each application for the renewal of a waiver issued under this subpart must:

(1) Be submitted in triplicate to: Associate Administrator for Hazardous Materials Safety, U.S. Department of Transportation, Washington, DC 20590-0001, Attention: SFTA Waivers Branch;

(2) Identify the waiver for which a renewal is requested;

(3) State the name, address, and telephone number of the applicant;

(4) Include either—

(i) A certification by the applicant that the descriptions, technical information and assessment submitted in the original application, or as may have been updated by any subsequent application for renewal, remain accurate and correct; or

(ii) Such amendments to the previously submitted descriptions, technical information and assessment as is necessary to update them and assure their accuracy and correctness;

(5) A statement describing all relevant shipping experiences, including incidents involving contamination of food products, that have occurred in connection with the waiver since its issuance or most recent renewal or, if no food contamination has occurred, a certification to that effect. This statement must include the approximate number of shipments made or packages shipped, as appropriate.

(b) To permit timely consideration, an application for renewal should be submitted at least 60 days before the expiration date of the waiver.

(c) If, at least 60 days prior to the expiration of an existing waiver of a continuing nature, the holder files an application for renewal which is complete and conforms with the requirements of this section, the waiver will not be considered to have expired until the application for renewal has been finally determined.

§ 108.107 Administrative review.

A written application for a waiver submitted as provided in § 108.103(b) or the renewal of a waiver submitted as provided in § 108.105 is reviewed by the Associate Administrator of Hazardous Materials Safety to determine whether it is complete and conforms with the requirements of this subpart. If it is not returned to the applicant by the end of that period, it will be processed as provided in § 108.109. If an application is returned, the applicant will be informed in what respects the application is incomplete.

§ 108.109 Processing of application.

(a) After an application for a waiver or renewal of a waiver is determined to be complete, the Associate Administrator for Hazardous Materials Safety docket the application and, for an application under § 108.103, publishes a notice in the **Federal Register** affording an opportunity for interested persons to comment. All comments received before the close of

the comment period are considered before final action is taken on such an application.

(b) No public hearing, or other formal proceeding is held on an application filed under this subpart before its disposition under this section. However, during the processing of an application the Associate Administrator for Hazardous Materials Safety may require the applicant to supply additional information.

(c) The Associate Administrator for Hazardous Materials Safety may deny 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 does not include information required by § 108.103 or § 108.105, as appropriate.

(2) If an application is denied, the Associate Administrator for Hazardous Materials Safety will notify the applicant in writing of the reason for denial and publish notice of the denial in the *Federal Register*.

(d) If the Associate Administrator for Hazardous Materials Safety determines that the application contains adequate justification, the Associate Administrator for Hazardous Materials Safety grants it subject to such terms as appropriate, notifies the applicant in writing, and publishes in the *Federal Register* a notice of the grant.

(e) If the Associate Administrator for Hazardous Materials Safety determines that an application concerns a matter of such general applicability and future effect as to warrant being made the subject of rulemaking, the Associate Administrator for Hazardous Materials Safety may initiate rule making under part 108 of this chapter in addition to or instead of granting or denying the application.

§ 108.111 Party to a waiver.

(a) Any person who is eligible to apply for a waiver under § 108.103 may apply to the Associate Administrator for Hazardous Materials Safety to be made a party to an application filed under this section or § 108.105 or to a waiver or renewal granted under § 108.109(d).

(b) Each application filed under this section must:

(1) Be submitted to: Associate Administrator for Hazardous Materials Safety, U.S. Department of Transportation, Washington, DC 20590-0001, Attention: SFTA Waivers Branch;

(2) Identify the waiver application or waiver to which the applicant seeks to become a party;

(3) State the name, address and telephone number of the applicant; and

(4) If the applicant is not a resident of the United States, include a designation of a permanent resident of the United States as agent for service of process in accordance with § 108.7.

(c) The applicant becomes a party to a waiver application or waiver if the Associate Administrator for Hazardous Materials Safety determines that:

(1) The applicant is a person who is eligible to apply under § 108.103 for a waiver; and

(2) The waiver application or waiver to which the applicant seeks to become a party concerns a matter of a continuing nature and does not depend upon information entitled to confidential treatment.

(d) The Associate Administrator for Hazardous Materials Safety publishes in the *Federal Register* a notice of each application received under § 108.103, each initial determination made and each renewal granted under this section.

(e) A person who becomes a party to a waiver under this section is subject to the terms of that waiver, including the expiration date stated therein. The procedures set forth in § 108.105 through § 108.109 with respect to an application for renewal of a waiver apply to a party to a waiver.

§ 108.117 Withdrawal.

(a) An applicant may withdraw an application at any time prior to a final determination by the Associate Administrator for Hazardous Materials Safety.

(b) Except for documents for which confidential treatment was requested by the applicant, withdrawal of an application does not authorize the removal of any related records from the dockets or files of the RSPA.

§ 108.119 Amendment, suspension, termination, and deferral for enforcement action.

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

(b) The Associate Administrator for Hazardous Materials Safety may amend or suspend a waiver if:

(1) The Associate Administrator for Hazardous Materials Safety determines that an activity under the waiver is not being performed in accordance with the terms of the waiver; or

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

(c) The Associate Administrator for Hazardous Materials Safety may terminate a waiver if:

(1) The Associate Administrator for Hazardous Materials Safety determines that the waiver is no longer consistent with the public interest;

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

(3) The waiver was granted on the basis of false or misleading material information; or

(4) The waiver holder or parties to the waiver are found to be in violation of the specific terms of the waiver or applicable requirements of subchapter B of this chapter.

(d) Unless the Associate Administrator for Hazardous Materials Safety determines that immediate amendment, suspension, or termination of a waiver is necessary to abate the risk of an imminent hazard, the Associate Administrator for Hazardous Materials Safety notifies the holder of the waiver or a party to a waiver in writing of the reasons for amending, suspending or terminating the waiver and provides that person an opportunity to show cause why the waiver 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 Administrator for Hazardous Materials Safety may refer a waiver for initiation of an enforcement case. If, as the result of the enforcement proceeding, the holder of the waiver or a party to a waiver is determined to have violated the terms of the waiver, the Associate Administrator for Hazardous Materials Safety may amend, suspend, or terminate the waiver.

§ 108.121 Petitions for reconsideration.

Any applicant for a waiver or renewal of a waiver aggrieved by an action taken by the Associate Administrator for Hazardous Materials Safety under this subpart, and any holder of a waiver suspended or terminated by the Associate Administrator for Hazardous Materials Safety under § 108.119 (b) or (c), may petition the Associate Administrator for Hazardous Materials Safety for reconsideration. The petition must be filed within 30 days of service of notification of that action. The petition must contain a brief statement of the complaint, and an explanation as to why that action is unreasonable or is not in the public interest.

§ 108.123 Availability for public inspection.

(a) Information relevant to an application under this part, including

the application and supporting data, memoranda of any informal meetings with the applicant, and the grant or denial of the application is available for public inspection, except as specified in paragraph (b) of this section, at the RSPA public docket room, 400 7th Street, SW., Washington, DC 20590-0001. Copies of available information may be obtained, as provided in part 7 of this title.

(b) Information made available for inspection does not include materials which the Associate Administrator for Hazardous Materials Safety determines should be withheld from public disclosure under § 108.5 and in accordance with the applicable provisions of section 552(b) of title 5, United States Code, and part 7 of this title.

PART 110—HAZARDOUS MATERIALS PUBLIC SECTOR TRAINING AND PLANNING GRANTS

8. The authority citation for part 110 continues to read as follows:

Authority: 49 App. U.S.C. 1815; 49 CFR part 1.

8a. Part 110 is transferred from subchapter B to subchapter A of subtitle B, chapter I of 49 CFR.

9. Subchapter B of chapter I of title 49 is revised to read as follows:

SUBCHAPTER B—FOOD SAFETY REGULATIONS

PART 121—GENERAL INFORMATION, REGULATIONS, COMMUNICATION STANDARDS AND DEFINITIONS

Subpart A—General Information, Regulations, Communication Standards and Definitions

Sec.

- 121.1 Purpose and scope.
- 121.3 General requirements.
- 121.5 Definitions.
- 121.11 Incident reporting.
- 121.13 Communication requirements.

Subpart B—General Requirements for Shippers and Carriers of Food Products

- 121.101 Food products in cargo tanks, portable tanks, and tank cars.
- 121.103 List of unacceptable nonfood products.
- 121.105 Food products in transport vehicles, freight containers, and bulk packagings other than cargo tanks, portable tanks, and tank cars.
- 121.107 List of dedicated vehicle products.
- 121.109 Dedicated vehicle products.

Authority: 49 App. U.S.C. 2803, 2804, 2805, 2806 and 2807.

Subpart A—General Information, Regulations, Communication Standards and Definitions

§ 121.1 Purpose and scope.

(a) This subchapter prescribes the requirements governing the offering, acceptance for transportation, and the transportation of food products, and of materials which pose a hazard to the safety of food products (e.g., solid waste and asbestos), by railroad freight car and motor vehicle in commerce.

(b) The following are not subject to the requirements of this subchapter:

- (1) Farm vehicles, considered implements of husbandry, operated by a private carrier exclusively for agricultural purposes;
- (2) The offering or acceptance for transportation of food packing materials such as cardboard, pallets, and beverage containers; or
- (3) Food packaged in two fully enclosed packagings, one of which is placed inside the other except that such packages may not be transported on vehicle used for dedicated vehicle products.

§ 121.3 General requirements.

(a) No person may offer, accept for transportation, or transport a food product, or a material which would make food products unsafe to humans or animals, unless that food product or material is handled and transported in accordance with this subchapter or a waiver issued under subchapter A of this chapter.

(b) Each person who offers or accepts for transportation, or transports material subject to the requirements of this subchapter must instruct any officer, agent, or employee of that person having responsibility for preparing for transportation or transporting the material as to the applicable regulations of this subchapter.

§ 121.5 Definitions.

In this subchapter: *Bulk packaging* means a packaging, other than a vessel or a barge, including a transport vehicle or freight container, in which food products or non-food products are loaded with no intermediate form of containment and which has:

- (1) A maximum capacity greater than 450 L (119 gallons) or more than 0.45 cubic meters (16 cubic feet) as a receptacle for a liquid;
- (2) A maximum net mass greater than 400 kg (882 pounds) and a maximum capacity greater than 450 L (119 gallons) as a receptacle for a solid; or
- (3) A water capacity greater than 454 kg (1000 pounds) as a receptacle for a gas as defined in 49 CFR 173.115.

Cargo tank means a bulk packaging which:

- (1) Is a tank intended primarily for the carriage of liquids or gases and includes appurtenances, reinforcements, fittings, and closures (for "tank", see 49 CFR 178.345-1(c), 178.337-1, or 178.338-1, as applicable);
- (2) Is permanently attached to or forms a part of a motor vehicle, or is not permanently attached to a motor vehicle but which, by reason of its size, construction or attachment to a motor vehicle is loaded or unloaded without being removed from the motor vehicle; and
- (3) Is not fabricated under a specification for cylinders, portable tanks, tank cars, or multi-unit tank car tanks.

Cargo tank motor vehicle means a motor vehicle with one or more cargo tanks permanently attached to or forming an integral part of the motor vehicle.

Contaminate means to corrupt, debase, or make impure by an admixture of a foreign substance not inherent to the material in question.

Cosmetic means:

- (1) An article intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance; or
- (2) An article intended for use as a component of any such article; except that such term shall not include soap.

Device means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is—

- (1) Recognized in the official National Formulary, or the United States Pharmacopoeia, or any supplement to them;
- (2) Intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in animals; or
- (3) Intended to affect the structure or any function of animals, and which does not achieve any of its principal intended purposes through chemical action within or on animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

Drug means:

- (1) Articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(2) Articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(3) Articles (other than food) intended to affect the structure or any function of animals; and

(4) Articles intended for use as a component of any article specified in paragraph (1), (2), or (3) of this definition, but does not include devices or their components, parts, or accessories.

Food means items, other than drugs or medicines, intended or suitable for consumption by humans or other animals and include:

(1) Articles used for food or drink for animals;

(2) Chewing gum; and

(3) Articles used for the components of any such article.

Food additive means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food; and including any source of radiation intended for any such use), if such substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures (or, in the case of a substance used in food prior to January 1, 1958, through either scientific procedures or experience based on common use in food) to be safe under the conditions of its intended use; except that such term does not include—

(1) A pesticide chemical in or on a raw agricultural commodity;

(2) A pesticide chemical to the extent that it is intended for use or is used in the production, storage, or transportation of any raw agricultural commodity;

(3) A color additive;

(4) Any substance used in accordance with a sanction or approval granted prior to the enactment of this paragraph pursuant to the Food Drug and Cosmetic Act, the Poultry Product Inspection Act (21 U.S.C. 451) or the Meat Inspection Act of March 4, 1907 (34 Stat. 1260), as amended and extended (21 U.S.C. 71); or

(5) A new animal drug approved by the Food and Drug Administration.

Food product means either a cosmetic, drug, device, food or food

additive, or combination thereof, as defined in this subchapter.

Implement of husbandry means a motor vehicle designed or adapted and used exclusively for agricultural operations and only incidentally operated or moved upon the highways.

Motor vehicle includes a vehicle, machine, tractor, trailer, or semitrailer, or any combination thereof, propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property. It does not include a vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

Nonfood product means any material that does not meet the definition of a food product.

Person means an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof.

Portable tank means a bulk packaging (except a cylinder having a water capacity of 1000 pounds or less) designed primarily to be loaded onto, or on, or temporarily attached to a transport vehicle or ship and equipped with skids, mountings, or accessories to facilitate handling of the tank by mechanical means. It does not include a cargo tank, tank car, multi-unit tank car tank, or trailer carrying 3AX, 3AAX, or 3T cylinders.

Railroad freight car means a car designed to carry freight or non-passenger personnel by rail, and includes a box car, flat car, gondola car, hopper car, tank car and occupied caboose.

Refuse means any discarded material to be transported to or disposed of in a landfill or incinerator, or required by law to be transported to or disposed of in a landfill or incinerator.

RSPA means the Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590.

Solid waste means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, or solid or dissolved material in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act,

as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

Transport vehicle means a cargo-carrying vehicle such as an automobile, van, tractor, truck, semitrailer, tank car, cargo tank, or railroad freight car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, rail car, tank etc.) is a separate transport vehicle.

Transports or Transportation means any movement of property in commerce (including intrastate commerce) by motor vehicle or rail freight car.

United States means the fifty States, the District of Columbia, Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Northern Mariana Islands, Guam, or any other territory or possession of the United States.

§ 121.11 Incident reporting.

(a) A carrier who has specific knowledge that a shipment of food product under its control was contaminated during transportation must, in addition to notifying the consignee and consignor (see § 121.13(e)), report in writing, on DOT form F xxx.x, in duplicate, to RSPA within 30 days of discovering such information.

(b) A person offering a food product for transportation who rejects a carrier's transport vehicle, freight container, or bulk packaging for the transportation of its food product because the transport vehicle, freight container, or bulk packaging has the potential to contaminate the food product must report, on DOT form F xxx.x, in duplicate, to RSPA, within 30 days of such rejection.

(c) A carrier whose transport vehicle, freight container, or bulk packaging was rejected due to possible contamination must provide any necessary information that is needed for the person to comply with paragraph (b) of this section.

(d) A person who has received or rejected a shipment of a food product or nonfood product that was transported in violation of § 121.13 (a) or (b) must report, on DOT form F xxx.x, in duplicate, to RSPA, within 30 days of such rejection.

(e) A person making a report under this section shall send the report to the Information Systems Manager, DHM-63, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590-0001; a copy of the report shall be retained, for a period of two years, at the person's principal place of business, or at other places as authorized and

approved in writing by an agency of the Department of Transportation.

§ 121.13 Communication requirements.

(a) No person may offer for transportation or transport a food product in a cargo tank unless the cargo tank is permanently marked, in a clearly visible location, with the words "Food Grade" or with a recognized food or food-type name (e.g., milk or sugar) in letters at least 50 mm (2.0 inches) in height.

(b) No person may offer for transportation or transport a nonfood product in a cargo tank marked "Food Grade" or marked with a recognized food or food type name (e.g., milk or sugar).

(c) Each person who offers for transportation a food product to be transported in a cargo tank that is not operated by that person must disclose to the carrier that the product to be carried is a food product. Disclosure can be accomplished in the following manner:

(1) In a written document signed by both the shipper and carrier, provided that both the shipper and carrier maintain a copy of the document on file, at their principal place of business, for at least 3 months following the last shipment. This notification may be used to cover multiple shipments by the same shipper and carrier; or

(2) By providing the carrier a shipping document at the time of pick-up that clearly states that the product being offered is a food product. This shipping document must be maintained by the carrier in the cab of the cargo tank motor vehicle for the duration of the shipment.

(d) Each person selling or leasing a transport vehicle, freight container, or bulk packaging that has been used to transport a dedicated vehicle product (see § 121.105), must disclose that fact to any potential buyer or lessee in writing.

(e) If a food product has been contaminated during transportation, the carrier must notify the consignor and the consignee of such fact, either orally or in writing, as soon as practicable, in order that prompt actions may be taken to protect the public.

Subpart B—General Requirements for Shippers and Carriers of Food Products

§ 121.101 Food products in cargo tanks, portable tanks, and tank cars.

(a) No person may offer, accept for transportation or transport a food product in a cargo tank, portable tank, or tank car that—

(1) Was previously loaded with or contains a nonfood product; or

(2) Previously contained a food product, unless the cargo tank, tank car or portable tank is free from all residues from the prior load so as not to contaminate the food product.

(b) No person may accept delivery of a food product from a cargo tank unless the cargo tank is marked in accordance with § 121.13 of this part.

(c) No person may accept delivery of a nonfood product, except spoiled food products that have been transported for disposal, from a cargo tank that is marked in accordance with § 121.13 of this part.

(d) No person may offer for transportation or transport a food product in a cargo tank, tank car, or portable tank that is constructed of materials, including its accessory equipment, that will contaminate the food product.

§ 121.103 List of unacceptable nonfood products.

List of unacceptable nonfood products. Unacceptable nonfood products are as follows:

(a) A material meeting the definition of Division 6.1, Packing Group I or II, material, in 49 CFR 171.8, except when transported in accordance with 49 CFR 173.4, 173.25, or 177.841(e);

(b) A material meeting the definition of Division 6.2, as defined in 49 CFR 171.8;

(c) A material meeting the definition of a hazardous waste, as defined in 49 CFR 171.8; and

(d) Solid waste.

§ 121.105 Food products in transport vehicles, freight containers, and bulk packagings other than cargo tanks, portable tanks, and tank cars.

(a) No person may offer, accept for transportation, or transport a food product in the same transport vehicle, freight container, or bulk packaging with an unacceptable nonfood product listed in § 121.103.

(b) No person may offer for transportation or transport a food product in a transport vehicle, freight container, or bulk packaging, if it contains a residue of a material identified in § 121.103 or any other previously loaded material that has the potential to contaminate the food product unless it has been cleaned prior to the loading of the food product.

(c) No person may offer for transportation or transport a food product in the same transport vehicle or freight container with a package bearing a KEEP AWAY FROM FOOD label, (see subchapter C of this chapter), unless the packages are segregated in accordance with the requirements in § 174.680(b) or

§ 177.841(e)(3) of this chapter, as appropriate.

§ 121.107 List of dedicated vehicle products.

List of dedicated vehicle products. The dedicated vehicle product is asbestos, meeting the definition of a hazardous substance in 49 CFR 171.8, when placed in a transport vehicle without any intermediate form of containment.

§ 121.109 Dedicated vehicle products.

No person may offer for transportation or transport any food or nonfood product, except for refuse and dedicated vehicle products, in a transport vehicle that has carried a dedicated vehicle product listed in § 121.107.

SUBCHAPTER C—HAZARDOUS MATERIALS REGULATIONS

PART 171—GENERAL INFORMATION, REGULATIONS AND DEFINITIONS

10. The authority citation for part 171 continues to read as follows:

Authority: 49 App. U.S.C. 1802, 1803, 1804, 1805, 1808 and 1818; 33 U.S.C. 1321; 49 CFR part 1.

§ 171.2 [Amended]

11. In 49 CFR 171.2, remove the words "subchapter B" and add, in their place, the words "subchapter A" in paragraphs (c) and (d)(3).

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

12. The authority citation for part 173 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805, 1806, 1807, 1808, 1817; 49 CFR part 1, unless otherwise noted.

13. In 49 CFR part 173, remove the words "subchapter B" and add, in their place, the words "subchapter A" in § 173.22(a)(2)(iv) and § 173.124(a)(1)(ii)(A).

PART 178—SPECIFICATIONS FOR PACKAGINGS

14. The authority citation for part 178 continues to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805, 1806, 1808; 49 CFR part 1.

15. In 49 CFR part 178, remove the words "subchapter B" and add, in their place, the words "subchapter A" in § 178.320, in the definition of "Manufacturer", § 178.337-18(a), and § 178.345-15(a).

PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

16. The authority citation for part 180 continues to read as follows:

Authority: 49 U.S.C. App. 1803; 49 CFR part 1.

17. In 49 CFR part 180, remove the words "subchapter B" and add, in their place, the words "subchapter A" in § 180.3 (a), (b)(3) and (b)(5) and § 180.413 (a)(1) and (a)(2).

Issued in Washington, DC on May 14, 1993, under authority delegated in 49 CFR 1.53(i).

Alan I. Roberts,
Associate Administrator for Hazardous Materials Safety.

Attachment to Preamble
Food Safety Incident Report

DOT Form F xxxx.x

(A) Date of Incident: _____
(B) Location of Incident:
Address: _____

City: _____
State: _____
Zip: _____

(C) Consignor's Information:
Name: _____
Company: _____
Address: _____
City: _____
State: _____
Zip: _____
Phone: _____

Carrier's Information:
Name: _____
Company: _____
Address: _____
City: _____
State: _____
Zip: _____
Phone: _____

Consignee's Information:
Name: _____
Company: _____
Address: _____
City: _____
State: _____
Zip: _____
Phone: _____

Page 2 of DOT Form F xxxx.x

(D) Food Packaging Information:
Type of Packaging: _____
Capacity: _____

(E) Food Product Information:

Product Name: _____
Quantity: _____

(F) Contamination Information:
Contaminant: _____
Contaminant Packaging: _____
How Contaminated: _____

(G) Rejection Information:
Reason for Rejection: _____
Last load, if nonfood: _____
Tank cleaned?: _____

(H) Damages:
Value of lost product: _____
Cost of disposal: _____
Cost of cleaning: _____

(I) Description of Incident (including how the incident happened, the time it occurred, how it was discovered, and any remedial actions taken):

(J) _____
Signature _____
Date _____
Company name and Address _____

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