DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 172

[Docket No. HM-145C, Amdt. No. 172-66]

Listing of Hazardous Materials

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

ACTION: Notice of denial of petitions for reconsideration.

SUMMARY: On March 19, 1981, the Materials Transportation Bureau (MTB) issued a final rule, entitled "Listing of Hazardous Materials" (46 FR 17738), as required by section 306(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), listing as hazardous materials under the Hazardous Materials Transportation Act (HMTA) certain materials defined as "hazardous substances" under section 101(14) of CERCLA. On April 20, 1981, MTB received petitions for reconsideration of that rule from the National Tank Truck Carriers, Inc. (NTTC) and the American Trucking Association, Inc. (ATA), jointly, and from the American Association of Railroads (AAR) urging that the final rule be amended to require that shipments of the listed materials comply with the hazardous materials shipping paper requirements. By this notice, the MTB denies the petitions for reconsideration and sets forth the reasons for that denial.

FOR FURTHER INFORMATION CONTACT: Douglas Anderson, Office of the Chief Counsel, Research and Special Programs Administration, 400 7th Street, S.W., Washington, D.C. 20590, telephone (202) 755-4972.

SUPPLEMENTARY INFORMATION:

Notice of Denial of Petitions for Reconsideration

On March 19, 1981, the MTB issued a final rule, entitled "Listing of Hazardous Materials" (46 FR 17738), as required by section 306(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), listing as hazardous materials under the Hazardous Materials Transportation Act (HMTA) certain materials defined as "hazardous substances" under section 101(14) of CERCLA. On April 20, 1981, MTB received petitions for reconsideration of that rule from the National Tank Truck Carriers, Inc. (NTTC) and the American Trucking Association, Inc. (ATA), jointly, and from the American Association of Railroads (AAR). Since the petitions raise similar issues, they have been consolidated for purposes of this notice.

The petitioner's principal objection to the final rule is that the rule did not subject the listed materials to the Hazardous Materials Regulations (HMR). Specifically, the petitioners assert that section 306(a) of CERCLA requires that the shipping paper requirements of the HMR apply to the listed materials. They argue, that, since section 306(b) of CERCLA exempts carriers from liability under section 107 of that Act prior to the effective date of the listing required by section 306(a), Congress must have intended that carriers be given actual notice that they are transporting listed materials in order to be subject to liability under CERCLA, and that the HMR shipping paper requirements be the means for providing such notice. Furthermore, they argue, since section 102 of CERCLA establishes a statutory reportable quantity (RQ) for the listed materials of one pound until the Environmental Protection Agency (EPA) establishes a different quantity, MTB must designate the listed materials as "hazardous substances", as defined in the HMR, and assign them an RQ of one pound, thereby requiring the preparation of shipping papers for all shipments containing one pound or more of listed materials.

MTB disagrees with this interpretation of the effect of section 306. While the legislative history is silent on whether Congress intended section 306 to require the application of the HMR to the listed materials, MTB expressed its understanding of Congressional intent in the preamble to the final rule:

> The purpose of these provisions (sections 306(a) and (b)) is twofold: First, to assure coordination of the implementation of CERCLA (as it relates to transportation) with the administration of the HMTA so as to avoid regulatory inconsistencies and overlaps; and, second, to provide *reasonable* notice, through the HMTA regulatory system, to transporters of hazardous substances that they are subject to the liability and other provisions of CERCLA. (Emphasis added)

Clearly, the first purpose is accomplished by the final rule; with respect to the listed materials that are not otherwise subject to the HMR, a framework has been established whereby, at such time as EPA establishes RQ's for those materials, MTB can subject them to the appropriate level of regulation under the HMR, including shipping paper requirements.

The second purpose is also accomplished to the extent reasonable. As a result of the final rule, carriers are aware that the listed materials are subject to CERCLA and that they may be held liable for release of those materials. To the extent that carriers know, or can determine, whether they transport these materials, this information is useful to them. As discussed in the preamble to the final rule, to go beyond this by requiring the preparation of shipping papers for all shipments of listed materials in quantities exceeding one pound would, in the view of MTB, be unwarranted, unreasonable, and contrary to the Department's goal of minimizing paperwork burdens.

It should be noted that, on the same day that CERCLA (Pub. L. 96-510) received final approval (December 11, 1980), another law, the "Paperwork Reduction Act of 1980", (Pub. L. 96-511) was approved in which Congress forcefully expressed the same goal: "The purpose of this chapter is—(1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons; * * *" (44 U.S.C. 3501). No information presented in the petitions outweighs these considerations in such a way as to alter MTB's previous conclusion.

In MTB's opinion, it was the intent of Congress in enacting section 306 that, once DOT has listed the materials subject to CERCLA as hazardous materials, DOT retain the discretion provided by the HMTA to determine whether, and to what extent, those materials should be regulated. A brief examination of DOT's authority under the HMTA clarifies that distinction. Section 104 of the HMTA provides, in part, "Upon a finding by the Secretary, in his discretion, that the transportation of a particular quantity and form of materials in commerce may pose an unreasonable risk to health and safety or property, he shall designate such quantity and form of material or group or class of such materials as a hazardous material." Section 105(a) provides, in part, "The Secretary may issue * * * regulations for the safe transportation in commerce of hazardous materials." Therefore, the effect of section 306(a) of CERCLA is, in effect, to remove the Secretary's discretion under section 104 of the HMTA by requiring him to "list" (or "designate") "hazardous substances" (as defined by CERCLA) as "hazardous materials" under the HMTA. Section 306(a) does not, however, in any way purport to affect the Secretary's discretion under section 105(a) of the HMTA to regulate those materials.

MTB cannot infer from completely silent legislative history that Congress intended so significant a change to the regulatory authority established by the HMTA as to remove the Secretary's discretion to determine whether, and to what extent, to regulate hazardous materials. To the contrary, it was evidently Congress' desire to preserve the Department's regulatory authority in this area and to assure that CERCLA would not overlap or conflict with that authority that led to the adoption of section 306. If if were to be concluded that Congress intended to remove the Secretary's discretion in determining whether to apply the HMR shipping paper requirements to the listed materials, there would be no basis for concluding that Congress did not also intend to remove his discretion in determining whether to apply other requirements of the HMR, such as packaging and labeling requirements. It is far more logical to conclude that Congress intended that the Secretary exercise his discretion in determining the appropriate degree of regulation under the HMTA.

In its petition, the AAR takes exception to an example cited in the preamble to the final rule to demonstrate the vast increase in paperwork requirements if MTB were to apply those requirements to all shipments containing at least one pound of listed materials: "For example, every shipment of galvanized steel containing more than one pound of zinc would require a hazardous materials shipping paper." (46 FR 17738) The AAR's objection appears to be based on the incorrect assumption that zinc is a "hazardous substance" (as defined in CERCLA) only because, in certain forms, it is a hazardous waste. To the contrary, zinc is also a CERCLA "hazardous substance" because it is a toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act. (46 FR 17744) In fact, many other common materials, which have never been considered to be hazardous in transportation, are CERCLA hazardous substances because they have been listed under section 307(a) (e.g., asbestos, chromium, copper, lead, mercury, nickel, and silver). Therefore, the example cited in the preamble is correct, and an appreciation for the tremendous paperwork burden that would result from an automatic extension of the shipping paper requirements to these essentially innocuous shipments strengthens MTB's opinion that Congress did not intend to achieve such a result by implication from section 306 of CERCLA.

Therefore, it is MTB's conclusion that section 306 of CERCLA does not require the application of the HMR shipping paper requirements to the listed materials, and that, as a matter of Departmental discretion under section 105(a) of the HMTA, it would be inappropriate at this time to apply those requirements to those materials that are not otherwise subject to them. For the foregoing reasons, the petitions for reconsideration are denied.

(49 U.S.C. 1803, 1804; 49 CFR 1.53, Appendix A to Part 1)

Issued in Washington, D.C., on November 23, 1981.

L. D. Santman,

Director, Materials Transportation Bureau.

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