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49 CFR Parts 171, 173 and 180
Hazardous Materials in Intrastate
Transportation; Proposed Rule

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration****49 CFR Parts 171, 173 and 180**

[Docket No. HM-200; Notice No. 96-6]

RIN 2137-AB37

Hazardous Materials in Intrastate Transportation**AGENCY:** Research and Special Programs Administration (RSPA), DOT.**ACTION:** Supplemental notice of proposed rulemaking (SNPRM) and notice of public meeting.

SUMMARY: Based on the merits of comments received in response to a notice of proposed rulemaking (NPRM) to apply the Hazardous Materials Regulations (HMR) to intrastate commerce by motor vehicle, RSPA is issuing these additional proposals. In this document RSPA proposes: Exceptions from the HMR for certain small quantities of hazardous materials transported and used by carriers, particularly private carriers, in the conduct of their businesses; exceptions for the continued use of non-specification smaller cargo tank motor vehicles (i.e., less than 13,250 liters (3,500 gallons) capacity) used exclusively in intrastate transportation of flammable liquid petroleum products; and an exception from certain requirements that address registered inspections of these smaller cargo tank motor vehicles, used exclusively for transporting flammable liquid petroleum fuels. These proposed actions are aimed at reducing regulatory burdens on persons subject to the HMR where costs may be disproportional to safety benefits. This proposal may affect certain State variances.

RSPA also is announcing a public meeting to solicit comments on the proposals contained in this docket.

DATES: *Written comments.* Comments must be received on or before June 17, 1996.

Public Meeting. A public meeting will be held from 9:00 a.m. to 4:00 p.m. on May 14, 1996 in Washington, DC. Exceptions for materials of trade will be discussed from 9:00 a.m. to 12 noon. Cargo tank and registered inspection exceptions will be discussed from 1:00 to 4:00 p.m.

ADDRESSES: *Comments.* Address comments to Dockets Unit, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001. Comments should identify the Docket

(HM-200) 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. The Dockets Unit is located in Room 8419 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. and 5:30 p.m., Monday through Friday except Federal holidays.

Public Meeting. The public meeting will be held at the Federal Aviation Administration Auditorium, Third Floor, 800 Independence Avenue, SW, Washington, DC. Any person wishing to attend and/or present an oral statement at the public meeting should notify Diane LaValle, by telephone or in writing, at least two days in advance of the hearing date. Each request must identify the speaker; organization represented, if any; daytime telephone number; and anticipated length of the presentation, not to exceed 10 minutes. Written text or oral statements should be presented to the hearing officer prior to the oral presentation.

FOR FURTHER INFORMATION CONTACT: Jackie Smith or Diane LaValle, 202-366-8553, Office of Hazardous Materials Standards, RSPA, 400 Seventh Street, SW, Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:**I. Background**

Currently, the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) do not apply to highway transportation by intrastate carriers with the exception of registration requirements and transportation of hazardous substances, hazardous wastes, marine pollutants, and flammable cryogenic liquids in portable tanks and cargo tanks. The HMR apply to all hazardous materials transported in commerce by rail car, aircraft or vessel.

A July 1986 report by the Office of Technology Assessment (OTA) entitled "Transportation of Hazardous Materials" highlighted the need for national uniformity in the regulation of hazardous materials transportation and packaging requirements. The reporting of hazardous materials incidents was specifically mentioned in the report as a prime area for extending the HMR to intrastate transportation. Of particular concern is a potential for lack of uniform communication and a potential for miscommunication to emergency responders in identifying the presence of hazardous materials regardless of whether transportation of the hazardous

materials is intrastate or interstate. Based on this report and a requirement in the Federal hazardous materials transportation law (49 U.S.C. 5103(b)(1)) that RSPA regulate the transportation of hazardous materials in intrastate commerce, RSPA proposed to extend the application of the HMR to all intrastate transportation of hazardous materials in commerce in a notice of proposed rulemaking (NPRM) on July 9, 1993 [58 FR 36920] and a correction to the NPRM on July 15, 1993 [58 FR 38111].

RSPA proposed that all intrastate shippers and carriers comply with the HMR. The NPRM requested comments on the need for, and potential consequences of, extending the application of the HMR to all intrastate transportation in commerce. Except for bulk packagings, RSPA proposed to require compliance within one year after publication of the final rule. RSPA proposed a three-year transition period (from October 1, 1993) for continued use of certain bulk packagings used to transport hazardous materials not currently regulated in intrastate commerce, provided these packagings are used exclusively by intrastate carriers and are specifically authorized by the State in which they are operated. RSPA believed that the proposed three-year transition period would provide adequate time for intrastate motor carriers to bring their bulk packagings into conformance with the HMR.

More than 230 comments were received in response to the NPRM, a significant number addressing matters that were not raised in response to the advance notice of proposed rulemaking RSPA published on June 29, 1987 [52 FR 24195]. This SNPRM is responsive to many of those matters, including concerns raised in regard to the operation of smaller cargo tank motor vehicles.

II. Issues Addressed in This Supplemental Notice

The issues addressed in this supplemental notice of proposed rulemaking (SNPRM) are exceptions for: (1) "materials of trade," (2) non-specification smaller cargo tank motor vehicles (i.e., less than 13,250 liters (3,500 gallon) capacity) used exclusively in intrastate transportation of flammable liquid petroleum products, and (3) certain requirements addressing use of registered inspectors for these smaller cargo tank motor vehicles used to transport flammable liquid petroleum fuels only.

A. Materials of Trade

If the proposals in the July 1993 notice were adopted without change, all applicable regulations in the HMR would apply to the carriage of many materials of trade. RSPA received approximately a dozen comments on the issue of materials of trade.

The HMR currently provide certain limited exceptions for hazardous materials that are transported by private carriers as "materials of trade." For example, § 173.5 provides exceptions from certain marking and packaging requirements for private carriers transporting specified quantities of formulated agricultural chemicals. However, the commenters requested that RSPA consider additional regulatory exceptions to allow for the transportation of hazardous materials that are used in support of business operations, particularly with regard to transportation by private carriers in intrastate commerce, many of whom are small business entities.

The Conference on Safe Transportation of Hazardous Articles, Inc., and the Edison Electric Institute's Utility Nuclear Waste and Transportation Program strongly encouraged RSPA to not regulate local movements of relatively small quantities of hazardous materials used in the field (e.g., those carried by plumbers, doctors, roofers and lawn service personnel). The Utility Solid Waste Group submitted a petition for rulemaking (P-1248) proposing exceptions from the HMR for materials of trade. Other petitions addressing certain exceptions for materials of trade include the Georgia Public Service Commission (P-1209), the Association of American Railroads (P-1058), and the Maryland Department of Transportation (P-1098). These commenters suggest that thousands of intrastate businesses affected by HM-200 would face impracticable regulatory requirements. As an example, they cite a routine situation involving a consumer commodity (class ORM-D) hazardous material (e.g., a can of spray paint) transported in a service vehicle. Under the current regulations, when transported for use by the carrier, the consumer commodity would have to be transported in a closed and marked outer box, thereby making it impractical to use.

Prompted by comments submitted to the docket and petitions for rulemaking, RSPA is proposing to limit regulatory requirements for the transportation of certain hazardous materials used as materials of trade. Factors leading to RSPA's determination include: (1) The

relatively small quantity of these hazardous materials that are normally carried on a motor vehicle; (2) the general reliance on a DOT specification or U.N. standard packaging (or components thereof) as the principal packaging; and (3) a motor vehicle operator's familiarity with the hazardous material.

These materials of trade would include, subject to certain limitations, hazardous materials carried on a motor vehicle for protecting the health and safety of the motor vehicle operator, such as insect repellent or self-contained breathing apparatus or for supporting the operation or maintenance of a motor vehicle, such as a spare battery or engine starting fluid. They would also include certain hazardous materials carried by a private motor carrier engaged in a principal business which is other than transportation, such as lawn mowing, plumbing, welding, and door-to-door sale of consumer goods.

In proposed § 173.6, RSPA has identified types and quantities of certain categories of hazardous materials commonly carried as materials of trade for which exceptions would be provided. Specific limitations and provisions are proposed to strike a balance between safety and costs. Each hazard class and division has been considered to determine how the materials of trade exception may be applied to maximize the number of entities and operations that would be covered by it, while minimizing the risks to hazmat employees, emergency responders, and members of the general public who may be exposed to these hazardous materials during transportation.

Proposed § 173.6 applies limitations on the maximum quantity per packaging and the total quantity per motor vehicle. For example, § 173.6 proposes to allow a gross mass of up to 30 kg (66 pounds) per packaging for a Class 8, packing group II or III material, and a gross mass of up to 75 kg (165 pounds) for a Division 2.1 material. Furthermore, the aggregate gross weight of all materials of trade on a motor vehicle, as proposed, may not exceed 150 kg (330 pounds). Proposed § 173.6 would exclude the following materials that present significant risk: (1) Self-reactive (see § 173.124(a)(2)); (2) poisonous-by-inhalation (see § 173.133); and (3) specific UN identification numbers associated with the hazardous materials description in the § 172.101 Table.

Additional provisions in § 173.6 include packaging and hazard communication requirements. The packaging for a material of trade must be

either the manufacturer's original packaging or a packaging of equal or greater strength and integrity. For example, a flammable liquid from a 55-gallon polyethylene drum could be repacked in a smaller polyethylene drum or a steel drum that provides equal or greater strength and integrity. In addition, § 173.6 proposes to except receptacles (e.g., cans and bottles) from the outside packaging requirement if they are secured against movement in cages, carts, bins, boxes or compartments.

For gasoline, packaging must be made of metal or plastic and conform to requirements of the HMR, or those of the Occupational Safety and Health Administration specified in 29 CFR 1910.106. By the action it is proposing in this SNPRM, RSPA intends that State and local fire codes that prohibit use of glass containers for gasoline not be preempted.

A cylinder or other pressure vessel containing a Division 2.1 or 2.2 material must fully conform to the packaging requirements of the HMR and the qualification, maintenance and use of cylinder requirements in § 173.34. An exception from the requirements for use of an outer packaging is provided in proposed § 173.6(d)(3).

Hazard communication requirements proposed in § 173.6 specify that DOT specification cylinders, with the exception of the DOT-39, would continue to be subject to marking and labeling requirements specified in the HMR. Each DOT-39 cylinder must display the markings specified in § 178.65-14. Any other packaging must be marked with an indication of the hazardous material that it contains. The hazard communication requirement specifies that a vehicle operator be informed that a material of trade is being carried on the motor vehicle and of the requirements pertaining to the transportation of the material of trade, e.g., packaging and vehicle quantity limitations, packaging markings and securement of packagings to protect against damage.

When transported by motor vehicle in conformance with § 173.6, materials of trade would not be subject to any other requirements of the HMR except as stated in the section. A provision is proposed in paragraph (f) of § 173.6 to clarify that both materials of trade and other hazardous materials could be transported on the same motor vehicle without affecting the applicability of the exception provided for the material of trade. By providing an exception for materials of trade, RSPA believes it is taking a common sense approach in regard to applicability of the HMR to

small and local business entities. The anticipated beneficiaries of materials of trade exceptions would primarily be small businesses that perform services such as plumbing, welding, lawn care, painting, pest control, swimming pool maintenance and a number of different activities related to farming. Companies, such as public utilities, will also benefit in regard to operation of their service vehicles. In addition, the proposed exception would apply to any type of carriage by motor vehicle (including common motor carriers) if the material, such as engine starting fluid, is used in association with the operation of the motor vehicle in which it is transported. RSPA is proposing application of these exceptions to both interstate and intrastate carriage. No new or additional cost burdens are anticipated.

B. Exceptions for Non-Specification Bulk Packagings Used in Intrastate Transportation

RSPA received more than 100 comments from petroleum carriers and farmers and their trade associations regarding the elimination of exceptions authorized by the States. Many of these commenters recommended that States be allowed the flexibility to determine who would be subject to the regulations. Petroleum marketers from several States contended that, if the proposal to regulate the transportation of hazardous materials in intrastate commerce replaces current State regulations, they would be forced to remove cargo tanks from hazardous materials service or retrofit them to conform to the applicable DOT specifications at prohibitive costs. In comments responding to the NPRM, the Petroleum Marketers Association of American (PMAA) urged—

* * * RSPA to provide an exemption from the requirements of 49 CFR part 180 and subparts D and F of part 173 for non-specification bulk packagings with capacities less than 3,500 gallons used to transport Hazard Classes 2.1 and 3 materials in intrastate commerce only where (1) the packaging is used exclusively in a State where its use for the material being transported was specifically authorized by statute or regulation of that State, and was specifically and continuously authorized on or before October 1, 1993; (2) the packaging complies with all requirements of the State; and (3) each shipment is offered in conformance with all other applicable requirements of this subchapter.

PMAA believes that—

Providing an exemption from the specification cargo tank requirements for small business petroleum marketers, as outlined above, would hardly create a glaring loophole in the HMR.

If RSPA denies this request for an exemption, then PMAA respectfully requests

that a ten to fifteen year transition period be given in proposed subpart 171.1(c) to allow affected small business petroleum marketers to fully utilize their current cargo tanks.

In an attempt to maintain an acceptable level of safety without unduly burdening the many small businesses that operate smaller cargo tank motor vehicles, RSPA is proposing in paragraph (b) of § 173.8 to except from the HMR's cargo tank specification requirement certain cargo tank motor vehicles that have a capacity of less than 13,250 liters (3,500 gallons). As provided in paragraph (c) of § 173.8, excepted cargo tanks may only be operated by intrastate motor carriers for transportation of flammable liquid petroleum products in conformance with the laws of the States in which they are operated. RSPA believes that this proposed exception is responsive to PMAA's request, thereby minimizing the economic impacts on those small intrastate businesses that currently operate non-specification smaller cargo tank motor vehicles. Since the exception applies only to those smaller cargo tank motor vehicles in operation prior to July 1, 1996, no additional non-specification smaller cargo tank motor vehicles would be authorized after that date. As these small businesses replace equipment, they would be required to replace such equipment with specification cargo tank motor vehicles. Comments are requested on the proposal to allow continued use of these non-specification smaller cargo tank motor vehicles beyond the three years initially proposed and the 10 to 15 years requested by PMAA. If comments on this issue provide sufficient justification to adopt any specific time limitation after October 1, 1996, e.g., a three year or a 10 to 15 year limitation, RSPA may revise the final rule issued under this docket accordingly.

It must be noted that, although RSPA is proposing to provide an exception from the specification requirements for smaller cargo tanks used to transport liquid petroleum products, all other applicable requirements of the HMR would apply. These include marking and placarding vehicles, hazmat training requirements, shipping paper and emergency response information requirements, and the applicable modal requirements. The extended (October 1, 1996) compliance period proposed in § 173.8(b) covers only parts 173 and 178 (for non-specification petroleum cargo tank motor vehicles) and part 180. In addition, the provisions of part 180 that apply to a DOT MC-306 cargo tank for an annual external visual and leakage test, a five year visual and hydrostatic or pneumatic test, would be applicable to smaller cargo tanks that are otherwise

excepted from the specification requirements; however, the cargo tank manhole assembly requirements in § 180.405(g) would not apply. If periodic maintenance, inspections and repairs are being performed on smaller non-specification tanks, as indicated by PMAA and other commenters, then any incremental costs associated with this rulemaking would be minimal. If they are not being performed, RSPA believes those costs associated with ensuring an acceptable level of continuing cargo tank integrity (e.g., no leakage, secure closures, and no significant damage) are justifiable when considering such cargo tank motor vehicles are used for transportation of gasoline.

PMAA also requested that an exception be provided for cargo tanks of less than 13,250 liters (3,500 gallons) used to transport Class 2.1 materials. RSPA has not proposed to include cargo tank motor vehicles with a capacity of less than 13,250 liters (3,500 gallons) used to transport Class 2.1 in the exception. The HMR provide an exception for the use of non-specification cargo tanks for transporting liquefied petroleum gas (see § 173.315(k)) and there is no proposal to revise or eliminate that exception. Therefore, providing the additional exception requested by PMAA is not necessary.

Also proposed in § 173.8 is an authorization for the use of other non-specification bulk packagings authorized by State regulations until June 30, 1999, as initially proposed in the NPRM. Those bulk packagings would not be required to conform to the requirements specified in § 173.8(c), including the requirements in part 180 as they were MC 306 cargo tanks. After June 30, 1999, these bulk packagings must be in full compliance with the requirements of the HMR.

C. Registered Inspector Exception

Prior to January 1, 1991, the HMR's inspection and periodic retest requirements did not apply to cargo tank motor vehicles with a capacity of 3,000 gallons or less used exclusively in flammable liquid service. This exception was fully evaluated and ultimately removed in a final rule published June 12, 1989 under Docket HM-183 [54 FR 24982]. Commenters to Docket HM-183 representing the petroleum marketing industry (i.e., distributors of gasoline, fuels and other petroleum products) opposed the change. Some of these commenters also objected to the proposal in this rulemaking to apply the inspection and periodic retest

requirements to cargo tanks used in intrastate transportation.

PMAA commented that compliance with Federal cargo tank regulations as adopted under HM-183 for inspection and testing would result in the loss of a substantial amount of work and service hours for employees and cargo tanks. Currently, a motor carrier must employ a registered inspector or must have the cargo tank inspected by a registered inspector. PMAA said that this may result in a significant loss of revenue due to removal of a cargo tank from service and payment of fees to a registered inspector.

Several commenters stated that they had already performed periodic maintenance and inspection of their smaller cargo tanks and, therefore, the proposal to subject these vehicles to periodic inspections was unnecessary. One commenter asserted that its vehicles were inspected annually by State fire marshals and, therefore, the exception should be retained. RSPA believes that only a few State and local agencies have enacted regulations governing the maintenance and testing of smaller cargo tanks.

RSPA proposes to revise § 180.409 to allow a person to perform an annual external visual inspection and leakage test on a cargo tank motor vehicle of less than 13,250 liters (3,500 gallons) capacity that is used exclusively for transportation of flammable liquid petroleum fuels (e.g., gasoline and diesel fuel) without being a registered inspector. Under this proposal, that person would be permitted to use one of its employees to perform the visual inspection and leakage test as required by § 180.407(c). The employee would not be required to be a registered inspector, although the employee would have to be trained and be familiar with the inspection requirements (§ 180.407) for the cargo tank being inspected, how to identify defects and the proper performance of the leakage test. The documentation required to be maintained by § 180.417(b) could be signed by the employee rather than a registered inspector. The employee performing the annual visual inspection and leakage test would be subject to the appropriate training required in part 172, subpart H—Training. Routine cargo tank maintenance could be performed by the operator. Other tests required for a cargo tank by § 180.407(c) would still be performed by a registered inspector. Cargo tank repair, modification, stretching and rebarreling would be performed by a registered facility. RSPA believes that this proposal will provide savings to both interstate and intrastate

motor carriers who operate these smaller cargo tank motor vehicles.

III. Discussion of Other Comments to the NPRM

Many commenters to the NPRM mistakenly believe that issuance of a final rule under this docket will require intrastate motor carriers to comply with the provisions of the Federal Motor Carrier Safety Regulations (FMCSR). For example, commenters stated that additional costs would be incurred by farmers to obtain a Commercial Driver's License (CDL) with a hazardous materials endorsement, and insurance.

RSPA does not believe that the proposed rule, if adopted, will subject any additional carriers to the FMCSR. All intrastate motor carriers that meet the criteria in 49 CFR 383.23 are already required to possess a CDL, unless a waiver is granted pursuant to 49 CFR 383.7 (and the proposed rule would not change this waiver authority). Intrastate carriers of hazardous materials in bulk are already required to meet the financial responsibility requirements in 49 CFR Part 387, and this will not change.

RSPA has not proposed to extend the authority of the FMCSR to cover all intrastate motor carriers, but assumes confusion may have resulted from the provision in § 177.804, which states that persons subject to the HMR must comply with the provisions in the FMCSR, to the extent those regulations apply. Section 177.804 does not broaden the application of requirements for motor carriers beyond those specifically required by the FMCSR. (See 49 CFR part 390.) For example, drivers of commercial motor vehicles may not drive in interstate commerce unless they meet certain medical qualification requirements. A driver for an intrastate motor carrier would only need to comply with those requirements if the State in which the carrier operates has adopted such requirements. If commenters believe that this rule would impose any additional costs, from application of the FMCSR or another agency's requirements, they should explain those costs and quantify them in detail.

Several commenters objected to applying the HMR to the intrastate transportation of anhydrous ammonia. Again, RSPA does not believe that this proposed rule would make any change in the HMR's applicability to the transportation of anhydrous ammonia in intrastate commerce. Anhydrous ammonia is regulated as a hazardous substance when transported in quantities of 100 pounds or more and that the transportation of hazardous

substances in intrastate commerce has been subject to the HMR since 1980. RSPA is required by law to regulate all hazardous substances designated by the Environmental Protection Agency (EPA) under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). In carrying out the statutory mandate, RSPA has no discretion to determine what is or is not a hazardous substance or the appropriate reportable quantity (RQ) for materials designated as hazardous substances. This authority is vested in EPA.

Other comments reflected a misunderstanding regarding RSPA's intentions for current exceptions provided in the HMR for certain motor carrier operations. Currently, the HMR provide exceptions for use of non-specification ammonia/liquified petroleum gas cargo tanks in § 173.315, paragraphs (k), (m), and in Note 17 of the table. Section 173.315(k) authorizes the use of non-specification cargo tanks for the transportation of liquified petroleum gas in intrastate commerce, under specified conditions. Non-specification cargo tanks are authorized for anhydrous ammonia in § 173.315(m) and Note 17 of the table. Other exceptions for agricultural operations and oil field service vehicles are found in §§ 173.5 and 173.7, respectively. RSPA has not proposed to eliminate these exceptions from the HMR. Accordingly, if a final rule is issued under this docket, the provisions authorizing the use of non-specification packagings provided in those sections would remain valid under the conditions specified.

Comments have been received under this proceeding and under Docket HM-222 [60 FR 17049], expressing the view that business entities, such as those engaged in agriculture, should be permitted to conduct their operations under the provisions of State rather than Federal law if they choose. For many years, DOT has encouraged States to adopt the HMR. RSPA sponsors an outreach program called the Cooperative Hazardous Materials Enforcement Development Program (COHMED) that fosters coordination, cooperation, and communication between Federal and State agencies and Indian Nations having regulatory and enforcement responsibilities for the safe transportation of hazardous materials. The Federal Highway Administration (FHWA) requires States to adopt and enforce its Federal Motor Carrier Safety Regulations (FMCSR 49 CFR parts 390-397) and highway-related portions of the HMR, or comparable State rules and regulations, to qualify for grants under

FHWA's Motor Carrier Safety Assistance Program (MCSAP).

All States have adopted the HMR for highway transportation however, some have provided exceptions from their application, particularly in regard to intrastate highway carriers. Some States have provided substantial exceptions from all regulation. For example, one State provides exceptions for significant quantities of hazardous materials when transported from retailer to final agricultural end user, or between final end users from farm to farm. Included in the exceptions are (1) 16,000 pounds (aggregate gross weight) or less ammonium nitrate fertilizer, (2) certain agricultural pesticides in Class 3 or Division 6.1 when moved in quantities of 5,000 pounds or less or 500 gallons or less volume in solution, and (3) gasoline and liquefied petroleum gas in quantities of 3,000 gallons or less. These materials are not subject to marking, labeling, placarding, shipping paper, emergency response information, or training requirements, except that vehicles transporting gasoline and liquefied petroleum gas must be placarded. RSPA has been asked to recognize such exceptions. RSPA believes that such broad exceptions are not in the public interest and are contrary to the Congressional intent that there be a uniform system of regulation for the safe transportation of hazardous materials. Of particular concern is the potential for lack of uniform communication and miscommunication to emergency responders in any location where they may encounter hazardous materials incidents.

On the other hand, RSPA does provide an opportunity for States to obtain authorization for requirements that differ from those in the Federal regulations. A State may apply for a waiver of preemption for requirements that otherwise would be preempted by the Federal hazardous materials transportation law. This waiver provision, in 49 U.S.C. 5125(e), authorizes RSPA to waive preemption for a State requirement that provides at least an equivalent level of safety as the Federal law and regulations and is not an unreasonable burden on commerce. RSPA has established procedures for this waiver process in 49 CFR 107.215-227.

IV. Regulatory Reinvention Initiative

On March 4, 1995, President Clinton issued a memorandum to heads of departments and agencies calling for a review of all agency regulations and elimination or revision of those that are outdated or in need of reform. The President also directed that front line

regulators "get out of Washington and create grassroots partnerships" with people affected by agency regulations. RSPA conducted an extensive review of the HMR to identify regulations that should be eliminated or revised. RSPA also has held 11 public meetings requesting comment on its hazardous materials program during 1995 at various locations nationwide and anticipates having more public meetings in 1996. Commenters at the public meetings addressed issues such as the need for exceptions for materials of trade and expressed concerns regarding the potential impacts of this rulemaking proceeding. Several stated that elimination of exceptions provided by States could cause them extreme hardships. A number of those concerns are addressed in this preamble and proposal. The proposals in this SNPRM are consistent with the President's goal to minimize regulatory requirements on industry, while maintaining an acceptable level of safety.

V. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This supplemental notice of proposed rulemaking (SNPRM) is considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was subject to review by the Office of Management and Budget. The SNPRM is considered significant under the Regulatory Policies and Procedures of the Department of Transportation [44 FR 11034] due to significant public and congressional interest. A regulatory evaluation is available for review in the docket.

B. Executive Order 12612

This supplemental notice of proposed rulemaking has been analyzed in accordance with the principles and criteria in Executive Order 12612 ("Federalism"). The Federal hazardous materials transportation law (49 U.S.C. 5101-5127) contains an express preemption provision that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

- (i) the designation, description, and classification of hazardous material;
- (ii) the packing, repacking, handling, labeling, marking, and placarding of hazardous material;
- (iii) the preparation, execution, and use of shipping documents pertaining to hazardous material and requirements respecting the number, content, and placement of those documents;
- (iv) the written notification, recording, and reporting of the

unintentional release in transportation of hazardous material; or

(v) the design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a packaging or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous material.

This proposed rule concerns packaging, labeling, marking, placarding, and shipping documentation for hazardous materials. If adopted, this rule would preempt State, local, or Indian tribe requirements concerning these subjects unless the non-Federal requirements are "substantively the same" as the Federal requirements. RSPA lacks discretion in this area and preparation of a federalism assessment is not warranted.

Federal law 49 U.S.C. 5125(b)(2) provides that if DOT issues a regulation concerning any of the covered subjects after November 16, 1990, DOT must determine and publish in the Federal Register the effective date of Federal preemption. That effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. RSPA proposed that the effective date of Federal preemption for these requirements be one year after publication of the final rule.

C. Regulatory Flexibility Act

This supplemental notice of proposed rulemaking would have minimal impact on shippers and carriers, some of whom may be small business entities. Based on information concerning the size and nature of entities likely affected by this rule, I certify that this supplemental notice of proposed rulemaking would not have a significant economic impact on a substantial number of small entities under criteria of the Regulatory Flexibility Act.

D. Paperwork Reduction Act

Many information collection requirements contained in the HMR are subject to approval by the Office of Management and Budget (OMB) under provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13) and OMB implementing regulations in 5 CFR 1320. RSPA is reevaluating information collection requirements for accuracy and conformance with the new law. Although neither this supplemental notice nor the preceding July 1993 notice specifically address sections of the regulations containing information collection requirements, applying the HMR to previously unregulated persons has the effect of making those persons subject to any applicable information

collection requirements of the HMR, such as those requiring preparation of shipping papers. RSPA intends to make adjustments to current assessments of burden hours based on the effects of this rulemaking action, and anticipates publishing in the near future one or more notices in the Federal Register inviting comments on adjustments to currently approved collections and any new collections needed to comply with OMB requirements.

DOT cannot impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. RSPA intends to obtain current OMB control numbers for any new or revised information collection requirements resulting from this rulemaking action prior to implementation of a final rule.

E. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

49 CFR Part 171

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

49 CFR Part 173

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

49 CFR Part 180

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

In consideration of the foregoing, 49 CFR parts 171, 173, and 180 are proposed to be amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for part 171 would continue to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

2. Section 171.1 would be revised to read as follows:

§ 171.1 Purpose and scope.

(a) This subchapter prescribes requirements of the Department of Transportation governing—

(1) Offering of hazardous materials for transportation, and transportation of hazardous materials in interstate, intrastate, and foreign commerce by rail car, aircraft, motor vehicle, and vessel (except as delegated at § 1.46(t) of this title).

(2) Representation that a hazardous material is present in a package, container, rail car, aircraft, motor vehicle, or vessel.

(3) The manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a packaging or container which is represented, marked, certified, or sold for use in transportation.

(b) Any person who, under contract with any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government, transports, or causes to be transported or shipped, a hazardous material or manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person as qualified for use in the transportation of a hazardous material shall be subject to and comply with all provisions of the Federal hazardous materials transportation law, all orders and regulations issued thereunder, and all other substantive and procedural requirements of Federal, State, and local governments and Indian tribes (except any such requirements that have been preempted by the Federal hazardous materials transportation law or any other Federal law), in the same manner and to the same extent as any person engaged in such activities that are in or affect commerce is subject to such provisions, orders, regulations, and requirements.

3. In § 171.8, a definition for “Material of trade” would be added in alphabetical order to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Material of trade means a hazardous material that is carried on a motor vehicle—

(1) For the purpose of protecting the health and safety of the motor vehicle operator or passengers;

(2) For the purpose of supporting the operation or maintenance of the motor vehicle (including its auxiliary equipment) in which it is carried; or

(3) By a private motor carrier in direct support of a principal business that is

other than transportation by motor vehicle.

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PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

4. The authority citation for part 173 would continue to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

5. A new § 173.6 would be added to read as follows:

§ 173.6 Materials of trade exceptions.

(a) A material of trade (see § 171.8 of this subchapter) is not subject to any other requirements of this subchapter when transported by motor vehicle in conformance with this section. This section is limited to materials of trade that are—

(1) Classed in Division 2.1, 2.2, 4.1, 5.1, 5.2, 6.1, Class 3, 8, 9, or ORM–D; and

(2) Contained in a packaging having a gross mass or capacity of—

(i) Not over 0.5 L (1 quart) or 0.5 kg (1 pound), for a Packing Group I material;

(ii) Not over 30 kg (66 pounds) for solids or 30 L (8 gallons) for liquids, for a Packing Group II, Packing Group III, or ORM–D material; or

(iii) Not over 75 kg (165 pounds), for a Division 2.1 or 2.2 material.

(b) This section does not apply to a hazardous material that is—

(1) Self-reactive (see § 173.124);

(2) Poisonous by inhalation (see § 173.133); or

(3) Assigned any of the following UN identification numbers associated with the hazardous materials description in the § 172.101 Table: 1131, 1422, 1491, 1504, 1798, 1873, 2031, 2495, 2626, 2924, 2925.

(c) The aggregate gross weight of all materials of trade on a motor vehicle may not exceed 150 kg (330 pounds).

(d) *Packaging.* (1) Packagings must be leak tight for liquids and gases, sift proof for solids, securely closed, secured against movement, and protected against damage.

(2) Each material must be packaged in the manufacturer's original packaging, or a packaging of equal or greater strength and integrity.

(3) Outer packagings are not required for receptacles (e.g., cans and bottles) that are secured against movement in cages, carts, bins, boxes or compartments.

(4) For gasoline, a packaging must be made of metal or plastic and conform to requirements of this subchapter or requirements of the Occupational Safety

and Health Administration of the Department of Labor contained in 29 CFR 1910.106.

(5) A cylinder or other pressure vessel containing a Division 2.1 or 2.2 material must conform to packaging, qualification, maintenance, and use requirements of this subchapter, except that outer packagings are not required when transported as specified in paragraph (d)(3) of this section.

(e) *Hazard communication.* (1) Except for a DOT specification cylinder, each package or receptacle (including a receptacle transported without an outer packaging) must be marked to indicate the hazardous material it contains.

(2) A DOT specification cylinder (except DOT Specification 39) must be marked and labeled as prescribed by this subchapter.

(3) The operator of a motor vehicle that contains a material of trade must be informed of the presence of the hazardous material and must be informed of the requirements of this section.

(f) A material of trade may be transported on a motor vehicle under the provisions of this section with hazardous materials other than materials of trade without affecting the eligibility for exceptions provided by this section.

6. A new § 173.8 would be added to read as follows:

§ 173.8 Exceptions for non-specification bulk packagings used in intrastate transportation.

(a) *Non-specification bulk packagings.* Notwithstanding requirements for specification packagings in subpart F of this part 173 and parts 178 and 180 of this subchapter, a non-specification bulk packaging that is used in accordance with the provisions of paragraph (c) of this section may be used for transportation of a hazardous material by an intrastate motor carrier until June 30, 1999.

(b) *Cargo tanks for petroleum products.* Notwithstanding requirements for specification packagings in subpart F of this part 173 and part 178 of this subchapter, a non-specification cargo tank motor vehicle, that has a capacity of less than 13,250 liters (3,500 gallons) and that is used in accordance with the provisions of paragraph (c) of this section, may be used by an intrastate motor carrier for transportation of a flammable liquid petroleum product.

(c) *Additional requirements.* A packaging used under the provisions of paragraph (a) or paragraph (b) of this section must—

(1) Be operated exclusively by an intrastate motor carrier and used as a packaging for hazardous material prior to July 1, 1996;

(2) Conform to requirements of the State in which it is used;

(3) Be authorized by a State statute or regulation in effect on and before July 1, 1996, for use as a packaging for the hazardous material being transported;

(4) Conform to all requirements in part 180 (except for § 180.405(g)) of this subchapter in the same manner as required for a DOT specification MC 306 cargo tank motor vehicle. A cargo tank motor vehicle that is used under the provisions of paragraph (b) of this section must meet these provisions on and after July 1, 1999;

(5) Be offered for transportation and transported in conformance with all other applicable requirements of this subchapter; and

(6) Not be used to transport a flammable cryogenic liquid, hazardous substance, hazardous waste, or marine pollutant.

PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

7. The authority citation for part 180 would continue to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

8. In § 180.409, the introductory text of paragraph (a) would be revised, paragraph (b) would be redesignated as paragraph (c), and a new paragraph (b) would be added to read as follows:

§ 180.409 Minimum qualifications for inspectors and testers.

(a) Except as otherwise provided in this section, any person performing or witnessing the inspections and tests specified in § 180.407(c) must—

* * * * *

(b) A person who performs only annual external visual inspections and leakage tests on a cargo tank motor vehicle with a capacity of less than 13,250 liters (3,500 gallons) used exclusively for flammable liquid petroleum fuels is not required to be registered in accordance with subpart F of Part 107 of this chapter. In addition, the person who signs the inspection report required by § 180.417(b) of this subpart for such cargo tank motor vehicles is not required to be registered. Although not required to register, a person who performs visual inspections or leakage tests or signs the inspection reports must have the knowledge and ability to perform such inspections and tests and must perform them as required by this subchapter.

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Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

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