

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Authority: Sec. 3001(f) RCRA, 42 U.S.C. 6921(f).

Dated: February 19, 2002.

Donald S. Welsh,

Regional Administrator, Region III.

For the reasons set forth in the preamble, 40 CFR part 261 is proposed to be amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for Part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, and 6938.

2. Table 1 of Appendix IX of part 261 is amended to add the following waste stream in alphabetical order by facility to read as follows:

Appendix IX to Part 261—Wastes Excluded Under §§ 260.20 and 260.22.

TABLE 1.—WASTES EXCLUDED FROM NON-SPECIFIC SOURCES

Facility	Address	Waste description
* Weirton Steel Corpora- tion	* Weirton, West Virginia	* Wastewater treatment sludge (known as C&E sludge) containing EPA Hazardous Waste Numbers F007 and F008, subsequent to its excavation from the East Lagoon and the Figure 8 tanks for the purpose of transportation and disposal in a Subtitle D landfill after (insert publication date of the final rule). This is a one-time exclusion for 18,000 cubic yards of C&E sludge. (1) <i>Reopener language</i> (a) If Weirton discovers that any condition or assumption related to the characterization of the excluded waste which was used in the evaluation of the petition or that was predicted through modeling is not as reported in the petition, then Weirton must report any information relevant to that condition or assumption, in writing, to the Regional Administrator and the West Virginia Department of Environmental Protection within 10 calendar days of discovering that information. (b) Upon receiving information described in paragraph (a) of this section, regardless of its source, the Regional Administrator and the West Virginia Department of Environmental Protection will determine whether the reported condition requires further action. Further action may include repealing the exclusion, modifying the exclusion, or other appropriate response necessary to protect human health or the environment. (2) <i>Notification Requirements</i> Weirton must provide a one-time written notification to any State Regulatory Agency to which or through which the delisted waste described above will be transported for disposal at least 60 calendar days prior to the commencement of such activities. Failure to provide such notification will be deemed to be a violation of this exclusion and may result in revocation of the decision and other enforcement action.
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DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 175

[Docket No. RSPA-02-11654 (HM-228)]

RIN 2137-AD18

Hazardous Materials: Revision of Requirements for Carriage by Aircraft

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

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: RSPA is considering changes to the requirements in the Hazardous Materials Regulations (HMR) on the

transportation of hazardous materials by aircraft. These changes would modify or clarify requirements to promote safer transportation practices; promote compliance and enforcement; eliminate unnecessary regulatory requirements; convert certain exemptions into regulations of general applicability; finalize outstanding petitions for rulemaking; facilitate international commerce; and make these requirements easier to understand. In addition, RSPA is denying a petition for rulemaking in this document.

This ANPRM invites public comments on how to accomplish these goals, provides an opportunity for comment on amendments that RSPA is considering, and provides a forum for the public to present additional ideas for improving the safe transportation of hazardous materials by aircraft.

DATES: *Written comments:* Comments must be received by May 31, 2002.

ADDRESSES: *Comments:* You must address comments to the Dockets Management System, U.S. Department of Transportation, Room PL 401, 400 Seventh Street SW., Washington, DC 20590-0001. You should identify the docket number (RSPA-02-11654 (HM-228)) and submit your comments in two copies. If you want to confirm our receipt of your comments, you should include a self-addressed, stamped postcard. You may submit comments to RSPA by e-mail to: rules@rspa.dot.gov or you may submit comments to the DMS Web at: <http://dms.dot.gov>. The Dockets Management System is located on the Plaza Level of the Department of Transportation headquarters building (Nassif Building) at the above address. You may review public dockets there between the hours of 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays. You may also review comments on-line at the DOT Dockets

Management System web site at:
<http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT:

Deborah Boothe or Michael Stevens of the Office of Hazardous Materials Standards, (202) 366-8553, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street SW., Washington DC 20590-0001.

SUPPLEMENTARY INFORMATION:

I. Background

The HMR (49 CFR Parts 171-180) govern the transportation of hazardous materials in commerce by all modes of transportation, including aircraft (49 CFR 171.1(a)(1)). Parts 172 and 173 of the HMR include requirements for classification and packaging of hazardous materials, hazard communication, and training of employees who perform functions subject to the requirements in the HMR. Part 175 contains additional requirements applicable to aircraft operators transporting hazardous materials aboard an aircraft, and authorizes passengers and crew members to carry hazardous materials on board an aircraft under certain conditions. In addition, aircraft operators must comply with the training requirements in 14 CFR parts 121 or 135, as appropriate.

RSPA ("we" or "our") and the Federal Aviation Administration (FAA) are reviewing Part 175 and other sections of the HMR applicable to transportation of hazardous materials by aircraft. This review will increase safety in the air transportation of hazardous materials by:

- (1) Modifying or clarifying requirements to promote compliance and enforcement;
- (2) Eliminating unnecessary current regulatory requirements;
- (3) Adopting current exemptions and outstanding petitions for rulemaking;
- (4) Facilitating international commerce; and
- (5) Making the regulations easier to understand.

RSPA requests interested persons ("you") to submit written comments concerning regulatory changes and clarifications to accomplish the goals set forth above. You should feel free to suggest any change to the HMR to improve safety in the transportation of hazardous materials by aircraft. You do not have to limit your comments to the specific sections of the HMR and issues discussed in this notice. You are encouraged to provide proposed language for changes to the current regulations, rationale and factual data to

support your proposed changes, and any other suggestions to make the HMR easier to understand and promote compliance and enforcement. We organized this ANPRM by subject matter with questions at the end of each section. When responding to the questions at the end of each section, please refer to the section and number of the question.

While this ANPRM attempts to encompass a broad range of safety issues regarding hazardous materials transported by air, it is not our only rulemaking initiative addressing air transportation. Other rulemakings include:

(1) a final rule under Docket HM-215D, published on June 21, 2001 (66 FR 33315), which addressed miscellaneous changes in §§ 175.10, 175.33, and 173.150, and revised §§ 175.78 and 175.85 to further align those regulations with the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods By Air (ICAO Technical Instructions);

(2) a NPRM under Docket HM-206C, published February 13, 2002 (67 FR 6669), in response to National Transportation Safety Board (NTSB) recommendation A-98-80, which recommends air carriers transporting hazardous materials to have the means to quickly retrieve and provide information about the identity of each shipment of hazardous material on an airplane;

(3) an NPRM under Docket HM-226, published January 22, 2001 (66 FR 6942), which proposes to revise the classification criteria and packaging requirements for infectious substances consistent with the United Nations Recommendations on the Transport of Dangerous Goods (UN Recommendations) and the ICAO Technical Instructions;

(4) a rulemaking to be initiated under Docket HM-224B, which is evaluating the packaging requirements for oxygen cylinders aboard aircraft (see the discussion in the preamble to our August 19, 1999 final rule under Docket HM-224A (64 FR 45391-93)); and

(5) a rulemaking to be initiated under Docket HM-224C, to revise the requirements of the HMR applicable to lithium batteries (see our advisory notice published September 7, 2000 (65 FR 54366)).

This rulemaking will not propose any security related changes to the HMR. As a result of the terrorist incidents of September 11, 2001, and subsequent threats related to biological materials, we are reviewing the HMR to determine if additional requirements are necessary

to assure the security of hazardous materials in transportation. We initiated a rulemaking project to address security issues related to the transportation of hazardous materials by all modes. We are examining hazard communication, shipping documentation, training, and other requirements to determine if rulemaking action is necessary.

II. Communication of Requirements to Airline Passengers and Shippers (Signage)

A. Discussion

Reducing the incidence of undeclared hazardous materials aboard aircraft is one of our highest priorities. We believe a lack of awareness of the risks posed by hazardous materials and their applicable regulatory requirements is a major factor in undeclared hazardous material shipments by air. RSPA and FAA are working with the Air Transport Association and others, on non-regulatory initiatives to increase public awareness through outreach and education efforts. Methods for detection of undeclared hazardous materials and ways to better assess the extent of the problem, are also of interest to us.

RSPA and FAA also are considering other measures. A requirement to verbally question passengers and shippers on whether their baggage or packages contain hazardous materials is one possibility. Another potential solution suggested by the NTSB in its Recommendation A-98-71, may be to require a shipper to provide written responses on shipping papers to inquiries about hazardous characteristics of the shipment. Blocks on shipping documents to check whether or not the package contains hazardous materials or requiring shipper certification when a new or unknown shipper is involved, may be alternative ways to accomplish basic objectives.

The HMR currently require notices to be posted at air passenger and cargo facilities and where cargo is accepted. The notices contain specific language warning passengers and offerors of cargo of the requirements applicable to carrying or offering hazardous materials and the penalties for failure to comply with those requirements. Section 175.25 requires aircraft operators to display notices warning passengers against carrying undeclared hazardous materials aboard aircraft in either their checked or carry-on luggage or on their persons, and prescribes the information to be contained in each notice. Section 175.26 requires each person who engages in the acceptance of, or the transportation of, cargo by aircraft, to

display notices in prominent locations at each facility where cargo is accepted. These notices are intended to inform their customers of what a hazardous material is, the requirement to comply with the HMR, and the penalties for failure to comply with the HMR. Therefore, signs must be in prominent view of passengers and persons who accept or offer cargo. Sections 175.25 and 175.26 also list the minimum information that must be contained on the notice.

In some cases, cargo terminals are co-located with passenger terminals. To make it easier for the industry to comply with signage requirements, FAA and RSPA stated in a final rule published September 27, 1993 (58 FR 50496) that display of separate passenger and cargo notices is not required at these passenger terminals. Notices are not required to be displayed at unattended locations if there is a general notice prominently displayed advising customers that shipments of hazardous materials at that location are prohibited. In addition, notices are not required to be displayed at a shipper's facility where packages of hazardous materials are accepted. However, we note there are differences in the information provided on the two notifications, and we are considering eliminating these differences. In a final rule published July 10, 1998 (63 FR 37454), we revised §§ 175.25 and 175.26 to reflect changes in the statutory citations and penalties, and to provide carriers greater flexibility.

Internationally, the ICAO Technical Instructions require each operator to warn passengers of the types of goods they are prohibited from transporting aboard aircraft. However, the ICAO Technical Instructions do not specify the wording or information to be provided in the warning. However, ICAO Technical Instruction Part 7.5.1 does require each operator to ensure the information is promulgated in such a manner to alert its passengers. The information must accompany the passenger ticket; and be sufficient in number and "prominently displayed" at each of the places in an airport where tickets are issued, passengers and baggage check in, aircraft boarding areas are maintained, and at any other location where passengers may check in. In addition, the ICAO Technical Instructions require operators to ensure that notices sufficient in number and prominence are displayed in baggage claim areas.

Some packaging, shipping and freight forwarding facilities erroneously believe they are not subject to the requirements of § 175.26. These entities believe they

are not subject to Part 175, and specifically § 175.26, because they are not air carriers (See discussion in Part IV. A.). The HMR require each person who engages in accepting or transporting packages for transportation by air to display notification signs. Packaging, shipping and freight forwarding facilities are not excepted from § 175.26(d), because they are performing carrier functions when they accept packages on a carrier's behalf. Therefore, such entities must comply with the signage requirements of § 175.26.

We are considering the need to clarify the term, "prominently displayed." In addition, we are considering clarifying the applicability of § 175.26 to packaging, shipping and freight forwarding facilities.

B. Questions

1. What do you estimate to be the frequency of undeclared hazardous materials shipments by air and what can be done to improve the accuracy of these estimates?

2. What can carriers or the government do to better detect undeclared hazardous materials shipments by air?

3. What are the best approaches (regulatory and non-regulatory) to reducing undeclared hazardous materials shipments by air?

4. What other alternatives should be considered to ensure requirements for shipping hazardous materials by air are understood and followed?

5. What benefits and burdens would result from requirements to verbally question passengers and shippers as to whether their baggage or packages contain hazardous materials?

6. What benefits and burdens would result from requiring shippers to provide written responses on shipping papers to inquiries about hazardous characteristics of the shipment?

7. How can signage be improved?

8. Are existing signage requirements effective in communicating to passengers and shippers the types of hazardous materials they are prohibited from carrying aboard aircraft in carry-on or checked luggage or as cargo?

9. Should we allow the use of warning signs required by ICAO Technical Instructions in lieu of the requirements of §§ 175.25 and 175.26?

10. Do the terms "prominent location" or "prominently displayed," need to be clarified?

11. Is there a need to change the requirements in §§ 175.25 and 175.26 to maximize the effectiveness of signs and posters? Is there a better way to design signs to increase the likelihood that

passengers and shippers will notice and understand requirements?

12. Do packaging, shipping and freight forwarding facilities understand that, if they accept packages as cargo for transportation by aircraft, which would meet the definition of an "air carrier" under 49 U.S.C. 40102, they must comply with the signage requirements of Section 175.26? If not, how can this be clarified?

13. Do we need to clarify or revise the location requirements for display of the signs?

III. ICAO Technical Instructions

A. Discussion

The ICAO Technical Instructions are based on the UN Recommendations and prescribe requirements applicable to the international transport of dangerous goods by air, including classification and packaging of hazardous materials, communication of their hazards, training of employees, and segregation and separation of materials. Section 171.11 of the HMR permits a person to offer and transport hazardous materials in accordance with the provisions of the ICAO Technical Instructions as an alternative to the applicable provisions of the HMR (parts 172 and 173 for classification, hazard communication, and packaging). Section 171.11 permits the use of ICAO Technical Instructions for international and domestic transportation, where at least one leg of transportation is by air.

However, the provisions of § 171.11 do not constitute a total alternative to compliance with the HMR. We are concerned about the lack of awareness that the other regulatory requirements continue to apply, such as those in part 175 of the HMR or the training requirements in 14 CFR. Shipments made in accordance with the ICAO Technical Instructions also remain subject to the emergency response provisions of subpart G of part 172 (Section 171.11(d)(10)). This requirement is restated in State Variation US12 to the ICAO Technical Instructions. Although the ICAO Technical Instructions contain a requirement for emergency response information, it is not detailed in respect to the type of emergency response information required. The ICAO Technical Instructions now satisfy the requirements of subpart G of part 172, with the exception of the requirement for a 24-hour emergency telephone number.

We are considering clarifying what requirements of the HMR apply to a shipment transported under the ICAO Technical Instructions, and updating

the conditions allowing for use of the ICAO Technical Instructions specified in § 171.11(d).

B. Questions

1. Do shippers understand that a shipment made under the ICAO Technical Instructions still must comply with other regulatory requirements, such as part 175 of the HMR and the training requirements in 14 CFR?

2. Should shippers and carriers of hazardous materials be allowed to use the provisions of the ICAO Technical Instructions other than those for packing, marking, labeling, classification, and description, such as Operator Responsibilities and Unloading and Storage provisions?

3. Do any of the conditions in § 171.11(d) on the use of the ICAO Technical Instructions need to be revised or removed? Should any other conditions be added?

4. Are there ways to improve consistency between the ICAO requirements and corresponding requirements in the HMR?

IV. Storage Requirements and Limitations and Docket HM-192

A. Storage Requirements and Limitations

Sections 175.75 and 175.85 prescribe limitations on the quantity of hazardous materials that may be carried aboard passenger-carrying or cargo-only aircraft, and the location of those materials, respectively. The quantity limitations for hazardous materials permitted aboard passenger-carrying aircraft are specified in § 175.75(a)(2). This section states that no more than 25 kg of hazardous materials and, in addition, 75 kg net weight of Division 2.2 (non-flammable compressed gas) may be carried aboard a passenger-carrying or cargo-only aircraft:

- (1) In an accessible cargo compartment;
- (2) In any freight container within an accessible cargo compartment; or
- (3) In any accessible cargo compartment of a cargo-only aircraft if the hazardous materials are loaded as to be inaccessible unless in a freight container.

Class 9 materials and consumer commodities are excepted from the quantity limitations of § 175.75(a)(2). Section 175.85(b) requires hazardous materials packages acceptable for cargo-aircraft only, to be loaded in a manner that allows access to the package by crew members.

Section 175.85(a) prohibits the carriage of a hazardous material in the passenger cabin or on the flight deck of

any aircraft, and specifies conditions under which hazardous materials may be carried on main-deck cargo compartments. Section 175.85(c)(1)(i) through (v) provides exceptions for cargo-only operations from the quantity limitations of § 175.75(a)(2), and accessibility requirements of § 175.85(b) for those hazardous materials listed. Section 175.85(c)(2) provides exceptions, when other means of transportation are impracticable, to the accessibility requirement of § 175.85(b) and the quantity limitation requirements of § 175.75(a)(2) for hazardous materials acceptable by both cargo-only and passenger-carrying aircraft. These exceptions require that packages are carried in accordance with procedures approved in writing by the nearest FAA Civil Aviation Security Field Office (CASFO). Columns 9A and 9B of the § 172.101 Hazardous Materials Table (HMT) specify limitations on individual package quantities, or list packages that are forbidden from transportation by aircraft. Section 173.27 specifies inner receptacle limits for combination packages.

Sections 175.85(c)(3)(i) through (iii) provide exceptions for small, single-pilot cargo-only aircraft from the accessibility requirements of § 175.85(b) and the quantity limits of § 175.75. These exceptions may be invoked when small aircraft are the only means of transporting hazardous materials to a particular destination. This applies to airports and locations incapable of supporting larger aircraft operations, where the only means of access is by smaller aircraft. The provisions of § 175.85(c)(3) do not require approval by the FAA.

Sections 175.310 and 175.320 provide exceptions from the quantity limitations in §§ 175.75 and 172.101, when certain conditions are met. Section 175.310 provides an aircraft may carry up to 20 gallons of flammable liquid if: (1) air transportation is the "only practical means" of providing suitable fuel; (2) the flight is necessary to meet the needs of a passenger; and (3) fuel is carried in metal containers, as specified in this section. Section 175.320 authorizes the transportation of certain hazardous materials by cargo-only aircraft in inaccessible cargo locations when means of transportation other than air are impracticable or not available (i.e., air transport is the only means of transportation) subject to the conditions specified in § 175.320.

We believe the language of §§ 175.75, 175.85 and §§ 175.310, 175.320 contain overlapping requirements and makes these sections difficult to understand. We base this on the number of inquiries

we receive requesting clarification of these regulations. Both § 175.75 and § 175.85 refer to quantities, accessibility and cargo location. Both also refer to exceptions for certain hazardous materials. For example, § 175.85 excepts certain Division 6.1 and 6.2; certain Class 3, 7, 9; and consumer commodities from the quantity limitations of § 175.75. Further, §§ 175.75 and 175.85 do not provide restrictions on the amount of Class 9 materials and hazardous materials reclassified as consumer commodities, loaded onto an aircraft. We believe these exceptions should be reevaluated relative to potential risks to safety.

In a letter issued to FAA on December 27, 2000, RSPA stated, for the purpose of § 175.85, "impracticable" means transportation is not physically possible or cannot be performed by routine and frequent means of other transportation, due to extenuating circumstances. Extenuating circumstances include: conditions precluding highway or water transportation, such as a frozen vessel route; road closures due to catastrophic weather or volcanic activity; or a declared state of emergency. Other means of transportation also would be "impracticable," if special characteristics of the material being shipped would render it useless upon arrival if transported by means other than aircraft. For example, time sensitive radio pharmaceuticals or hazardous materials required in response to an emergency. However, the desire for expedience of a shipper, carrier, or consignor, is not relevant in determining whether other means of transportation are impracticable.

With regard to the issues presented in this section, we are considering the following changes to the HMR regarding package storage requirements and limitations:

1. Combining §§ 175.75 and 175.85 for purposes of clarity.
2. Eliminating the exception in § 175.75(b) for consumer commodities and Class 9 materials.
3. Adding a definition for the term "impracticable."
4. Adding a footnote to Column 9A and 9B of the HMT to clarify that there are additional requirements for materials transported by aircraft contained in § 173.27 and Part 175.

B. Docket HM-192

On April 6, 1983, we published an ANPRM under Docket HM-192 (49 FR 13717) in response to a petition filed by Japan Air Lines Company LTD (JAL) (P-903). The petition requested removal of the quantity limitations in § 175.75. JAL asserted that the quantity limitation in

§ 175.75 was arbitrary, unjustifiable and inconsistent with other provisions of Part 175 and the ICAO Technical Instructions. The petition noted that: (1) HMR allow an unlimited quantity of hazardous materials to be carried in accessible cargo compartments; (2) the § 175.75 limitation applies only to passenger-carrying aircraft, not to cargo-only aircraft; and (3) the ICAO Technical Instructions do not contain a per-aircraft limitation. JAL stated it was unaware of any incidents attributable to the transportation of quantities of hazardous materials in excess of the limitation prescribed in § 175.75(a)(2). Further, JAL believes that the current lack of uniformity between U.S. regulations and ICAO Technical Instructions may increase dangers as a result of additional handling, (e.g., off-loading and re-loading) at an en route station prior to departure to the U.S.

In response to the ANPRM, we received 28 written comments. Additionally, eight persons made oral presentations at a public meeting held on May 30, 1985 (See 50 FR 6013). At least one advocate for the removal of § 175.75(a)(2) recommended issuance of an interim final rule for a trial period of one year. The proposed interim rule would revise the quantity limit in § 175.75(a)(2) from 25 kg (55 pounds) to 135 kg (300 pounds), and from 75 kg (165 pounds) to 225 kg (500 pounds) for non-flammable compressed gas. The determination to implement a final rule would be based on the results of the interim final rule. JAL stated § 175.75(a)(2) should be removed because the 25 kg (55 pounds) limit is rendered obsolete by advances in aviation technology and improvements in procedures for packaging dangerous goods.

Persons opposed to the removal of the 25 kg (55 pounds) limitation asserted that the relaxation of the hazardous materials standards would be ill-advised and would compromise the safety of flight crews and passengers. Some opposing commenters believe more study is required before this quantity limitation is removed for passenger carrying aircraft. Some commenters believe there are serious deficiencies in cargo compartment fire containment capabilities, and it is the wrong time to remove any quantity limitations.

On March 18, 1996, the Air Freight Association (AFA) filed a petition for rulemaking (P-1310) requesting amendments to the quantity limitations requirement of § 175.75. AFA stated that limitations on the quantities of hazardous materials on aircraft should be determined by the nature of service for which each aircraft is intended. AFA

suggested that limited quantities regulations are permitted to apply to a wider range of materials than originally intended. AFA cited the evolving nature of the small package delivery process. Specifically, AFA referred to the time constraints dictated by customers' need to have packages delivered next-day, second-day, etc. AFA believes the need to monitor loading limits causes its members to inefficiently load packages into unit load devices (ULD), and the time-sensitive nature of next-day or second-day delivery processes are adversely impacted by assuring the quantity limitations requirements are met. In its petition, AFA stated that exemption DOT E-11110, is adequate proof that the removal of the quantity limitations for cargo-only aircraft operations causes no adverse impact on safety. Exemption DOT E-11110 authorizes the transportation of certain hazardous materials in combination packages in quantities that exceed those authorized by § 175.75(a)(2). These hazardous materials include Division 1.4 Compatibility Group S; Class 3 Packing Group III (that do not meet any other hazard class); Division 6.1 PG III; and Class 8 PG III (that do not meet any other hazard class). However, P-1310 also requests the inclusion of packages of hazardous materials in Division 2.2 (non-flammable, non-poisonous compressed gas) and Class 3 PG II to the exception. Based upon the rationale presented, we do not believe that the claims made and the evidence cited by the petitioners, provide an adequate basis for removal of the quantity limitations of § 175.75. We are unaware of the existence of any data suggesting that an increase in the amount of hazardous materials carried in inaccessible cargo compartments will not increase the risk of an incident involving hazardous materials, nor place passengers aboard aircraft at higher risk for injury. We also do not believe that the evolution of the package delivery process demonstrates the ability of the process to provide the same levels of safety sought by regulation, for all hazardous materials. Further, we do not believe an "inefficiency" to the loading process in and of itself, is a sufficient reason to relax safety regulation. In fact, loading processes vary from operator to operator. This includes the amounts, if any, of hazardous materials carried and the location of where the materials are loaded on the aircraft. Finally, we believe continued regulation for certain hazardous materials is warranted at this time. Therefore, we are denying P-903

and P-1310, and closing Docket HM-192.

C. Questions

1. Would footnotes to Column 9A and 9B of the HMT to reference § 173.27 and Part 175 be helpful?

2. Should §§ 173.27, 175.75, or 173.85 be amended to include cross-references to quantity limitations in other sections?

3. Would combining §§ 175.75 and 175.85 simplify and/or clarify these regulations?

4. Does compartment accessibility versus inaccessibility affect air safety and/or commerce?

5. Should the exception allowing unlimited amounts of consumer commodities and Class 9 materials to be loaded on both passenger and cargo-only aircraft be modified or eliminated?

6. Should DOT Exemption E-11110 (or any of the provisions contained within it) be incorporated into the HMR? Would incorporating this exemption adversely affect safety?

7. Is RSPA's definition of the term "impracticable" feasible? Should it be revised and/or added to the HMR?

8. Should we remove or revise any approval provisions in part 175? Should we add new approval procedures to part 175?

V. Other Requirements in Part 175

A. Scope and Applicability

1. Discussion

Section 175.1 states that part 175 prescribes requirements for aircraft operators transporting hazardous materials aboard aircraft that are in addition to those contained in parts 171, 172, and 173. Section 175.5 states that part 175 applies to the acceptance for transportation, loading and transportation of hazardous materials in any aircraft in the United States, and in aircraft of United States registry anywhere in air commerce. Section 175.5 also provides exceptions from the requirements of the HMR for those aircraft under the direct, exclusive control of a government and not used for commercial purposes.

We believe there is some confusion over the applicability of part 175 to persons who are not air carriers, such as freight forwarders. Although the language of § 175.1 refers to aircraft operators, part 175 also applies to persons who are not direct air carriers but perform the same functions. Such persons include: persons who accept packages for air commerce; ground handling crews; contracted employees; air freight forwarders; and subsidiary companies formed by aircraft operators that perform pallet building and handle,

load, and unload hazardous materials in air commerce. (Note: Additional discussion on the applicability of the HMR to airline passengers is contained in Section V.D. of this preamble.)

The exceptions provided in § 175.5 do not apply to commercial aircraft operators who supply contractual services to a government, because the government does not have exclusive control of the aircraft in flight. These exceptions are for those aircraft under the direct exclusive control of a government, and not a private carrier working under a government contract. Exclusive direction and control consists of both administrative and physical control.

We are considering revising § 175.1 to clarify that persons who are not direct air carriers but perform air carrier functions, are subject to part 175. We are also considering revising the applicability of the HMR to air carriers under exclusive control of a government.

2. Questions

1. Should § 175.1 be rewritten to clarify the applicability to persons who are not direct air carriers but perform air carrier functions (e.g., indirect air carriers)?

2. Are there conditions relating to the control of an aircraft by a government, that need to be clarified or addressed?

B. Inspection and Acceptance of Packages/Shipments

1. Discussion

A number of requirements in part 175 contain provisions for inspecting and accepting shipments of hazardous materials transported by aircraft. Section 175.3 prohibits aircraft operators from accepting hazardous materials not prepared for shipment in accordance with the HMR. Section 175.30, states no person may carry a hazardous material aboard an aircraft unless the package is inspected by the aircraft operator to ensure that the integrity of the package has not been compromised. Section 175.88 prohibits a ULD from being placed on an aircraft unless the device is inspected and found to be free from evidence of leakage from, or damage to, any package containing hazardous materials. Section 175.90 requires packages and overpacks containing hazardous materials to be inspected after unloading from aircraft, to assure no damage or leakage has occurred during flight. When packages or overpacks containing hazardous materials are carried in a ULD, an immediate inspection of the location where the ULD was stored on the

aircraft is required to detect any evidence of leakage or contamination. Packages or overpacks containing hazardous materials carried in a ULD must also be inspected for damage or leakage when unloaded from a ULD.

We issued a formal interpretation on the acceptance of hazardous materials on June 4, 1998 (63 FR 30411). We stated a carrier's acceptance and transportation of hazardous materials can involve several different situations. For example, in some manner a shipment could be declared by the offeror to contain hazardous materials, and should comply with requirements of the HMR. Conversely, an "undeclared" or "hidden" shipment is a shipment of hazardous materials that, intentionally or unintentionally, is not declared by the offeror to contain hazardous materials and there is no attempt to comply with the HMR.

The importance of responsibly accepting hazardous materials is highlighted by the requirement under 49 U.S.C. 5123 to assess a civil penalty against any person who "knowingly violates" any requirement in the HMR, including the provisions of § 175.30. Section 5123(a) provides that a person "acts knowingly" when (A) the person has actual knowledge of the facts giving rise to the violation; or (B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge. A carrier knowingly violates the HMR when the carrier accepts or transports a hazardous material with actual or constructive knowledge that a package contains a hazardous material not properly packaged, marked, labeled, or described on a shipping paper as required by the HMR. This means a carrier may not ignore readily apparent facts indicating that either (1) a shipment declared to contain a hazardous material is not properly packaged, marked, labeled, placarded, or described on a shipping paper, or (2) a shipment actually contains a hazardous material governed by the HMR despite the fact it is not marked, labeled, placarded, or described on a shipping paper as containing a hazardous material.

Internationally, part 7 of the ICAO Technical Instructions contains hazardous materials acceptance procedures for aircraft operators. ICAO Part 7;1.3 requires operators to develop and use a checklist that includes all reasonable steps to assure packages are properly prepared for transportation by aircraft, and all regulatory requirements have been satisfied.

Because § 175.3 appears to overlap with the provisions of § 171.2(a) and (b), we are considering eliminating § 175.3.

We are also considering whether the provisions of § 175.30 provide adequate guidance for accepting packages of hazardous materials, and for air carriers to identify shipments of undeclared hazardous materials. In place of these provisions, we are determining whether a checklist similar to the one used in the ICAO Technical Instructions would be helpful in assuring packages of hazardous materials are in compliance with applicable regulations prior to being accepted. Finally, based on the detailed requirements of § 175.90, we are considering merging the pre-flight ULD inspection requirements of § 175.88 into the post-flight inspection requirements of § 175.90.

2. Questions

1. Are the requirements of § 175.3 already addressed by § 171.2? If so, should these requirements be removed from § 175.3?

2. Are there additional issues regarding accepting or inspecting packages that are not addressed by § 175.30?

3. As outlined in the formal interpretation we issued on June 4, 1998 on the acceptance of hazardous materials, the acceptance requirements of § 175.30 are not limited to declared hazardous materials packages. Are the requirements of § 175.30 sufficiently clear or should we revise the section?

4. Should we adopt a checklist similar to the one used in the ICAO Technical Instructions to enable operators to assure packages of hazardous materials are in compliance with applicable regulations? Would such a checklist help operators to identify undeclared hazardous materials? If adopted, when should the checklist be completed?

5. Should we merge the pre-flight ULD inspection requirements of § 175.88 with the post-flight inspection requirements of § 175.90?

C. Discrepancy Reporting

1. Discussion

Section 175.31 requires a person who discovers a discrepancy after acceptance of a package of hazardous materials (as defined by § 175.31(b)) to notify the nearest FAA Civil Aviation Security Field Office (CASFO) by telephone "as soon as practicable," and provide certain information. This requirement permits early investigation and intervention to determine the cause for failure to either properly declare or prepare a hazardous materials shipment. A May 27, 1980, final rule under Docket HM-168 (45 FR 35329), adopted requirements in 49 CFR 175.31 for reporting discrepancies. In the preamble to the final rule, we stated:

A shipment containing a hazardous material must be offered to the carrier in accordance with the regulations. An offering occurs when (1) the package is presented, (2) the shipping paper is presented, (3) the certification is executed, and (4) the transfer of the package and shipping paper is completed with no further exchange (written or verbal) between the shipper and aircraft operator, as usually evidenced by the departure of the shipper. At this point, it is clear that the operator has accepted the shipment and the shipper has removed himself from a final opportunity to take corrective action that would preclude a violation of the HMR relative to transportation of hazardous materials aboard aircraft . . . the requirement which has been adopted [in this final rule] limits required reporting to shipment discrepancies which are discovered [subsequent to] acceptance of the shipment for transportation and limits "reportable" discrepancies to those discrepancies which are not detectable as a result of proper examination by a person accepting shipment under the acceptance criteria of § 175.30. This notification requirement will facilitate the timely investigation by FAA personnel of shipment discrepancies involving situations where inside containers do not meet prescribed packaging or quantity limitation requirements and where packages or baggage are found to contain hazardous materials after having been offered and accepted as other than hazardous materials.

Internationally, ICAO Technical Instructions part 7.4.5 contains provisions under which operators must report undeclared or misdeclared dangerous goods found in cargo, or dangerous goods not permitted to be carried by passengers, found in baggage. This report must be given to the appropriate authorities in the country in which the incident occurs.

We adopted the reporting requirement of § 175.31 with the intent to allow time to investigate those persons offering undeclared shipments. We note that the reporting requirement in § 175.31(a) is limited in § 175.31(b) to those discrepancies involving hazardous materials which are improperly described, certified, labeled, marked, or packaged, in a manner not ascertainable when accepted under the provisions of § 175.30(a). There is no requirement for a carrier to report discrepancies that are ascertainable under the acceptance and inspection requirements of § 175.30(a). However, many of the "discrepancies" reported by carriers fall into this latter category. We are considering the need for guidelines to help discern discrepancies from violations.

2. Questions

1. Should we require discrepancies to be reported immediately so packages are still available for inspection? Should the term in § 175.31, "as soon as

practicable" be further clarified? Would a time limit established in hours be a good alternative?

2. Should a formalized amnesty feature be considered for those who report discrepancies?

3. Should the requirement to report discrepancies be clarified as they apply to indirect air carriers and other shipping facilities after acceptance of cargo?

D. Exceptions

1. Company Materials

Section 175.10(a)(2) excepts from the HMR certain hazardous materials required to be aboard an aircraft in accordance with applicable airworthiness requirements and operating instructions. However, items of replacement for such materials and other company materials (COMAT) of an airline that are hazardous materials must be properly classed, described, marked, labeled, packaged, handled, stored, and secured in accordance with the HMR (Note: We published an advisory notice on COMAT on December 13, 1996 (61 FR 65479)).

The HMR provide the following limited exceptions for COMAT: (1) Items of replacement for installed equipment containing hazardous materials are excepted from the packaging requirements of the HMR if they are contained in specialized packaging providing at least an equivalent level of protection of required packaging; (2) aircraft batteries are excepted from the quantity limitations in §§ 172.101 and 175.75(a); and (3) an aircraft tire assembly is not subject to the HMR if it is not inflated to a gauge pressure exceeding the maximum rated pressure for the tire. Other materials such as paint, chemicals for corrosion removal, automotive batteries, wastes, and engine-powered ground equipment containing fuels do not qualify for this limited relief.

In some cases, items of replacement for installed equipment containing hazardous materials or for hazardous materials carried to meet airworthiness requirements, are owned by one air carrier but are transported by another air carrier as part of a "parts pooling agreement." The COMAT exceptions in § 175.10 do not apply to transportation of another air carrier's materials. The purpose of the exceptions in § 175.10(a)(2) is based on the knowledge of an air carrier to handle and package materials specific to the owner's operational use. Therefore, transportation of another air carrier's materials must be conducted in full compliance with the HMR. We are

considering the need to clarify that this exception only applies to the transportation of an airline's own material.

2. Passengers and Crew

Section 175.10 also provides limited exceptions for the transportation of certain personal items of passengers or crew members that are hazardous materials, such as toiletries, alcoholic beverages, and medicinal items. We are examining these exceptions to determine if any of them should be removed and if additional exceptions should be provided. We understand some persons are not aware that the HMR apply to aircraft passengers who are carrying hazardous materials on their person or in checked or carry-on baggage. For example, we are aware of situations where passengers with certain medical conditions must transport as carry-on baggage personal monitors and devices such as apnea and heart monitors, nebulizers, and nerve stimulators. These items would qualify as hazardous materials for purposes of the HMR. Therefore, we are considering clarifying the applicability of the HMR to aircraft passengers carrying hazardous materials and are considering moving the passenger exceptions to part 173. We request comments on the need for any additional exceptions and whether any of the existing exceptions should be removed or revised. We are also considering removing exceptions applicable to disabled persons with medical conditions from § 175.10 and placing them in a new section.

3. Special Operations

Section 175.10 also provides limited exceptions for the transportation of certain hazardous materials for special aircraft operations, such as avalanche control flights, aerial applications, and sport parachute jumping. We received a petition (P-846) to add an exception to § 175.10 for hazardous materials that are loaded onto and carried in an aircraft for the purpose of emergency response situations where a loss of life or property is imminent. These materials would include items such as self-contained breathing apparatus or other related emergency equipment necessary for each situation. The exception would provide an exception for hazardous materials transported for the purpose of emergency response from the subchapter. The exception would apply to materials in authorized packaging. Each operator transporting the materials would keep current a manual of operational guidelines and handling procedures, and the aircraft could only transport crew members, emergency

response personnel, FAA inspectors, or persons essential to handling the hazardous materials. We are considering adopting this proposal into the HMR. A copy of the petition is available for review in the public docket.

4. Questions

1. Should we reorganize § 175.10 into three sections applicable to: (1) Passengers and crewmembers; (2) COMAT; and (3) special operations?

2. Should we remove the exceptions applicable to persons with medical conditions from § 175.10 and place them in a new section? Should we move these exceptions, in particular the exceptions for passengers and crew, to another part of the HMR? If so, what part?

3. Is it understood that the COMAT exception contained in § 175.10 does not apply to transportation of another air carrier's material? Should the COMAT exception apply only to the transportation of those materials intended for an aircraft-on-ground (AOG)?

4. Is clarification of the applicability of the HMR to passengers necessary? Is there a more effective way of communicating the applicable passenger provisions of this section, such as moving the exceptions to Part 173? Should we define the term "passenger" in § 171.8?

5. Should we provide additional exceptions in § 175.10, such as those for personal monitors and devices such as apnea and heart monitors, nebulizers and nerve stimulators? Should we remove or modify any of these exceptions?

6. Should we except hazardous materials necessary for emergency response situations where there is the possibility of imminent loss of life or property from the requirements of the HMR? What effect would this have on air safety?

7. Should we make changes as to which provisions require FAA approval?

E. Training Requirements

1. Discussion

Section 175.20 requires aircraft operators to comply with all applicable requirements in parts 106, 171, 172, and 175. In addition, hazmat employers must ensure all hazmat employees receive training in accordance with part 172. Initial training under the HMR must be conducted within 90 days after employment begins or a change in the employee's job function. Recurrent training must be conducted every three years. Section 175.20 also refers to the

training requirements of the FAA under 14 CFR §§ 121.135, 121.401, 121.433a, 135.323, 135.327, and 135.333, which additionally address training for air carriers.

A "hazmat employee" is defined in § 171.8 to include "all persons who in the course of employment perform functions that directly affect hazardous materials transportation safety." This does not include every person who works around an area where, for example, hazardous materials are loaded, unloaded, handled, and stored. The employee's functional relationship to hazardous materials transportation safety, rather than incidental contact with hazardous materials in the workplace, is the primary factor in determining whether an individual is a "hazmat employee."

We believe there is confusion over who is a hazmat employee and, must therefore receive hazmat training. An employee of (or an employee of a contractor for) an airline who performs security functions related to hazardous materials is a hazmat employee and must receive the training required by 49 CFR part 172 and by 14 CFR parts 121 and 135. Such security functions could include: loading cargo onto pallets and x-ray machines; opening cargo for inspection; and transporting cargo that may include hazardous materials. An employee of an airline, including an employee of a contractor, who is not responsible for performing any function addressed by the HMR is not considered to be a "hazmat employee" and is not subject to the training requirements of the HMR. We are considering the need to revise § 175.20 to clarify training requirements for certain air carrier personnel.

2. Questions

1. Are the requirements for training applicable to aircraft operators and hazmat employees clear and easy to understand?

2. Should we clarify that persons responsible for screening for unacceptable hazardous materials must be trained?

3. Should we require baggage handling, sorting, security, and other carrier personnel to receive training to help them to identify undeclared hazardous materials in cargo?

4. Do aircraft operators understand what training requirements apply to their personnel (e.g., 49 CFR versus 14 CFR)?

F. Carriage of Radioactive Material Aboard Aircraft

1. Discussion

Section 5114 of the federal hazardous materials transportation law addresses ionizing radiation material transportation. It states that the material may be transported on a passenger-carrying aircraft in air commerce, only if the material is intended for use in, or incident to, research or medical diagnosis or treatment; and does not present an unreasonable hazard to health and safety when being prepared for, and during, transportation. Section 175.700 of the HMR prohibits, in addition to other requirements, any person from carrying in a passenger-carrying aircraft any package required to be labeled in accordance with § 172.403 of the HMR with a Radioactive Yellow II or III label, unless certain provisions are met. In addition, § 175.700(c) states that (except for limited quantities) no person shall carry any class 7 material aboard a passenger-carrying aircraft unless that material is intended for use in research, medical diagnosis, or treatment.

It appears some persons have misused the definition of research to avoid these restrictions. We do not consider research to include the application of existing technology to industrial endeavors. For example, the use of radioactive material (e.g., iridium-192) to detect cracks in oil field pipelines is not research, but the application of existing scientific knowledge. We are considering revising § 175.700 to clarify that research does not include the application of existing technology to industrial endeavors.

2. Question

Does the term "research" as used in § 175.700 require further clarification?

VI. Small Quantities, Limited Quantities and Consumer Commodities

A. Discussion

The HMR contain hazardous materials exceptions for small quantities, limited quantities, and consumer commodities. These exceptions allow materials to be transported at reduced levels of regulation. Small quantities of hazardous materials are excepted from all other requirements of the HMR, provided certain criteria in § 173.4 are met. Limited quantity exceptions in the HMR are based on the class of the hazardous material, and contain some additional requirements for air transportation. Materials that meet the limited quantity exception and also meet the definition of a consumer

commodity as provided by § 171.8, may be renamed "Consumer Commodity" and reclassified as ORM-D. Consumer commodities are excepted from specification packaging, labeling, placarding and quantity limitations applicable to air transportation. As currently written, these exceptions allow small quantities and consumer commodities to be transported by aircraft even though they may contain hazardous materials otherwise forbidden aboard aircraft. These exceptions are inconsistent with the ICAO Technical Instructions, which require that before a hazardous material may be transported as an excepted quantity (i.e. small quantity), it must be suitable for transportation aboard passenger aircraft. In addition, the HMR allows many more hazardous materials to be transported as a consumer commodity than do the ICAO Technical Instructions. The ICAO Technical Instructions restrict consumer commodities to include only non-toxic aerosols, Class 3 Packing Group II or III, Division 6.1 packing group III, and UN3175. Therefore, we are considering revising the small quantity, limited quantity and consumer commodity provisions to be consistent with the ICAO Technical Instructions.

B. Questions

1. Should the provisions for small quantity, limited quantity and consumer commodity be revised to be consistent with the ICAO Technical Instructions?
2. Should the § 173.4 package marking be amended to align it with the ICAO Technical Instructions excepted quantity package marking?

VII. Request for Additional Comments

Comments are invited on any items or issues pertinent to this topic not addressed by the above questions. There are a number of additional issues we must address in determining whether to proceed with rulemaking on this matter. These include the analyses required under the following statutes and Executive Orders:

A. Executive Order 12866: Regulatory Planning and Review

E.O. 12866 requires agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." We therefore request comments, including specific data if possible, concerning the costs and benefits associated with the issues addressed in this notice.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), we must consider whether a proposed rule would have a significant economic impact on a substantial number of "small entities." "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. We invite comments as to the economic impact that the issues addressed in this notice may have on small businesses.

C. Executive Order 13132: Federalism

Federal hazardous materials transportation law (49 U.S.C. 5101 et seq.) preempts many state and local laws and regulations concerning hazardous materials transportation that are not the same as the federal requirements. E.O. 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. We invite comments on the effect that the issues addressed in this notice may have on state or local safety or emergency response programs.

D. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

E.O. 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that "significantly or uniquely affect" Indian communities and that impose "substantial and direct compliance costs" on such communities. We do not believe there will be any effect on Indian tribes, but invite Indian tribal governments to provide comments as to the effect the issues addressed in this notice may have on Indian communities.

VIII. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This rulemaking is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This rulemaking is not considered significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

B. 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.

Issued in Washington, DC, on February 20, 2002, under the authority delegated in 49 CFR Part 106.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

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