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(1) Direct the offeror of the package, or other person responsible for the package, to have the package transported to a facility where the material may be examined and analyzed;

(2) Direct the packaging manufacturer or tester of the packaging to have the package transported to a facility where the packaging may be tested in accordance with the HMR; or

(3) Direct the carrier to transport the package to a facility capable of conducting such examination and analysis.

(c) The 48-hour removal period provided in §109.7 may be extended in writing by the Administrator pending the conclusion of examination and analysis under this section.

§109.11 Assistance of properly qualified personnel.

An agent may authorize properly qualified personnel to assist in the activities conducted under this part if the agent is not properly qualified to perform a function that is essential to the agent's exercise of authority under this part or when safety might otherwise be compromised by the agent's performance of such a function.

§109.13 Closing packages and safe resumption of transportation.

(a) *No imminent hazard found.* If, after an agent exercises an authority under §109.5, the agent finds that no imminent hazard exists, and the package otherwise conforms to applicable requirements in subchapter C of this chapter, the agent will:

(1) Assist in preparing the package for safe and prompt transportation, when practicable, by reclosing the package in accordance with the packaging manufacturer's closure instructions or other appropriate closure method;

(2) Mark and certify the reclosed package to indicate that it was opened and reclosed in accordance with this part;

(3) Return the package to the person from whom the agent obtained it, as soon as practicable; and

(4) For a package containing a perishable hazardous material, assist in resuming the safe and expeditious transportation of the package as soon as practicable after determining that the package presents no imminent hazard.

(b) *Imminent hazard found.* If an imminent hazard is found to exist after an agent exercises an authority under §109.5, the Administrator or his/her designee may issue an out-of-service order prohibiting the movement of the package until the package has been brought into compliance with subchapter C of this chapter. Upon receipt of the out-of-service order, the person in possession of, or responsible for, the package must remove the package from transportation until it is brought into compliance.

(c) *Package does not contain hazardous material.* If, after an agent exercises an authority under §109.5, the agent finds that a package does not contain a hazardous material, the agent shall securely close the package, mark and certify the reclosed package to indicate that it was opened and reclosed, and return the package to transportation.

(d) *Non-compliant package.* If, after an agent exercises an authority under §109.5, the agent finds that a package contains hazardous material and does not conform to requirements in subchapter C of this chapter, but does not present an imminent hazard, the agent will return the package to the person in possession of the package at the time the non-compliance is discovered for appropriate corrective action. A non-compliant package may not continue in transportation until all identified non-compliance issues are resolved.

§109.15 Termination.

When the facts disclosed by an investigation indicate that further action is not warranted under this Part at the time, the Administrator will close the investigation without prejudice to further investigation and notify the person being investigated of the decision. Nothing herein precludes civil enforcement action at a later time related to the findings of the investigation.

Subpart C—Emergency Orders

§109.17 Emergency Orders.

(a) *Determination of imminent hazard.* When an Administrator determines

that a violation of a provision of the Federal hazardous material transportation law, or a regulation or order prescribed under that law, or an unsafe condition or practice, constitutes or is causing an imminent hazard, as defined in §109.1, the Administrator may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without advance notice or an opportunity for a hearing. The basis for any action taken under this section shall be set forth in writing which must—

(1) Describe the violation, condition, or practice that constitutes or is causing the imminent hazard;

(2) Set forth the terms and conditions of the emergency order;

(3) Be limited to the extent necessary to abate the imminent hazard; and,

(4) Advise the recipient that, within 20 calendar days of the date the order is issued, recipient may request review; and that any request for a formal hearing in accordance with 5 U.S.C. 554 must set forth the material facts in dispute giving rise to the request for a hearing; and

(5) Set forth the filing and service requirements contained in §109.19(f), including the address of DOT Docket Operations and of all persons to be served with the petition for review.

(b) *Out-of-service order.* An out-of-service order is issued to prohibit the movement of an aircraft, vessel, motor vehicle, train, railcar, locomotive, transport unit, transport vehicle, or other vehicle, or a freight container, portable tank, or other package until specified conditions of the out-of-service order have been met.

(1) Upon receipt of an out-of-service order, the person in possession of, or responsible for, the package must remove the package from transportation until it is brought into compliance with the out-of-service order.

(2) A package subject to an out-of-service order may be moved from the place where it was found to present an imminent hazard to the nearest location where the package can be brought into compliance, provided that the agent who issued the out-of-service order is notified before the move.

(3) The recipient of the out-of-service order must notify the operating administration that issued the order when the package is brought into compliance.

(4) Upon receipt of an out-of-service order, a recipient may appeal the decision of the agent issuing the order to PHMSA's Chief Safety Officer. A petition for review of an out-of-service order must meet the requirements of §109.19.

(c) *Recalls.* PHMSA's Associate Administrator, Office of Hazardous Materials Safety, may issue an emergency order mandating the immediate recall of any packaging, packaging component, or container certified, represented, marked, or sold as qualified for use in the transportation of hazardous materials in commerce when the continued use of such item would constitute an imminent hazard. All petitions for review of such an emergency order will be governed by the procedures set forth at §109.19.

§109.19 Petitions for review of emergency orders.

(a) *Petitions for review.* A petition for review must—

(1) Be in writing;

(2) State with particularity each part of the emergency order that is sought to be amended or rescinded and include all information, evidence and arguments in support thereof;

(3) State whether a formal hearing in accordance with 5 U.S.C. 554 is requested, and, if so, the material facts in dispute giving rise to the request for a hearing; and,

(4) Be filed and served in accordance with §109.19(f).

(b) *Response to the petition for review.* An attorney designated by the Office of Chief Counsel of the operating administration issuing the emergency order may file and serve, in accordance with §109.19(f), a response, including appropriate pleadings, within five calendar days of receipt of the petition by the Chief Counsel of the operating administration issuing the emergency order.

(c) *Chief Safety Officer Responsibilities.*

(1) *Hearing requested.* Upon receipt of a petition for review of an emergency order that includes a formal hearing request and states material facts in dispute, the Chief Safety Officer shall immediately assign the petition to the

Office of Hearings. Unless the Chief Safety Officer issues an order stating that the petition fails to set forth material facts in dispute and will be decided under paragraph (c)(2) of this section, a petition for review including a formal hearing request will be deemed assigned to the Office of Hearings three calendar days after the Chief Safety Officer receives it.

(2) *No hearing requested.* For a petition for review of an emergency order that does not include a formal hearing request or fails to state material facts in dispute, the Chief Safety Officer shall issue an administrative decision on the merits within 30 days of receipt of the petition. The Chief Safety Officer's decision constitutes final agency action.

(d) *Hearings.* Formal hearings shall be conducted by an Administrative Law Judge assigned by the Chief Administrative Law Judge of the Office of Hearings. The Administrative Law Judge may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by the appropriate agency regulations (49 CFR 209.7, 49 CFR 105.45, 14 CFR 13.3, and 49 U.S.C. 502 and 31133);

(3) Adopt the relevant Federal Rules of Civil Procedure for the United States District Courts for the procedures governing the hearings when appropriate;

(4) Adopt the relevant Federal Rules of Evidence for United States Courts and Magistrates for the submission of evidence when appropriate;

(5) Take or cause depositions to be taken;

(6) Examine witnesses at the hearing;

(7) Rule on offers of proof and receive relevant evidence;

(8) Convene, recess, adjourn or otherwise regulate the course of the hearing;

(9) Hold conferences for settlement, simplification of the issues, or any other proper purpose; and,

(10) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of an issue raised therein.

(e) *Parties.* The petitioner may appear and be heard in person or by an authorized representative. The operating administration issuing the emergency order shall be represented by an attorney designated by its respective Office of Chief Counsel.

(f) *Filing and service.* (1) Each petition, pleading, motion, notice, order, or other document submitted in connection with an order issued under this subpart must be filed (commercially delivered or submitted electronically) with: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. All documents filed will be published on the Department's docket management Web site, *http://www.regulations.gov*. The emergency order shall state the above filing requirements and the address of DOT Docket Operations.

(2) Service. Each document filed in accordance with paragraph (f)(1) of this section must be concurrently served upon the following persons:

(i) Chief Safety Officer (*Attn:* Office of Chief Counsel, PHC), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590 (*facsimile:* 202–366–7041) (*electronic mail: PHMSAChiefCounsel@dot.gov*);

(ii) The Chief Counsel of the operating administration issuing the emergency order;

(iii) If the petition for review requests a formal hearing, the Chief Administrative Law Judge, U.S. Department of Transportation, Office of Hearings, M–20, Room E12–320, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*facsimile:* 202–366–7536).

(iv) Service shall be made personally, by commercial delivery service, or by electronic means if consented to in writing by the party to be served, except as otherwise provided herein. The emergency order shall state all relevant service requirements and list the persons to be served and may be updated as necessary. The emergency order shall also be published in the FEDERAL REGISTER as soon as practicable after its issuance.

(3) Certificate of service. Each order, pleading, motion, notice, or other document shall be accompanied by a certificate of service specifying the manner in which and the date on which service was made.

(4) The emergency order shall be served by ''hand delivery,'' unless such delivery is not practicable, or by electronic means if consented to in writing by the party to be served.

(5) Service upon a person's duly authorized representative, agent for service, or an organization's president constitutes service upon that person.

(g) *Report and recommendation.* The Administrative Law Judge shall issue a report and recommendation at the close of the record. The report and recommendation shall:

(1) Contain findings of fact and conclusions of law and the grounds for the decision based on the material issues of fact or law presented on the record;

(2) Be served on the parties to the proceeding; and

(3) Be issued no later than 25 days after receipt of the petition for review by the Chief Safety Officer.

(h) *Expiration of order.* If the Chief Safety Officer, or the Administrative Law Judge, where appropriate, has not disposed of the petition for review within 30 days of receipt, the emergency order shall cease to be effective unless the Administrator issuing the emergency order determines, in writing, that the imminent hazard providing a basis for the emergency order continues to exist. The requirements of such an extension shall remain in full force and effect pending decision on a petition for review unless stayed or modified by the Administrator.

(i) *Reconsideration.*

(1) A party aggrieved by the Administrative Law Judge's report and recommendation may file a petition for reconsideration with the Chief Safety Officer within one calendar day of service of the report and recommendation. The opposing party may file a response to the petition within one calendar day of service of a petition for reconsideration.

(2) The Chief Safety Officer shall issue a final agency decision within three calendar days of service of the final pleading, but no later than 30 days after receipt of the original petition for review.

(3) The Chief Safety Officer's decision on the merits of a petition for reconsideration constitutes final agency action.

(j) *Appellate review.* A person aggrieved by the final agency action may petition for review of the final decision in the appropriate Court of Appeals for the United States as provided in 49 U.S.C. 5127. The filing of the petition for review does not stay or modify the force and effect of the final agency.

(k) *Time.* In computing any period of time prescribed by this part or by an order issued by the Administrative Law Judge, the day of filing of the petition for review or of any other act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days.

§ 109.21 Remedies generally.

An Administrator may request the Attorney General to bring an action in the appropriate United States district court seeking temporary or permanent injunctive relief, punitive damages, assessment of civil penalties as provided by 49 U.S.C. 5122(a), and any other appropriate relief to enforce the Federal hazardous material transportation law, regulation, order, special permit, or approval prescribed or issued under the Federal hazardous material transportation law.

PART 110—HAZARDOUS MATERIALS PUBLIC SECTOR TRAINING AND PLANNING GRANTS

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