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SUBCHAPTER A—HAZARDOUS MATERIALS AND OIL TRANSPORTATION

PART 105—HAZARDOUS MATERIALS PROGRAM DEFINITIONS AND GENERAL PROCEDURES

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Subpart A—Definitions

§ 105.5 Definitions.

(a) This part contains the definitions for certain words and phrases used throughout this subchapter (49 CFR parts 105 through 110). At the beginning of each subpart, the Pipeline and Hazardous Materials Safety Administration (''PHMSA'' or ''we'') will identify the defined terms that are used within the subpart—by listing them—and refer the reader to the definitions in this part. This way, readers will know that PHMSA has given a term a precise meaning and will know where to look for it.

(b) Terms used in this part are defined as follows:

Associate Administrator means Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

Approval means written consent, including a competent authority approval, from the Associate Administrator or other designated Department official, to perform a function that requires prior consent under subchapter C of this chapter (49 CFR parts 171 through 180).

Competent Authority means a national agency that is responsible, under its national law, for the control or regulation of some aspect of hazardous materials (dangerous goods) transportation. Another term for Competent Authority is ''Appropriate authority'' which is used in the International Civil Aviation Organization's (ICAO) Technical Instructions for the Safe Transport of Dangerous Goods by Air. The Associate Administrator is the United States Competent Authority for purposes of 49 CFR part 107.

Competent Authority Approval means an approval by the competent authority that is required under an international standard (for example, the ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air and the International Maritime Dangerous Goods Code). Any of the following may be considered a competent authority approval if it satisfies the requirement of an international standard:

(1) A specific regulation in subchapter A or C of this chapter.

(2) A special permit or approval issued under subchapter A or C of this chapter.

(3) A separate document issued to one or more persons by the Associate Administrator.

Federal hazardous material transportation law means 49 U.S.C. 5101 *et seq.*

File or *Filed* means received by the appropriate PHMSA or other designated office within the time specified in a regulation or rulemaking document.

Hazardous material means a substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and has designated as hazardous under section 5103 of Federal hazardous materials transportation law (49 U.S.C. 5103). The term includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, materials designated as hazardous in the Hazardous Materials Table (see 49 CFR 172.101), and materials that meet the defining criteria for hazard classes and divisions in part 173 of subchapter C of this chapter.

Hazardous Materials Regulations or *HMR* means the regulations at 49 CFR parts 171 through 180.

Indian tribe has the same meaning given that term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

Person means an individual, firm, copartnership, corporation, company, association, or joint-stock association (including any trustee, receiver, assignee, or similar representative); or a government or Indian tribe (or an agency or instrumentality of any government or Indian tribe) that transports a hazardous material to further a commercial enterprise or offers a hazardous material for transportation in commerce. Person does not include the following:

(1) The United States Postal Service.

(2) Any agency or instrumentality of the Federal government, for the purposes of 49 U.S.C. 5123 (civil penalties) and 5124 (criminal penalties).

(3) Any government or Indian tribe (or an agency or instrumentality of any government or Indian tribe) that transports hazardous material for a governmental purpose.

Political subdivision means a municipality; a public agency or other instrumentality of one or more States, municipalities, or other political body of a State; or a public corporation, board, or commission established under the laws of one or more States.

Preemption determination means an administrative decision by the Associate Administrator that Federal hazardous materials law does or does not void a specific State, political subdivision, or Indian tribe requirement.

Regulations issued under Federal hazardous material transportation law include this subchapter A (parts 105–110) and subchapter C (parts 171–180) of this chapter, certain regulations in chapter I (United States Coast Guard) of title 46, Code of Federal Regulations, and in chapters III (Federal Motor Carrier Safety Administration) and XII (Transportation Security Administration) of subtitle B of this title, as indicated by the authority citations therein.

Special permit means a document issued by the Associate Administrator under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 et seq. (e.g., Federal Motor Carrier Safety routing requirements). The terms ''special permit'' and ''exemption'' have the same meaning for purposes of subchapter A or C of this chapter or other regulations issued under 49 U.S.C. 5101 through 5127. An exemption issued prior to October 1, 2005 remains valid until it is past its expiration date, terminated by the Associate Administrator, or is issued as a special permit, whichever occurs first.

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

Transports or *Transportation* means the movement of property and loading, unloading, or storage incidental to the movement.

Waiver of Preemption means a decision by the Associate Administrator to forego preemption of a non-Federal requirement—that is, to allow a State, political subdivision or Indian tribe requirement to remain in effect. The non-Federal requirement must provide at least as much public protection as the Federal hazardous materials transportation law and the regulations

issued under Federal hazardous materials transportation law, and may not unreasonably burden commerce.

[67 FR 42951, June 25, 2002, as amended at 68 FR 52846, Sept. 8, 2003; 70 FR 56087, Sept. 23, 2005; 70 FR 73158, Dec. 9, 2005]

Subpart B—General Procedures

§ 105.15 Defined terms used in this subpart.

The following defined terms (see subpart A of this part) appear in this subpart: Approval; Federal hazardous material transportation law; Hazardous material; Hazardous materials regulations; Indian tribe; Preemption determination; Special permit; State; Transportation; Waiver of preemption

[67 FR 42951, June 25, 2002, as amended at 70 FR 73159, Dec. 9, 2005]

OBTAINING GUIDANCE AND PUBLIC INFORMATION

§ 105.20 Guidance and interpretations.

(a) *Hazardous materials regulations.* You can obtain information and answers to your questions on compliance with the hazardous materials regulations (49 CFR parts 171 through 180) and interpretations of those regulations by contacting PHMSA's Office of Hazardous Materials Safety as follows:

(1) Call the Hazardous Materials Information Center at 1–800–467–4922 (in Washington, DC, call (202) 366–4488). The Center is staffed from 9 a.m. through 5 p.m. Eastern time, Monday through Friday except Federal holidays. After hours, you can leave a recorded message and your call will be returned by the next business day.

(2) E-mail the Hazardous Materials Information Center at *infocntr@dot.gov*.

(3) Obtain hazardous materials safety information via the Internet at *http://www.phmsa.dot.gov*.

(4) Send a letter, with your return address and a daytime telephone number, to: Standards and Rulemaking Division, Pipeline and Hazardous Materials Safety Administration, Attn: PHH–10, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(b) *Federal hazardous materials transportation law and preemption.* You can obtain information and answers to your questions on Federal hazardous materials transportation law, 49 U.S.C. 5101 *et seq.*, and Federal preemption of State, local, and Indian tribe hazardous material transportation requirements, by contacting PHMSA's Office of the Chief Counsel as follows:

(1) Call the office of the Chief Counsel at (202) 366–4400 from 9 a.m. to 5 p.m. Eastern time, Monday through Friday except Federal holidays.

(2) Access information from the Office of the Chief Counsel via the Internet at *http://www.phmsa.dot.gov*.

(3) Send a letter, with your return address and a daytime telephone number, to: Office of the Chief Counsel, Pipeline and Hazardous Materials Safety Administration, Attn: PHC–10, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) Contact the Office of the Chief Counsel for a copy of applications for preemption determinations, waiver of preemption determinations, and inconsistency rulings received by PHMSA before February 1, 1997.

[70 FR 56087, Sept. 23, 2005, as amended at 72 FR 55682, Oct. 1, 2007; 76 FR 56310, Sept. 13, 2011]

§ 105.25 Reviewing public documents.

PHMSA is required by statute to make certain documents and information available to the public. You can review and copy publicly available documents and information at the locations described in this section.

(a) *DOT Docket Management System.* Unless a particular document says otherwise, the following documents are available for public review and copying at the Department of Transportation's Docket Management System, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, or for review and downloading through the Internet at *http://www.regulations.gov*.

(1) Rulemaking documents in proceedings started after February 1, 1997, including notices of proposed rulemaking, advance notices of proposed rulemaking, public comments, related FEDERAL REGISTER notices, final rules, appeals, and PHMSA's decisions in response to appeals.

(2) Applications for special permits numbered DOT–E or DOT–SP 11832 and above. Also available are supporting data, memoranda of any informal meetings with applicants, related FEDERAL REGISTER notices, public comments, and decisions granting or denying applications for special permits.

(3) Applications for preemption determinations and waiver of preemption determinations received by PHMSA after February 1, 1997. Also available are public comments, FEDERAL REGISTER notices, and PHMSA's rulings, determinations, decisions on reconsideration, and orders issued in response to those applications.

(b) *Office of Pipeline and Hazardous Materials Safety Administration's Office of Hazardous Materials Safety.* (1) You may obtain documents (*e.g.*, proposed and final rules, notices, letters of clarification, safety notices, DOT forms and other documents) by contacting the Hazardous Materials Information Center at 1–800–467–4922 or through the Internet at *http://www.phmsa.dot.gov*.

(2) Upon your written request, we will make the following documents and information available to you:

(i) Appeals under 49 CFR part 107 and PHMSA's decisions issued in response to those appeals.

(ii) Records of compliance order proceedings and PHMSA compliance orders.

(iii) Applications for approvals, including supporting data, memoranda of any informal meetings with applicants, and decisions granting or denying approvals applications.

(iv) Applications for special permits numbered below DOT–E or DOT–SP 11832 and related background information are available for public review and copying at the Office of Hazardous Materials Safety, Approvals and Permits Division, U.S. Department of Transportation, PHH–30, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(v) Other information about PHMSA's hazardous materials program required by statute to be made available to the public for review and copying and any other information PHMSA decides should be available to the public.

(3) Your written request to review documents should include the following:

(i) A detailed description of the documents you wish to review.

(ii) Your name, address, and telephone number.

(4) Send your written request to: Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration, Attn: PHH–1, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

[70 FR 56088, Sept. 23, 2005, as amended at 70 FR 73159, Dec. 9, 2005; 72 FR 55682, Oct. 1, 2007; 76 FR 56310, Sept. 13, 2011]

§ 105.26 Obtaining records on file with PHMSA.

To obtain records on file with PHMSA, other than those described in §105.25, you must file a request with PHMSA under the Freedom of Information Act (FOIA) (5 U.S.C. 552). The procedures for filing a FOIA request are contained in 49 CFR part 7.

§ 105.30 Information made available to the public and request for confidential treatment.

When you submit information to PHMSA during a rulemaking proceeding, as part of your application for special permit or approval, or for any other reason, we may make that information publicly available unless you ask that we keep the information confidential.

(a) *Asking for confidential treatment.* You may ask us to give confidential treatment to information you give to the agency by taking the following steps:

(1) Mark ''confidential'' on each page of the original document you would like to keep confidential.

(2) Send us, along with the original document, a second copy of the original document with the confidential information deleted.

(3) Explain why the information you are submitting is confidential (for example, it is exempt from mandatory public disclosure under the Freedom of Information Act, 5 U.S.C. 552 or it is information referred to in 18 U.S.C. 1905).

(b) *PHMSA Decision*. PHMSA will decide whether or not to treat your information as confidential. We will notify you, in writing, of a decision to grant or deny confidentiality at least five days before the information is publicly disclosed, and give you an opportunity to respond.

[67 FR 42951, June 25, 2002, as amended at 70 FR 73159, Dec. 9, 2005]

SERVING DOCUMENTS

§ 105.35 Serving documents in PHMSA proceedings.

(a) *Service by PHMSA*. We may serve the document by one of the following methods, except where a different method of service is specifically required:

(1) Registered or certified mail.

(i) If we serve a document by registered or certified mail, it is considered served when mailed.

(ii) An official United States Postal Service receipt from the registered or certified mailing is proof of service.

(iii) We may serve a person's authorized representative or agent by registered or certified mail, or in any other manner authorized by law. Service on a person's authorized agent is the same as service on the person.

(2) Personal service.

(3) Publication in the FEDERAL REGISTER.

(4) Electronic service. (i) Service by electronic means if consented to in writing by the party to be served.

(ii) For all special permits and approvals actions, electronic service is authorized.

(b) *Service by others*. If you are required under this subchapter to serve a person with a document, serve the document by one of the following methods, except where a different method of service is specifically required:

(1) Registered or certified mail.

(i) If you serve a document by registered or certified mail, it is considered served when mailed.

(ii) An official United States Postal Service receipt from the registered or certified mailing is proof of service.

(iii) You may serve a person's authorized representative or agent by registered or certified mail or in any other manner authorized by law. Service on a person's authorized agent is the same as service on the person.

(2) Personal service.

(3) Electronic service.

(i) In a proceeding under §107.317 of this subchapter (an administrative law judge proceeding), you may electronically serve documents on us.

(ii) Serve documents electronically through the Internet at *http://www.regulations.gov*.

[67 FR 42951, June 25, 2002, as amended at 72 FR 55682, Oct. 1, 2007; 76 FR 460, Jan. 5, 2011]

§ 105.40 Designated agents for nonresidents.

(a) *General requirement*. If you are not a resident of the United States but are required by this subchapter or subchapter C of this chapter to designate a permanent resident of the United States to act as your agent and receive documents on your behalf, you must prepare a designation and file it with us.

(b) *Agents*. An agent, also known as ''agent for service of process'':

(1) May be an individual, a firm, or a domestic corporation.

(2) May represent any number of principals.

(3) May not reassign responsibilities under a designation to another person.

(c) *Preparing a designation*. Your designation must be written and dated, and it must contain the following information:

(1) The section in the HMR that requires you to file a designation.

(2) A certification that the designation is in the correct legal form required to make it valid and binding on you under the laws, corporate bylaws, and other requirements that apply to designations at the time and place you are making the designation.

(3) Your full legal name, the principal name of your business, and your mailing address.

(4) A statement that your designation will remain in effect until you withdraw or replace it.

(5) The legal name and mailing address of your agent.

(6) A declaration of acceptance signed by your agent.

(d) *Address*. Send your designation to: Approvals and Permits Division, Pipeline and Hazardous Materials Safety

Administration, Attn: PHH–30, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(e) *Designations are binding.* You are bound by your designation of an agent, even if you did not follow all the requirements in this section, until we reject your designation.

[67 FR 42951, June 25, 2002, as amended at 70 FR 56088, Sept. 23, 2005; 70 FR 73159, Dec. 9, 2005; 72 FR 55682, Oct. 1, 2007; 75 FR 27211, May 14, 2010; 76 FR 56310, Sept. 13, 2011]

SUBPOENAS

§ 105.45 Issuing a subpoena.

(a) *Subpoenas explained.* A subpoena is a document that may require you to attend a proceeding, produce documents or other physical evidence in your possession or control, or both. PHMSA may issue a subpoena either on its initiative or at the request of someone participating in a proceeding. Anyone who requests that PHMSA issue a subpoena must show that the subpoena seeks information that will materially advance the proceeding.

(b) *Attendance and mileage expenses.* (1) If you receive a subpoena to attend a proceeding under this part, you may receive money to cover attendance and mileage expenses. The attendance and mileage fees will be the same as those paid to a witness in a proceeding in the district courts of the United States.

(2) If PHMSA issues a subpoena to you based upon a request, the requester must serve a copy of the original subpoena on you, as required in §105.50. The requester must also include attendance and mileage fees with the subpoena unless the requester asks PHMSA to pay the attendance and mileage fees because of demonstrated financial hardship and PHMSA agrees to do so.

(3) If PHMSA issues a subpoena at the request of an officer or agency of the Federal government, the officer or agency is not required to include attendance and mileage fees when serving the subpoena. The officer or agency must pay the fees before you leave the hearing at which you testify.

§ 105.50 Serving a subpoena.

(a) *Personal service.* Anyone who is not an interested party and who is at least 18 years of age may serve you with a subpoena and fees by handing the subpoena and fees to you, by leaving them at your office with the individual in charge, or by leaving them at your house with someone who lives there and is capable of making sure that you receive them. If PHMSA issues a subpoena to an entity, rather than an individual, personal service is made by delivering the subpoena and fees to the entity's registered agent for service of process or to any officer, director or agent in charge of any of the entity's offices.

(b) *Service by mail.* You may be served with a copy of a subpoena and fees by certified or registered mail at your last known address. Service of a subpoena and fees may also be made by registered or certified mail to your agent for service of process or any of your representatives at that person's last known address.

(c) *Other methods.* You may be served with a copy of a subpoena by any method where you receive actual notice of the subpoena and receive the fees before leaving the hearing at which you testify.

(d) *Filing after service.* After service is complete, the individual who served a copy of a subpoena and fees must file the original subpoena and a certificate of service with the PHMSA official who is responsible for conducting the hearing.

§ 105.55 Refusal to obey a subpoena.

(a) *Quashing or modifying a subpoena.* If you receive a subpoena, you can ask PHMSA to overturn (''quash'') or modify the subpoena within 10 days after the subpoena is served on you. Your request must briefly explain the reasons you are asking for the subpoena to be quashed or modified. PHMSA may then do the following:

(1) Deny your request.

(2) Quash or modify the subpoena.

(3) Grant your request on the condition that you satisfy certain specified requirements.

(b) *Failure to obey.* If you disobey a subpoena, PHMSA may ask the Attorney General to seek help from the

United States District Court for the appropriate District to compel you, after notice, to appear before PHMSA and give testimony, produce subpoenaed documents or physical evidence, or both.

PART 106—RULEMAKING PROCEDURES

Subpart A—PHMSA Rulemaking Documents

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

SOURCE: 67 FR 42954, June 25, 2002, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 106 appear at 70 FR 56088, Sept. 23, 2005.

Subpart A—PHMSA Rulemaking Documents

§ 106.5 Defined terms used in this subpart.

The following defined terms (see part 105, subpart A, of this subchapter) appear in this subpart: File; Person; State.

§ 106.10 Process for issuing rules.

(a) PHMSA (''we'') uses informal rulemaking procedures under the Administrative Procedure Act (5 U.S.C. 553) to add, amend, or delete regulations. To propose or adopt changes to a regulation, PHMSA may issue one or more of the following documents. We publish the following rulemaking documents in the FEDERAL REGISTER unless we name and personally serve a copy of a rule on every person subject to it:

(1) An advance notice of proposed rulemaking.

(2) A notice of proposed rulemaking.

(3) A final rule.

(4) An interim final rule.

(5) A direct final rule.

(b) Each of the rulemaking documents in paragraph (a) of this section generally contains the following information:

(1) The topic involved in the rulemaking document.

(2) PHMSA's legal authority for issuing the rulemaking document.

(3) How interested persons may participate in the rulemaking proceeding (for example, by filing written comments or making oral presentations).

(4) Whom to call if you have questions about the rulemaking document.

(5) The date, time, and place of any public meetings being held to discuss the rulemaking document.

(6) The docket number and regulation identifier number (RIN) for the rulemaking proceeding.

[67 FR 42954, June 25, 2002, as amended at 70 FR 56088, Sept. 23, 2005]

§ 106.15 Advance notice of proposed rulemaking.

An advance notice of proposed rulemaking (ANPRM) tells the public that

PHMSA is considering an area for rulemaking and requests written comments on the appropriate scope of the rulemaking or on specific topics. An advance notice of proposed rulemaking may or may not include the text of potential changes to a regulation.

§ 106.20 Notice of proposed rulemaking.

A notice of proposed rulemaking (NPRM) contains PHMSA's specific proposed regulatory changes for public comment and contains supporting information. It generally includes proposed regulatory text.

§ 106.25 Revising regulations without first issuing an ANPRM or NPRM.

PHMSA may add, amend, or delete regulations without first issuing an ANPRM or NPRM in the following situations:

(a) We may go directly to a final rule or interim final rule if, for good cause, we find that a notice of proposed rulemaking is impracticable, unnecessary, or contrary to the public interest. We must place that finding and a brief statement of the reasons for it in the final rule or interim final rule.

(b) We may issue a direct final rule (see § 106.40).

§ 106.30 Final rule.

A final rule sets out new regulatory requirements and their effective date. A final rule will also identify issues raised by commenters in response to the notice of proposed rulemaking and give the agency's response.

§ 106.35 Interim final rule.

An interim final rule is issued without first issuing a notice of proposed rulemaking and accepting public comments and sets out new regulatory requirements and their effective date. PHMSA may issue an interim final rule if it finds, for good cause, that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. PHMSA will clearly set out this finding in the interim final rule. After receiving and reviewing public comments, as well as any other relevant documents, PHMSA may revise the interim final rule and then issue a final rule.

§ 106.40 Direct final rule.

A direct final rule makes regulatory changes and states that the regulatory changes will take effect on a specified date unless PHMSA receives an adverse comment or notice of intent to file an adverse comment within the comment period—generally 60 days after the direct final rule is published in the FEDERAL REGISTER.

(a) *Actions taken by direct final rule.* We may use direct final rulemaking procedures to issue rules that do any of the following:

(1) Make minor substantive changes to regulations.

(2) Incorporate by reference the latest edition of technical or industry standards.

(3) Extend compliance dates.

(4) Make noncontroversial changes to regulations. We must determine and publish a finding that use of direct final rulemaking, in this situation, is in the public interest and unlikely to result in adverse comment.

(b) *Adverse comment.* An adverse comment explains why a rule would be inappropriate, or would be ineffective or unacceptable without a change. It may challenge the rule's underlying premise or approach. Under the direct final rule process, we do not consider the following types of comments to be adverse:

(1) A comment recommending another rule change, in addition to the change in the direct final rule at issue, unless the commenter states why the direct final rule would be ineffective without the change.

(2) A frivolous or irrelevant comment.

(c) *Confirmation of effective date.* We will publish a confirmation document in the FEDERAL REGISTER, generally within 15 days after the comment period closes, if we have not received an adverse comment or notice of intent to file an adverse comment. The confirmation document tells the public the effective date of the rule—either the date stated in the direct final rule or at least 30 days after the publication date of the confirmation document, whichever is later.

(d) *Withdrawing a direct final rule.* (1) If we receive an adverse comment or

notice of intent to file an adverse comment, we will publish a document in the FEDERAL REGISTER before the effective date of the direct final rule advising the public and withdrawing the direct final rule in whole or in part.

(2) If we withdraw a direct final rule because of an adverse comment, we may incorporate the adverse comment into a later direct final rule or may publish a notice of proposed rulemaking.

(e) *Appeal.* You may appeal PHMSA's issuance of a direct final rule (see §106.115) only if you have previously filed written comments (see §106.60) to the direct final rule.

§106.45 Tracking rulemaking actions.

The following identifying numbers allow you to track PHMSA's rulemaking activities:

(a) *Docket number.* We assign an identifying number, called a docket number, to each rulemaking proceeding. Each rulemaking document that PHMSA issues in a particular rulemaking proceeding will display the same docket number. This number allows you to do the following:

(1) Associate related documents that appear in the FEDERAL REGISTER.

(2) Search the DOT Docket Management System (''DMS'') for information on particular rulemaking proceedings—including notices of proposed rulemaking, public comments, petitions for rulemaking, appeals, records of additional rulemaking proceedings and final rules. There are two ways you can search the DMS:

(i) Visit the public docket room and review and copy any docketed materials during regular business hours. The DOT Docket Management System is located at the U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(ii) View and download docketed materials through the Internet at *http://www.regulations.gov*.

(b) *Regulation identifier number.* The Department of Transportation publishes a semiannual agenda of all current and projected Department of Transportation rulemakings, reviews of existing regulations, and completed actions. This semiannual agenda appears in the Unified Agenda of Federal Regulations that is published in the FEDERAL REGISTER in April and October of each year. The semiannual agenda tells the public about the Department's—including PHMSA's—regulatory activities. The Department assigns a regulation identifier number (RIN) to each individual rulemaking proceeding in the semiannual agenda. This number appears on all rulemaking documents published in the FEDERAL REGISTER and makes it easy for you to track those rulemaking proceedings in both the FEDERAL REGISTER and the semiannual regulatory agenda itself, as well as to locate all documents in the Docket Management System pertaining to a particular rulemaking.

[70 FR 56088, Sept. 23, 2005, as amended at 72 FR 55682, Oct. 1, 2007]

Subpart B—Participating in the Rulemaking Process

§106.50 Defined terms used in this subpart.

The following defined terms (see part 105, subpart A, of this subchapter) appear in this subpart: File; Person; Political subdivision; State.

§106.55 Public participation in the rulemaking process.

You may participate in PHMSA's rulemaking process by doing any of the following:

(a) File written comments on any rulemaking document that asks for comments, including an advance notice of proposed rulemaking, notice of proposed rulemaking, interim final rule, or direct final rule.

(b) Ask that we hold a public meeting in any rulemaking proceeding and participate in any public meeting that we hold.

(c) File a petition for rulemaking that asks us to add, amend, or delete a regulation.

(d) File an appeal that asks us to reexamine our decision to issue all or part of a final rule, interim final rule, or direct final rule.

WRITTEN COMMENTS

§ 106.60 Filing comments.

Anyone may file written comments about proposals made in any rulemaking document that requests public comments, including any State government agency, any political subdivision of a State, and any interested person invited by PHMSA to participate in the rulemaking process.

§ 106.65 Required information for written comments.

Your comments must be in English and must contain the following:

(a) The docket number of the rulemaking document you are commenting on, clearly set out at the beginning of your comments.

(b) Information, views, or arguments that follow the instructions for participation that appear in the rulemaking document on which you are commenting.

(c) All material that is relevant to any statement of fact in your comments.

(d) The document title and page number of any material that you reference in your comments.

§ 106.70 Where and when to file comments.

(a) Unless you are told to do otherwise in the rulemaking document on which you are commenting, send your comments to us in either of the following ways:

(1) By mail to: Docket Management System, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(2) Through the Internet at *http://www.regulations.gov*.

(b) Make sure that your comments reach us by the deadline set out in the rulemaking document on which you are commenting. We will consider late filed comments to the extent possible.

(c) We may reject comments that are not relevant to the rulemaking. We may reject comments you file electronically if you do not follow the electronic filing instructions at the DOT Web site.

[67 FR 42954, June 25, 2002, as amended at 69 FR 54044, Sept. 7, 2004; 72 FR 55682, Oct. 1, 2007]

§ 106.75 Extension of time to file comments.

You may ask for more time to file comments on a rulemaking proceeding. If PHMSA grants your request, it is granted to all persons. We will notify the public of the extension by publishing a document in the FEDERAL REGISTER. If PHMSA denies your request, PHMSA will notify you of the denial. To ask for more time, you must do the following:

(a) File a request for extension at least ten days before the end of the comment period established in the rulemaking document.

(b) Show that you have good cause for the extension and that an extension is in the public interest.

(c) Include the docket number of the rulemaking document you are seeking additional time to comment on, clearly set out at the beginning of your request.

(d) Send your request to: Docket Management System, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

[67 FR 42954, June 25, 2002, as amended at 72 FR 55682, Oct. 1, 2007]

PUBLIC MEETINGS AND OTHER PROCEEDINGS

§ 106.80 Public meeting procedures.

A public meeting is a non-adversarial, fact-finding proceeding conducted by a PHMSA representative. Generally, public meetings are announced in the FEDERAL REGISTER. Interested persons are invited to attend and to present their views to the agency on specific issues. There are no formal pleadings and no adverse parties, and any regulation issued afterward is not necessarily based exclusively on the record of the meeting. Sections 556 and 557 of the Administrative Procedure Act (5 U.S.C. 556 and 557) do not apply to public meetings under this part.

§ 106.85 Requesting a public meeting.

(a) You may ask for a public meeting by filing a written request with PHMSA no later than 20 days before the expiration of the comment period specified in the rulemaking document. Send your request for a public meeting to: Docket Management System, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(b) PHMSA will review your request and, if you have shown good cause for a public meeting, we will grant it and publish a notice of the meeting in the FEDERAL REGISTER.

[67 FR 42954, June 25, 2002, as amended at 72 FR 55682, Oct. 1, 2007]

§ 106.90 Other rulemaking proceedings.

During a rulemaking proceeding, PHMSA may invite you to do the following:

(a) Participate in a conference at which minutes are taken.

(b) Make an oral presentation.

(c) Participate in any other public proceeding to ensure that PHMSA makes informed decisions during the rulemaking process and to protect the public interest, including a negotiated rulemaking or work group led by a facilitator.

PETITIONS FOR RULEMAKING

§ 106.95 Requesting a change to the regulations.

You may ask PHMSA to add, amend, or delete a regulation by filing a petition for rulemaking as follows:

(a) For regulations in 49 CFR parts 110, 130, 171 through 180, submit the petition to: Standards and Rulemaking Division, Pipeline and Hazardous Materials Safety Administration, Attn: PHH–10, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(b) For regulations in 49 CFR parts 105, 106, or 107, submit the petition to: Office of the Chief Counsel, Pipeline and Hazardous Materials Safety Administration, Attn: PHC–10, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

[70 FR 56089, Sept. 23, 2005, as amended at 72 FR 55683, Oct. 1, 2007; 76 FR 56310, Sept. 13, 2011]

§ 106.100 Required information for a petition for rulemaking.

(a) You must include the following information in your petition for rulemaking:

(1) A summary of your proposed action and an explanation of its purpose.

(2) The language you propose for a new or amended rule, or the language you would delete from a current rule.

(3) An explanation of your interest in your proposed action and the interest of anyone you may represent.

(4) Information and arguments that support your proposed action, including relevant technical and scientific data available to you.

(5) Any specific cases that support or demonstrate the need for your proposed action.

(b) If the impact of your proposed action is substantial, and data or other information about that impact are available to you, we may ask that you provide information about the following:

(1) The costs and benefits of your proposed action to society in general, and identifiable groups within society in particular.

(2) The direct effects, including preemption effects under section 5125 of Federal hazardous materials transportation law, of your proposed action on States, on the relationship between the Federal government and the States, and on the distribution of power and responsibilities among the various levels of government. (See 49 CFR part 107, subpart C, regarding preemption.)

(3) The regulatory burden of your proposed action on small businesses, small organizations, small governmental jurisdictions, and Indian tribes.

(4) The recordkeeping and reporting burdens of your proposed action and whom they would affect.

(5) The effect of your proposed action on the quality of the natural and social environments.

§ 106.105 PHMSA response to a petition for rulemaking.

We will review and respond to your petition for rulemaking as follows:

If your petition is . . .	And if we determine that . . .	Then . . .
(a) Incomplete	.....	We may return your petition with a written explanation.
(b) Complete ..	Your petition does not justify a rulemaking action.	We will notify you in writing that we will not start a rulemaking proceeding.
(c) Complete ..	Your petition does justify a rulemaking action.	We will notify you in writing that we will start a rulemaking proceeding.

APPEALS

§ 106.110 Appealing a PHMSA Action.

You may appeal the following PHMSA actions:

(a) PHMSA's issuance of a final rule or PHMSA's withdrawal of a notice of proposed rulemaking under the rulemaking procedures in this part. However, you may appeal PHMSA's issuance of a direct final rule only if you previously filed comments to the direct final rule (see § 106.40(e)).

(b) Any PHMSA decision on a petition for rulemaking.

§ 106.115 Required information for an appeal.

(a) *Appeal of a final rule or withdrawal of a notice of proposed rulemaking.* If you appeal PHMSA's issuance of a final rule or PHMSA's withdrawal of a notice of proposed rulemaking, your appeal must include the following:

(1) The docket number of the rulemaking you are concerned about, clearly set out at the beginning of your appeal.

(2) A brief statement of your concern about the final rule or the withdrawal of notice of proposed rulemaking at issue.

(3) An explanation of why compliance with the final rule is not practical, reasonable, or in the public interest.

(4) If you want PHMSA to consider more facts, the reason why you did not present those facts within the time given during the rulemaking process for public comment.

(b) *Appeal of a decision.* If you appeal PHMSA's decision on a petition for rulemaking, you must include the following:

(1) The contested aspects of the decision.

(2) Any new arguments or information.

§ 106.120 Appeal deadline.

(a) *Appeal of a final rule or withdrawal of a notice of proposed rulemaking.* If you appeal PHMSA's issuance of a final rule or PHMSA's withdrawal of a proposed rulemaking, your appeal document must reach us no later than 30 days after the date PHMSA published the regulation or the withdrawal notice in the FEDERAL REGISTER. After that time, PHMSA will consider your appeal to be a petition for rulemaking under § 106.100.

(b) *Appeal of a decision.* If you appeal PHMSA's decision on a petition for rulemaking, your appeal document must reach us no later than 30 days from the date PHMSA served you with written notice of PHMSA's decision.

[70 FR 56089, Sept. 23, 2005]

§ 106.125 Filing an appeal.

Send your appeal to: Docket Management System, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

[67 FR 42954, June 25, 2002, as amended at 72 FR 55682, Oct. 1, 2007]

§ 106.130 PHMSA response to an appeal.

Unless PHMSA provides otherwise, filing an appeal will not keep a final rule from becoming effective. We will handle an appeal according to the following procedures:

(a) *Appeal of a final rule or withdrawal of a notice of proposed rulemaking.* (1) We may consolidate your appeal with other appeals of the same rule.

(2) We may grant or deny your appeal, in whole or in part, without further rulemaking proceedings, unless granting your appeal would result in the issuance of a new final rule.

(3) If we decide to grant your appeal, we may schedule further proceedings and an opportunity to comment.

(4) PHMSA will notify you, in writing, of the action on your appeal within 90 days after the date that PHMSA published the final rule or withdrawal of notice of proposed rulemaking at issue in the FEDERAL REGISTER. If we do not issue a decision on your appeal within the 90-day period and we anticipate a substantial delay, we will notify you directly about the delay and will give you an expected decision date. We will also publish a notice of the delay in the FEDERAL REGISTER.

(b) *Appeal of a decision.* (1) We will not consider your appeal if it merely repeats arguments that PHMSA has previously rejected.

(2) PHMSA will notify you, in writing, of the action on your appeal within 90 days after the date that PHMSA served you with written notice of its decision on your petition for rulemaking. If we do not issue a decision on your appeal within the 90-day period, and we anticipate a substantial delay, we will notify you directly about the delay and will give you an expected decision date.

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AUTHORITY: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 section 4 (28 U.S.C. 2461 note); Pub. L. 104–121 sections 212–213; Pub. L. 104–134 section 31001; 49 CFR 1.45, 1.53.

EDITORIAL NOTE: Nomenclature changes to part 107 appear at 67 FR 61011, Sept. 27, 2002, 70 FR 56089, Sept. 23, 2005, and 70 FR 73159, Dec. 9, 2005.

Subpart A—Definitions

§ 107.1 Definitions.

All terms defined in 49 U.S.C. 5102 are used in their statutory meaning. Other terms used in this part are defined as follows:

Acting knowingly means acting or failing to act while

(1) Having actual knowledge of the facts giving rise to the violation, or

(2) Having the knowledge that a reasonable person acting in the same circumstances and exercising due care would have had.

Administrator means the Administrator, Pipeline and Hazardous Materials Safety Administration or his or her delegate.

Applicant means the person in whose name a special permit, approval, registration, a renewed or modified special permit or approval, or party status to a special permit is requested to be issued.

Application means a request under subpart B of this part for a special permit, a renewal or modification of a special permit, party status to a special permit, or a request under subpart H of this part for an approval, or renewal or modification of an approval.

Approval means written consent, including a competent authority approval, from the Associate Administrator or other designated Department official, to perform a function that requires prior consent under subchapter C of this chapter (49 CFR parts 171 through 180).

Approval Agency means an organization or a person designated by the PHMSA to certify packagings as having been designed, manufactured, tested, modified, marked or maintained in compliance with applicable DOT regulations.

Associate Administrator means the Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

Competent Authority means a national agency that is responsible, under its national law, for the control or regulation of some aspect of hazardous materials (dangerous goods) transportation. Another term for Competent Authority is ''Appropriate authority,'' which is used in the International Civil Aviation Organization's (ICAO) Technical Instructions for the Safe Transport of Dangerous Goods by Air. The Associate Administrator is the United States Competent Authority for purposes of this part 107.

Competent Authority Approval means an approval by the competent authority that is required under an international standard (for example, the

ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air and the International Maritime Dangerous Goods Code). Any of the following may be considered a competent authority approval if it satisfies the requirement of an international standard:

(1) A specific regulation in subchapter A or C of this chapter.

(2) A special permit or approval issued under subchapter A or C of this chapter.

(3) A separate document issued to one or more persons by the Associate Administrator.

DOT or Department means U.S. Department of Transportation.

Federal hazardous material transportation law means 49 U.S.C. 5101 *et seq.*

Filed means received by the appropriate PHMSA or other designated office within the time specified in a regulation or rulemaking document.

Holder means the person in whose name a special permit or approval has been issued.

Imminent Hazard means the existence of a condition which presents a substantial likelihood that death, serious illness, severe personal injury, or substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion of an administrative hearing or other formal proceeding initiated to abate the risks of those effects.

Incident means an event resulting in the unintended and unanticipated release of a hazardous material or an event meeting incident reporting requirements in §171.15 or §171.16 of this chapter.

Indian Tribe has the same meaning given that term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

Investigation includes investigations authorized under 49 U.S.C. 5121 and inspections authorized under 49 U.S.C. 5118 and 5121.

Manufacturing special permit means a special permit from compliance with specified requirements that otherwise must be met before representing, marking, certifying (including requalifying, inspecting, and testing), selling or offering a packaging or container as meeting the requirements of subchapter C of this chapter governing its use in the transportation in commerce of a hazardous material. A manufacturing special permit is a special permit issued to a manufacturer of packagings who does not offer for transportation or transport hazardous materials in packagings subject to the special permit.

Party means a person, other than a holder, authorized to act under the terms of a special permit.

Person means an individual, firm, copartnership, corporation, company, association, or joint-stock association (including any trustee, receiver, assignee, or similar representative); or a government or Indian tribe (or an agency or instrumentality of any government or Indian tribe) that transports a hazardous material to further a commercial enterprise or offers a hazardous material for transportation in commerce. Person does not include the following:

(1) The United States Postal Service.

(2) Any agency or instrumentality of the Federal government, for the purposes of 49 U.S.C. 5123 (civil penalties) and 5124 (criminal penalties.)

(3) Any government or Indian tribe (or an agency or instrumentality of any government or Indian tribe) that transports hazardous material for a governmental purpose.

Registration means a written acknowledgment from the Associate Administrator that a registrant is authorized to perform a function for which registration is required under subchapter C of this chapter (e.g., registration in accordance with 49 CFR 178.503 regarding marking of packagings). For purposes of subparts A through E, ''registration'' does not include registration under subpart F or G of this part.

Report means information, other than an application, registration or part thereof, required to be submitted to the Associate Administrator pursuant to this subchapter, subchapter B or subchapter C of this chapter.

Respondent means a person upon whom the PHMSA has served a notice of probable violation.

Special permit means a document issued by the Associate Administrator,

or other designated Department official, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapters A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 *et seq.* (*e.g.*, Federal Motor Carrier Safety routing requirements).

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

Transports or *transportation* means the movement of property and loading, unloading, or storage incidental to the movement.

[Amdt. 107–3, 41 FR 38170, Sept. 9, 1976]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §107.1, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

Subpart B—Special Permits

SOURCE: Amdt. 107–38, 61 FR 21095, May 9, 1996, unless otherwise noted.

§ 107.101 Purpose and scope.

This subpart prescribes procedures for the issuance, modification and termination of special permits from requirements of this subchapter, subchapter C of this chapter, or regulations issued under chapter 51 of 49 U.S.C.

§ 107.105 Application for special permit.

(a) *General.* Each application for a special permit or modification of a special permit and all supporting documents must be written in English and submitted for timely consideration at least 120 days before the requested effective date and conform to the following requirements:

(1) The application, including a table of contents, must:

(i) Be submitted to the Associate Administrator for Hazardous Materials Safety (Attention: General Approvals and Permits, PHH–31), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001;

(ii) Be submitted with any attached supporting documentation by facsimile (fax) to: (202) 366–3753 or (202) 366–3308;

(iii) Be submitted electronically by e-mail to: *specialpermits@dot.gov*; or

(iv) Be submitted using PHMSA's online system (table of contents omitted) at: *http://www.phmsa.dot.gov/hazmat/regs/sp-a*.

(2) The application must state the name, mailing address, physical address(es) of all known locations where the special permit would be used, e-mail address (if available), and telephone number of the applicant. If the applicant is not an individual, the application must state the company name, mailing address, physical address(es) of all known locations where the special permit would be used, e-mail address (if available), and telephone number of an individual designated as the point of contact for the applicant for all purposes related to the application, the name of the company Chief Executive Officer (CEO) or president, or ranking officer; and the Dun and Bradstreet Data Universal Numbering System (D–U–N–S) identifier.

(3) If the applicant is not a resident of the United States, in addition to the information listed in paragraph (a)(2) of this section, the application must identify and designate an agent that is a permanent resident of the United States for service in accordance with §105.40 of this part.

(4) For a manufacturing special permit, in addition to the information listed in paragraph (a)(2) of this section, the application must state the name and street address of each of the facilities of the applicant where manufacturing under the special permit will occur, and the symbol of the packaging manufacturer (''M'' number), if applicable.

(5) For persons required to be registered in accordance with Subpart F or G of this part, in addition to the information listed in paragraph (a)(2) of this section, the application must provide the registration number or the

name of the company to which the registration number is assigned if different from the applicant. For persons not required to be registered in accordance with Subpart F or G of this part, in addition to the information listed in paragraph (a)(2) of this section, the application must provide a statement indicating that registration is not required.

(b) *Confidential treatment.* To request confidential treatment for information contained in the application, the applicant must comply with § 105.30(a).

(c) *Description of special permit proposal.* The application must include the following information that is relevant to the special permit proposal:

(1) A citation of the specific regulation from which the applicant seeks relief;

(2) The proposed mode or modes of transportation, including a description of all operational controls required;

(3) A detailed description of the proposed special permit (*e.g.,* alternative packaging, test, procedure, activity, or hazard communication, including marking and labeling requirements) including, as appropriate, written descriptions, drawings, flow charts, plans and other supporting documents;

(4) A specification of the proposed duration or schedule of events for which the special permit is sought;

(5) A statement outlining the applicant's basis for seeking relief from compliance with the specified regulations and, if the special permit is requested for a fixed period, a description of how compliance will be achieved at the end of that period. For transportation by air, a statement outlining the reason(s) the hazardous material is being transported by air if other modes are available;

(6) If the applicant seeks emergency processing specified in § 107.117, a statement of supporting facts and reasons;

(7) Identification and description, including an estimated quantity of each shipment of the hazardous materials planned for transportation under the special permit or;

(8) Description of each packaging, including specification or special permit number, as applicable, to be used in conjunction with the requested special permit;

(9) For alternative packagings, documentation of quality assurance controls, package design, manufacture, performance test criteria, in-service performance and service-life limitations;

(10) An estimate of the number of operations expected to be conducted or number of shipments to be transported under the special permit;

(11) An estimate of the number of packagings expected to be manufactured under the special permit, if applicable;

(12) A statement as to whether the special permit being sought is related to a compliance review, inspection activity, or enforcement action; and

(13) When a Class 1 material is forbidden for transportation by aircraft except under a special permit (*see* Columns 9A and 9B in the table in 49 CFR 172.101), a certification from an applicant for a special permit to transport such Class 1 material on passenger-carrying or cargo-only aircraft with a maximum certificated takeoff weight of less than 12,500 pounds that no person within the categories listed in 18 U.S.C. 842(i) will participate in the transportation of the Class 1 material.

(14) A statement indicating whether the applicant will be acting as a shipper (offeror), carrier or both under the terms of the special permit.

(d) *Justification of special permit proposal.* The application must demonstrate that a special permit achieves a level of safety at least equal to that required by regulation, or if a required safety level does not exist, is consistent with the public interest. At a minimum, the application must provide the following:

(1) Information describing all relevant shipping and incident experience of which the applicant is aware that relates to the application; and

(2) A statement identifying any increased risk to safety or property that may result if the special permit is granted, and a description of the measures to be taken to address that risk; and

(3) Either:

(i) Substantiation, with applicable analyses, data or test results (*e.g.*, failure mode and effect analysis), that the proposed alternative will achieve a

level of safety that is at least equal to that required by the regulation from which the special permit is sought; or

(ii) If the regulations do not establish a level of safety, an analysis that identifies each hazard, potential failure mode and the probability of its occurrence, and how the risks associated with each hazard and failure mode are controlled for the duration of an activity or life-cycle of a packaging.

[76 FR 460, Jan. 5, 2011, as amended at 76 FR 44500, July 26, 2011; 76 FR 43524, July 20, 2011; 76 FR 56310, Sept. 13, 2011]

§ 107.107 Application for party status.

(a) Any person eligible to apply for a special permit may apply to be a party to an application or an existing special permit, other than a manufacturing special permit.

(b) Each application filed under this section must conform to the following requirements:—

(1) The application must:

(i) Be submitted to the Associate Administrator for Hazardous Materials Safety (Attention: General Approvals and Permits, PHH–31), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001;

(ii) Be submitted with any attached supporting documentation by facsimile (fax) to: (202) 366–3753 or (202) 366–3308; or

(iii) Be submitted by electronically by e-mail to: *specialpermits@dot.gov*, or on-line at: *http://www.phmsa.dot.gov/hazmat/regs/sp-a*.

(2) The application must identify by number the special permit application or special permit to which the applicant seeks to become a party.

(3) The application must state the name, mailing address, physical address(es) of all known locations where the special permit would be used, e-mail address (if available), and telephone number of the applicant. If the applicant is not an individual, the application must state the company name, mailing address, physical address(es) of all known locations where the special permit would be used, e-mail address (if available), and telephone number of an individual designated as the point of contact for the applicant for all purposes related to the application, the name of the company Chief Executive Officer (CEO), president, or ranking executive officer and the Dun and Bradstreet Data Universal Numbering System (D–U–N–S) identifier. In addition, each applicant must state why party status to the special permit is needed and must submit a certification of understanding of the provisions of the special permit to which party status is being requested.

(4) If the applicant is not a resident of the United States, the application must identify and designate an agent that is a permanent resident of the United States for service in accordance with § 105.40 of part.

(5) For a Class 1 material that is forbidden for transportation by aircraft except under a special permit (*see* Columns 9A and 9B in the table in 49 CFR 172.101), a certification from an applicant for party status to a special permit to transport such Class 1 material on passenger-carrying or cargo-only aircraft with a maximum certificated takeoff weight of less than 12,500 pounds that no person within the categories listed in 18 U.S.C. 842(i) will participate in the transportation of the Class 1 material.

(6) The applicant must certify that the applicant has not previously been granted party status to the special permit. If the applicant has previously been granted party status, the applicant must follow renewal procedures as specified in § 107.109.

(7) A statement indicating whether the applicant will be acting as a shipper (offeror), carrier or both under the terms of the special permit.

(c) The Associate Administrator may grant or deny an application for party status in the manner specified in § 107.113(e) and (f) of this subpart.

(d) A party to a special permit is subject to all terms of that special permit, including the expiration date. If a party to a special permit wishes to renew party status, the special permit renewal procedures set forth in § 107.109 apply.

[76 FR 461, Jan. 5, 2011, as amended at 76 FR 44500, July 26, 2011; 76 FR 43524, July 20, 2011; 76 FR 56310, Sept. 13, 2011]

§ 107.109 Application for renewal.

(a) Each application for renewal of a special permit or party status to a special permit must conform to the following requirements:

(1) The application must:

(i) Be submitted to the Associate Administrator for Hazardous Materials Safety (Attention: General Approvals and Permits, PHH–31), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001;

(ii) Be submitted with any attached supporting documentation submitted in an appropriate format by facsimile (fax) to: (202) 366–3753 or (202) 366–3308; or

(iii) Be submitted electronically by e-mail to: *specialpermits@dot.gov;* or online at: *http://www.phmsa.dot.gov/hazmat/regs/sp-a*.

(2) The application must identify by number the special permit for which renewal is requested.

(3) The application must state the name, mailing address, physical address(es) of all known new locations not previously identified in the application where the special permit would be used and all locations not previously identified where the special permit was used, e-mail address (if available), and telephone number of the applicant. If the applicant is not an individual, the application must state the name, mailing address, physical address(es) of all known new locations not previously identified in the application where the special permit would be used and all locations not previously identified where the special permit was used, e-mail address (if available), and telephone number of an individual designated as the point of contact for the applicant for all purposes related to the application, the name of the company Chief Executive Officer (CEO), president, or ranking executive officer, and the Dun and Bradstreet Data Universal Numbering System (D–U–N–S) identifier. In addition, each applicant for renewal of party status must state why party status to the special permit is needed and must submit a certification of understanding of the provisions of the special permit to which party status is being requested.

(4) The application must include either a certification by the applicant that the original application, as it may have been updated by any application for renewal, remains accurate (*e.g.*, all section references, shipping descriptions, *etc.*) and complete; or include an amendment to the previously submitted application as is necessary to update and ensure the accuracy and completeness of the application, with certification by the applicant that the application as amended is accurate and complete.

(5) The application must include a statement describing all relevant operational, shipping, and incident experience of which the applicant is aware in connection with the special permit since its issuance or most recent renewal. If the applicant is aware of no incidents, the applicant must so certify. When known to the applicant, the statement must indicate the approximate number of shipments made or packages shipped, as applicable, and the number of shipments or packages involved in any loss of contents, including loss by venting other than as authorized in subchapter C.

(6) When a Class 1 material is forbidden for transportation by aircraft, except under a special permit (*see* Columns 9A and 9B in the table in 49 CFR 172.101), an application to renew a special permit to transport such Class 1 material on passenger-carrying or cargo-only aircraft with a maximum certificated takeoff weight of less than 12,500 pounds must certify that no person within the categories listed in 18 U.S.C. 842(i) will participate in the transportation of the Class 1 material.

(7) If the renewal is requested after the expiration date of the special permit, the following information is required:

(i) The reason the special permit authorization was allowed to expire;

(ii) A certification statement that no shipments were transported after the expiration date of the special permit, or a statement describing any transportation under the terms of the special permit after the expiration date, if applicable; and

(iii) A statement describing the action(s) the applicant will take to ensure future renewal is requested before the expiration date.

(8) If no operations or shipments have been made since the issuance or renewal of the special permit, the applicant must provide specific justification as to why the special permit should be renewed.

(9) A statement indicating whether the applicant will be acting as a shipper (offeror), carrier or both under the terms of the special permit.

(b) If, at least 60 days before an existing special permit expires the holder files an application for renewal that is complete and conforms to the requirements of this section, the special permit will not expire until final administrative action on the application for renewal has been taken.

[76 FR 462, Jan. 5, 2011, as amended at 76 FR 44501, July 26, 2011; 76 FR 43524, July 20, 2011; 76 FR 56310, Sept. 13, 2011]

§ 107.111 Withdrawal.

An application may be withdrawn at any time before a decision to grant or deny it is made. Withdrawal of an application does not authorize the removal of any related records from the PHMSA dockets or files. Applications that are eligible for confidential treatment under §105.30 will remain confidential after the application is withdrawn. The duration of this confidential treatment for trade secrets and commercial or financial information is indefinite, unless the party requesting the confidential treatment of the materials notifies the Associate Administrator that the confidential treatment is no longer required.

§ 107.113 Application processing and evaluation.

(a) The Associate Administrator reviews an application for a special permit, modification of a special permit, party to a special permit, or renewal of a special permit to determine if it is complete and conforms with the requirements of this subpart. This determination will be made within 30 days of receipt of the application for a special permit, modification of a special permit, or party to a special permit, and within 15 days of receipt of an application for renewal of a special permit. If an application is determined to be incomplete, the applicant is informed of the deficiency.

(b) An application, that is not a renewal, party to, or emergency special permit application, and is determined to be complete is docketed. Notice of the application is published in the FEDERAL REGISTER, and an opportunity for public comment is provided. All comments received during the comment period are considered before final action is taken on the application.

(c) No public hearing or other formal proceeding is required under this subpart before the disposition of an application. Unless emergency processing under §107.117 is requested and granted, applications are usually processed in the order in which they are filed.

(d) During the processing and evaluation of an application, the Associate Administrator may conduct an on-site review or request additional information from the applicant. A failure to cooperate with an on-site review may result in the application being deemed incomplete and subsequently being denied. If the applicant does not respond to a written or electronic request for additional information within 30 days of the date the request was received, the application may be deemed incomplete and denied. However, if the applicant responds in writing or by electronic means within the 30-day period requesting an additional 30 days within which it will gather the requested information, the Associate Administrator may grant the 30-day extension.

(e) The Associate Administrator may grant or deny an application, in whole or in part. In the Associate Administrator's discretion, an application may be granted subject to provisions that are appropriate to protect health, safety or property. The Associate Administrator may impose additional provisions not specified in the application or remove conditions in the application that are unnecessary.

(f) The Associate Administrator may grant an application on finding that—

(1) The application complies with this subpart;

(2) The application demonstrates that the proposed alternative will achieve a level of safety that:

(i) Is at least equal to that required by the regulation from which the special permit is sought, or

(ii) If the regulations do not establish a level of safety, is consistent with the public interest and adequately will protect against the risks to life and property inherent in the transportation of hazardous materials in commerce;

(3) The application states all material facts, and contains no materially false or materially misleading statement;

(4) The applicant meets the qualifications required by applicable regulations; and

(5) The applicant is fit to conduct the activity authorized by the special permit. This assessment may be based on information in the application, prior compliance history of the applicant, and other information available to the Associate Administrator.

(g) An applicant is notified in writing or by electronic means whether the application is granted or denied. A denial contains a brief statement of reasons.

(h) The initial special permit terminates according to its terms or, if not otherwise specified, 24 months from the date of issuance. A subsequent renewal of a special permit terminates according to its terms or, if not otherwise specified, 48 months after the date of issuance. A grant of party status to a special permit, unless otherwise stated, terminates on the date that the special permit expires.

(i) The Associate Administrator, on determining that an application concerns a matter of general applicability and future effect and should be the subject of rulemaking, may initiate rulemaking under part 106 of this chapter in addition to or instead of acting on the application.

(j) The Associate Administrator publishes in the FEDERAL REGISTER a list of all special permit grants, denials, and modifications and all special permit applications withdrawn under this section.

[Amdt. 107–38, 61 FR 21095, May 9, 1996, as amended at 67 FR 61011, Sept. 27, 2002; 70 FR 73161, Dec. 9, 2005; 76 FR 463, Jan. 5, 2011]

§ 107.117 Emergency processing.

(a) An application is granted emergency processing if the Associate Administrator, on the basis of the application and any inquiry undertaken, finds that—

(1) Emergency processing is necessary to prevent significant injury to persons or property (other than the hazardous material to be transported) that could not be prevented if the application were processed on a routine basis; or

(2) Emergency processing is necessary for immediate national security purposes or to prevent significant economic loss that could not be prevented if the application were processed on a routine basis.

(b) Where the significant economic loss is to the applicant, or to a party in a contractual relationship to the applicant with respect to the activity to be undertaken, the Associate Administrator may deny emergency processing if timely application could have been made.

(c) A request for emergency processing on the basis of potential economic loss must reasonably describe and estimate the potential loss.

(d) An application submitted under this section must conform to § 107.105 to the extent that the receiving Department official deems necessary to process the application. An application on an emergency basis must be submitted to the Department modal contact official for the initial mode of transportation to be utilized, as follows:

(1) *Certificate-Holding Aircraft:* The Federal Aviation Administration Civil Aviation Security Office that serves the place where the flight will originate or that is responsible for the aircraft operator's overall aviation security program. The nearest Civil Aviation Security Office may be located by calling the FAA Duty Officer, 202–267–3333 (any hour).

(2) *Noncertificate-Holding Aircraft (Those Which Operate Under 14 CFR Part 91):* The Federal Aviation Administration Civil Aviation Security Office that serves the place where the flight will originate. The nearest Civil Aviation Security Office may be located by calling the FAA Duty Officer, 202–267–3333 (any hour).

(3) *Motor Vehicle Transportation:* Chief, Hazardous Materials Division,

Federal Motor Carrier Safety Administration, U.S. Department of Transportation, Washington, DC 20590–0001, 202–385–2400 (day); 1–800–424–8802 (night).

(4) *Rail Transportation:* Staff Director, Hazardous Materials Division, Office of Safety Assurance and Compliance, Federal Railroad Administration, U.S. Department of Transportation, Washington, DC 20590–0001, 202–493–6248 or 202–493–6244 (day); 1–800–424–8802 (night).

(5) *Water Transportation:* Chief, Hazardous Materials Standards Division, Office of Operating and Environmental Standards, U.S. Coast Guard, U.S. Department of Homeland Security, Washington, DC 20593–0001; 202–372–1420 (day); 1–800–424–8802 (night).

(e) On receipt of all information necessary to process the application, the receiving Department official transmits to the Associate Administrator, by the most rapid available means of communication, an evaluation as to whether an emergency exists under §107.117(a) and, if appropriate, recommendations as to the conditions to be included in the special permit. If the Associate Administrator determines that an emergency exists under §107.117(a) and that, with reference to the criteria of §107.113(f), granting of the application is in the public interest, the Associate Administrator grants the application subject to such terms as necessary and immediately notifies the applicant. If the Associate Administrator determines that an emergency does not exist or that granting of the application is not in the public interest, the applicant immediately is so notified.

(f) A determination that an emergency does not exist is not subject to reconsideration under §107.123 of this part.

(g) Within 90 days following issuance of an emergency special permit, the Associate Administrator will publish, in the FEDERAL REGISTER, a notice of issuance with a statement of the basis for the finding of emergency and the scope and duration of the special permit.

[Amdt. 107–38, 61 FR 21095, May 9, 1996, as amended at 62 FR 51556, Oct. 1, 1997; 64 FR 51914, Sept. 27, 1999; 65 FR 58618, Sept. 29, 2000; 66 FR 45377, Aug. 28, 2001; 67 FR 61011, Sept. 27, 2002; 70 FR 56090, Sept. 23, 2005; 75 FR 53596, Sept. 1, 2010; 76 FR 463, Jan. 5, 2011]

§107.121 Modification, suspension or termination of special permit or grant of party status.

(a) The Associate Administrator may modify a special permit or grant of party status on finding that:

(1) Modification is necessary so that the special permit reflects current statutes and regulations; or

(2) Modification is required by changed circumstances to meet the standards of §107.113(f).

(b) The Associate Administrator may modify, suspend or terminate a special permit or grant of party status, as appropriate, on finding that:

(1) Because of a change in circumstances, the special permit or party status no longer is needed or no longer would be granted if applied for;

(2) The application contained inaccurate or incomplete information, and the special permit or party status would not have been granted had the application been accurate and complete;

(3) The application contained deliberately inaccurate or incomplete information; or

(4) The holder or party knowingly has violated the terms of the special permit or an applicable requirement of this chapter in a manner demonstrating the holder or party is not fit to conduct the activity authorized by the special permit.

(c) Except as provided in paragraph (d) of this section, before a special permit or grant of party status is modified, suspended, or terminated, the Associate Administrator notifies the holder or party in writing or by electronic means of the proposed action and the reasons for it, and provides an opportunity to show cause why the proposed action should not be taken.

(1) Within 30 days of receipt of notice of the proposed action, the holder or party may file a response in writing or by electronic means that shows cause

why the proposed action should not be taken.

(2) After considering the holder's or party's response, or after 30 days have passed without response since receipt of the notice, the Associate Administrator notifies the holder or party in writing or by electronic means of the final decision with a brief statement of reasons.

(d) The Associate Administrator, if necessary to avoid a risk of significant harm to persons or property, may, in the notification, declare the proposed action immediately effective.

[76 FR 463, Jan. 5, 2011]

§ 107.123 Reconsideration.

(a) An applicant for special permit, a special permit holder, or an applicant for party status to a special permit may request that the Associate Administrator reconsider a decision under § 107.113(g), § 107.117(e) or § 107.121(c) of this part. The request must—

(1) Be in writing or by electronic means and filed within 20 days of receipt of the decision;

(2) State in detail any alleged errors of fact and law;

(3) Enclose any additional information needed to support the request to reconsider; and

(4) State in detail the modification of the final decision sought.

(b) The Associate Administrator grants or denies, in whole or in part, the relief requested and informs the requesting person in writing or by electronic means of the decision. If necessary to avoid a risk of significant harm to persons or property, the Associate Administrator may, in the notification, declare the action immediately effective.

[76 FR 463, Jan. 5, 2011]

§ 107.125 Appeal.

(a) A person who requested reconsideration under § 107.123 and is denied the relief requested may appeal to the Administrator. The appeal must—

(1) Be in writing or by electronic means and filed within 30 days of receipt of the Associate Administrator's decision on reconsideration; (2) state in detail any alleged errors of fact and law;

(2) State in detail any alleged errors of fact and law;

(3) Enclose any additional information needed to support the appeal; and

(4) State in detail the modification of the final decision sought.

(b) The Administrator, if necessary to avoid a risk of significant harm to persons or property, may declare the Associate Administrator's action effective pending a decision on appeal.

(c) The Administrator grants or denies, in whole or in part, the relief requested and informs the appellant in writing or by electronic means of the decision. The Administrator's decision is the final administrative action.

[Amdt. 107–38, 61 FR 21095, May 9, 1996, as amended at 76 FR 463, Jan. 5, 2011]

§ 107.127 Availability of documents for public inspection.

(a) Documents related to an application under this subpart, including the application itself, are available for public inspection, except as specified in paragraph (b) of this section, at the Office of the Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration, Approvals and Permits Division, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays when the office is closed. Copies of available documents may be obtained as provided in part 7 of this title. Documents numbered 11832 and above may also be viewed at the website address *http://www.regulations.gov*.

(b) Documents available for inspection do not include materials determined to be withheld from public disclosure under § 105.30 and in accordance with the applicable provisions of section 552(b) of title 5, United States Code, and part 7 of this title.

[Amdt. 107–38, 61 FR 21095, May 9, 1996, as amended at 65 FR 58618, Sept. 29, 2000; 66 FR 45377, Aug. 28, 2001; 67 FR 61011, Sept. 27, 2002; 70 FR 73162, Dec. 9, 2005; 72 FR 55683, Oct. 1, 2007; 76 FR 56310, Sept. 13, 2011]

Subpart C—Preemption

§ 107.201 Purpose and scope.

(a) This subpart prescribes procedures by which:

(1) Any person, including a State, political subdivision, or Indian tribe, directly affected by a requirement of a State, political subdivision, or Indian tribe, may apply for a determination as to whether that requirement is preempted under 49 U.S.C. 5125.

(2) A State, political subdivision, or Indian tribe may apply for a waiver of preemption with respect to any requirement that the State, political subdivision, or Indian tribe acknowledges to be preempted by 49 U.S.C. 5125, or that has been determined by a court of competent jurisdiction to be so preempted.

(b) For purposes of this subpart ''political subdivision'' includes a municipality; a public agency or other instrumentality of one or more States, municipalities, or other political subdivisions of a State; or a public corporation, board, or commission established under the laws of one or more States.

(c) [Reserved]

(d) An application for a preemption determination that includes an application for a waiver of preemption will be treated and processed solely as an application for a preemption determination.

[Amdt. 107–3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107–24, 56 FR 8622, Feb. 28, 1991; Amdt. 107–25, 57 FR 20428, May 13, 1992; Amdt. 107–32, 59 FR 49130, Sept. 26, 1994; Amdt. 107–35, 60 FR 49108, Sept. 21, 1995; Amdt. 107–38, 61 FR 21098, May 9, 1996; 68 FR 52846, Sept. 8, 2003; 71 FR 30067, May 25, 2006]

§ 107.202 Standards for determining preemption.

(a) Except as provided in § 107.221 and unless otherwise authorized by Federal law, any requirement of a State or political subdivision thereof or an Indian tribe that concerns one of the following subjects and that is not substantively the same as any provision of the Federal hazardous materials transportation law, a regulation issued under the Federal hazardous material transportation law, or a hazardous material transportation security regulation or directive issued by the Secretary of Homeland Security that concerns that subject, is preempted:

(1) The designation, description, and classification of hazardous material.

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(3) The preparation, execution, and use of shipping documents pertaining to hazardous material and requirements related to the number, content, and placement of those documents.

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

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

(b) Except as provided in § 107.221 and unless otherwise authorized by Federal law, any requirement of a State or political subdivision or Indian tribe is preempted if—

(1) It is not possible to comply with a requirement of the State, political subdivision, or Indian tribe and a requirement under the Federal hazardous material transportation law, a regulation issued under the Federal hazardous material transportation law, or a hazardous material transportation security regulation or directive issued by the Secretary of Homeland Security;

(2) The requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to accomplishing and carrying out the Federal hazardous material transportation law, a regulation issued under the Federal hazardous material transportation law, or a hazardous material transportation security regulation or directive issued by the Secretary of Homeland Security.

(3) It is preempted under 49 U.S.C. 5125 (c).

(c) A State, political subdivision, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing and

maintaining a capability for emergency response.

(d) For purposes of this section, ''substantively the same'' means that the non-Federal requirement conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted.

[Amdt. 107–24, 56 FR 8622, Feb. 28, 1991, as amended by Amdt. 107–25, 57 FR 20428, May 13, 1992; Amdt. 107–29, 58 FR 51527, Oct. 1, 1993; Amdt. 107–32, 59 FR 49130, Sept. 26, 1994; Amdt. 107–38, 61 FR 21098, May 9, 1996; Amdt. 107–39, 61 FR 51337, Oct. 1, 1996; 68 FR 52847, Sept. 8, 2003]

PREEMPTION DETERMINATIONS

§ 107.203 Application.

(a) With the exception of highway routing matters covered under 49 U.S.C. 5125(c), any person, including a State or political subdivision thereof or an Indian tribe, directly affected by any requirement of a State or political subdivision thereof or an Indian tribe, may apply to the Chief Counsel for a determination as to whether that requirement is preempted by §107.202(a), (b), or (c).

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

(1) Be submitted to the Chief Counsel:

(i) By mail addressed to the Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHC–1, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001;

(ii) By facsimile to 202–366–7041; or

(iii) Electronically to the Chief Counsel at *phmsachiefcounsel@dot.gov*.

(2) Set forth the text of the State or political subdivision or Indian tribe requirement for which the determination is sought;

(3) Specify each requirement of the Federal hazardous materials transportation law, regulations issued under the Federal hazardous material transportation law, or hazardous material transportation security regulations or directives issued by the Secretary of Homeland Security with which the applicant seeks the State or political subdivision or Indian tribe requirement to be compared;

(4) Explain why the applicant believes the State or political subdivision or Indian tribe requirement should or should not be preempted under the standards of §107.202; and

(5) State how the applicant is affected by the State or political subdivision or Indian tribe requirement.

(c) The filing of an application for a determination under this section does not constitute grounds for noncompliance with any requirement of the Federal hazardous materials transportation law, regulations issued under the Federal hazardous material transportation law, or hazardous material transportation security regulations or directives issued by the Secretary of Homeland Security.

(d) Once the Chief Counsel has published notice in the FEDERAL REGISTER of an application received under paragraph (a) of this section, no applicant for such determination may seek relief with respect to the same or substantially the same issue in any court until final action has been taken on the application or until 180 days after filing of the application, whichever occurs first. Nothing in §107.203(a) prohibits a State or political subdivision thereof or Indian tribe, or any other person directly affected by any requirement of a State or political subdivision thereof or Indian tribe, from seeking a determination of preemption in any court of competent jurisdiction in lieu of applying to the Chief Counsel under paragraph (a) of this section.

[Amdt. 107–24, 56 FR 8622, Feb. 28, 1991, as amended by Amdt. 107–25, 57 FR 20428, May 13, 1992; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–38, 61 FR 21098, May 9, 1996; 68 FR 52847, Sept. 8, 2003; 71 FR 30067, May 25, 2006; 72 FR 55683, Oct. 1, 2007]

§ 107.205 Notice.

(a) If the applicant is other than a State, political subdivision, or Indian tribe, the applicant shall mail a copy of the application to the State, political subdivision, or Indian tribe concerned accompanied by a statement that the State, political subdivision, or Indian tribe may submit comments regarding the application to the Chief Counsel. The application filed with the Chief Counsel must include a certification that the applicant has complied with

this paragraph and must include the names and addresses of each State, political subdivision, or Indian tribe official to whom a copy of the application was sent.

(b) The Chief Counsel will publish notice of, including an opportunity to comment on, an application in the FEDERAL REGISTER and may notify in writing any person readily identifiable as affected by the outcome of the determination.

(c) Each person submitting written comments to the Chief Counsel with respect to an application filed under this section must send a copy of the comments to the applicant and certify to the Chief Counsel that he or she has complied with this requirement. The Chief Counsel may notify other persons participating in the proceeding of the comments and provide an opportunity for those other persons to respond. Late-filed comments are considered so far as practicable.

[Amdt. 107–38, 61 FR 21098, May 9, 1996, as amended at 71 FR 30067, May 25, 2006]

§ 107.207 Processing.

(a) The Chief Counsel may initiate an investigation of any statement in an application and utilize in his or her evaluation any relevant facts obtained by that investigation. The Chief Counsel may solicit and accept submissions from third persons relevant to an application and will provide the applicant an opportunity to respond to all third person submissions. In evaluating an application, the Chief Counsel may consider any other source of information. The Chief Counsel on his or her own initiative may convene a hearing or conference, if he or she considers that a hearing or conference will advance his or her evaluation of the application.

(b) The Chief Counsel may dismiss the application without prejudice if:

(1) He or she determines that there is insufficient information upon which to base a determination; or

(2) He or she requests additional information from the applicant and it is not submitted.

[Amdt. 107–3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107–24, 56 FR 8621, 8622, Feb. 28, 1991; Amdt. 107–38, 61 FR 21098, May 9, 1996; 71 FR 30067, May 25, 2006]

§ 107.209 Determination.

(a) Upon consideration of the application and other relevant information received, the Chief Counsel issues a determination.

(b) The determination includes a written statement setting forth the relevant facts and the legal basis for the determination, and provides that any person aggrieved thereby may file a petition for reconsideration with the Chief Counsel.

(c) The Chief Counsel provides a copy of the determination to the applicant and to any other person who substantially participated in the proceeding or requested in comments to the docket to be notified of the determination. A copy of each determination is placed on file in the public docket. The Chief Counsel will publish the determination or notice of the determination in the FEDERAL REGISTER, at which time the determination becomes a final agency action.

(d) A determination issued under this section constitutes an administrative determination as to whether a particular requirement of a State or political subdivision or Indian tribe is preempted under the Federal hazardous materials transportation law. The fact that a determination has not been issued under this section with respect to a particular requirement of a State or political subdivision or Indian tribe carries no implication as to whether the requirement is preempted under the Federal hazardous materials transportation law.

[Amdt. 107–24, 56 FR 8623, Feb. 28, 1991, as amended by Amdt. 107–25, 57 FR 20428, May 13, 1992; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–38, 61 FR 21098, May 9, 1996; 68 FR 52847, Sept. 8, 2003; 71 FR 30067, May 25, 2006]

§ 107.211 Petition for reconsideration.

(a) Any person aggrieved by a determination issued under §107.209 may file a petition for reconsideration. The petition must be filed with the Chief Counsel, in the same manner specified for filing an application in §107.203(b), within 20 days of publication of the determination in the FEDERAL REGISTER.

(b) The petition must contain a concise statement of the basis for seeking review, including any specific factual

or legal error alleged. If the petition requests consideration of information that was not previously made available to the Chief Counsel, the petition must include the reasons why such information was not previously made available.

(c) The petitioner shall mail a copy of the petition to each person who participated, either as an applicant or commenter, in the preemption determination proceeding, accompanied by a statement that the person may submit comments concerning the petition to the Chief Counsel within 20 days. The petition filed with the Chief Counsel must contain a certification that the petitioner has complied with this paragraph and include the names and addresses of all persons to whom a copy of the petition was sent. Late-filed comments are considered so far as practicable.

(d) The Chief Counsel will publish the decision on the petition for reconsideration or notice of the decision in the FEDERAL REGISTER, at which time the decision on the petition for reconsideration becomes a final agency action.

[Amdt. 107–25, 57 FR 20428, May 13, 1992, as amended by Amdt. 107–38, 61 FR 21099, May 9, 1996; 71 FR 30067, May 25, 2006]

§ 107.213 Judicial review.

A party to a proceeding under § 107.203(a) may seek review of a determination of the Chief Counsel by filing a petition, within 60 days after the determination becomes final, in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the person resides or has its principal place of business.

[71 FR 30068, May 25, 2006]

WAIVER OF PREEMPTION DETERMINATIONS

§ 107.215 Application.

(a) With the exception of requirements preempted under 49 U.S.C. 5125(c), a State or political subdivision thereof, or Indian tribe may apply to the Chief Counsel for a waiver of preemption with respect to any requirement that the State or political subdivision thereof or Indian tribe acknowledges to be preempted under the Federal hazardous materials transportation law, or that has been determined by a court of competent jurisdiction to be so preempted. The Chief Counsel may waive preemption with respect to such requirement upon a determination that such requirement—

(1) Affords an equal or greater level of protection to the public than is afforded by the requirements of the Federal hazardous material transportation law or the regulations issued thereunder, and

(2) Does not unreasonably burden commerce.

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

(1) Be submitted to the Chief Counsel:

(i) By mail addressed to the Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHC–1, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001;

(ii) By facsimile to 202–366–7041; or

(iii) Electronically to the Chief Counsel at *phmsachiefcounsel@dot.gov*.

(2) Set forth the text of the State or political subdivision requirement for which the determination is being sought;

(3) Include a copy of any court order and any ruling issued under § 107.209 having a bearing on the application;

(4) Contain an express acknowledgment by the applicant that the State, political subdivision, or Indian tribe requirement is preempted under Federal hazardous materials transportation law, unless it has been so determined by a court of competent jurisdiction or in a determination issued under § 107.209;

(5) Specify each requirement of the Federal hazardous materials transportation law that preempts the State, political subdivision, or Indian tribe requirement;

(6) State why the applicant believes the State, political subdivision or Indian tribe requirements affords an equal or greater level of protection to the public than is afforded by the requirements of the Federal hazardous material transportation law or the regulations issued thereunder;

(7) State why the applicant believes the State, political subdivision or Indian tribe requirement does not unreasonably burden commerce; and

(8) Specify what steps the State, political subdivision or Indian tribe is taking to administer and enforce effectively its inconsistent requirement.

[Amdt. 107–3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107–22, 55 FR 39978, Oct. 1, 1990; Amdt. 107–24, 56 FR 8621, 8623, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991; Amdt. 107–23, 56 FR 66156, Dec. 20, 1991; Amdt. 107–25, 57 FR 20428, May 13, 1992; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–38, 61 FR 21099, May 9, 1996; 68 FR 52847, Sept. 8, 2003; 71 FR 30068, May 25, 2006; 72 FR 55683, Oct. 1, 2007]

§ 107.217 Notice.

(a) The applicant shall mail a copy of the application and any subsequent amendments or other documents relating to the application to each person who is reasonably ascertainable by the applicant as a person who will be affected by the determination sought. The copy of the application must be accompanied by a statement that the person may submit comments regarding the application within 45 days. The application must include a certification that the application has complied with this paragraph and must include the names and addresses of each person to whom the application was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the State or political subdivision determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was not sent.

(c) The Chief Counsel may require the applicant to provide notice in addition to that required by paragraphs (a) and (b) of this section, or may determine that the notice required by paragraph (a) of the section is not impracticable, or that notice should be published in the FEDERAL REGISTER. Late-filed comments are considered so far as practicable.

(d) The Chief Counsel may notify any other persons who may be affected by the outcome of a determination on the application.

(e) Any person submitting written comments with respect to an application filed under this section shall send a copy of the comments to the applicant. The person shall certify that he has complied with the requirements of this paragraph. The Chief Counsel may notify other persons participating in the proceeding of the comments and provide an opportunity for those other persons to respond.

[Amdt. 107–3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; Amdt. 107–25, 57 FR 20429, May 13, 1992; Amdt. 107–38, 61 FR 21099, May 9, 1996; 71 FR 30068, May 25, 2006]

§ 107.219 Processing.

(a) The Chief Counsel may initiate an investigation of any statement in an application and utilize in his or her evaluation any relevant facts obtained by that investigation. The Chief Counsel may solicit and accept submissions from third persons relevant to an application and will provide the applicant an opportunity to respond to all third person submissions. In evaluating an application, the Chief Counsel on his or her own initiative may convene a hearing or conference, if he or she considers that a hearing or conference will advance his or her evaluation of the application.

(b) The Chief Counsel may dismiss the application without prejudice if:

(1) He or she determines that there is insufficient information upon which to base a determination;

(2) Upon his or her request, additional information is not submitted by the applicant; or

(3) The applicant fails to provide the notice required by §107.217.

(c) The Chief Counsel will only consider an application for waiver of preemption determination if—

(1) The applicant State or political subdivision thereof or Indian tribe expressly acknowledges in its application that the State or political subdivision or Indian tribe requirement for which the determination is sought is inconsistent with the requirements of the

Federal hazardous materials transportation law, regulations issued under the Federal hazardous material transportation law, or hazardous material transportation security regulations or directives issued by the Secretary of Homeland Security.

(2) The State or political subdivision thereof or Indian tribe requirement has been determined by a court of competent jurisdiction or in a ruling issued under § 107.209 to be inconsistent with the requirements of the Federal hazardous materials transportation law, regulations issued under the Federal hazardous material transportation law, or hazardous material transportation security regulations or directives issued by the Secretary of Homeland Security.

(d) When the Chief Counsel has received all substantive information it considers necessary to process an application for a waiver of preemption determination, it serves notice of that fact upon the applicant and all other persons who received notice of the proceeding pursuant to § 107.217.

(e) To the extent possible, each application for a waiver of preemption determination will be acted upon in a manner consistent with the disposition of previous applications for waiver of preemption determinations.

[Amdt. 107–3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107–24, 56 FR 8621, 8623, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–38, 61 FR 21099, May 9, 1996; 65 FR 58618, Sept. 29, 2000; 68 FR 52847, Sept. 8, 2003; 69 FR 54044, Sept. 7, 2004; 71 FR 30068, May 25, 2006]

§ 107.221 Determination.

(a) After considering the application and other relevant information received or obtained during the proceeding, the Chief Counsel issues a determination.

(b) The Chief Counsel may issue a waiver of preemption only on finding that the requirement of the State or political subdivision thereof or Indian tribe affords the public a level of safety at least equal to that afforded by the requirements of the Federal hazardous material transportation law or the regulations issued thereunder and does not unreasonably burden commerce. In determining if the requirement of the State or political subdivision thereof or Indian tribe unreasonably burdens commerce, the Chief Counsel considers:

(1) The extent to which increased costs and impairment of efficiency result from the requirement of the State or political subdivision thereof or Indian tribe.

(2) Whether the requirement of the State or political subdivision thereof or Indian tribe has a rational basis.

(3) Whether the requirement of the State or political subdivision thereof or Indian tribe achieves its stated purpose.

(4) Whether there is need for uniformity with regard to the subject concerned and if so, whether the requirement of the State or political subdivision thereof or Indian tribe competes or conflicts with those of other States or political subdivisions thereof or Indian tribes.

(c) The determination includes a written statement setting forth relevant facts and legal bases and providing that any person aggrieved by the determination may file a petition for reconsideration with the Chief Counsel.

(d) The Chief Counsel provides a copy of the determination to the applicant and to any other person who substantially participated in the proceeding or requested in comments to the docket to be notified of the determination. A copy of the determination is placed on file in the public docket. The Chief Counsel will publish the determination or notice of the determination in the FEDERAL REGISTER, at which time the determination becomes a final agency action.

(e) A determination under this section constitutes an administrative finding of whether a particular requirement of a State or political subdivision thereof or Indian tribe is preempted under the Federal hazardous materials transportation law, or whether preemption is waived.

[Amdt. 107–38, 61 FR 21099, May 9, 1996, as amended at 68 FR 52848, Sept. 8, 2003; 71 FR 30068, May 25, 2006]

§ 107.223 Petition for reconsideration.

(a) Any person aggrieved by a determination under § 107.221 may file a petition for reconsideration. The petition

must be filed with the Chief Counsel, in the same manner specified for filing an application in §107.215(b), within 20 days of publication of the determination in the FEDERAL REGISTER.

(b) The petition must contain a concise statement of the basis for seeking review, including any specific factual or legal error alleged. If the petition requests consideration of information that was not previously made available to the Chief Counsel, the petition must include the reasons why such information was not previously made available.

(c) The petitioner shall mail a copy of the petition to each person who participated, either as an applicant or commenter, in the waiver of preemption proceeding, accompanied by a statement that the person may submit comments concerning the petition to the Chief Counsel within 20 days. The petition filed with the Chief Counsel must contain a certification that the petitioner has complied with this paragraph and include the names and addresses of all persons to whom a copy of the petition was sent. Late-filed comments are considered so far as practicable.

(d) The Chief Counsel will publish the decision on the petition for reconsideration or notice of the decision in the FEDERAL REGISTER, at which time the decision on the petition for reconsideration becomes a final agency action.

[Amdt. 107–25, 57 FR 20429, May 13, 1992, as amended by Amdt. 107–38, 61 FR 21099, May 9, 1996; 71 FR 30068, May 25, 2006]

§107.227 Judicial review.

A party to a proceeding under §107.215(a) may seek review of a determination of the Chief Counsel by filing a petition, within 60 days after the determination becomes final, in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the person resides or has its principal place of business.

[71 FR 30068, May 25, 2006]

Subpart D—Enforcement

SOURCE: Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, unless otherwise noted.

§107.301 Delegated authority for enforcement.

Under redelegation from the Administrator, Pipeline and Hazardous Materials Safety Administration, the Associate Administrator for Hazardous Materials Safety and the Office of the Chief Counsel exercise their authority for enforcement of the Federal hazardous material transportation law, this subchapter, and subchapter C of this subchapter, in accordance with §1.53 of this title.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994]

§107.303 Purpose and scope.

This subchapter describes the various enforcement authorities exercised by the Associate Administrator for Hazardous Materials Safety and the Office of Chief Counsel and the associated sanctions and prescribes the procedures governing the exercise of those authorities and the imposition of those sanctions.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–15, 51 FR 34986, Oct. 1, 1986; Amdt. 107–24, 56 FR 8621, Feb. 28, 1991]

§107.305 Investigations.

(a) *General.* In accordance with its delegated authority under part 1 of this title, the Associate Administrator may initiate investigations relating to compliance by any person with any provisions of this subchapter or subchapter C of this chapter, or any special permit, approval, or order issued thereunder, or any court decree relating thereto. The Associate Administrator encourages voluntary production of documents in accordance with and subject to §105.45, and hearings may be conducted, and depositions taken pursuant to 49 U.S.C. 5121(a). The Associate Administrator may conduct investigative conferences and hearings in the course of any investigation.

(b) *Investigations and Inspections.* Investigations under 49 U.S.C. 5121(a) are conducted by personnel duly authorized for that purpose by the Associate Administrator. Inspections under 49

U.S.C. 5121(c) are conducted by Hazardous Materials Enforcement Specialists or Hazardous Materials Compliance Investigators, also known as ''hazmat investigators'' or ''investigators,'' whom the Associate Administrator has designated for that purpose.

(1) An investigator will, on request, present his or her credentials for examination, but the credentials may not be reproduced.

(2) An investigator may administer oaths and receive affirmations in any matter under investigation by the Associate Administrator.

(3) An investigator may gather information by reasonable means including, but not limited to, interviews, statements, photocopying, photography, and video- and audio-recording.

(4) With concurrence of the Director, Field Operations, Pipeline and Hazardous Materials Safety Administration, an investigator may issue a subpoena for the production of documentary or other tangible evidence if, on the basis of information available to the investigator, the documents and evidence materially will advance a determination of compliance with this subchapter or subchapter C. Service of a subpoena shall be in accordance with §105.50. A person to whom a subpoena is directed may seek review of the subpoena by applying to the Office of Chief Counsel in accordance with §105.55(a). A subpoena issued under this paragraph may be enforced in accordance with §105.55(b).

(c) *Notification.* Any person who is the subject of an Associate Administrator investigation and who is requested to furnish information or documentary evidence is notified as to the general purpose for which the information or evidence is sought.

(d) *Termination.* When the facts disclosed by an investigation indicate that further action is unnecessary or unwarranted at that time, the person being investigated is notified and the investigative file is closed without prejudice to further investigation by the Associate Administrator.

(e) *Confidentiality.* Information received in an investigation under this section, including the identity of the person investigated and any other person who provides information during the investigation, shall remain confidential under the investigatory file exception, or other appropriate exception, to the public disclosure requirements of 5 U.S.C. 552.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–38, 61 FR 21099, May 9, 1996; 66 FR 45377, Aug. 28, 2001; 67 FR 61011, Sept. 27, 2002; 73 FR 4711, Jan. 28, 2008; 76 FR 56311, Sept. 13, 2011]

COMPLIANCE ORDERS AND CIVIL PENALTIES

§ 107.307 General.

(a) When the Associate Administrator and the Office of Chief Counsel have reason to believe that a person is knowingly engaging or has knowingly engaged in conduct which is a violation of the Federal hazardous material transportation law or any provision of this subchapter or subchapter C of this chapter, or any exemption, special permit, or order issued thereunder, for which the Associate Administrator or the Office of Chief Counsel exercise enforcement authority, they may—

(1) Issue a warning letter, as provided in §107.309;

(2) Initiate proceedings to assess a civil penalty, as provided in either §§107.310 or 107.311;

(3) Issue an order directing compliance, regardless of whether a warning letter has been issued or a civil penalty assessed; and

(4) Seek any other remedy available under the Federal hazardous material transportation law.

(b) In the case of a proceeding initiated for failure to comply with an exemption or special permit, the allegation of a violation of a term or condition thereof is considered by the Associate Administrator and the Office of Chief Counsel to constitute an allegation that the special permit holder or party to the special permit is failing, or has failed to comply with the underlying regulations from which relief was granted by the special permit.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–36, 61 FR 7183, Feb. 26, 1996; 66 FR 45377, Aug. 28, 2001; 70 FR 73162, Dec. 9, 2005]

§ 107.309 Warning letters.

(a) The Associate Administrator may issue a warning letter to any person whom the Associate Administrator believes to have committed a probable violation of the Federal hazardous material transportation law or any provision of this subchapter, subchapter C of this chapter, or any special permit issued thereunder.

(b) A warning letter issued under this section includes:

(1) A statement of the facts upon which the Associate Administrator bases its determination that the person has committed a probable violation;

(2) A statement that the recurrence of the probable violations cited may subject the person to enforcement action; and

(3) An opportunity to respond to the warning letter by submitting pertinent information or explanations concerning the probable violations cited therein.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–15, 51 FR 34986, Oct. 1, 1986; Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–36, 61 FR 7183, Feb. 26, 1996; 66 FR 45377, Aug. 28, 2001]

§ 107.310 Ticketing.

(a) For an alleged violation that does not have a direct or substantial impact on safety, the Associate Administrator may issue a ticket.

(b) The Associate Administrator issues a ticket by mailing it by certified or registered mail to the person alleged to have committed the violation. The ticket includes:

(1) A statement of the facts on which the Associate Administrator bases the conclusion that the person has committed the alleged violation;

(2) The maximum penalty provided for by statute, the proposed full penalty determined according to PHMSA's civil penalty guidelines and the statutory criteria for penalty assessment, and the ticket penalty amount; and

(3) A statement that within 45 days of receipt of the ticket, the person must pay the penalty in accordance with paragraph (d) of this section, make an informal response under § 107.317, or request a formal administrative hearing under § 107.319.

(c) If the person makes an informal response or requests a formal administrative hearing, the Associate Administrator forwards the inspection report, ticket and response to the Office of the Chief Counsel for processing under §§ 107.307–107.339, except that the Office of the Chief Counsel will not issue a Notice of Probable Violation under § 107.311. The Office of the Chief Counsel may impose a civil penalty that does not exceed the proposed full penalty set forth in the ticket.

(d) Payment of the ticket penalty amount must be made in accordance with the instructions on the ticket.

(e) If within 45 days of receiving the ticket the person does not pay the ticket amount, make an informal response, or request a formal administrative hearing, the person has waived the right to make an informal response or request a hearing, has admitted the violation and owes the ticket penalty amount to PHMSA.

[Amdt. 107–36, 61 FR 7183, Feb. 26, 1996, as amended at 66 FR 45377, Aug. 28, 2001]

§ 107.311 Notice of probable violation.

(a) The Office of Chief Counsel may serve a notice of probable violation on a person alleging the violation of one or more provisions of the Federal hazardous material transportation law or any provision of this subchapter or subchapter C of this chapter, or any special permit, or order issued thereunder.

(b) A notice of probable violation issued under this section includes the following information:

(1) A citation of the provisions of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or the terms of any special permit issued thereunder which the Office of Chief Counsel believes the respondent is violating or has violated.

(2) A statement of the factual allegations upon which the demand for remedial action, a civil penalty, or both, is based.

(3) A statement of the respondent's right to present written or oral explanations, information, and arguments in answer to the allegations and in mitigation of the sanction sought in the notice of probable violation.

(4) A statement of the respondent's right to request a hearing and the procedures for requesting a hearing.

(5) In addition, in the case of a notice of probable violation proposing a compliance order, a statement of the proposed actions to be taken by the respondent to achieve compliance.

(6) In addition, in the case of a notice of probable violation proposing a civil penalty:

(i) A statement of the maximum civil penalty for which the respondent may be liable;

(ii) The amount of the preliminary civil penalty being sought by the Office of Chief Counsel, constitutes the maximum amount the Chief Counsel may seek throughout the proceeding; and

(iii) A description of the manner in which the respondent makes payment of any money due the United States as a result of the proceeding.

(c) The Office of Chief Counsel may amend a notice of probable violation at any time before issuance of a compliance order or an order assessing a civil penalty. If the Office of Chief Counsel alleges any new material facts or seeks new or additional remedial action or an increase in the amount of the proposed civil penalty, it issues a new notice of probable violation under this section.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 50 FR 45730, Nov. 1, 1985; Amdt. 107–24, 56 FR 8624, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–35, 60 FR 49108, Sept. 21, 1995; Amdt. 107–36, 61 FR 7184, Feb. 26, 1996]

§ 107.313 Reply.

(a) Within 30 days of receipt of a notice of probable violation, the respondent must either:

(1) Admit the violation under § 107.315;

(2) Make an informal response under § 107.317; or

(3) Request a hearing under § 107.319.

(b) Failure of the respondent to file a reply as provided in this section constitutes a waiver of the respondent's right to appear and contest the allegations and authorizes the Chief Counsel, without further notice to the respondent, to find the facts to be as alleged in the notice of probable violation and issue an order directing compliance or assess a civil penalty, or, if proposed in the notice, both. Failure to request a hearing under paragraph (a)(3) of this section constitutes a waiver of the respondent's right to a hearing.

(c) Upon the request of the respondent, the Office of Chief Counsel may, for good cause shown and filed within the 30 days prescribed in the notice of probable violation, extend the 30-day response period.

§ 107.315 Admission of violations.

(a) In responding to a notice of probable violation issued under § 107.311, the respondent may admit the alleged violations and agree to accept the terms of a proposed compliance order or to pay the amount of the preliminarily assessed civil penalty, or, if proposed in the notice, both.

(b) If the respondent agrees to the terms of a proposed compliance order, the Chief Counsel issues a final order prescribing the remedial action to be taken by the respondent.

(c) Payment of a civil penalty, when the amount of the penalty exceeds $10,000, must be made by wire transfer, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions on making payments by wire transfer may be obtained from the Financial Operations Division (AMZ–120), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25082, Oklahoma City, OK 73125.

(d) Payment of a civil penalty, when the amount of the penalty is $10,000 or less, must be made either by wire transfer, as set forth in paragraph (c) of this section, or certified check or money order payable to ''U.S. Department of Transportation'' and submitted to the Financial Operations Division (AMZ–120), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25082, Oklahoma City, OK 73125.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–23, 57 FR 45453, Oct. 1, 1992; Amdt. 107–29, 58 FR 51527, Oct. 1, 1993; Amdt. 107–38, 61 FR 21100, May 9, 1996; 68 FR 52848, Sept. 8, 2003]

§ 107.317 Informal response.

(a) In responding to a notice of probable violation under §107.311, the respondent may submit to the official who issued the notice, written explanations, information, or arguments in response to the allegations, the terms of a proposed compliance order, or the amount of the preliminarily assessed civil penalty.

(b) The respondent may include in his informal response a request for a conference. Upon the request of the respondent, the conference may be either in person or by telephone. A request for a conference must set forth the issues the respondent will raise at the conference.

(c) Upon receipt of a request for a conference under paragraph (b) of this section, the Chief Counsel's Office, in consultation with the Associate Administrator, arranges for a conference as soon as practicable at a time and place of mutual convenience.

(d) The respondent's written explanations, information, and arguments as well as the respondent's presentation at a conference are considered by the Chief Counsel in reviewing the notice of probable violation. Based upon a review of the proceeding, the Chief Counsel may dismiss the notice of probable violation in whole or in part. If he does not dismiss it in whole, he issues an order directing compliance or assessing a civil penalty, or, if proposed in the notice, both.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–23, 56 FR 66157, Dec. 20, 1991; 66 FR 45377, Aug. 28, 2001]

§ 107.319 Request for a hearing.

(a) In responding to a notice of probable violation under §107.311, the respondent may request a formal administrative hearing on the record before an Administrative Law Judge (ALJ) obtained by the Office of the Chief Counsel.

(b) A request for a hearing under paragraph (a) of this section must:

(1) State the name and address of the respondent and of the person submitting the request if different from the respondent;

(2) State which allegations of violations, if any, are admitted; and

(3) State generally the issues to be raised by the respondent at the hearing. Issues not raised in the request are not barred from presentation at the hearing; and

(4) Be addressed to the official who issued the notice.

(c) After a request for a hearing that complies with the requirements of paragraph (b) of this section, the Chief Counsel obtains an ALJ to preside over the hearing and notifies the respondent of this fact. Upon assignment of an ALJ, further matters in the proceeding generally are conducted by and through the ALJ, except that the Chief Counsel and respondent may compromise or settle the case under §107.327 of this subpart without order of the ALJ or voluntarily dismiss the case under Rule 41(a)(1) of the Federal Rules of Civil Procedure without order of the ALJ; in the event of such a compromise, settlement or dismissal, the Chief Counsel expeditiously will notify the ALJ thereof.

(d) At any time after requesting a formal administrative hearing but prior to the issuance of a decision and final order by the ALJ, the respondent may withdraw such request in writing, thereby terminating the jurisdication of the ALJ in the case. Such a withdrawal constitutes an irrevocable waiver of respondent's right to such a hearing on the facts, allegations, and proposed sanction presented in the notice of probable violation to which the request for hearing relates.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 48 FR 17094, Apr. 21, 1983; Amdt. No. 107–19, 54 FR 22899, May 30, 1989]

§ 107.321 Hearing.

(a) To the extent practicable, the hearing is held in the general vicinity of the place where the alleged violation occurred or at a place convenient to the respondent. Testimony by witnesses shall be given under oath and the hearing shall be recorded verbatim.

(b) Hearings are conducted in accordance with the Federal Rules of Evidence and Federal Rules of Civil Procedure; however, the ALJ may modify them as he determines necessary in the interest of a full development of the facts. In addition, the ALJ may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by § 105.45;

(3) Adopt procedures for the submission of motions, evidence, and other documents pertinent to the proceeding;

(4) Take or cause depositions to be taken;

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

(6) Examine witnesses at the hearing;

(7) Convene, recess, reconvene, adjourn and otherwise regulate the course of the hearing;

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

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

(c) The official who issued the notice of probable violation, or his representative, has the burden of proving the facts alleged therein.

(d) The respondent may appear and be heard on his own behalf or through counsel of his choice. The respondent or his counsel may offer relevant information including testimony which he believes should be considered in opposition to the allegations or which may bear on the sanction being sought and conduct such cross-examination as may be required for a full disclosure of the facts.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 67 FR 61011, Sept. 27, 2002]

§ 107.323 ALJ's decision.

(a) After consideration of all matters of record in the proceeding, the ALJ shall issue an order dismissing the notice of probable violation in whole or in part or granting the sanction sought by the Office of Chief Counsel in the notice. If the ALJ does not dismiss the notice of probable violation in whole, he issues an order directing compliance or assessing a civil penalty, or, if proposed in the notice, both. The order includes a statement of the findings and conclusions, and the reasons therefore, on all material issues of fact, law, and discretion.

(b) If, within 20 days of receipt of an order issued under paragraph (a) of this section, the respondent does not submit in writing his acceptance of the terms of an order directing compliance, or, where appropriate, pay a civil penalty, or file an appeal under § 107.325, the case may be referred to the Attorney General with a request that an action be brought in the appropriate United States District Court to enforce the terms of a compliance order or collect the civil penalty.

§ 107.325 Appeals.

(a) *Hearing proceedings.* A party aggrieved by an ALJ's decision and order issued under § 107.323, may file a written appeal in accordance with paragraph (c) of this section with the Administrator, Office of the Administrator, Pipeline and Hazardous Materials Safety Administration, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(b) *Non-Hearing proceedings.* A respondent aggrieved by an order issued under § 107.317, may file a written appeal in accordance with paragraph (c) of this section with the Administrator, Office of the Administrator, Pipeline and Hazardous Materials Safety Administration, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(c) An appeal of an order issued under this subpart must:

(1) Be filed within 20 days of receipt of the order by the appealing party; and

(2) State with particularity the findings in the order that the appealing party challenges, and include all information and arguments pertinent thereto.

(d) If the Administrator, PHMSA, affirms the order in whole or in part, the respondent must comply with the terms of the decision within 20 days of the respondent's receipt thereof, or within the time prescribed in the order. If the respondent does not comply with the terms of the decision within 20 days of receipt, or within the time prescribed in the order, the case may be referred to the Attorney General for action to enforce the terms of the decision.

(e) The filing of an appeal stays the effectiveness of an order issued under §107.317 or §107.323. However, if the Administrator, PHMSA, determines that it is in the public interest, he may keep an order directing compliance in force pending appeal.

[70 FR 56090, Sept. 23, 2005, as amended at 72 FR 55683, Oct. 1, 2007]

§107.327 Compromise and settlement.

(a) At any time before an order issued under §107.317 or §107.323 is referred to the Attorney General for enforcement, the respondent or the Office of Chief Counsel may propose a compromise as follows:

(1) In civil penalty cases, the respondent or Chief Counsel may offer to compromise the amount of the penalty by submitting an offer for a specific amount to the other party. An offer of compromise by the respondent shall be submitted to the Chief Counsel who may, after consultation with the Associate Administrator, accept or reject it.

(i) A compromise offer stays the running of any response period then outstanding.

(ii) If a compromise is agreed to by the parties, the respondent is notified in writing. Upon receipt of payment by Office of Chief Counsel, the respondent is notified in writing that acceptance of payment is in full satisfaction of the civil penalty proposed or assessed, and Office of Chief Counsel closes the case with prejudice to the respondent.

(iii) If a compromise cannot be agreed to, the respondent is notified in writing and is given 10 days or the amount of time remaining in the then outstanding response period, whichever is longer, to respond to whatever action was taken by the Office of Chief Counsel or the Administrator, PHMSA.

(2) In compliance order cases, the respondent may propose a consent agreement to the Chief Counsel. If the Chief Counsel accepts the agreement, he issues an order in accordance with its terms. If the Chief Counsel rejects the agreement, he directs that the proceeding continue. An agreement submitted to the Chief Counsel must include:

(i) A statement of any allegations of fact which the respondent challenges;

(ii) The reasons why the terms of a compliance order or proposed compliance order are or would be too burdensome for the respondent, or why such terms are not supported by the record in the case;

(iii) A proposed compliance order suitable for issuance by the Chief Counsel;

(iv) An admission of all jurisdictional facts; and

(v) An express waiver of further procedural steps and all right to seek judicial review or otherwise challenge or contest the validity of the order.

(b) Notwithstanding paragraph (a)(1) of this section, the respondent or Office of Chief Counsel may propose to settle the case. If the Chief Counsel agrees to a settlement, the respondent is notified and the case is closed without prejudice to the respondent.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 50 FR 45730, Nov. 1, 1985; Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991; Amdt. 107–29, 58 FR 51527, Oct. 1, 1993; 66 FR 45377, Aug. 28, 2001]

§107.329 Maximum penalties.

(a) A person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or a special permit or approval issued under this subchapter applicable to the transportation of hazardous materials or the causing of them to be transported or shipped is liable for a civil penalty of not more than $55,000 and not less than $250 for each violation, except the maximum civil penalty is $110,000 if the violation results in death, serious illness or severe injury to any person or substantial destruction of property, and a minimum $495 civil penalty applies to a violation relating to training. When the violation is a continuing one, each day of the violation constitutes a separate offense.

(b) A person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or a special permit or approval issued under

this subchapter applicable to the design, manufacture, fabrication, inspection, marking, maintenance, reconditioning, repair or testing of a package, container, or packaging component which is represented, marked, certified, or sold by that person as qualified for use in the transportation of hazardous materials in commerce is liable for a civil penalty of not more than $55,000 and not less than $250 for each violation, except the maximum civil penalty is $110,000 if the violation results in death, serious illness or severe injury to any person or substantial destruction of property, and a minimum $495 civil penalty applies to a violation relating to training.

[71 FR 8487, Feb. 17, 2006, as amended at 74 FR 68702, Dec. 29, 2009; 75 FR 53596, Sept. 1, 2010]

§ 107.331 Assessment considerations.

After finding a knowing violation under this subpart, the Office of Chief Counsel assesses a civil penalty taking the following into account:

(a) The nature and circumstances of the violation;

(b) The extent and gravity of the violation;

(c) The degree of the respondent's culpability;

(d) The respondent's prior violations;

(e) The respondent's ability to pay;

(f) The effect on the respondent's ability to continue in business; and

(g) Such other matters as justice may require.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–30, 58 FR 50500, Sept. 27, 1993; Amdt. 107–38, 61 FR 21100, May 9, 1996]

CRIMINAL PENALTIES

§ 107.333 Criminal penalties generally.

A person who knowingly violates § 171.2(l) of this title or willfully or recklessly violates a requirement of the Federal hazardous material transportation law or a regulation, order, special permit, or approval issued thereunder shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both, except the maximum amount of imprisonment shall be 10 years in any case in which the violation involves the release of a hazardous material which results in death or bodily injury to any person.

[71 FR 8487, Feb. 17, 2006]

§ 107.335 Referral for prosecution.

If the Associate Administrator becomes aware of a possible willful violation of the Federal hazardous material transportation law, this subchapter, subchapter C of this chapter, or any special permit, or order issued thereunder, for which the Associate Administrator exercises enforcement responsibility, it shall report it to the Office of the Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590–0001. If appropriate, the Chief Counsel refers the report to the Department of Justice for criminal prosecution of the offender.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–22, 55 FR 39978, Oct. 1, 1990; Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–35, 60 FR 49108, Sept. 21, 1995; 66 FR 45377, Aug. 28, 2001]

§ 107.336 Limitation on fines and penalties.

If a State or political subdivision or Indian tribe assesses any fine or penalty determined by the Secretary to be appropriate for a violation concerning a subject listed in § 107.202(a), no additional fine or penalty may be assessed for such violation by any other authority.

[Amdt. 107–24, 56 FR 8624, Feb. 28, 1991]

INJUNCTIVE ACTION

§ 107.337 Injunctions generally.

Whenever it appears to the Office of Chief Counsel that a person has engaged, or is engaged, or is about to engage in any act or practice constituting a violation of any provision of the Federal hazardous material transportation law, this subchapter, subchapter C of this chapter, or any special permit, or order issued thereunder, for which the Office of Chief Counsel exercises enforcement responsibility,

the Administrator, PHMSA, or his delegate, may request the Attorney General to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages as provided by 49 U.S.C. 5122(a).

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–32, 59 FR 49131, Sept. 26, 1994]

§ 107.339 Imminent hazards.

Whenever it appears to the Office of the Chief Counsel that there is a substantial likelihood that death, serious illness, or severe personal injury will result from the transportation of a particular hazardous material or hazardous materials container, before a compliance order proceeding or other administrative hearing or formal proceeding to abate the risk of that harm can be completed, the Administrator, PHMSA, or his delegate, may bring an action under 49 U.S.C. 5122(b) in the appropriate United States District Court for an order suspending or restricting the transporation of that hazardous material or those containers or for such other equitable relief as is necessary or appropriate to ameliorate the hazard.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–15, 51 FR 34987, Oct. 1, 1986; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994]

APPENDIX A TO SUBPART D OF PART 107—GUIDELINES FOR CIVIL PENALTIES

I. This appendix sets forth the guidelines used by the Office of Hazardous Materials Safety (as of October 1, 2005) in making initial baseline determinations for recommending civil penalties. The first part of these guidelines is a list of baseline amounts or ranges for probable violations frequently cited in enforcement reports referred for action. Following the list of violations are general guidelines used by OHMS in making initial penalty determinations in enforcement cases.

II. LIST OF FREQUENTLY CITED VIOLATIONS

II—LIST OF FREQUENTLY CITED VIOLATIONS

Violation description	Section or cite	Baseline assessment
General Requirements		
A. Registration Requirements: Failure to register as an offeror or carrier of hazardous material and pay registration fee.	107.608, 107.612	$1,000 + $500 each additional year.
B. Training Requirements:		
1. Failure to provide initial training to hazmat employees (general awareness, function-specific, safety, and security awareness training):	172.702	
a. More than 10 hazmat employees		$700 and up each area.
b. 10 hazmat employees or fewer		$450 and up each area.
2. Failure to provide recurrent training to hazmat employees (general awareness, function-specific, safety, and security awareness training).	172.702	$450 and up each area.
3. Failure to provide security training when a security plan is required but has not been developed.	172.702	Included in penalty for no security plan.
4. Failure to provide security training when a security plan has been developed but hazmat employees have not been trained concerning the security plan and its implementation.	172.702	$2,500.
5. Failure to create and maintain training records:	172.704	
a. more than 10 hazmat employees		$800 and up.
b. 10 hazmat employees or fewer		$500 and up.
C. Security Plans:		
1. Failure to develop a security plan; failure to adhere to security plan:	172.800	
a. § 172.504 table 1 materials		$7,500.
b. Packing Group I		$6,000.
c. Packing Group II		$4,500.
d. Packing Group III		$3,000.
2. Incomplete security plan or incomplete adherence (one or more of four required elements missing).		One-quarter (25%) of above for each element.
3. Failure to update a security plan to reflect changing circumstances	172.802(b)	One-third (33%) of baseline for no plan.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
4. Failure to put security plan in writing; failure to make all copies identical.	172.800(b)	One-third (33%) of baseline for no plan.
D. Notification to a Foreign Shipper: Failure to provide information of HMR requirements applicable to a shipment of hazardous materials within the United States, to a foreign offeror or forwarding agent at the place of entry into the U.S.	171.12(a)	$1,500 to $7,500 (corresponding to violations by foreign offeror or forwarding agent).
E. Expired Exemption or Special Permit: Offering or transporting a hazardous material, or otherwise performing a function covered by an exemption or special permit, after expiration of the exemption or special permit	171.2(a), (b), (c), Various.	$1,000 + $500 each additional year.
Offeror Requirements—All hazardous materials		
A. Undeclared Shipment:		
Offering for transportation a hazardous material without shipping papers, package markings, labels, or placards.	172.200, 172.300, 172.400, 172.500.	$15,000 and up.
B. Shipping Papers:		
1. Failure to provide a shipping paper for a shipment of hazardous materials.	172.201	$3,000 to $6,000.
2. Failure to follow one or more of the three approved formats for listing hazardous materials on a shipping paper.	172.201(a)(1)	$1,200.
3. Failure to retain shipping papers:.		
a. by an offeror, for two years after the date the shipment is provided to the carrier (or 3 years if the material is a hazardous waste).		
b. by a carrier, for one year after the date the shipment is provided to the carrier (or 3 years if the material is a hazardous waste).	172.201(e), 174.24(b), 175.30(a), 176.24(b), 177.817(f).	$1,000.
4. Failure to include a proper shipping name in the shipping description or using an incorrect proper shipping name.	172.202	$800 to $1,600.
5. Failure to include a hazard class/division number in the shipping description.	172.202	$1,000 to $2,000.
6. Failure to include an identification number in the shipping description.	172.202	$1,000 to $2,000.
7. Using an incorrect hazard class/identification number:	172.202.	
a. that does not affect compatibility requirements		$800.
b. that affects compatibility requirements		$3,000 to $6,000.
8. Using an incorrect identification number:	172.202..	
a. that does not change the response information		$800.
b. that changes the response information		$3,000 to $6,000.
9. Failure to include the Packing Group, or using an incorrect Packing Group.	172.202	$1,200.
10. Using a shipping description that includes additional unauthorized information (extra or incorrect words).	172.202	$800.
11. Using a shipping description not in required sequence	172.202	$500.
12. Using a shipping description with two or more required elements missing or incorrect:.	172.202.	
a. such that the material is misdescribed		$3,000.
b. such that the material is misclassified		$6,000.
13. Failure to include the total quantity of hazardous material covered by a shipping description.	172.202(c)	$500.
14. Failure to list an exemption or special permit number in association with the shipping description.	172.203(a)	$800.
15. Failure to indicate ''Limited Quantity'' or ''Ltd Qty'' following the basic shipping description of a material offered for transportation as a limited quantity.	172.203(b)	$500.
16. Failure to include ''RQ'' in the shipping description to identify a material that is a hazardous substance.	172.203(c)(2)	$500.
17. Failure to include a required technical name in parenthesis for a listed generic or ''n.o.s.'' material.	172.203(k)	$1,000.
18. Failure to include the required shipper's certification on a shipping paper.	172.204	$1,000.
19. Failure to sign the required shipper's certification on a shipping paper.	172.204	$800.
C. Emergency Response Information Requirements:		
1. Providing or listing incorrect emergency response information with or on a shipping paper.	172.602.	
a. No significant difference in response		$800.
b. Significant difference in response		$3,000 to $6,000.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
2. Failure to include an emergency response telephone number on a shipping paper.	172.604	$2,600.
3. Failure to have the emergency response telephone number monitored while a hazardous material is in transportation or listing multiple telephone numbers (without specifying the times for each) that are not monitored 24 hours a day.	172.604	$1,300.
4. Listing an unauthorized emergency response telephone number on a shipping paper.	172.604	$2,600 to $4,200.
5. Listing an incorrect or non-working emergency response telephone number on a shipping paper.	172.604	$1,300.
6. Failure to provide required technical information when the listed emergency response telephone number is contacted.	172.604	$1,300.
D. Package Marking Requirements:		
1. Failure to mark the proper shipping name on a package or marking an incorrect shipping name on a package.	172.301(a)	$800 to $1,600.
2. Failure to mark the identification number on a package	172.301(a)	$1,000 to $2,000.
3. Marking a package with an incorrect identification number	172.301(a).	
a. that does not change the response information		$800.
b. that changes the response information		$3,000 to $6,000.
4. Failure to mark the proper shipping name and identification number on a package.	172.301(a)	$3,000 to $6,000.
5. Marking a package with an incorrect shipping name and identification number.	172.301(a).	
a. that does not change the response information		$1,500 to $3,000.
b. that changes the response information		$3,000 to $6,000.
6. Failure to include the required technical name(s) in parenthesis for a listed generic or ''n.o.s.'' entry.	172.301(c)	$1,000.
7. Marking a package as containing hazardous material when it contains no hazardous material.	172.303(a)	$800.
8. Failure to locate required markings away from other markings that could reduce their effectiveness.	172.304(a)(4)	$800.
9. Failure to mark a package containing liquid hazardous materials with required orientation marking.	172.312	$2,500 to $3,500.
10. Failure to mark ''RQ'' on a non-bulk package containing a hazardous substance.	172.324(b)	$500.
E. Package Labeling Requirements:		
1. Failure to label a package	172.400	$5,000.
2. Placing a label that represents a hazard other than the hazard presented by the hazardous material in the package.	172.400	$5,000.
3. Placing a label on a package that does not contain a hazardous material.	172.401(a)	$800.
4. Failure to place a required subsidiary label on a package	172.402	$500 to $2,500.
5. Placing a label on a different surface of the package than, or away from, the proper shipping name.	172.406(a)	$800.
6. Placing an improper size label on a package	172.407(c)	$800.
7. Placing a label on a package that does not meet color specification requirements (depending on the variance).	172.407(d)	$600 to $2,500.
8. Failure to provide an appropriate class or division number on a label.	172.411	$2,500.
F. Placarding Requirements:		
Failure to properly placard a freight container or vehicle containing hazardous materials:.	172.504.	
a. when Table 1 is applicable		$1,000 to $9,000.
b. when Table 2 is applicable		$800 to $7,200.
G. Packaging Requirements:		
1. Offering a hazardous material for transportation in an unauthorized non-UN standard or nonspecification packaging (includes failure to comply with the terms of an exemption or special permit authorizing use of a nonstandard or nonspecification packaging).	Various.	
a. Packing Group I (and § 172.504 Table I materials)		$9,000.
b. Packing Group II		$7,000.
c. Packing Group III		$5,000.
2. Offering a hazardous material for transportation in a self-certified packaging that has not been subjected to design qualification testing:.	178.601 & Various.	
a. Packing Group I (and § 172.504 Table I materials)		$10,800.
b. Packing Group II		$8,400.
c. Packing Group III		$6,000.
3. Offering a hazardous material for transportation in a packaging that has been successfully tested to an applicable UN standard but is not marked with the required UN marking.	178.503(a)	$3,600.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
4. Failure to close a UN standard packaging in accordance with the closure instructions.	173.22(a)(4)	$2,500.
5. Offering a hazardous material for transportation in a packaging that leaks during conditions normally incident to transportation:	173.24(b).	
a. Packing Group I (and § 172.504 Table I materials)		$12,000.
b. Packing Group II		$9,000.
c. Packing Group III		$6,000.
6. Overfilling or underfilling a package so that the effectiveness is substantially reduced:	173.24(b).	
a. Packing Group I (and § 172.504 Table I materials)		$9,000.
b. Packing Group II		$6,000.
c. Packing Group III		$3,000.
7. Offering a hazardous material for transportation after October 1, 1996, in an unauthorized non-UN standard packaging marked as manufactured to a DOT specification:	171.14.	
a. packaging meets DOT specification		$3,000.
b. packaging does not meet DOT specification		$5,000 to $9,000.
8. Failure to mark an overpack with a statement that the inside packages comply with prescribed specifications or standards when specification or standard packaging is required.	173.25(a)(4)	$3,000.
9. Filling an IBC or a portable tank (DOT, UN, or IM) that is out of test and offering hazardous materials for transportation in that IBC or portable tank.	173.32(a), 180.352, 180.605.	
a. All testing overdue		$3,500 to $7,000.
b. Only periodic (5 year) test overdue		$3,500.
c. Only intermediate periodic (2.5 year) tests overdue		$3,500.
10. Failure to provide the required outage in a portable tank that results in a release of hazardous materials.	173.32(f)(6)	$6,000 to $12,000.
Offeror Requirements—Specific hazardous materials		
A. Cigarette Lighters:		
Offering for transportation an unapproved cigarette lighter, lighter refill, or similar device, equipped with an ignition element and containing fuel.	173.21(i)	$7,500.
B. Class 1—Explosives:		
1. Failure to mark the package with the EX number for each substance contained in the package or, alternatively, indicate the EX number for each substance in association with the description on the shipping description.	172.320	$1,200.
2. Offering an unapproved explosive for transportation:	173.54, 173.56(b).	
a. Div. 1.3 and 1.4 fireworks meeting the chemistry requirements (quantity and type) of APA Standard 87–1.		$5,000 to $10,000.
b. All other explosives (including forbidden)		$10,000 and up.
3. Offering a leaking or damaged package of explosives for transportation.	173.54(c)	$10,000 and up.
4. Packaging explosives in the same outer packaging with other materials.	173.61	$2,500 to $5,000.
C. Class 7—Radioactive Materials:		
1. Failure to include required additional entries, or providing incorrect information for these additional entries.	172.203(d)	$1,000 to $3,000.
2. Failure to mark the gross mass on the outside of a package of Class 7 material that exceeds 110 pounds.	172.310(a)	$800.
3. Failure to mark each package in letters at least 13 mm (½ inch) high with the words ''Type A'' or ''Type B'' as appropriate.	172.310(b)	$800.
4. Placing a label on Class 7 material that understates the proper label category.	172.403	$5,000.
5. Placing a label on Class 7 material that fails to contain (or has erroneous) entries for the name of the radionuclide(s), activity, and transport index.	172.403(g)	$2,000 to $4,000.
6. Failure to meet one or more of the general design requirements for a package used to ship a Class 7 material.	173.410	$5,000.
7. Failure to comply with the industrial packaging (IP) requirements when offering a Class 7 material for transportation.	173.411	$5,000.
8. Failure to provide a tamper-indicating device on a Type A package used to ship a Class 7 material.	173.412(a)	$2,000.
9. Failure to meet the additional design requirements of a Type A package used to ship a Class 7 material.	173.412(b)–(i)	$5,000.
10. Failure to meet the performance requirements for a Type A package used to ship a Class 7 material..	173.412(j)–(l)	$8,400.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
11. Offering a DOT specification 7A packaging without maintaining complete documentation of tests and an engineering evaluation or comparative data:	173.415(a), 173.461	
a. Tests and evaluation not performed		$8,400.
b. Complete records not maintained		$2,000 to $5,000.
12. Offering any Type B, Type B(U), Type B(M) packaging that failed to meet the approved DOT, NRC or DOE design, as applicable.	173.416	$9,000.
13. Offering a Type B packaging without holding a valid NRC approval certificate:	173.471(a).	
a. Never having obtained one		$3,000.
b. Holding an expired certificate		$1,000.
14. Failure to meet one or more of the special requirements for a package used to ship uranium hexafluoride.	173.420	$10,800.
15. Offering Class 7 material for transportation as a limited quantity without meeting the requirements for limited quantity.	173.421(a)	$4,000.
16. Offering a multiple-hazard limited quantity Class 7 material without addressing the additional hazard.	173.423(a)	$500 to $2,500.
17. Offering Class 7 low specific activity (LSA) materials or surface contaminated objects (SCO) with an external dose rate that exceeds an external radiation level of 1 rem/hr at 3 meters from the unshielded material.	173.427(a)(1)	$6,000.
18. Offering Class 7 LSA materials or SCO as exclusive use without providing specific instructions to the carrier for maintenance of exclusive use shipment controls.	173.427(a)(6)	$1,000.
19. Offering in excess of Type A quantity of a Class 7 material in a Type A packaging.	173.431	$12,000.
20. Offering a package that exceeds the permitted limits for surface radiation or transport index.	173.441	$10,000 and up.
21. Offering a package without determining the level of removable external contamination, or that exceeds the limit for removable external contamination.	173.443	$5,000 and up.
22. Storing packages of radioactive material in a group with a total transport index more than 50.	173.447(a)	$5,000 and up.
23. Offering for transportation or transporting aboard a passenger aircraft any single package or overpack of Class 7 material with a transport index greater than 3.0.	173.448(e)	$5,000 and up.
24. Exporting a Type B, Type B(U), Type B(M), or fissile package without obtaining a U.S. Competent Authority Certificate or, after obtaining a U.S. Competent Authority Certificate, failing to submit a copy to the national competent authority of each country into or through which the package is transported.	173.471(d)	$3,000.
25. Offering special form radioactive materials without maintaining a complete safety analysis or Certificate of Competent Authority.	173.476(a), (b)	$2,500.
D. Class 2—Compressed Gases in Cylinders:		
1. Filling and offering a cylinder with compressed gas when the cylinder is out of test.	173.301(a)(6)	$4,200 to $10,400.
2. Failure to check each day the pressure of a cylinder charged with acetylene that is representative of that day's compression, after the cylinder has cooled to a settled temperature, or failure to keep a record of this test for 30 days.	173.303(d)	$5,000.
3. Offering a limited quantity of a compressed gas in a metal container for the purpose of propelling a nonpoisonous material and failure to heat the cylinder until the pressure is equivalent to the equilibrium pressure at 130 °F, without evidence of leakage, distortion, or other defect.	173.306(a)(3), (h)	$1,500 to $6,000.
Manufacturing, Reconditioning, Retesting Requirements		
A. Third-Party Packaging Certifiers (General):		
Issuing a certification that directs the packaging manufacturer to improperly mark a packaging (e.g., steel drum to be marked UN 4G).	171.2(e), 178.2(b), 178.3(a), 178.503(a).	$500 per item.
B. Packaging Manufacturers (General):		
1. Failure of a manufacturer or distributor to notify each person to whom the packaging is transferred of all the requirements not met at the time of transfer, including closure instructions.	178.2(c)	$2,500.
2. Failure to insure a packaging certified as meeting the UN standard is capable of passing the required performance testing.	178.601(b).	
a. Packing Group I (and § 172.504 Table 1 materials)		$10,800.
b. Packing Group II		$8,400.
c. Packing Group III		$6,000.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
3. Certifying a packaging as meeting a UN standard when design qualification testing was not performed.	178.601(d).	
a. Packing Group I (and § 172.504 table 1 materials)		$10,800.
b. Packing Group II		$8,400.
c. Packing Group III		$6,000.
4. Failure to conduct periodic retesting on UN standard packaging (depending on length of time and Packing Group).	178.601(e)	$2,000 to $10,800.
5. Failure to properly conduct testing for UN standard packaging (*e.g.,* testing with less weight than marked on packaging; drop testing from lesser height than required; failing to condition fiberboard boxes before design test):.		
a. Design qualification testing	178.601(d)	$2,000 to $10,800.
b. Periodic retesting	178.601(e)	$500 to $10,800.
6. Marking, or causing the marking of, a packaging with the symbol of a manufacturer or packaging certifier other than the company that actually manufactured or certified the packaging.	178.2(b), 178.3(a), 178.503(a)(8).	$7,200.
7. Failure to maintain testing records	178.601(l).	
a. Design qualification testing		$1,000 to $5,000.
b. Periodic retesting		$500 to $2,000.
8. Improper marking of UN certification	178.503	$500 per item.
9. Manufacturing DOT specification packaging after October 1, 1994 that is not marked as meeting a UN performance standard.	171.14.	
a. If packaging does meet DOT specification		$3,000.
b. If packaging does not meet DOT specification		$6,000 to $10,800.
C. Drum Manufacturers & Reconditioners:		
1. Failure to properly conduct production leakproofness test on a new or reconditioned drum.	178.604(b), (d), 173.28(b)(2)(i).	
a. Improper testing		$2,000.
b. No testing performed		$3,000 to $5,000.
2. Marking an incorrect registration number on a reconditioned drum	173.28(b)(2)(ii).	
a. Incorrect number		$800.
b. Unauthorized use of another reconditioner's number		$7,200.
3. Representing, marking, or certifying a drum as a reconditioned UN standard packaging when the drum does not meet a UN standard.	173.28(c), (d)	$6,000 to $10,800.
4. Representing, marking, or certifying a drum as altered from one UN standard to another, when the drum has not actually been altered.	173.28(d)	$500.
D. IBC and Portable Tank Requalification:		
1. Failure to properly mark an IBC or portable tank with the most current retest and/or inspection information.	180.352(e), 178.703(b), 180.605(k).	$500 per item.
2. Failure to keep complete and accurate records of IBC or portable tank retest and reinspection.	180.352(f), 180.605(l).	
a. No records kept		$4,000.
b. Incomplete or inaccurate records		$1,000 to $3,000.
3. Failure to make reinspection and retest records available to a DOT representative upon request.	180.352(f), 49 U.S.C. 5121(b)(2).	$1,000.
E. Cylinder Manufacturers & Rebuilders:		
1. Manufacturing, representing, marking, certifying, or selling a DOT high-pressure cylinder that was not inspected and verified by an approved independent inspection agency.	Various	$7,500 to $15,000.
2. Failure to have a registration number or failure to mark the registration number on the cylinder.	Various	$800.
3. Marking another company's number on a cylinder	Various	$7,200.
4. Failure to mark the date of manufacture or lot number on a DOT-39 cylinder.	178.65(i)	$3,000.
5. Failure to have a chemical analysis performed in the U.S. for a material manufactured outside the U.S./failure to obtain a chemical analysis from the foreign manufacturer.	Various	$5,000.
6. Failure to meet wall thickness requirements	Various	$7,500 to $15,000.
7. Failure to heat treat cylinders prior to testing	Various	$5,000 to $15,000.
8. Failure to conduct a complete visual internal examination	Various	$2,500 to $6,200.
9. Failure to conduct a hydrostatic test, or conducting a hydrostatic test with inaccurate test equipment.	Various	$2,500 to $6,200.
10. Failure to conduct a flattening test	Various	$7,500 to $15,000.
11. Failure to conduct a burst test on a DOT-39 cylinder	178.65(f)(2)	$5,000 to $15,000.
12. Failure to have inspections and verifications performed by an inspector.	Various	$7,500 to $15,000.
13. Failure to maintain required inspector's reports	Various.	
a. No reports at all		$5,000.
b. Incomplete or inaccurate reports		$1,000 to $4,000.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
14. Representing a DOT-4 series cylinder as repaired or rebuilt to the requirements of the HMR without being authorized by the Associate Administrator.	180.211(a)	$6,000 to $10,800.
F. Cylinder Requalification:		
1. Failure to remark as DOT 3AL an aluminum cylinder manufactured under a former exemption or special permit.	173.23(c)	$800.
2. Certifying or marking as retested a nonspecification cylinder	180.205(a)	$800.
3. Failure to have retester's identification number (RIN)	180.205(b)	$4,000.
4. Failure to have current authority due to failure to renew a retester's identification number (RIN).	180.205(b)	$2,000.
5. Failure to have a retester's identification number and marking another RIN on a cylinder.	180.205(b)	$7,200.
6. Marking a RIN before successfully completing a hydrostatic retest	180.205(b)	$800.
7. Representing, marking, or certifying a cylinder as meeting the requirements of an exemption or special permit when the cylinder was not maintained or retested in accordance with the exemption or special permit.	171.2(c), (e), 180.205(c), Applicable Exemption or Special Permit.	$2,000 to $6,000.
8. Failure to conduct a complete visual external and internal examination.	180.205(f)	$2,100 to $5,200.
9. Failure to conduct visual inspection or hydrostatic retest	180.205(f) & (g)	$4,200 to $10,400.
10. Performing hydrostatic retesting without confirming the accuracy of the test equipment.	180.205(g)(3)	$2,100 to $5,200.
11. Failure to hold hydrostatic test pressure for 30 seconds or sufficiently longer to allow for complete expansion.	180.205(g)(5)	$3,100.
12. Failure to perform a second retest, after equipment failure, at a pressure increased by the lesser of 10% or 100 psi (includes exceeding 90% of test pressure prior to conducting a retest).	180.205(g)	$3,100.
13. Failure to condemn a cylinder when required (*e.g.,* permanent expansion of 10% [5% for certain exemption or special permit cylinders], internal or external corrosion, denting, bulging, evidence of rough usage).	180.205(i)	$6,000 to $10,800.
14. Failure to properly mark a condemned cylinder or render it incapable of holding pressure.	180.205(i)(2)	$800.
15. Failure to notify the cylinder owner in writing when a cylinder has been condemned.	180.205(i)(2)	$1,000.
16. Failure to perform hydrostatic retesting at the minimum specified test pressure.	180.209(a)(1)	$2,100 to $5,200.
17. Marking a star on a cylinder that does not qualify for that mark	180.209(b)	$2,000 to $4,000.
18. Marking a "+" sign on a cylinder without determining the average or minimum wall stress by calculation or reference to CGA Pamphlet C–5.	173.302a(b)	$2,000 to $4,000.
19. Marking a cylinder in or on the sidewall when not permitted by the applicable specification.	180.213(b)	$6,000 to $10,800.
20. Failure to maintain legible markings on a cylinder	180.213(b)(1)	$800.
21. Marking a DOT 3HT cylinder with a steel stamp other than a low-stress steel stamp.	180.213(c)(2)	$6,000 to $10,800.
22. Improper marking of the RIN or retest date on a cylinder	180.213(d)	$800.
23. Marking an FRP cylinder with steel stamps in the FRP area of the cylinder such that the integrity of the cylinder is compromised.	Applicable Exemption or Special Permit.	$6,000 to $10,800.
24. Failure to maintain current copies of 49 CFR, DOT exemption or special permits, and CGA Pamphlets applicable to inspection, retesting, and marking activities.	180.215(a)	$600 to $1,200.
25. Failure to keep complete and accurate records of cylinder reinspection and retest.	180.215(b).	
a. No records kept		$4,000.
b. Incomplete or inaccurate records		$1,000 to $3,000.
26. Failure to report in writing a change in name, address, ownership, test equipment, management, or retester personnel.	171.2(c) & (e), Approval Letter.	$600 to $1,200.
Carrier Requirements		
A. Incident Notification:		
1. Failure to give immediate notification of a reportable hazardous materials incident.	171.15	$3,000.
2. Failure to file a written hazardous material incident report within 30 days following an unintentional release of hazardous materials in transportation (or other reportable incident).	171.16	$500 to $2,500.
B. Shipping Papers:		

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
Failure to retain shipping papers for 375 days after a hazardous material (or 3 years for a hazardous waste) is accepted by the initial carrier.	174.24(b), 175.30(a)(2), 176.24(b), 177.817(f).	$1,000.
C. Stowage/transportation Requirements:		
1. Transporting packages of hazardous material that have not been secured against movement.	Various	$3,000.
2. Failure to properly segregate hazardous materials	Various	$7,500 and up.
3. Transporting explosives in a motor vehicle containing metal or other articles or materials likely to damage the explosives or any package in which they are contained, without segregating in different parts of the load or securing them in place in or on the motor vehicle and separated by bulkheads or other suitable means to prevent damage.	177.835(i)	$5,200.
4. Transporting railway track torpedoes outside of flagging kits, in violation of DOT-E 7991.	171.2(b) & (e)	$7,000.
5. Transporting Class 7 (radioactive) material having a total transport index greater than 50.	177.842(a)	$5,000 and up.
6. Transporting Class 7 (radioactive) material without maintaining the required separation distance.	177.842(b)	$5,000 and up.
7. Failure to comply with requirements of an exemption or special permit authorizing the transportation of Class 7 (radioactive) material having a total transportation index of 50.	171.2(b) & (e).	
a. Failure to have the required radiation survey record		$5,000.
b. Failure to have other required documents		$500 each.
c. Other violations		$5,000 and up.

III. CONSIDERATION OF STATUTORY CRITERIA

A. These guidelines are used by the Office of Hazardous Materials Safety (OHMS) in setting initial proposed penalties for hazmat violations. They indicate baseline amounts or ranges for probable violations frequently cited in enforcement reports and set forth general OHMS policy for considering statutory criteria.

B. The initial baseline determination partially considers the nature, extent, circumstances, and gravity of the alleged violation. That determination then is adjusted to consider all other evidence concerning the nature, extent, circumstances, and gravity of the alleged violation; degree of culpability; history of prior violations; ability to pay; effect of the penalty on ability to continue to do business; and such other matters as justice may require (a major component of which is corrective action taken by a respondent to prevent a recurrence of similar violations). In making a penalty recommendation, the baseline or range may be increased or decreased on the basis of evidence pertaining to these factors.

C. The following miscellaneous factors are used to implement one or more of the statutory assessment criteria.

IV. MISCELLANEOUS FACTORS AFFECTING PENALTY AMOUNTS

A. Corrective Action

1. A proposed penalty is mitigated for documented corrective action of alleged violations taken by a respondent. Corrective action may occur: (1) After an inspection and before a Notice of Probable Violation (NOPV) is issued; (2) on receipt of an NOPV; or (3) after receipt of an NOPV (possibly after it is solicited by an PHMSA attorney). In general, corrective action may reduce a penalty up to 25%. Mitigation may be taken into account in the referral memo or may be recommended prior to issuance of an Order by PHMSA's Chief Counsel.

2. The two primary factors in determining the penalty reduction are extent and timing of the corrective action. In other words, mitigation will be determined on the basis of how much corrective action was taken and when it was taken. Systemic action to prevent future violations is given greater consideration than action simply to remedy violations identified during the inspection.

3. Mitigation is applied to individual violations. Thus, in a case with two violations, if corrective action for the first violation is more extensive than for the second, the penalty for the first will be mitigated more than that for the second.

B. Respondents That Re-Ship

A shipper that reships materials received from another company, in the same packaging and without opening or altering the package, independently is responsible for ensuring that the shipment complies with Federal hazmat law, and independently may be subject to enforcement action if the package does not comply. Nevertheless, the reshipper is considered to have a lesser level of responsibility for compliance in those respects in which it reasonably relies on the compliance of the package as received. In most cases of

this type, OHMS will discount the applicable baseline standard by about 25%. The specific knowledge and expertise of all parties must be considered in discounting for reliance on a prior shipper. This discount is applied before any consideration of mitigation based on corrective action.

C. Penalty Increases for Multiple Counts

Under the Federal hazmat law, 49 U.S.C. 5123(a), each violation of the HMR and each day of a continuing violation (except for violations pertaining to packaging manufacture or qualification) is subject to a civil penalty of up to $55,000 or $110,000 for a violation occurring on or after January 1, 2010. Absent aggravating factors, OHMS, in its exercise of discretion, ordinarily will apply a single penalty for multiple counts or days of violation. In a number of cases, particularly those involving shippers, an inspector may cite two or more similar packaging violations for different hazardous materials. For example, the inspector may cite the same marking violation for two or more packages. OHMS usually will consider those additional violations as counts of the same violation and will not recommend multiples of the same baseline penalty. Rather, OHMS usually will recommend the baseline penalty for a single violation, increased by 25% for each additional violation.

D. Financial Considerations

1. Mitigation is appropriate when the baseline penalty would (1) exceed an amount that the respondent is able to pay, or (2) have an adverse effect on the respondent's ability to continue in business. These criteria relate to a respondent's entire business, and not just the product line or part of its operations involved in the violation(s). Beyond the overall financial size of the respondent's business, the relevant items of information on a respondent's balance sheet include the current ratio (current assets to current liabilities), the nature of current assets, and net worth (total assets minus total liabilities).

2. These figures are considered on a case-by-case basis. In general, however, a current ratio close to or below 1.0 means that the company may have difficulty in paying a large penalty, and may justify reduction of the penalty or an installment payment plan. A small amount of cash on hand representing limited liquidity, even with substantial other current assets (such as accounts receivable or inventory), may warrant a short-term payment plan. Respondent's income statement also will be reviewed to determine whether a payment plan is appropriate.

3. Many companies are able to continue in business for extended periods of time with a small or negative net worth, and many respondents have paid substantial civil penalties in installments even though net worth was negative. For this reason, negative net worth alone does not always warrant reduction of a proposed penalty or even, in the absence of factors discussed above, a payment plan.

4. In general, an installment payment plan may be justified where reduction of a proposed penalty is not, but the appropriateness of either (or both) will depend on the circumstances of the case. The length of a payment plan should be as short as possible, but the plan may consider seasonal fluctuations in a company's income if the company's business is seasonal (e.g., swimming pool chemical sales, fireworks sales) or if the company has documented specific reasons for current non-liquidity.

5. Evidence of financial condition is used only to decrease a penalty, and not to increase it.

E. Penalty Increases for Prior Violations

The baseline penalty presumes an absence of prior violations. If prior violations exist, generally they will serve to increase a proposed penalty. The general standards for increasing a baseline proposed penalty on the basis of prior violations are as follows:

1. For each prior civil or criminal enforcement case—25% increase over the pre-mitigation recommended penalty.

2. For each prior ticket—10% increase over the pre-mitigation recommended penalty.

3. A baseline proposed penalty will not be increased more than 100% on the basis of prior violations.

4. A case or ticket of prior violations initiated in a calendar year more than six years before the calendar year in which the current case is initiated normally will not be considered in determining a proposed penalty for the current violation(s).

F. Penalty Increases for Use of Expired Special Permits

Adjustments to the base line figures for use of expired special permits can be made depending on how much material has been shipped during the period between the expiration date and the renewal date. If the company previously has been found to have operated under an expired special permit, the penalty is normally doubled. If the company has been previously cited for other violations, the penalty generally will be increased by about 25%.

[Amdt. 107–33, 60 FR 12141, Mar. 6, 1995, as amended by Amdt. 107–40, 62 FR 2972, 2977, Jan. 21, 1997; 62 FR 51556, Oct. 1, 1997; 65 FR 58618, Sept. 29, 2000; 66 FR 45180, Aug. 28, 2001; 68 FR 52848, 52855, Sept. 8, 2003; 69 FR 54044, Sept. 7, 2004; 70 FR 56090, Sept. 23, 2005; 70 FR 73162, Dec. 9, 2005; 71 FR 8487, Feb. 17, 2006; 74 FR 53185, Oct. 16, 2009; 74 FR 68702, Dec. 29, 2009]

Subpart E—Designation of Approval and Certification Agencies

§ 107.401 Purpose and scope.

(a) This subpart establishes procedures for the designation of agencies to issue approval certificates and certifications for types of packagings designed, manufactured, tested, or maintained in conformance with the requirements of this subchapter, subchapter C of this chapter, and standards set forth in the United Nations (U.N.) Recommendations (Transport of Dangerous Goods). Except for certifications of compliance with U.N. packaging standards, this subpart does not apply unless made applicable by a rule in subchapter C of this chapter.

(b) The Associate Administrator may issue approval certificates and certifications addressed in paragraph (a) of this section.

[Amdt. 107–31, 50 FR 10062, Mar. 13, 1985, as amended by Amdt. 107–23, 56 FR 66157, Dec. 20, 1991; 66 FR 45377, Aug. 28, 2001]

§ 107.402 Application for designation as an approval or certification agency.

(a) Any organization or person seeking designation as an approval or certification agency shall apply in writing to the Associate Administrator for Hazardous Materials Safety (PHH–32), Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington DC 20590–0001. Alternatively, the application with any attached supporting documentation in an appropriate format may be submitted by facsimile (fax) to: (202) 366–3753 or (202) 366–3308 or by electronic mail (e-mail) to: *approvals@dot.gov*. Each application must be signed and certified to be correct by the applicant or, if the applicant is an organization, by an authorized officer or official representative of the organization. Any false statement or representation, or the knowing and willful concealment of a material fact, may subject the applicant to prosecution under the provisions of 18 U.S.C. 1001, result in the denial or termination of a designation.

(b) Each application for designation must be in English and include the following information:

(1) Name and address of the applicant, including place of incorporation if a corporation. In addition, if the applicant is not a resident of the United States, the name and address of a permanent resident of the United States designated in accordance with § 105.40 to serve as agent for service of process.

(2) If the applicant's principal place of business is in a country other than the United States, a copy of the designation from the Competent Authority of that country delegating to the applicant an approval or designated agency authority for the type of packaging for which a DOT designation is sought, and a statement that the Competent Authority also delegates similar authority to U.S. Citizens or organizations having designations under this subpart from the PHMSA.

(3) A listing, by DOT specification (or special permit) number, or U.N. designation, of the types of packagings for which approval authority is sought.

(4) A personnel qualifications plan listing the qualifications that the applicant will require of each person to be used in the performance of each packaging approval or certification function. As a minimum, these qualifications must include:

(i) The ability to review and evaluate design drawings, design and stress calculations;

(ii) A knowledge of the applicable regulations of subchapter C of this chapter and, when applicable, U.N. standards; and

(iii) The ability to conduct or monitor and evaluate test procedures and results; and

(iv) The ability to review and evaluate the qualifications of materials and fabrication procedures.

(5) A statement that the applicant will perform its functions independent of the manufacturers and owners of the packagings concerned.

(6) A statement that the applicant will allow the Associate Administrator or his representative to inspect its records and facilities in so far as they relate to the approval or certification of specification packagings and shall cooperate in the conduct of such inspections.

(c) The applicant shall furnish any additional information relevant to the

applicant's qualifications, if requested by the Associate Administrator.

[Amdt. 107–13, 50 FR 10062, Mar. 13, 1985; 50 FR 16089, Apr. 24, 1985, as amended by Amdt. 107–22, 55 FR 39978, Oct. 1, 1990; Amdt. 107–23, 56 FR 66157, Dec. 20, 1991; 66 FR 45377, Aug. 28, 2001; 67 FR 61011, Sept. 27, 2002; 70 FR 56090, Sept. 23, 2005; 72 FR 55683, Oct. 1, 2007]

§ 107.403 Designation of approval agencies.

(a) If the Associate Administrator determines that an application contains all the required information, the applicant is sent a letter of designation and assigned an identification code.

(b) If the Associate Administrator determines that an application does not contain all the required information, the application is denied and the applicant is sent a written notice containing all the reasons for the denial.

(c) Within 30 days of an initial denial of an application under paragraph (b) of this section, the applicant may file an amended application. If after considering the amended application, the Associate Administrator determines that it should be denied, he notifies the applicant, and the denial constitutes the final action of the Associate Administrator on the application. Within 60 days of receipt of the final denial the applicant may appeal the denial to the Administrator, PHMSA, setting forth in writing where the Associate Administrator for Hazardous Materials Safety erred in this determination.

[Amdt. 107–13, 50 FR 10062, Mar. 13, 1985, as amended by Amdt. 107–23, 56 FR 66157, Dec. 20, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; 66 FR 45377, Aug. 28, 2001]

§ 107.404 Conditions of designation.

(a) Each designation made under this subpart contains the following conditions:

(1) The designated approval or certification agency may use only testing equipment that it has determined, through personal inspection, to be suitable for the purpose.

(2) Each approval certificate and certification issued by the designated approval agency must contain the name and identification code of the approval agency.

(3) Each approval certificate and certification must be in a format acceptable to the Associate Administrator.

(b) The designated approval agency shall notify the Associate Administrator within 20 days after the date there is any change in the information submitted under § 107.402.

(c) The designated approval agency shall comply with all of the terms and conditions stated in its letter of designation under the subpart.

(d) Nothing in this part relieves a manufacturer or owner of a packaging of responsibility for compliance with any of the applicable requirements of this title.

[Amdt. 107–13, 50 FR 10062, Mar. 13, 1985, as amended by Amdt. 107–23, 56 FR 66157, Dec. 20, 1991; 66 FR 45377, Aug. 28, 2001]

§ 107.405 Termination of designation.

(a) Any designation issued under § 107.403 of this subchapter may be suspended or terminated if the Associate Administrator determines that:

(1) The application for designation contained a misrepresentation, or the applicant willfully concealed a material fact.

(2) The approval agency failed to comply with a term or condition stated in the agency's letter of designation.

(3) The Competent Authority of an approval agency of a country outside the United States has failed to initiate, maintain or recognize a qualified U.S. approval agency.

(b) Before a designation is suspended or terminated, the Associate Administrator shall give to the approval agency:

(1) Written notice of the facts or conduct believed to warrant suspension or termination of the designation.

(2) Sixty days in which to show in writing why the designation should not be suspended or terminated.

[Amdt. 107–13, 50 FR 10062, Mar. 13, 1985, as amended by Amdt. 107–23, 56 FR 66157, Dec. 20, 1991; 66 FR 45377, Aug. 28, 2001]

Subpart F—Registration of Cargo Tank and Cargo Tank Motor Vehicle Manufacturers, Assemblers, Repairers, Inspectors, Testers, and Design Certifying Engineers

§ 107.501 Scope.

(a) This subpart establishes a registration procedure for persons who are engaged in the manufacture, assembly, inspection and testing, certification, or repair of a cargo tank or a cargo tank motor vehicle manufactured in accordance with a DOT specification under subchapter C of this chapter or under terms of a special permit issued under this part.

(b) Persons engaged in continuing qualification and maintenance of cargo tanks and cargo tank motor vehicles must be familiar with the requirements set forth in part 180, subpart E, of this chapter.

[Amdt. 107–20, 55 FR 37047, Sept. 7, 1990]

§ 107.502 General registration requirements.

(a) *Definitions:* For purposes of this subpart—

(1) *Assembly* means the performance of any of the following functions when the function does not involve welding on the cargo tank wall:

(i) The mounting of one or more tanks or cargo tanks on a motor vehicle or to a motor vehicle suspension component;

(ii) The installation of equipment or components necessary to meet the specification requirements prior to the certification of the cargo tank motor vehicle; or

(iii) The installation of linings, coatings, or other materials to the inside of a cargo tank wall.

(2) The terms *Authorized Inspector*, *Cargo tank*, *Cargo tank motor vehicle*, *Design Certifying Engineer*, *Registered Inspector*, and *Person* are defined in §171.8 of this chapter.

(3) The terms *cargo tank wall* and *manufacturer* are defined in §178.320(a), and *repair* is defined in §180.403 of this chapter.

(b) No person may engage in the manufacture, assembly, certification, inspection or repair of a cargo tank or cargo tank motor vehicle manufactured under the terms of a DOT specification under subchapter C of this chapter or a special permit issued under this part unless the person is registered with the Department in accordance with the provisions of this subpart. A person employed as an inspector or design certifying engineer is considered to be registered if the person's employer is registered.

(c) A person who performs functions which are subject to the provisions of this subpart may perform only those functions which have been identified to the Department in accordance with the procedures of this subpart.

(d) Registration statements must be in English, contain all of the information required by this subpart, and be submitted to: FMCSA Hazardous Materials Division—MC-ECH, West Building, MC–ECH, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(e) Upon determination that a registration statement contains all the information required by this subpart, the Department will send the registrant a letter confirming receipt of the registration application and assigning a registration number to that person. A separate registration number will be assigned for each cargo tank manufacturing, assembly, repair facility or other place of business identified by the registrant.

[Amdt. 107–20, 54 FR 25003, June 12, 1989; 55 FR 37047, Sept. 7, 1990, as amended by Amdt. 107–22, 55 FR 39978, Oct. 1, 1990; Amdt. 107–23, 56 FR 66157, Dec. 20, 1991; Amdt. 107–28, 58 FR 46873, Sept. 3, 1993; Amdt. 107–39, 61 FR 51337, Oct. 1, 1996; 67 FR 61011, Sept. 27, 2002; 68 FR 19273, Apr. 18, 2003; 72 FR 55683, Oct. 1, 2007]

§ 107.503 Registration statement.

(a) Each registration statement must be in English and contain the following information:

(1) Name;

(2) Street address, mailing address and telephone number for each facility or place of business;

(3) A statement indicating whether the facility uses mobile testing/inspection equipment to perform inspections, tests, or repairs at a location other than the address listed in paragraph (a)(2) of this section.

(4) A statement signed by the person responsible for compliance with the applicable requirements of this chapter, certifying knowledge of those requirements and that each employee who is a Registered Inspector or Design Certifying Engineer meets the minimum qualification requirements set forth in §171.8 of this chapter for ''Registered Inspector'' or ''Design Certifying Engineer''. The following language may be used.

I certify that all Registered Inspectors and Design Certifying Engineers used in performance of the prescribed functions meet the minimum qualification requirements set forth in 49 CFR 171.8, that I am the person responsible for ensuring compliance with the applicable requirements of this chapter, and that I have knowledge of the requirements applicable to the functions to be performed.

(5) A description of the specific functions to be performed on cargo tanks or cargo tank motor vehicles, e.g.:

(i) Manufacture,

(ii) Assembly,

(iii) Inspection and testing (specify type, e.g., external or internal visual inspection, lining inspection, hydrostatic pressure test, leakage test, thickness test),

(iv) Certification,

(v) Repair, or

(vi) Equipment manufacture;

(6) An identification of the types of DOT specification and special permit cargo tanks or cargo tank motor vehicles which the registrant intends to manufacture, assemble, repair, inspect, test or certify;

(7) A statement indicating whether the registrant employs Registered Inspectors or Design Certifying Engineers to conduct certification, inspection or testing functions addressed by this subpart. If the registrant engages a person who is not an employee of the registrant to perform these functions, provide the name, address and registration number of that person; and

(8) If the registrant is not a resident of the United States, the name and address of a permanent resident of the United States designated in accordance with §105.40 to serve as agent for service of process.

(b) In addition to the information required under paragraph (a) of this section, each person who manufactures a cargo tank or cargo tank motor vehicle must submit a copy of the manufacturer's current ASME Certificate of Authorization for the use of the ASME ''U'' stamp.

(c) In addition to the information required under paragraph (a) of this section, each person who repairs a cargo tank or cargo tank motor vehicle must submit a copy of the repair facility's current National Board Certificate of Authorization for the use of the ''R'' stamp or ASME Certificate of Authorization for the use of the ASME ''U'' stamp. Any person who repairs MC-series cargo tanks which are not certified to the ASME Code must submit a copy of the National Board or ASME Certificate of Authorization to PHMSA before June 30, 1992.

[Amdt. 107–20, 54 FR 25003, June 12, 1989; 55 FR 37047, Sept. 7, 1990; 57 FR 365, Jan. 6, 1992; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–39, 61 FR 51337, Oct. 1, 1996; 63 FR 52846, Oct. 1, 1998; 68 FR 19273, Apr. 18, 2003]

§107.504 Period of registration, updates, and record retention.

(a) Registration will be for a maximum of six years from the date of the original registration.

(b) Any correspondence with the Department must contain the registrant's name and registration number.

(c) A registration must be renewed every six years or within thirty days of reissuance of an ASME or National Board Certification, whichever occurs first, by submitting an up-to-date registration statement containing the information prescribed by §107.503. Any person initially registered under the provisions of §107.502 and who is in good standing is eligible for renewal.

(d) A registrant shall provide written notification to the Department within thirty days of any of the following occurrences:

(1) Any change in the registration information submitted under §107.503;

(2) Replacement of the person responsible for compliance with the requirements in §107.503(a)(4). If this occurs, the registrant shall resubmit the required certification;

(3) Loss of ASME or National Board Certificate of Authorization; or

(4) A change in function; such as, from assembly to manufacture, an addition of a function, or a change to the types of inspections, tests or certifications of cargo tanks or cargo tank motor vehicles.

(e) Each registrant shall maintain a current copy of the registration information submitted to the Department and a current copy of the registration number identification received from the Department at the location identified in §107.503(a)(2) during such time the person is registered with the Department and for two years thereafter.

(f) The issuance of a registration number under this subpart is not an approval or endorsement by the Department of the qualifications of any person to perform the specified functions.

[Amdt. 107–20, 54 FR 25003, June 12, 1989; 55 FR 37048, Sept. 7, 1990, as amended by Amdt. 107–20, 56 FR 27875, June 17, 1991; Amdt. 107–37, 61 FR 18931, Apr. 29, 1996; 71 FR 54390, Sept. 14, 2006]

Subpart G—Registration of Persons Who Offer or Transport Hazardous Materials

SOURCE: Amdt. No. 107–26, 57 FR 30630, July 9, 1992, unless otherwise noted.

§ 107.601 Applicability.

(a) The registration and fee requirements of this subpart apply to any person who offers for transportation, or transports, in foreign, interstate or intrastate commerce—

(1) A highway route-controlled quantity of a Class 7 (radioactive) material, as defined in §173.403 of this chapter;

(2) More than 25 kg (55 pounds) of a Division 1.1, 1.2, or 1.3 (explosive) material (see §173.50 of this chapter) in a motor vehicle, rail car or freight container;

(3) More than one L (1.06 quarts) per package of a material extremely toxic by inhalation (*i.e.*, ''material poisonous by inhalation,'' as defined in §171.8 of this chapter, that meets the criteria for ''hazard zone A,'' as specified in §§173.116(a) or 173.133(a) of this chapter);

(4) A shipment of a quantity of hazardous materials in a bulk packaging (see §171.8 of this chapter) having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases or more than 13.24 cubic meters (468 cubic feet) for solids;

(5) A shipment in other than a bulk packaging of 2,268 kg (5,000 pounds) gross weight or more of one class of hazardous materials for which placarding of a vehicle, rail car, or freight container is required for that class, under the provisions of subpart F of part 172 of this chapter; or

(6) Except as provided in paragraph (b) of this section, a quantity of hazardous material that requires placarding, under provisions of subpart F of part 172 of this chapter.

(b) Paragraph (a)(6) of this section does not apply to those activities of a farmer, as defined in §171.8 of this chapter, that are in direct support of the farmer's farming operations.

(c) In this subpart, the term ''shipment'' means the offering or loading of hazardous material at one loading facility using one transport vehicle, or the transport of that transport vehicle.

[65 FR 7309, Feb. 14, 2000, as amended at 67 FR 61011, Sept. 27, 2002]

§ 107.606 Exceptions.

(a) The following are excepted from the requirements of this subpart:

(1) An agency of the Federal government.

(2) A State agency.

(3) An agency of a political subdivision of a State.

(4) An Indian tribe.

(5) An employee of any of those entities in paragraphs (a)(1) through (a)(4) of this section with respect to the employee's official duties.

(6) A hazmat employee (including, for purposes of this subpart, the owner-operator of a motor vehicle that transports in commerce hazardous materials, if that vehicle at the time of those activities, is leased to a registered motor carrier under a 30-day or longer lease as prescribed in 49 CFR part 376 or an equivalent contractual agreement).

(7) A person domiciled outside the United States, who offers solely from a location outside the United States, hazardous materials for transportation in commerce, *provided* that the country of which such a person is a domiciliary does not require persons domiciled in

the United States, who solely offer hazardous materials for transportation to the foreign country from places in the United States, to file a registration statement or to pay a registration fee.

(b) Upon making a determination that persons domiciled in the United States, who offer hazardous materials for transportation to a foreign country solely from places in the United States, must file registration statements or pay fees to that foreign country, the U.S. Competent Authority will provide notice of such determination directly to the Competent Authority of that foreign country and by publication in the FEDERAL REGISTER. Persons who offer hazardous materials for transportation to the United States from that foreign country must file a registration statement and pay the required fee no later than 60 days following publication of the determination in the FEDERAL REGISTER.

[Amdt 107–34, 60 FR 27233, May 23, 1995, as amended at 63 FR 52847, Oct. 1, 1998; 72 FR 24538, May 3, 2007]

§ 107.608 General registration requirements.

(a) Each person subject to this subpart must submit a complete and accurate registration statement on DOT Form F 5800.2 not later than June 30 for each registration year, or in time to comply with paragraph (b) of this section, whichever is later. Each registration year begins on July 1 and ends on June 30 of the following year.

(b) No person required to file a registration statement may transport a hazardous material or cause a hazardous material to be transported or shipped, unless such person has on file, in accordance with §107.620, a current Certificate of Registration in accordance with the requirements of this subpart.

(c) A registrant whose name or principal place of business has changed during the year of registration must notify PHMSA of that change by submitting an amended registration statement not later than 30 days after the change.

(d) Copies of DOT Form F 5800.2 and instructions for its completion may be obtained from the Outreach, Training and Grants Division, PHH–50, U.S. Department of Transportation, Washington, DC 20590–0001, by calling 202–366–4109, or via the Internet at *http://phmsa.dot.gov/hazmat/registration*.

(e) If the registrant is not a resident of the United States, the registrant must attach to the registration statement the name and address of a permanent resident of the United States, designated in accordance with §105.40, to serve as agent for service of process.

[Amdt. No. 107–26, 57 FR 30630, July 9, 1992, as amended by Amdt. 107–31, 59 FR 32932, June 27, 1994; 65 FR 7309, Feb. 14, 2000; 67 FR 61011, Sept. 27, 2002; 70 FR 56090, Sept. 23, 2005; 72 FR 55683, Oct. 1, 2007; 76 FR 56311, Sept. 13, 2011]

§ 107.612 Amount of fee.

(a) For the registration year 2010–2011 and subsequent years, each person offering for transportation or transporting in commerce a material listed in §107.601(a) must pay an annual registration fee, as follows:

(1) *Small business.* Each person that qualifies as a small business, under criteria specified in 13 CFR part 121 applicable to the North American Industry Classification System (NAICS) code that describes that person's primary commercial activity, must pay an annual registration fee of $250 and the processing fee required by paragraph (a)(4) of this section.

(2) *Not-for-profit organization.* Each not-for-profit organization must pay an annual registration fee of $250 and the processing fee required by paragraph (a)(4) of this section. A not-for-profit organization is an organization exempt from taxation under 26 U.S.C. 501(a).

(3) *Other than a small business or not-for-profit organization.* Each person that does not meet the criteria specified in paragraph (a)(1) or (a)(2) of this section must pay an annual registration fee of $2,575 and the processing fee required by paragraph (a)(4) of this section.

(4) *Processing fee.* The processing fee is $25 for each registration statement filed. A single statement may be filed for one, two, or three registration years as provided in §107.616(c).

(b) For registration years 2009–2010 and prior years, each person that offered for transportation or transported in commerce a material listed in §107.601(a) during that year must pay

the annual registration fee, including the processing fee, specified under the requirements of this subchapter in effect for the specific registration year.

(c) *Registration years 2003–2004, 2004–2005 and 2005–2006.* For registration years 2003–2004, 2004–2005, and 2005–2006, each person subject to the requirements of this subpart must pay an annual registration fee as follows:

(1) *Small business.* Each person that qualifies as a small business, under criteria specified in 13 CFR part 121 applicable to the North American Industry Classification System (NAICS) code that describes that person's primary commercial activity, must pay an annual registration fee of $125 and the processing fee required by paragraph (c)(4) of this section.

(2) *Not-for-profit organization.* Each not-for-profit organization must pay an annual registration fee of $125 and the processing fee required by paragraph (c)(4) of this section. A not-for-profit organization is an organization exempt from taxation under 26 U.S.C. 501(a).

(3) *Other than a small business or not-for-profit organization.* Each person that does not meet the criteria specified in paragraph (c)(1) or (c)(2) of this section must pay an annual registration fee of $275 and the processing fee required by paragraph (c)(4) of this section.

(4) *Processing fee.* The processing fee is $25 for each registration statement filed. A single statement may be filed for one, two, or three registration years as provided in §107.616(c).

(d) *Registration years 2006–2007 and following.* For each registration year beginning with 2006–2007, each person subject to the requirements of this subpart must pay an annual fee as follows:

(1) *Small business.* Each person that qualifies as a small business, under criteria specified in 13 CFR part 121 applicable to the North American Industry Classification System (NAICS) code that describes that person's primary commercial activity, must pay an annual registration fee of $250 and the processing fee required by paragraph (d)(4) of this section.

(2) *Not-for-profit organization.* Each not-for-profit organization must pay an annual registration fee of $250 and the processing fee required by paragraph (d)(4) of this section. A not-for-profit organization is an organization exempt from taxation under 26 U.S.C. 501(a).

(3) *Other than a small business or not-for-profit organization.* Each person that does not meet the criteria specified in paragraph (d)(1) or (d)(2) of this section must pay an annual registration fee of $975 and the processing fee required by paragraph (d)(4) of this section.

(4) *Processing fee.* The processing fee is $25 for each registration statement filed. A single statement may be filed for one, two, or three registration years as provided in §107.616(c).

[65 FR 7309, Feb. 14, 2000, as amended at 67 FR 58345, Sept. 16, 2002; 68 FR 1345, Jan. 9, 2003; 75 FR 15619, Mar. 30, 2010]

§107.616 Payment procedures.

(a) Each person subject to the requirements of this subpart must mail the registration statement and payment in full to the U.S. Department of Transportation, Hazardous Materials Registration, P.O. Box 530273, Atlanta, GA 30353–0273, or submit the statement and payment electronically through the Department's e-Commerce Internet site. Access to this service is provided at *http://phmsa.dot.gov/hazmat/registration.* A registrant required to file an amended registration statement under §107.608(c) must mail it to the same address or submit it through the same Internet site.

(b) Payment must be made by certified check, cashier's check, personal check, or money order in U.S. funds and drawn on a U.S. bank, payable to the U.S. Department of Transportation and identified as payment for the ''Hazmat Registration Fee,'' or by completing an authorization for payment by credit card or other electronic means of payment acceptable to the Department on the registration statement or as part of an Internet registration as provided in paragraph (a) of this section.

(c) Payment must correspond to the total fees properly calculated in the ''Amount Due'' block of the DOT form F 5800.2. A person may elect to register and pay the required fees for up to three registration years by filing one

complete and accurate registration statement.

[Amdt. 107–26, 57 FR 30630, July 9, 1992, as amended by Amdt. 107–26, 58 FR 12545, Mar. 5, 1993; 65 FR 7310, Feb. 14, 2000; 67 FR 58345, Sept. 16, 2002; 68 FR 1346, Jan. 9, 2003; 71 FR 54390, Sept. 14, 2006; 72 FR 24538, May 3, 2007; 76 FR 56311, Sept. 13, 2011]

§ 107.620 Recordkeeping requirements.

(a) Each person subject to the requirements of this subpart, or its agent designated under §107.608(e), must maintain at its principal place of business for a period of three years from the date of issuance of each Certificate of Registration:

(1) A copy of the registration statement filed with PHMSA; and

(2) The Certificate of Registration issued to the registrant by PHMSA.

(b) After January 1, 1993, each motor carrier subject to the requirements of this subpart must carry a copy of its current Certificate of Registration issued by PHMSA or another document bearing the registration number identified as the ''U.S. DOT Hazmat Reg. No.'' on board each truck and truck tractor (not including trailers and semi-trailers) used to transport hazardous materials subject to the requirements of this subpart. The Certificate of Registration or document bearing the registration number must be made available, upon request, to enforcement personnel.

(c) In addition to the requirements of paragraph (a) of this section, after January 1, 1995, each person who transports by vessel a hazardous material subject to the requirements of this subpart must carry on board the vessel a copy of its current Certificate of Registration or another document bearing the current registration number identified as the ''U.S. DOT Hazmat Reg. No.''

(d) Each person subject to this subpart must furnish its Certificate of Registration (or a copy thereof) and all other records and information pertaining to the information contained in the registration statement to an authorized representative or special agent of DOT upon request.

[Amdt. No. 107–26, 57 FR 30630, July 9, 1992, as amended at 57 FR 37902, August 21, 1992; Amdt. 107–26, 58 FR 12545, Mar. 5, 1993; Amdt. 107–31, 59 FR 32932, June 27, 1994]

Subpart H—Approvals, Registrations and Submissions

SOURCE: Amdt. 107–38, 61 FR 21100, May 9, 1996, unless otherwise noted.

§ 107.701 Purpose and scope.

(a) This subpart prescribes procedures for the issuance, modification and termination of approvals, and the submission of registrations and reports, as required by this chapter.

(b) The procedures of this subpart are in addition to any requirements in subchapter C of this chapter applicable to a specific approval, registration or report. If compliance with both a specific requirement of subchapter C of this chapter and a procedure of this subpart is not possible, the specific requirement applies.

(c) Registration under subpart F or G of this part is not subject to the procedures of this subpart.

[Amdt. 107–38, 61 FR 21100, May 9, 1996; Amdt. 107–38, 61 FR 27948, June 3, 1996]

§ 107.705 Registrations, reports, and applications for approval.

(a) A person filing a registration, report, or application for an approval, or a renewal or modification of an approval subject to the provisions of this subpart must—

(1) File the registration, report, or application with the Associate Administrator for Hazardous Materials Safety (Attention: Approvals, PHH–32), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Alternatively, the document with any attached supporting documentation in an appropriate format may be filed by facsimile (fax) to: (202) 366–3753 or (202) 366–3308 or by electronic mail (e-mail) to: *approvals@dot.gov*.

(2) Identify the section of the chapter under which the registration, report, or application is made;

(3) If a report is required by an approval, a registration or a special permit, identify the approval, registration or special permit number;

(4) Provide the name, street and mailing addresses, e-mail address optional, and telephone number of the person on whose behalf the registration, report, or application is made and, if different, the person making the filing;

(5) If the person on whose behalf the filing is made is not a resident of the United States, provide a designation of agent for service in accordance with §105.40;

(6) Provide a description of the activity for which the registration or report is required; and

(7) Provide additional information as requested by the Associate Administrator, if the Associate Administrator determines that a filing lacks pertinent information or otherwise does not comply with applicable requirements.

(b) In addition to the provisions in paragraph (a) for an approval, an application for an approval, or an application for modification or renewal of an approval, the applicant must provide—

(1) A description of the activity for which the approval is required;

(2) The proposed duration of the approval;

(3) The transport mode or modes affected, as applicable;

(4) Any additional information specified in the section containing the approval; and

(5) For an approval which provides exceptions from regulatory requirements or prohibitions—

(i) Identification of any increased risk to safety or property that may result if the approval is granted, and specification of the measures that the applicant considers necessary or appropriate to address that risk; and

(ii) Substantiation, with applicable analyses or evaluations, if appropriate, demonstrating that the proposed activity will achieve a level of safety that is at least equal to that required by the regulation.

(c) For an approval with an expiration date, each application for renewal or modification must be filed in the same manner as an original application. If a complete and conforming renewal application is filed at least 60 days before the expiration date of an approval, the Associate Administrator, on written request from the applicant, will issue a written extension to permit operation under the terms of the expired approval until a final decision on the application for renewal has been made. Operation under an expired approval is prohibited absent a written extension. This paragraph does not limit the authority of the Associate Administrator to modify, suspend or terminate an approval under §107.713.

(d) To request confidential treatment for information contained in the application, the applicant shall comply with §105.30(a).

[Amdt. 107–38, 61 FR 21100, May 9, 1996, as amended at 65 FR 50457, Aug. 18, 2000; 67 FR 61011, Sept. 27, 2002; 70 FR 56090, Sept. 23, 2005; 70 FR 73162, Dec. 9, 2005; 72 FR 55683, Oct. 1, 2007]

§107.709 Processing of an application for approval, including an application for renewal or modification.

(a) No public hearing or other formal proceeding is required under this subpart before the disposition of an application.

(b) At any time during the processing of an application, the Associate Administrator may request additional information from the applicant. If the applicant does not respond to a written request for additional information within 30 days of the date the request was received, the application may be deemed incomplete and denied. However, if the applicant responds in writing within the 30-day period requesting an additional 30 days within which it will gather the requested information, the Associate Administrator may grant the 30-day extension.

(c) The Associate Administrator may grant or deny an application, in whole or in part. At the Associate Administrator's discretion, an application may be granted subject to provisions that are appropriate to protect health, safety and property. The Associate Administrator may impose additional provisions not specified in the application,

or delete conditions in the application which are unnecessary.

(d) The Associate Administrator may grant an application on finding that—

(1) The application complies with this subpart;

(2) The application demonstrates that the proposed activity will achieve a level of safety that—

(i) Is at least equal to that required by the regulation, or

(ii) If the regulations do not establish a level of safety, is consistent with the public interest and adequately will protect against the risks to life and property inherent in the transportation of hazardous materials in commerce;

(3) The application states all material facts, and contains no materially false or materially misleading statement;

(4) The applicant meets the qualifications required by applicable regulations; and

(5) The applicant is fit to conduct the activity authorized by the approval, or renewal or modification of approval. This assessment may be based on information in the application, prior compliance history of the applicant, and other information available to the Associate Administrator.

(e) Unless otherwise specified in this chapter or by the Associate Administrator, an approval in which a term is not specified does not expire.

(f) The Associate Administrator notifies the applicant in writing of the decision on the application. A denial contains a brief statement of reasons.

§ 107.711 Withdrawal.

An application may be withdrawn at any time before a decision to grant or deny it is made. Withdrawal of an application does not authorize the removal of any related records from the PHMSA dockets or files. Applications that are eligible for confidential treatment under §105.30 will remain confidential after the application is withdrawn. The duration of this confidential treatment for trade secrets and commercial or financial information is indefinite, unless the party requesting the confidential treatment of the materials notifies the Associate Administrator that the confidential treatment is no longer required.

[Amdt. 107–38, 61 FR 21100, May 9, 1996, as amended at 67 FR 61011, Sept. 27, 2002]

§ 107.713 Approval modification, suspension or termination.

(a) The Associate Administrator may modify an approval on finding that—

(1) Modification is necessary to conform an existing approval to relevant statutes and regulations as they may be amended from time to time; or

(2) Modification is required by changed circumstances to enable the approval to continue to meet the standards of §107.709(d).

(b) The Associate Administrator may modify, suspend or terminate an approval, as appropriate, on finding that—

(1) Because of a change in circumstances, the approval no longer is needed or no longer would be granted if applied for;

(2) The application contained inaccurate or incomplete information, and the approval would not have been granted had the application been accurate and complete;

(3) The application contained deliberately inaccurate or incomplete information; or

(4) The holder knowingly has violated the terms of the approval or an applicable requirement of this chapter in a manner demonstrating lack of fitness to conduct the activity for which the approval is required.

(c) Except as provided in paragraph (d) of this section, before an approval is modified, suspended or terminated, the Associate Administrator notifies the holder in writing of the proposed action and the reasons for it, and provides an opportunity to show cause why the proposed action should not be taken.

(1) The holder may file a written response with the Associate Administrator within 30 days of receipt of notice of the proposed action.

(2) After considering the holder's or party's written response, or after 30 days have passed without response since receipt of the notice, the Associate Administrator notifies the holder in writing of the final decision with a brief statement of reasons.

(d) The Associate Administrator, if necessary to avoid a risk of significant harm to persons or property, may in the notification declare the proposed action immediately effective.

§ 107.715 Reconsideration.

(a) An applicant or a holder may request that the Associate Administrator reconsider a decision under § 107.709(f) or § 107.713(c). The request must:

(1) Be in writing and filed within 20 days of receipt of the decision;

(2) State in detail any alleged errors of fact and law;

(3) Enclose any additional information needed to support the request to reconsider; and

(4) State in detail the modification of the final decision sought.

(b) The Associate Administrator considers newly submitted information on a showing that the information could not reasonably have been submitted during application processing.

(c) The Associate Administrator grants or denies, in whole or in part, the relief requested and informs the requesting person in writing of the decision.

§ 107.717 Appeal.

(a) A person who requested reconsideration under § 107.715 may appeal to the Administrator the Associate Administrator's decision on the request. The appeal must:

(1) Be in writing and filed within 30 days of receipt of the Associate Administrator's decision on reconsideration;

(2) State in detail any alleged errors of fact and law;

(3) Enclose any additional information needed to support the appeal; and

(4) State in detail the modification of the final decision sought.

(b) The Administrator, if necessary to avoid a risk of significant harm to persons or property, may declare the Associate Administrator's action effective pending a decision on appeal.

(c) The Administrator grants or denies, in whole or in part, the relief requested and informs the appellant in writing of the decision on appeal. The Administrator's decision on appeal is the final administrative action.

Subpart I—Approval of Independent Inspection Agencies, Cylinder Requalifiers, and Non-domestic Chemical Analyses and Tests of DOT Specification Cylinders

SOURCE: 67 FR 51639, Aug. 8, 2002, unless otherwise noted.

§ 107.801 Purpose and scope.

(a) This subpart prescribes procedures for—

(1) A person who seeks approval to be an independent inspection agency to perform tests, inspections, verifications and certifications of DOT specification cylinders or UN pressure receptacles as required by parts 178 and 180 of this chapter;

(2) A person who seeks approval to engage in the requalification (*e.g.* inspection, testing, or certification), rebuilding, or repair of a cylinder manufactured in accordance with a DOT specification or a pressure receptacle in accordance with a UN standard, under subchapter C of this chapter or under the terms of a special permit issued under this part;

(3) A person who seeks approval to perform the manufacturing chemical analyses and tests of DOT specification cylinders, special permit cylinders, or UN pressure receptacles outside the United States.

(b) No person may engage in a function identified in paragraph (a) of this section unless approved by the Associate Administratior in accordance with the provisions of this subpart. Each person must comply with the applicable requirements in this subpart. In addition, the procedural requirements in subpart H of this part apply to the filing, processing, and termination of an approval issued under this subpart.

[67 FR 51639, Aug. 8, 2002, as amended at 71 FR 33873, June 12, 2006]

§ 107.803 Approval of an independent inspection agency (IIA).

(a) *General.* Prior to performing cylinder inspections and verifications required by parts 178 and 180 of this chapter, a person must apply to the Associate Administrator for an approval as

an independent inspection agency. A person approved as an independent inspection agency is not an PHMSA agent or representative.

(b) *Criteria.* No applicant for approval as an independent inspection agency may be engaged in the manufacture of cylinders for use in the transportation of hazardous materials, or be directly or indirectly controlled by, or have a financial involvement with, any entity that manufactures cylinders for use in the transportation of hazardous materials, except for providing services as an independent inspector.

(c) *Application information.* Each applicant must submit an application in conformance with §107.705 containing the information prescribed in §107.705(a). In addition, the application must contain the following information:

(1) Name and address of each facility where tests and inspections are to be performed.

(2) Detailed description of the inspection and testing facilities to be used by the applicant.

(3) Detailed description of the applicant's qualifications and ability to perform the inspections and to verify the inspections required by part 178 of this chapter or under the terms of a special permit issued under this part.

(4) Name, address, and principal business activity of each person having any direct or indirect ownership interest in the applicant greater than three percent and any direct or indirect ownership interest in each subsidiary or division of the applicant.

(5) Name of each individual whom the applicant proposes to employ as an inspector and who will be responsible for certifying inspection and test results, and a statement of that person's qualifications.

(6) An identification or qualification number assigned to each inspector who is supervised by a certifying inspector identified in paragraph (c)(3) of this section.

(7) A statement that the applicant will perform its functions independent of the manufacturers and owners of the cylinders.

(8) If the applicant's principal place of business is in a country other than the United States, the Associate Administrator may approve the applicant on the basis of an approval issued by the Competent Authority of the country of manufacture. The Competent Authority must maintain a current listing of approved IIAs and their identification marks. The applicant must provide a copy of the designation from the Competent Authority of that country delegating to the applicant an approval or designated agency authority for the type of packaging for which a DOT or UN designation is sought; and

(9) The signature of the person certifying the approval application and the date on which it was signed.

(d) *Facility inspection.* Upon the request of the Associate Administrator, the applicant must allow the Associate Administrator or the Associate Administrator's designee to inspect the applicant's facilities and records. The person seeking approval must bear the cost of the inspection.

(e) After approval, the Associate Administrator may authorize, upon request, the independent inspection agency to perform other inspections and functions for which the Associate Administrator finds the applicant to be qualified. Such additional authorizations will be noted on each inspection agency's approval documents.

[67 FR 51639, Aug. 8, 2002, as amended at 68 FR 24659, May 8, 2003; 71 FR 33873, June 12, 2006]

§107.805 Approval of cylinder and pressure receptacle requalifiers.

(a) *General.* A person must meet the requirements of this section to be approved to inspect, test, certify, repair, or rebuild a cylinder in accordance with a DOT specification or a UN pressure receptacle under subpart C of part 178 or subpart C of part 180 of this chapter, or under the terms of a special permit issued under this part.

(b) *Independent Inspection Agency Review.* Each applicant must arrange for an independent inspection agency, approved by the Associate Administrator pursuant to this subpart, to perform a review of its inspection or requalification operation. The person seeking approval must bear the cost of the inspection. A list of approved independent inspection agencies is available from the Associate Administrator at the address

listed in §107.705. Assistance in obtaining an approval is available from the same address.

(c) *Application for approval.* If the inspection performed by an independent inspection agency is completed with satisfactory results, the applicant must submit a letter of recommendation from the independent inspection agency, an inspection report, and an application containing the information prescribed in §107.705(a). In addition, the application must contain—

(1) The name of the facility manager;

(2) The types of DOT specification or special permit cylinders, or UN pressure receptacles that will be inspected, tested, repaired, or rebuilt at the facility;

(3) A certification that the facility will operate in compliance with the applicable requirements of subchapter C of this chapter; and

(4) The signature of the person making the certification and the date on which it was signed.

(d) *Issuance of requalifier identification number (RIN).* The Associate Administrator issues a RIN as evidence of approval to requalify DOT specification or special permit cylinders, or UN pressure receptacles if it is determined, based on the applicant's submission and other available information, that the applicant's qualifications and, when applicable, facility are adequate to perform the requested functions in accordance with the criteria prescribed in subpart C of part 180 of this subchapter.

(e) *Expiration of RIN.* Unless otherwise provided in the issuance letter, an approval expires five years from the date of issuance, provided the applicant's facility and qualifications are maintained at or above the level observed at the time of inspection by the independent inspection agency, or at the date of the certification in the application for approval for requalifiers only performing inspections made under §180.209(g) of this chapter.

(f) *Exceptions.* Notwithstanding the requirements in paragraphs (b) and (c) of this section, a person who only performs inspections in accordance with §180.209(g) of this chapter may submit an application that, in addition to the information prescribed in §107.705(a), identifies the DOT specification/special permit cylinders to be inspected; certifies the requalifier will operate in compliance with the applicable requirements of subchapter C of this chapter; certifies the persons performing inspections have been trained and have the information contained in each applicable CGA pamphlet incorporated by reference in §171.7 of this chapter applicable to the requalifiers' activities; and includes the signature of the person making the certification and the date on which it was signed. Each person must comply with the applicable requirements in this subpart. In addition, the procedural requirements in subpart H of this part apply to the filing, processing and termination of an approval issued under this subpart. No person may requalify a DOT specification/special permit cylinder in accordance with §180.209(g) of this chapter unless that person has been issued a RIN as provided in paragraph (d) of this section.

(g) Each holder of a current RIN shall report in writing any change in its name, address, ownership, testing equipment, or management or personnel performing any function under this section, to the Associate Administrator (PHH–32) within 20 days of the change.

[67 FR 51639, Aug. 8, 2002, as amended at 68 FR 24659, May 8, 2003; 68 FR 55544, Sept. 26, 2003; 70 FR 56090, Sept. 23, 2005; 70 FR 73162, Dec. 9, 2005; 71 FR 33873, June 12, 2006; 76 FR 56311, Sept. 13, 2011]

§107.807 Approval of non-domestic chemical analyses and tests.

(a) *General.* A person who seeks to manufacture DOT specification or special permit cylinders outside the United States must seek an approval from the Associate Administrator to perform the chemical analyses and tests of those cylinders outside the United States.

(b) *Application for approval.* Each applicant must submit an application containing the information prescribed in §107.705(a). In addition, the application must contain—

(1) The name, address, and a description of each facility at which cylinders are to be manufactured and chemical analyses and tests are to be performed;

(2) Complete details concerning the dimensions, materials of construction, wall thickness, water capacity, shape, type of joints, location and size of openings and other pertinent physical characteristics of each specification or special permit cylinder for which approval is being requested, including calculations for cylinder wall stress and wall thickness, which may be shown on a drawing or on separate sheets attached to a descriptive drawing;

(3) The name of the independent inspection agency to be used; and

(4) The signature of the person making the certification and the date on which it was signed.

(c) *Facility inspections.* Upon the request of the Associate Administrator, the applicant must allow the Associate Administrator or the Associate Administrator's designee to inspect the applicant's cylinder manufacturing and testing facilities and records, and must provide such materials and cylinders for analyses and tests as the Associate Administrator may specify. The applicant or holder must bear the cost of the initial and subsequent inspections, analyses, and tests.

§ 107.809 Conditions of UN pressure receptacle approvals.

(a) Each approval issued under this subpart contains the following conditions:

(1) Upon the request of the Associate Administrator, the applicant or holder must allow the Associate Administrator or the Associate Administrator's designee to inspect the applicant's pressure receptacle manufacturing and testing facilities and records, and must provide such materials and pressure receptacles for analyses and tests as the Associate Administrator may specify. The applicant or holder must bear the cost of the initial and subsequent inspections, analyses, and tests.

(2) Each holder must comply with all of the terms and conditions stated in the approval letter issued under this subpart.

(b) In addition to the conditions specified in §107.713, an approval may be denied or if issued, suspended or terminated if the Competent Authority of the country of manufacture fails to initiate, maintain or recognize an IIA approved under this subpart; fails to recognize UN standard packagings manufactured in accordance with this subchapter; or implements a condition or limitation on United States citizens or organizations that is not required of its own citizenry.

[71 FR 33874, June 12, 2006]

PART 109—DEPARTMENT OF TRANSPORTATION HAZARDOUS MATERIALS PROCEDURAL REGULATIONS FOR OPENING OF PACKAGES, EMERGENCY ORDERS, AND EMERGENCY RECALLS

Subpart A—Definitions

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109.1 Definitions.

Subpart B—Inspections and investigations

109.3 Inspections and investigations.
109.5 Opening of packages.
109.7 Removal from transportation.
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109.11 Assistance of properly qualified personnel.
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109.15 Termination.

Subpart C—Emergency Orders

109.17 Emergency orders.
109.19 Petitions for review of emergency orders.
109.21 Remedies generally.

AUTHORITY: 49 U.S.C. §§5101–5128, 44701; Pub. L. 101–410 §4 (28 U.S.C. 2461 note); Pub. L. 104–121 §§212–213; Pub. L. 104–134 §31001; 49 CFR 1.45, 1.53.

SOURCE: 76 FR 11592, Mar. 2, 2011, unless otherwise noted.

Subpart A—Definitions

§ 109.1 Definitions.

For purposes of this part, all terms defined in 49 U.S.C. 5102 are used in their statutory meaning. Other terms used in this part are defined as follows:

Administrator means the head of any operating administration within the Department of Transportation, and includes the Administrators of the Federal Aviation Administration, Federal

Motor Carrier Safety Administration, Federal Railroad Administration, and Pipeline and Hazardous Materials Safety Administration, to whom the Secretary has delegated authority in part 1 of this title, and any person within an operating administration to whom an Administrator has delegated authority to carry out this part.

Agent of the Secretary or *agent* means a Federal officer, employee, or agent authorized by the Secretary to conduct inspections or investigations under the Federal hazardous material transportation law.

Chief Safety Officer or *CSO* means the Assistant Administrator of the Pipeline and Hazardous Materials Safety Administration.

Emergency order means an emergency restriction, prohibition, recall, or out-of-service order set forth in writing.

Freight container means a package configured as a reusable container that has a volume of 64 cubic feet or more, designed and constructed to permit being lifted with its contents intact and intended primarily for containment of smaller packages (in unit form) during transportation.

Immediately adjacent means a packaging that is in direct contact with the hazardous material or is otherwise the primary means of containment of the hazardous material.

Imminent hazard means the existence of a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment.

In writing means unless otherwise specified, the written expression of any actions related to this part, rendered in paper or digital format, and delivered in person; via facsimile, commercial delivery, U.S. Mail; or electronically.

Objectively reasonable and articulable belief means a belief based on particularized and identifiable facts that provide an objective basis to believe or suspect that a package may contain a hazardous material.

Out-of-service order means a written requirement issued by the Secretary, or a designee, that an aircraft, vessel, motor vehicle, train, railcar, locomotive, other vehicle, transport unit, transport vehicle, freight container, portable tank, or other package not be moved or cease operations until specified conditions have been met.

Packaging means a receptacle and any other components or materials necessary for the receptacle to perform its containment function in conformance with the minimum packing requirements of this subchapter. For radioactive materials packaging, see §173.403 of subchapter C of this chapter.

Perishable hazardous material means a hazardous material that is subject to significant risk of speedy decay, deterioration, or spoilage, or hazardous materials consigned for medical use, in the prevention, treatment, or cure of a disease or condition in human beings or animals where expeditious shipment and delivery meets a critical medical need.

Properly qualified personnel means a company, partnership, proprietorship, or individual who is technically qualified to perform designated tasks necessary to assist an agent in inspecting, examining, opening, removing, testing, or transporting packages.

Related packages means any packages in a shipment, series or group of packages that can be traced to a common nexus of facts, including, but not limited to: The same offeror or packaging manufacturer; the same hazard communications information (marking, labeling, shipping documentation); or other reasonable and articulable facts that may lead an agent to believe such packages are related to a package that may pose an imminent hazard. Packages that are located within the same trailer, freight container, unit load device, *etc.* as a package removed subject to this enhanced authority without additional facts to substantiate its nexus to an imminent hazard are not ''related packages'' for purposes of removal. The related packages must also demonstrate that they may pose an imminent hazard. They must exhibit a commonality or nexus of origin, which may include, but are not limited to, a common offeror, package manufacturer,

marking, labeling, shipping documentation, hazard communications, *etc.*

Remove means to keep a package from entering the stream of transportation in commerce; to take a package out of the stream of transportation in commerce by physically detaining a package that was offered for transportation in commerce; or stopping a package from continuing in transportation in commerce.

Safe and expeditious means prudent measures or procedures designed to minimize delay.

Subpart B—Inspections and Investigations

§ 109.3 Inspections and Investigations.

(a) *General authority.* An Administrator may initiate an inspection or investigation to determine compliance with Federal hazardous material transportation law, or a regulation, order, special permit, or approval prescribed or issued under the Federal hazardous material transportation law, or any court decree or order relating thereto.

(b) *Inspections and investigations.* Inspections and investigations are conducted by designated agents of the Secretary who will, upon request, present their credentials for examination. Such an agent is authorized to:

(1) Administer oaths and receive affirmations in any matter under investigation.

(2) Gather information by any reasonable means, including, but not limited to, gaining access to records and property (including packages), interviewing, photocopying, photographing, and video- and audio-recording in a reasonable manner.

(3) Serve subpoenas for the production of documents or other tangible evidence if, on the basis of information available to the agent, the evidence is relevant to a determination of compliance with the Federal hazardous material transportation law, regulation, order, special permit, or approval prescribed or issued under the Federal hazardous material transportation law, or any court decree or order relating thereto. Service of a subpoena shall be in accordance with the requirements of the agent's operating administration as set forth in 14 CFR 13.3 (Federal Aviation Administration); 49 CFR 209.7 (Federal Railroad Administration), 49 U.S.C. 502(d), 5121(a) (Federal Motor Carrier Safety Administration), and 49 CFR 105.45–105.55 (Pipeline and Hazardous Materials Safety Administration).

§ 109.5 Opening of packages.

(a) When an agent has an objectively reasonable and articulable belief that a package offered for or in transportation in commerce may contain a hazardous material and that such a package does not otherwise comply with this chapter, the agent may—

(1) Stop movement of the package in transportation and gather information from any person to learn the nature and contents of the package;

(2) Open any overpack, outer packaging, or other component of the package that is not immediately adjacent to the hazardous materials contained in the package and examine the inner packaging(s) or packaging components.

§ 109.7 Removal from transportation.

An agent may remove a package and related packages in a shipment or a freight container from transportation in commerce for up to forty-eight (48) hours when the agent has an objectively reasonable and articulable belief that the packages may pose an imminent hazard. The agent must record this belief in writing as soon as practicable and provide written notification stating the reason for removal to the person in possession.

§ 109.9 Transportation for examination and analysis.

(a) An agent may direct a package to be transported to a facility for examination and analysis when the agent determines that:

(1) Further examination of the package is necessary to evaluate whether the package conforms to subchapter C of this chapter;

(2) Conflicting information concerning the package exists; or

(3) Additional investigation is not possible on the immediate premises.

(b) In the event of a determination in accordance with paragraph (a) of this section, an agent may:

(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

Sec.

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

SOURCE: Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 110 appear at 70 FR 56090, Sept. 23, 2005.

§ 110.1 Purpose.

This part sets forth procedures for reimbursable grants for public sector planning and training in support of the emergency planning and training efforts of States, Indian tribes, and local communities to deal with hazardous materials emergencies, particularly those involving transportation. These grants will enhance the implementation of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001).

§ 110.5 Scope.

(a) This part applies to States and Indian tribes and contains the program requirements for public sector training and planning grants to support hazardous materials emergency planning and training efforts.

(b) The requirements contained in 49 CFR part 18, ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments'', apply to grants issued under this part.

(c) Copies of standard forms and OMB circulars referenced in this part are available from the HMTUSA Grants Manager, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington DC 20590–0001.

[Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, as amended at 72 FR 55683, Oct. 1, 2007]

§ 110.7 Control Number under the Paperwork Reduction Act.

The Office of Management and Budget control number assigned to collection of information in §§ 110.30, 110.70, 110.80, and 110.90 is 2137–0586.

§ 110.10 Eligibility.

This part applies to States and Indian tribes. States may apply for planning and training grants. Federally-recognized Indian tribes may apply for training grants.

§ 110.20 Definitions.

Unless defined in this part, all terms defined in 49 U.S.C. 5102 are used in their statutory meaning and all terms defined in 49 CFR part 18 and OMB Circular A–102, with respect to administrative requirements for grants, are used as defined therein. Other terms used in this part are defined as follows:

Allowable costs means those costs that are: eligible, reasonable, necessary, and allocable to the project permitted by the appropriate Federal cost principles, and approved in the grant.

Associate Administrator means the Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

Budget period means the period of time specified in the grant agreement during which the project manager may expend or obligate project funds.

Cost review means the review and evaluation of costs to determine reasonableness, allocability, and allowability.

Indian country means Indian country as defined in 18 U.S.C. 1151. That section defines Indian country as all land within the limits of any reservation under the jurisdiction of the U.S. Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian tribe means a tribe ''Federally-recognized'' by the Secretary of the Interior under 25 CFR 272.2.

Local Emergency Planning Committee (LEPC) means a committee appointed by the State Emergency Response Commission under section 301(c) of the Emergency Planning and Community

Right-to-Know Act of 1986 (42 U.S.C. 11001(c)) that includes at a minimum, representatives from each of the following groups or organizations: elected State and local officials; law enforcement, firefighting, civil defense, first aid, health, local environmental, hospital, and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to the emergency planning requirements.

National curriculum means the curriculum required to be developed under 49 U.S.C. 5115 and necessary to train public sector emergency response and preparedness teams, enabling them to comply with performance standards as stated in 49 U.S.C. 5115(c).

Political subdivision means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937 (42 U.S.C. 1401 *et seq.*), school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Project means the activities and tasks identified in the grant agreement.

Project manager means the State or Indian tribal official designated in a grant as the recipient agency's principal program contact with the Federal Government.

Project officer means the Federal official designated in a grant as the program contact with the project manager. The project officer is responsible for monitoring the project.

Project period means the length of time specified in a grant for completion of all work associated with that project.

State Emergency Response Commission (SERC) means the State Emergency Response Commission appointed by the Governor of each State and Territory under the Emergency Planning and Community Right-to-Know Act of 1986.

Statement of Work means that portion of a grant that describes the purpose and scope of activities and tasks to be carried out as part of the proposed project.

[Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, as amended by Amdt. 110–3, 59 FR 49132, Sept. 26, 1994; 66 FR 45377, Aug. 28, 2001]

§ 110.30 Grant application.

(a) *General.* An applicant for a planning or training grant shall use only the standard application forms approved by the Office of Management and Budget (OMB) (SF–424 and SF–424A) under the Paperwork Reduction Act of 1980 (44 U.S.C. 3502). Applicants are required to submit an original and two copies of the application package to: Grants Manager, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Applications received on or before January 1st and July 1st of each year will be considered in that cycle of the semi-annual review and award process. An initial round of the review and award process will consider applications received on or before November 15, 1992. Requests and continuation applications must include an original and two copies of the affected pages; previously submitted pages with information that is still current do not have to be resubmitted. The application must include the following:

(1) Application for Federal Assistance for non-construction programs (SF–424) and Budget sheets (SF–424A). A single application may be used for both planning and training if the budgets for each are entered separately on all budget sheets.

(2) For States, a letter from the Governor designating the State agency that is authorized to apply for a grant and to provide the written certifications required to receive a grant.

(3) For Indian tribes, a letter from the tribal government, governing body, or tribal council to the effect that the applicant is authorized to apply for a grant and to provide the written certifications required to receive a grant.

(4) A written statement explaining whether the State or tribe assesses and collects fees on the transportation of hazardous materials and whether such assessments or fees are used solely to

carry out purposes related to the transportation of hazardous materials.

(5) A statement designating a project manager and providing the name, position, address and phone number of that individual who will be responsible for coordinating the funded activities with other agencies/organizations.

(6) A project narrative statement of the goals and objectives of the proposed project, project design, and long range plans. The proposed grant project and budget periods may be one or more years.

(7) A statement of work in support of the proposed project that describes and sets priorities for the activities and tasks to be conducted, the costs associated with each activity, the number and types of deliverables and products to be completed, and a schedule for implementation.

(8) A description of the major items of costs needed to implement the statement of work and a copy of any cost or price analysis if conducted.

(9) *Drug-Free Workplace Certification.* The applicant must certify as specified in appendix C of 49 CFR part 29 that it will comply with the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, title V, subtitle D; 51 U.S.C. 701 *et seq.*).

(10) *Anti-Lobbying Certification.* The applicant must certify as specified in appendix A of 49 CFR part 20 that no Federal funds will be expended to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress (section 319 of Pub. L. 101–121, 31 U.S.C. 1352).

(11) *Debarment and Suspension Certification.* The applicant must certify as specified in subpart G of 49 CFR part 29 that it will not make an award or permit any award to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs.

(b) *Planning.* In addition to the requirements specified in paragraph (a) of this section, eligible State applicants must include the following in their application package:

(1) A written certification that the State is complying with sections 301 and 303 of the Emergency Planning and Community Right-to-Know Act of 1986, including a brief explanation of how compliance has been achieved.

(2) A written statement specifying the aggregate expenditure of funds of the State, exclusive of Federal funds, for each of its last five fiscal years for developing, improving, and implementing emergency plans under the Emergency Planning and Community Right-to-Know Act of 1986, including an explanation specifying the sources of these funds. A written certification that the State's aggregate expenditures, as defined by the State, of funds for this purpose, exclusive of Federal funds, will not fall below the average level of its expenditures for its last five fiscal years. The applicant may not claim any of these expenditures for cost-sharing.

(3) A written statement agreeing to make at least 75 percent of the Federal funds awarded available to LEPCs and an explanation of how the applicant intends to make such funds available to them for developing, improving, or implementing emergency plans.

(4) Designation of a project manager to serve as contact for coordinating planning funds under this program.

(5) A project narrative statement of the goals and objectives of each proposed project, including the following:

(i) A background statement describing the applicant's long-term goals and objectives with respect to:

(A) The current abilities and authorities of the applicant's program for preparedness planning;

(B) The need to sustain or increase program capability;

(C) Current degree of participation in or intention to assess the need for a regional hazardous materials emergency response team; and

(D) The impact that the grant will have on the program.

(ii) A discussion of whether the applicant's program currently knows, or intends to assess, transportation flow patterns of hazardous materials within the State and between that State and another State.

(iii) A schedule for implementing the proposed grant activities.

(iv) A statement describing the ways in which planning will be monitored by the project manager.

(v) A statement indicating that all members of the State Emergency Response Commission were provided the opportunity to review the grant application.

(c) *Training.* In addition to the requirements specified in paragraph (a) of this section, eligible State and Indian tribe applicants must include the following in their application package:

(1) For a State applicant, a written certification explaining how the State is complying with sections 301 and 303 of the Emergency Planning and Community Right-to-Know Act.

(2) A written statement specifying the aggregate expenditure of funds of the State or Indian tribe, exclusive of Federal funds, for each of its last five fiscal years for training public sector employees to respond to accidents and incidents involving hazardous materials, including an explanation specifying the sources of these funds. A written certification that the applicant's aggregate expenditure, as defined by the State or tribe, of funds for this purpose, exclusive of Federal funds, will not fall below the average level of its expenditures for its last five fiscal years. The applicant may not claim any of these expenditures for cost-sharing purposes.

(3) For a State applicant, a written statement agreeing to make at least 75 percent of the Federal funds awarded available for the purpose of training public sector employees employed or used by political subdivisions. A State applicant may elect to pass all or some portion of the grant on to political subdivisions for this purpose. The applicant must include a specific explanation of how it intends to meet this requirement.

(4) Designation of a primary point of contact for coordinating training funded under this program. Identification of a single repository for copies of course materials delivered under the grant as specified in §110.90 of this part.

(5) A project narrative statement of the long-range goals and objectives of each proposed project, including the following:

(i) A background statement describing:

(A) The current hazardous materials training program(s);

(B) Training audience, including numbers and levels of training and accreditation program for each level or criterion required to advance to the next level;

(C) Estimated total number of persons to be trained under the proposed project;

(D) The ways in which training grants will support the integrated delivery of training to meet the needs of individualized geographic and resource needs and time considerations of local responders. When appropriate, a statement describing how the proposed project will accommodate the different training needs for rural versus urban environments; and

(E) The impact that the grant and the National Curriculum will have on the program.

(ii) A statement describing how the National Curriculum will be used or modified to train public sector employees at the local level to respond to accidents and incidents involving hazardous materials.

(iii) A statement describing the ways in which effectiveness of training will be monitored by the project manager, including, but not limited to, examinations, critiques, and instructor evaluations.

(iv) A schedule for implementing the proposed training grant activities.

(v) A statement indicating that all members of the State or Tribal Emergency Response Commission were provided the opportunity to review the grant application.

[Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, as amended by Amdt. 110–3, 59 FR 49132, Sept. 26, 1994; 70 FR 73162, Dec. 9, 2005; 72 FR 55683, Oct. 1, 2007]

§110.40 Activities eligible for funding.

(a) *Planning.* Eligible State applicants may receive funding for the following activities:

(1) Development, improvement, and implementation of emergency plans required under the Emergency Planning and Community Right-to-Know Act of 1986, as well as exercises which test the emergency plan. Enhancement of emergency plans to include hazard analysis as well as response procedures for

emergencies involving transportation of hazardous materials, including radioactive materials.

(2) An assessment to determine flow patterns of hazardous materials within a State, between a State and another State or Indian country, and development and maintenance of a system to keep such information current.

(3) An assessment of the need for regional hazardous materials emergency response teams.

(4) An assessment of local response capabilities.

(5) Conduct of emergency response drills and exercises associated with emergency preparedness plans.

(6) Provision of technical staff to support the planning effort.

(7) Additional activities the Associate Administrator deems appropriate to implement the scope of work for the proposed project plan and approved in the grant.

(b) *Training.* Eligible State and Indian tribe applicants may receive funding for the following activities:

(1) An assessment to determine the number of public sector employees employed or used by a political subdivision who need the proposed training and to select courses consistent with the National Curriculum.

(2) Delivery of comprehensive preparedness and response training to public sector employees. Design and delivery of preparedness and response training to meet specialized needs. Financial assistance for trainees and for the trainers, if appropriate, such as tuition, travel expenses to and from a training facility, and room and board while at the training facility.

(3) Emergency response drills and exercises associated with training, a course of study, and tests and evaluation of emergency preparedness plans.

(4) Expenses associated with training by a person (including a department, agency, or instrumentality of a State or political subdivision thereof or an Indian tribe) and activities necessary to monitor such training including, but not limited to examinations, critiques and instructor evaluations.

(5) Provision of staff to manage the training effort designed to result in increased benefits, proficiency, and rapid deployment of local and regional responders.

(6) Additional activities the Associate Administrator deems appropriate to implement the scope of work for the proposed project and approved in the grant.

[Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, as amended by 66 FR 45377, Aug. 28, 2001]

§ 110.50 Disbursement of Federal funds.

(a) Preaward expenditures may not be reimbursed.

(b) Reimbursement may not be made for a project plan unless approved in the grant award.

(c) If a recipient agency seeks additional funds, the amendment request will be evaluated on the basis of needs, performance and availability of funds. An existing grant is not a commitment of future Federal funding.

§ 110.60 Cost sharing for planning and training.

(a) The recipient agency must provide 20 percent of the direct and indirect costs of all activities covered under the grant award program with non-Federal funds. Recipients may either use cash (hard-match), in-kind (soft-match) contributions, or a combination of in-kind plus hard-match to meet this requirement. In-kind (soft-match) contributions are in addition to the maintenance of effort required of recipients of grant awards. The types of contributions allowed are as follows:

(1) Any funds from a State, local, or other non-Federal source used for an eligible activity as defined in § 110.40 in this part.

(2) The dollar equivalent value of an eligible activity as defined in § 110.40 of this part provided by a State, local, or other non-Federal source.

(3) The value of participants' salary while attending a planning or training activity contained in the approved grant application provided by a State, local, or other non-Federal source.

(4) Additional types of in-kind contributions the Associate Administrator deems appropriate.

(b) Funds used for matching purposes under any other Federal grant or cooperative agreement may not be used for matching purposes. The funds expended

by a recipient agency to qualify for the grant may not be used for cost-sharing purposes.

(c) Acceptable contributions for matching and cost sharing purposes must conform to 49 CFR part 18.

[Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, as amended by Amdt. 110–3, 59 FR 49132, Sept. 26, 1994; 66 FR 45377, Aug. 28, 2001]

§ 110.70 Financial administration.

(a) A State must expend and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to:

(1) Permit the preparation of reports required by 49 CFR part 18 and this part, including the tracing of funds provided for planning to a level of expenditure adequate to establish that at least 75 percent of the funds provided were made available to LEPCs for developing, improving, and implementing emergency plans; and the tracing of funds provided for training to a level of expenditure adequate to establish that at least 75 percent of the funds provided were made available for the purposes of training public sector employees employed or used by political subdivisions.

(2) Permit the tracing of funds to a level of expenditure adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of Indian tribes and any subgrantees must meet the standards of 49 CFR 18.20, including the ability to trace funds provided for training to a level of expenditure adequate to establish that at least 75 percent of the funds provided were made available for the purposes of training public sector employees employed or used by political subdivisions.

(c) Advances shall be made to States and Indian tribes consistent with 49 CFR part 18 and 31 CFR part 205. The Associate Administrator shall base these advances on demonstrated need, which will be determined on a case-by-case basis, considering such factors as State/Tribal budget constraints and reductions in amounts budgeted for hazardous materials activities. To obtain an advance, a State or Indian tribe must comply with the following requirements:

(1) A letter from the Governor or Tribal leader or their designee is required specifying the extenuating circumstances requiring the funding advance for the grant;

(2) The maximum advance request may not be more than $25,000 for each State or Indian tribe;

(3) Recipients of advance funding must obligate those funds within 3 months of receipt;

(4) Advances including interest will be deducted from the initial reimbursement to the State or Indian tribe; and

(5) The State or Indian tribe will have its allocation of current grant funds reduced and will not be permitted to apply for future grant funds until the advance is covered by a request for reimbursement. For example, if $25,000 is advanced for personnel costs, this advance would be deducted from the initial reimbursement in the year the advance was made.

(d) To be allowable, costs must be eligible, reasonable, necessary, and allocable to the approved project in accordance with OMB Circular A–87 and included in the grant award. Costs incurred prior to the award of any grant are not allowable. Recipient agencies are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501), 49 CFR part 90, and OMB Circular A–128. Audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits. The Associate Administrator may audit a recipient agency at any time.

[Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, as amended by 66 FR 45377, Aug. 28, 2001]

§ 110.80 Procurement.

Project managers shall use procurement procedures and practices which reflect applicable State laws and regulations and Federal requirements as specified in 49 CFR 18.36.

§ 110.90 Grant monitoring, reports, and records retention.

(a) *Grant monitoring.* Project managers are responsible for managing the day-to-day operations of grant, subgrant and contract-supported activities. Project managers must monitor performance of supported activities to assure compliance with applicable Federal requirements and achievement of performance goals. Monitoring must cover each program, function, activity, or task covered by the grant. Monitoring and reporting requirements for planning and training are contained in this part; general grant reporting requirements are specified in 49 CFR 18.40.

(b) *Reports.* (1) The project manager shall submit a performance report at the completion of an activity for which reimbursement is being requested or with a request to amend the grant. The final performance report is due 90 days after the expiration or termination of the grant.

(2) Project managers shall submit an original and two copies of all performance reports. Performance reports for planning and training must include comparison of actual accomplishments to the stated goals and objectives established for the performance period, and the reasons for not achieving those goals and objectives, if applicable.

(3) Project managers shall report developments or events that occur between the required performance reporting dates which have significant impact upon the planning and training activity such as:

(i) Problems, delays, or adverse conditions which will impair the ability to meet the objective of the grant; and

(ii) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(4) Financial reporting, except as provided in §110.70 and 49 CFR 18.41, shall be supplied quarterly using Standard Form 270, Request for Advance or Reimbursement, to report the status of funds. The project manager shall report separately on planning and training.

(c) *Records retention.* In accordance with 49 CFR 18.42, all financial and programmatic records, supporting documents, statistical records, training materials, and other documents generated under a grant shall be maintained by the project manager for three years from the date the project manager submits the final financial status report (SF 269) or Request for Advance or Reimbursement (SF 270). The project manager shall designate a repository and single-point of contact for planning and for training, or both, for these purposes. If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

§ 110.100 Enforcement.

If a recipient agency fails to comply with any term of an award (whether stated in a Federal statute or regulation, an assurance, a State plan or application, a notice of award, or elsewhere) a noncompliance action may be taken as specified in 40 CFR 18.43. The recipient agency may appeal any such actions as specified in 49 CFR part 18. Costs incurred by the recipient agency during a suspension or after termination of an award are not allowable unless the Associate Administrator authorizes it in writing. Grant awards may be terminated in whole or in part with the consent of the recipient at any agreed upon effective date, or by the recipient upon written notification.

[Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, as amended by 66 FR 45377, Aug. 28, 2001]

§ 110.110 After-grant requirements.

The Associate Administrator will close out the award upon determination that all applicable administrative actions and all required work of the grant are complete in accordance with subpart D of 49 CFR part 18. The project manager must submit all financial, performance, and other reports required as a condition of the grant, within 90 days after the expiration or termination of the grant. This time

frame may be extended by the Associate Administrator for Hazardous Materials Safety for cause.

[Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, as amended by 66 FR 45377, Aug. 28, 2001]

§ 110.120 Deviation from this part.

Recipient agencies may request a deviation from the non-statutory provisions of this part. The Associate Administrator will respond to such requests in writing. If appropriate, the decision will be included in the grant agreement. Request for deviations from part 110 must be submitted to: Grants Manager, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

[Amdt. 110–1, 57 FR 43067, Sept. 17, 1992, as amended by Amdt. 110–3, 59 FR 49132, Sept. 26, 1994; 66 FR 45377, Aug. 28, 2001; 72 FR 55683, Oct. 1, 2007]

§ 110.130 Disputes.

Disputes should be resolved at the lowest level possible, beginning with the project manager and the project officer. If an agreement cannot be reached, the Administrator, PHMSA, will serve as the dispute resolution official, whose decision will be final.