

The Department expects the economic impact of this rule to be minimal. This rule does not represent a significant departure from the current ratemaking process, and there are no expected increases in costs. Therefore, a full regulatory evaluation is not necessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Department must consider whether this final rule will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632). One commenter believes that this rule will have a significant economic impact on a substantial number of small entities. However, the commenter did not elaborate on why this impact would occur. Since this rule is not a major change from past rulemaking practices, and only three pilot associations with a total of approximately 40 members will be directly affected by this rule, this final rule should have little or no impact on small entities that pay pilotage rates or that receive income from pilotage rates. Because it expects the impact of this proposal to be minimal, the Department certifies under 5 U.S.C. 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this final rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This rule contains collection-of-information requirements. The Department has submitted the requirements to the Office of Management and Budget (OMB) for review under section 3504(h) of the paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), and OMB has approved them. The part numbers are parts 401 and 403 and the corresponding OMB approval number is OMB Control Number 2115-0616.

Federalism

The Department has analyzed this final rule under the principles and criteria contained in Executive Order 12612, and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. State action addressing pilotage regulation is preempted by 46 U.S.C. 9306, which provides that a State or political subdivision of a State may not regulate

or impose any requirement on pilotage on the Great Lakes.

Environment

The Department considered the environmental impact of this final rule and concluded that this rule is categorically excluded from further environmental documentation under section 2.B.2 of Commandant Instruction M16475.1B. The rule is procedural in nature because it deals exclusively with ratemaking and accounting procedures. Therefore, this is included in the categorical exclusion in subsection 2.B.2.1.—Administrative actions or procedural regulations and policies which clearly do not have any environmental impact. A Categorical Exclusion Determination has been placed in the docket.

List of Subjects in 46 CFR Parts 403 and 404

Administrative practice and procedure, Great Lakes, Navigation (water), Penalties, Reporting and recordkeeping requirements, Seamen.

For reasons set out in the preamble, the Department proposes to amend Parts 403 and 404 of Title 46 of the Code of Federal Regulations as follows:

PART 403—[AMENDED]

1. The authority citation for part 403 continues to read as follows:

Authority: 46 U.S.C. 8105, 9303, 9304; 49 CFR 1.46.

2. Section 403.300(b) is revised to read as follows:

§ 403.300 Financial reporting requirements.

* * * * *

(b) Required Reports:

(1) By April 1 of each year, each Association shall obtain an annual unqualified long form audit report for the preceding year, audited and prepared in accordance with generally accepted auditing standards by an independent certified public accountant.

(2) Each Association shall forward their annual unqualified long form audit report, and any associated settlement statements, to the Director no later than April 7 of each year.

PART 404—[AMENDED]

3. Section 404.1(b) is revised to read as follows:

Authority: 46 U.S.C. 8105, 9303, 9304, 49 CFR 1.46.

§ 404.1 General ratemaking provisions.

* * * * *

(b) Great Lakes pilotage rates shall be reviewed annually in accordance with the procedures detailed in Appendix C to this part. The Director shall review Association audit reports annually and, at a minimum, the Director shall complete a thorough audit of pilot association expenses and establish pilotage rates in accordance with the procedures detailed in § 404.10 of this part at least once every five years. An interested party or parties may also petition the Director for a review at any time. The petition must present a reasonable basis for concluding that a review may be warranted. If the Director determines, from the information contained in the petition, that the existing rates may no longer be reasonable, a full review of the pilotage rates will be conducted. If the full review shows that pilotage rates are within a reasonable range of their target, no adjustment to the rates will be initiated.

Issued at Washington, DC this 2nd day of May, 1996.

Federico Peña,

Secretary of Transportation.

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Research and Special Programs Administration

49 CFR Parts 107, 171, 173 and 178

[Docket No. HM-207C, Amdt. Nos. 107-38, 171-141, 173-249, and 178-113]

RIN 2137-AC63

Exemption, Approval, Registration and Reporting Procedures; Miscellaneous Provisions

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

ACTION: Final rule.

SUMMARY: In this final rule, RSPA revises procedures for applying for exemptions and establishes procedures for applying for approvals, and registering and filing reports with RSPA. In addition, RSPA amends certain provisions, mostly procedural, in the Hazardous Materials Regulations. This rulemaking action is intended to expedite processing of applications and to promote clarity and program consistency. It is part of the President's Regulatory Reinvention Initiative to revise all agency regulations that are in need of reform.

DATES: *Effective date:* The effective date of these amendments is October 1, 1996.

Compliance date: Voluntary compliance with the regulations, as

amended herein, is authorized as of July 12, 1996.

FOR FURTHER INFORMATION CONTACT:

Kathleen Stokes Molinar, Office of the Chief Counsel, (202) 366-4400, or Diane LaValle, Office of Hazardous Materials Standards, (800) 467-4922, RSPA, Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal hazardous material transportation law (Federal hazmat law; 49 U.S.C. 5101-5127) directs the Secretary of Transportation to prescribe regulations for the safe transportation of hazardous materials in commerce. RSPA is the agency within the Department of Transportation primarily responsible for implementing the Federal hazmat law. RSPA does so through the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). Under 49 U.S.C. 5117(a), RSPA is authorized to issue an exemption from specific requirements of the Federal hazmat law or the HMR if an applicant demonstrates that public safety will not be compromised. The procedures governing application for an exemption and the manner in which the application is processed are found at 49 CFR part 107, subpart B.

In numerous instances, the HMR require approval by, or registration with, RSPA before a person may engage in particular hazmat transportation-related activities in areas such as manufacturing and certifying hazardous material packagings, offering hazardous materials for transportation, and transporting hazardous materials. The HMR also impose reporting requirements on persons engaging in certain hazardous materials transportation activities. A significant portion of the regulated community is subject to one or more of these requirements. Procedures to be followed in seeking an approval from RSPA, registering with RSPA, or reporting to RSPA are often found in the HMR provision establishing the particular requirement, but in many cases these procedures are absent or incomplete.

This final rule revises procedures for exemptions in subpart B of part 107 and establishes procedures for approvals, registrations and reports in subpart H of part 107. Establishment of formal procedures for approval, registration, and reporting activities provides uniform and consistent guidance to all those who may be subject to these requirements in the HMR, and fosters consistency in RSPA's handling of these matters. Additionally, this final rule

minimizes RSPA's need to seek additional information from applicants in order to complete the processing of these matters.

The procedures adopted in this final rule for approvals, registrations, and reports are limited in their application. Other Federal agencies (e.g., the United States Coast Guard (USCG) and the Federal Railroad Administration (FRA)) issue approvals or receive registrations or reports under the HMR. For example, under § 176.415, persons are required to obtain approvals from the USCG before loading or unloading certain explosives onto or from vessels. The procedures established in this rule apply only with respect to those matters under the HMR that are handled by RSPA. Those matters for which the HMR assign responsibility to other entities will continue to be handled according to the procedures of those entities.

II. Regulatory Reinvention Initiative

In a March 4, 1995 memorandum, the President directed Federal agencies to review all agency regulations and eliminate or revise those that are outdated or in need of reform. On April 4, 1995 (60 FR 17049), and July 28, 1995 (60 FR 38888), RSPA issued notices requesting comments on regulatory reform and announcing several public meetings nationwide to identify obsolete and burdensome regulations that can be eliminated from the HMR and techniques to improve RSPA's customer services. Some of the commenters responding to those notices and participating in the public meetings identified the exemption and approval procedures as areas in need of clarification and reform. This rule is consistent with the goals of the President to clarify and revise Federal agency regulations to relieve unnecessary regulatory burdens and to clarify regulatory requirements.

III. Summary of Comments and Regulatory Changes

On September 14, 1995, RSPA published a notice of proposed rulemaking (NPRM) under Docket HM-207C (60 FR 47723). In the NPRM, RSPA proposed to revise the exemption procedures of subpart B of part 107 and adopt new procedures in subpart H of part 107 for approvals, registration, and reporting information to RSPA.

RSPA received 16 comments to the NPRM from offerors and carriers of hazardous materials, chemical and packaging manufacturers, consulting firms, and the United States Department of Energy. Commenters were generally supportive of RSPA's effort to revise and clarify the procedures for exemptions and establish procedures for approvals,

registration, and reporting. The comments and RSPA's response to them are discussed below.

Part 107

Subpart A—General Provisions

§ 107.3 Definitions.

Commenters requested clarification of the difference between approvals and exemptions and, further, requested that RSPA explain the difference between an approval and a competent authority approval. An approval is a written authorization to take some action delineated in a particular regulation (e.g., § 173.21) in the HMR and is specifically authorized in that regulation. Approvals generally are limited in scope, such as in § 178.604(b)(2) that authorizes an applicant to apply for an approval to deviate from the number of samples used in conducting a leakproofness test. Because issuance of all approvals is specifically recognized in the HMR and almost all approval documents can be made available for public review, applications are not published in the Federal Register.

Sections 171.11 and 171.12 authorize compliance with international standards (i.e., the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions) and the International Maritime Dangerous Goods Code (IMDG Code)) as an alternative to compliance with certain provisions of the HMR. For certain types of activities, both the ICAO Technical Instructions and the IMDG Code have provisions which require that the activity be approved by the competent authority of the country of origin. The Associate Administrator for Hazardous Materials Safety (Associate Administrator), RSPA, is the competent authority for the United States of America (see the definition of "competent authority" in 49 CFR § 171.8).

A competent authority approval means an approval by the competent authority which is required under the provisions of international regulations, such as the ICAO Technical Instructions or the IMDG Code. To the extent that it satisfies the requirement of the international regulations, any of the following may serve as a competent authority approval: a specific regulation of subchapter A or C, an exemption or approval issued under the provisions of subchapter A or C, or a separate document issued to one or more persons by the Associate Administrator. In other words, if an activity is authorized for international transport under the HMR,

then the HMR serves as the competent authority approval. An exemption or approval may serve as a competent authority approval provided the exemption or approval does not prohibit any international transport. To facilitate international commerce, for a function that relates only to a requirement of an international standard, and not to the HMR, the Associate Administrator may issue a competent authority approval as a separate document that is not related to either an approval or an exemption under the HMR.

An exemption allows an applicant to perform a function which is *not* authorized under the HMR and which, in fact, would be a violation of the HMR in the absence of the exemption. An exemption may involve an authorization to engage in a function for which there is no provision in the regulations. A "manufacturing exemption" is an exemption issued to a manufacturer of packagings who does not offer for transportation or transport hazardous materials in packagings subject to the exemption.

The process of applying for an exemption, as provided by the Federal hazardous materials transportation law (49 USC 5117), requires that the applicant provide documentation demonstrating that the proposed process or activity will meet a level of safety at least equivalent to that provided by the HMR or, if the regulations do not contain a specified level of safety, will be consistent with the public interest. Notice of most exemption applications is published in the Federal Register for public comment prior to their being granted or denied.

For clarity, RSPA is adopting definitions in § 107.3 for "approval," "competent authority approval," "exemption," and "manufacturing exemption" to differentiate between approvals and exemptions and clarify the types of exemptions and approvals that are issued.

One commenter requested that the proposed term "accident" be replaced with "incident" to avoid confusion. The commenter stated that the word "incident" is currently used in the HMR and has the same connotation as the proposed definition of accident. The commenter also stated that other modal agencies within DOT use the term "accident" to mean a collision between moving vehicles (e.g., the FHWA expressly defines "accident" as a motor vehicle collision). RSPA agrees and is adopting the term "incident" to refer to an event resulting in the unintended or unanticipated release of hazardous material or an event which meets

incident reporting requirements in 171.15 or 171.16.

Another commenter suggested that RSPA define the term "registration" to describe what the term includes, rather than what it does not include. The commenter recommended that the wording "'registration' does not include registration under Subpart F or G of this part" be removed. RSPA agrees that providing examples of the types of registration covered under this definition is beneficial and is adding several examples. RSPA has not granted the commenter's request to delete the language referencing specific registration requirements that are not included in the definition. RSPA believes that this exclusionary language provides as much guidance as a description of what types of "registration" are included in the definition.

No comments were received concerning other proposed definitions, and those definitions are adopted as proposed.

Subpart B—Exemptions

§ 107.101 Purpose and scope. One commenter requested that all exemptions be described as "competent authority approvals" to provide for greater acceptance outside the United States since competent authority approvals are accepted internationally. An exemption concerns a variance from the HMR and not the international regulations. As previously indicated, an exemption may be used as competent authority approval to the extent that it is suitable for international transport and satisfies the approval requirement of the applicable international regulation. However, a number of exemptions, such as those applicable to transportation by motor vehicle only, are not applicable under international regulations. Therefore, RSPA is not adopting the commenter's suggestion.

Another commenter suggested that RSPA adopt only two procedures: one for approvals and exemptions, and the other for registrations and reports. The commenter contended that the requirements, procedures, and justifications related to exemptions and approvals are sufficiently different that users of the regulations are better served by RSPA providing separate, self-contained provisions for exemptions and approvals. This commenter added that since applicants are not always sure whether to submit an application requesting an exemption, approval or registration, RSPA should be responsible for determining the appropriate action since the data required for each is the same. RSPA is

not adopting the commenter's suggestion that RSPA determine the appropriate action for submitted applications because it is the applicant's responsibility to make this determination and the requirements are different. By defining the terms "exemption," "approval," and "registration," as well as clarifying the procedures for obtaining each, RSPA is assisting applicants in determining the appropriate action.

One commenter stated that the exemption procedures do not provide for carrier exemptions. The commenter requested that more general procedures be adopted for carrier exemptions because the application information differs from that required for shippers and packaging manufacturers. For consistency, RSPA utilizes the same exemption application procedure for all applicants (e.g., packaging manufacturers, shippers, and carriers). In this final rule, RSPA is clarifying the types of information required of an exemption applicant (see preamble discussion under § 107.105). Additionally, RSPA is including language in the rule under the "emergency processing" provisions of § 107.117 which should assist carriers by directing an applicant to seek an emergency exemption through the modal office for the proposed initial mode of transportation.

One commenter strongly recommended that RSPA incorporate more exemptions into the HMR to allow industry more flexibility and reduce the number of exemptions. The commenter requested that RSPA explain the standards which it utilizes to determine which exemptions are incorporated into the HMR. The commenter stated that "making this information [the standards which RSPA utilizes] public would provide a clearer picture of the need for a more flexible regulatory scheme and give a benchmark on which to assess efforts to incorporate existing exemptions."

Although RSPA has no formal set of standards for selecting exemptions to be converted to regulations of general applicability, RSPA periodically reviews existing exemptions to prioritize them as to their suitability for conversion to regulations. Whether a specific exemption is a candidate for regulatory action depends on any number of factors, such as the expressed interest of the exemption holder or others, the suitability of the exemption for conversion, rulemaking activity in related areas, agency priorities, and whether the process, packaging or activity authorized by the exemption has provided a clearly demonstrated

level of safety equivalent to that which is provided by the HMR.

Another commenter recommended that RSPA automatically incorporate exemptions into the HMR after the second renewal of the exemption. RSPA agrees that if an exemption of general applicability demonstrates a level of safety equivalent to the HMR, the provisions of the exemption ultimately may be suitable for incorporation into the HMR. However, RSPA is not adopting the commenter's recommendation. As previously discussed, a number of factors influence whether an exemption is proposed for conversion to a regulation.

§ 107.105 Application for exemption. Commenters supported RSPA's proposal to require that applicants submit exemption applications in duplicate, rather than triplicate. Commenters stated that this amendment would reduce the burden on applicants, and RSPA is adopting the requirement as proposed.

One commenter requested that applicants be required to submit the application information in numerical order consistent with the application procedures so that RSPA can quickly determine if any information is missing. While RSPA encourages applicants to follow the format utilized in the rule when submitting application materials, RSPA believes that its personnel can expeditiously determine the completeness of an application. Further, RSPA does not want to place another requirement on applicants; therefore, RSPA recommends but is not mandating use of this commenter's suggestion.

Another commenter suggested that proposed § 107.105 (a)(2) and (a)(4) be combined. Proposed paragraph (a)(2) requires that an applicant who is not an individual (i.e., the applicant is a corporation, partnership, or the like) designate an agent pursuant to the laws of the United States. Proposed paragraph (a)(4), however, requires a foreign applicant to designate an agent within the United States. This paragraph applies to both individuals and legal entities. To avoid confusion between an agent for a U.S. applicant that is not an individual and an agent for a foreign applicant, RSPA is keeping the two requirements as separate paragraphs (a)(2) and (a)(3), respectively, in this final rule.

One commenter suggested that RSPA require applicants to provide a Material Safety Data Sheet (MSDS) or emergency response information for hazardous materials in an application to confirm that this information is consistent with the Emergency Response Guidebook. RSPA agrees that an MSDS may contain

useful information, such as hazard properties of a commodity, for inclusion in an application and this information may be needed to justify an application. RSPA believes that an MSDS is not necessary in most instances and did not propose to require MSDS' or emergency response information with exemption applications. Therefore, RSPA is not adopting the commenter's suggestion.

Several commenters expressed concern regarding what they perceive as the increased quantity and detail of information required to be included in an exemption application. Some commenters stated that supplying this information would place an undue burden on applicants and make it more difficult or even impossible to obtain an exemption or approval. Without providing any supporting statistics or financial data, one commenter stated that trying to meet some of these requirements could substantially increase the paperwork burdens for both the applicant and RSPA, and the U.S. Department of Energy (DOE) stated that the new requirements would impose severe economic impacts on applicants who use contractors because the contractors would have to perform extensive analyses and compilation of information to satisfy the new requirements.

RSPA believes that the administrative burden on applicants remains unchanged under proposed § 107.105 and under the provisions adopted in this final rule. The information and analyses set forth in this final rule for exemption applications are essentially what is required under the Federal hazmat law and what RSPA historically has requested, often during the processing of the exemption. By clearly specifying this information in the regulations, RSPA hopes to minimize delays in application processing and requests for extra submissions from applicants occasioned by RSPA's having to obtain additional information from exemption applicants at a later time. Additionally, the commenters who raised these "increased burden" arguments have not submitted supporting documentation demonstrating that exemption applicants' paperwork or economic burdens will be increased by this regulatory change. Finally, RSPA notes that an applicant is not required to submit information which is inapplicable to the exemption request or which is impracticable for the applicant to obtain. Therefore, RSPA does not believe that paperwork and economic burdens upon an exemption applicant will increase, and is adopting the

regulatory change essentially as proposed.

Several commenters requested that RSPA clarify certain information required in the proposed application procedures. Specifically, one commenter recommended that RSPA consolidate and clarify the information required in proposed paragraphs (a)(1) through (a)(18). Another commenter requested clarification of what is meant in proposed § 107.105(a)(16) by "any increased risk to safety or property that may result if the exemption is granted." The commenter stated that RSPA needs to specify the extent of analysis an applicant is required to provide in the application. Another commenter requested that RSPA add language in proposed paragraphs (a)(16) and (a)(18) that applicants provide risks that "are known or could reasonably have been expected to be known" to clarify that a "full-blown" risk assessment is not intended by RSPA. Another commenter added that it is unclear whether an applicant is required to include the information in proposed paragraph (a)(18). The commenter requested that RSPA add some examples to clarify when the provision is required.

The Federal hazmat law requires each person seeking an exemption to provide a safety analysis that justifies the exemption (49 U.S.C. 5117(b)). The information required under § 107.105 is intended to elicit the information and analyses necessary to demonstrate that the requested exemption provides an equivalent level of safety to that afforded by the HMR or, if the HMR do not establish a level of safety, is consistent with the public interest and will adequately protect against risk to life and property.

The safety analyses required to support exemptions can vary greatly. The analyses may range from simple comparative analyses relied upon by an applicant seeking an exemption which will permit minor variations in packaging, to complex risk analyses for complex packaging systems involving new technologies or materials of construction. The risks presented by new technologies and materials are often more difficult to evaluate, and may require a more extensive safety analysis.

Successful shipping experience may be useful to support a safety analysis, but does not necessarily demonstrate that a particular package or transport practice provides a level of safety equivalent to that authorized. Successful shipping experience may only indicate that a package was not subjected to a drop, impact, or fire during transportation. A safety analysis

of a package or transport practice that includes exposure to normal and accident environments is a more valid indication of the level of safety provided by the package or transport practice, than simply looking to whether a history of incidents exists. Therefore, RSPA is requiring the applicant to describe all relevant shipping and incident experience of which the applicant is aware that relates to the application. The applicant also must specify safety control measures (e.g., use of a private carrier or additional packaging) necessary to demonstrate that the proposed package or transport practice meets a level of safety equivalent to that afforded by the HMR and is in the public interest. In response to commenters' requests, RSPA is clarifying the information specified in proposed paragraphs (a)(16) through (a)(18).

Several commenters stated that certain requested information may be unavailable to the applicant. One commenter stated that some of the requested information, such as service life and performance of an alternative packaging, constitutes reasons for the exemption—to find these answers by authorizing controlled shipments under an exemption. Commenters stated that the proposed changes facilitate the ability of the Associate Administrator to reject an application not deemed complete. One commenter stated that, if an applicant cannot identify a potential failure mode and its possibility of an occurrence, the application would be deemed incomplete and could be denied.

The proposed language of § 107.105 was intended to expedite processing of exemption applications for the benefit of persons seeking exemptions. RSPA acknowledges that not all information about a proposed alternative packaging or activity is available at the time an exemption is requested. However, an exemption is granted only when an applicant has provided sufficient information to demonstrate that the requested variation from the regulatory requirement will afford a level of safety equivalent to that which is provided by the HMR. This demonstration must include information relevant to the expected service, performance and limitations of the packaging.

Commenters also stated that certain information may not be applicable to some exemptions. For example, some commenters expressed concern that the requirement to provide detailed commodity information (proposed § 107.105(a)(12)) may not be necessary or appropriate for an exemption that authorizes manufacture of a packaging.

The commenters stated that lack of this information could result in the rejection of the application. Commenters requested that § 107.105 be modified to indicate that such detailed information must be included in an application only when appropriate based on the nature of the exemption being sought. In response to commenters' concerns, RSPA is requiring the applicant to provide information in the application only when it is appropriate to demonstrate that the proposal meets the statutory and regulatory standards. Therefore, this final rule indicates that an applicant need only submit information that is relevant to an application.

Other commenters expressed opposition to RSPA's proposal to extend the recommended time period for filing an exemption application from 120 days to 180 days before the requested effective date of the exemption. The commenters indicated that this extended deadline appeared to be contrary to the stated purpose of the rule—reduction of the processing time of exemption applications and renewals. Another commenter requested that RSPA also issue or deny an exemption in the same time period when a properly prepared application is submitted. RSPA's proposal was intended to parallel the Federal hazmat law requirement, 49 U.S.C. 5117, that the Secretary of Transportation issue or renew an exemption for which an application was filed, or deny such issuance or renewal, within 180 days after the first day of the month following the date of the filing of such application. RSPA understands that many parties requesting exemptions cannot anticipate their needs beyond four months. Therefore, RSPA is addressing the needs of its customers by retaining the 120-day application filing time. However, RSPA notes that 120 days is often not enough time for processing an incomplete or very complicated exemption application, and encourages parties to file an application for an exemption as early as possible.

Another commenter objected to the proposal to limit the use of manufacturing exemptions to specific plants or locations. The commenter stated that many shippers are also manufacturers and use more than one vendor to supply a packaging. The commenter requested the flexibility to use alternative suppliers of its packaging. RSPA did not propose to limit the use of manufacturing exemptions to particular plants, but to require applicants to identify the location of each facility where an exemption would be used. It was RSPA's intention to limit the

application and definition of a manufacturing exemption to a manufacturer of packagings who does not offer for transportation or transport hazardous materials in the exemption packagings it produces (i.e., a business entity engaged in the manufacturing and marketing packagings for use by other entities). A person who manufactures, marks and sells packagings under an exemption may do so at dozens of facilities without restriction; however, RSPA is retaining the requirement that applicants for manufacturing exemptions identify the location of each facility where manufacturing under an exemption will occur. The requirement does not apply to shippers who produce packagings for their own use.

Based on the foregoing, RSPA is revising the exemption application procedures essentially as proposed with modifications as described above, reformatting of the section and revising of certain provisions to make them less burdensome.

§ 107.107 Application for party status. This section is adopted essentially as proposed. Paragraph (a)(4) is revised to delete an information requirement pertaining to consent to U.S. jurisdiction. Paragraph (c) is revised to reference § 107.113 (e) and (f) for the manner by which the Associate Administrator grants or denies applications.

§ 107.109 Application for renewal. This section is adopted essentially as proposed. One commenter requested that one renewal application suffice for all parties to an exemption. A single renewal application would not provide all incident experience encountered by all parties to an exemption. Further, where there are numerous parties to an exemption and each attained party status on a different date, issuance of a blanket renewal for all parties becomes unworkable from a timing perspective. For example, persons who attained party status close to the date for the blanket renewal may find themselves immediately faced with renewal. RSPA, therefore, is not adopting this suggestion.

One commenter encouraged RSPA to extend the exemption renewal process from two years to five years to alleviate some of the administrative burdens on RSPA and the regulated industry. The commenter stated that RSPA could determine whether an exemption should continue based on any incidents that occur during the life of the exemption. Another commenter stated that an exemption period of three years may be more appropriate for the information required in the revised application procedures. Another

commenter suggested that RSPA seek a legislative change that allows exemptions to remain in effect until such time as the Secretary finds that continuation is no longer in the public interest or the exemption holder withdraws the exemption. The Federal hazardous materials transportation law (49 U.S.C. 5117) currently provides that an exemption can be issued for no more than a two-year maximum period of time; therefore, RSPA lacks statutory authority to extend the two-year period. However, on March 27, 1996, a legislative proposal was sent to Congress which included a request that the two-year exemption limitation be extended to four years.

§ 107.111 Withdrawal. One commenter requested that RSPA clarify that all documents deemed confidential by the Associate Administrator in accordance with § 107.5 that are related to an active or inactive application will remain confidential. RSPA accepts the commenter's suggestion and is adding a statement in this section clarifying this point and further clarifying that the time period for which confidential treatment will be afforded comports with the guidelines of the Freedom of Information Act (5 U.S.C. 552(b)). Specifically, submissions which fall within the definition of "trade secrets" or "commercial or financial information obtained from a person and privileged or confidential" will remain confidential indefinitely, unless the party requesting the confidential treatment notifies the Associate Administrator that the confidential treatment is no longer desired.

§ 107.113 Application processing. Commenters raised concerns about the proposed language in paragraph (a) with respect to the time frame in which a determination is made concerning whether an application is complete. The commenters requested that RSPA remove the proposed wording "usually is made" and retain the current wording "will be made." One commenter stated that the requirement is reasonable since it is only a determination of the application's completeness and not a decision on its merits. RSPA agrees with the commenter and is retaining the current wording in paragraph (a) as requested.

Seven of the 15 commenters were strongly opposed to RSPA's proposal to consider the existence of pending or completed enforcement actions as a factor in determining whether an exemption applicant demonstrates fitness to conduct an activity that would be authorized under the exemption. One commenter stated that RSPA's technical experts should be able to determine the

safety of the subject of a proposed exemption request without reference to enforcement actions on unrelated subjects. Another commenter stated that, historically, RSPA could deny an exemption application on any basis. The commenter stated that the proposed language could create an unnecessarily adversarial situation. One commenter stated that it objected to consideration of pending or completed enforcement actions as "*prima facie* evidence of an applicant's capability or integrity." The commenter stated that, in cases where assessed penalties were low, respondents in enforcement actions may have adopted a "no contest" posture in an enforcement action and paid a penalty, rather than expend the time and money necessary to litigate an action. If enforcement history is used against these respondents, the commenter said that a business decision to not contest the action would have more severe consequences than successful resistance to an enforcement action by a more litigious respondent. The commenter also stated that denial of an exemption or approval because of enforcement history would punish the violator twice for a violation. The commenter added that Congress, in developing the hazardous materials transportation legislation, had considered and rejected adoption of a licensing concept because existing enforcement powers are sufficiently strong to address violations, without denying authority to operate under an exemption or approval. The commenter concluded that the "enforcement history" provision should be very narrowly tailored: only prior violations which indicate flagrant disregard for HMR compliance should be considered. Another commenter suggested that only enforcement actions of a "significant nature" be considered evidence of insufficient competence or integrity.

In general, RSPA believes that consideration of completed enforcement actions and certain pending enforcement actions as evidence of an applicant's capability and integrity is a legitimate means of protecting the public. It is not punishment but recognition of relevant information. Enforcement actions may be indicative of an applicant's ability or willingness to comply with the applicable regulations. Because the Associate Administrator is considering whether to authorize compliance with specific alternatives to the HMR, the likelihood of an applicant's compliance with those alternatives is relevant to public safety.

One commenter suggested that RSPA revise paragraph (a)(5) to read "The application may be denied if the

shipping and accident experience supplied by the applicant in accordance with § 107.105(a) which directly relates to the exemption being sought demonstrates that approval of the application poses a potential threat to life or property." Limiting consideration to only an applicant's shipping and accident experience which directly relates to the exemption sought fails to protect the public from applicants with poor compliance histories who seek exemptions to authorize new hazardous materials transportation activities.

One commenter stated that the rule is unclear as to whether violations that qualify for the ticketing program are considered "enforcement actions" under the proposed rule. The commenter recommended that RSPA not consider ticketed violations. RSPA will consider ticketed violations as part of an applicant's compliance history, using the criteria specified in § 107.331 to assess the weight to be given to the violation.

DOE requested clarification of the provision concerning consideration of past violations in determining an applicant's capability and integrity as it applies to government entities that use contractors. DOE also asked RSPA to clarify the terms "pending" and "complete" as used in the proposed regulation and the type of activity that warrants a determination of "lack of integrity."

For purposes of regulatory compliance, RSPA looks to the entity whose act or omission constitutes a violation of the HMR. In response to DOE's question regarding the status of an enforcement action as either "pending" or "complete," an enforcement case historically has been initiated by issuance of a Notice of Probable Violation (NOPV). However, RSPA recently established a pilot "ticketing" program permitting initiation of an enforcement case by issuance of a ticket. Thus, a case is "pending" from the date of issuance of either the NOPV or the ticket until a final order has been issued and the time for appeal has expired. If the order has been appealed in a timely manner, the case is "pending" until the RSPA Administrator (Administrator) issues an Action on Appeal. When an order has become final or when an order was appealed and the Administrator has issued an Action on Appeal, the enforcement action is considered to be "complete."

RSPA is adopting the proposed rule with several modifications. In making a determination to grant or deny a request for an exemption, RSPA will consider information submitted in the

application package, compliance history of the applicant, and other information available to the Associate Administrator.

Another commenter objected to the proposed language providing that an applicant who failed to respond within 30 days to a request for additional information would have his or her application deemed incomplete and denied. The commenter stated that, where reasonable and appropriate, an extension of time should be granted. RSPA understands the commenter's concern. Currently, if an applicant fails to respond to a request for additional information for good cause, RSPA grants a 30-day extension. To clarify this point, RSPA is adding a provision in this section and § 107.709 (approval application processing) that allows an applicant to submit a written request for a 30-day extension.

Finally, commenters stated that, while they favored initiating a rulemaking in addition to issuing an exemption, they did not agree with initiating a rulemaking in lieu of issuing an exemption. The commenters stated that the latter penalized an applicant because rulemaking usually has taken longer than processing of an exemption request. One of the commenters noted that, in its experience, RSPA staff faced with this situation would issue an exemption to the applicant, and concurrently initiate a rulemaking action, which could lead ultimately to issuance of a rule of general applicability.

RSPA has seldom issued a rulemaking in lieu of processing an exemption application, and RSPA does not intend to change that policy. However, RSPA believes that if the subject of an exemption application is so broad and of such general applicability that it should result in a rulemaking action, going forward with issuance of the exemption during the pendency of the rulemaking process may have the effect of prejudging the rulemaking. A large number of applications for similar exemptions or "party to" status may also adversely impact RSPA's programs. For these reasons, the Associate Administrator may either process the exemption application, use the application as a basis for rulemaking, or do both. When an applicant meets all other regulatory requirements and demonstrates a compelling necessity for an exemption, the Associate Administrator may issue an exemption.

§ 107.115 Priority processing. Some commenters supported RSPA's proposal to establish a new priority processing category for applications that do not qualify for emergency processing but

merit more expeditious consideration than routine processing. One commenter stated that overall processing time should be reduced. However, other commenters expressed concern that the processing time of routine and priority exemption applications would be the same if each must undergo the same review process as proposed. Some commenters opposed a priority processing category because it would delay the preparation and processing of applications for exemptions as each applicant tried to demonstrate significant economic loss and RSPA evaluated each application.

One commenter requested that RSPA provide an indication of the time in which RSPA would respond to a priority exemption application. Another commenter requested that RSPA provide the Associate Administrator the flexibility to issue temporary exemptions to applicants who qualify for priority processing while the application is being processed to minimize financial burdens on the applicant. Commenters stated that cases that have the potential for severe economic harm are already handled by emergency processing.

Another commenter requested that RSPA clarify why current emergency processing should be replaced by two separate processing categories that appear to be more complex. The commenter noted that, in the NPRM, priority processing would be based on economic factors and emergency processing would be based on life and property criteria. The commenter stated that, in the current emergency processing procedures, RSPA considers either endangerment to life or property or serious economic loss. The commenter asked whether RSPA, by proposing two separate processing categories, is suggesting that it considers a health threat to be more important than economic loss, even if the health threat is remote and the economic loss is substantial.

One commenter objected to the proposed rule requiring non-government entities to meet higher standards than government entities to qualify for priority processing. Based on the comments, RSPA has determined that adding a priority processing category is not warranted. Therefore, the proposal is not adopted in this final rule.

§ 107.117 Emergency processing. Commenters favored the continued existence of an emergency processing category. One commenter stated that the current procedures require that "an applicant need only show that existing conditions necessitate the transportation

of a hazardous material, or that the protection of life and property would not be possible if such material is not transported." The commenter objected to the proposed emergency processing procedures in that they require applicants to demonstrate that such processing is necessary to prevent "significant injury" to persons or property. The commenter requested that RSPA remove the term "significant" because it is subjective. The current procedures allow only applicants who can show that a life-threatening situation exists to qualify for emergency processing. In the proposed rule, RSPA responded to requests of applicants that a broader standard be utilized in determining that emergency processing is warranted. At the same time, RSPA proposed to include the term "significant" to set a reasonable limit on the expanded criteria, and believes that the term is necessary to ensure fairness to applicants awaiting routine processing by not allowing applicants to allege "minor" injuries or losses as the basis for emergency processing.

One commenter stated that, under the proposed rule, the Associate Administrator could deny priority or emergency processing if timely application could have been made. The commenter requested that RSPA allow an applicant to explain circumstances that may have contributed to the applicant not filing an application in a timely manner so that the applicant may still be considered for priority or emergency processing. RSPA contemplates that an applicant seeking emergency processing will provide evidence of circumstances that prevented the applicant from filing the application in a timely manner.

One commenter stated that it is unlikely that applicants who request emergency processing will be able to supply the information specified in proposed § 107.105(a)(17) for analyses, data, or test results. In response to comments to the proposed application procedures in § 107.105, RSPA is clarifying the extent to which applicants are required to supply analyses, data, or test results. See preamble discussion under § 107.105.

Another commenter stated that the "emergency processing" language appeared to apply only to "carrier" exemptions and questioned its applicability to exemptions issued to shippers. The commenter stated that the proposed rule directs carriers to send the exemption application to the office of the modal administration which has oversight responsibility for the carrier's mode of transportation (e.g., FHWA, the Federal Railroad Administration, etc.).

The commenter stated that shippers often utilize more than one mode and therefore the proposed requirement that an application be sent to only one modal office requires "fine tuning." Any applicant, including a shipper, seeking an emergency exemption must submit the application to the specified modal contact official for the *initial* mode of transportation to be utilized.

Some commenters suggested that emergency exemption applications be submitted directly to RSPA, consistent with other exemption submissions, and not to the specific modal administration. An emergency exemption application is most expeditiously handled when submitted to the applicable modal administration, where an immediate analysis of the proposed transportation can be performed by personnel having expertise in the affected mode of transportation. This process will eliminate the need for RSPA to forward the exemption application to the affected mode for input, thus allowing for more expeditious application review and more timely and efficient customer service.

In this final rule the section is adopted essentially as proposed with editorial changes for clarity. Proposed paragraph (f) is deleted as unnecessary, and proposed paragraph (g) and (h) are redesignated as (f) and (g), respectively.

§ 107.121 Modification, suspension, or termination of exemption or grant of party status. One commenter expressed concern that the proposed rule would allow termination simply "for no other reason than if the Department wants it terminated regardless of the shipping and incident experience * * *." The commenter argued that: (1) This provision appears contrary to the performance-oriented packaging system; (2) this provision gives no regard to contracts for the supply of materials between shippers and consignees; (3) the exemption holder is placed at the mercy of RSPA personnel; (4) it is doubtful that the proposed rule comports with the intent of Congress; (5) the proposed rule does not comport with the preamble, which indicates that the purpose of the NPRM is to expedite processing of applications and promote program consistency; and (6) based on the foregoing, the proposed rule is "significant."

This rule clarifies standards for exemption modification, suspension, and termination and gives the Associate Administrator more flexibility to determine which of the three remedies is appropriate in a given situation. Presently, the Associate Administrator may modify or suspend an exemption if

its provisions are violated or if new information suggests that the activity under the exemption creates a risk to life or property. The Associate Administrator may terminate an exemption if it is no longer consistent with the public interest, is no longer necessary due to a change in the regulations, or was granted on the basis of false or misleading information. The "public interest" criterion encompasses all grounds on which the Associate Administrator may terminate an exemption, but it is vague. Furthermore, the sharp distinction that the existing regulation draws between those conditions that justify modifying or suspending an exemption and those that justify terminating it handicap the Associate Administrator in taking the action that is most appropriate in a particular circumstance. For example, the current regulation may require the termination of an exemption when modification would suffice.

The Associate Administrator's decision to modify, suspend, or terminate an exemption must be based on the criteria specified in the proposed regulatory text (see 49 CFR 107.121 (a) and (b)).

In this final rule § 107.121 is adopted essentially as proposed. Paragraph (d) is added to specify conditions by which the Associate Administrator may declare a proposed action immediately effective.

§ 107.123 Reconsideration. One commenter suggested that RSPA clarify that applications denied pursuant to § 107.113(d) are eligible for reconsideration in accordance with this section. RSPA agrees that they are eligible for reconsideration, but sees no reason for a rule change. In the NPRM, RSPA specifically stated that applicants may request reconsideration of decisions made under §§ 107.113(g), 107.117(e), and 107.121(c). This section is adopted as proposed.

Subpart C—Preemption

One commenter suggested that "Associate Administrator for Hazardous Materials Safety" be revised to read "Associate Administrator" for consistency with other sections in part 107. RSPA agrees and, in the interest of achieving consistency, is modifying the language of subpart C as suggested in all general references to the Associate Administrator. Also, RSPA is making other minor modifications to the regulatory language of subpart C for clarity and consistency.

§ 107.205 Notice. One commenter recommended changing "may publish notice of an application" in paragraph (b), to "will publish notice of, including

an opportunity to comment on, an application." RSPA agrees and is revising the paragraph to require publication of the notice in the Federal Register.

In paragraph (c) and in §§ 107.211(c), 107.217(c), and 107.223(c), RSPA is adding a sentence, "Late-filed comments are considered so far as practicable." This sentence reflects the manner in which RSPA has handled late-filed comments in preemption matters and is consistent with § 106.23 concerning the handling of late-filed comments in rulemaking actions. Because this change is merely a modification to a rule of agency procedure, public notice and an opportunity to comment on the change are not mandated by the Administrative Procedure Act.

§ 107.209 Determination.

Commenters also favored revision of paragraph (c) to change "may publish" to "will publish". RSPA agrees and is making this change.

One commenter disagreed with the proposed deletion of paragraph (b) to eliminate the Associate Administrator's authority to issue a preemption determination on his or her own initiative. The commenter did not agree that the authority was eliminated by the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA). The commenter recommended adding language allowing the Associate Administrator to issue a preemption determination where he or she is directly affected by a requirement of a State or political subdivision or Indian tribe. RSPA disagrees. The pre-HMTUSA regulations authorized RSPA to issue inconsistency rulings, which were merely advisory in nature, on its own initiative. However, in enacting HMTUSA, Congress replaced these advisory inconsistency rulings with authorization to issue binding preemption determinations and, further, provided for issuance of preemption determinations only in response to applications by "directly affected" persons. See 49 U.S.C. 5125(d). In light of these statutory changes, RSPA believes that it is inappropriate for the Associate Administrator to initiate a preemption determination proceeding on his or her own initiative. Therefore, paragraph (b) is eliminated as proposed.

§ 107.211 Petition for reconsideration. RSPA proposed to amend this section by revising paragraph (a) to read "The petition must be filed within 20 days of publication of the determination in the Federal Register." A commenter expressed concern about this language in light of RSPA's proposal to make publication

optional. As previously stated, RSPA will publish all preemption determinations and, therefore, this language will not be problematic. The proposal is adopted in this final rule.

§ 107.213 Judicial review. In the NPRM, RSPA proposed to add a new section to allow a party to a proceeding under § 107.203(a) to seek review by the appropriate district court of the United States of a decision of the Administrator by filing a petition with the court within 60 days after the Administrator's decision becomes final. One commenter recommended that references to the "Administrator" be changed to the "Associate Administrator." RSPA agrees with this suggestion and amends this section accordingly. The commenter also requested that RSPA specify when its decision on a petition for reconsideration of a preemption determination becomes final. The Associate Administrator's decision becomes final when it is published in the Federal Register. RSPA is amending this section to clarify this issue. In addition, RSPA is revising the wording "decision" to read "determination" to minimize confusion.

§ 107.217 Notice. One commenter suggested that the word "ruling" in paragraph (d) be changed to "outcome of a determination on the application." RSPA agrees with this suggestion, and is making the change accordingly.

§ 107.221 Determination. A commenter asked that, in paragraph (d), the word "may" be changed to "will" concerning publication of determinations in the Federal Register. RSPA agrees and is making this change.

§ 107.223 Petition for reconsideration. One commenter suggested that the term "order" be changed to "determination." For clarity and consistency, RSPA is making this change.

§ 107.227 Judicial review. RSPA is amending this section for consistency with § 107.213. See preamble discussion under § 107.213.

Subpart D—Enforcement

§ 107.305 Investigations. A commenter opposed the proposal to authorize RSPA inspectors to issue subpoenas for the production of documents or other tangible evidence because of the potential for abuse. RSPA is adopting the provision as proposed. RSPA inspectors are broadly empowered, through delegations of investigatory authority under the Federal hazmat law, 49 U.S.C. 5121, to collect evidence reasonably related to hazardous materials compliance inspections. Their use of a subpoena without involvement of RSPA's Office

of the Chief Counsel will improve program efficiency by expediting the information-gathering process. The potential for inspectors to abuse this authority is minimal because the Director of the Office of Hazardous Materials Enforcement must approve the issuance of the subpoena and the recipient of the subpoena may seek review of the subpoena by RSPA's Office of the Chief Counsel under § 107.13(h).

For clarity, RSPA added the words "also known as "hazmat inspectors" or "inspectors" after the words "Hazardous Materials Enforcement Specialists." This addition was not proposed in the NPRM, but is added on RSPA's initiative to provide consistency between § 107.305(b) and subparagraphs (1), (2), and (3) which refer to "inspectors."

§ 107.315 Admission of violations. Paragraphs (c) and (d) are revised to delete the recommendation that payment of a civil penalty be documented by forwarding a photocopy of the respondent's electronic fund transfer receipt or check to the Office of the Chief Counsel. This administrative change, not in the NPRM, eliminates a potential paperwork burden on the regulated industry. Because this change is merely a modification to a rule of agency procedure, public notice and opportunity to comment on the change are not required by the Administrative Procedure Act.

§ 107.331 Assessment considerations. This section is adopted essentially as proposed, with a minor editorial revision.

Subpart H—Approvals, Registrations and Submissions.

§ 107.107 Purpose and scope. This section is adopted as proposed.

§ 107.705 Registration and reporting. One commenter recommended that RSPA develop a standard form in place of general procedures for registrations and reports. RSPA does not believe that a standard form is practical, considering the variation in information required for the numerous approvals, registrations, and reports that would have to be accommodated by a standard generic form.

Except as discussed in the following paragraph, this section is adopted as proposed.

§ 107.707 Applications. The proposed provisions for renewal of approvals state that RSPA will issue a written extension to operate under an expired approval until RSPA makes a final determination on the application. One commenter requested that the renewal procedures for approvals be

consistent with renewal procedures for exemptions in that if an application is submitted at least 60 days prior to the expiration date, the expiration is automatically extended until RSPA makes a final determination on the application. RSPA agrees with the commenter, and is adopting the suggestion. Further, since the requirements for registration and reporting specified in the proposed § 107.705 and the requirements for an approval application specified in § 107.707 are essentially the same, RSPA is eliminating the separate language of § 107.707, and combining the "registration and reporting" requirements of § 107.707 with the "approval application" requirements of § 107.705, in a section entitled "Registrations, reports, and applications for approval."

§ 107.709 Application processing. Commenters again expressed opposition to RSPA's proposal to permit the Associate Administrator to consider pending or completed enforcement actions in determining whether an approval application is processed or denied. This issue is discussed under § 107.113 and RSPA is modifying this section similarly.

§ 107.711 Withdrawal. With respect to documents submitted in conjunction with an exemption application which is later withdrawn, one commenter requested that RSPA clarify that all documents deemed confidential by the Associate Administrator in accordance with § 107.5 that are related to an active or inactive application will remain confidential. RSPA has agreed to do so, and is extending this confidential treatment to documents submitted in conjunction with an approval application. See preamble comments to 49 CFR § 107.111.

§ 107.713 Approval modification, suspension, or termination. One commenter raised the same concerns about the proposed procedures for modification, suspension, or termination of approvals as he raised regarding modification, suspension, or termination of exemptions. RSPA discussed these issues under § 107.121. Paragraph (d) is added to specify conditions by which the Associate Administrator may declare a proposed action immediately effective. Otherwise, the section is adopted as proposed.

§ 107.715 Reconsideration. Paragraph (b) is adopted as proposed.

§ 107.717 Appeal. Proposed paragraph (c) is not adopted for the same reasons as discussed under § 107.715 above. Otherwise, the section is adopted as proposed.

Part 171

§ 171.1 Purpose and scope. One commenter recommended that the wording "in commerce" be added following "hazardous materials" throughout this section for clarity and consistency with the Federal hazardous material transportation law. RSPA agrees and is modifying paragraph (a) accordingly.

Additionally, a new paragraph (d) is added, as proposed, to clarify that the requirements of subchapter C are applicable to the use of terms and symbols prescribed in this subchapter for marking, labeling, placarding, and describing hazardous materials and packagings used in their transport.

§ 171.2 General requirements. The modifications of paragraphs (a) through (d), and the addition of paragraph (h) are adopted essentially as proposed in the NPRM, with minor modifications to the regulatory language for accuracy and clarity. Identifications listed in paragraph (d) have been expanded to include most, if not all, of the identifications covered by the regulations.

§ 171.3 Hazardous waste. A commenter objected to RSPA's proposal to eliminate paragraph (c) of this section; the commenter opined that the paragraph implements a requirement of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6923(b), that all RCRA rules issued by the Environmental Protection Agency be consistent with the Federal hazmat law and the HMR. The commenter also stated that retention of this provision is necessary to inform states implementing RCRA of the necessity for consistency with the Federal hazmat law and the HMR. For preemption purposes, RSPA looks at hazardous waste issues together with issues covering all other hazardous materials. RCRA's directive that EPA's hazardous waste requirements be consistent with the Federal hazmat law does not mandate that RSPA establish a separate preemption provision for hazardous waste. Therefore, RSPA is deleting paragraph (c), including the note contained therein, as proposed.

§ 171.8 Definitions. RSPA is adopting a definition for "approval" and revising the definition for "person", as proposed. In addition, RSPA is adding a definition for "exemption" for clarity. Because this latter change is merely informative, public notice and opportunity to comment on the change are not required by the Administrative Procedure Act.

Part 172

§ 172.302 General marking requirements for bulk packagings. A

commenter requested that RSPA authorize markings for small portable tanks and intermediate bulk containers (IBC's) to be only one inch high. The commenter suggested that, instead of incorporating the minimum height of exemption number markings into § 172.302(c), RSPA should cross-reference § 172.302(b), which requires exemption markings to be the same size as other required markings on bulk packagings and makes the marking size dependent upon the size and capacity of the packaging. The commenter also requested that width requirements for exemption markings be specified. RSPA is considering changes to the marking height and width requirements under a separate rulemaking action. Therefore, the proposed change in the NPRM and this commenter's suggested change regarding size of exemption markings are not adopted as part of this final rule.

Part 173

§ 173.22a Use of packagings authorized under exemptions. Proposed paragraph (c) is revised to refer to "offeror" rather than "shipper." Also, a sentence is added to clarify that a carrier shall maintain a copy of an exemption in the same manner as for a shipping paper.

Part 178

§ 178.3 Marking of packagings. Paragraph (d) is adopted as proposed.

IV. Rulemaking Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

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

This final rule will not result in any additional costs to persons subject to the HMR. Therefore, preparation of a regulatory impact analysis or regulatory evaluation is not warranted.

B. Executive Order 12612

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

(i) the designation, description, and classification of hazardous material;

(ii) the packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(iii) the preparation, execution, and use of shipping documents pertaining to hazardous material and requirements respecting the number, content, and placement of such documents;

(iv) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or

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

Title 49 U.S.C. 5125(b)(2) provides that if DOT issues a regulation concerning any of the covered subjects after November 16, 1990, DOT must determine and publish in the Federal Register the effective date of Federal preemption. That effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. The effective date of Federal preemption for this final rule is October 1, 1996. Because RSPA lacks discretion in this area, preparation of a Federalism assessment is not warranted.

C. Regulatory Flexibility Act

I certify that this final rule will not have a significant economic impact on a substantial number of small entities. This final rule amends existing requirements and adds new procedural provisions to clarify existing practice. The amendments contained in this rule do not impose any new requirements on persons subject to the HMR; thus, there are no direct or indirect adverse economic impacts for small units of government, businesses, or other organizations.

D. Paperwork Reduction Act

Information collection requirements applicable to applications for exemptions contained in this final rule are unchanged in substance and amount of burden from those currently approved by the Office of Management and Budget (OMB) under OMB control number 2137-0051. RSPA is requesting revision of the OMB approval to update section references in accordance with changes made in this final rule. Information collection requirements applicable to approvals are unchanged in substance and amount of burden from those previously approved under OMB control number 2137-0557. RSPA is requesting reinstatement and revision of this approval from OMB and will

display, through publication in the Federal Register, the control number when it is approved by OMB. Public comment on this request has been invited through publication of a Federal Register notice on March 5, 1996 (61 FR 8706). Under the Paperwork Reduction Act of 1995, no person is required to respond to a requirement for collection of information unless the requirement displays a valid OMB control number.

E. Regulation Identification Number (RIN)

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

List of Subjects

49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Packaging and containers, Penalties, Reporting and recordkeeping requirements.

49 CFR Part 171

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

49 CFR Part 173

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

49 CFR Part 178

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

In consideration of the foregoing, 49 CFR chapter I is amended as follows:

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

1-2. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101-5127, 44701; 49 CFR 1.45, 1.53.

3. In § 107.3, definitions are added in alphabetical order to read as follows:

§ 107.3 Definitions.

* * * * *

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, Research and Special Programs Administration.

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

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

Approval means a written authorization, including a competent authority approval, from the Associate Administrator to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter.

* * * * *

Associate Administrator means the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration.

* * * * *

Competent Authority Approval means an approval by the competent authority which is required under the provisions of an international standard, such as the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air or the International Maritime Dangerous Goods Code. To the extent that it satisfies the requirement of the international standard, any of the following may serve as a competent authority approval: a specific regulation of this subchapter or subchapter C of this chapter, an exemption or approval issued under the provisions of this subchapter or subchapter C of this chapter, or a separate document issued to one or more persons by the Associate Administrator.

Exemption means a document issued under the authority of 49 U.S.C. 5117 by the Associate Administrator that authorizes a person to perform a function that is not otherwise authorized under this subchapter, subchapter C, or other regulations issued under 49 U.S.C. 5101-5127 (e.g., Federal Highway Administration routing).

* * * * *

Filed means received at the Research and Special Programs Administration

office designated in the applicable provision or, if no office is specified, at the Office of Hazardous Materials Exemptions and Approvals (DHM-30), Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street SW., Washington DC, 20590-0001.

Holder means the person in whose name an exemption or approval has been issued.

* * * * *

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.

* * * * *

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

Manufacturing exemption means an exemption 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 exemption is an exemption issued to a manufacturer of packagings who does not offer for transportation or transport hazardous materials in packagings subject to the exemption.

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

* * * * *

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 with RSPA as a cylinder retester pursuant to 49 CFR 173.34(e)(1), or 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.

* * * * *

4. In § 107.5, paragraph (a) is revised to read as follows:

§ 107.5 Request for confidential treatment.

(a) If any person filing a document with the Associate Administrator claims that some or all the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure, and if that person requests the Associate Administrator not to disclose the information, that person shall file, together with the document, a second copy of the document with the confidential information deleted. The person shall indicate each page of the original document that is confidential or contains confidential information by marking or stamping "confidential" on each page for which a claim of confidentiality is made, and may file a statement specifying the justification for the claim of confidentiality. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, that person shall include a statement as to why the information is privileged or confidential. If the person filing a document does not mark or stamp a document as confidential or submit a second copy of the document with the confidential information deleted, the Associate Administrator may assume that there is no objection to public disclosure of the document in its entirety.

* * * * *

§ 107.5 [Amended]

5. In addition, in § 107.5, in paragraph (b), the phrase "Associate Administrator for Hazardous Materials Safety" is revised to read "Associate Administrator" both places it appears.

6. Subpart B of part 107 is revised to read as follows:

Subpart B—Exemptions

Subpart B—Exemptions

- 107.101 Purpose and scope.
- 107.105 Application for exemption.
- 107.107 Application for party status.
- 107.109 Application for renewal.
- 107.111 Withdrawal.
- 107.113 Application processing and evaluation.
- 107.117 Emergency processing.
- 107.121 Modification, suspension or termination of exemption or grant of party status.
- 107.123 Reconsideration.
- 107.125 Appeal.

107.127 Availability of documents for public inspection.

* * * * *

§ 107.101 Purpose and scope.

This subpart prescribes procedures for the issuance, modification and termination of exemptions 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 exemption.

(a) *General.* Each application for an exemption or modification of an exemption must—

(1) Be submitted in duplicate and, for timely consideration, at least 120 days before the requested effective date to: Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001. Attention: Exemptions, DHM-31;

(2) State the name, street and mailing addresses, and telephone number of the applicant; if the applicant is not an individual, state the name, street and mailing addresses, and telephone number of an individual designated as an agent of the applicant for all purposes related to the application;

(3) If the applicant is not a resident of the United States, a designation of agent for service in accordance with § 107.7 of this part; and

(4) For a manufacturing exemption, a statement of the name and street address of each facility where manufacturing under the exemption will occur.

(b) *Confidential treatment.* To request confidential treatment for information contained in the application, the applicant shall comply with § 107.5(a).

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

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

(2) Specification of the proposed mode or modes of transportation;

(3) A detailed description of the proposed exemption (e.g., alternative packaging, test, procedure or activity) 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 exemption is sought;

(5) A statement outlining the applicant's basis for seeking relief from compliance with the specified regulations and, if the exemption is requested for a fixed period, a

description of how compliance will be achieved at the end of that period;

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

(7) Identification and description of the hazardous materials planned for transportation under the exemption;

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

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

(d) *Justification of exemption proposal.* The application must demonstrate that an exemption 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;

(2) A statement identifying any increased risk to safety or property that may result if the exemption 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, that the proposed alternative will achieve a level of safety that is at least equal to that required by the regulation from which the exemption 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.

§ 107.107 Application for party status.

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

(b) Each application filed under this section must—

(1) Be submitted in duplicate to: Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001. Attention: Exemptions, DHM-31;

(2) Identify by number the exemption application or exemption to which the applicant seeks to become a party;

(3) State the name, street and mailing addresses, and telephone number of the applicant; if the applicant is not an individual, state the name, street and mailing addresses, and telephone number of an individual designated as the applicant's agent for all purposes related to the application; and

(4) If the applicant is not a resident of the United States, provide a designation of agent for service in accordance with § 107.7.

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

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

§ 107.109 Application for renewal.

(a) Each application for renewal of an exemption or party status to an exemption must—

(1) Be submitted in duplicate to: Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590–0001. Attention: Exemptions, DHM–31;

(2) Identify by number the exemption for which renewal is requested;

(3) State the name, street and mailing addresses, and telephone number of the applicant; if the applicant is not an individual, state the name, street and mailing addresses, and telephone number of an individual designated as an agent of the applicant for all purposes related to the application;

(4) Include either a certification by the applicant that the original application, as it may have been updated by any application for renewal, remains accurate and complete; or include an amendment to the previously submitted application as is necessary to update and assure the accuracy and completeness of the application, with certification by the applicant that the application as amended is accurate and complete; and

(5) Include a statement describing all relevant shipping and incident experience of which the applicant is aware in connection with the exemption since its issuance or most recent renewal. If the applicant is aware of no incidents, the applicant shall so certify. When known to the applicant, the statement should indicate the approximate number of shipments made

or packages shipped, as the case may be, and number of shipments or packages involved in any loss of contents, including loss by venting other than as authorized in subchapter C.

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

§ 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 RSPA dockets or files. Applications that are eligible for confidential treatment under § 107.5 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 exemption, modification of exemption, party to exemption, or renewal of an exemption 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 exemption, modification of exemption, or party to exemption, and within 15 days of receipt of an application for renewal of an exemption. If an application is determined to be incomplete, the applicant is informed of the reasons.

(b) An application, other than a renewal, party to, or emergency exemption application, that 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 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.

(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 exemption 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 exemption. 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 whether the application is granted or denied. A denial contains a brief statement of reasons.

(h) An exemption and any renewal thereof terminates according to its terms or, if not otherwise specified, two years after the date of issuance. A grant of party status to an exemption, unless otherwise stated, terminates on the date that the exemption 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 exemption grants, denials, and modifications and all exemption applications withdrawn under this section.

§ 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 U.S. Department of Transportation official deems necessary to process the application. An application on an emergency basis must be submitted to the U.S. Department of Transportation 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:* Director, Office of Motor Carrier Research and Standards, Federal Highway Administration, U.S. Department of Transportation, Washington, DC 20590-0001, 202-366-4001 (day); 202-267-2100 (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, 202-366-0509 or 366-0523 (day); 202-267-2100 (night).

(5) *Water Transportation:* Chief, Hazardous Materials Standards Branch, Operating and Environmental Standards Division, United States Coast Guard, U.S. Department of Transportation, Washington, DC 20593-0001, 202-267-1577 (day); 202-267-2100 (night).

(e) On receipt of all information necessary to process the application, the receiving Department of Transportation 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 exemption. 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 exemption, 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 exemption.

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

(a) The Associate Administrator may modify an exemption or grant of party status on finding that—

(1) Modification is necessary so that an exemption 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 an exemption or grant of party status, as appropriate, on finding that—

(1) Because of a change in circumstances, the exemption 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 exemption 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 exemption 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 exemption.

(c) Except as provided in paragraph (d) of this section, before an exemption or grant of party status is modified, suspended or terminated, the Associate Administrator notifies the holder or party 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 or party may file a written response that shows cause why the proposed action should not be taken 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 or party 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.

§ 107.123 Reconsideration.

(a) An applicant for exemption, an exemption holder, or an applicant for party status to an exemption 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 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 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.

§ 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 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. The Administrator's decision is the final administrative action.

§ 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, Research and Special Programs Administration, Dockets Unit, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001, Room 8421. Office hours are 8:30 a.m. to 5:00 p.m., Monday through Friday, except holidays when the office is closed. Copies of available documents may be obtained as provided in part 7 of this title.

(b) Documents available for inspection do not include materials determined to be withheld from public disclosure under § 107.5 and in accordance with the applicable provisions of section 552(b) of title 5, United States Code, and part 7 of this title.

7. In § 107.201, paragraph (d) is revised to read as follows:

§ 107.201 Purpose and scope.

* * * * *

(d) Unless otherwise ordered by the Associate Administrator, an application for a preemption determination which includes an application for a waiver of preemption will be treated and processed solely as an application for a preemption determination.

8. In § 107.202, in paragraph (a), the introductory text is revised to read as follows:

§ 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 material transportation law, this subchapter or subchapter C that concerns that subject, is preempted:

* * * * *

§ 107.202 Amended]

9. In addition, in § 107.202, in paragraph (b)(3), the wording "49 U.S.C. 5125 (b) or (c)" is revised to read "49 U.S.C. 5125(c)".

§ 107.203 [Amended]

10. In § 107.203, the following changes are made:

a. In paragraph (a), the wording "a State, political subdivision, or Indian tribe" is revised to read "a State or political subdivision thereof or an Indian tribe" each place it appears.

b. In paragraphs (a) and (d), the phrase "for Hazardous Materials Safety" is removed immediately following "Associate Administrator" each place it appears.

11. Section 107.205 is revised to read as follows:

§ 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 Associate Administrator. The application filed with the Associate Administrator 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 Associate Administrator 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 Associate Administrator with respect to an application filed under this section shall send a copy of the comments to the applicant and certify to the Associate Administrator that he or she has complied with this requirement. The Associate Administrator 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.

§ 107.207 [Amended]

12. In § 107.207, the following changes are made:

a. In paragraph (a), the wording "or her" is added immediately following the word "his" each place it appears.

b. In paragraphs (a) and (b), the wording "for Hazardous Materials Safety" is removed immediately following "Associate Administrator" each place it appears.

c. In paragraphs (a) and (b), the wording "or she" is added immediately following the word "he" each place it appears.

13. In § 107.209, paragraph (b) is removed, and paragraphs (c), (d), and (e) are redesignated as paragraphs (b), (c), and (d), respectively, and newly designated paragraph (c) is revised to read as follows:

§ 107.209 Determination.

* * * * *

(c) The Associate Administrator 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 Associate Administrator will publish the determination or notice of the determination in the Federal Register.

* * * * *

§ 107.209 [Amended]

14. In addition, in § 107.209, in paragraphs (a) and (b), the phrase "for Hazardous Materials Safety" is removed following "Associate Administrator" each place it appears.

15. In § 107.211, paragraph (a) is revised and a sentence is added at the end of paragraph (c) to read as follows:

§ 107.211 Petition for reconsideration.

(a) Any person aggrieved by a determination issued under § 107.209 may file a petition for reconsideration with the Associate Administrator. The petition must be filed within 20 days of publication of the determination in the Federal Register.

* * * * *

(c) * * * Late-filed comments are considered so far as practicable.

* * * * *

16. A new § 107.213 is added to read as follows:

§ 107.213 Judicial review.

A party to a proceeding under § 107.203(a) may seek review by the appropriate district court of the United States of a decision of the Associate Administrator by filing a petition with the court within 60 days after the Associate Administrator's determination becomes final. The determination becomes final when it is published in the Federal Register.

§ 107.215 [Amended]

17. In § 107.215, in paragraph (a), the phrase "for Hazardous Materials Safety" is removed immediately following "Associate Administrator" each place it appears, and the wording "State, political subdivision, or Indian tribe" is revised to read "State or political subdivision thereof or an Indian tribe."

18. In § 107.217, paragraph (d) is revised to read as follows:

§ 107.217 Notice.

* * * * *

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

* * * * *

§ 107.217 [Amended]

19. In addition, in § 107.217, in paragraphs (a), (b), (c), and (e), the phrase "for Hazardous Materials Safety" is removed immediately following the wording "Associate Administrator" each place it appears, and the following sentence is added at the end of paragraph (c):

* * * * *

(c) * * * Late-filed comments are considered so far as practicable.

§ 107.219 [Amended]

20. In § 107.219, the following changes are made:

a. In paragraphs (a), (b), (c), and (d), the phrase "for Hazardous Materials Safety" is removed immediately following the wording "Associate Administrator" each place it appears.

b. In paragraphs (a) and (b), the wording "or she" is added immediately following "he," each place it appears, and the wording "or her" is added immediately following "his," each place it appears.

c. In paragraphs (c)(1) and (c)(2), the phrase "State or political subdivision" is revised to read "State or political subdivision thereof or Indian tribe" each place it appears.

21. Section 107.221 is revised to read as follows:

§ 107.221 Determination.

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

(b) The Associate Administrator 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 Associate Administrator 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 Associate Administrator.

(d) The Associate Administrator 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 Associate Administrator will publish the determination or notice of the determination in the Federal Register.

(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 material transportation law or any regulation issued thereunder, or whether preemption is waived.

22. In § 107.223, paragraph (a) is revised to read as follows, and the following sentence is added at the end of paragraph (c):

§ 107.223 Petition for reconsideration.

(a) Any person aggrieved by a determination under § 107.221 may file a petition for reconsideration with the Associate Administrator. The petition must be filed within 20 days of publication of the determination in the Federal Register.

* * * * *

(c) * * * Late-filed comments are considered so far as practicable.

23. Section 107.227 is revised to read as follows:

§ 107.227 Judicial review.

A party to a proceeding under § 107.215(a) may seek review by the appropriate district court of the United States of a decision of the Associate Administrator by filing a petition with the court within 60 days after the Associate Administrator's determination becomes final. The determination becomes final when it is published in the Federal Register.

§ 107.299 [Removed]

24. Section 107.299 is removed.
25. In § 107.305, paragraph (b) is revised to read as follows:

§ 107.305 Investigations.

* * * * *

(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, also known as "hazmat inspectors" or "inspectors," whom the Associate Administrator has designated for that purpose.

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

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

(3) An inspector 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, Office of Hazardous Materials Enforcement, Research and Special Programs Administration, an inspector may issue a subpoena for the production of documentary or other tangible evidence if, on the basis of information available to the inspector, 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 § 107.13 (c) and (d). 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 § 107.13(h). A subpoena issued under this paragraph may be enforced in accordance with § 107.13(i).

* * * * *

§ 107.315 [Amended]

26. In § 107.315, in paragraphs (c) and (d), the last sentence is removed.

27. In § 107.331, the introductory paragraph and paragraph (d) are revised to read as follows:

§ 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:

* * * * *

(d) The respondent's prior violations;

* * * * *

28. A new subpart H of part 107 is added to read as follows:

Subpart H—Approvals, Registrations and Submissions

- Sec.
- 107.701 Purpose and scope.
- 107.705 Registrations, reports, and applications for approval.
- 107.709 Processing of an application for approval, including an application for renewal or modification.
- 107.711 Withdrawal.
- 107.713 Approval modification, suspension or termination.
- 107.715 Reconsideration.
- 107.717 Appeal.

§ 107.701 Purpose and scope.

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.

§ 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, Research and Special Programs Administration, U.S. Department of Transportation, 400 7th Street, SW, Washington, DC 20590-0001, Attention: Approvals, DHM-32;

(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 an exemption, identify the approval, registration or exemption number;

(4) Provide the name, street, mailing address, 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 § 107.7;

(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 § 107.5(a).

§ 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 RSPA dockets or files. Applications that are eligible for confidential treatment under § 107.5 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.

§ 107.713 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.

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

29. The authority citation for part 171 continues to read as follows:

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

§ 171.1 [Amended]

30. In § 171.1, in the introductory text of paragraph (a), the wording “in commerce” is added immediately following the wording “materials” and preceding “by”.

31. Also in § 171.1, a new paragraph (d) is added to read as follows:

§ 171.1 Purpose and scope.

* * * * *

(d) The use of terms and symbols prescribed in this subchapter for the marking, labeling, placarding and description of hazardous materials and packagings used in their transport.

32. In § 171.2, paragraphs (a), (b), (c) and (d) are revised and a new paragraph (h) is added to read as follows:

§ 171.2 General requirements.

(a) No person may offer or accept a hazardous material for transportation in commerce unless that person is registered in conformance with subpart G of part 107 of this chapter, if applicable, and the hazardous material is properly classed, described, packaged, marked, labeled, and in

condition for shipment as required or authorized by applicable requirements of this subchapter, or an exemption, approval or registration issued under this subchapter or subchapter A of this chapter.

(b) No person may transport a hazardous material in commerce unless that person is registered in conformance with subpart G of part 107 of this chapter, if applicable, and the hazardous material is handled and transported in accordance with applicable requirements of this subchapter, or an exemption, approval or registration issued under this subchapter or subchapter A of this chapter.

(c) No person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of this subchapter or an exemption, approval or registration issued under this subchapter or subchapter A of this chapter, governing its use in the transportation in commerce of a hazardous material, whether or not it is used or intended to be used for the transportation of a hazardous material, unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired and retested, as appropriate, in accordance with applicable requirements of this subchapter, or an exemption, approval or registration issued under this subchapter or subchapter A of this chapter.

(d) The representations, markings, and certifications subject to the prohibitions of paragraph (c) of this section include, but are not limited to—

(1) Specification identifications that include the letters "ICC," "DOT," "MC," or "UN";

(2) Exemption, approval, and registration numbers that include the letters "DOT," "EX," "M," or "R"; and

(3) Test dates associated with specification, registration, approval, retest or exemption markings indicating compliance with a test or retest requirement of this subchapter, or an exemption, an approval or a registration issued under this subchapter or subchapter A of this chapter.

(h) No person shall—

(1) Falsify or alter an exemption, approval, registration or other grant of authority issued under this subchapter or subchapter A of this chapter; or

(2) Offer a hazardous material for transportation or transport a hazardous material in commerce, or represent, mark, certify, or sell a packaging or container, under a false or altered exemption, approval, registration or

other grant of authority issued under this subchapter or subchapter A of this chapter.

§ 171.3 [Amended]

33. In § 171.3, paragraph (c) and the Note are removed, and paragraph (d) is redesignated as paragraph (c).

34. In § 171.8, the definitions of "Approval" and "Exemption" are added in alphabetical order and the definition of "Person" is revised to read as follows:

§ 171.8 Definitions and abbreviations.

* * * * *

Approval means a written authorization, including a competent authority approval, from the Associate Administrator to perform a function for which prior authorization by the Associate Administrator is required under subchapter C of this chapter.

* * * * *

Exemption means a document issued under the authority of 49 U.S.C. 5117 by the Associate Administrator that authorizes a person to perform a function that is not otherwise authorized under this subchapter, subchapter C, or other regulations issued under 49 U.S.C. 5101–5127 (e.g., Federal Highway Administration routing).

* * * * *

Person means an individual, firm, copartnership, corporation, company, association, joint-stock association, including any trustee, receiver, assignee, or similar representative thereof; or government, Indian tribe, or agency or instrumentality of any government or Indian tribe when it offers hazardous material for transportation in commerce or transports hazardous material to further a commercial enterprise, but such term does not include:

- (1) The United States Postal Service;
- (2) For the purposes of 49 U.S.C. 5123 and 5124, any agency or instrumentality of the Federal Government.

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

35. The authority citation for Part 173 continues to read as follows:

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

36. In § 173.22a, a new paragraph (c) is added to read as follows:

§ 173.22a Use of packagings authorized under exemptions.

* * * * *

(c) When an exemption issued to a person who offers a hazardous material contains requirements that apply to a

carrier of the hazardous material, the offeror shall furnish a copy of the exemption to the carrier before or at the time a shipment is tendered. When the provisions of the exemption require it to be in the possession of a carrier during transportation in commerce, the carrier shall maintain the copy of the exemption in the same manner as required for a shipping paper.

PART 178—SPECIFICATIONS FOR PACKAGINGS

37. The authority citation for Part 178 continues to read as follows:

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

38. In § 178.3, a new paragraph (d) is added to read as follows:

§ 178.3 Marking of packagings.

* * * * *

(d) No person may mark or otherwise certify a packaging or container as meeting the requirements of a manufacturing exemption unless that person is the holder of or a party to that exemption, an agent of the holder or party for the purpose of marking or certification, or a third party tester.

Issued in Washington, DC on May 2, 1996, under authority delegated in 49 CFR part 1. Rose A. McMurray,

Acting Deputy Administrator, Research and Special Programs Administration.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 663

[Docket No. 951227306–5306–01; I.D. 043096A]

Pacific Coast Groundfish Fishery; Closure and Trip Limit Reduction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure; fishing restrictions; request for comments.

SUMMARY: NMFS announces the closure of the open access fishery for thornyheads taken and retained north of Point Conception, CA (34°27' N. lat.), and a further restriction to the open access fishery for sablefish taken with nontrawl gear north of the Conception subarea (36°00' N. lat.). This action is authorized by the Pacific Coast Groundfish Fishery Management Plan