DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 172, 174, 175, 176, and 177

[Docket No. RSPA–97–2850 (HM–169B)]

RIN 2137–AD14

Hazardous Materials: Withdrawal of Radiation Protection Program Requirement

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: RSPA is proposing to amend the Hazardous Materials Regulations (HMR) to remove Subpart I of 49 CFR Part 172, ''Radiation Protection Program'' and related modal provisions that require persons who offer, accept for transportation, or transport radioactive materials to develop and maintain a written radiation protection program. This action is necessary to address difficulties and complexities concerning implementation of and compliance with the requirements for a radiation protection program, as evidenced by comments received from the radioactive material transportation industry and other interested parties.

DATES: Comments must be received on or before February 13, 1998.

ADDRESSES: Address comments to the Dockets Management System, U.S. Department of Transportation, 400 Seventh Street, SW, Washington, D.C. 20590–0001. Comments should identify the Docket No. [RSPA–97–2850 (HM–169B)] and be submitted in two copies. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed stamped postcard. The Dockets Management System is located on the Plaza level of the Nassif Building at the above address. Public dockets may be reviewed between the hours of 10:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. Comments may also be submitted by E-mail to ''rules@rspa.dot.gov.'' In every case, the comment should refer to the Docket Number set forth above.

FOR FURTHER INFORMATION CONTACT: Dr. Fred D. Ferate II, Office of Hazardous Materials Technology, (202) 366–4545 or Charles E. Betts, Office of Hazardous Materials Standards, (202) 366–8553; RSPA, U.S. Department of Transportation, 400 Seventh Street SW, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: On September 28, 1995, RSPA published a final rule in the **Federal Register** under Docket No. HM–169A (60 FR 50292). The changes made in Docket No. HM–169A were part of RSPA's ongoing effort to harmonize the Hazardous Materials Regulations (HMR; 49 CFR 171–180) with international standards and to improve radiation safety for workers and the public during the transportation of radioactive materials.

One of the substantive regulatory changes under Docket No. HM–169A is a requirement to develop and maintain a written radiation protection program (RPP). The RPP requirements are found in Subpart I of Part 172 of the HMR. Implementation provisions for rail, air, vessel and highway are found in §§ 174.705, 175.706, 176.703, and 177.827, respectively. The RPP requirements apply, with certain exceptions, to each person who offers for transportation, accepts for transportation, or transports Class 7 (radioactive) materials. Compliance with the RPP requirements was required after October 1, 1997.

Following publication of the September 28, 1995 final rule, many comments were received concerning technical difficulties in implementing the RPP requirements. Subsequently, on April 19, 1996, RSPA published in the **Federal Register** a request for comments on the implementation of the RPP requirements (Notice 96–7; 61 FR 17349). In Notice 96–7, RSPA stated its intention to develop guidance for the radioactive material industry to facilitate compliance with the RPP requirements.

RSPA received 23 comments in response to Notice 96–7. After considering these comments, RSPA decided that the concerns expressed could not all be resolved through guidance; new rulemaking was required in order to adequately address many of the issues raised in the comments. RSPA determined that the current RPP requirements in Subpart I of Part 172, and §§ 174.705, 175.706, 176.703, and 177.827 should be withdrawn, because it did not believe they could be corrected without significant review and a further rulemaking action. Accordingly, RSPA published a direct final rule on September 2, 1997 (62 FR 46214), withdrawing the RPP requirements effective September 30, 1997, unless an adverse comment or notice of intent to file an adverse comment was received by September 30, 1997. Because RSPA received two adverse comments it is revoking the direct final rule in a separate document. In a final rule published in Docket No. HM–169B, RSPA is also extending until October 1, 1999, the date for compliance with the RPP requirements, because it does not believe it would be appropriate to require compliance with requirements which it is proposing to withdraw in this NPRM.

Several commenters to Notice 96–7 cited modal differences as a factor which makes application of the RPP requirements difficult. Examples given include difficulties in tracking doses to workers involved in shipping radioactive material by rail because of multiple transfers from one company to another of rail cars during transport, or to ship crews because of ships being registered under foreign flags, or because often their operations are carried out in foreign ports. Several commenters stated that dose to personnel involved in bulk or containerized transport of radioactive material by highway, rail, or vessel is usually much lower than for non-bulk shipments.

Additional comments pointed to ambiguities in the regulations. Some of the ambiguities cited are that the regulations do not make clear whether the 200 transport index (TI) threshold to qualify for an exception is to be applied over an entire company or at each site; that concepts such as ''approved by a Federal or state agency'' and ''occupationally exposed hazmat worker'' are vague; and that the requirement to monitor occupationally exposed hazmat workers appears to be too inclusive and may be interpreted to extend even to those workers whose doses would be expected to be below the limit of detection of the dosimeters. Most commenters noted the practical impossibility of being able to assure compliance with the requirements cited in the regulations for dose and dose rate limits for members of the general public, and the uncertainty as to which persons are included in the category of ''general public.''

Several commenters cited inconsistencies with other regulations. For example, in contrast to the HMR, the Nuclear Regulatory Commission (NRC) regulations and Environmental Protection Agency (EPA) guidelines do not include a quarterly occupational dose limit, or a weekly dose or a dose rate limit for members of the public; the HMR criteria for determining whether monitoring is required differ appreciably from those in the International Atomic Energy Agency (IAEA) regulations; the HMR annual limit for members of the public is different from that of the NRC and the IAEA regulations; the HMR recordkeeping requirements are

different from the NRC's; and the HMR require monitoring of occupationally exposed hazmat workers, while the NRC requires monitoring adult workers with personal dosimetry only if their annual dose is likely to exceed 5 mSv.

Commenters stated that there are also internal inconsistencies in the present RPP requirements. For example, one commenter noted that entities with an RPP are required to comply with the stated limits for dose to members of the general public, while entities which qualify for an exception are not. Another commenter indicated that the monthly limit of 0.5 mSv for a declared pregnant worker renders irrelevant the additional stated limit of 5 mSv during the term of pregnancy. Commenters also stated that implementation of the RPP requirements would force affected shippers and carriers to adopt the most conservative approach, leading to unnecessarily high costs and potentially serious disruption of the market.

In addition to the comments received, RSPA also received six petitions. The first was a petition for reconsideration received from the Radiopharmaceutical Shippers and Carriers Conference (RSCC) in response to publication of Docket No. HM–169A as a final rule. This petition was considered and denied in a May 8, 1996 **Federal Register** notice (61 FR 20748). Three documents purporting to be ''petitions for reconsideration'' of the September 28, 1995 final rule received during the comment period established in Notice 96–7, were treated as comments rather than petitions for reconsideration because they were received after the thirty day period in the September 28, 1995 final rule. Petitions for rulemaking were received from the RSCC and the Nuclear Energy Institute (NEI). A discussion of these remaining five petitions follows.

Lockheed Martin (Energy Research Corporation and Energy Systems, Inc.), Los Alamos National Laboratories, and the Oak Ridge Operations Office of the Department of Energy requested that implementation of the RPP requirements be postponed, and that an exception to the RPP requirements be allowed for less-than-truckload (LTL) non-exclusive use shipments of radioactive material.

RSCC requested amendments to various paragraphs of the RPP requirements. These included restricting the 0.02 mSv/hour (2 mrem/hour) limit to members of the public and other non-occupationally exposed individuals to those radioactive material transportation activities which occur at fixed facilities; changing the threshold to qualify for an exception from 200 TI to 1000 TI; and applying the 1000 TI threshold exception for each fixed facility. It was requested, also, that regulations be clarified by specifically stating that certification by the American Board of Health Physics is not the only acceptable criterion as evidence of competency of the evaluator referred to in 49 CFR 172.803(d)(ii). Finally, it was requested that the wording ''200 TI'' be changed to ''1000 TI'' and ''worker'' changed to ''occupationally exposed hazmat employee'' in 49 CFR 172.805(d); and that the effective date of October 1, 1997 be postponed until appropriate guidance is available.

The NEI petitioned RSPA to rescind the public radiation measurement requirement in 49 CFR 172.803(b)(2).

The arguments presented in these petitions have been considered along with the other comments received. However, the disposition of the petitions for rulemaking will be decided at a later date.

Two persons submitted adverse comments on the direct final rule: Caliber System, Inc. and Davis Transport Inc. Caliber System, Inc., believes that the concerns raised through public comments can be addressed through guidance and other means. It contends that all shippers and consignees of radioactive materials already have formal, approved, written procedures for the handling of radioactive material and exposure monitoring for their personnel and as a result, all shippers and consignees are already in compliance with HM–169A. In addition, it argues that carriers who regularly engage in transporting radioactive materials in the course of their main business also have formal, written and approved programs. Davis Transport, Inc., argues that RSPA did not adequately consider worker safety, overemphasized the comments on economic ability to comply, and overstated the inconsistency and compliance assurance issues associated with the rule.

Before the September 28, 1995 final rule under Docket No. HM–169A, the HMR had not contained a performance standard requiring hazmat employers to minimize radiation exposure to the lowest level possible through a RPP. In the past, the HMR have sought to minimize radiation hazards to workers and the public by including requirements on: (1) packagings designed and tested to contain Type A quantities of RAM under normal conditions, and Type B quantities of radioactive materials under both normal and accident conditions during transportation; (2) hazard communication, such as shipping paper information, labels, and markings; (3) limitations on permissible rates of external radiation and package contamination; and (4) segregation and separation of packages from passengers and hazmat employees. This system has worked well, but it can be improved.

RSPA believes that some form of an RPP requirement may be appropriate in the HMR, to provide a formal and structured framework for ensuring radiation safety during radioactive material transportation activities. RSPA notes that many shippers of radioactive material, specifically those who are Department of Energy contractors or NRC or Agreement State licensees, are already subject to RPP requirements. RSPA will continue to review criteria, such as those adopted by the IAEA Safety Series Standards Series No. ST–1, that could form the basis of revised RPP requirements in the HMR. As a result, RSPA may propose in a future rulemaking the establishment of revised RPP requirements, to provide such a formal and structured framework.

Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule provides relief to persons who offer for transportation, accept for transportation, or transport Class 7 (radioactive) materials by eliminating the need to develop and maintain a radiation protection program. The effect of this rule, as proposed, is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and was not reviewed by the Office of Management and Budget. This proposed rule is not considered significant under the regulatory policies and procedures of the Department of Transportation (44 FR 11034; February 26, 1979).

RSPA has prepared a regulatory evaluation that specifically addresses the issue of withdrawing requirements for a radiation protection program. The regulatory evaluation prepared in support of the final rule issued under Docket No. HM–169A (60 FR 50292; September 28, 1995) estimated annual costs attributed to radiation protection program requirements in the amount of $6.6 million. At that time, RSPA did not have sufficient data to quantitatively assess benefits to be derived from the radiation protection program requirements. However, the regulatory evaluation considered the health benefits to the transportation community of limiting radiation exposures to be significant.

The benefits of removing the radiation protection program are, at a minimum, the $6.6 million RSPA estimated that the RPP requirements would cost to implement. However, RSPA believes that the RPP requirements are so overly restrictive, ambiguous, and inconsistent with the requirements of other Federal agencies that they would tend to cause affected parties to adopt the most conservative approach, leading to unnecessarily high costs in order to assure compliance. Therefore, RSPA believes that the health benefits in implementing these requirements would be much lower than originally anticipated. Also, because of the problems with the RPP requirements which have been identified, RSPA believes that any improvements to safety through implementation of the current RPP requirements would be much less than anticipated and their value would be less than the costs of implementation. Therefore, RSPA believe that the costs of implementation of RPP requirements will exceed their benefits and that withdrawing the requirements is cost-effective.

B. Executive Order 12612

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 (''Federalism''). The Federal hazardous material transportation law contains express preemption provisions at 49 U.S.C. 5125 that premempt State, local, and Indian tribe requirements if

(1) Complying with a requirement of the State, political subdivision, or Indian tribe and Federal hazardous material transportation law or regulations is not possible;

(2) The requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to accomplishing and carrying out Federal hazardous material transportation law or regulations; or

(3) The requirement of the State, political subdivision, or Indian tribe concerns any of the following ''covered subjects'' and is not substantially the same as a provision of Federal hazardous material transportation law or regulations:

(A) The designation, description, and classification of hazardous material;

(B) The packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(C) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents;

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

(E) The design, manufacture, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

Federal law (49 U.S.C. 5125(b)(2) provides that if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance.

RSPA is not aware of any State, local, or Indian tribe requirements that would be preempted by a withdrawal of the RPP requirements, as proposed herein. RSPA invites comments on this subject and, if any person believes that this proposed rule concerns a covered subject, what the effective date of Federal preemption should be.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (Act), as amended, 5 U.S.C. 601–612, directs agencies to consider the potential impact of regulations on small business and other small entities. In the regulatory evaluation originally prepared to consider requirements for a radiation protection program, RSPA estimated a total of 497 carriers (primarily motor carriers) would be subject to those requirements. All but a certain few of those carriers are thought to meet criteria of the Small Business Administration as ''small business,'' e.g., motor freight carriers with annual revenue of less than $18.5 million. The effect of withdrawing requirements for a radiation protection program is to allow those carriers to continue to transport radioactive materials without having to develop and implement a written plan that goes beyond what is now required of them by the HMR, by a RSPA exemption, or by other Federal departments and agencies.

Based upon the above, I certify that this proposed rule will not have a significant adverse economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act of 1995

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

E. Paperwork Reduction Act

Under regulations implementing the Paperwork Reduction Act of 1995, ''* * * an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.'' 5 CFR 1320.8(b)(iii)(6). RSPA has reviewed the HM–169A final rule and the information collection approval for radioactive materials transportation requirements. (OMB control number 2137–0510 was issued in January 1995 in anticipation of the final rule to be issued under Docket No. HM–169A. That approval expires on January 31, 1998, unless renewed.) Based on that review, RSPA concludes that the OMB approval is limited to information collection requirements for radioactive materials transportation other than the RPP requirements contained in Subpart I of Part 172.

Section 1320.8(d), Title 5, Code of Federal Regulations requires that RSPA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. RSPA estimates that the total information collection and recordkeeping burden for a Radiation Protection Program is:

Number of Respondents: 497.

Total Annual Responses: 497.

Total Annual Burden Hours: 94,286.

Total Annual Burden Cost: $6.6 million.

These figures are based on RSPA's estimates from the regulatory evaluation under HM–169A. As previously indicated, the estimate of total annual burden cost may be higher than this estimate. However, RSPA estimates that approximately 497 (50%) of these carriers will be required to implement and maintain a full radiation protection program. The cost of a radiation protection program was considered in two parts. First, RSPA considered the cost of monitoring those workers who are not currently required to be monitored by the existing regulations of the Occupational Safety and Health Administration or the Nuclear Regulatory Commission. The second cost considered was that of the hourly wages of technical and managerial workers to implement the radiation protection program. Other costs of a radiation protection program are already accounted for in the requirements of the HMR for a HAZMAT employer to give their HAZMAT employees safety training relative to the risks associated with the material a person transports.

Requests for a copy of this information collection should be directed to Deborah Boothe, Office of Hazardous Materials Standards (DHM–10), Research and Special Programs Administration, Room 8102, 400 Seventh Street, SW, Washington, DC 20590–0001. Telephone (202) 366–8553.

RSPA specifically requests comments on the information collection and recordkeeping burdens associated with developing, implementing and maintaining a radiation protection program. Written comments should be addressed to the Dockets Unit as identified in the **ADDRESSES** section of this rulemaking. Comments should be received prior to the close of comment period identified in the **DATES** section of this rulemaking. If a decision is made to retain the RPP requirements, RSPA will submit this information collection and recordkeeping requirement to the Office of Management and Budget for approval.

F. Regulation Identifier Number (RIN)

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

List of Subjects

49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 174

Hazardous materials transportation, Radioactive materials, railroad safety.

49 CFR Part 175

Air carriers, Hazardous materials transportation, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 176

Hazardous materials transportation, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR parts 172, 174, 175, 176, and 177 is proposed to be amended as follows:

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

1. The authority citation for part 172 would continue to read as follows:

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

Subpart I—[Removed]

2. In Part 172, Subpart I would be removed.

PART 174—CARRIAGE BY RAIL

3. The authority citation for part 174 would continue to read as follows:

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

§ 174.705 [Removed]

4. Section 174.705 would be removed.

PART 175—CARRIAGE BY AIRCRAFT

5. The authority citation for part 175 would continue to read as follows:

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

§ 175.706 [Removed]

6. Section 175.706 would be removed.

PART 176—CARRIAGE BY VESSEL

7. The authority citation for part 176 would continue to read as follows:

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

§ 176.703 [Removed]

8. Section 176.703 would be removed.

PART 177—CARRIAGE BY PUBLIC HIGHWAY

9. The authority citation for part 177 would continue to read as follows:

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

§ 177.827 [Removed]

10. Section 177.827 would be removed.

Issued in Washington, DC on December 12, 1997 under authority delegated in 49 CFR Part 1.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

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