DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials
Safety Administration

49 CFR Parts 171, 172, and 173
(Docket No. RSPA–2004–18795 (HM–237))

RIN 2137–AD88

Hazardous Materials: Requirements for
Lighters and Lighter Refills

AGENCY: Pipeline and Hazardous
Materials Safety Administration
(PHMSA), DOT.

ACTION: Final rule; response to appeals;
correction.

SUMMARY: On January 23, 2006, PHMSA
published a final rule entitled “Requirements for Lighters and Lighter
Refills” that amended requirements in
the Hazardous Materials Regulations
pertaining to the examination, testing,
certification, and transportation of
lighters and lighter refills. In response to
appeals submitted by persons affected
by the final rule, this final rule amends
requirements applicable to the
transportation of lighter refills and
allows for immediate voluntary
compliance with certain provisions.

DATES: Effective Date: The effective
date of this final rule is January 1, 2007.

Voluntary compliance: Except for
paragraphs (a), (b)(1), (b)(3), (b)(4), and
(d) in §173.308, voluntary compliance
with the final rule amending 49 CFR
parts 171, 172, and 173 published at 71
FR 3418 on January 23, 2006, and with
this final rule is authorized as of April

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SUPPLEMENTARY INFORMATION:

I. Background

On January 23, 2006, the Pipeline and
Hazardous Materials Safety
Administration (PHMSA, we) adopted a
final rule specifying requirements for
the examination, testing, certification,
and transportation of lighters and lighter
refills. Specifically, the final rule
amended the Hazardous Materials
Regulations (HMR; 49 CFR parts 171
through 180) to:

a. Adopt requirements for the design,
capacity, and pressure capability of
lighters that are generally consistent
with definitions in the American
Society for Testing and Materials
(ASTM), Standard Consumer Safety
Specification for Lighters (ASTM F–
400);

b. Revise approval procedures to
permit lighter designs to be examined,
tested, and assigned a unique
identification number by a qualified
person authorized by PHMSA; and

c. Revise packaging and
transportation requirements for lighters
and lighter refills that are generally
consistent with international standards.
The final rule will be effective January
1, 2007.

II. Appeals of the Final Rule

We received four appeals to the final
rule from the Lighter Association, Zippo
Manufacturing Company (Zippo),
Ronson Consumer Products Corporation
(Ronson), and Ms. Andrea C. Sassa, Esq.
(Sassa). The Lighter Association, Zippo,
and Ronson express concern about the
provisions of the final rule applicable to
the transportation of lighter refills. Sassa
requests us to permit voluntary
compliance with the provisions of the
final rule in advance of the effective
date. These appeals are discussed in
detail below.

A. Lighter Refills

Currently, the Hazardous Materials
Table (HMT) in §172.101 of the HMR
lists “Lighters or lighter refills” as a
single entry and refers shippers and
transporters to Special Provision N10
and §§173.21 and 173.308 for packing
requirements. However, neither Special
Provision N10 nor §§173.21 and
173.308 include specific packaging
requirements for lighter refills. These
sections of the HMR set forth
requirements applicable to lighters only.
Thus, no provisions of the HMR
establish transportation requirements
specific to lighter refills.

In letters of interpretation issued over
the past several years, we have advised
persons offering lighter refills for
transportation to use the HMT entry
applicable to the fuel contained in the
lighter refill—typically butane—to
determine applicable packaging
requirements. The HMT entry for butane
refers shippers and transporters to
Special Provision 19 and §173.304 for
packaging requirements. In addition, the
HMT entry refers to §173.306 for
exceptions applicable to the shipment of
butane; no exceptions apply to the
transportation of “lighters and lighter
refills.”

Section 173.306 permits a limited
quantity of butane or other flammable
gas (not more than 4 fluid ounces) to be
renamed “consumer commodity” and
reclassified as ORM–D material. ORM–D
shipments are excepted from
specification packaging requirements
and, for other than air transportation,
from shipping paper and labeling
requirements.

One goal of the HM–237 rulemaking
was to develop transportation
requirements specific to lighter refills.
To this end, in the NPRM we proposed
a separate entry in the HMT for “lighter
refills containing flammable gas
exceeding 4 fluid ounces capacity.” We
inadvertently omitted a separate HMT
entry for “lighter refills containing
flammable gas not exceeding 4 fluid
ounces capacity,” but added a new
paragraph (h) to §173.306 to specify
requirements for lighter refills not
exceeding 4 fluid ounces. The
provisions proposed in this paragraph
were identical to provisions for lighter
refills in the UN Recommendations for
the Transport of Dangerous Goods, 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).

The NPRM proposal for lighter refills
included an exception for shipments
transported by highway, but did not
include limited quantity or consumer
commodity exceptions. Indeed, the
preamble discussion on lighter refills
stated that, under the NPRM,
“regardless of transportation mode,
lighter refills [would not be] eligible for
the exceptions under the ORM–D
hazard class and [could] not be renamed
‘Consumer commodity.’” The preamble
did not specifically address the option
that currently permits shippers to utilize
customer commodity exceptions
applicable to shipments of butane nor
did the proposed regulatory text
specifically prohibit lighter refills from
taking advantage of limited quantity
and consumer commodity exceptions.

The Lighter Association was the only
commenter to address the consumer
commodity exception in its comments
to the NPRM. The Lighter Association
comments on lighter refills specifically
address the exception provided in the
NPRM for highway shipments and its
view that the packaging proposed for
this exception was unnecessarily
rigorous. In support of this view, the
Lighter Association noted that “lighter
refills under 4 fluid ounces have been
treated as ORM–D for over thirty years.
To the best of our knowledge, there have
not been any safety incidents with the
transportation of any size lighter refills
[‘*’*’].” The Association did not
specifically address our proposal to
prohibit lighter refills taking
advantage of the consumer commodity
exception. In the final rule, we modified...
the NPRM provisions applicable to the highway exception for lighter refills to accommodate the Lighter Association comments. No other commenters addressed the proposal in the NPRM applicable to consumer commodity exceptions for lighter refills.

In the final rule, we added the entry to the HMT for “lighter refills containing flammable gas not exceeding 4 fluid ounces” that had been inadvertently omitted from the NPRM. In addition, we amended § 173.306(a)(1) to clarify, consistent with the NPRM proposal, that lighter refills may not utilize limited quantity or consumer commodity exceptions. However, in the preamble to the final rule we did not include a detailed discussion of these changes to the NPRM.

The Lighter Association, Zippo, and Ronson suggest that the changes in the final rule eliminated the limited quantity and consumer commodity exceptions that had been utilized by shippers of lighter refills without providing adequate notice and opportunity for comment. The appeals are based on our clarifying amendments to § 173.306(a)(1), which was not proposed in the NPRM. Zippo suggests that “PHMSA [sought] to bring these changes about in a process that was not open and transparent. This major change was not in the Proposed Rule as published for public comment. Rather it was slipped in by an almost hidden amendment to 49 CFR Part 173.306(a)(1) in the Final Rule.” In addition, the Lighter Association is concerned that neither the NPRM nor the final rule includes an explanation of why the change is needed. “PHMSA provides no evidence that there have been safety issues associated with the transportation of lighter refills.” The Lighter Association suggests that elimination of the limited quantity and consumer commodity exceptions for lighter refills “causes great economic harm to at least three significant lighter companies in this country and thousands of smaller businesses.”

Upon review, we believe the discussion in the preamble to the NPRM provided sufficient notice of our intention to prohibit shippers of lighter refills from utilizing limited quantity and consumer commodity exceptions. However, we did not provide notice that the limited quantity and consumer commodity exceptions authorized for transportation of butane and other flammable gases would no longer be available for lighter refill shipments. Further, appellants have highlighted potential economic impacts of this provision on the regulated community that were not considered in the development of the final rule. Therefore, we are granting the appeals submitted by the Lighter Association, Zippo, and Ronson by correcting the final rule to permit shippers to continue to utilize limited quantity and consumer commodity exceptions for shipments of lighter refills when in containers with a capacity of 4 fluid ounces (7.22 cubic inches) or less. We note in this regard, however, that neither the ICAO Technical Instructions nor the IMDG Code provide limited quantity or consumer commodity exceptions for lighter refills. Therefore, the exceptions we are providing in the HMR for lighter refills would not be acceptable for aircraft or vessel shipments under international standards. In addition, lighter refills with a capacity greater than 4 fluid ounces (7.22 cubic inches) must be described as the gas contained therein and packaged in an authorized specification container regardless of transportation mode.

B. Voluntary Compliance

The effective date of the January 23, 2006 final rule is January 1, 2007. This provides almost a full year for the industry to implement the new program and procedures for the testing and examination of lighter designs.

However, the final rule contains several amendments providing regulatory relief that are currently authorized only under the terms of a special permit granted by PHMSA. The Sassa appeal relates to one such special permit (DOT—SP 14273) that would no longer be needed if the final rule were in effect. We are aware of additional special permits that would also be affected, but to date we have not received any requests for relief. Sassa requests that offerors and transporters be permitted to voluntarily comply with the provisions of the HM–237 final rule.

There are significant portions of the new examination, testing, marking, and record retention procedures for which immediate voluntary compliance will not be possible. For example, there are no laboratories currently approved by PHMSA to test and examine lighter designs under the procedures adopted in the final rule. We anticipate that a number of entities will consider examining and testing lighter designs in the near future. However, until additional laboratories are authorized to examine and test lighter designs, those portions of § 173.308 related to lighter design, examination, testing, marking, and record retention will not be effective until January 1, 2007. In response to the Sassa appeal we are authorizing voluntary compliance with all other provisions of the HM–237 final rule, including:

- Procedures for submitting lighter design samples to an authorized examination and testing facility prescribed in § 173.308(b)(2);
- Inner and outer packaging requirements prescribed in § 173.308(c);
- Exceptions for the private, common, or contract carriage of lighters prescribed in § 173.308(e)(1) and (e)(2).

III. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule is published under authority of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 et seq.). Section 5103(b) of Federal hazmat law authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce. In accordance with § 5103(a) of Federal hazmat law, the Secretary is authorized to designate a material or a group or class of materials as hazardous when transportation of that material in commerce may pose an unreasonable risk to health and safety, or property. A lighter fueled by a flammable gas or a flammable liquid is a hazardous material for purposes of regulation under Federal hazmat law and the HMR.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

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

This final rule will not impose increased compliance costs on the regulated industry. The corrections we are making to the January 23, 2006 final rule will provide regulatory relief to persons offering lighters and lighter refills for transportation in commerce by reinstating limited quantity and consumer commodity exceptions for lighter refills and permitting immediate voluntary compliance with certain provisions of the final rule. Overall, this final rule will reduce the compliance burden on the regulated industry without compromising transportation safety.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order
13132 (“Federalism”). This final rule would preempt State, local, and Indian tribe requirements but does not propose any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

The Federal hazardous materials transportation law, 49 U.S.C. 5101–5127, contains an express preemption provision (49 U.S.C. 5125(b)) that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

(i) The designation, description, and classification of hazardous materials;
(ii) The packaging, repackaging, handling, labeling, marking, and placarding of hazardous materials;
(iii) The preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents, and placement of those documents;
(iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or
(v) The design, manufacture, fabrication, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

This final rule addresses covered subject items (i), (ii), (iii), and (v) above and preempts State, local, and Indian tribe requirements not meeting the “substantially the same” standard. This final rule is necessary to update, clarify, and provide relief from regulatory requirements.

This final rule has been developed in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered.

F. Paperwork Reduction Act

PHMSA currently has an approved information collection under Office of Management and Budget (OMB) Control Number 2137–0557, “Approvals for Hazardous Materials,” with an expiration date of June 30, 2007. This final rule imposes no new information collection and recordkeeping requirements.

G. 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.

H. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It will not result in costs of $120.7 million or more, in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

I. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the Federal Register published on April 11, 2000 (Volume 65, Number 70; pages 19477–78) or you may visit http://dms.dot.gov.

List of Subjects in 49 CFR Part 173

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

In consideration of the foregoing, we are making the following correction to rule FR Doc. 06–464, published on January 23, 2006 (71 FR 3418):

§ 173.306 [Corrected]

1. On page 3427, in the middle column, correct amendatory instruction “12.a. to read “a. In paragraph (a)(1), in the last sentence, the wording “paragraph (b)” is removed and the wording “paragraph (i)” is added in its place.”

Issued in Washington, DC on April 10, 2006 under authority delegated in 49 CFR part 1.

Brigham A. McCown,
Acting Administrator.
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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 060315071–6101–02; I.D. 030906C]

RIN 0648–AT22

Fisheries of the Northeastern United States; Monkfish Fishery

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

ACTION: Final rule.

SUMMARY: NMFS implements measures to establish target total allowable catch