

by a U.S. company, Spyker of North America, and are sold and serviced in the U.S. through a network of 18 dealers. Spyker argued that denial of an extension will negatively impact these companies.

3. Spyker argued that if the exemption is not granted, U.S. consumer choice would be harmed and that the agency has long maintained that the National Traffic and Motor Vehicle Safety Act seeks, if possible, to avoid limiting consumer choice.

4. The petitioner argued that given their exotic design and high-performance nature, the C line vehicles are not expected to be used extensively, nor are they expected to carry children with any frequency.

NHTSA specifically invites comment on the likelihood that a child or infant will be a passenger in a Spyker vehicle sold in the U.S.

5. Spyker stated that as of the submission date of its application for extension, approximately 60 exempted C line vehicles have been imported into the U.S. and there have been no reports of any air bag-related injuries.

6. Spyker stated that an important safety feature that the C line vehicles offer is enhanced occupant protection. The petitioner stated that occupants are positioned in a protective "cell" because the main chassis structure is built around them.

*Agency Review of Petition*—Upon receiving a petition, NHTSA conducts an initial review of the petition with respect to whether the petition is complete and whether the petitioner appears to be eligible to apply for the requested exemption. The agency has tentatively concluded that the petition is complete. The agency has not made any judgment on the eligibility of the petitioner or the merits of the application, and is placing a non-confidential copy of the petition in the docket.

#### IV. Issuance of Notice of Final Action

We are providing a 30-day comment period. After considering public comments and other available information, we will publish a notice of final action on the application in the **Federal Register**.

Issued on: March 31, 2011.

Joseph S. Carra,

*Acting Associate Administrator for Rulemaking.*

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## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2006-26275; Notice No. 11-3]

#### Petition for Rulemaking— Classification of Polyurethane Foam and Certain Finished Products Containing Polyurethane Foam as Hazardous Materials

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

**ACTION:** Notice; closing of comment period and denial of petition P-1491.

**SUMMARY:** On March 30, 2007, a notice [72 FR 15184] was published in the **Federal Register** soliciting comments on the merits of a petition for rulemaking filed by the National Association of State Fire Marshals (NASFM). The NASFM petitioned PHMSA to classify polyurethane foam and certain finished products containing polyurethane foam as hazardous material for purposes of transportation in commerce. The comment period for the notice closed June 28, 2007. Subsequently, on October 19, 2007, the NASFM requested that action be deferred on the petition, and that the public docket be re-opened to allow interested persons to submit additional comments on the March 30, 2007 notice, and on supplemental information submitted by the petitioner. On May 7, 2008, a notice [73 FR 25825] was published in the **Federal Register** re-opening the comment period and indicating that it would remain open until further notice had been published in the **Federal Register**. Since re-opening of the comment period, no additional or supplemental information have been submitted to PHMSA to support the contention that polyurethane foam and certain finished products containing polyurethane foam should be designated as hazardous materials when transported in commerce. As well, no further comments have been submitted to suggest we continue to pursue any further action on this subject.

Therefore, in light of the fact that the comment period had been extended and remained opened for more than three years, with no further comment or data having been submitted to PHMSA to support proposals contained in petition P-1491 or the NASFM's October 19, 2007 supplemental letter, issuance of this notice closes the comment period for the March 30, 2007 Notice [72 FR 15184] and the May 7, 2008 Notice [73

FR 25825], under Docket No. PHMSA-2006-26275.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, Routing Symbol M-30, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

*Privacy Act:* Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, 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), which may also be found at <http://www.regulations.gov>.

#### FOR FURTHER INFORMATION CONTACT:

Helen L. Engrum, Office of Hazardous Materials Standards (202) 366-8553, Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On October 31, 2006, the National Association of State Fire Marshals (NASFM) submitted a petition for rulemaking to the U. S. Department of Transportation (DOT) through the Pipeline and Hazardous Materials Safety Administration (PHMSA) under the provisions of 49 CFR 106.95 (formerly 49 CFR 106.31). The NASFM requested that the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) be amended to classify polyurethane (PU) foam and certain finished products containing PU foam as a hazardous material for purposes of transportation in commerce. The NASFM is made up of senior-level public safety officials from the 50 States and the District of Columbia. The NASFM petition was received and acknowledged by PHMSA and assigned petition number P-1491; Docket No. PHMSA-2006-26275. On March 30, 2007, a notice [72 FR 15184] was published in the **Federal Register** soliciting comments on the merits of the petition for rulemaking filed by the NASFM.

*A. Summary of Petition P-1491*

As a matter of safety for emergency responders and the public, the National Association of State Fire Marshals (NASFM) petitioned the Department to classify PU foam and certain finished products containing PU foam as a hazardous material for purposes of transportation in commerce. The NASFM regards this proposal as critical to the safety of emergency responders and the public they are sworn to protect, and said that the safety of emergency responders begins with information—at minimum, responders have the absolute right to know when they are dealing with hazardous materials, so they may take special precautions at incidents. The petitioners' interest extends to ensuring that hazardous materials are used, stored and transported in safe ways. According to the NASFM, regulations exist across agencies that regulate the use and storage of PU foam,

but a gap exists in ensuring the safe transportation of this hazardous material, and because it is not officially classified as a hazardous material for purposes of transportation, the NASFM believes the safety of emergency responders and the public is compromised.

*B. NASFM's Proposed Rulemaking Procedure*

In its petition, the NASFM proposed the following procedure based on its understanding of the PHMSA rulemaking process: "Issue an interim final rule designating bulk shipments of Polyurethane (PU) Foam as a Class 9 (Miscellaneous) hazardous material. As part of this interim final rule,

## Phase I

- Assign a North American Identification Number to PU foam.

- Except shippers/carriers from requiring shipping papers, employee training, specific packaging requirements, and placarding.

- Require carriers to display Orange Panels with the identification number to identify the presence of PU foam for initial responders.

- Require transportation incidents involving PU foam fires to be reported to PHMSA.

- Publish a Safety Alert identifying measures initial responders can take to protect themselves and the general public during this initial response phase of the incident involving PU foam.

- Incorporate the measures published in the Safety Alert into the 2008 Emergency Response Guidebook (ERG). Cotton can be used as an example of how PU can be initially regulated. The following is recommended for inclusion in the Hazardous Materials Table (49 CFR 172101):

Column 1—Symbols .....	D (Domestic).
Column 2—HM description and proper shipping name .....	Polyurethane Foam.
Column 3—Hazard Class or Division .....	9.
Column 4—Identification Number .....	NA XXXX (to be assigned by PHMSA).
Column 5—Packing Group .....	Leave blank.
Column 6—Label Codes .....	None.
Column 7—Special Provisions .....	To be determined by PHMSA.
Column 8—Packaging (8A, 8B, and 8C) .....	None.
Column 9—Packaging Limitations .....	To be determined by PHMSA and the Federal Aviation Administration.
Column 10—Vessel Stowage .....	To be determined by PHMSA and the US Coast Guard.

This should not be considered a significant rulemaking because there are a limited number of carriers transporting bulk PU foam.

## Phase IIA

Initiate domestic rulemaking to finalize interim final rule and explore the need for additional regulatory oversight of products manufactured using PU foam through the issuance of a notice of proposed rulemaking.

## Phase IIB

Introduce PU foam as a proposed work item at the 30th session of the Transport of Dangerous Goods Sub-Committee.

Phase IIA and IIB can be conducted simultaneously.

*C. NASFM's Follow-Up Requests for Exceptions or Exemptions*

On June 26, 2007, the NASFM submitted a letter to the docket stating that the dialogue resulting from the public comment period on this petition has caused the NASFM to consider amending the petition to exempt mattresses that meet the new Federal fire safety requirements (16 CFR part 1633), institutional and other

upholstered furniture that meets California Technical Bulletin 133, and charitable organizations, such as the Salvation Army whose trucks may occasionally carry upholstered furniture and mattresses. Previously, the NASFM had contacted the Business and Institutional Furniture Manufacturers Association (BIFMA), the International Sleep Products Association (ISPA), and the Salvation Army to determine if they wish the NASFM to amend its petition as noted. The resulting correspondence (i.e., copies of letters from the NASFM written to BIFMA, ISPA, and the Salvation Army asking them if they wish to be excepted from the proposals in the PU foam petition) was submitted to the docket as an attachment to the June 26, 2007 letter to the docket.

On August 7, 2007, the NASFM submitted a letter to PHMSA requesting an amendment of its original petition (P-1491) to provide exceptions. It requested that if the PU proposals from petition P-1491 are adopted, the following categories or organizations should be excepted:

(1) Mattresses that meet or exceed the Federal standard for flammability (open flame) of mattress sets in accordance with 16 CFR part 1633; [CPSC]

(2) Upholstered furniture in compliance with the standard California Technical Bulletin 133; and

(3) Charitable not-for-profit organizations.

*D. NASFM's Request To Defer Action on Petition P-1491 and Extend the Comment Period*

On October 19, 2007, the NASFM submitted a letter to PHMSA asking to defer any action on its petition (P-1491) and to re-open the public docket to allow additional consideration of the flammability risks posed by PU foam and finished products containing PU foam. In its letter, the NASFM noted that PU foam and products containing PU foam "do not fit neatly within the Agency's long-standing definition for flammable solids," and suggests that the Agency should consider whether another, more appropriate definition should be developed to convey the risks associated with these materials. The NASFM also suggests that Federal, State, and industry standards-setting agencies and organizations should consider developing a standard test and definition applicable to polyurethane foam. According to the NASFM:

Other branches of the U.S. Department of Transportation, the U.S. Coast Guard, and the U.S. Consumer Product Safety Commission regulate these materials and each agency has its own tests, standards and terms to define the same combustible properties. The same is true of the International Building Code, International Fire Code, and the National Fire Protection Association's standard for automatic fire extinguishers (NFPA 13), all of which contain the language to provide authority to regulate polyurethane foam as a hazardous material requiring special protection. These model codes are referenced in countless Federal, State and local statutes. In effect, the polyurethane foam in the dashboard of a truck is regulated while the polyurethane foam shipped on the truck is not. The polyurethane foam shipment is regulated as a fire hazard in the factories in which it is made and used, in the warehouses in which it is stored, in the retail stores that offer it to the public and in the home. It is regulated in the seats of a commercial aircraft, but not in the cargo hold of that same aircraft.

The NASFM stated that the question is not whether PU foam is dangerously flammable, but whether PHMSA has a more appropriate means of classifying PU foam as a hazardous material for transportation. For this reason, the NASFM asked to defer action on its petition and to re-open the public docket. The NASFM believes that additional public comment may be useful to solicit ideas on how best to classify PU foam under PHMSA's existing definitions, possible statutory changes to clarify questions such as this, and comments on whether a single standardized test might be feasible.

On May 7, 2008, PHMSA re-opened the public docket and extended the comment period of the preceding original notice [72 FR 15184] to allow additional public comment on the question of whether there is a more appropriate means of classifying PU foam as a hazardous material for purposes of transportation in commerce. In the subsequent notice [73 FR 25825] re-opening the comment period, PHMSA said that we appreciated and shared the NASFM's concern for public safety and effective emergency response, and agreed with the NASFM that the comment period on this issue should be extended to permit interested persons to

provide more data and information on the definitional issue raised by the NASFM in its October 19, 2007 letter. PHMSA indicated that the comment period would remain open until further notice had been published in the **Federal Register**, and that this action did not constitute a decision by DOT/PHMSA to undertake a rulemaking action on the substance of the petition. The notice was issued solely to obtain comments on the merits of the petition to assist PHMSA in making a decision of whether to proceed with a rulemaking. We were particularly interested in substantive comments that address the following items: (1) Estimated incremental costs or savings; (2) Anticipated safety benefits; (3) Estimated burden hours associated with the proposals related to information collection; (4) Impact on small businesses; and (5) Impact on the national environment.

We asked that the commenters address the safety implications of the proposals contained in the NASFM's petition. We were particularly interested in data and information related to regulation of PU foam by other agencies, such as the Consumer Product Safety Commission (CPSC), the Occupational Safety and Health Administration (OSHA), the U.S. Coast Guard (USCG), and the National Fire Protection Association (NFPA), and whether the standards used by these agencies could be adapted for use in the transportation environment. We invited interested persons to supplement comments they may have already submitted to address the issues raised in the NASFM's October 19, 2007 letter, to highlight other issues that we should consider in making a decision on the petition, or to provide additional data and information in support of previously stated positions. To date, no further information or additional comments have been received, including any comments on the issues raised in the NASFM October 19, 2007 letter, suggesting that Federal, State, and industry standards-setting agencies and organizations should consider developing a standard test and definition applicable to PU foam.

## II. Summary of Comments Received on the March 30, 2007 Notice [72 FR 15814]

The purpose of the notice [72 FR 15184] was to solicit comments on the merits of a petition for rulemaking (P-1491) filed by the NASFM requesting classification of PU foam and certain finished products containing PU foam as a Class 9 (Miscellaneous) hazardous material, whether or not it meets the Class 9 (Miscellaneous) definition in § 173.140 of the HMR. The majority of commenters did not support the NASFM request to classify PU foam and certain finished products containing PU foam as a Class 9 (Miscellaneous) hazardous material during transportation. Under the HMR, a Class 9 (Miscellaneous) material presents a hazard in transportation but does not meet the definition of any other hazard class. Class 9 (Miscellaneous) materials are: (a) Any material which has an anesthetic, noxious or other similar property which could cause extreme annoyance or discomfort to a flight crew member so as to prevent the correct performance of assigned duties; or (b) Any material that meets the definition of an elevated temperature material, a hazardous substance, and a hazardous waste, or a marine pollutant.

Twenty-nine (29) of the thirty (30) comments received opposed the proposals to classify PU foam as a hazardous material, saying, among other reasons, that there is little or no evidence or data demonstrating the dangers of PU foam in transportation. Most commenters believe that the transportation safety risks of such materials have not been documented and the costs of increased regulation would be prohibitive. Many commenters said that PU foam does not exhibit hazard characteristics that meet any of the hazard class definitions in the HMR, and that the NASFM did not provide any data, documentation, or information that would warrant a change.

Comments were received from the following trade associations, companies, organizations and individuals:

### LIST OF COMMENTERS

Commenters	Position
1. American Chemistry Council (Center for the PU Industry) .....	Opposed.
2. American Home Furnishings .....	Opposed.
3. American Moving and Storage Assoc. ....	Opposed.
4. American Trucking Associations .....	Opposed.
5. Association of Rotational Moulders International .....	Opposed.
6. Bayer Material Science .....	Opposed.
7. Bodman Attorneys & Counselors (for Lear Corporation) .....	Opposed.
8. The Business and Institutional Furniture Manuf. Assoc. ....	Opposed.

## LIST OF COMMENTERS—Continued

Commenters	Position
9. The Council on Safe Transportation of Hazardous Articles .....	Opposed.
10. Ken A. Cruishank (DOE Subcontractor) .....	Opposed.
11. Foam Supplies, inc. ....	Opposed.
12. Dangerous Goods Advisory Council .....	Opposed.
13. General Plastics Manufacturing Company .....	Opposed.
14. Gonzalez, Saggio, Harlan LLP (for Johnson Controls, Inc.) .....	Opposed.
15. Hickory Chair .....	Opposed.
16. Hickory Springs Manufacturing Company .....	Opposed.
17. High Point Furniture Industries .....	Opposed.
18. Huntsman Polyurethanes .....	Opposed.
19. International Sleep Products Association .....	Opposed.
20. International Vessel Operators Dangerous Goods Assoc., Inc. ....	Opposed.
21. Metal Construction Association .....	Opposed.
22. McIntyre Law Firm, PLLC (for the PU Foam Assoc.) .....	Opposed.
23. National Tank Truck Carriers, Inc. ....	Opposed.
24. National Association of State Fire Marshals .....	Support.
25. National Home Furnishings Association .....	Opposed.
26. North American Automotive Hazmat Action Committee .....	Opposed.
27. Polyisocyanurate Insulation Manufacturers Association .....	Opposed.
28. Ritchie Industries, Inc. ....	Opposed.
29. Sealed Air Corporation .....	Opposed.
30. Charles (Chuck) Williamson (Retired from Plastics Industry) .....	Opposed.

#### A. One Commenter Supports Granting of Petition P-1491

The NASFM believes that the proposals in its petition have merit. On May 9, 2007, the NASFM commented to the Docket. The NASFM stated that PHMSA has clear authority to grant the petition, and that the NASFM has provided sufficient justification in support of the proposed action. The NASFM said it enthusiastically supports PHMSA's innovative approach to encouraging cooperative problem-solving among stakeholders via "enterprise" dialogues, and therefore welcomes this opportunity to elaborate on the petition. The NASFM noted that this public comment addresses the question of whether polyurethane foam and products containing it are hazardous materials, and is the first of three submissions the NASFM will make to this docket.

In its comment, the NASFM affirmed that the American Chemistry Council's Center for the Polyurethanes Industry (CPI) describes itself as representing "the leading companies engaged in the business of polyurethanes." CPI members are committed to environmental and social sustainability and the health, safety and security of its employees and communities. Over the years, the NASFM has observed the Center and its predecessor, the Alliance for the Polyurethanes Industry (API), translate these words into stewardship that often goes well beyond minimum mandatory levels of safety. Attached to this comment were articles, MSDS, and a technical bulletin, marked as Attachments A, B, C, D, and E. The

attachments addressed fire safety guidelines on flexible PU used in upholstered furniture and bedding, proper handling and storage of flexible PU, several MSDS on PU from two manufacturers, and an article on the problem of flammability of foamed plastics in storage.

On June 12, 2007, the NASFM acknowledged in its comments that in the notice PHMSA had requested data on known transportation incidents involving polyurethane foam and products containing it. The NASFM went on to say that even if polyurethane foam and products containing it were currently classified as hazardous materials for transportation, incident data might not be readily available. Because PU foam is not classified as a hazardous material for transportation, it might follow that finding examples of incidents would be difficult. Federal Law requires immediate and detailed reporting of serious transportation incidents where the term "serious" is defined as a fatality or injury caused by the hazardous material, loss of more than 119 gallons of product, closure of a major transportation artery, or change of an aircraft's flight plan.

The NASFM said that it is willing to undergo a detailed review of fire department reports from incidents involving commercial vehicles. In separate correspondence to the U.S. DOT, the NASFM said that it will soon propose a detailed assessment of fire department records to identify transportation incidents where shipments of PU foam and product containing it

contributed to the severity of the fire. To this end, on June 12, 2007, the NASFM submitted to the U.S. DOT, Bureau of Transportation Statistics (BTS) "an unsolicited research proposal." The NASFM said that details of the proposal were included in an attachment from the firm of TriData Corporation, "an acknowledged expert in fire statistics and well known to the Department." The NASFM requested funding from BTS to utilize multiple data sources to determine the extent PU foam is involved in transportation incidents. To date, PHMSA has no knowledge of the BTS response to the NASFM's request for funding and research into incidents involving the transportation of PU foam.

In its June 28, 2007 comment to the docket, the President of the NASFM stated:

Whether or not a hazardous material has been technically classified as a hazardous material does not affect the temperature of a fire or the smoke and gases from that fire. When a clearly hazardous material is not officially classified, the hazard is all that much greater because emergency responders have no way of knowing the risks as they attempt to rescue trapped vehicle occupants, protect nearby lives and property, and suppress the fire.

Firefighters are trained to look for placards, read manifests and consult with experts before they choose tactics. The American Chemistry Council's Chemtrec program handles 300 telephone calls a day, many from emergency responders at the scene of incidents seeking information on a hazardous material listed on a manifest or placard. Responders know that water can cause an explosion when used with some hazardous materials and that some suppression foams

do not work on certain hazardous materials. Responders know that evacuation may be necessary depending on the hazardous material and weather conditions. But when responders have no way of knowing that a burning substance is hazardous, they have no way of taking any of these precautions.

No one questions the fact that polyurethane foam ignites easily, spreads fire aggressively, and generates large volumes of highly toxic smoke and gases. Polyurethane foam is classified as a combustible solid where it is manufactured, stored, sold and used in construction. Other branches of the U.S. Department of Transportation recognize the exceptionally poor fire performance of polyurethane foam, as do the National Transportation Safety Board, the U.S. Coast Guard, The Departments of Defense and Commerce, and the U.S. Consumer Product Safety Commission.

The U.S. Department of Transportation has broad powers to protect the public, ensure the safety of emergency responders and classify and regulate hazardous materials. The National Association of State Fire Marshals, on behalf of its members as well as emergency responders nationwide, asks the Department to use its authority to ensure that responders have some way of knowing when they are dealing with transportation incidents involving this exceptionally hazardous material.

PHMSA notes that we did not receive any individual comments from firefighters, emergency responders, or firefighter associations. The NASFM has said that it speaks on behalf of firefighters and emergency responders nationwide.

#### *B. Commenters Opposed to Granting Petition P-1491*

The majority of commenters opposed the proposals contained in the petition. The American Home Furnishings Alliance (AHFA) opposed the petition and said about 80 percent of the upholstery sold in the United States is manufactured domestically. To remain competitive, domestic producers rely on lean manufacturing and distribution regimens. Process management software ensures that the right quantities of wood frame parts, polyurethane foam, and polyester fiber are delivered to furniture plants in response to individual orders at retail. Consequently, AHFA members are vitally interested in the efficient safe transportation of bulk foam, foam cushions and other furniture components. Regulatory changes that would disrupt this just-in-time manufacturing process are a recipe for job loss. AHFA asked that PHMSA weigh the logistical burdens the proposed regulation would have on the furniture industry and its carriers against any safety benefit likely to be accrued.

The McIntyre Law Firm, PLLC, on behalf of the Polyurethane Foam

Association (PFA), suggested that PHMSA dismiss the petition. In 1994, PHMSA issued an interpretation as a result of an inquiry from James T. McIntyre, Counsel for the PFA, in response to a request for a determination that the HMR does not apply to flexible PU foam. In the interpretation response, PHMSA concluded that flexible PU foam is able to burn, but are not self-reactive, do not meet the definition of a Division 4.1 (flammable solid) material, do not release flammable gas or vapor likely to create a flammable mixture with air in a transport vehicle, do not meet any hazard class definition and, therefore, it is not regulated by the HMR for purposes of transportation in commerce. In concluding that PU foam is not a Division 4.1 hazardous material, DOT determined that it does not fit within any class, which would include Class 9 (Miscellaneous). Thus, Mr. McIntyre stated that the petition is asking for a reversal of that determination, but it cites no justifiable basis for doing so.

The American Chemistry Council (ACC) stated that polyurethanes are an important contributor of the U.S. economy and such a rulemaking could have serious repercussions for consumers and small businesses. The ACC said that in 2004, the total production of polyurethane in the United States was approximately 6,692.5M pounds. Because of this large production volume, the polyurethanes industry directly creates 47,500 jobs paying \$2 billion in wages to its employees and generates \$19.7 billion in revenues. Increased regulations would result in increased cost for transporting these products on our nation's roadways, without any evidence that such classification would result in safer transportation of PU foam and products containing PU. Finally, classifying such widely used products as a hazardous material has the potential to create unnecessary concern with emergency responders. ACC said that this could have unintended negative consequences in the effectiveness of the existing hazardous material emergency response program.

The Business and Institutional Furniture Manufacturers Association (BIFMA) said that as written the proposal appears to regulate shipment of "urethane" foam whether in bulk or in finished goods. In addition to commercial furniture, this could conceivably be extended to clothing, shoes, and other products where the percentage of urethane foam is also small and the products have little or no fire hazard in their final form. BIFMA members are currently dealing with

many overlapping and often conflicting rules on furniture flammability. For example, the CPSC is in the process of developing more rigorous flammability rules for upholstered furniture at the same time that environmental agencies are banning chemical fire retardants that are often required to achieve flame resistance performance. The entire regulatory environment for furniture flammability is changing, and the proposed regulation of urethane foam as a hazardous material would further complicate the use and handling of these materials in a way that could be detrimental to many manufacturers, distributors, and consumers, alike.

The Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA) stated that while we understand the intent of the NASFM to enhance safety to emergency responders, they see insignificant safety benefits that might be anticipated through this petition. Emergency responders are already trained to be aware of hazards associated with vehicle fires due not only to the contents of the vehicle but the components built into the vehicle, many of which employ vinyl and other polymers due to their strength and durability and the "creature comforts" the public demands. PU foam may also be in common use as an insulating material in refrigerated delivery trucks such as those involved in delivery of dairy products or frozen foods, and in refrigerated freight containers. COSTHA said to attempt to identify, classify, and mark all of these articles and substances for transportation might tend to create complacency or a false sense of safety when responding to fires involving vehicles not so marked.

The Dangerous Goods Advisory Council (DGAC) stated that while it appreciates the concerns expressed by the NASFM, DGAC does not consider the petition compelling and recommends that PHMSA deny the petition. Further, while oftentimes materials not subject to the HMR have the potential for extensive damage in tunnels, they do not consider the HMR to be the appropriate means of controlling risks to tunnels posted by non-hazardous materials. In fact, the referenced Mont Blanc tunnel fire which resulted in 39 deaths and an estimated cost of \$2.5 billion involved the burning of 9 tons of margarine, road bed material and nearby vehicles.

The National Tank Truck Carriers, Inc. (NTTC) stated that polyurethane foam does not meet the definition of a hazardous material, even as a Miscellaneous Class 9 material. NTTC noted, in this instance, the effort to have it both ways by requiring an orange

label, while also exempting shippers and carriers from complying with the normal hazardous materials requirements regarding shipping papers, training, and placarding, et al., demonstrates the weakness of the petition. It is unclear how emergency response will be improved. NTTC said that what is foreseeable, however, is that the requested action would unnecessarily open the door to consideration of numerous other non-hazardous products. In addition, it would weaken the international harmonization of hazardous materials that PHMSA is working to further, and which NTTC supports. In short, NTTC views the petition as "an attempt to fit a round peg into a square hole," and urged the Administrator to deny the petition.

The International Sleep Products Association (ISPA) opposes the petition and requests that PHMSA dismiss it. ISPA said that most mattress producers assemble finished mattresses from components supplied by third parties, and that many mattresses sold in the United States today contain flexible PU foam to provide cushioning and support. All finished mattresses, including those that contain flexible PU foam, must meet various flammability standards. For example, since the mid-1970s, the Consumer Product Safety Commission (CPSC) has required that all mattresses resist ignition from a smoldering cigarette. 16 CFR part 1632. Beginning July 1, 2007 the CPSC will require that all mattresses withstand an open-flame ignition (such as a match, lighter, or candle). 16 CFR part 1633. ISPA said that PHMSA should dismiss the petition because it provides no legal or factual basis for designating PU foam as a hazardous material.

The American Trucking Associations (ATA) said that one of the most troubling aspects of the petition is the difficulty motor carriers would experience in complying with the suggested requirement to mark trucks to indicate the presence of polyurethane foam. Polyurethane foam is ubiquitous. In addition to its use in furniture, pillows, mattresses, car seats, and carpet padding, it is used as insulation in refrigerators, freezers and truck bodies. It is used as a packaging material. It also is used as a decorative coating and is molded into car bumpers. The ATA said that motor carriers take seriously their responsibility to comply with DOT regulations, and that the regulatory requirements requested in this petition set up motor carriers to fail—as motor carriers face a regulatory requirement to mark trucks containing polyurethane foam, but have no corresponding way to

know whether a shipper has tendered articles containing polyurethane foam.

### III. PHMSA Is Denying the NASFM Petition P-1491

In accordance with 49 CFR 106.95, Petition P-1491 is denied for the following reasons:

(1) In conclusion, the majority of commenters do not believe that PU foam, nor products that contain PU foam, meet any of the defining criteria under the HMR, and do not constitute an "unreasonable" risk to health, safety and property when transported in commerce. PHMSA agrees with the majority of the commenters. A PU fire is similar to house fires and other fires with organic materials. A PU fire does not require special fire fighting agents, procedures, or protective equipment and, therefore, does not pose an unreasonable danger to first responders. PHMSA believes that the information in the compendium do not support the petition. Thus, classifying PU foam as a hazardous material is unwarranted and inconsistent with the standards for classification set forth in the HMR.

(2) PU foam is not designated as a hazardous material because it is not considered a substance or material capable of posing an acute or unreasonable risk to health, safety and property when transported in commerce. The petition does not provide sufficient supporting data to warrant the adoption of the petition.

(3) PU foam products are solid organic materials. Like many other plastic products, PU foam products were not deemed to meet the "Readily combustible solid" definition and test criteria when DOT and the UN Committee of Experts developed the definition, test method, and criteria in 1990. The Material Safety Data Sheets (MSDS) submitted by the NASFM did not identify PU foam products as hazardous materials. Rather, the MSDS recognizes that PU foam products when exposed to fire will melt into liquid and the flash point of the liquids is >500 °F, which is outside of the range and criteria of Flammable liquid or Combustible liquid, as defined in 49 CFR 173.120.

(4) The safety implications of the proposals in the petition were given careful considerations as we went through the process of determining whether regulatory action was needed. While we understand the intent of the NASFM to improve safety of emergency responders, anticipated safety benefits associated with the transportation of PU foam would be insignificant, since emergency responders are already trained to be aware of hazards

associated with vehicle fires due to components built into the vehicle, many of which employ vinyl and other polymers because of their strength and durability.

(5) The NASFM stated in the petition that this should not be considered a significant rulemaking because there are a limited number of carriers transporting bulk PU foam. However, if the proposal to classify PU foam as a hazardous material was adopted, it could be applied universally to all PU foam products. To attempt to identify, classify, and mark all of these articles and substances for purposes of transportation in commerce would be a much larger impact, greater than transportation. The costs associated with implementing the petition would far exceed the benefits.

Issued in Washington, DC, on March 31, 2011.

**Magdy El-Sibaie,**

*Associate Administrator for Hazardous Materials Safety.*

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[Docket No. FD 35237]

#### City of Davenport, Iowa—Construction and Operation Exemption—in Scott County, Iowa

By petition filed on July 21, 2009, the City of Davenport, Iowa (the City) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to construct approximately 2.8 miles of rail line in southern Eldridge, northern Davenport, and an unincorporated area of Scott County, Iowa. The new line will provide the Eastern Iowa Industrial Center, an industrial park, with rail access. The City will hire an operator to provide service on the line, but the City also will be required to ensure continued rail service.

In a decision served on October 19, 2009, the Board instituted a proceeding under 49 U.S.C. 10502(b). No comments opposing the petition have been filed.

The Federal Highway Administration (FHWA), the lead Federal agency on this rail project, and the City issued an Environmental Assessment (EA) for public review and comment on March 17, 2008. On July 8, 2008, the FHWA issued its Record and Finding of No Significant Impact and recommended 3 environmental conditions to mitigate the impacts of the project. After the Board's Office of Environmental