PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Indiana, is amended by adding Oolitic, Channel 231A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

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DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 109

[Docket No. PHMSA–2005–22356]

RIN 2137–AE13

Hazardous Materials: Enhanced Enforcement Authority Procedures

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: PHMSA is proposing to issue rules implementing certain inspection, investigation, and enforcement authority conferred on the Secretary of Transportation by the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005. The proposed rules would establish procedures for: (1) The inspection and opening of packages to identify undeclared or non-compliant shipments; (2) the temporary detention and inspection of suspicious packages; and (3) the issuance of emergency orders (restrictions, prohibitions, recalls, and out-of-service orders) to address unsafe conditions or practices posing an imminent hazard. These new inspection and enforcement procedures will enhance DOT's ability to respond immediately and effectively to conditions or practices that pose serious threats to life, property, or the environment.

DATES: Comments must be received by December 1, 2008.

ADDRESSES: You may submit comments by any of the following methods:

- *U.S. Government Regulations.gov Web site: http://www.regulations.gov.* Use the search tools to find this rulemaking and follow the instructions for submitting comments.
- *U.S. Mail or private delivery service:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590–0001.
- *Fax:* 1–202–493–2251.
- *Hand Delivery:* To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays:

Instructions: You must include the agency name and docket number, PHMSA–05–22356 or the Regulatory Identification Number (RIN) for this rulemaking at the beginning of your comment. Note that all comments received will be posted without change to the U.S. Government Regulations.gov Web site: *http://www.regulations.gov.,* including any personal information provided. Please see the Privacy Act section of this document.

FOR FURTHER INFORMATION CONTACT: Jackie K. Cho or Vincent M. Lopez, Office of Chief Counsel, (202) 366–4400, Pipeline and Hazardous Materials Safety Administration.

SUPPLEMENTARY INFORMATION:

I. Background

Under authority delegated by the Secretary of Transportation (Secretary), four agencies within DOT enforce the Hazardous Materials Regulations (HMR), 49 CFR parts 171–180 and other regulations, approvals, special permits, and orders issued under Federal Hazardous Material Transportation Law (Hazmat Law), 49 U.S.C. 5101 *et seq.*; the Federal Aviation Administration (FAA), 49 CFR 1.47(j)(1); Federal Railroad Administration (FRA), 49 CFR 1.49(s)(1); Federal Motor Carrier Safety Administration (FMCSA), 49 CFR 1.73(d)(1); and Pipeline and Hazardous Materials Safety Administration (PHMSA), 49 CFR 1.53(b)(1). The Secretary has delegated authority to each respective operating administration to exercise the enhanced inspection and enforcement authority conferred by the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (HMTSSRA). 71 FR 52751, 52753 (Sept. 7, 2006). The United States Coast Guard (USCG) is authorized to enforce the HMR in connection with certain transportation or shipment of hazardous materials by water. This authority originated with the Secretary and was first delegated to USCG prior to 2003, when USCG was made part of the Department of Homeland Security. Enforcement authority over ''bulk transportation of hazardous materials that are loaded or carried on board a vessel without benefit of containers or labels, and received and handled by the vessel without mark or count, and regulations and exemptions governing ship's stores and supplies'' was also transferred in 2003. DHS Delegation No. 0170.1(2)(103) & 2(104); *see also* 6 U.S.C. 458(b), 551(d)(2). The USCG inspects portable tanks and freight containers primarily under two laws: the Safe Container Act 46 U.S.C. 80501 et seq. with its implementing regulations found in 46 CFR 450–453, and 49 U.S.C Chapter 51 Transportation of Hazardous Material as it relates to waterborne transportation. DOT will coordinate its inspections, investigations, and enforcements aboard vessels and waterfront facilities, as defined in 33 CFR 126.3, with the USCG to avoid duplicative or conflicting efforts. Moreover, nothing proposed herein would affect USCG's enforcement authority with respect to transportation of hazardous materials.

A. Need for Enhanced Enforcement Authority

Each year, about three billion tons of hazardous materials are transported in the United States. United States Government Accountability Office, Undeclared Hazardous Materials: New DOT Efforts May Provide Additional Information on Undeclared Shipments, GAO–06–471, at 9 (March 2006) (GAO Report). Under DOT-mandated safety standards, including suitable packaging and handling, nearly all of these shipments move through the system safely and without incident. When incidents do occur, DOT-mandated labels and other forms of hazard communication provide transportation employees and emergency responders the information necessary to mitigate the consequences. Together, these risk controls provide a high degree of protection. Yet their effectiveness depends largely on compliance by hazmat offerors, beginning with proper classification and packaging of hazardous materials. When a package containing hazardous materials is placed in transportation without regard to HMR requirements, the effectiveness of all other risk controls is compromised, increasing both the likelihood of an incident and the severity of consequences. Accordingly, we have long considered undeclared shipments of hazardous materials to be a serious safety issue. The HMR define

''undeclared hazardous material'' as a material ''offered for transportation in commerce without any visible indication to the person accepting the hazardous material for transportation that a hazardous material is present, on either an accompanying shipping document, or the outside of a transport vehicle, freight container, or package'' that is subject to the hazardous materials communication standards. 49 CFR 171.8.

Approximately 1.2 million hazardous materials shipments are transported daily; of those, approximately 800,000 involve consolidations, intermodal, or intramodal transfers and in-transit storage. 68 FR at 67751 (Dec. 3, 2003). These figures do not include the unknown numbers of hazardous materials shipments that are undeclared and, accordingly, less readily accounted for. To detect and deter hidden shipments of hazardous materials, PHMSA's predecessor agency amended the HMR in 2004 to require persons who discover shipments of undeclared hazardous materials to report these incidents to the agency. 49 CFR 171.16(a)(4). These requirements were intended, in part, to ''define the extent of the problem, establish trends, and help gauge the effectiveness of efforts to reduce undeclared shipments.'' 68 FR 67746, 67754. In 2005, offerors and carriers reported about 1,000 incidents of undeclared hazardous materials, 70 of which involved shipments entering the United States from abroad. GAO Report at 28.

FAA enforcement statistics show that undeclared hazardous materials are a frequent and persistent problem. In 1993, FAA reported 420 enforcement cases involving undeclared hazardous materials shipments. Seven years later, the number of such enforcement cases rose to 1,716.

Hidden hazardous materials pose a significant threat to transportation workers, emergency responders, and the general public. By definition, an undeclared shipment does not include markings or documentation designed to communicate the material's hazards in the event of an accidental release. And experience demonstrates that undeclared hazardous materials are more likely to be packaged improperly and, consequently, more likely to be released in transportation. Moreover, it is likely that terrorists who seek to use hazardous materials to harm Americans will move those materials as hidden shipments. Accordingly, although the presence of undeclared hazardous materials by no means demonstrates wrongful intent, we cannot expect to target willful violations and security threats by limiting inspections and enforcement to declared shipments. One way to address the problem of undeclared shipments is by expanding our inspection authority to permit an enforcement officer to open and examine packages suspected to contain hazardous materials. This expanded enforcement authority would also provide us with a tool to identify declared hazardous materials shipments that nonetheless may not have been prepared in accordance with the HMR requirements.

DOT's experience enforcing Federal hazmat law and the HMR also suggests a need for expedited procedures to address imminent safety hazards. Imminent hazards, by definition, require immediate intervention to reduce the substantial likelihood of death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment. Under current statutory law, DOT may obtain relief against a hazmat safety violation posing an imminent hazard only by court order. Even with such a threat present, the DOT operating administration seeking such relief must coordinate with the Department of Justice (DOJ) to file a civil action against the offending party, and seek and obtain a restraining order or preliminary injunction. As a practical matter, judicial relief could rarely be obtained before the hazardous transportation movement is complete. The streamlined administrative remedies implemented in this rulemaking will materially enhance our ability to prevent unsafe movements of hazardous materials and reduce related risks.

B. Statutory Amendments to Inspection, Investigation, and Enforcement Authority

On August 10, 2005, the President signed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), which included the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (HMTSSRA) as Title VII of the statute, 119 Stat. 1891. Section 7118 of HMTSSRA revised 49 U.S.C. 5121 to read:

—In paragraph (c)(1) that a designated officer, employee, or agent of the Secretary of Transportation:

(A) May inspect and investigate, at a reasonable time and in a reasonable manner, records and property relating to a function described in section 5103(b)(1);

(B) Except in the case of packaging immediately adjacent to its hazardous material contents, may gain access to, open, and examine a package offered for, or in, transportation when the officer, employee, or agent has an objectively reasonable and articulable belief that the package may contain a hazardous material;

(C) May remove from transportation a package or related packages in a shipment offered for or in transportation for which—

(i) Such officer, employee, or agent has an objectively reasonable and articulable belief that the package may pose an imminent hazard; and

(ii) Such officer, employee, or agent contemporaneously documents such belief in accordance with procedures set forth in guidance or regulations prescribed under subsection (e);

(D) May gather information from the offeror, carrier, packaging manufacturer or tester, or other person responsible for the package, to ascertain the nature and hazards of the contents of the package;

(E) As necessary, under terms and conditions specified by the Secretary, may order the offeror, carrier, packaging manufacturer or tester, or other person responsible for the package to have the package transported to, opened, and the contents examined and analyzed, at a facility appropriate for the conduct of such examination and analysis; and

(F) When safety might otherwise be compromised, may authorize properly qualified personnel to assist in the activities conducted under this subsection.

—In paragraph (c)(3) that, in instances when, as a result of an inspection or investigation under this subsection, an imminent hazard is not found to exist, the Secretary, in accordance with procedures set forth in regulations prescribed under subsection (e), shall assist—

(A) In the safe and prompt resumption of transportation of the package concerned; or

(B) In any case in which the hazardous material being transported is perishable, in the safe and expeditious resumption of transportation of the perishable hazardous material.

—In subsection (d) that,

(1) In General.—If, upon inspection, investigation, testing, or research, the Secretary determines that a violation of a provision of this chapter, or a regulation prescribed under this chapter, or an unsafe condition or practice, constitutes or is causing an imminent hazard, the Secretary may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders [as defined in paragraph (d)(5)], without notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.

(2) Written Orders.–The action of the Secretary under paragraph (1) shall be in a written emergency order that–

(A) Describes the violation, condition, or practice that constitutes or is causing the imminent hazard;

(B) States the restrictions, prohibitions, recalls, or out-of-service orders issued or imposed; and

(C) Describes the standards and procedures for obtaining relief from the order.

(3) Opportunity for Review.—After taking action under paragraph (1), the Secretary shall provide for review of the action under

section 554 of title 5 if a petition for review is filed within 20 calendar days of the date of issuance of the order for the action.

(4) Expiration of Effectiveness of Order.—If a petition for review of an action is filed under paragraph (3) and the review under that paragraph is not completed by the end of the 30-day period beginning on the date the petition is filed, the action shall cease to be effective at the end of such period unless the Secretary determines, in writing, that the imminent hazard providing a basis for the action continues to exist.

119 Stat. at 1902–1905.

Congress enacted HMTSSRA in part to combat the problem of undeclared hazardous materials shipments. While section 7118 of HMTSSRA (Section 7118), which amended 49 U.S.C. 5121, enhances DOT's authority to discover undeclared hazardous materials shipments, the application of this enforcement authority is not limited to undeclared shipments. On a broader scale, Section 7118 promotes the Department's inspection and enforcement authority ''to more effectively identify hazardous materials shipments and to determine whether those shipments are made in accordance with the [H]azardous [M]aterials [R]egulations.'' H. Conf. Rep. No. 109–203, at 1079 (2005), *reprinted in* 2005 U.S.C.C.A.N. 452, 712. Congress reasoned that the Department needed enhanced inspection and enforcement authority to ensure that ''DOT officials, law enforcement and inspection personnel * * * have the tools necessary to accurately determine whether hazardous materials are being transported safely and in accordance with the relevant law and regulations.'' H. Conf. Rep. No. 109–203, at 1081, 2005 U.S.C.C.A.N. at 714. Section 7118 carries out this directive by authorizing DOT employees to access, open and examine a package (except for the packaging that is immediately adjacent to the suspected hazardous material's contents) that was offered for, or is in transportation in commerce, when those employees have an objectively reasonable and articulable belief that the shipment may contain a hazardous material, remove the package from transportation when the shipment may pose an imminent hazard, order the shipment to be transported, opened, and tested at an appropriate facility, as necessary, and permit the shipment to resume its transportation when an inspection does not identify an imminent hazard.

Following enactment of HMTSSRA, several interested parties recommended that PHMSA issue regulations that adopt the traditional notice and comment rulemaking procedure rather than the temporary regulations prescribed by statute. PHMSA agrees that the traditional notice and comment rulemaking is necessary. As described further below, this rulemaking presents several critical factual and policy issues warranting public comment and development of an administrative record.

II. Summary of Proposals in This NPRM

This NPRM proposes procedures to implement the expanded enforcement authority conferred in HMTSSRA. These procedures would apply to hazardous materials safety compliance and enforcement activities conducted by PHMSA, FAA, FRA, and FMCSA inspection personnel. Specifically, we are proposing procedures to enable DOT inspectors to open, detain, and remove a hazardous materials shipment from transportation in commerce, and order the package to be transported to a facility to analyze its contents. In addition, we are proposing procedures for issuing emergency orders to address imminent hazards. As proposed, these procedures will apply in a number of contexts and circumstances:

- We are proposing procedures under which an inspector may open a package to determine whether it contains an undeclared hazardous material or otherwise does not comply with applicable regulatory requirements. These procedures apply to the opening of an overpack, outer packaging, freight container, or other packaging component not immediately adjacent to the hazardous material. Inspectors will not open single packagings (such as cylinders, portable tanks, cargo tanks, or rail tank cars) nor will inspectors open the innermost receptacle of a combination packaging.
- We are proposing procedures under which an inspector may temporarily remove a package or shipment from transportation when the inspector believes that the package or shipment poses an imminent hazard. Such a belief may arise from a compliance problem identified as a result of opening the package or from conditions observed through an inspection that does not include opening the package. As proposed, the inspector may remove a package or shipment from transportation on his or her own authority provided he records his belief in writing. An inspector may temporarily remove any type of package or shipment from transportation if he or she has a ''reasonable and articulable belief'' that the package poses an imminent hazard.
- We are proposing procedures under which an inspector may order the person in possession of or responsible for the package to transport the package and its contents to a facility that will examine and analyze its contents. An inspector may issue such an order for any type of package or shipment, not merely those packages for which package opening is authorized. As proposed, the inspector may issue this order on his own authority provided he documents his reasoning.
- We are proposing procedures under which an inspector will assist in preparing a package for safe and prompt transportation if, after a complete examination of a package initially thought to pose an imminent hazard, no imminent hazard is found. If the package has been opened, the inspector will assist in reclosing the package in accordance with the packaging manufacturer's closure instructions or an alternate closure method approved by PHMSA, marking the package to indicate that it was opened and reclosed in accordance with DOT procedures, and returning it to the person from whom it was obtained.
- We are proposing procedures for the issuance of an out-of-service (OOS) order if, after complete examination of a package initially thought to pose an imminent hazard, an imminent hazard is indeed found to exist. The OOS order effects the permanent removal of the package from transportation by prohibiting its movement until it has been brought into compliance with all applicable regulatory requirements. An OOS order may be issued for any type of packaging or shipment. For example, in the case of motor carriers, DOT will apply the Commercial Vehicle Safety Alliance (CVSA) OOS criteria for hazardous materials in identifying an imminent hazard for which an OOS order may be issued.
- We are proposing procedures for the issuance of an emergency order when PHMSA, FAA, FMCSA, or FRA determines that a non-compliant shipment or an unsafe condition or practice is causing an imminent hazard. As proposed, the PHMSA, FAA, FMCSA, or FRA Administrator may issue an emergency order without advance notice or opportunity for a hearing. The emergency order may be issued in conjunction with or in place of an OOS order. The emergency order may impose emergency restrictions, prohibitions, or recalls and may be issued for any type of shipment and for any unsafe condition posing an imminent hazard, not merely unsafe conditions related to packaging.

III. Summary of Comments

PHMSA published a notice on January 25, 2006 (71 FR 4207), inviting interested persons to participate in a series of public meetings to comment on the agency's implementation of section 7118. The notice identified 11 possible topics on which PHMSA would begin a discussion at the public meetings. The topics were:

(1) The types of outer packagings that could be opened by an inspector, if the person in possession of the package does not agree to open the package himself.

(2) Whether the legal standard for opening an outer packaging—i.e., an objectively reasonable and articulable belief that the package may pose an imminent hazard—needs further explanation in the regulations.

(3) The locations at which a package would be observed and the relevance of this fact to the manner of opening the outer packaging and, if no imminent hazard is found, the manner of reclosing the package for further transportation in compliance with the HMR.

(4) The amount of time required to open an outer packaging, examine the inner container(s) or receptacle(s) and, if no imminent hazard is found, reclose the package for further transportation in compliance with the HMR.

(5) The circumstances under which a person would be required to have a package transported, opened, and the contents examined and analyzed, at an appropriate facility.

(6) The time and cost for the facility to examine and analyze the contents of a package which would be examined and analyzed at an appropriate facility.

(7) The value of the contents of a package which would be examined and analyzed at an appropriate facility.

(8) The effect upon offeror or transporter subject to an emergency action or order, including removing a package from transportation or ordering a restriction, prohibition, recall, or OOS order to abate an imminent hazard.

(9) Conditions that would be appropriate for including in an emergency restriction, prohibition, recall, or OOS order, such as allowing a vehicle to be moved to a safe location for inspection or vehicle repairs.

(10) The time and cost of preparing a petition for review of an emergency action or order.

(11) The criteria necessary to seek relief from the issuance of an emergency action or order.

71 FR at 4208 (Jan. 25, 2006).

PHMSA convened public meetings on February 21, 2006, in Dallas, Texas; March 8, 2006, in Washington, DC; and March 15, 2006, in Seattle, Washington; in which the agency invited interested persons to comment on the agency's implementation of section 7118 within the context of the above 11 topics and any other issues of interest. The material comments both oral and written elicited from these meetings are summarized below. (Transcripts of these meetings are available on the U.S. Government Regulations.gov Web site at *http://www.regulations.gov*.)

(1) Types of Outer Packagings That Could Be Opened By an Inspector

Several participants (Brumbaugh, Jackson, McElhoe, Rinehart, Roberts, Surovi, Tobin, Association of Hazmat Shippers (AHS), Alaska Airlines, Boeing Company, Dangerous Goods Advisory Council (DGAC) and Tyco Healthcare (Tyco)) expressed concern about how DOT intends to exercise its new enforcement authority, i.e., identifying undeclared shipments or non-compliant shipments and the procedures DOT would follow when opening such packages during an inspection. Additionally, the International Vessel Operators Hazardous Materials Association (VOHMA) and Council on Safe Transportation of Hazardous Articles (COSTHA) questioned the manner in which section 7118 would apply to carriers given that carriers may not open packages that they do not own. Others suggested that DOT should limit the exercise of its enhanced inspection and enforcement authority to an offeror's facility to minimize the risk of a hazardous material release during transportation and to direct enforcement effort toward the parties most responsible for ensuring proper packaging and certification.

PHMSA Response: As discussed above, the primary objectives of DOT's enhanced inspection and enforcement authority are to discover and prevent undeclared shipments of hazardous materials that would otherwise pose imminent hazards in transportation. This authority, however, is not limited to undeclared hazardous material shipments. If a shipment, whether or not it is a declared hazardous material, is found to be leaking; is improperly marked, labeled or packaged; or the shipping paper indicates a potential problem, a DOT inspector may invoke this authority to open and examine the shipment to determine the scope of the problem and potential hazard. In addition, if the shipment poses an imminent hazard, the inspector may remove it from transportation. The procedures governing such inspections are enumerated under proposed section 109.3(b) and discussed in the section-by-section analysis below. In other words, PHMSA intends for DOT inspectors to use their enhanced inspection authority to verify that hazardous materials shipments are packaged, marked, and labeled in compliance with DOT requirements.

The package opening authority, however, applies only to an overpack, outer packaging, freight container, or other packaging component that is not immediately adjacent to the hazardous material it contains. Thus, as proposed, DOT inspectors will not open packagings that serve as the primary means of containment (such as cargo tanks, portable tanks, railroad tank cars, or cylinders) and will not open inner packagings of combination packages (such as the bottles inside a fiberboard box or test tubes inside an infectious substances triple packaging). In any case, this proposed rule in no way limits the Department's general inspection and investigation authority under 49 U.S.C. 5103(b)(1). The final rule will authorize certain additional investigatory techniques and remedies, without limiting DOT's existing authority with respect to the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. Section 5103(b) also grants the Secretary regulatory authority with respect to security in the transportation of hazardous materials. Therefore, the authority to issue emergency orders is not limited to safety; rather, it is foreseeable that this authority may be invoked in a case of national emergency to address potential security violations involving the transportation of hazardous materials.

PHMSA foresees that DOT hazardous materials inspections will continue at offeror or carrier fixed facilities or terminals. But we note that inspections may be conducted at other locations within the Department's jurisdiction, consistent with the authority conveyed by section 7118, depending upon the relevant circumstances and as necessary to promote the interest of public safety. PHMSA recognizes that detaining a shipment may impact a commercial transaction involving the package in transit and will make every effort to avoid unnecessary delays and interruptions.

The instances in which this authority may be invoked are heavily fact-specific and situation-dependent. Thus, it would not serve the interest of public safety to limit the context in which this authority may be exercised. Though we will make every effort to avoid unnecessary delays and shipment interruptions, the authority granted in SAFETEA–LU is sufficiently specific and particularized, authorizing designated DOT agents to open a package in transportation if that agent has an objectively reasonable and articulable belief that the package may contain a hazardous material, irrespective of the location at which the package is identified.

With respect to comments regarding carriers' ability to open packages, we do not intend this rulemaking to affect contractual or other legal rights or obligations surrounding the carrier-shipper relationship. Although carriers and shippers may wish to clarify or address their contractual arrangements, the regulatory procedures we are proposing do not depend on carriers' consent or assistance in opening packages. Should a carrier refuse consent, section 7118 authorizes an agent of the Secretary to open the package himself or herself or to order the package to be transported to an appropriate facility at which it may be opened and examined. In any case, we consider contract negotiations among private entities beyond the scope of this rulemaking.

The operating administrations responsible for enforcement of the HMR—PHMSA, FMCSA, FAA, and FRA—all worked together under PHMSA's leadership to develop this proposed rule. This NPRM proposes regulations that establish a clear, basic outline of the procedures all four operating administrations will use to implement DOT's new enforcement authority. To provide for uniformity across modes of transportation and separate enforcement staffs, the regulations proposed in this NPRM must be broad and provide a common framework. The operating administrations are also developing a joint operations manual to address issues particular to a specific mode of transportation or regulated industry. It is our intent that the joint operations manual will be publically available on PHMSA's Web site at the time of issuance of the Final Rule. The proposed regulations set out a framework for the procedures PHMSA, FMCSA, FAA, and FRA will employ when conducting inspections or investigations, thus ensuring consistency in approaches and enforcement measures among modes of transportation. A Final Rule, implemented with the guidance of an operational manual, will ensure that this authority, especially a finding of an imminent hazard, is used effectively yet judiciously. It will focus and direct an informed enforcement effort to address problems with undeclared shipments of hazardous material and other packaging communication requirements while preventing the additional authority from being misused as an exploratory tool or without reasoned deliberation.

(2) The Meaning and Application of Objectively Reasonable and Articulable Belief That a Package May Pose an Imminent Hazard

Commenters raised two critical questions regarding the legal standards that determine whether DOT may open a shipment and detain and remove it from transportation. The American Trucking Association (ATA), COSTHA, DaRuBa Enterprises (DaRuBa), Arrowhead Industrial Services, DGAC, VOHMA, and Tyco contend that the operative term ''objectively reasonable and articulable belief'' requires further explanation. AHS, COSTHA, and VOHMA also requested clarification on what the term ''imminent hazard'' means. Finally, several interested persons, including DGAC, ATA, and the Institute of Makers of Explosives (IME) questioned how PHMSA would define these terms in the regulatory text.

PHMSA Response: The proposed rule defines ''objectively reasonable and articulable belief'' as ''a belief based on particularized and identifiable facts that provide an objective basis to believe or suspect.'' See proposed § 109.1. The proposed rule defines ''imminent hazard'' as ''the existence of a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment.'' See proposed § 109.1. This proposed definition of ''imminent hazard'' is consistent with the statutory definition of the term found in 49 U.S.C. 5102(5). Both of these terms determine whether the Department may detain, open, and examine a suspect shipment for the presence of hazardous material in its contents and/or remove the package from transportation in commerce.

PHMSA starts with the premise that an offeror that places articles in a closed and opaque container has a legitimate expectation of privacy and retains a possessory interest in those items when they are being transported in commerce. *Jacobsen*, 466 U.S. at 113, 114; *U.S.* v. *Villarreal*, 963 F.2d at 773. The hazardous materials transportation industry, however, is closely regulated, meaning that a person engaging in this industry has a reduced expectation of privacy. *U.S.* v. *V–1 Oil Company*, 63 F.3d 909, 911 (9th Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996). DOT therefore is authorized to conduct warrantless and unannounced inspections of an entity that offers or transports hazardous material in commerce to determine its level of compliance with the Hazmat Law and HMR under the ''administrative search'' doctrine. *Id.* at 913.

When the government asserts control of the shipment and its contents, e.g., by detaining the package from further transportation, it has conducted a seizure subject to the Fourth Amendment. *Jacobsen*, 466 U.S. at 120. Nevertheless, brief investigative detentions are authorized, provided there is a reasonable articulable suspicion that the shipment does not comply with regulatory requirements. *V–1 Oil Company* v. *Means*, 94 F.3d 1420, 1424 (10th Cir. 1996). Known as a ''*Terry*'' stop after the landmark decision, *Terry* v. *Ohio*, 392 U.S. 1 (1968), such an investigative stop is permitted when an inspector can ''point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant'' the detention. *Terry*, 392 U.S. at 21. The inspector must have particularized and identifiable facts, i.e., some articulable basis, to believe that a Federal statute or regulation has been violated. See *Brierley* v. *Schoenfeld*, 781 F.2d 838, 841 (10th Cir. 1986). *Terry* employs a ''less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.'' *Illinois* v. *Wardlow*, 528 U.S. 119, 123 (2000). (In contrast, probable cause means ''a fair probability that contraband or evidence of a crime will be found.'' *Alabama* v. *White*, 496 U.S. 325, 330 (1990)). In short, DOT need only establish a ''minimal level of objective justification'' to detain, open, and inspect a shipment that may have hidden or undeclared hazardous materials. See *U.S.* v. *Sokolow*, 490 U.S. 1, 7 (1989).

Accordingly, an inspector would need to produce facts establishing that the official reasonably believed that a noncomplying condition existed. *U.S.* v. *Delfin-Colina*, 464 F.3d 392, 398 (3d Cir. 2006). An inchoate hunch or guess would be insufficient: an inspector is required to set out evidence supporting the detention. *Alabama*, 496 U.S. at 329–30; *see also* 59 FR 7448, 7454 (Feb. 15, 1994) (FRA ''reasonable cause'' testing standard requires reasonable suspicion). The information relied upon may come from a variety of sources, including but not limited to the following: package appearance, identity of offeror or carrier, an odor emanating from a container, and anonymous tips. *U.S.* v. *Wheat*, 278 F.3d 722, 726 (8th Cir. 2001), *cert. denied*, 537 U.S. 850 (2002). The basis for reasonable

suspicion would center on the totality of circumstances experienced by the inspector and the official's skill and experience in determining whether an investigative stop would be justified. *Brierley*, 781 F.2d at 841. The Department therefore would afford its inspectors reasonable discretion in making reasonable suspicion findings in light of the flexible nature of *Terry* and its progeny.

While this proposed regulation implements the Department of Transportation's enforcement authority, it does not in any way affect Department of Homeland Security (DHS) agents exercising their statutory authority at points of entry. Therefore, DOT's standards for the inspection and detention of packagings, vehicles or persons, including a requirement of an objectively reasonable and articulable belief that a package may contain a hazardous material, do not apply to DHS, which operates under separate statutory and regulatory authorities.

Finally, Department officials would exercise reasonable, intrusive means when stopping a shipment from continuing in transportation in commerce. An inspector would be authorized to hold a package at a terminal or depot until qualified personnel or shipping papers arrived to ascertain its contents. The inspector also would be permitted to order the shipment to be moved to an appropriate facility when necessary to safely conduct an inspection. *See Means*, 94 F.3d at 1427. The inspector would release the shipment for transportation when the underlying objectives of the detention had been met.

The term imminent hazard has been defined in the hazmat law for many years (49 U.S.C. 5102(5)) and PHMSA proposes to retain that definition without change. An imminent hazard exists when an unsafe condition or practice, or a combination thereof, causes, or is causing, a situation that is likely to result in serious injury or death, or significant property or environmental damage if not discontinued immediately. The proposed rule would authorize a designated DOT inspector to remove a package from transportation if the inspector has an objectively reasonable and articulable belief that the package may pose an imminent hazard, provided that he contemporaneously documents such belief in accordance with the regulations issued under section 7118(e).

In summary, this proposed rule would provide three new enhanced enforcement tools. First, a Department inspector would be permitted to stop, open, and examine a shipment when he or she has a reasonable suspicion that the package contains a hazardous material. Depending on the circumstances, a package may be suspicious even if it bears no mark, label, or shipping paper indicating the presence of a hazardous material. In other cases, a package could be marked or labeled incorrectly, thus causing the inspector to believe that the package contains hazardous material. Misidentification of the package contents can have serious safety implications, well justifying use of the package opening authority to inspect HMR compliance. Listing of an incorrect UN identification number, for example, could result in improper segregation, handling, and/or response measures. Likewise, the inspector could elect to open a package that is properly marked and labeled but that appears not to comply with other regulatory requirements or otherwise presents an imminent hazard.

Second, the Department inspector or delegated official would be authorized to remove the package and related packages in the shipment from transportation in commerce and order their delivery to an appropriate facility for testing and analysis when he or she has determined that an imminent hazard may exist. A finding of imminent hazard is not a prerequisite to the detention, opening and examination of a package suspected of containing a hazardous material. Third, upon further investigation, PHMSA on its own initiative, or after advice and recommendation from the other modal officials, may issue a recall of an entire packaging design if it presents an imminent hazard.

(3) Reclosing Packages

Several commenters expressed concern about the reclosing of packages after they have been opened. Allergan, COSTHA, Delta Airlines, and Rykos expressed concern about preserving the integrity of a package after it has been opened and found not to contain an undeclared hazardous material. The regulated community also was interested in learning about the manner in which DOT intends to reclose certain packagings that have been opened in transit, including specification packaging; refrigeration packaging; specific-mode packaging; pharmaceutical manufacturing and healthcare products packaging; overnight or express delivery packaging; and packages containing expensive, valuable, or perishable products. American President Lines (APL), the Association of American Railroads, Nuclear Energy Institute, and Rykos inquired about reclosing packagings that require specialized seals, and the ATA suggested that DOT develop a seal or tape to identify that a package has been opened to ensure against rejection upon delivery. Finally, American Eagle Airlines, Brookwarehousing Corporation, COSTHA, DGAC, International Warehouse Logistics Association (IWLA), United Parcel Service, and VOHMA advised that PHMSA should consider whether small businesses or carrier terminals are properly equipped to reclose a package that is already in transit at the time DOT conducts an inspection.

PHMSA Response: The Department is developing internal operational procedures to address the proper closure of packaging in accordance with the HMR. As part of these procedures, we are considering affixing a DOT-specific tape over the packaging that identifies the agency and the inspector who opened the package in question. These procedures will be covered within the joint operations manual discussed above in the section entitled ''Types of Outer Packages that could be Opened by Inspectors.''

We are sensitive to concerns about reclosing shipments that are opened during a hazardous materials inspection. The availability of qualified personnel, equipment, accessibility, and other capabilities are factors we are considering for the guidelines on reclosing shipments after conducting inspections. PHMSA thus solicits further comments from the public on these and other factors in reclosing packages and the manner and materials available to prevent release of hazardous materials.

(4) Amount of Time Required To Open and Examine an Outer Packaging

The ATA and VOHMA expressed concern that enhanced inspections may delay their business operations and questioned whether exercising this authority may impact carriers' other existing regulatory requirements. For example, ATA expressed concern that the amount of time required to open and examine a package may potentially affect a carrier's obligation to comply with hours of service requirements under the Federal Motor Carrier Safety Regulations. Moreover, VOHMA stated that if a package is opened in accordance with this enhanced authority, inspectors may not be able to restore every package in accordance with the manufacturer's instructions, and thus the package could become noncompliant with other regulatory

requirements or be refused by the consignee.

PHMSA Response: We believe that the package opening authority can be exercised without undue interference with business operations. DOT will take reasonable measures to narrow the scope of an enhanced inspection to determine compliance with the HMR and will remove a shipment from transportation only when there is a reasonable basis for suspecting that the package may pose an imminent hazard. Correspondingly, the Department will limit the time of such inspections to minimize transportation delays when we can do so without compromising transportation safety. We request comments relating to any time-sensitive standards or consignment contracts mandated by law that may be affected by a final rule.

The implementation of this enhanced authority will not waive or supersede any other regulatory requirements. The packages must be reclosed and shipped in accordance with the HMR. An inspector who exercises this enhanced authority will take action to facilitate the resumption of transportation in commerce if the package is found to be in compliance with the HMR. If the package is not in compliance, the package will not be returned to the stream of commerce until the package is brought into conformance with the HMR.

(5) When a Package Must Be Transported and Analyzed at an Appropriate Facility

The ATA and DGAC inquired about which entity would transport a hazardous material package to an offsite facility, pay to transport, and test the material subject to this authority.

PHMSA Response: The operating administration requiring the testing will pay for the transportation and analysis of the material if the package is found to be in compliance with the HMR. If the material is found to be packaged in violation of the HMR, the costs for the transportation and analysis of the material would be taken into consideration at the time any civil penalty is assessed against the party responsible for the violation (usually the offeror). Furthermore, nothing herein is intended to relieve any entity or person of hazmat clean-up costs under Federal, State, or local laws as enforced by other Federal government agencies (*e.g.*, Environmental Protection Agency, Bureau of Alcohol Tobacco, Firearms, and Explosives, and Occupational Safety and Health Administration).

(6) Effect on Offeror or Transporter Subject to an Emergency Action or Order

Commenters addressed the issue of the impact that an emergency order may have on an offeror or transporter that is subject to its requirements. Their primary concern was the effect that an emergency order may have on commercial operations relating to pre-transportation and transportation functions that are regulated by the HMR.

PHMSA Response: PHMSA understands that an emergency order may affect commercial operations of offerors or transporters that perform regulated activities. Indeed, because issuance of an emergency order does not require a finding of noncompliance, it is possible that such an order could require a regulated entity to alter or amend otherwise lawful practices or transactions. The circumstances warranting such extraordinary action are necessarily fact-specific and, in all likelihood, rarely encountered. In any case, DOT intends to tailor the remedy to the imminent hazard present, issuing only the appropriate restriction, prohibition, recall, or out-of-service order necessary to abate the condition. We will use this enforcement tool judiciously, as a means of addressing imminent hazards and not as a substitute for rulemaking or other measures for addressing emergent risks.

(7) Liability

Commenters also raised the issue of whether DOT or its operating administrations would be liable for any damages to business operations when an inspector conducts an enhanced inspection or when a modal administration issues an emergency order. In particular, the interested persons asked whether the Federal government would be responsible for compensatory, consequential, or incidental damages incurred by any regulated entity that had its shipments contaminated, damaged, delayed, destroyed, or removed from service as a result of an enhanced inspection or emergency order.

PHMSA Response: PHMSA acknowledges that the exercise of enhanced inspection and enforcement authority occasionally may result in the breach of packages and/or delay of shipments that have been offered and transported in full compliance with regulatory requirements. Although we will strive to minimize such effects, we believe the public benefits to be gained through enhanced inspection and enforcement measures justify the increased burdens. The exercise of enhanced inspection and enforcement authority in accordance with the proposed rule will protect life, property, and the environment, and improve the performance of the transportation system by reducing risks posed by undeclared and other noncompliant hazardous materials shipments.

To minimize burdens on the transportation system, the Department will take measures to target and manage its exercise of enhanced inspection and enforcement remedies. Such measures include training its inspectors to exercise appropriate discretion while carrying out their inspection tasks consistently with HMTSSRA and a final rule. In any case, we do not expect DOT to bear financial responsibility for private costs related to our exercise of enhanced inspection and enforcement authority. Under the discretionary function exception, the Federal Tort Claims Act (FTCA) would bar any common law tort action against the Department or operating administration based on such activities. *See* 28 U.S.C. 2680(a); *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 809–10 (1984) (''*Varig Airlines*'') (discretionary function exemption was intended to exempt claims stemming from Federal agencies' regulatory activities); *Hylin* v. *U.S.*, 755 F.2d 551, 553 (7th Cir. 1985) (discretionary function exception prohibits tort claims against government for inspection and enforcement activities requiring exercise of discretion); *Mid-South Holding Co.* v. *United States*, 225 F.3d 1201, 1206 (11th Cir. 2000) (discretionary function exception applies to any discretionary act irrespective of ''administrative level at which it is authorized or taken''); *Wells* v. *United States*, 655 F. Supp. 715, 720 (D.D.C. 1987) (government's discretionary acts in regulating private conduct ''are presumptively exempt from liability''), *aff'd*, 851 F.2d 1471 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); *cf., Roundtree* v. *United States*, 40 F.3d 1036 (9th Cir. 1994) (FAA not liable in suspending operating certificate under FTCA's discretionary function exception).

(8) Training of Inspectors

APL and DGAC recommended that DOT properly train the inspectors who will exercise the enhanced inspection and enforcement authority in the field. They contend training is essential to ensure that well-defined inspections are conducted, enforcement actions are measured, and the public (and the inspectors themselves) are protected.

PHMSA Response: PHMSA agrees that the DOT inspectors conducting

enhanced inspections will need to be trained on carrying out such inspections. Inspectors will also be trained on utilizing an enforcement remedy commensurate with the non-complying condition or imminent hazard identified and having the requisite knowledge in repackaging shipments that have been opened. The inspectors also will need to be trained on various scenarios in which they will need to order a shipment to be transferred to an appropriate facility for testing and analysis. Because all Department inspectors will have the same general training and modal specific instruction (as discussed above in the section on ''Types of Outer Packages that could be Opened by Inspectors''), PHMSA is confident that inspectors will be proficient in applying the enhanced inspection and enforcement regulations to inspections conducted at offeror or carrier facilities.

(9) State Participation in the Federal Hazardous Materials Inspection Program

APL, ATA, IME, and Prezant Consulting cautioned that DOT and State inspectors conducting hazardous materials inspections need to be consistent in carrying out the regulations implementing the enhanced inspection and enforcement authority.

PHMSA Response: The proposed rule is limited in scope to authorized Federal enforcement employees of PHMSA, FRA, FAA, and FMCSA. The proposed regulations and underlying statutory authority are Federal; they would not empower State officials to exercise the enhanced inspection and enforcement authority. All emergency orders under this enhanced enforcement authority will be issued solely by the Federal government, not State participants. These proposed regulations are not intended to be part of the Motor Carrier Safety Assistance Program (MCSAP) or the Rail Safety State participation program. However, the proposed regulations would not limit the States from passing similar statutes or from promulgating similar regulations for their hazardous materials transportation enforcement officials.

(10) Communications/Notification to Parties

APL, IWLA, DaRuBa, and Tyco expressed concern about notifying offerors and consignees about a possible delay in arrival because DOT intended to open a package for inspection.

PHMSA Response: PHMSA believes that all parties responsible for a shipment that is opened or removed from transportation need to be notified of the action taken. DOT inspectors will be required to communicate the findings made and enforcement measures taken to the appropriate offeror, recipient, and carrier of the package, and the expected delay or detention based on the condition of the shipment, location of the inspection, and need and availability of personnel, equipment, and other resources to reclose the package to safely resume its transportation.

(11) Assumption of Control of Detained Shipment

Commenters questioned who would assume control of a package when an inspection found undeclared hazardous material or determined that the shipment may pose an imminent hazard, and when such control would commence.

PHMSA Response: The offeror tendering the package or the carrier transporting the shipment retains custody of the shipment until the government asserts or exercises dominion or control over the package and its contents. *Jacobsen*, 466 U.S. at 120. Once an inspector opens the package to continue the inspection or detain or remove the shipment from transportation, the Department will become the responsible custodian for the package. If a package is opened but does not pose an imminent hazard, and is otherwise in compliance with the HMR, the inspector will assist in reclosing the package, at which point custody will revert to the offeror or carrier, and reenter the transportation stream. If a package is non-compliant before it is opened, and it is later found not to pose an imminent hazard, the offeror or carrier will resume custody of the package at the conclusion of the investigation. It is the ultimate responsibility of the offeror to bring any such package into compliance.

This proposed rule contemplates DOT informing the private party of the government's intent to assert and relinquish control of the shipment and the measures it will take to safeguard and reclose the package until it is safe to resume its movement in transportation. PHMSA welcomes comments on the parties' expectations when the government exercises control of a package and whether further clarification of possessory interest is necessary.

Section-by-Section Analysis

PHMSA proposes to add part 109 to Title 49, Code of Federal Regulations, prescribing standards and procedures governing exercise of enhanced inspection and enforcement authority by DOT operating administrations. Below is an analysis of the proposed regulatory provisions.

Section 109.1 Definitions

This section contains a comprehensive set of definitions. PHMSA proposes to promulgate these definitions in order to clarify the meaning of important terms as they are used in the text of this proposed rule. Several terms introduce concepts new to the HMR. These definitions require further discussion as set forth below. Other terms defined in this rule are borrowed from the Hazmat Law at 49 U.S.C. 5102 and are used in their statutory meaning.

Administrator and Agent of the Secretary or agent are proposed to identify the parties authorized by delegation from the Secretary to carry out the functions of the proposed rule. *Administrator* is defined as the head official of each operating administration within DOT to whom the Secretary has delegated authority under 49 CFR part 1 and any person employed by an operating administration to whom the Administrator has delegated authority to carry out this rule. Likewise, *Agent of the Secretary or agent* means a Federal officer or employee, including an inspector, investigator, or specialist authorized by the Secretary or Administrator to conduct inspections or investigations under the Hazmat Law and HMR.

Chief Safety Officer or *CSO* refers to the Assistant Administrator for PHMSA who is appointed in competitive service by the agency's Administrator. *See* 49 U.S.C. 108(e).

Emergency order is defined as an emergency restriction, prohibition, recall, or out-of-service (OOS) order. (The term ''out-of-service order'' is defined below.) As proposed, an Administrator, and in the case of an OOS order, an agent of the Secretary would be authorized to impose an equitable remedy restricting, prohibiting, recalling, or removing from service a package that contains a hazardous material. An emergency order is the type of extraordinary relief available to address imminent hazard circumstances.

Freight container is defined as it is defined in 49 CFR 171.8 and has been included in this section for clarity and ease of referral.

Immediately adjacent to the hazardous material contained in the package means a packaging that is in direct contact with the hazardous material, or otherwise serves as the primary means of containment of the hazardous material.

As defined by statute, *imminent hazard* means ''the existence of a condition that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment.'' 49 U.S.C. 5102(5). Restated, an imminent hazard exists when any condition is likely to result in serious injury or death, or significant property or environmental damage if not discontinued immediately. *Cf.* Sen. Rep. No. 98–424, at 12 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4785, 4796 (definition of ''imminent hazard'' under the Motor Carrier Safety Act).

Objectively reasonable and articulable belief is defined in this proposed rule as a belief based on discrete facts or indicia that provide a reasonable basis to believe or suspect that a shipment may contain a hazardous material. The term, which is discussed above in the context of DOT inspections of hazardous materials shipments, codifies the temporary stop and detention principle often referred to as a ''*Terry*'' stop, referring to *Terry* v. *Ohio*, 392 U.S. 1 (1968). The reasonable suspicion standard must be more than an ''inchoate and unparticularized suspicion or 'hunch[,]' '' *id.* at 27, meaning that a reasonable person possessing the same information as the inspector had must have believed that the action taken was appropriate. *Id.* at 21–22. In determining whether an officer or agent had such a reasonable suspicion, courts consider the ''totality of the circumstances.'' *See Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). At its core, the term refers to an investigatory stop in which there is particularized suspicion based on observations made, inferences drawn, and deductions made that the shipment does not comply with the Hazmat Law or HMR. *See generally, U.S.* v. *Cortez*, 449 U.S. 411, 417–18 (1981).

The brief investigative detention enables the inspectors to conduct a more thorough inspection to determine the level of compliance with the Hazmat Law or HMR and is reasonably related in scope to the circumstances justifying the detention. *See Means*, 94 F.3d at 1424; *U.S.* v. *McSwain*, 29 F.3d 558, 561 (10th Cir. 1994). This legal standard authorizes minimally intrusive conduct to detain a shipment for a short duration when articulable facts and circumstances suggest that a package contains undeclared hazardous materials. *See McSwain*, 29 F.3d at 561. The agency notes that the standard authorizes inspectors to employ reasonable intrusive means, but not the least intrusive means, to conduct an inspection, meaning that safety and security measures may justify moving a package to another site when necessary to carry out an inspection. *See Means*, 94 F.3d at 1427.

Out-of-service (OOS) order is defined as a written requirement issued by an agent of the Secretary prohibiting further movement or operation of an aircraft, vessel, motor vehicle, train, railcar, locomotive, transport vehicle, or freight container, portable tank, or other package until certain conditions have been satisfied. An order is similar in concept and application to a special notice for repairs that FRA issues for freight cars, locomotives, passenger equipment, and track segments. *See* 49 CFR part 216. The definition covers transport vehicles and packages that are unsafe for further movement, requiring that the equipment be removed from transportation until repairs are made or safety conditions are met. PHMSA believes that an OOS order is appropriate when equipment or a shipment is unsafe for further service or presents an unreasonable or unacceptable risk to safety, creating an imminent hazard at a given instant.

Packaging as defined in this part is more expansive than the definition provided at 49 CFR 171.8. In this part, proposed § 109, the term includes a freight container, intermediate bulk container, overpack, or trailer as a receptacle to contain a hazardous material. As proposed, the regulatory text would authorize DOT inspectors to open, detain, and remove from transportation such container or enclosure units when circumstances warrant.

Perishable refers to a hazardous material that may experience accelerated decay, deterioration, or spoilage. PHMSA envisions etiologic agents, such as biological products, infectious substances, medical waste, and toxins as perishable commodities that will require special handling.

Properly qualified personnel means a company, partnership, proprietorship, or individual who is qualified to inspect, examine, open, remove, test, or transport hazmat shipments.

Remove means to keep a package from entering into the stream of transportation in commerce; to take a package out of the stream of transportation in commerce by physically detaining a package that was offered for transportation in commerce; or stopping a package from continuing in transportation in commerce. The term is defined to make clear that if a DOT inspector has an objectively reasonable and articulable belief that a package may pose an imminent hazard, that inspector is authorized to stop, detain, and prevent the further transportation in commerce of that package until the imminent hazard is abated.

Safe and expeditious refers to appropriate measures or procedures available to minimize any delays in resuming the movement of a perishable hazardous material.

Trailer is added to set out the contours of another type of package that is subject to this rule. Although a trailer and freight container perform the same function, a trailer has a chassis, hitch, and tires attached to the unit, enabling it to travel as a cargo unit attached to a tractor.

Section 109.3 Inspections and Investigations

Proposed § 109.3 sets out the inspections and investigations that agents of the Secretary (e.g., DOT inspectors) would be authorized to conduct in implementing the HMTSSRA. Of significance, this section would implement section 7118 by enabling inspectors to open, detain, and remove a hazardous material shipment from transportation in commerce, and order the package to be transported to a facility that can analyze its contents.

Paragraph (a) of § 109.3 reiterates the authority to initiate inspections and investigations as provided by 49 U.S.C. 5121(a), which has been delegated to the operating administrations and redelegated to the inspectors by internal delegation. The operating administrations focus their inspection resources on the mode of transportation that they oversee. *See* 49 CFR 1.47(j)(1) (FAA), 1.49(s)(1) (FRA), 1.53(b)(1) (PHMSA), and 1.73(d)(1) (FMCSA). Nevertheless, operating administrations may ''use their resources for DOT-wide purposes, such as inspections of shippers by all modes of transportation.'' 65 FR 49763, 49764 (Aug. 15, 2000). DOT believes that broad delegation authority is necessary to address cross-modal and intermodal issues to combat undeclared hazardous materials shipments. *Id.* at 49763. Accordingly, DOT inspectors would be authorized to carry out the enhanced inspection and enforcement authority rule across different modes of transportation.

Proposed § 109.3(b) sets out the enhanced inspection process when conducting hazardous materials inspections. Inspectors must present their credentials for examination upon request under 49 U.S.C. 5121(c)(2) and may gather information by interviewing,

photocopying, photographing, and audio and video recording during inspections or investigations. The inspections or investigations may be conducted at any pre-transportation or transportation facility wherever a hazardous material is offered, transported, loaded, or unloaded or stored incidental to the hazardous material movement, provided they are performed ''at a reasonable time and in a reasonable manner.'' See 49 U.S.C. 5121(c)(1)(A); 49 CFR 171.1. PHMSA interprets ''reasonable time'' to mean an entity's regular business hours. PHMSA believes ''reasonable manner'' means that DOT inspectors may gather information from any entity or source that is related to the transportation of hazardous materials in commerce whenever hazardous material operations or work connected to such operations are being performed. *See generally* H.R. Rep. No. 96–1025, at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3830, 3839. DOT also may issue and serve administrative subpoenas for documents or other tangible things when such evidence is necessary to assist an inspection or investigation. Each operating administration would serve the subpoena in accordance with its own regulations. *See* 14 CFR 13.3 (FAA), 49 CFR 105.45–.55 (PHMSA), 49 CFR 209.7 (FRA), and 49 CFR 386.53 (FMCSA). PHMSA believes that this provision would enable DOT to gather information from any source, including the offeror, carrier, packaging manufacturer or tester responsible for the shipment, to learn about the nature of the contents of the package. This process would promote communication and cooperation by all concerned parties and enable the Department to detect and deter undeclared hazardous material shipments.

Proposed § 109.3(b)(4) implements the authority conferred by 49 U.S.C. 5121(c)(1) to enable DOT inspectors to take enhanced inspection and enforcement action. Under § 109.3(b)(4)(i), inspectors may open an overpack, outer packaging, freight container, or other package component that is not immediately adjacent to the hazardous material contents and inspect the inside of the receptacle or container for undeclared hazardous material, provided that the officials have an objectively reasonable and articulable belief that the shipment contains hazardous material. (Please see above for PHMSA's discussion of the meaning and application of ''objectively reasonable and articulable belief.'') Therefore, shipments such as plastic bottles or drums, which are in direct contact with a hazardous material, will not be opened pursuant to this authority. PHMSA expects DOT inspectors to exercise this enhanced authority at locations through which hazardous materials are shipped and transported, including port facilities, weigh stations, international border crossings, interchange points, intermodal facilities, and terminals to identify undeclared hazardous material shipments or other noncompliant shipments that are offered for transportation, or being transported, in commerce.

The enhanced inspection authority builds on the existing authority to conduct warrantless inspections. Under the administrative search doctrine, a company engaged in a closely regulated activity, such as hazardous materials transportation, has no Fourth Amendment protection against unannounced compliance inspections. *See V–1 Oil*, 63 F.3d at 913 (FRA's warrantless and unannounced inspection of a hazardous materials transportation facility is constitutional); see also *U.S.* v. *Burger*, 482 U.S. 691 (1987); *Skinner,* 489 U.S. at 625 (railroad industry is pervasively regulated to ensure safety); *U.S.* v. *Mendoza-Gonzalez*, 363 F.3d 788, 794 (8th Cir. 2004) (commercial trucking is a closely regulated industry); *Means*, 94 F.3d at 1426 (motor carrier industry is closely regulated); *Suburban O'Hare Com'n* v. *Dole*, 787 F.2d 186, 188 (7th Cir.) (aviation industry is closely regulated), *cert. denied*, 479 U.S. 847 (1986). The proposed rule would enable inspectors who already have unconditional access to property relating to hazardous material transportation to more closely examine certain shipments. In all cases, DOT inspections are limited by time, place, and manner in which a package may be opened. The statute (49 U.S.C. 5121) limits the discretion of the inspectors, delineating the scope of inspections and defining the objective circumstances in which the package opening authority may be exercised. These limitations promote uniform application of the enhanced inspection authority, while leaving inspectors sufficient discretion to respond effectively to circumstances encountered in the field. We note that DOT's use of unannounced, warrantless inspections has survived legal and constitutional challenge, as reflected in the cases cited above. Although evidence gathered in hazmat inspections or investigations could later serve as the basis for criminal prosecution, our use of warrantless inspections serves a legitimate and lawful purpose: detecting and deterring undeclared hazardous material shipments. See *Skinner*, 489 U.S. at 620–21 n.5 (1989) (FRA inspection program served lawful purpose and was not a pretext to collect evidence for criminal law enforcement purposes).

Proposed § 109.3(b)(4)(ii) implements 49 U.S.C. 5121(c)(1)(C) by permitting a DOT inspector to remove from transportation in commerce a package (including a freight container) when the inspector has an objectively reasonable and articulable belief that the package contains a hazardous material and may pose an imminent hazard. PHMSA intends to employ this remedy when necessary to suspend or restrict the transportation of a shipment that is deemed unsafe. *See* S. Rep. No. 101–444, at 10 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4595, 4604. Should this condition exist, the inspector must document the basis for removing the package from transportation as soon as practicable, including the findings that the shipment contained a hazardous material and the imminent hazard identified. The documentation requirement safeguards the inspection and enforcement process by requiring DOT to specifically describe the hazard present and substantiate the need to remove the shipment from the stream of commerce. The documentation will chronicle the activities and events culminating in removing the package from transportation. The documentation must provide sufficient justification to pursue further investigation into the contents of a package. This section further provides that an inspector must limit this removal to a reasonable duration of time in order to determine whether the package may pose an imminent hazard.

Section 109.3(b)(4)(iii), which implements 49 U.S.C. 5121(c)(1)(E), proposes that an agent of the Secretary may order the party in possession of the package, or otherwise responsible for the shipment, to have it transported to, opened, and examined at an appropriate facility if it is not practicable to examine the contents of a package at the time of the stop. This provision would enable DOT to facilitate learning about the nature of the product inside the shipment by permitting delivery of the shipment to a facility that is capable of identifying the contents. PHMSA intends for DOT to employ this remedy only when an on-site inspection is inadequate or a facility has the sophisticated personnel, equipment, and information technology to assist in the inspection or investigation. Qualified personnel may be asked to assist DOT when the inspectors open,

detain, or remove a shipment, if it is possible that a package may experience a leak, spill, or release. Proposed § 109.3(b)(4)(iv) provides this authorization.

Under proposed § 109.3(b)(5), an inspector would make a reasonable effort to assist in preparing a shipment to reenter transportation after opening or detaining the package if the shipment does not pose an imminent hazard and reentry in transportation is otherwise practicable. The inspector or a designee would reclose the package in accordance with the packaging manufacturer's instructions or other procedures approved by PHMSA's Associate Administrator for Hazardous Materials Safety. The inspector would then mark and certify that the shipment was opened and reclosed, and return the shipment for transportation, as quickly as practicable. Additionally, the inspector would assist in the safe and expeditious movement of a shipment that contains a perishable material once it is determined that the package does not present an imminent hazard. These measures, of course, presume that the package otherwise complies with the HMR. The Department's operating administrations would not be responsible for bringing an otherwise non-specification or non-compliant package into compliance and resuming its movement in commerce. If the package did not comply with the HMR, the fact that a DOT official opened it in the course of an inspection or investigation would not make DOT or its inspector responsible for bringing the package into compliance.

At this juncture, PHMSA is soliciting comments from interested parties about appropriate closure measures that would reseal opened packages. In particular, we seek comments from manufacturers of receptacles, containers, or other units that perform a containment function for hazardous material and hope to learn of equipment, instruments, and types of resealment that may be used to reclose a shipment. PHMSA is further requesting comments or suggestions from manufacturers, packaging companies, offerors, and carriers about the appropriate manner of reclosing a shipment containing a perishable material, including medical material such as radiopharmaceuticals and radionuclides, for prompt re-transportation. PHMSA also is contemplating using a special tape that would identify that the package was opened by a DOT inspector. The agency requests comments on whether tape or another adhesive would provide adequate notice that a DOT inspector opened a shipment.

Proposed § 109.3(b)(6) addresses the situation in which a package is found to present an imminent hazard. This section would authorize the Administrator of each operating administration, or his/her designee, to issue an OOS order prohibiting the movement of a package until the imminent hazard is abated and the package has been brought into compliance with the HMR. Consequently, if an inspector determines that a package presents an imminent hazard, the carrier or other person in possession of, or responsible for, the package must remove the package from transportation until it is brought into compliance with the HMR. OOS orders ensure that if a package presents an imminent hazard, immediate action is taken to abate that hazard. Proposed paragraph (b)(6)(i) provides that a package subject to an OOS order may be moved from the place where it is first discovered to present an imminent hazard to the nearest location where remedial action can be taken to abate the hazard and bring the package into compliance with the HMR, provided that before the move, the agent issuing the OOS order is notified of the planned move. Proposed paragraph (b)(6)(ii) would require that the recipient of an OOS order notify the agent who issued the order when the package is brought into compliance with the HMR.

Proposed paragraph (b)(6)(iii) provides an appeal process for a recipient of an OOS order to challenge the issuance of the order. The appeal process proposed for OOS orders is consistent with the appeal process proposed for other types of emergency orders set forth in proposed § 109.5(e)–(h), discussed below.

Section 109.3(c) proposes that the operating administration would close the investigative file and inform the subject party of the decision when the agency determines that no further action is necessary. This provision clarifies when an investigation concludes and states that DOT will notify respondent that the file has been closed without prejudice to further investigation.

Section 109.5 Emergency Orders

Proposed § 109.5, which implements 49 U.S.C. 5121(d) authorizes DOT operating administrations to issue emergency orders to remove hazardous materials shipments from transportation in commerce without advance notice or an opportunity for a hearing. This section governs the issuance of emergency restrictions, prohibitions, OOS orders, and recalls, all of which fit within the purview of an emergency order. (See above for PHMSA's meaning and application of the term ''emergency order.'')

The predicate for issuing an emergency order is a violation of the Hazmat Law or HMR, or an unsafe condition or practice, whether or not it violates an existing statutory or regulatory requirement, which amounts to or is causing an imminent hazard. PHMSA believes that such an extraordinary remedy is necessary to address emergency situations or circumstances involving a hazard of death, illness, or injury to persons affected by an imminent hazard. *Cf. United Transp. Union* v. *Lewis*, 699 F.2d 1109, 1113 (11th Cir. 1983) (FRA emergency order authority is necessary to abate unsafe conditions or practices that extend to hazard of death or injury to persons); 49 U.S.C. 46105(c) (FAA is authorized to issue orders to meet existing emergency relating to safety in air commerce); 49 U.S.C. 521(b)(5) (FMCSA permitted to order a motor carrier OOS when vehicle or operation constitutes an imminent hazard to safety, *i.e.*, ''substantially increases the likelihood of serious injury or death if not discontinued immediately''). The Department intends that each operating administration issue an emergency order only after an inspection, investigation, testing, or research determines that an imminent hazard exists that requires exercising this enforcement tool to eliminate the particular hazard and protect public safety. *See* House Conf. Rep. No. 109–203 at 1080, 2005 U.S.C.C.A.N. at 714; *see generally* H.R. Rep. No. 96–1025, at 12, *reprinted in* 1980 U.S.C.C.A.N. 3830, 3837 (''purpose of the emergency powers provision is to vest administrative discretion in the Secretary to protect the public safety''). The order must articulate a sufficient factual basis that addresses the emergency situation warranting prompt prohibitive action. As proposed, the operating administrations would be conferred authority to take immediate measures to address a particular safety or security threat.

Proposed paragraph (a) outlines the critical elements that must be established before an agency may issue an emergency order. Principally, the order must be in writing and describe the violation, condition or practice that is causing the imminent hazard; enumerate the terms and conditions of the order; be circumscribed to abate the imminent hazard; and inform the recipient that it may seek administrative review of the order by filing a petition

with PHMSA's CSO. In other words, the order must be narrowly tailored to the discrete and specific safety hazard and identify the corrective action available to remedy the hazard. Due to the urgent nature of the action, a petitioner would have 20 calendar days to file the petition after the emergency order is issued. *See* 49 U.S.C. 5121(d)(3). (The time period that would apply is proposed at paragraph (a)(4), which adopts, in pertinent part, Fed. R. Civ. P. 6(a)). The proposed provision would ensure that the operating administrations employ uniform procedures and standards when issuing emergency orders and provides a degree of certainty and predictability to the regulated community about the requisite elements to establish a prima facie emergency order.

PHMSA proposes providing a party with administrative due process rights to seek redress of an emergency order, and thus, proposed paragraph (b) sets forth requirements for filing a petition for administrative review of an emergency order. The petition: (1) Must be in writing; (2) specifically state which part of the emergency order is being appealed; (3) include all information and arguments in support thereof; and (4) indicate whether a formal administrative hearing is requested. Should a petitioner request a hearing, the party must detail the material facts in dispute giving rise to the hearing request. The petition also must be addressed to PHMSA's CSO with a copy transmitted to the Chief Counsel of the operating administration issuing the emergency order. Proposed paragraph (c) provides that the Office of Chief Counsel of the operating administration that issued the emergency order may file a response, including appropriate pleadings, with the CSO within five days after receiving the petition. PHMSA proposes this short turnaround to enable the issuing operating administration to present evidence and argument supporting the emergency order. PHMSA notes that Congress mandated that DOT must resolve the petition within 30 days of its receipt unless the operating administration issues a subsequent order extending the original order, pending review of the petition. *See* 49 U.S.C. 5121(d)(4).

Under proposed paragraph (d), the CSO would review the petition and response and issue a decision within 30 days upon receipt of the petition if the petitioner does not request a formal hearing or the petition fails to assert material facts in dispute. The CSO's decision would constitute final agency action in this instance. Alternatively, if the petition contains a request for a formal hearing and states material facts in dispute, the CSO would assign the petition to DOT's Office of Hearings. PHMSA thus proposes designating the CSO as the first line of review of emergency orders. It is possible that the CSO would amend, affirm, lift, modify, stay, or vacate the emergency order upon review.

PHMSA believes that the CSO should serve as the primary adjudicator of petitions. Designating a single decision maker to handle all petitions will promote consistency in the application of review standards. The CSO is the leading safety authority in PHMSA, which is the agency that issues the HMR, interprets the Hazmat Law and its implementing regulations, and oversees DOT's hazardous materials transportation program.

Proposed paragraphs (e) through (h) set out the administrative hearing procedures that the Department's Office of Hearings would employ. Upon receiving the petition from the CSO, the Chief Administrative Law Judge would assign it to an Administrative Law Judge (ALJ), who would schedule and conduct an ''on the record'' hearing under 5 U.S.C. 554, 556, and 557. PHMSA believes that a petitioner should be afforded a formal hearing that addresses the merits of a petition to ensure that a record is created in a proceeding that will form the basis for final agency action and judicial review, if necessary.

Paragraph (e) provides that an ALJ may administer oaths and affirmations, issue subpoenas as authorized by each operating administration's regulations, enable the parties to engage in discovery, and conduct settlement conferences and hearings to resolve disputed factual issues. PHMSA expects ALJs to conduct efficient and expeditious proceedings, including controlling discovery actions, to enable the parties to obtain relevant information and present material arguments at a hearing within the time parameters established.

Paragraph (f) permits a petitioner to appear in person or through an authorized representative. The representative need not be an attorney. The operating administration, however, would be represented by an attorney from its Office of Chief Counsel. Paragraph (g) delineates the service rules governing the emergency order and review process. Generally, parties may effect service by electronic transmission via e-mail (with the pertinent document in Adobe PDF format attached) or facsimile, certified or registered mail, or personal delivery. Additionally, the operating administration that issued the emergency order must identify the list of persons, including the Department's docket management system, to receive the order and serve it by ''hand delivery,'' unless such delivery is not practicable. The agency will also publish a notice of the emergency order in the **Federal Register** as soon as practicable after the order's issuance.

Paragraph (h) proposes requiring the ALJ to issue a report and recommendation when the record is closed. The decision must contain factual findings and legal conclusions based on legal authorities and evidence presented on the record. Critically, the decision must be issued within 25 days after the CSO receives the petition. Under paragraph (i), which codifies 49 U.S.C. 5121(d)(4), the emergency order will no longer be effective if the ALJ or CSO has not ruled on the petition within 30 days of the CSO's receipt of the petition, unless the Administrator who issued the emergency order determines in writing that the imminent hazard continues to exist. The order then would remain in effect pending the disposition of the petition unless stayed or modified by the Administrator. PHMSA maintains that this provision is necessary to ensure that the order is extended to abate the imminent hazard.

Paragraph (j) would provide that an aggrieved party may file a petition for reconsideration of the ALJ's report and recommendation within one day of the issuance of the decision. The CSO then must issue a final agency decision no later than 30 days from the receipt of the petition for review, unless a subsequent emergency order is issued. In that case, the CSO would have three calendar days to render the decision after receiving the petition for reconsideration. The CSO's decision on the merits of a petition for reconsideration would constitute final agency action.

Paragraph (k) would enable an aggrieved party to seek judicial review of either the CSO's administrative decision or the CSO's adoption of the ALJ's report and recommendation. Judicial review would be available in an appropriate U.S. Court of Appeals under 49 U.S.C. 5127, 49 U.S.C. 20114(c), 28 U.S.C. 2342, and 5 U.S.C. 701–706. All parties should note that the filing of a petition will not stay or modify the force and effect of final agency action unless otherwise ordered by the appropriate U.S. Court of Appeals.

Paragraph (l) would specify the computation of time in the adjudications process.

Section 109.7 Emergency Recalls

Section 109.7 implements 49 U.S.C. 5121(d). Generally, PHMSA received

new recall authority in HMSSTRA to work hand in hand with our previous authority under 49 U.S.C. 5103(b)(1)(A)(iii) to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. Specifically, PHMSA proposes to implement the authority to recall packagings, containers, or package components which were improperly designed, manufactured, fabricated, inspected, marked, maintained, reconditioned, repaired, or tested but sold as qualified DOT packages, containers, or packaging components for use in the transportation of hazardous materials in commerce.

Section 109.9 Remedies Generally

In addition to seeking relief in Federal court with respect to an imminent hazard, this proposed section defines the need for general remedies available through litigation. As such, an Administrator may also request the Attorney General bring an action in the appropriate U.S. district court for all other necessary or appropriate relief, including, but not limited to, injunctive relief, punitive damages, and assessment of civil penalties as provided by 49 U.S.C. 5122(a). Proposed § 109.11 would authorize an Administrator to request DOJ to bring a cause of action in the appropriate U.S. district court seeking legal and equitable relief, including civil penalties, punitive damages, temporary restraining orders, and preliminary and permanent injunctions, to enforce the Hazmat Law, HMR, or an order, special permit, or approval issued.

Rulemaking Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This NPRM is published under the authority of 49 U.S.C. 5103(b) which authorizes the Secretary to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce and under the authority of 49 U.S.C. 5121(e). If adopted as proposed, the final rule would revise PHMSA's inspection and enforcement procedures in PHMSA's regulations to implement 49 U.S.C. 5121(c) and (d), as amended by HMTSSRA. Specifically, this proposed rule implements the enhanced inspection and enforcement authority mandated by section 7118 by enabling DOT to open, detain, and remove packages from transportation where appropriate, and issue emergency orders limiting or restricting packages from transportation. The NPRM carries out the statutory mandate and clarifies DOT's role and responsibility in ensuring that hazardous materials are being safely transported and promoting the regulated community's understanding and compliance with regulatory requirements applicable to specific situations and operations.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This NPRM is a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was reviewed by the Office of Management and Budget. This rule is also significant under the Regulatory Policies and Procedures of the DOT (44 FR 11034). A copy of the regulatory evaluation is available for review in the docket.

C. Executive Orders 13132 and 13084

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). As amended by HMTSSRA, 49 U.S.C. 5125(i) provides that the preemption provisions in Federal hazardous material transportation law do ''not apply to any procedure * * * utilized by a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material.'' Accordingly, this proposed rule has no preemptive effect on state, local, or Indian tribe enforcement procedures and penalties, and preparation of a federalism assessment is not warranted.

This NPRM has also been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this proposed rule does not significantly or uniquely affect the communities of the Indian tribal governments and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13084 do not apply.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have significant impact on a substantial number of small entities. Based on the assessment in the preliminary regulatory evaluation I hereby certify that, while the proposed rule will affect a substantial number of small businesses, there will be no significant economic impact. This proposal applies to offerors and carriers of hazardous materials, some of which are small entities; however, there will not be any economic impact on any person who complies with Federal hazardous materials law and the regulations and orders issued under that law.

Potentially affected small entities. The proposals in this NPRM will apply to persons who perform, or cause to be performed, functions related to the transportation of hazardous materials in transportation in commerce. This includes offerors of hazardous materials and persons in physical control of a hazardous material during transportation in commerce. Such persons may primarily include motor carriers, air carriers, vessel operators, rail carriers, temporary storage facilities, and intermodal transfer facilities. Unless alternative definitions have been established by the agency in consultation with the Small Business Administration, the definition of ''small business'' has the same meaning as under the Small Business Act (15 CFR parts 631–657c). Therefore, since no such special definition has been established, PHMSA employs the thresholds (published in 13 CFR 121.201) of 1,500 employees for air carriers (NAICS Subgroup 481), 500 employees for rail carriers (NAICS Subgroup 482), 500 employees for vessel operators (NAICS Subgroup 483), $18.5 million in revenues for motor carriers (NAICS Subgroup 484), and $18.5 million in revenues for warehousing and storage companies (NAICS Subgroup 493). Of the approximately 116,000 entities to which the proposals in this NPRM would apply (104,000 of which are motor carriers), we estimate that about 90 percent are small entities.

Potential cost impacts. The NPRM proposal to implement the enhanced enforcement and investigation authority applies to all persons subject to the HMR. We expect the exercise of this authority will produce a deterrent effect far beyond the number of packages actually detained, opened, or removed from transportation. Over a ten-year period, we estimate the proposed rule would result in the reduction of 40,299,701 undeclared shipments of hazardous material across three modes of transportation (air, rail, and highway), and the avoidance of 63 serious incidents and 2,104 non-serious incidents. The estimated costs to industry are fairly minimal; we estimate $45,997 in total cost to the industry over ten years.

Potential costs savings. Although the potential cost of implementing this enhanced enforcement authority could total $2,307,897 for the four operating administrations, the potential benefit

from avoiding incidents total $9,697,748 over a ten-year period.

Alternate proposals for small business. In accordance with the Regulatory Flexibility Act, we also considered whether special standards should be developed to minimize the regulatory burden on small businesses. In the case of compliance standards, it is sometimes possible to establish exceptions or different requirements for small businesses without compromising the overall objectives of the rule. However, we have concluded that such relief is not appropriate for the rules at issue here, pertaining to inspection procedures and safety remedies. Although DOT may well consider companies' relative sizes in deciding how to allocate inspection resources, once an inspection or investigation is underway, the size of an individual entity has no proper bearing on the exercise of enhanced inspection and enforcement authority. In the case of a suspicious package, for instance, the risk to public safety and need for enforcement action does not depend on the size of the company responsible for the hazard.

E. Paperwork Reduction Act

PHMSA has analyzed this proposed rulemaking in accordance with the Paperwork Reduction Act of 1995 (PRA). The PRA requires Federal agencies to minimize paperwork burden imposed on the American public by ensuring maximum utility and quality of federal information, ensuring the use of information technology to improve Government performance, and improving the federal government's accountability for managing information collection activities. This proposal contains no new information collection requirements subject to the PRA as the requirements applicable to all collections of information conducted or sponsored by a federal agency do not apply to a collection of information ''during the conduct of a civil action to which the United States or any official or agency thereof is apart, or during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities'' (5 CFR 1320.4).

F. Unfunded Mandates Reform Act of 1995

The proposal in this NPRM would not impose unfunded mandates under the Unfunded Mandates Act of 1995. The proposed rule would not result in annual costs of $100 million or more, in the aggregate, to any of the following: State, local, or Indian tribal governments, or the private sector, and is the least burdensome alternative to achieve the objective of the proposed rule.

G. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires that Federal agencies analyze proposed actions to determine whether an action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order Federal agencies to conduct an environmental review considering (1) the need for the proposed action (2) alternatives to the proposed action (3) probable environmental impacts of the proposed action and alternatives and (4) the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

1. Purpose and Need

Congress enacted HMTSSRA in part to combat the problem of undeclared hazardous materials shipments. The broader authority of HMTSSRA allows the Department to identify hazardous materials shipments and to determine whether those shipments are made in accordance with the HMR. Congress determined that this authority would equip DOT officials and inspection personnel with the necessary tools to accurately determine whether hazardous materials are being transported safely and in accordance with the relevant law and regulations. *See* Background section of the preamble to this NPRM, *supra*.

2. Alternatives

Because this NPRM addresses a Congressional mandate, we have limited latitude in defining alternative courses of action. The option of taking no action would be both inconsistent with Congress' direction and undesirable from the standpoint of safety and enforcement. Failure to implement the new authority would perpetuate the problem of undeclared hazardous material shipments and resulting incidents or releases. It would also leave PHMSA and other operating administrations without an effective plan to abate an imminent safety hazard.

3. Analysis of Environmental Impacts

The selected alternative could result in decreasing the likelihood of an incident, or a release of hazardous material, e.g., explosives, flammables, or corrosives. These hazardous materials could ignite, leak, or react with other material, thereby causing fires and explosions in confined spaces such as aircraft or vessels. If such incidents occurred while an aircraft or vessel is in transportation, the consequences would likely threaten human health and the environment. If hazardous material shipments are not properly marked, labeled, packaged, and handled, every person who comes into contact with the shipment could be at risk. Emergency responders would not be able to extinguish a fire in the most effective and timely manner because an undeclared shipment would not contain the correct hazard communications, thus possibly exacerbating the situation or prolonging the public's exposure to a release.

4. Consultations and Public Comment

Before preparing this NPRM, we held a series of public meetings and invited all interested persons to offer comments on topics related to this proposed rule. We received no comments regarding environmental concerns.

H. 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 spring and fall of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

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://www.regulations.gov*.

List of Subjects in 49 CFR Part 109

Definitions, Inspections and investigations, Emergency orders, Imminent hazards, Remedies generally.

The Rule

In consideration of the foregoing, PHMSA proposes to add a new part 109 to Title 49, Subtitle B, Chapter 1, Subchapter A to read as follows:

PART 109—INSPECTION AND INVESTIGATION PROCEDURES

Sec.

109.1 Definitions.
109.3 Inspections and investigations.
109.5 Emergency orders.
109.7 Emergency recalls.

109.9 Remedies generally.

Authority: 49 U.S.C. 5101–5127, 44701; Pub. L. 101–410 § 4 (28 U.S.C. 2461 note); Pub. L. 104–121 §§ 212–213; Pub. L. 104–134 § 31001; 49 CFR 1.45, 1.53.

§ 109.1 Definitions.

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

Administrator means the head of any operating administration within the Department of Transportation, and includes the Administrators of the Federal Aviation Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, and Pipeline and Hazardous Materials Safety Administration, to whom the Secretary has delegated authority in part 1 of this title, and any person within an operating administration to whom an Administrator has delegated authority to carry out this part.

Agent of the Secretary or agent means an officer, employee, or agent authorized by the Secretary to conduct inspections or investigations under the Federal hazardous material transportation law.

Chief Safety Officer or CSO means the Assistant Administrator of the Pipeline and Hazardous Materials Safety Administration.

Emergency order means an emergency restriction, prohibition, recall, or out-of-service order.

Freight container means a package configured as a reusable container that has a volume of 64 cubic feet or more, designed and constructed to permit being lifted with its contents intact and intended primarily for containment of smaller packages (in unit form) during transportation.

Immediately adjacent means a packaging that is in direct contact with the hazardous material or is otherwise the primary means of containment of the hazardous material.

Imminent hazard means the existence of a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment.

Objectively reasonable and articulable belief means a belief based on particularized and identifiable facts that provide an objective basis to believe or suspect that a package may contain a hazardous material.

Out-of-service order means a written requirement issued by the Secretary, or a designee, that an aircraft, vessel, motor vehicle, train, railcar, locomotive, other vehicle, transport unit, transport vehicle, freight container, portable tank, or other package not be moved or cease operations until specified conditions have been met.

Packaging means any receptacle, including, but not limited to, a freight container, intermediate bulk container, overpack, or trailer, and any other components or materials necessary for the receptacle to perform its containment function in conformance with the minimum packing requirements of this subchapter. For radioactive materials packaging, see § 173.403 of this subchapter.

Perishable hazardous material means a hazardous material that is subject to significant risk of speedy decay, deterioration, or spoilage.

Properly qualified personnel means a company, partnership, proprietorship, or individual who is technically qualified to perform designated tasks necessary to assist an agent in inspecting, examining, opening, removing, testing, or transporting packages.

Remove means to keep a package from entering the stream of transportation in commerce; to take a package out of the stream of transportation in commerce by physically detaining a package that was offered for transportation in commerce; or stopping a package from continuing in transportation in commerce.

Safe and expeditious means prudent measures or procedures designed to minimize delay.

Trailer means a non-powered motor vehicle designed for transporting freight that is drawn by a motor carrier, motor carrier tractor, or locomotive.

§ 109.3 Inspections and investigations.

(a) General. An Administrator may initiate an inspection or investigation to determine compliance with Federal hazardous material transportation law, or a regulation, order, special permit, or approval prescribed or issued under the Federal hazardous material transportation law, or any court decree or order relating thereto.

(b) Inspections and investigations. Inspections and investigations are conducted by designated agents of the Secretary who will, upon request, present their credentials for examination. Such an agent is authorized to:

(1) Administer oaths and receive affirmations in any matter under investigation.

(2) Gather information by any reasonable means, including, but not limited to, interviewing, photocopying, photographing, and video- and audio-recording in a reasonable manner.

(3) Serve subpoenas for the production of documents or other tangible evidence if, on the basis of information available to the agent, the evidence is relevant to a determination of compliance with the Federal hazardous material transportation law, regulation, order, special permit, or approval prescribed or issued under the Federal hazardous material transportation law, or any court decree or order relating thereto. Service of a subpoena shall be in accordance with the requirements of the agent's operating administration as set forth in 14 CFR 13.3 (Federal Aviation Administration); 49 CFR 209.7 (Federal Railroad Administration), 49 CFR 386.53 (Federal Motor Carrier Safety Administration), and 49 CFR 105.45–105.55 (Pipeline and Hazardous Materials Safety Administration).

(4) When an agent has an objectively reasonable and articulable belief that a package offered for or in transportation in commerce may contain a hazardous material, the agent may:

(i) Stop movement of the package in transportation and gather information from any person to learn the nature and contents of the package;

(ii) Open any overpack, outer packaging, freight container, or other component of the package that is not immediately adjacent to the hazardous materials contained in the package and examine the inner packaging(s) or packaging components;

(iii) Remove the package and related packages in a shipment or a freight container from transportation in commerce when the agent has an objectively reasonable and articulable belief that the package may pose an imminent hazard, provided the agent records this belief in writing as soon as practicable;

(iv) Order the person in possession of, or responsible for, the package to have the package transported to, opened, and the contents examined and analyzed by, a facility capable of conducting such examination and analysis; and,

(iv) Authorize qualified personnel to assist in the activities conducted under this paragraph (b)(4).

(5) If, after an agent exercises an authority under paragraph (b)(4), an imminent hazard is not found to exist, the agent shall assist in preparing the package for safe and prompt transportation, when practicable, by reclosing the package in accordance with the packaging manufacturer's

closure instructions or an alternate closure method approved by PHMSA's Associate Administrator for Hazardous Materials Safety; marking and certifying the reclosed package to indicate that it was opened and reclosed in accordance with this paragraph (b)(5); and returning the package to the person from whom the inspector obtained it, as soon as practicable. For a package containing a perishable material, the agent shall assist in resuming the safe and expeditious transportation of the package as soon as practicable after determining that the package presents no imminent hazard.

(6) If, after an inspector exercises an authority under paragraph (b)(4), and an imminent hazard is found to exist, the Administrator or his/her designee may issue an out-of-service order prohibiting the movement of the package until the package has been brought into compliance with Subchapter C of Title 49 of the Code of Federal Regulations. Upon receipt of the out-of-service order, the person in possession of, or responsible for, the package shall remove the package from transportation until it is brought into compliance:

(i) A package subject to an out-of-service order may be moved from the place where it was found to present an imminent hazard to the nearest location where the package can be brought into compliance, provided, that the agent that issued the out-of-service order is notified before the move.

(ii) The recipient of the out-of-service order shall notify the operating administration that issued the order when the package is brought into compliance.

(iii) Upon receipt of an out-of-service order, a recipient may appeal the decision of the agent issuing the order to PHMSA's Chief Safety Officer. A petition for review of an out-of-service order must meet the requirements of § 109.5(b), and the procedures set forth in § 109.5(c)–(h) apply.

(c) Termination. When the facts disclosed by an investigation indicate that further action is not necessary at that time, the Administrator will close the investigative file without prejudice to further investigation and notify the person being investigated of the decision.

§ 109.5 Emergency orders.

(a) Determination of imminent hazard. When an Administrator determines that a violation of a provision of the Federal hazardous material transportation law, or a regulation or order prescribed under that law, or an unsafe condition or practice, constitutes or is causing an imminent hazard, as defined in § 109.1, the Administrator may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without advance notice or an opportunity for a hearing. The basis for any action taken under this section shall be set forth in writing which must—

(1) Describe the violation, condition, or practice that constitutes or is causing the imminent hazard;

(2) Set forth the terms and conditions of the emergency order;

(3) Be limited to the extent necessary to abate the imminent hazard; and,

(4) Advise the recipient that it may request review of the emergency order by filing a petition for review with PHMSA's Chief Safety Officer within 20 calendar days of the date the order is issued.

(b) A petition for review must—

(1) Be in writing;

(2) State with particularity each part of the emergency order that is sought to be amended or rescinded and include all information, evidence and arguments in support thereof;

(3) State whether a formal hearing in accordance with 5 U.S.C. 554 is requested. The petition must specifically state the material facts in dispute giving rise to the request for a hearing; and,

(4) *Be addressed to:* Chief Safety Officer (ATTN: Office of Chief Counsel, PHC–10), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590, with a copy transmitted to the Chief Counsel of the operating administration issuing the emergency order. The petition for review may be hand delivered or sent by first-class mail, facsimile (202–366–7041), or electronically (*PHMSACHIEFCOUNSEL@dot.gov*). A signed original and one copy of any petition for review must be personally delivered or mailed to: 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.

(c) Response to the petition for review. An attorney designated by the Office of Chief Counsel of the operating administration issuing the emergency order may file a response, including appropriate pleadings, with the Chief Safety Officer within five calendar days of receipt of the petition by the Chief Counsel of the operating administration issuing the emergency order.

(d) *Chief Safety Officer Responsibilities:* Upon receipt of a petition for review of an emergency order, the Chief Safety Officer shall immediately assign the petition for review to the Office of Hearings when the petition requests a formal hearing and states material facts in dispute. The Chief Safety Officer shall issue an administrative decision on the merits within 30 days of receipt of the petition when it does not request a formal hearing or fails to state material facts in dispute. In this case, the Chief Safety Officer's decision constitutes final agency action.

(e) Hearings—Formal hearings shall be conducted by an Administrative Law Judge assigned by the Chief Administrative Law Judge of the Office of Hearings. The Administrative Law Judge may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by the appropriate agency regulations (49 CFR 209.7, 49 CFR 105.45, 14 CFR 13.3, 49 CFR 386.53; and 49 U.S.C. 502 and 31133);

(3) Adopt the relevant Federal Rules of Civil Procedure for the United States District Courts for the procedures governing the hearings when appropriate;

(4) Adopt the relevant Federal Rules of Evidence for United States Courts and Magistrates for the submission of evidence when appropriate;

(5) Take or cause depositions to be taken;

(6) Examine witnesses at the hearing;

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

(8) Convene, recess, adjourn or otherwise regulate the course of the hearing;

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

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

(f) Parties. The petitioner may appear and be heard in person or by an authorized representative. The operating administration issuing the emergency order shall be represented by an attorney designated by its respective Office of Chief Counsel.

(g) Service.

(1) Each petition, pleading, motion, notice, order, or other document required to be served under this section shall be served personally, by registered or certified mail, or electronically by e-mail or facsimile, except as otherwise provided herein. The emergency order shall identify the list of persons, including the Department's Docket Management System, to be served and may be updated as necessary. The emergency order shall also be published

in the **Federal Register** as soon as practicable after its issuance.

(2) Each order, pleading, motion, notice, or other document shall be accompanied by a certificate of service specifying the manner in which and the date on which service was made.

(3) The emergency order shall be served by ''hand delivery,'' unless such delivery is not practicable.

(4) Service upon a person's duly authorized representative constitutes service upon that person.

(h) Report and recommendation. The Administrative Law Judge shall issue a report and recommendation at the close of the record. The report and recommendation shall:

(1) Contain findings of fact and conclusions of law and the grounds for the decision based on the material issues of fact or law presented on the record;

(2) Be served on the parties to the proceeding; and

(3) Be issued no later than 25 days after receipt of the petition for review by the Chief Safety Officer.

(i) Expiration of order. If the Chief Safety Officer, or the Administrative Law Judge, where appropriate, has not disposed of the petition for review within 30 days of receipt, the emergency order shall cease to be effective unless the Administrator issuing the emergency order determines, in writing, that the imminent hazard providing a basis for the emergency order continues to exist. The requirements of such an extension shall remain in full force and effect pending decision on a petition for review unless stayed or modified by the Administrator.

(j) Reconsideration.

(1) A party aggrieved by the Administrative Law Judge's report and recommendation may file a petition for reconsideration with the Chief Safety Officer within one calendar day of issuance of the report and recommendation. The opposing party may file a response to the petition within one calendar day.

(2) The Chief Safety Officer shall issue a final agency decision within three calendar days, but no later than 30 days after receipt of the original petition for review.

(3) The Chief Safety Officer's decision on the merits of a petition for reconsideration constitutes final agency action.

(k) Appellate review. A person aggrieved by the final agency action may petition for review of the final decision in the appropriate Court of Appeals for the United States as provided in 49 U.S.C. 5127. The filing of the petition for review does not stay or modify the force and effect of the final agency.

(l) Time. In computing any period of time prescribed by this part or by an order issued by the Administrative Law Judge, the day of filing of the petition for review or of any other act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days.

§ 109.7 Emergency recalls.

PHMSA's Associate Administrator, Office of Hazardous Materials Safety, may issue an emergency order mandating the immediate recall of any packaging; packaging component; or container certified, represented, marked, or sold as qualified for use in the transportation of hazardous materials in commerce when the continued use of such item would constitute an imminent hazard. All petitions for review of such an emergency order will be governed by the procedures set forth at § 109.5(b).

§ 109.9 Remedies generally.

An Administrator may request the Attorney General to bring an action in the appropriate United States district court seeking temporary or permanent injunctive relief, punitive damages, assessment of civil penalties as provided by 49 U.S.C. 5122(a), and any other appropriate relief to enforce the Federal hazardous material transportation law, regulation, order, special permit, or approval prescribed or issued under the Federal hazardous material transportation law.

Issued in Washington, DC on September 26, 2008 under authority delegated in 49 CFR part 1.

David K. Lehman,

Acting Associate Administrator for Hazardous Materials Safety.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2008–0157]

RIN 2127–AK15

Federal Motor Vehicle Safety Standards; Motorcycle Helmets

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: NHTSA is proposing to amend several aspects of Federal Motor Vehicle Safety Standard (FMVSS) No. 218, *Motorcycle Helmets.* Some of the amendments would help realize the full potential of compliant helmets by aiding state and local law enforcement officials in enforcing state helmet use laws, thereby increasing the percentage of motorcycle riders wearing helmets compliant with FMVSS No. 218. The amendments would do this by adopting additional requirements and revising existing requirements to reduce misleading labeling of novelty helmets that creates the impression that uncertified, noncompliant helmets have been properly certified as compliant.

The other amendments would aid NHTSA in enforcing the standard by specifying a quasi-static load application rate for the helmet retention system; revising the impact attenuation test by specifying test velocity and tolerance limits and removing the drop height requirement; providing tolerances for the helmet conditioning specifications; revising requirements related to size labeling and location of the DOT symbol; correcting figures 7 and 8 in the Standard; and updating the reference in S7.1.9 to SAE recommended practice J211.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than December 1, 2008.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.