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: Final rule.

SUMMARY: PHMSA is implementing enhanced inspection, investigation, and enforcement authority conferred on the Secretary of Transportation by the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005. This final rule establishes procedures for issuance of emergency orders (restrictions, prohibitions, recalls, and out-of-service orders) to address unsafe conditions or practices posing an imminent hazard; opening packages to identify undeclared or non-compliant shipments, when the person in possession of the package refuses a request to open it; and the temporary detention and inspection of potentially non-compliant packages. These inspection and enforcement procedures will not change the current inspection procedures for DOT, but will enhance DOT's existing enforcement authority and allow us to respond immediately and effectively to conditions or practices that pose serious threats to life, property, or the environment. As this rule affects only agency enforcement procedures, it therefore results in no additional burden of compliance costs to industry.

DATES: This final rule is effective May 2, 2011.

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

SUPPLEMENTARY INFORMATION:

I. Background

On October 2, 2008, the Pipeline and Hazardous Materials Safety Administration (PHMSA) published a notice of proposed rulemaking (NPRM) under Docket No. PHMSA–2005–22356 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 (HMTSSRA). In this final rule, the agency is finalizing its procedures for implementing its enhanced enforcement authority.

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 Materials Transportation Law (Federal hazmat law), 49 U.S.C. §§ 5101 *et seq.:* (1) Federal Aviation Administration (FAA), 49 CFR 1.47(j)(1); (2) Federal Railroad Administration (FRA), 49 CFR 1.49(s)(1); (3) Federal Motor Carrier Safety Administration (FMCSA), 49 CFR 1.73(d)(1); and (4) 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 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 to the USCG. DHS Delegation No. 0170, Sec. 2(99) & 2(100); *see also* 6 U.S.C. §§ 457, 551(d)(2). DOT will coordinate its inspections, investigations, and enforcements with the USCG, through a Memorandum of Understanding (MOU) or otherwise, to avoid duplicative or conflicting efforts. Nothing in this final rule affects 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 the HMR, which prescribe appropriate packaging, hazard communication, and handling requirements, nearly all of these shipments move through the system safely and without incident. When incidents do occur, HMR-mandated labels and other forms of hazard communication provide transportation employees and emergency responders the information necessary to mitigate the consequences. These risk controls provide a high degree of protection; however, 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, DOT has long considered undeclared shipments of hazardous materials to be a serious safety issue.

Hidden hazardous materials pose a significant threat to transportation workers, emergency responders, and the general public. By definition, an undeclared shipment is one that is not marked, labeled, accompanied by shipping documentation, or otherwise identified as hazardous materials. *See* 49 CFR 171.8 (definition of undeclared hazardous material). 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 would move those materials as hidden shipments. Accordingly, although the presence of undeclared hazardous materials by no means demonstrates wrongful intent, DOT 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 to permit a DOT agent to open and examine packages suspected to contain hazardous materials. It is the experience of most enforcement programs that when asked to open a package, the offeror or regulated industry generally opens it voluntarily. DOT generally operates under the assumption that it already possesses the implicit authority, by virtue of our enforcement authority, to open packages that the person in possession refuses to open without the passage of HMTSSRA. However, the new statutory authority implemented here explicitly grants that authority. This authority will not change the current inspection procedures for DOT

and is not likely to result in additional packages being opened. In addition to the discovery of undeclared shipments, the statutory authority also provides DOT with a tool to identify declared hazardous materials shipments that nonetheless may not have been prepared in accordance with all existing HMR requirements.

Although a great deal of attention has been given to the package opening portion of the statutory authority and its implementing portion of the regulation, the authority to issue emergency orders, restrictions, prohibitions, and recalls in response to imminent hazards is the most transformative to DOT's enforcement programs. 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. Prior to the enactment of HMTSSRA, DOT could 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 was required to enlist the Department of Justice (DOJ) to file a civil action against the offending party, seeking a restraining order or preliminary injunction. As a practical matter, judicial relief could rarely be obtained before the hazardous transportation movement was 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 HMTSSRA as Title VII of the statute, 119 Stat. 1891. Section 7118 of HMTSSRA (Section 7118) revised 49 U.S.C. 5121, inserting procedures for enhanced enforcement authority, including the ability to open the outer packaging of packages believed to contain hazardous materials and authority to remove hazardous material shipments from transportation believed to pose an imminent hazard.

Congress enacted HMTSSRA in part to combat the problem of undeclared hazardous materials shipments. While Section 7118 enhances DOT's authority to discover undeclared hazardous materials shipments, the clear language of this statutory 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 * * * 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: (1) Access, open and examine a package (except for the packaging that is immediately adjacent to the suspected hazardous material's contents) that is 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 and does otherwise not comply with this Chapter; (2) remove the package from transportation if it is determined that the shipment may pose an imminent hazard; (3) order the shipment to be transported, opened, and tested at an appropriate facility, as necessary; and (4) permit the shipment to resume its transportation when an inspection does not identify an imminent hazard.

II. Notice of Proposed Rulemaking

On October 2, 2008, PHMSA published a notice of proposed rulemaking (NPRM) (73 FR 57281) to propose procedures to implement the expanded enforcement authority conferred in HMTSSRA. As proposed, these procedures would apply to hazardous materials safety compliance and enforcement activities conducted by PHMSA, FAA, FRA, and FMCSA inspection personnel. Specifically, PHMSA proposed procedures to enable DOT agents 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, PHMSA proposed procedures for issuing emergency orders to address imminent hazards. As proposed, these procedures would apply in a number of contexts and circumstances:

- PHMSA proposed procedures under which an agent may open a package to determine whether it contains an undeclared hazardous material or otherwise does not comply with applicable regulatory requirements. These procedures would apply to the opening of an overpack, outer packaging, freight container, or other packaging component not immediately adjacent to the hazardous material. Agents would not open single packagings (such as cylinders, portable tanks, cargo tanks, or rail tank cars) nor would agents open the innermost receptacle of a combination packaging.
- PHMSA proposed procedures under which an agent could temporarily remove a package or related packages from transportation when the agent believed that the package posed an imminent hazard. Such a belief could 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 agent could remove a package or related packages from transportation on his or her own authority provided he recorded his belief in writing. An agent could temporarily remove any type of package from transportation if he or she had a "reasonable and articulable belief" that the package posed an imminent hazard.
- PHMSA proposed procedures under which an agent could order the person in possession of or responsible for the package to transport the package and its contents to a facility that would examine and analyze its contents. An agent could issue such an order for any type of package or shipment, not merely those packages for which package opening is authorized. As proposed, the agent could issue this order on his own authority provided he documented his reasoning.
- PHMSA proposed procedures under which an agent could 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 was found. If the package had been opened, the agent would 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.
- PHMSA proposed 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 was indeed found to exist. The OOS

order would effect the permanent removal of the package from transportation by prohibiting its movement until it was brought into compliance with all applicable regulatory requirements. An OOS order could be issued for any type of packaging or shipment.

• PHMSA proposed procedures for the issuance of an emergency order when PHMSA, FAA, FMCSA, or FRA determined that a non-compliant shipment or an unsafe condition or practice was causing an imminent hazard. As proposed, the PHMSA, FAA, FMCSA, or FRA Administrator could issue an emergency order without advance notice or opportunity for a hearing. The emergency order could be issued in conjunction with or in place of an OOS order. The emergency order could impose emergency restrictions, prohibitions, or recalls and could 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 the Final Rule

In this final rule, PHMSA is implementing statutory authority to establish procedures for issuing emergency orders to address imminent hazards. In addition, statutory authority for DOT agents during an inspection conducted under existing enforcement authority is also being implemented. These procedures will apply in a number of contexts and circumstances:

• An agent may open a package to determine whether it contains non-compliant shipments of hazardous materials when the agent has reason to believe that the package does not comply with regulatory requirements. These procedures apply to the opening of any packaging component not immediately adjacent to the hazardous material. Agents will not open single packagings (such as cylinders, portable tanks, cargo tanks, or rail tank cars) nor will agents open the innermost receptacle of a combination packaging. An agent will only open a package with cause and if the person in possession of the package refuses to open it.

• An agent may temporarily remove a package or shipment from transportation, or prevent its entering transportation, when the agent believes that the package or shipment may pose 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. The agent may remove a package or related packages from transportation for up to 48 hours on his or her own authority provided he records in writing the basis for his belief that the package or related packages may pose an imminent hazard. This regulation implements statutory authority for DOT to take immediate action to remove a potentially dangerous package from transportation, rather than seeking a court order to stop a package.

• An agent 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 agent may issue such an order for any type of package. The agent may issue this order on his own authority provided he documents his reasoning and provides written notification for the reasons for removal.

• An agent 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 agent will assist in reclosing the package in accordance with the packaging manufacturer's closure instructions 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.

• An out-of-service (OOS) order will be issued if, after complete examination of any package, 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 emergency order will be issued when DOT determines that a non-compliant shipment or an unsafe condition or practice is causing an imminent hazard. The PHMSA, FAA, FMCSA, or FRA Administrator may issue an emergency order without advance notice or opportunity for a hearing. The emergency order may impose emergency restrictions, prohibitions, or recalls and may be issued for any type of packaging, not merely those for which package opening is authorized, and for any unsafe condition posing an imminent hazard, not merely unsafe conditions related to packaging.

IV. Discussion of Comments on the NPRM

The following paragraphs discuss the comments received on the NPRM and the revisions we have made in response to the comments. Interested persons should be aware that, in conjunction with this final rule, DOT has developed an internal operations manual for training and use by its agents when this final rule becomes effective. The operations manual will be made available to the public on the PHMSA Web site, *http://www.phmsa.dot.gov.* The operations manual is a joint document created by the operating administrations that enforce the HMR, to provide guidance on common issues encountered by the operating administrations in the exercise of existing authorities. The manual also provides guidance to agents who, in the course of conducting inspections, determine that they need to open a package, remove a package from transportation, or perform any other function authorized by 49 CFR Part 109. The manual seeks to establish baseline conditions that will ensure consistent application of the authorities exercised under 49 CFR part 109 at a minimum threshold. Each operating administration may place additional constraints on the application of these regulations. This guidance will be implemented to target and manage the use of enhanced inspection and enforcement authority in a manner that minimizes burdens on the transportation system while, at the same time, meeting the overriding mission of transportation safety. It may be subject to change as agency policies evolve.

In the following paragraphs, we discuss the relevant comments to the NPRM and explain the impact of the comments on the regulatory text in this final rule. The comments in the docket for this rulemaking may be viewed at *https://www.regulations.gov* under Docket No. PHMSA–2005–22356.

A. Scope of the Rule

Although most commenters express support for the proposed rule's focus on the detection of undeclared hazardous materials shipments, many raise concerns with the scope of the rule and several practical aspects of the proposal. Some commenters (including the Council on Safe Transportation of Hazardous Articles, Inc. (COSTHA), the Association of Hazmat Shippers, Inc. (AHS), the American Trucking Associations (ATA), the Radiopharmaceutical Shippers & Carriers Conference (RSCC), and the Institute of Makers of Explosives (IME)) express the view that DOT should limit the use of its enhanced authority to discover undeclared shipments of hazardous materials. According to the commenters, the enhanced authority should not apply to shipments of hazardous materials that are declared but otherwise may not conform to

requirements in the HMR. Declared shipments, the commenters contend, can be investigated under existing regulatory procedures to address noncompliance. IME comments that although the preamble to the NPRM states that the inspection and opening of packages authority would be used to identify undeclared or non-compliant shipments, no such limitation is stated in the proposed regulatory text. IME also suggests that the opening of outer packagings as proposed in the rule should be limited to instances where it would be "reasonably" necessary to establish that a package is non-compliant. AHS asserts that the use of this enhanced authority to conduct "random stops" in order to "verify that hazardous materials are packaged, marked, and labeled in compliance with DOT requirements" would be contrary to the public interest.

PHMSA Response:

Commenters cite to legislative history as evidence that this authority should apply only to undeclared shipments; however, DOT interprets the statute more broadly. The plain language of the statute does not limit DOT's authority to undeclared shipments. Although discovery of undeclared shipments was a major catalyst for this legislation, it was not the sole purpose, as demonstrated by the legislative history indicating that Congress intended to promote DOT's authority to ensure that hazardous materials shipments are made in accordance with the HMR. *See supra.*

Moreover, in HMTSSRA, Congress created a two-tiered standard to deal with noncompliant shipments of hazmat—first, the ability to detect the presence of non-compliant shipments of hazmat; and second, a means to deal with emergency situations where such shipments may seriously impact the safety of others or the environment.

It is quite possible that a package declared as hazmat, but that is otherwise non-compliant with the HMR, could pose an imminent hazard. If DOT narrowed the application of this authority only to undeclared shipments, the agency would be rendered powerless in situations in which emergency enforcement action is desperately needed. DOT does not believe Congress granted this authority with such a limited view of safety in mind. Imminent hazard, as defined in the statute, means the existence of a condition relating to hazardous material that presents a substantial likelihood of death, serious illness, severe personal injury, or substantial endangerment to health, property, or the environment. *See* 49 U.S.C. 5102(5). We do not believe imminent hazards occur only as a result of undeclared hazmat shipments.

The agency is mindful, however, of the numerous comments received concerning the broad scope of the package opening authority. The statutory authority is actually quite broad: It states that an agent may open and examine a package when there is an objectively reasonable and articulable belief that the package may contain a hazardous material. Thus, it would seem that the statute could allow the opening of *any* packages that may contain hazardous material, without regard to whether or not the package may be in compliance. In response to comments to the NPRM, which incorporated the language directly from the statute, we decided to narrow the scope of this rule from any packages that may contain hazardous material to any packages that may contain hazardous material and are not in compliance with the HMR or Federal hazmat law. Limiting the opening of packages to only those that may be non-compliant will guard against unwarranted opening or delay of declared compliant packages. Accordingly, this final rule includes a separate provision, § 109.5 Opening packages, that addresses the opening of packages under this authority. PHMSA believes this is a pivotal limitation on its package opening authority, providing the industry a greater sense of the parameters within which agents may exercise this authority while also balancing the agency's need to enforce the HMR. By narrowing the scope of the package opening authority, the agency will be able to direct its inspections and investigations where the greatest needs exist: Undeclared and non-compliant shipments that may pose an imminent hazard. Limiting the opening of packages to packages that may be non-compliant will guard against unwarranted opening or delay of declared packages that are in compliance with the HMR. Ultimately, this limitation will guard against the unnecessary disruption of commerce.

Dow Chemical Co. (Dow) states that the "objectively reasonable and articulable belief" standard may lead to inconsistent application of the rule, and should thus be more clearly defined.

PHMSA Response:

The objectively reasonable and articulable belief standard was defined in the NPRM, and is finalized here, as a "belief based on particularized and identifiable facts that provide an objective basis to believe or suspect" that a package may pose an imminent hazard, citing well-settled case law. 73 FR 57285–86. Therefore, to remove a package from transportation, an agent must be able to articulate specific facts about the instant situation establishing that he held an objective and reasonable belief that a package could pose an imminent hazard if it continued in transportation. The application of this standard is inherently situational, and it would be inaccurate to draw bright lines absent a specific set of facts. The development of an internal operations manual by all of the operating administrations serves to prevent inconsistencies among modes of transportation by establishing a baseline from which all modes will work. Moreover, the manual will ensure the uniform administration of the authority within a mode.

B. Comments to Specific Definitions in § 109.1 of Proposed Rule

"Perishable Hazardous Material"

In the NPRM, PHMSA proposed to define the term "perishable hazardous material" as "a hazardous material that is subject to significant risk of speedy decay, deterioration, or spoilage." United Parcel Service (UPS) suggests a change in the definition as follows: "A material of any kind, including either hazardous or non-hazardous material that is subject to significant risk of speedy decay, deterioration, or spoilage." RSCC also comments that the definition of "perishable hazardous material" should be expanded to include packages consigned for medical use because the urgency of these deliveries is not limited to the perishable nature of the contents, but also the critical needs of the medical personnel awaiting the shipment.

PHMSA Response:

UPS points out a helpful distinction; however, changing the term to "perishable material" to include hazardous and non-hazardous material is beyond the scope of this rule. The NPRM's Section-by-Section misstated the definitional term as "perishable" while it should have been termed "perishable hazardous material," as in the regulatory text of § 109.1. We have corrected this drafting error in the applicable regulatory provision, § 109.13(a)(4), to be consistent with the term as defined in § 109.1.

PHMSA agrees, however, with RSCC that the definition of "perishable hazardous materials" should be expanded to include other types of packages that contain hazardous materials consigned for medical use. In addition to the proposed definition cited above, the definition has been revised to also include the following

language: "A hazardous material that is subject to significant risk of speedy decay, deterioration, or spoilage, or hazardous materials consigned for medical use in the prevention, treatment, or cure of a disease or condition in human beings or animals where expeditious shipment and delivery meet a critical medical need."

"Properly Qualified Personnel"

In the NPRM, PHMSA proposed to define "properly qualified personnel" to mean "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." The Dangerous Goods Advisory Council (DGAC) suggests that with respect to term that "person" be used consistent with the definition in 49 CFR 171.8, *i.e.,* "a person who is technically qualified."

PHMSA Response:

The term is defined as DGAC suggests, as reiterated above. The definition for "properly qualified personnel" comes directly from the authorizing statute, 49 U.S.C. 5121 (c)(1)(F). Section 109.3(b)(4)(iv) from the NPRM used the term "qualified personnel." The content of § 109.3, Inspections and investigations, as proposed in the NPRM, has been reorganized in the final regulatory text. This particular provision regarding properly qualified personnel was located in § 109.3(b)(4)(iv) in the NPRM as follows: "Authorize qualified personnel to assist in the activities conducted under this paragraph (b)(4)." This substantive provision is now located in the new § 109.11, Assistance of properly qualified personnel, where it states: "If an agent is not properly qualified to perform a function, or when safety might otherwise be compromised by the agent's performance of a function that is essential for the agent's exercise of authority under this part, the agent may authorize properly qualified personnel to assist in the activities conducted under this part."

"Agent"

In the NPRM, PHMSA proposed to define "agent" to mean "an officer, employee, or agent authorized by the Secretary to conduct inspections or investigations under Federal hazmat law." UPS expresses concern that despite the NPRM preamble language explaining that the scope of the rule is limited to personnel of designated U.S. DOT agencies, the definition of "agent" is not specific enough and could be read expansively by state enforcement personnel as an authorization for them to engage in the opening of packages, since it is customary to refer to State enforcement personnel as "duly authorized representatives of the Department." UPS proposes that "agent" be defined as "a Federal officer, employee, or agent specifically authorized and trained by the Secretary to conduct inspections or investigations under the Federal hazardous material transportation law."

PHMSA Response:

As UPS notes in its comments, the preamble to the NPRM specifically stated that the rule would not apply to state personnel. Unlike DOT agents, State partners act under their own police powers, authorities that DOT agents do not possess. The preamble explained that "the proposed regulations and underlying statutory authority are Federal," and accordingly, "they would not empower State officials to exercise the enhanced inspection and enforcement authority" of the rule. This includes State agents or officers who are enforcing equivalent regulations under the Motor Carrier Safety Assistance Program (MCSAP) and other grant programs. PHMSA agrees that the word "Federal" is helpful in the definition. Thus, in this final rule, the definition of "Agent of the Secretary or agent" is revised to read: "a Federal officer, employee, or agent authorized by the Secretary to conduct inspections and investigations under the Federal hazardous material transportation law."

"Emergency Order"

In the NPRM, PHMSA proposed to define "emergency order" to mean an emergency restriction, prohibition, recall, or out-of-service order. DGAC suggests that the definition of "Emergency order" include the term "written" to be consistent with the regulatory text in proposed § 109.5.

PHMSA Response:

Proposed § 109.5(a) specifically stated that the basis for issuance of an emergency order shall be set forth in writing. However, PHMSA agrees for the sake of clarity and consistency, the term "written" should be incorporated into the definition. The definition of "emergency order" has been revised to read as follows: "an emergency restriction, prohibition, recall, or out-of-service order set forth in writing."

"Packaging"

In the NPRM, PHMSA proposed to define "packaging" to mean 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. DGAC comments that the definition of "packaging" is not fully consistent with the definition in 49 CFR 171.8 and though illustrative, fears it may cause more confusion than clarity.

PHMSA Response:

PHMSA agrees with the commenter that the expanded definition of packaging is inconsistent with the existing regulatory definition. PHMSA has reconsidered the necessity of retaining a definition inconsistent with 49 CFR 171.8, and for purposes of clarity and consistency, the definition of "packaging" as provided in 49 CFR 171.8 will apply in the final rule. "Packaging" is defined in 49 CFR 171.8 as "a receptacle 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." PHMSA believes this definition is sufficient for the purposes of this authority, as the final rule makes clear that as long as the packaging is not immediately adjacent to the hazardous material itself, an agent may gain access to, open and examine such a package subject to this authority.

"Trailer"

In the NPRM, PHMSA proposed to define "trailer" to mean "a non-powered motor vehicle designed for transporting freight that is drawn by a motor carrier, motor carrier tractor, or locomotive." DGAC comments that the definition of trailer is inconsistent with the definition in the Federal Motor Carrier Safety Regulations (FMCSRs) at 49 CFR 390.5, which does not mention "locomotive."

PHMSA Response:

PHMSA agrees with the commenter that the proposed definition was not consistent with the preamble discussion. While the proposed rule defined trailer as "a non-powered motor vehicle designed for transporting freight that is drawn by a motor carrier, motor carrier tractor, or locomotive," in the preamble we explained that "a trailer has a chassis, hitch, and tires attached to the unit, enabling it to travel as a cargo unit attached to a tractor." Because the only time "trailer" is used in the rule is when it is listed in the definition of "packaging," and because we do not believe that the term needs further clarification, the definition of the term has been removed from § 109.1.

"Freight Container"

In the NPRM, PHMSA proposed to define "freight container" to mean "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." The Reusable Industrial Packaging Association (RIPA) comments that there is no need to utilize volumetric capacity in the proposed definition of "freight container." Further, RIPA comments that if DOT believes there is a need to include such a reference, the threshold should be greater than 64 cubic feet, since it would encompass some rigid and flexible intermediate bulk container (IBC) designs, as well as many large packagings. RIPA offers the following definition for Agency consideration: "'Freight container' means a reusable container that is designed for mechanical handling and intended for the containment of unit packages. Freight containers are not designed for direct contact with hazardous ladings."

PHMSA Response:

As noted in the NPRM, the definition of "freight container," including the reference to volumetric capacity, comes directly from 49 CFR 171.8 and is included in this rule for clarity and ease of referral. Therefore, in this final rule, PHMSA is adopting the definition as proposed.

C. Identification of Packages Subject to Proposed § 109.3(b)(4)'s Authority To Stop, Open, Remove and Test a Package and the Objectively Reasonable and Articulable Belief Standard

In the NPRM, PHMSA proposed enhanced inspection procedures for conducting hazardous materials inspections. In proposed § 109.3(b)(4) (now § 109.5), PHMSA proposed to permit an agent to 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 the agent has an objectively reasonable and articulable belief that the shipment contains hazardous material and does not otherwise comply with Federal hazmat law or the HMR.

DGAC questions how proposed § 109.3(b)(4) would apply to a package that is marked and labeled to indicate it contains a hazardous material and also how that authority relates to proposed § 109.3(b)(5), which provides that: "If, after an agent exercises this enhanced authority, and 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; marking and certifying the reclosed package to indicate that it was opened and reclosed in accordance with paragraph (b)(5); and returning the package to the person from whom the agent obtained it, as soon as practicable. For a package containing a perishable hazardous 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."

PHMSA Response:

In response to comments, and for the sake of clarity and better organization, the provisions formerly proposed as 49 CFR 109.3(b)(3) and 109.3(b)(4) have been revised and restructured. For packages that are marked, labeled, and documented to indicate the presence of a hazardous material, the agent must identify evidence that the package may not be otherwise in compliance with Federal hazmat law or the HMR before taking any further action. If there is a reasonable and articulable suspicion that the package contains hazardous materials and does not comply with the regulations, then an agent may open the package for further investigation.

In this final rule, the regulatory provisions originally located in § 109.3(a)–(c) of the NPRM have been reorganized into the following separate provisions: § 109.5 Opening of packages; § 109.7 Removal from transportation; § 109.9 Transportation for examination and analysis; § 109.11 Assistance of properly qualified personnel; § 109.13 Closing packages/safe resumption of transportation; and § 109.15 Termination. As PHMSA reviewed the comments received in response to the NPRM, it became evident that the regulatory provisions needed further clarification. Although the regulatory text derived almost entirely from the statutory language, it was necessary to provide additional detail and guidance as to how this authority will be implemented. Separating the provisions also makes the regulatory text easier to read and reference. Therefore, each significant action under this authority is laid out in its own section. For example, § 109.5 Opening of packages, provides the standard under which an agent may open a package: that is, a reasonable and articulable belief that a package offered for or in transportation may contain a hazardous material and does not conform to Federal hazmat law or the HMR. Under this standard, an agent may stop the movement of a package in transportation to gather information and learn the nature and contents of the package, and if necessary, the agent may open and examine any component of the package that is not immediately in contact with the hazardous materials.

DGAC further comments that the reference to "related packages" in proposed § 109.3(b)(4)(iii) may be read broadly to mean that an "entire load could be removed because the freight in the transport vehicle is destined to the same terminal or ultimate destination." Accordingly, DGAC recommends that (1) the term "related packages" in § 109.3(b)(4)(iii) be connected to the offeror of the package at issue (presumably so that only packages from that offeror could be considered "related packages" subject to removal), and that (2) the "articulable belief" standard be connected to each package that is being removed. Further, DGAC asserts that the phrase "in a shipment or freight container" in paragraph (b)(4)(iii) "creates a conflict in terminology" that "could be resolved by deleting the words."

PHMSA Response:

Although the term "related packages" comes directly from Section 7118, the agency agrees that it is connected to the objectively reasonable and articulable belief standard that an imminent hazard exists. This provision will serve to deal with situations in which there are a number of packages that appear to have been prepared by a single offeror or appear to present a similar hazard. PHMSA agrees, however, that the term "related packages" requires more explanation. A definition of "related packages" has been added to the regulatory text in § 109.1 to respond to DGAC's concern that related packages share some common connection and undergo the same standard of a reasonable and articulable belief that related packages may pose an imminent hazard in order to be removed. "Related packages" is now defined to mean "any packages in a shipment, series or group of packages that can be traced to a common nexus of facts, including, but not limited to: The same offeror or packaging manufacturer; the same hazard communications information (marking, labeling, shipping documentation); present a similar hazard; or other reasonable and articulable facts that may lead an agent to believe such packages may pose an imminent hazard." Packages that are located within the same trailer, freight container, unit load device, etc. as a package removed subject to this enhanced authority without additional

facts to substantiate its nexus to an imminent hazard are not 'related packages' for purposes of removal. The related packages must also demonstrate that they may pose an imminent hazard. They must exhibit a commonality or nexus of origin, which may include, but are not limited to, a common offeror, package manufacturer, marking, labeling, shipping documentation, hazard communications, *etc.*

D. Proposed § 109.3(b)(4)—Custody and Detention of Package

DGAC, Ecolab, FedEx, and National Association of Chemical Distributors (NACD) questioned who is the responsible person at each step of the inspection process in proposed § 109.3. For example, if a DOT agent removes a package and related packages from transportation in accordance with proposed § 109.3(b)(4), is he then responsible for the safe handling of those packages? Moreover, if an agent directs a package to be moved to another location for testing, is that agent responsible for compliance with the HMR rather than the carrier from whom it has been taken? To answer questions regarding custody, we created the following chart breaking down each subparagraph under proposed § 109.3(b)(4) (now located at §§ 109.5–109.13) and determined who has custody during each potential stage of the inspection process.

Regulatory provision	Enforcement action	Who has custody?
§ 109.5(a)(1)	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 and the agent has reason to believe that such a package does not otherwise comply with this chapter, the agent may: (1) Stop movement of the package in transportation and gather information from any person to learn the nature and contents of the package;	Person in possession, as this step is only information gathering.
§ 109.5(a)(2)	Open any overpack, outer packaging, 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.	DOT.
§ 109.7	An agent may remove a package and related packages in a shipment or a freight container from transportation in commerce for up to forty-eight (48) hours when the agent has an objectively reasonable and articulable belief that the packages may pose an imminent hazard, provided the agent records this belief in writing as soon as practicable and provides written notification stating the reason for removal to the person in possession.	DOT.
§ 109.9	When an agent determines that further examination of a package is necessary; if conflicting information exists; or to otherwise determine that a package is in compliance with this chapter, the agent may: (1) Direct the offeror of the package, or other person responsible for the package, to have the hazardous material transported to a facility where the material will be examined and analyzed; (2) Direct the packaging manufacturer or tester of the packaging to have the package transported to a facility where the packaging will be tested in accordance with the HMR; or (3) Direct the carrier to transport the package to a facility capable of conducting such examination and analysis.	Person in possession (carrier) if carrier is transporting to the facility; once the carrier is done transporting package, it is the responsibility of the offeror since it is its package.
§ 109.11	If an agent is not properly qualified to perform a function, or when safety might otherwise be compromised by the agent's performance of a function that is essential for the agent's exercise of authority under this part, the agent may authorize properly qualified personnel to assist in the activities conducted under this part.	Person in possession (carrier) if carrier is transporting to the facility; once the carrier has transported the package, it is the responsibility of the offeror since it is its package.
§ 109.13(a)(1)–(2)	*No imminent hazard found.* If, after an agent exercises an authority under § 109.5, an imminent hazard is not found to exist, and the package is otherwise found to be compliant, the agent shall: (1) 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; (2) Mark and certify the reclosed package to indicate that it was opened and reclosed in accordance with this part;	DOT.
§ 109.13(a)(3)	Return the package to the person from whom the agent obtained it, as soon as practicable; and	Custody of person in possession at the time of the enhanced inspection.

Regulatory provision	Enforcement action	Who has custody?
§ 109.13(a)(4)	For a package containing a perishable hazardous 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.	DOT (during repackaging until it is returned).
§ 109.13(b)	If, after an agent exercises an authority under § 109.5, 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 [(carrier)], or responsible for [(offeror)], the package shall remove the package from transportation until it is brought into compliance.	Person in possession (carrier) or person responsible for the package (offeror).
§ 109.13(c)	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.	Person transporting.
§ 109.13(d)	*Noncompliant package.* If, after an agent exercises an authority under § 109.5, a package is found to contain hazardous material in violation of this Chapter, but does not present an imminent hazard, the agent shall not close the package and is under no obligation to bring the package into compliance.	Person in possession (carrier) or person responsible for the package (offeror).

E. Opening and Reclosing Outer Packagings as Proposed

Inner vs. Outer Packaging

In accordance with Section 7118, in § 109.3(b)(4)(ii) of the NPRM, PHMSA proposed to, in certain circumstances, authorize DOT agents to 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." For example, a combination packaging could consist of a fiberboard box (the outer component) and glass or plastic bottles or jugs (the inner components). Reclosing the package would be done in accordance with the manufacturer's closure instructions. Here, the original fiberboard box would likely be re-taped or when re-taping is not possible, the bottles and jugs could be overpacked in another suitable outer packaging component.

UPS comments that it would be difficult for an agent to determine what is inner vs. outer packaging, especially since hazmat may not be properly packaged and may not have an inner packaging. UPS proposes to modify this section of the NPRM, which is now finalized as § 109.5(a)(2), to read, "Ascertain through careful inspection whether the contents of the package are contained in single packaging or combination packaging; whether the contents are a hazardous article that may be handled safely; or whether the contents are loose within the packaging in a condition that would be unsafe if the packaging is opened. If the agent determines it is safe to do so, he may 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."

PHMSA Response:

UPS raises a valid concern. This is an important consideration that would serve as a helpful guideline for DOT agents in the operational manual. This comment has been incorporated into the manual.

Radioactive Packages

RSCC commented that inspection procedures should recognize that even the outer layers of certain declared packages (*i.e.,* radiopharmaceutical) should never be breached because of the sterile and radioactive nature of the contents of packages. Similarly, Ameriflight commented that Certain Class 7 (Radioactive) shipments, particularly material used in cancer therapy, are extremely time critical, and delays of even an hour have an immediate impact on the usability of the product.

PHMSA Response:

Initially, it is important to remember that properly prepared packages will not be opened by DOT agents simply to see what may be inside the packages in question. As is currently the case, the information relied upon may come from a variety of sources, including but not limited to the following: package appearance, conflicting information between the shipping papers and the markings on the package, identity of offeror or carrier, an odor emanating from a container, and anonymous tips. The agent will conduct a careful inspection of the package to determine if there is an inner and outer package and if the outer package can be opened. If the agent believes there is reasonable suspicion to open a package, he/she will request the person in possession to open the package. Only if refused, which rarely, if ever, happens, would the explicit statutory authority codified by this rule be invoked by the agent to open the package.

If a shipment is not properly prepared for transportation the agent will order the package out-of-service until the deficiencies are fixed by the offeror and the package is suitable for transportation as required by the HMR. Opening of the package will be the last resort in an overall effort to identify the contents and correcting the violations of the HMR. The Department has no intention of allowing agents to physically handle radioactive materials while in transportation. Moreover, DOT or other agencies charged with enforcing these regulations cannot be responsible for delays of time-sensitive materials that have not been properly prepared for shipment under the HMR.

Perishable Hazmat/Pharmaceuticals

NACD states that for pharmaceuticals and other perishable materials, if packages have been breached, customers will not accept them, even if they have DOT seals. Receivers in these cases demand original, manufacturer seals and consider any evidence of tampering, even if by government inspectors, as possible cause for the materials to be contaminated and unusable.

PHMSA Response:

Properly marked, labeled and packaged pharmaceuticals and other perishable hazardous materials will not be breached or delayed, as there would be no reason for them to undergo further scrutiny. If a pharmaceutical package is improperly packaged or otherwise not in compliance, it should not continue in transportation, with or without this enhanced enforcement authority. Needless to say, distributors of sensitive pharmaceuticals and other perishable materials must be especially diligent in adhering to the packaging, marking and labeling requirements to avoid package breaches that result from errors in the packaging requirements and communication standards that are integral to the HMR. Because the scope of the package opening authority has been limited in the final rule, unless an agent believes that the packages do not conform to the HMR, these packages will not be opened.

Perishable Medical Products

RSCC comments that products in this industry are specially packed, marked, labeled, and documented, and the carriers operate under special DOT controls and limitations. Thus, both the shipper and carrier can respond to questions about subject packages in a prompt manner, without the need to delay or stop the shipment.

PHMSA Response:

This rule is designed to address those packages that are undeclared or not properly packaged, marked, labeled, or documented. Packages such as those described in RSSC's comment, *i.e.,* compliant shipments, would not fall under scrutiny and no delays would occur to those shipments.

We also agree with RSCC's comment that declared nuclear medical packages must be handled with the utmost care and caution, and have provided accordingly in the internal operations manual. We cannot, however, except radioactive medical packages from the scope of this authority, as radioactive materials are regulated under the HMR. Radioactive materials also cannot be exempted from the regulations by operation of a special permit under 49 CFR part 107 subpart B, as special permits are issued on the basis that there is an equivalent level of safety or it is consistent with the public interest and protects against the risks to life and property should radioactive materials be exempted from the HMR for the purposes of this regulation. This burden would not be met. The rule, as provided in the definition of perishable hazardous material and through § 109.13(a)(4), sufficiently addresses the expeditious treatment of perishable hazardous material.

Leaking Packages

ATA comments that if an agent opens a package that is leaking and suspected of containing undeclared hazardous materials, it would be inconsistent with the statutory limitation on opening packages that are adjacent to the hazardous materials. If a package has visible signs of a breach and release of hazardous materials, then by definition the outer packaging is now adjacent to the hazardous materials and may not be opened by the agent. In such a situation, for the safety of all present, ATA recommends only a trained emergency responder should handle the leaking package.

PHMSA Response:

We agree that a package with visible indications of a breach and/or release of hazardous materials may not be opened. Evidence of leakage, however, may be one of the facts leading an agent to detain the shipment, remove it from transportation altogether, or if the case requires, seek immediate assistance from emergency responders. Again, we must reiterate that DOT agents will not open packages simply because the authority exists in the rule, without parameters and justifying circumstances, especially at the cost of safety of all individuals present in such situations. We have added appropriate precautions to the operating manual.

Reclosing Packages

RIPA states that there is potential conflict between reclosing a package in accordance with manufacturer's instructions and following a PHMSA-approved method: When an agent opens a freight container or, in some cases, an overpack, that is not covered by the HMR, he will not have access to closure instructions, since none are required by DOT. In these cases, the agent will have no option but to close the package in accordance with an approved PHMSA method. RIPA suggests proposed § 109(b)(4)(v) be amended by adding a new second sentence, as follows: "If a package does not meet a DOT specification or UN standard, the agent shall close it using an approved PHMSA closure method."

PHMSA Response:

If a package is not packaged or otherwise prepared in accordance with existing regulatory requirements under the HMR and the Federal hazmat law, DOT is under no obligation to bring the non-compliant package into compliance. In § 109.13, each possible re-closure scenario is discussed in detail. It appears that RIPA's concern is sufficiently addressed in the newly created provision, § 109.13(a), when it has been determined that the package is in compliance and an imminent hazard is found not 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 other appropriate closure method. Packages certified and reclosed subject to Part 109 will not be subject to testing requirements under 49 CFR Part 178 until the package has reached its final destination, or is returned to the offeror or packaging manufacturer." In instances where the opening and re-closing is done at a fixed facility, where the offeror is present, the agent shall assist in preparing the package for transportation. On occasions where the opening and reclosing of a package that is later determined to be compliant is in the possession of a carrier, and the offeror is not present, the agent will reclose the package accordingly to resume transportation.

Dow poses the question: If a package is opened, tested, re-closed and then found to be leaking when it is offered back into transportation or when it arrives at the consignee's facility, who will ultimately be liable? UPS comments that an agent should have full responsibility for reclosing a shipment, not just assisting, as a carrier may lack the expertise regarding packaging requirements.

PHMSA Response:

First, with respect to Dow's questions regarding reclosing a package following testing, PHMSA must clarify that only packages that are opened subject to § 109.5, *i.e.,* opened and examined at the time of inspection, will be reclosed by, or with the assistance of, the DOT agent. Packages that are ordered transported to another facility for further examination and testing under § 109.9, will not be reclosed by the agent. The offeror of the package at the time of testing will be responsible for preparing the package for continued transportation or disposal upon conclusion of testing, as appropriate. Simply stated, a package ordered for

testing to determine its chemical composition will not be reclosed and offered back into transportation under this authority.

Second, with respect to UPS's proposal that the agent assumes full responsibility for reclosing a shipment following an enhanced inspection, should a carrier lack the expertise regarding packaging requirements, the agent will be able to make sure the packaging is properly reclosed. Agents may need to reclose or assist in reclosing packages during inspections involving carriers more so than when an inspection takes place at a fixed facility (such as a manufacturer's or offeror's facility) where the offeror, who is the party responsible for the proper packaging and hazard communication, is present to reclose the package.

As we explained in detail in the NPRM, DOT does not bear financial responsibility for private costs related to the 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 based on such activities. *See* 73 FR 57287.

F. Ordering the Transportation of a Package for Further Examination

ATA expresses concern that proposed § 109.3(b)(4)(iv), authorizing under certain circumstances, an agent to order the transportation of a package to a facility to be opened and examined, will lead to agents ordering motor carriers to transport undeclared hazardous materials shipments, or otherwise ordering motor carriers to move packages that are out of compliance with the HMR. ATA further contends that before ordering the further transportation of a package in accordance with proposed § 109.3(b)(4)(iv), the agent should have an objectively reasonable and articulable belief that the package may contain a hazardous material, and the same belief that the package may pose an imminent hazard. ATA states that this prerequisite is articulated in the enabling statute, while also requiring an agent to contemporaneously document his reasonable and articulable belief.

PHMSA Response:

The rule does not state, nor does it imply, that an agent will direct an undeclared hazmat shipment or a non-compliant hazardous material shipment to be transported. Only if the agent cannot determine the contents of the package, or if it would be more feasible to have the package contents analyzed elsewhere and to avoid further delays, would the package be transported to a facility capable of such further examination. If an imminent hazard is found to exist, a package will not be transported any further by anyone. It will be ordered out of service immediately. If the package posing an imminent hazard has been removed from a larger shipment, the remainder of the otherwise compliant shipment may continue in transportation.

Section 5121(c)(1)(E) states that an agent "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 * * *." An imminent hazard need not be present for an agent to order a package to be transported, opened, and examined. Section 5121(c)(1)(E) stands apart from § 5121(c)(1)(B) (which provides for the opening of packages) and (C) (which provides for the removal of packages from transportation when they may pose an imminent hazard), and thus is not a corollary of either provision. The statute states that, as necessary under specified terms and conditions, an agent may order the package to be moved. The corresponding regulatory provision, formerly § 109.3(b)(4)(iv) in the NPRM, has been revised in the final rule. In consideration of ATA's comment, PHMSA has attempted to specify the situations in which this authority may be used. This provision is now located at § 109.9, Transportation for examination and analysis, and states that if an agent determines that further examination of a package is necessary, if there is conflicting information, or if it is otherwise necessary to determine compliance of a package, the agent may direct a package to be transported to a facility for further examination and analysis.

An agent may consider removing a package from a shipment in transportation when he or she believes the package may pose an imminent hazard, but for some reason, the agent does not have all of the information necessary in order for his/her operating administration's qualifying official to make a determination of an imminent hazard. For example, there is conflicting or missing information about the material or packaging, or examination and analysis of the material or packaging is needed to determine compliance. In most situations, a removal is limited to 48 hours. Furthermore, exercising this authority will minimize the burden on commerce by allowing the rest of an otherwise conforming shipment to continue in transportation.

When an agent determines that further examination of the material is required, he or she may have the package transported to a testing facility. However, this authority will likely be used sparingly. For example, before deciding to use this authority, an agent will need to identify a facility capable of performing the proper examination and analysis and consider the facility's location, and whether the suspected package can be safely transported to the facility. In most instances, the agent should be able to identify a qualified facility based on his or her own professional experience and assistance from his/her operating administration.

IME questioned how any package presenting an imminent hazard can be ordered to be moved.

PHMSA Response:

This comment assumes that an imminent hazard is a prerequisite for the ordering of the transportation of the package for further examination; that § 109.3(b)(4)(iv) necessarily precedes (v). However, these regulatory provisions are not mutually inclusive. The purpose of § 109.3(b)(4) was to list all of the options available to an agent, to be used alone or in tandem with other provisions in § 109.3(b)(4). In the final rule, the regulatory text has been revised and reorganized to illustrate this point more clearly.

The point of these procedures is to provide a way for DOT to prevent and immediately address violations of the existing regulations that rise to the urgency of an imminent hazard. Proposed § 109.3(b)(4)(v) (now § 109.9) would likely come into play where an agent may not be able to determine immediately that a package is in compliance, or where there are indications that the labels on a package do not accurately reflect the contents, or where shipping papers are inconsistent with the package, etc. Nevertheless, the purpose of the provision is not to place an undue burden on a carrier by forcing it to transport a non-compliant package. Rather, it is an option for the agent when a conclusive examination cannot be made at the time the package is observed due to logistics, timing, location, or other similar factors; and in the interest of safety of all parties involved, it would be best to have the package opened, analyzed, or tested elsewhere.

Compensation for Costs in the Transportation and Testing of a Package

In the NPRM, PHMSA explained how responsibility for costs would be

determined if a package is ordered to be transported and analyzed at another facility pursuant to § 109.3(b)(4)(iv). 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 may be taken into consideration at the time any civil penalty is assessed against the party responsible for the violation (usually the offeror). ATA comments that the compensation of costs for the transportation and analysis of a subject package should be included in the regulatory text.

PHMSA Response:

We decline to adopt the compensation structure as part of the regulatory text, as it remains an administrative matter that is not integral to carry out subsections (c) (Inspections and investigations) and (d), (Emergency orders) of § 5121, which is the substantive focus of this authority and the basis for the Department's rulemaking authority. Once this regulation is in effect, DOT will not compensate parties for monetary losses incurred for packages subject to an emergency order as it is related to our exercise of inspection and enforcement authority. For a detailed discussion of the discretionary function exception under the Federal Tort Claims Act (FTCA), please see relevant portions of the NPRM. 73 FR 57287. The probability of packages projected to be found in compliance after opening is relatively low. These are projections, but it is likely that the numbers may be even lower once the regulation is implemented.

Directing a Retail Store Owner Not Engaged in the Transportation of Hazardous Materials to Move the Hazmat

A number of retail shipping store owners provided the same or similar comments. We refer to their comments under the group name, storefront retail owners. Storefront retail owners suggest that in a scenario where undeclared hazmat is found during an inspection at their stores, and should DOT direct store staff to move it, stores would face liability because they cannot legally or safely transport hazmat. National Alliance of Retail Ship Centers (NARSC) expressed similar concern that the rule may cause employees to repack or hold hazmat packages at retail shipping stores, or to transport such packages from store locations. NARSC states that such actions will cause stores to violate their leases, franchise agreements, and local zoning laws; transportation of hazmat is also beyond the scope of their abilities.

PHMSA Response:

We realize that retail shipping stores do not have the capability to transport hazardous materials. Our agents will not direct a carrier, business, or offeror to transport a questionable shipment where it is not a feasible and safe option, either because a facility is not equipped to do so, or if doing so would endanger the people in the area, or would otherwise exacerbate a potentially dangerous situation. When in doubt, retail shipping stores should contact the offeror to safely transport the package.

Notice to Offeror

Several commenters (ATA, Dow, Fed Ex, IME and MDS Norton) suggest that shippers and recipients should be notified immediately each time their packages are detained and/or opened. They suggest this could be done by sending an alert to the shipper's emergency response contact.

PHMSA Response:

We agree that notice should be given to the offeror and this type of provision has been incorporated into the operations manual. The operating administration will take every reasonable effort to immediately notify the recipient that the order has been issued and provide a copy of the order (without attachments) by facsimile or electronic mail. With regard to the person in possession of the package: Generally, the removal order and the sticker the agent affixes to the package(s) is adequate notification. However, when practicable, the agent should provide to the person with custody of the package copies of the documentation and evidence used to obtain the removal. With regard to the original offeror: If the person with custody and control of the package is not the original offeror, the agent should immediately take reasonable measures to notify the original offeror of the removal. In addition, reasonable measures should also be taken to supply the original offeror with copies of any documentation that was provided to the person with custody and control of the package. A telephone call, facsimile, or e-mail message are some examples of reasonable measures for satisfying the notification requirement.

NACD recommends that the agent provide immediate notification that the shipment will be held as well as how long it is expected to be held. This will allow the carrier to more effectively communicate with the shipper and receiver about the delay.

PHMSA Response:

We will make every effort to notify the offeror once a decision has been made to issue an emergency order and remove the package from transportation.

G. Liability for Undeclared and Non-Compliant Shipments Identified Through § 109.3 Inspections and Investigations

Liability of Retail Shipping Stores

Storefront retail owners contend that they face the risk of legal action from their customers if DOT inspectors conduct any inspection in their stores without a warrant or probable cause. Moreover, they state that allowing DOT to open and discover undeclared hazmat packages would cause them to be in violation of their lease agreements, local zoning laws, carrier contracts and franchise agreements.

Storefront retail owners further argue that the liability and expenses for non-compliant hazmat packages should be on the actual shipper, not on the business that serves as a drop-off location between the carriers and their customers. NARSC is concerned that the liability falls on store owners if the inspection of a package results in a damaged, delayed or canceled shipment. NARSC also states that retail stores are prohibited by carriers from shipping or accepting hazmat, but at the same time, required to accept drop-off packages from shippers for which the store becomes liable if these packages contain undeclared hazmat. And finally, storefront retail owners and NARSC suggest that a special classification be created for the retail shipping channel.

PHMSA Response:

With respect to the retail store owners' concern regarding DOT inspections without a warrant or probable cause, as stated previously in the NPRM, because the hazardous materials transportation industry is closely regulated, those engaged in the industry have 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). Therefore, DOT is authorized under 49 U.S.C. 5121(c) 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 Federal hazmat law and HMR under the administrative search doctrine. *Id.* at 913. *See also* 73 FR 57285.

PHMSA understands the commenters' underlying concern for how this final rule may impact their daily operations.

As stated previously, DOT will not conduct investigative activities in unsuitable locations. Indeed, inspections at a retail shipping store may happen only in rare circumstances as the package opening authority may only be exercised during inspections arising under existing authority under the HMR and Federal Hazmat law. It is unclear how compliance with this final rule would violate store owners' private agreements or contracts, or conflict with local zoning laws; however, retail store owners may need to renegotiate agreements to accommodate compliance with this Federal regulation as necessary if they feel this final rule may impact such operations. It should be noted, however, that contractual negotiations between private parties and municipal land use policy are beyond the scope of this final rule.

The retail shipping stores face a situation similar to carriers in that because they are not the original offerors, they must rely on the information given to them by the shipper, but face the possibility of having to deal with a problem package while it is in their possession. The HMR generally do not apply to retail shipping stores that do not accept hazardous materials shipments. Retail shipping stores will not be responsible for unknowingly accepting hazmat shipments at their stores if there are no indications through marking, labeling, shipping documentation, or any other means in accepting the package indicating that it contains hazardous materials. The store may rely on information provided by the person offering the package for transportation unless it knows (or a reasonable person acting in the circumstances and exercising reasonable care would have knowledge) that the information provided is incorrect. If the retail shipping store accepts shipments that may contain hazardous material, its staff must be able to recognize such shipments and its proper handling or preparation of hazard communication. With that in mind, employees of such shipping stores are strongly recommended to receive training on the recognition of possible hazardous materials shipments.

Nonetheless, an offeror who fails to properly declare a shipment of hazardous materials bears the primary responsibility for a non-compliant or undeclared shipment. Whenever hazardous materials have not been shipped in accordance with the HMR, DOT will generally attempt to identify and bring an enforcement proceeding against the person who first caused the transportation of a non-compliant shipment. A special classification, therefore, is not necessary, as retail shipping stores are not offerors. If a retail shipping store discovers undeclared hazardous materials, it should contact the offeror immediately to retrieve the package and ship it accordingly.

Liability of Carriers

In that same vein, ATA comments that a motor carrier, who did not prepare the package and did not participate in the opening of the package, should not be held liable for injuries that result to inspectors or others in the vicinity of packages that are opened if the motor carrier did not knowingly accept the undeclared hazardous material for transportation and did not choose to participate in the opening of the package. Similarly, Ameriflight, LLC (Ameriflight) comments that air cargo operators are limited in their ability to assist in opening suspect packages because of privacy and delivery integrity concerns. Therefore, if an FAA inspector requires a package opening, it must be on FAA's authority alone, and the FAA must be prepared to assume liability for downstream problems such as items missing from high-value shipments.

PHMSA Response:

Refusing to open a package may be the carrier's prerogative, but that alone does not end a carrier's responsibility. Although a carrier may not knowingly accept undeclared hazmat, that in and of itself does not absolve a carrier from its existing obligations under the HMR. A carrier who transports hazmat in commerce may rely on information provided by the offeror unless the carrier knows, or a reasonable person, acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror is incorrect. Therefore, a carrier cannot ignore a package that clearly does not contain what it claims to contain; is not packaged, marked, labeled, or documented properly; or otherwise raises red flags as to its contents. A carrier, as a person who transports hazardous material under 49 CFR 171.1(c), is subject to the existing requirements under the HMR (49 CFR 172.700) to be trained to recognize and identify hazardous materials, and have knowledge of emergency response information, self protection measures and accident prevention methods and procedures as it did before this regulation.

Air Carrier Industry

Air carriers in particular bear responsibility for accepting declared shipments of hazardous materials in violation of 49 CFR 175.30, which requires air carriers to conduct an inspection ensuring that the shipment is, among other things, within quantity limitations, accompanied by shipping papers that properly describe the material, and is marked, labeled and packaged in accordance with the HMR. An air carrier's failure to conduct a proper inspection could result in a violation of 49 CFR 175.30 or 175.3, which prohibits an air carrier from offering or accepting for transportation, or transportation aboard an aircraft, hazardous materials that are not prepared for shipment in accordance with 49 CFR part 175.

Packaging Manufacturers, Reconditioners, and Distributors

RIPA is concerned that packaging manufacturers, reconditioners, and distributors may be subject to DOT enforcement actions in the event of a hazardous materials release from packaging opened, closed and returned to transportation by a DOT agent.

PHMSA Response:

If a release is caused by a packaging failure, then the responsible party may face enforcement action under DOT's existing statutory authority (49 U.S.C. 5121). If there is evidence that a subsequent release was caused by the actions of a DOT agent, such evidence would be a defense to an enforcement action assigning blame for the failure upon the shipper or carrier. We reiterate: If a package complies with the HMR, it will not be stopped, opened, or put out of service. If a package is opened based upon an objectively reasonable and articulable belief that there is a violation of the HMR, and then deemed to be compliant upon further investigation, the package will be closed according to manufacturer's closing instructions or otherwise made safe for transportation and returned to the stream of commerce. If the package is found not to contain hazardous material, it will not require the same specified closures as a hazmat package, but will be closed as securely as possible and returned to the stream of commerce.

If a packaging was correctly manufactured, reconditioned, or distributed, there should be no further issues and there would likely be no reason for it to be opened, or subject to an emergency restriction, prohibition, or recall. However, if the package itself fails to contain the hazardous materials

as prescribed by the HMR, and there is a subsequent release, responsibility for the cause of the failure will have to be determined based upon all available information. We cannot, and must not, grant preemptive exemptions from responsibility to any party under the HMR, least of all in the abstract.

H. Comments Particular to Motor Carrier Industry

NACD expressed concern that enhanced inspections under this rule could result in FMCSA hours-of-service issues for drivers if these inspections take too long.

PHMSA Response:

We are mindful of hours-of-service considerations and will make every effort to ensure these inspections and investigations will cause a minimal interruption of time. As inspections generally occur at fixed facilities, the delay to one package should not delay any others, because it can be removed from the rest of the shipment, so there should be no effect on hours of service from exercising any authority under this rule. There is a negligible additional time added to inspections as a result of this rule, because agents always ask for packages to be opened and are rarely, if ever, refused. Additional time to open if refused will be only seconds.

ATA supports PHMSA's ability to issue out-of-service ("OOS") orders that prohibit the movement of a package that poses an imminent hazard until that package has been rendered safe for continued transportation. ATA also requests that any OOS orders should not be factored into a motor carrier's safety rating, nor should it be included in the motor carrier's hazardous materials OOS rate, which is used to determine a motor carrier's ability to obtain a federal hazardous materials safety permit under 49 CFR Part 385.

PHMSA Response:

Out-of-service orders (OOS) issued under this imminent hazard authority may affect a motor carrier's safety rating or its ability to obtain or renew a hazardous material safety permit under FMCSA's Safety Fitness Procedures (49 CFR Part 385). Violations that result in an OOS order are considered under FMCSA's current safety rating methodology and are also used to calculate OOS rates that are a qualifying factor for obtaining a hazardous material safety permit. *See* 49 CFR 385.7 (safety rating factors), 49 CFR part 385, App. B (Explanation of Safety Rating Process), and 49 CFR 385.407(a)(2)(iii) (What conditions must a motor carrier satisfy for FMCSA to issue a safety permit?). Any single OOS order issued under this rule would not, alone, affect a carrier's safety rating or safety permit issuance. OOS orders issued under this rule, however, would be considered along with any other type of OOS order that the Agency or its State partners might issue for a serious safety violation committed by a motor carrier. The commenters seek to have OOS orders issued under authority of the final rule excluded from consideration. DOT's position is that these OOS orders should be considered in the same manner that FMCSA currently considers these types of serious violations. This regulation would not change the manner in which a motor carrier's HM OOS rate is calculated. Note that such OOS rates currently are examined only when a motor carrier is undergoing a compliance review or applying for an initial or renewed safety permit. Only carriers transporting certain types and amounts of HM must obtain an HM safety permit, which must be renewed every two years. 49 CFR 385.403; 49 CFR 385.419.

Objections to the consideration of these OOS criteria under the relevant FMCSA regulations are outside the scope of this rulemaking.

Former § 109.3(b)(4)(v)—Qualified Personnel To Assist (§ 109.11 Assistance of Properly Qualified Personnel)

ATA expresses concern regarding the possibility that an agent may "authorize qualified personnel to assist" in the opening of packages and their removal from transportation. ATA states that considering the scope of the training provided to motor carrier employees and the lack of appropriate personal protective equipment, motor carrier employees are not qualified to assist in such activities.

PHMSA Response:

As defined in § 109.1, "properly qualified personnel" refers to entities who are technically qualified to perform designated tasks necessary to assist in the opening, removing, testing, or transporting of packages. We agree, as a general matter, that many motor carrier employees would not be considered properly qualified personnel and would not be required to assist the agent in the above situations.

I. Drafting Corrections

UPS and DGAC point out that throughout most of the proposed regulatory text, we used the defined term "agent," however, in two places the terminology changes to "inspector." First, the commenters note that proposed § 109.3(b)(5) refers to an "inspector" returning a package found not to pose an imminent hazard and similarly, § 109.3(b)(6) references an "inspector" exercising an authority under paragraph (b)(4).

PHMSA Response:

We agree that cited references to the term "inspector" should be changed. For consistency, the term "inspector" has been replaced with the term "agent" throughout the final rule.

Noting the definitions of the terms "movement" and "transportation" in 49 CFR 171.8, DGAC comments that § 109.3(b)(6) "correctly cites 'movement' early in the text, and later cites 'transportation' which, if retained, would create an impossibility."

PHMSA Response:

The provision formerly located at proposed § 109.3(b)(6) is now § 109.13(b), Imminent hazard found. The HMR define "movement" as "the physical transfer of a hazardous material from one geographic location to another by rail car, aircraft, motor vehicle, or vessel." 49 CFR 171.8. The HMR define "transportation" as "the movement of property and loading, unloading, or storage incidental to that movement." *Id.* Further, the HMR provide that "[t]ransportation in commerce begins when a carrier takes physical possession of the hazardous material for the purpose of transporting it and continues [with certain exceptions] until the package containing the hazardous material is delivered to the destination indicated on a shipping document, package marking, or other medium." *Id.* at 171.1(c). The HMR also define "transportation" to include movement, as well as loading, unloading, and storage incidental to movement. *Id.* In other words, "movement" is actually one subset of actions or activities that comprise "transportation" and accordingly, the two terms as utilized in proposed § 109.3(b)(6) do not conflict.

If an imminent hazard is found to exist, pursuant to § 109.13(b), the Administrator may issue an out-of-service order prohibiting the "movement" of the package until the package has been brought into compliance. In other words, the immediate effect of an OOS order is to stop the further movement of the package (*i.e.,* stop the physical transfer of a package from one geographic location to another). The same paragraph further provides that 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. In other words, the package may not be moved, loaded, unloaded or stored incidental to transportation, or otherwise reenter the stream of commerce until it is brought into compliance. We also note that the

language of § 109.13(b) is consistent with the language of 49 U.S.C. 5121(c)(3) (providing for the safe and prompt "resumption of transportation" of a package found not to present an imminent hazard). Therefore, PHMSA believes the terminology used in the section is an accurate summation of how an OOS order should operate when this regulation goes into effect.

J. Proposed § 109.5—Emergency Orders

Who Issues Emergency Orders

DGAC expresses concern that DOT agencies may have differing views on the meaning and application of imminent hazard criteria and inspection procedures. Therefore, DGAC supports the concept of one place to appeal an emergency order. In addition, DGAC suggests there be an emergency contact available at the agency to address immediate issues related to emergency orders.

PHMSA Response:

The joint operations manual will provide guidance to address consistency in enforcement. Moreover, each operating administration will provide emergency contact information in conjunction with the issuance of emergency orders issued under Part 109.

Internal Agency Review of Decisions To Issue Emergency Orders

RSCC and AHS request more details about the internal system of review by DOT management and counsel before an emergency order is issued. In particular, AHS states that in the NPRM, an "Administrator" is defined to include "any person within an operating administration to whom an Administrator has delegated authority to carry out this part," which leads them to conclude that emergency order authority may be delegated down to the agent/inspector level without further review.

PHMSA Response:

Although each operating administration may make minor adjustments to the delegations to its enforcement personnel, there will always be at least two levels of review above an agent before an emergency order may be issued. Therefore, an agent who observes that a package may present an imminent hazard will document such a belief in writing. At the same time, he will be in contact with his first line supervisor. That first line supervisor will then contact the headquarters enforcement manager and the modal administration's Chief Counsel's office for consultation on whether an emergency order should be issued. At a minimum, there will be two levels of review above the agent's level before an emergency order is issued under this rule, and always in consultation with the appropriate Chief Counsel's office. The time it takes to issue an emergency order may vary by operating administration and the type of emergency order sought. For a leaking package, issuance of an emergency order may be issued nearly contemporaneously with the inspection. For more complicated situations, such as a recall of defective packaging, it may take several hours or days for DOT to complete the required due diligence to confirm an imminent hazard determination and authorize an emergency order.

There is also a defined appeal process in §§ 109.17 and 109.19 to ensure that the emergency order was not issued in error, and to present a respondent with the opportunity to challenge the agency's action once the emergency has been abated.

K. Out-of-Service Orders and Notification of the Agent

Proposed § 109.3(b)(6)(i), the substance of which is now located at § 109.17(b), provides that 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 it can be brought into compliance as long as the carrier notifies the agent who issued the OOS order. This is not a new regulatory requirement; rather, it gives the carrier the option of moving a package to the nearest location where it can be brought into compliance. DGAC proposes that this notification should be available anytime on a 24-hour basis.

PHMSA Response:

PHMSA agrees with this suggestion and has revised § 109.17(b) to reflect that an agent may be notified on a 24-hour basis before a package subject to an OOS order is moved. In imminent hazard situations, timeliness is of the utmost importance and the process of bringing an offending package to a location where the imminent hazard can be abated should not be unduly delayed. Accordingly, all parties should act expeditiously with respect to the offending package.

L. Miscellaneous Comments

Training

Ameriflight asks how the industry will be compensated for the extensive training that will be needed for operators and contract ground personnel to comply with this rule.

PHMSA Response:

It is unclear what Ameriflight envisions as additional training under the HMR for carriers when this rule becomes effective. We reiterate that this regulation creates no new regulatory requirements for carriers, offerors, and any other person subject to the HMR. Carriers will continue to be subject to training requirements under 49 CFR § 172.700 for operators and contract ground personnel performing hazmat functions, but this rule imposes no additional training requirement on persons subject to the HMR.

Limited Use of Enhanced Authority

NACD urges DOT to use this authority as sparingly as possible. If packages are properly marked, inspections to search for non-compliance inside should be limited as much as possible to prevent disruption. NACD also suggests that this authority only be exercised by certain operating administrations, such as FAA because many undeclared shipments are transported by air.

PHMSA Response:

PHMSA agrees with NACD that packages that are accompanied with shipping papers, properly marked, labeled, and packaged may raise no further concern and would likely not be opened to search for non-compliance. As stated previously, only when there are observable indications that the package may not be compliant (package appearance, conflicting information between the shipping papers and the markings on the package, identity of offeror or carrier, an odor emanating from a container, and anonymous tips) will it be subject to opening.

With the additional safeguard of a reasonable and articulable belief that a package does not comply with the regulations, only packages suspected of non-compliance may be opened. As stated previously, DOT generally operates under the assumption that it already possesses the implicit authority, by virtue of our enforcement authority, to open packages that the person in possession refuses to open without the passage of HMTSSRA. The statutory authority implemented in this final rule explicitly grants that authority. However, it is the experience of most enforcement programs that when asked to open a package, the regulated industry generally opens it voluntarily. Therefore, it appears that package opening component of this statutory authority will be used only rarely.

The procedures adopted in this final rule are intended to ensure that this enhanced enforcement authority is exercised judiciously and under carefully defined and controlled conditions. The rule makes clear that wholesale opening of packages is not allowed. DOT agents cannot and should

not open everything, as inspections would take much longer to conduct if this were the case. The statute limits opening to combination packagings only. This is primarily for the safety of the agent and those present during an inspection, as it could be dangerous to have individuals exposed to potentially unknown hazardous materials if allowed to open outer packaging right down to the material itself, such as opening a 55-gallon drum full of chemicals. By only opening packages that may contain hazardous materials and believed to be non-compliant, DOT is able to make better use of its enforcement staff while preserving the safety of all involved.

With respect to NACD's suggestion that the use of this authority be limited to certain operating administrations, PHMSA respectfully disagrees. The agency would not be serving the public interest by isolating this authority to certain modes of transportation while not remaining vigilant in all of them. Moreover, this would create an inequitable disparity in enforcement among the transportation industry.

Preemption

Some commenters (DGAC, ATA, IME, COSTHA) express concern that state entities may begin implementing this authority and believe that DOT should preempt state and local enforcement authority.

PHMSA Response:

As stated previously in the NPRM, the statute does not provide preemption authority. This enhanced enforcement authority under the statute is granted only to Federal agents.

Contractual Issues

ATA expressed concern that the rule does not address how contractual issues between motor carrier and shipper should be resolved in the event that freight is damaged or delayed during an enhanced inspection, or later refused by the offeror after such an inspection. ATA also suggests an alternate inspection process, moving the inspection to the consignor/consignee's facility.

PHMSA Response:

As a Federal agency charged with a safety mission, DOT does not endeavor to regulate private contractual matters between carriers and shippers. To the extent it is practicable, we agree that moving the inspection to the consignor/consignee's facility may be beneficial and will be attempted if practicable and if it may be accomplished without compromising the safety of those involved. The location of inspections will not change as a result of this regulation. All enforcement activities will continue to proceed as they do now. DOT agents will now have an extra tool to inspect compliance with the HMR, but the premise for conducting inspections (enforcement authority under 49 U.S.C. 5121), the locations at which they are conducted (generally fixed facilities), and the regulations under which the industry must comply (HMR), remained unchanged by this regulation.

Agents will continue to follow current operational procedures to conduct investigations and inspections. Although it is generally not a common practice for an agent to open a package during an investigation or inspection, this authority will allow them to do so, as necessary. Currently, most inspections are conducted at fixed facilities and do not involve disruption of a shipment while in transit; we do not foresee changes to this practice. Also, certain rule limitations and procedures such as opening only non-complaint packages; notification requirements and the 48 hour rule; and removal procedures allowing for a shipment to continue in transportation will effectively limit where and when a package will be opened. Again, the intention of this enhanced authority is not to unduly delay commerce without cause; rather, it is a calculated effort to detect non-compliant shipments that could potentially harm people, property or the environment.

V. Section-by-Section Analysis

In this final rule, PHMSA adds Part 109 to Title 49, Code of Federal Regulations, prescribing standards and procedures governing the exercise of enhanced inspection and enforcement authority by DOT operating administrations. Below is an analysis of the regulatory provisions.

Section 109.1 Definitions

This section contains a comprehensive set of definitions. PHMSA includes these definitions 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. As explained below, other terms defined in this rule are taken from the Federal hazmat law at 49 U.S.C. 5102 and are used with their statutory meaning.

Administrator and *Agent of the Secretary* or *agent* 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 implement this rule. Similarly, *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 Federal hazmat law and HMR. Thus, the rule does not apply to state personnel.

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 set forth in writing. (The term "out-of-service order" is defined below.) An emergency order provides extraordinary relief to address imminent hazard circumstances, including the agency's ability to order a company to immediately discontinue any or all operations related to an unsafe condition or practice causing an imminent hazard.

Freight container is defined as it is defined in 49 CFR 171.8 with one minor modification—we have preceded the § 171.8 definition with the phrase "a package configured as"—to indicate that freight containers are considered packages within the scope of this regulation. It has been included in this section for clarity and ease of referral.

This final rule defines the new term *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 49 U.S.C. 5102(5) *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).

In writing is defined as the written expression of any actions related to this part, rendered in paper or digital format, and delivered in person; via facsimile, commercial delivery, U.S. Mail, or electronically. Given the expedited schedule of actions in the implementation of this regulation, all parties must be given flexibility in the rendering of documentation.

This final rule includes the new term *objectively reasonable and articulable belief* and defines it 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 NPRM includes a detailed discussion of the case law background and parameters of this standard, 73 FR 57285.

Out-of-service (OOS) order is defined as a written order issued by an agent of the Secretary prohibiting further movement or operation of an aircraft, vessel, motor vehicle, train, railcar, locomotive, transport vehicle, 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. OOS orders will essentially operate in the same way as FRA special notices in that an activity will be prohibited until all conditions for compliance are met. Similar to the OOS order provided for in this rule, FRA's regulations provide an appeal process for any party to whom a Special Notice for Repairs is issued to challenge the decision of the Inspector who issued the notice. *See* 49 CFR 216.17.

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 means a receptacle 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. PHMSA has reconsidered the necessity of retaining a definition inconsistent with 49 CFR 171.8, and for purposes of clarity and consistency, the definition of "packaging" in this final rule is the same as the definition provided in 49 CFR 171.8.

Perishable hazardous material refers to a hazardous material that may experience accelerated decay, deterioration, or spoilage. We envision etiologic agents, such as biological products, infectious substances, medical waste, and toxins as perishable commodities that will require special handling; however, in response to comments requesting the expansion of the definition to include other hazardous materials relevant to the medical industry, the definition was modified from the proposed definition to include packages consigned for medical use in the prevention, treatment, or cure of a disease or condition in human beings or animals where expeditious shipment and delivery meet a critical medical need. We believe the definition remains broad enough to capture the types of hazardous material requiring expedited handling as prescribed by statute (49 U.S.C. 5121(c)(3)).

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. A carrier would not be considered "properly qualified personnel" to assist in § 109.11; *e.g.,* a truck driver, an airline pilot, a railroad engineer, or a warehouse fork-lift operator would not be required to assist the agent in his capacity.

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 agent has an objectively reasonable and articulable belief that a package may pose an imminent hazard, that agent is authorized to stop, detain, and prevent the further transportation in commerce of that package until the imminent hazard is abated. The basis for reasonable suspicion would center on the totality of circumstances experienced by the agent and the official's skill and experience in determining whether an investigative stop would be justified. *Brierley,* 781 F.2d at 841. As is currently the case, the information relied upon may come from a variety of sources, including but not limited to the following: Package appearance, conflicting information between the shipping papers and the markings on the package, identity of offeror or carrier, an odor emanating from a container, and anonymous tips.

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

The definition of *Trailer* was removed from this section in response to a comment citing its inconsistency with the definition of "trailer" in the FMCSRs.

§ 109.3 Inspections and Investigations

The regulatory provisions originally located in § 109.3(a)–(c) of the NPRM have now been reorganized into the following separate provisions: § 109.5 Opening of packages; § 109.7 Removal from transportation; § 109.9 Transportation for examination and analysis; § 109.11 Assistance of properly qualified personnel; § 109.13 Closing packages/safe resumption of transportation; § 109.15 Termination. As PHMSA reviewed the comments received in response to the NPRM, it became evident that the regulatory provisions needed further clarification. For clarity and ease of referral, most of the content proposed as § 109.3 and § 109.5 has been restructured into separate sections based on each action taken. Reorganizing the provisions of § 109.3 into several sections helps clarify the substance of the regulations, providing more details as to how each part of the authority will be implemented, the principles that may guide its execution, and the limitations that are required in using it. Although the regulatory text derived almost entirely from the statutory language, it was necessary to provide additional detail and guidance as to how this authority will be used. Therefore, each significant action under this authority is housed in its own section. For example, § 109.5 Opening of packages, provides the standard under which an agent may open a package: Reasonable and articulable belief that a packaged offered for or in transportation may contain a hazardous material and a reasonable and articulable belief that such a package does not comply with this Chapter. Under this standard an agent may stop the movement of a package in transportation to gather information and learn the nature and contents of the package, and if necessary, the agent may open and examine any component of the package that is not immediately in contact with the hazardous materials.

Section 109.3(a) remains unchanged from PHMSA's proposal; it states the Department's general authority to

initiate inspections and investigations as provided by 49 U.S.C. 5121(a), which has been delegated to the operating administrations. 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 are authorized to carry out the enhanced inspection and enforcement authority rule across different modes of transportation.

Section 109.3(b) is identical to PHMSA's proposal with the exception of the following language added to § 109.3(b)(2) (in italics): "Inspections and investigations are conducted by designated agents of the Secretary who will, upon [a person's] request, present their credentials for examinations. Such an agent is authorized to * * * [g]ather information by any reasonable means, including, but not limited to, gaining access to records and property (including packages) * * *." In addition to interviewing, photocopying, photographing, and audio and video recording during inspections or investigations, this language was included to specify what seems implicit in the Department's general authority—the ability to gather evidence and information through records and property, including access to the packages subject to inspection, and otherwise gather information to support enforcement activity. This is existing general authority under 49 U.S.C. 5121(a)–(b).

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 interprets "reasonable manner" to mean 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. Although a new provision to DOT's statutory authority, § 5121(c)(1)(A) specifies DOT's ability to inspect records and property under its existing regulatory authority under § 5103(b)(1). Aside from § 5121(c)(1)(A), DOT continues to have authority to 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 will serve the subpoena in accordance with its own existing statutory or regulatory authority. *See* 14 CFR 13.3 (FAA), 49 CFR 105.45–.55 (PHMSA), 49 CFR 209.7 (FRA), and 49 U.S.C. 502(d), 5121, and 31133(a)(4) (FMCSA). PHMSA believes that this provision enables 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 promotes communication and cooperation by all concerned parties and enables the Department to detect and deter undeclared hazardous material shipments and declared shipments that are not in compliance with the Federal hazmat law or the HMR.

§ 109.5 Opening of Packages

What was proposed as § 109.3(b)(4) in the NPRM is now located at § 109.5, Opening of packages. This provision implements the authority conferred by 49 U.S.C. 5121(c)(1) to enable DOT agents to take enhanced inspection and enforcement action. The most significant revision since the publication of the NPRM is the addition of a second criterion to justify the opening of a package. Section 109.5(a) requires, in addition to the requirement in the NPRM, that an agent have an objectively reasonable and articulable belief that a package may contain hazardous material, that an agent also have an objectively reasonable and articulable reason to believe that the package does not otherwise comply with the Federal hazmat law. If such facts exist, then an agent may stop the movement of the package in transportation to gather more information; or he may open the outer packaging of the package that is not immediately in contact with the hazardous material. Shipments such as plastic bottles or drums that are in direct contact with a hazardous material will not be opened pursuant to this authority.

Proposed § 109.3(b)(4)(iii) stated that an agent may 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. The substance of this provision is now located in its separate section at § 109.7, Removal from transportation. This section implements 49 U.S.C. 5121(c)(1)(C) by permitting a DOT agent to remove from transportation in commerce a package (including a freight container) or related packages when the agent has an objectively reasonable and articulable belief that the package 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. Should this condition exist, the agent must document for his or her supervising official the basis for removing the package from transportation as soon as practicable, including the findings that the shipment contained a hazardous material and the identified imminent hazard. 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 agent must limit this removal to a maximum 48-hour period in order to determine whether the package may pose an imminent hazard. The 48-hour window begins when the written order is issued to the person with custody and control of the package. This limitation was added in response to a comment regarding the delay of packages subject to OOS orders. Dow states that packages that are taken out of service, opened and inspected, and then later found compliant will result in shipment delay and shutdown of customer processes. DGAC expresses similar concern about extended delays that may result from each instance where a package is removed or goods are stopped in transit, because the package is effectively placed out of service. PHMSA agrees that a removal under these circumstances should be limited in time in order to provide carriers with a date certain as to when packages may resume transportation if brought into compliance. Forty-eight hours serves as

a workable timeframe for terms of an OOS order to be addressed, or enough time for an imminent hazard investigation to be completed.

In addition, agents must present written notification stating the reason for removal to the person in possession of the package to be removed. A notification provision was added because the removal of a package from transportation due to an imminent hazard is inherently an emergency situation. Accordingly, the affected party must be promptly informed about the action taken so that it may begin to take immediate corrective action.

§ 109.9 Transportation for Examination and Analysis

Proposed § 109.3(b)(4)(iv) stated that an agent may order the person in possession of, or responsible for, the package to have it transported to, opened, and the contents examined and analyzed by, a facility capable of conducting such examination and analysis. The substance of this provision is now located at § 109.9, Transportation for examination and analysis. This section has been revised in response to comments requesting greater detail as to how and when a package may be ordered to be transported for further examination and analysis. As stated in § 109.9(a), a package may be ordered to be transported to an appropriate facility if it requires further examination, presents conflicting information, or if additional investigation is not possible on the immediate premises.

This section implements 49 U.S.C. 5121(c)(1)(E), which provides that under terms and conditions specified by the Secretary, an agent 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 the agent determines that it is not practicable to examine the contents of a package at the time and location of the stop. This provision enables DOT to facilitate learning about the nature of the product inside the shipment by permitting delivery of the shipment to a facility where its contents can be identified. 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. Although removal of a package for further analysis is new authority provided by statute to work in conjunction with package opening, this provision is a simply new method to enforce existing statutory authority, which is to ensure the safe transportation of hazardous materials.

Under proposed § 109.3(b)(4)(v), properly qualified personnel may be asked to assist DOT when the agents open, detain, or remove a shipment, if it is possible that a package may experience a leak, spill, or release. There was an error in the NPRM with regard to § 109.4(b)(iv); the last subparagraph of § 109.3(b) was identified as (iv) when it should have been (v). This provision is now located at § 109.11, Assistance of properly qualified personnel, and also states that if an agent is not properly qualified to perform a function, or if safety might be compromised, an agent may authorize the assistance of properly qualified personnel. This section was revised in response to a comment requesting further clarification regarding the circumstances in which properly qualified personnel would be asked to assist.

§ 109.13 Closing Packages and Safe Resumption of Transportation

Closure of opened packages and their return to transportation remained an issue of great interest among commenters. Many commenters had questions as to how packages would be reclosed, who would reclose them, and how the packages would reenter the stream of commerce. In formulating responses to these comments, the agency decided that a significant revision of this provision was necessary.

Proposed § 109.3(b)(5)–(6) attempted to cover the reclosing process and the resumption of transportation, but without much success. Details were lacking and all possible scenarios were not addressed. The content of these two sections were parsed out in what is now § 109.13, Closing packages and safe resumption of transportation. The first provision, § 109.13(a), entitled *No imminent hazard found,* addresses what happens if no imminent hazard is found and the package contains hazardous material that is otherwise found to be compliant. If an imminent hazard is not found, an agent will assist in reclosing the package in accordance with the packaging manufacturer's closure instructions or other appropriate method; mark and certify the package as opened by an identified Federal agent and reclosed under this part; and return the package from whom it was obtained. Packages containing perishable hazardous material will be given expeditious treatment after it is determined there is no imminent hazard.

Section 109.13(b), entitled *Imminent hazard found,* addresses the situation in which an imminent hazard is found. In the event of an imminent hazard, an out-of-service order will be issued, prohibiting the movement of the package until it has been brought into compliance. The package will not be reclosed by a DOT agent because a non-compliant package posing an imminent hazard will not be permitted to enter into, or continue in, transportation. Moreover, DOT is not obligated to bring an offeror's package into compliance, as it is the offeror's responsibility to maintain compliance for its shipments. The recipient of the OOS order must remove the package from transportation until it is brought into compliance. Although this was implicit in the operation of emergency orders, it was necessary to articulate the possibility nonetheless. This language did not exist in the NPRM, but upon reconsideration of this section, it was added for clarity.

Section 109.13(c), entitled *Package does not contain hazardous material,* addresses the situation in which a package is opened and does not contain hazardous material. The agent will securely close the package, mark and certify its opening and closing by a Federal agent, and return the package to transportation. Because there is no hazardous material at issue, there would be no further packaging or reclosing obligations and the package may continue in transportation.

Section 109.13(d), entitled *Package contains hazardous materials not in compliance with this Chapter,* presents the final possibility when a package is opened: If a package contains hazardous material not in compliance with Federal hazmat law or the HMR. If the opening of a package reveals noncompliant hazmat that does not pose an imminent hazard, the agent will not close the package as there is no obligation to bring that package into compliance.

The Department's operating administrations will not be responsible for bringing an otherwise non-compliant package into compliance and resuming its movement in commerce. If the package does not conform to the HMR at the time of inspection, the fact that a DOT official opened it in the course of an inspection or investigation will not make DOT or its agent responsible for bringing the package into compliance.

Section 109.15 Termination, (former § 109.3(c)) states that the operating administration will close the investigative file and inform the subject party of the decision when the agency determines that no further action is necessary, and that DOT will notify respondent that the file has been closed without prejudice to further investigation. The substance of this

provision is now located at § 109.15, Termination, and includes language that reserves civil enforcement at a later time as is necessary to carry out the Federal hazmat law.

§ 109.17 Emergency Orders

Proposed § 109.5 Emergency orders, which implements 49 U.S.C. 5121(d), authorizes DOT operating administrations to issue or impose emergency restrictions, prohibitions, OOS orders, and recalls. The predicate for issuing an emergency order is a violation of Federal hazmat law or the 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. The order must articulate a sufficient factual basis that addresses the emergency situation warranting prompt prohibitive action. The operating administrations will have authority to take immediate measures to address a particular safety or security threat.

As proposed, the provisions addressing emergency orders were located at § 109.5 as well as in § 109.3(b)(6). In the final rule, PHMSA has decided to bring all matters regarding emergency orders into the same location, § 109.17 Emergency Orders. Proposed § 109.3(b)(6), now located at § 109.17(a), addresses the general criteria for when an Administrator may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders when an imminent hazard is present. Under this authority, the agency may order a company to immediately discontinue any or all operations based on any unsafe condition or practice causing an imminent hazard. An emergency order identifying the terms and conditions of such a restriction or prohibition may also prescribe necessary actions to abate the imminent hazard before operations may be resumed.

In the NPRM, the procedures for an OOS order were located at proposed § 109.3(b)(6), following the package opening authority, in the section under inspection and investigation. This provision is now located at § 109.17(b), where it makes better sense to have OOS orders organized as a subtopic of emergency orders. Section 109.17(b) authorizes 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 agent 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§ 109.3(b)(6)(i), now located at § 109.17(b)(2), 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 on a 24-hour basis.

Proposed § 109.3(b)(6)(ii), now located at § 109.17(b)(3), requires 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 § 109.3 (b)(6)(iii), now located at § 109.17(b)(4), provides an appeal process for a recipient of an OOS order to challenge the issuance of the order. The appeal process for OOS orders is consistent with the appeal process proposed for other types of emergency orders set forth in § 109.17, discussed below.

Proposed § 109.5(a), now located at § 109.17(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 will have 20 calendar days to file the petition after the emergency order is issued. *See* 49 U.S.C. 5121(d)(3). This provision ensures 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.

Proposed § 109.5(a)(4), now located at § 109.17(a)(4), was revised to provide notice regarding a formal hearing request in accordance with 5 U.S.C. 554. A recipient must provide the material facts in dispute giving rise to the request for a hearing. PHMSA has also added § 109.17(a)(5) in the final regulatory text, which references § 109.19(f) for filing and service requirements. All documents related to a petition for review must be filed with DOT Docket Operations and served on all relevant parties, as detailed in § 109.19(f).

Proposed § 109.7, Emergency Recalls, is now located at § 109.17(c) so that the procedures for all agency actions addressing emergency situations may be found in the same section. This provision 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, in consultation with relevant operating administrations, will 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.

§ 109.19 Petitions for Review of Emergency Orders

PHMSA provides a party with administrative due process rights to seek redress of an emergency order, and thus, proposed § 109.5(b), now located at § 109.19 Petitions for review of emergency orders, sets forth requirements for filing a petition for administrative review of an emergency order. The petition must: (1) Be in writing; (2) specifically state which part of the emergency order is being appealed; and (3) indicate whether a formal administrative hearing is requested. If a petitioner requests a hearing, the party must detail the material facts in dispute giving rise to the hearing request. In this final rule, § 109.19(a)(4) (which was proposed as § 109.5(b)(4) in the NPRM), now references the service and filing requirements of § 109.19(f) instead of providing separate instructions in this paragraph as originally proposed.

Proposed § 109.5(c), now located at § 109.19(b), 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 believes this short turnaround is adequate 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).

Proposed § 109.5(d), now located at § 109.19(c), provides that the PHMSA CSO will 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 constitutes 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 will assign the petition to DOT's Office of Hearings. PHMSA thus designates its CSO as the first line of review of emergency orders. It is possible that the PHMSA CSO may amend, affirm, lift, modify, stay, or vacate the emergency order upon review. An additional provision was added in the final regulatory text in § 109.19(c)(1) under the CSO's responsibilities for cases in which a hearing is requested. Unless the CSO issues an order determining no material facts are in dispute and will be decided on the merits, a formal hearing request will be deemed assigned to the Office of Hearings three calendar days after the CSO receives it. This internal mechanism will ensure that the Office of Hearings has sufficient time to complete the hearing process and aid the agency in meeting the statutory requirement of 30 days to act on a petition for review.

PHMSA believes that its 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 lead safety authority in PHMSA, which is the agency that issues the HMR, interprets the Federal hazmat law and its implementing regulations, and oversees DOT's hazardous materials transportation program.

Proposed §§ 109.5(e)–(h), now located at §§ 109.19(d)–(g) set out the administrative hearing procedures that the Department's Office of Hearings will employ. Upon receiving the petition from the CSO, the Chief Administrative Law Judge will assign it to an Administrative Law Judge (ALJ), who will 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. The ALJ process is not new; DOT currently utilizes it for enforcement proceedings. The timeline for which the ALJ proceedings must begin and conclude are new, however, as 49 U.S.C. 5121(d)(4) mandates petitions for review must be adjudicated within 30 days of filing. Thus, the ALJ must issue a report and recommendation within 25 days after receipt of the petition for review by the Chief Safety Officer.

Proposed § 109.5(g), entitled "Service," is now located at § 109.19(f) and entitled "Filing and service." This section also provides that all documents must be filed with DOT Docket Operations, and identifies the parties which must be served. PHMSA believes one location for filing and service requirements of all documents makes the regulatory text more consistent and easier to understand.

Proposed § 109.5(e), now located at § 109.19(d), 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. Proposed § 109.5(f), now located at § 109.19(e), 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. Proposed § 109.5(g), now located at § 109.19(f), 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.

Proposed § 109.5(h), now located at § 109.19(g), requires 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, which is part of an ALJ's existing authority. Critically, the decision must be issued within 25 days after the CSO receives the petition, which is a new requirement under the statute. Under proposed § 109.5(i), now located at § 109.19(h), 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 remains in effect pending the disposition of the petition unless stayed or modified by the Administrator. PHMSA maintains that this provision implementing new regulatory authority to issue emergency orders on the basis of an imminent hazard is necessary to ensure that the order is extended to abate the imminent hazard.

Proposed § 109.5(j), now located at § 109.19(i), provides 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. This is an existing provision of DOT regulations for parties seeking reconsideration of agency action. 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 has 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 constitutes final agency action.

Proposed § 109.5(k), now located at § 109.19(j) enables 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 (final agency action). Consistent with existing remedies, judicial review is 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.

Proposed § 109.5(l), now located at § 109.19(k), specifies the computation of time in the adjudications process.

§ 109.21 Remedies Generally

In addition to seeking relief in Federal court with respect to an imminent hazard, this section defines the need for general remedies available through litigation. An Administrator may request the Attorney General to 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 § 109.9, now located at § 109.21, authorizes 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. DOT's ability to request DOJ's assistance to petition for injunctive relief in district court to enforce the Federal hazmat law is an existing remedy.

Rulemaking Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule 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). 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 final 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 final rule carries out the statutory mandate and clarifies DOT's role and responsibilities 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 Orders 12866, 13563, and DOT Regulatory Policies and Procedures

This final rule is a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was reviewed by the Office of Management and Budget consistent with Executive Orders 12866 and 13563. This rule is also significant under the Regulatory Policies and Procedures of the DOT (44 FR 11034). We completed a final regulatory evaluation and placed it in the docket for this rulemaking. This final rule finalizes 49 CFR Part 109, which contains regulations on DOT inspection and investigation procedures. These regulations are not part of the HMR, which govern the transportation of hazmat, thus they do not carry any additional compliance requirements or costs for entities that must comply with the HMR. It is possible, however, that some carriers or shippers, who in the absence of this rule would have refused to open a package when requested, may experience delays that they would not have otherwise faced. DOT is not aware of any cases of shippers or carriers refusing to open packages and so anticipates that these costs will be minimal.

C. Executive Orders 13132 and 13084

This final rule 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 final 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 final rule 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 final 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 regulatory evaluation I hereby certify that the final rule will not have a significant economic impact on a substantial number of small entities. This final rule 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 provisions in this final rule 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 this final rule would apply (104,000 of which are motor carriers), we estimate that about 90 percent are small entities.

Potential cost impacts. This final rule finalizes 49 CFR part 109, which contains regulations on DOT inspection and investigation procedures. These regulations are not part of the HMR, which govern the transportation of hazmat, thus they do not carry any additional compliance requirements or costs for entities that must comply with the HMR. It is possible, however, that some carriers or shippers, who in the absence of this rule would have refused to open a package when requested, may experience delays that they would not have otherwise faced. DOT is not aware of any cases of shippers or carriers refusing to open packages and so anticipates that these costs will be minimal.

Alternate proposals for small business. Because this final rule 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 will perpetuate the problem of undeclared hazardous material shipments and resulting incidents or releases. It will also leave PHMSA and other operating administrations without an effective plan to abate an imminent safety hazard.

E. Paperwork Reduction Act

PHMSA has analyzed this final rule in accordance with the Paperwork Reduction Act of 1995 (PRA). The PRA requires Federal agencies to minimize the 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 final rule contains no new information collection requirements subject to the PRA.

F. Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. The final rule will not result in annual costs of $141.3 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 Federal agencies to 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, law enforcement, 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 final rule, supra.

2. Alternatives

Because this final rule 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 will perpetuate the problem of undeclared hazardous material shipments and resulting incidents or releases. It will 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 final rule, we invited all interested persons to offer comments on topics related to this final rule at public meetings and in response to the published NPRM. 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, RIN 2137–AE13, 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 adds a new part 109 to Title 49, Subtitle B, Chapter 1, Subchapter A to read as follows:

PART 109—DEPARTMENT OF TRANSPORTATION HAZARDOUS MATERIALS PROCEDURAL REGULATIONS FOR OPENING OF PACKAGES, EMERGENCY ORDERS, AND EMERGENCY RECALLS

Subpart A—Definitions

Subpart B—Inspections and investigations

Subpart C—Emergency Orders

Authority: 49 U.S.C. §§ 5101–5128, 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.

Subpart A—Definitions

§ 109.1 Definitions.

For purposes of this part, 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 a Federal 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 set forth in writing.

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.

In writing means unless otherwise specified, the written expression of any actions related to this part, rendered in paper or digital format, and delivered in person; via facsimile, commercial delivery, U.S. Mail; or electronically.

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 a receptacle 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 subchapter C of this chapter.

Perishable hazardous material means a hazardous material that is subject to significant risk of speedy decay, deterioration, or spoilage, or hazardous materials consigned for medical use, in the prevention, treatment, or cure of a disease or condition in human beings or animals where expeditious shipment and delivery meets a critical medical need.

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.

Related packages means any packages in a shipment, series or group of packages that can be traced to a common nexus of facts, including, but not limited to: The same offeror or packaging manufacturer; the same hazard communications information (marking, labeling, shipping documentation); or other reasonable and articulable facts that may lead an agent to believe such packages are related to a package that may pose an imminent hazard. Packages that are located within the same trailer, freight container, unit load device, *etc.* as a package removed subject to this enhanced authority without additional facts to substantiate its nexus to an imminent hazard are not "related packages" for purposes of removal. The related packages must also demonstrate that they may pose an imminent hazard. They must exhibit a commonality or nexus of origin, which may include, but are not limited to, a common offeror, package manufacturer, marking, labeling, shipping documentation, hazard communications, *etc.*

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.

Subpart B—Inspections and Investigations

§ 109.3 Inspections and Investigations.

(a) *General authority.* 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, gaining access to records and property (including packages), 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 U.S.C. 502(d), 5121(a) (Federal Motor Carrier Safety Administration), and 49 CFR 105.45–105.55 (Pipeline and Hazardous Materials Safety Administration).

§ 109.5 Opening of packages.

(a) 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 and that such a package does not otherwise comply with this chapter, the agent may—

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

(2) Open any overpack, outer packaging, 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.

§ 109.7 Removal from transportation.

An agent may remove a package and related packages in a shipment or a freight container from transportation in commerce for up to forty-eight (48) hours when the agent has an objectively reasonable and articulable belief that the packages may pose an imminent hazard. The agent must record this belief in writing as soon as practicable and provide written notification stating the reason for removal to the person in possession.

§ 109.9 Transportation for examination and analysis.

(a) An agent may direct a package to be transported to a facility for examination and analysis when the agent determines that:

(1) Further examination of the package is necessary to evaluate whether the package conforms to subchapter C of this chapter;

(2) Conflicting information concerning the package exists; or

(3) Additional investigation is not possible on the immediate premises.

(b) In the event of a determination in accordance with paragraph (a) of this section, an agent may:

(1) Direct the offeror of the package, or other person responsible for the package, to have the package transported to a facility where the material may be examined and analyzed;

(2) Direct the packaging manufacturer or tester of the packaging to have the package transported to a facility where the packaging may be tested in accordance with the HMR; or

(3) Direct the carrier to transport the package to a facility capable of conducting such examination and analysis.

(c) The 48-hour removal period provided in § 109.7 may be extended in writing by the Administrator pending the conclusion of examination and analysis under this section.

§ 109.11 Assistance of properly qualified personnel.

An agent may authorize properly qualified personnel to assist in the activities conducted under this part if the agent is not properly qualified to perform a function that is essential to the agent's exercise of authority under this part or when safety might otherwise be compromised by the agent's performance of such a function.

§ 109.13 Closing packages and safe resumption of transportation.

(a) *No imminent hazard found.* If, after an agent exercises an authority under § 109.5, the agent finds that no imminent hazard exists, and the package otherwise conforms to applicable requirements in subchapter C of this chapter, the agent will:

(1) 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 other appropriate closure method;

(2) Mark and certify the reclosed package to indicate that it was opened and reclosed in accordance with this part;

(3) Return the package to the person from whom the agent obtained it, as soon as practicable; and

(4) For a package containing a perishable hazardous material, assist in resuming the safe and expeditious transportation of the package as soon as practicable after determining that the package presents no imminent hazard.

(b) *Imminent hazard found.* If an imminent hazard is found to exist after an agent exercises an authority under § 109.5, 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 this chapter. Upon receipt of the out-of-service order, the person in possession of, or responsible for, the package must remove the package from transportation until it is brought into compliance.

(c) *Package does not contain hazardous material.* If, after an agent exercises an authority under § 109.5, the agent finds that a package does not contain a hazardous material, the agent shall securely close the package, mark and certify the reclosed package to indicate that it was opened and reclosed, and return the package to transportation.

(d) *Non-compliant package.* If, after an agent exercises an authority under § 109.5, the agent finds that a package contains hazardous material and does not conform to requirements in subchapter C of this chapter, but does not present an imminent hazard, the agent will return the package to the person in possession of the package at the time the non-compliance is discovered for appropriate corrective action. A non-compliant package may not continue in transportation until all identified non-compliance issues are resolved.

§ 109.15 Termination.

When the facts disclosed by an investigation indicate that further action is not warranted under this Part at the time, the Administrator will close the investigation without prejudice to further investigation and notify the person being investigated of the decision. Nothing herein precludes civil enforcement action at a later time related to the findings of the investigation.

Subpart C—Emergency Orders

§ 109.17 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, within 20 calendar days of the date the order is issued, recipient may request review; and that any request for a formal hearing in accordance with 5 U.S.C. 554 must set forth the material facts in dispute giving rise to the request for a hearing; and

(5) Set forth the filing and service requirements contained in § 109.19(f), including the address of DOT Docket Operations and of all persons to be served with the petition for review.

(b) *Out-of-service order.* An out-of-service order is issued to prohibit the movement of an aircraft, vessel, motor vehicle, train, railcar, locomotive, transport unit, transport vehicle, or other vehicle, or a freight container, portable tank, or other package until specified conditions of the out-of-service order have been met.

(1) Upon receipt of an out-of-service order, the person in possession of, or responsible for, the package must remove the package from transportation until it is brought into compliance with the out-of-service order.

(2) 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 who issued the out-of-service order is notified before the move.

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

(4) 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 § 109.19.

(c) *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 § 109.19.

§ 109.19 Petitions for review of emergency orders.

(a) *Petitions for review.* 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, and, if so, the material facts in dispute giving rise to the request for a hearing; and,

(4) Be filed and served in accordance with § 109.19(f).

(b) *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 and serve, in accordance with § 109.19(f), a response, including appropriate pleadings, within five calendar days of receipt of the petition by the Chief Counsel of the operating administration issuing the emergency order.

(c) *Chief Safety Officer Responsibilities.*

(1) *Hearing requested.* Upon receipt of a petition for review of an emergency order that includes a formal hearing request and states material facts in dispute, the Chief Safety Officer shall immediately assign the petition to the Office of Hearings. Unless the Chief Safety Officer issues an order stating that the petition fails to set forth material facts in dispute and will be decided under paragraph (c)(2) of this section, a petition for review including a formal hearing request will be deemed assigned to the Office of Hearings three calendar days after the Chief Safety Officer receives it.

(2) *No hearing requested.* For a petition for review of an emergency order that does not include a formal hearing request or fails to state material facts in dispute, the Chief Safety Officer shall issue an administrative decision on the merits within 30 days of receipt of the petition. The Chief Safety Officer's decision constitutes final agency action.

(d) *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, 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.

(e) *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.

(f) *Filing and service.* (1) Each petition, pleading, motion, notice, order, or other document submitted in connection with an order issued under this subpart must be filed (commercially delivered or submitted electronically) with: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. All documents filed will be published on the Department's docket management Web site, *http://www.regulations.gov.* The emergency order shall state the above filing requirements and the address of DOT Docket Operations.

(2) Service. Each document filed in accordance with paragraph (f)(1) of this section must be concurrently served upon the following persons:

(i) Chief Safety Officer (*Attn:* Office of Chief Counsel, PHC), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey

Avenue, SE., East Building, Washington, DC 20590 (*facsimile:* 202–366–7041) (*electronic mail: PHMSAChiefCounsel@dot.gov*);

(ii) The Chief Counsel of the operating administration issuing the emergency order;

(iii) If the petition for review requests a formal hearing, the Chief Administrative Law Judge, U.S. Department of Transportation, Office of Hearings, M–20, Room E12–320, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*facsimile:* 202–366–7536).

(iv) Service shall be made personally, by commercial delivery service, or by electronic means if consented to in writing by the party to be served, except as otherwise provided herein. The emergency order shall state all relevant service requirements and list the persons 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.

(3) Certificate of service. 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.

(4) The emergency order shall be served by "hand delivery," unless such delivery is not practicable, or by electronic means if consented to in writing by the party to be served.

(5) Service upon a person's duly authorized representative, agent for service, or an organization's president constitutes service upon that person.

(g) *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.

(h) *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.

(i) *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 service of the report and recommendation. The opposing party may file a response to the petition within one calendar day of service of a petition for reconsideration.

(2) The Chief Safety Officer shall issue a final agency decision within three calendar days of service of the final pleading, 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.

(j) *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.

(k) *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.

§ 109.21 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 February 17, 2011 under authority delegated in 49 CFR part 1.

Cynthia L. Quarterman,

Administrator, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2011–4270 Filed 3–1–11; 8:45 am]

BILLING CODE 4910–60–P