

DEPARTMENT OF TRANSPORTATION**Pipeline and Hazardous Materials Safety Administration****49 CFR Parts 171, 172, and 173**

[Docket No. RSPA-2004-18795 (HM-237)]

RIN 2137-AD88

Hazardous Materials: Requirements for Lighters and Lighter Refills**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.**ACTION:** Final rule; response to appeals; correction.

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

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

Voluntary compliance: Except for paragraphs (a), (b)(1), (b)(3), (b)(4), and (d) in § 173.308, voluntary compliance with the final rule amending 49 CFR parts 171, 172, and 173 published at 71 FR 3418 on January 23, 2006, and with this final rule is authorized as of April 25, 2006.

FOR FURTHER INFORMATION CONTACT: Michael G. Stevens or Kurt Eichenlaub, Office of Hazardous Materials Standards, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, telephone (202) 366-8553.

SUPPLEMENTARY INFORMATION:**I. Background**

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

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

Specification for Lighters (ASTM F-400);

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

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

II. Appeals of the Final Rule

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

A. Lighter Refills

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

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

Section 173.306 permits a limited quantity of butane or other flammable gas (not more than 4 fluid ounces) to be renamed "consumer commodity" and reclassified as ORM-D material. ORM-D shipments are excepted from specification packaging requirements

and, for other than air transportation, from shipping paper and labeling requirements.

One goal of the HM-237 rulemaking was to develop transportation requirements specific to lighter refills. To this end, in the NPRM we proposed a separate entry in the HMT for "lighter refills containing flammable gas exceeding 4 fluid ounces capacity." We inadvertently omitted a separate HMT entry for "lighter refills containing flammable gas not exceeding 4 fluid ounces capacity," but added a new paragraph (h) to § 173.306 to specify requirements for lighter refills not exceeding 4 fluid ounces. The provisions proposed in this paragraph were identical to provisions for lighter refills in the UN Recommendations for the Transport of Dangerous Goods, the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions), and the International Maritime Dangerous Goods Code (IMDG Code).

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

The Lighter Association was the only commenter to address the consumer commodity exception in its comments to the NPRM. The Lighter Association comments on lighter refills specifically address the exception provided in the NPRM for highway shipments and its view that the packaging proposed for this exception was unnecessarily rigorous. In support of this view, the Lighter Association noted that "lighter refills under 4 fluid ounces have been treated as ORM-D for over thirty years. To the best of our knowledge, there have not been any safety incidents with the transportation of any size lighter refills * * *" The Association did not specifically address our proposal to prohibit lighter refills from taking advantage of the consumer commodity exception. In the final rule, we modified

the NPRM provisions applicable to the highway exception for lighter refills to accommodate the Lighter Association comments. No other commenters addressed the proposal in the NPRM applicable to consumer commodity exceptions for lighter refills.

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

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

Upon review, we believe the discussion in the preamble to the NPRM provided sufficient notice of our intention to prohibit shippers of lighter refills from utilizing limited quantity and consumer commodity exceptions. However, we did not provide notice that the limited quantity and consumer commodity exceptions authorized for transportation of butane and other flammable gases would no longer be available for lighter refill shipments. Further, appellants have highlighted potential economic impacts of this provision on the regulated community that were not considered in the

development of the final rule. Therefore, we are granting the appeals submitted by the Lighter Association, Zippo, and Ronson by correcting the final rule to permit shippers to continue to utilize limited quantity and consumer commodity exceptions for shipments of lighter refills when in containers with a capacity of 4 fluid ounces (7.22 cubic inches) or less. We note in this regard, however, that neither the ICAO Technical Instructions nor the IMDG Code provide limited quantity or consumer commodity exceptions for lighter refills. Therefore, the exceptions we are providing in the HMR for lighter refills would not be acceptable for aircraft or vessel shipments under international standards. In addition, lighter refills with a capacity greater than 4 fluid ounces (7.22 cubic inches) must be described as the gas contained therein and packaged in an authorized specification container regardless of transportation mode.

B. Voluntary Compliance

The effective date of the January 23, 2006 final rule is January 1, 2007. This provides almost a full year for the industry to implement the new program and procedures for the testing and examination of lighter designs. However, the final rule contains several amendments providing regulatory relief that are currently authorized only under the terms of a special permit granted by PHMSA. The Sassa appeal relates to one such special permit (DOT-SP 14273) that would no longer be needed if the final rule were in effect. We are aware of additional special permits that would also be affected, but to date we have not received any requests for relief. Sassa requests that offerors and transporters be permitted to voluntarily comply with the provisions of the HM-237 final rule.

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

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

III. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

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

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

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

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

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order

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

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

(i) The designation, description, and classification of hazardous materials;

(ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

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

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

(v) The design, manufacture, fabrication, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

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

Federal hazardous materials transportation law provides at section 5125(b)(2) that, if DOT issues a regulation concerning any of the covered subjects, DOT must determine and publish in the **Federal Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. PHMSA has determined that the effective date of Federal preemption for these requirements will be 1 year from the date of publication of a final rule in the **Federal Register**.

D. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order

13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not have tribal implications and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Regulatory Policies and Procedures

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 a significant impact on a substantial number of small entities. This final rule will not impose increased compliance costs on the regulated industry. The revisions we are making to the January 23, 2007 final rule will provide regulatory relief to persons offering lighters and lighter refills for transportation in commerce by reinstating limited quantity and consumer commodity exceptions for lighter refills and permitting immediate voluntary compliance with certain provisions of the final rule. Therefore, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

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

F. Paperwork Reduction Act

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

G. Regulation Identifier Number (RIN)

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

H. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the

Unfunded Mandates Reform Act of 1995. It will not result in costs of \$120.7 million or more, in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

I. Privacy Act

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

List of Subjects in 49 CFR Part 173

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

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

§ 173.306 [Corrected]

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

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

Brigham A. McCown,

Acting Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

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

RIN 0648–AT22

Fisheries of the Northeastern United States; Monkfish Fishery

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

ACTION: Final rule.

SUMMARY: NMFS implements measures to establish target total allowable catch