

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration****49 CFR Parts 171 and 173**

[Docket No. HM-224; Amdt. Nos. 171-146; and 173-254]

RIN 2137-AC89

Prohibition of Oxygen Generators as Cargo in Passenger- Aircraft**AGENCY:** Research and Special Programs Administration (RSPA), DOT.**ACTION:** Final rule.

SUMMARY: RSPA is prohibiting the transportation of oxygen generators as cargo on board passenger-carrying aircraft. This rule applies to both foreign and domestic passenger-carrying aircraft entering, leaving or operating in the United States, and to any person offering an oxygen generator for transportation on any passenger-carrying aircraft.

EFFECTIVE DATE: This final rule is effective December 31, 1996.

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SUPPLEMENTARY INFORMATION:**I. Background**

On May 24, 1996, RSPA published in the Federal Register an interim final rule temporarily prohibiting, until January 1, 1997, the transportation of chemical oxygen generators as cargo on passenger-carrying aircraft. 61 FR 26418. This prohibition applies to domestic and foreign air carriers operating passenger-carrying aircraft entering, leaving or operating in the United States, and to any person offering a chemical oxygen generator for transportation as cargo on any of these aircraft.

This interim final rule was issued under the authority delegated to RSPA by the Secretary of Transportation, in 49 CFR 1.53(b), to issue regulations implementing the Federal hazardous material transportation law, 49 U.S.C. 5101-5127. Enforcement of the Federal hazardous material transportation law and the Hazardous Materials Regulations (HMR, 49 CFR Parts 171-180) issued under that law is shared by RSPA and four modal administrations within the Department of Transportation: Federal Aviation Administration (FAA), Federal Highway

Administration, Federal Railroad Administration, and United States Coast Guard. FAA has primary enforcement authority concerning transportation of hazardous materials by air. 49 CFR 1.47(k).

RSPA does not regulate, and the HMR do not apply to, components of the aircraft itself. Accordingly, the May 24, 1996 interim final rule does not apply to chemical oxygen generators that are installed in the cabins of many aircraft to provide oxygen in emergencies to passengers and crew members. The prohibition in the May 24, 1996 interim final rule also does not apply to compressed oxygen in cylinders.

The May 24, 1996 interim final rule included the following definition of an oxygen generator to which the prohibition applies: "Oxygen generator (chemical) means a device containing chemicals that upon activation release oxygen as a product of chemical reaction." 49 CFR 171.8 (61 FR 26419). Exceptions to the prohibition are provided for a chemical oxygen generator that meets the specific safety requirements of 49 CFR 175.10(a)(7), for medical use of passengers in the passenger cabin, and for small oxygen generators for personal use that are transported as checked baggage in accordance with 49 CFR 175.10(a)(24). 49 CFR 173.21(k) (61 FR 26419). As discussed below, in a separate rulemaking proceeding in Docket No. HM-224A, RSPA is proposing elimination of the exception in 49 CFR 175.10(a)(24) for small personal oxygen generators.

II. NTSB Recommendations

The May 24, 1996 interim final rule responds in part to the following two recommendations of the National Transportation Safety Board (NTSB) that RSPA:

In cooperation with the Federal Aviation Administration, permanently prohibit the transportation of chemical oxygen generators as cargo on board any passenger or cargo aircraft when the generators have passed expiration dates, and the chemical core has not been depleted. (A-96-29) (Class I, Urgent Action)

In cooperation with the Federal Aviation Administration, prohibit the transportation of oxidizers and oxidizing materials (e.g., nitric acid) in cargo compartments that do not have fire or smoke detection systems. (A-96-30) (Class I, Urgent Action)

These recommendations were issued as part of NTSB's ongoing investigation of the May 11, 1996 accident involving the loss of ValuJet Airlines Flight 592. Preliminary evidence indicates that chemical oxygen generators were being carried in a cargo compartment on board

Flight 592 and may have caused, or contributed to the severity of, the accident. NTSB and FAA are continuing to investigate this accident and issues concerning whether the chemical oxygen generators in the cargo compartment on board Flight 592 were offered for transportation, and were being transported, in accordance with the applicable requirements of the HMR. Nonetheless, RSPA issued the May 24, 1996 interim final rule to prevent any similar incidents involving chemical oxygen generators as cargo on passenger-carrying aircraft while RSPA could consider whether to make this prohibition permanent. In the separate rulemaking in Docket No. HM-224A, RSPA addresses the remaining parts of the NTSB recommendations by proposing to prohibit oxidizers from being transported aboard all passenger-carrying aircraft and in those inaccessible cargo compartments on cargo aircraft that lack fire or smoke detection and suppression systems (i.e., Class D compartments, see 14 CFR 25.857).

III. Comments and Other Matters Considered

RSPA received five comments on the interim final rule. As discussed below, RSPA is permanently prohibiting the transportation of oxygen generators (chemical) as cargo on passenger-carrying aircraft. This prohibition is consistent with the July 1996 amendment to the 1995-96 Edition of the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air. (The HMR authorize the transportation of hazardous materials within the United States by aircraft in accordance with the ICAO Technical Instructions. 49 CFR 171.11.)

Two commenters recommended that the prohibition in the interim final rule be made permanent and extended to cargo aircraft. According to the Air Line Pilots Association (ALPA), similar crash scenarios "can produce the same amount of destruction" for both cargo and passenger-carrying aircraft. ALPA stated that oxygen generators pose a significant potential hazard to all aircraft and that the "line of demarcation" is not the number of persons on board an aircraft that might be lost, but whether the aircraft could withstand the potential hazard and be landed safely without loss of life or the aircraft.

A consultant who previously worked for FAA as a hazardous material inspector and coordinator expressed his concern that chemical oxygen generators should be forbidden for

transport by any type of aircraft. He stated that it is difficult, if not impossible, for an air carrier to insure that these items are in safe condition for transportation. He believes that airlines could normally transport replacement generators by ground and keep a supply at strategic locations, to avoid the need to carry them as cargo on their own airplanes, but he indicated that a limited exemption might be appropriate to allow replacements to be transported to overseas or remote areas. A private citizen also expressed her concern about hazardous materials contained in passengers' baggage. She recommended a prohibition against transportation of any material having the remotest possibility of endangering those on board an aircraft.

The Air Transport Association (ATA) supported the interim final rule but recommended that RSPA not rule out the possibility of reauthorizing the air transportation of chemical oxygen generators at a future date. ATA expressed its understanding that the oxygen generators carried aboard ValuJet Flight 592 "were unnecessarily and perhaps improperly offered for transportation by aircraft." It stated that, "since chemical oxygen generators were first installed in aircraft in lieu of oxygen bottles, tens of thousands have been safely transported by airlines in compliance with regulations" and also "as part of the aircraft's installation." ATA urged RSPA and FAA to address the "two possible failure modes" for these devices, inadequate safety devices and high ambient temperatures, through regulations that would require protective devices (such as a locking pin and a protective cap) and research into packaging methodologies that would provide thermal protection. ATA recommended that these issues receive further analysis "before RSPA totally forecloses the possibility of the resupply of chemical oxygen generators for installation in air carrier fleets via the combination air carriers' cargo system." ATA also indicated that air carriers had sought for many years, and would welcome, an increase in enforcement directed at offerors who fail to properly disclose shipments of hazardous materials.

A European supplier of aircraft oxygen equipment stated that it was necessary to allow chemical oxygen generators to be transported on passenger-carrying aircraft in order to repair planes on which the oxygen equipment had malfunctioned. This company indicated it is often requested to supply replacement equipment within four hours, because an aircraft is not permitted to take off before the

defective equipment is replaced. This commenter stated that this happens "monthly several times all over the world," and asked if there was an exemption for an "aircraft on ground" situation. Otherwise, it stated, a forwarding agency would have to wait for a cargo-only aircraft, which operate less frequently.

RSPA recognizes that the oxygen generators involved in the ValuJet accident appear to have been shipped in violation of the HMR, and RSPA continues to believe that these generators may be safely transported in compliance with the HMR, including the conditions of the approvals under which the generators are offered for transportation by their original manufacturers. However, these devices appear to be unique in that, if handled improperly, they can both generate sufficient heat to set adjacent materials on fire and also provide oxygen to intensify a fire. The potential for loss of life and damage to property justify this prohibition and the consequence that any generators needed as replacement parts must be transported by ground or by cargo-only aircraft.

At the present time, RSPA is continuing this prohibition as limited to passenger-carrying aircraft. RSPA believes that any decision to prohibit chemical oxygen generators from cargo aircraft should only follow public notice and an opportunity for further comment. A prohibition against transporting any oxidizers in Class D compartments of cargo aircraft, as proposed under docket HM-224A, would apply to chemical oxygen generators. In that proceeding, among others, RSPA will continue to evaluate the hazards posed by chemical oxygen generators to determine what additional requirements, if any, are needed to insure their safe transportation.

ALPA also recommended removing the exceptions provided in 49 CFR 175.10(a) (7) and (24). The first subparagraph allows the transportation of an oxygen generator provided by the air carrier for medical use of a passenger in the passenger cabin. The exception solely applies to the transportation of those oxygen generators that are for use by on-board passengers and does not provide for the transportation of medical oxygen generators for the purposes of staging or positioning. ALPA believes that the availability of gaseous oxygen makes this part of the exception unnecessary. RSPA is not eliminating this part of subparagraph 175.10(a)(7) at this time because there is insufficient information on the potential effect on airline passengers with breathing difficulties, and the public

interest would require public notice and comment before making this type of change to the HMR. RSPA may consider removing oxygen generators from subparagraph (a)(7) in a future rulemaking.

The exception in 49 CFR 175.10(a)(24) allows a small oxygen generator intended for personal use to be transported as a passenger's checked baggage under certain circumstances, including the approval of the air carrier. ALPA believes that passengers are unaware of this requirement, and therefore fail to notify the carrier, because of a lack of public awareness programs and procedures for informing passengers that they must contact the carrier before checking baggage containing an oxygen generator. ALPA also stated that there is no practical means of assuring that the person owning this type of oxygen generator has been educated in how to inspect and maintain the generator as specified in the HMR, and there is no way for the air carrier to examine the generator to verify compliance with the conditions in subsection 175.10(a)(24). ALPA pointed out that the United Kingdom's Civil Aviation Authority has prohibited the transportation of these personal oxygen generators on passenger-carrying aircraft.

ALPA's arguments in favor of eliminating the exception in subsection 175.10(a)(24) warrant further consideration. At the same time, RSPA believes that any such change should follow public notice and comment. Accordingly, RSPA is proposing to eliminate 49 CFR 175.10(a)(24) in the proposed rule in docket No. HM-224A. ALPA's recommendation and supporting comments will be considered in that proceeding.

IV. Effective Date

Because of the potential safety risk posed by continued transportation of oxygen generators as cargo in passenger-carrying aircraft, RSPA has determined that good cause exists for making this rule effective less than 30 days following its issuance.

V. Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is considered a significant regulatory action under section 3(f) of Executive Order 12866 and therefore is subject to review by the Office of Management and Budget. The rule is significant according to the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

The changes adopted in this rule should not result in any significant additional costs to persons subject to the HMR. About 150,000 of these oxygen generators are installed on about 1,000 U.S. passenger-carrying aircraft. Because of their typical effective life of about twelve years, it is not necessary to frequently transport these generators as uninstalled or not-in-use materials. In addition, alternative transportation is available for these generators because this rule does not prohibit or inhibit their transportation by highway, rail, water or cargo aircraft. Because of the minimal economic impact of this rule, a full regulatory evaluation is not warranted.

Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria in Executive Order 12612 ("Federalism") and does not have sufficient Federalism impacts to warrant the preparation of a federalism assessment.

Regulatory Flexibility Act

I certify that this final rule will not have a significant economic impact on a substantial number of small entities. There are limited adverse economic impacts on small businesses or other organizations because this rule imposes

a limited prohibition on certain persons subject to the HMR.

Paperwork Reduction Act

There are no information collection requirements in this final rule.

Regulation Identifier Number

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.

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

49 CFR Part 173

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

In consideration of the foregoing, the interim rule amending 49 CFR parts 171 and 173 which was published at 61 FR 26418 on May 24, 1996, is adopted as a final rule with the following change:

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

1. The authority citation for Part 173 is revised to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45, 1.53.

2. In § 173.21, paragraph (k) is revised to read as follows:

§ 173.21 Forbidden materials and packages.

* * * * *

(k) Notwithstanding any other provision of this subchapter, including §§ 171.11 and 175.10(a)(2) of this subchapter, an oxygen generator (chemical) as cargo on a passenger-carrying aircraft. This prohibition does not apply to an oxygen generator for medical or personal use of a passenger that meets the requirements of § 175.10(a)(7) or § 175.10(a)(24) of this subchapter.

Issued in Washington, DC on December 23, 1996, under authority delegated in 49 CFR part 1.

Kelley S. Coyner,

Acting Administrator, Research and Special Programs Administration.

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