

DEPARTMENT OF TRANSPORTATION

Research and Special Programs
Administration

49 CFR Parts 171 and 173

[Docket HM-200; Amdt. Nos. 171-154 and
173-262]

RIN 2137-AB37

**Hazardous Materials in Intrastate
Commerce; Delay of Compliance Date,
Technical Amendments, Corrections
and Response to Petitions for
Reconsideration****AGENCY:** Research and Special Programs
Administration (RSPA), DOT.**ACTION:** Final rule, delay of compliance
date, technical amendments, correction
and response to petitions for
reconsideration.

SUMMARY: On January 8, 1997, RSPA published a final rule which amended the Hazardous Materials Regulations (HMR) to expand the scope of the regulations to intrastate transportation of hazardous materials. The intended effect of the January 8, 1997 rule is to raise the level of safety in the transportation of hazardous materials by applying a uniform system of safety regulations to all hazardous materials transported in commerce throughout the United States. In this final rule, RSPA is providing one additional year, until October 1, 1998, for compliance, responding to petitions for reconsideration and correcting errors in the January 8, 1997 final rule. The minor editorial changes made by this final rule will not impose any new requirements on persons subject to the HMR.

DATES: Effective dates: This final rule is effective October 1, 1997. The effective date for the final rule published under Docket HM-200 on January 8, 1997 (62 FR 1208) remains October 1, 1997.

Compliance dates: Voluntary compliance with the January 8, 1997 final rule has been authorized beginning April 8, 1997. Voluntary compliance with this final rule is authorized as of September 22, 1997.

Mandatory compliance with the HMR by intrastate motor carriers of hazardous materials is required beginning October 1, 1998, except that intrastate motor carriers of hazardous waste, hazardous substances, marine pollutants, and flammable cryogenic liquids in portable tanks and cargo tanks are already subject to the HMR.

FOR FURTHER INFORMATION CONTACT:
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366-8553, Office of Hazardous Materials

Standards, RSPA, 400 Seventh Street,
SW, Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:**I. Background**

On January 8, 1997, RSPA issued a final rule under Docket HM-200 [62 FR 1208]. The final rule amended the HMR by expanding the scope of the regulations to intrastate transportation of hazardous materials in commerce. In the final rule, RSPA created or amended exceptions for agricultural operations (§ 173.5), materials of trade (§ 173.6), non-specification packagings used in intrastate transportation (§ 173.8) and minimum qualifications for registered inspectors (§ 180.409).

Since publication of the final rule, RSPA has discovered minor errors in § 173.6 (materials of trade) that are being corrected in this document. In response to a petition for reconsideration, RSPA is also amending § 173.6 to include provisions that materials of trade may include Division 2.2 materials in permanently installed cylinders or tanks built to the American Society of Mechanical Engineers (ASME) standards. RSPA is denying another part of this petition for reconsideration and two other petitions for reconsideration of the final rule.

To offset burdens that may fall on intrastate motor carriers and their shippers who were not previously subject to requirements comparable to those in the HMR because of State exceptions, RSPA is providing an additional year for compliance. RSPA is adding to § 171.1 the wording "except that until October 1, 1998, this subchapter applies to intrastate carriers by motor vehicle only in so far as this subchapter relates to hazardous waste, hazardous substances, flammable cryogenic liquids in portable tanks and cargo tanks, and marine pollutants." This will ensure that the final rule will be printed in the 1997 edition of the Code of Federal Regulations while still providing additional time for compliance. It is important for people who choose to voluntarily comply to have up-to-date information on these requirements. However, RSPA concludes that an additional year is appropriate for these persons to learn and come into compliance with the requirements in the HMR.

In addition, the July 1, 1998 date set forth in §§ 173.5(a)(2) and 173.8(d)(3) as the deadline for States to enact legislation that authorizes exceptions for agricultural operations and non-specification cargo tanks is being changed to October 1, 1998, for consistency with the mandatory

compliance date of the final rule. This will eliminate the potential problem of requiring compliance before a State has the opportunity to enact legislation to allow carriers in that state to take advantage of the exceptions.

II. Materials of Trade (§ 173.6)

RSPA is making several changes to § 173.6, as follows:

As provided by § 173.6, only certain hazardous materials are authorized the materials of trade exception. Although proposed in the March 20, 1996 supplemental notice of proposed rulemaking (SNPRM) [61 FR 11484], the final rule inadvertently omitted Division 5.2 (organic peroxide) materials from the list. Therefore, Division 5.2 materials are added to the list in § 173.6(a)(1) and are authorized under the materials of trade exception.

A reference to regulations of the Occupational Safety and Health Administration (OSHA) applicable to construction activities (29 CFR 1926.152) was inadvertently omitted in the requirements for packaging gasoline (§ 173.6(b)(4)). These OSHA requirements address storage and use of gasoline at construction sites and authorize up to one-gallon capacity plastic containers for gasoline. RSPA believes that the material of trade exception should also authorize these small plastic safety cans for the transportation of gasoline to avoid the transfer of gasoline from one container to another. Therefore § 173.6(b)(4) is revised to reference the OSHA standard in 29 CFR 1926.152(a)(1). Additionally the reference to 29 CFR 1910.106 is expanded to identify the specific paragraph that references the OSHA safety can standard.

The aggregate gross weight of all materials of trade on board a vehicle is limited by § 173.6(d). This paragraph erroneously refers to "permanently mounted tanks" authorized by paragraph (a)(1)(iii) of this section. Therefore, § 173.6(d) is revised to refer to "materials of trade authorized under paragraph (a)(1)(iii)."

The last sentence in § 173.6(d) is placed in new paragraph (e) for clarity. New paragraph (e) clarifies that materials of trade may be transported on a motor vehicle with other hazardous materials and still be authorized exceptions.

Phillips Petroleum Company (Phillips) petitioned that the materials of trade exception be expanded to authorize transportation of Division 2.2 (non-flammable gas) materials in non-specification permanently mounted cylinders. Phillips stated that these cylinders for compressed air are

constructed to the American Society of Mechanical Engineers (ASME) Pressure Vessel Code and are typically less than 70 gallons water capacity. Phillips further stated that since the air cylinders do not meet DOT specifications, they must be depressurized before they can be transported and then must be repressurized at the next job site before use.

RSPA agrees that the materials of trade exception may properly be expanded to include permanently installed tanks built to the ASME Pressure Vessel Code containing non-liquefied non-flammable compressed gases with no subsidiary hazard. This provision has been adopted into § 173.6(a)(1)(iv).

Phillips also petitioned RSPA to authorize the transportation, as materials of trade, of DOT exemption cylinders containing compressed or flammable gas samples. Several exemptions are in existence authorizing such transportation, and Phillips stated that these cylinders have been used for many years and have a proven track record of safety and reliability.

As provided in the final rule, § 173.6(b)(5) authorizes transportation of a cylinder or other pressure vessel containing a Division 2.1 or 2.2 material, conforming to the packaging, qualification, maintenance, and use requirements of this subchapter, as a material of trade. A cylinder manufactured under the terms of an exemption is an authorized packaging under the provisions of the subchapter. Therefore, no regulatory change is necessary to authorize such transportation and, accordingly, this part of Phillips's petition is denied.

III. Non-Specification Packagings Used in Intrastate Transportation (§ 173.8); Minimum Qualifications for Inspectors and Testers (§ 180.409)

National Tank Truck Carriers, Inc. (NTTC) petitioned RSPA to reconsider its authorization for continued use of non-specification cargo tanks by intrastate carriers transporting flammable liquid petroleum products. NTTC stated that the exceptions provided in the final rule for the continued use of these non-specification cargo tanks create a patchwork regulatory system that cannot be enforced and do not provide an "equivalent" level of safety. They also provided scenarios that, in NTTC's opinion, could create difficulties for enforcement and carrier personnel to determine compliance with the inspection and testing requirements of Part 180.

Two rebuttal letters were received in response to NTTC's petition for reconsideration. The Petroleum Marketers Association of America stated that States have traditionally been responsible for public safety and allowing the States to continue to exercise their rational judgement in packaging of certain hazardous materials in intrastate commerce does not endanger public safety. The Petroleum Transportation & Storage Association also opposed NTTC's petition and stated that NTTC completely misstates the effect HM-200 will have on the regulated community and public safety in general.

RSPA denies NTTC's petition. The situation described by NTTC regarding the unfair advantage given to intrastate motor carriers by allowing them to use non-specification cargo tanks is not new to the regulated industry. In fact, HM-200 will eventually lead to the elimination of non-specification cargo tanks and their replacement with DOT specification cargo tanks in the same manner the older MC 300 series cargo tanks are being removed from service, some of which are more than 25 years old.

The continuing use provision recognizes that a State may assume the responsibility on behalf of its citizens to allow the use of non-specification cargo tanks to transport liquid fuels in that State under specified conditions. In an effort to minimize the impact of a total replacement of the intrastate cargo tank fleet for small businesses in these States, RSPA decided to provide for the continued use of these non-specification cargo tanks. This provision applies only in those States that have or will provide a specific provision for their use by State law or regulation. No new non-specification cargo tanks used to transport flammable liquid petroleum products may be placed in service after October 1, 1998. In addition to any operational requirements placed on their use by the States in which they are operated, they are only authorized for continued operation in conformance with the inspection and test requirements of Part 180 after July 1, 2000. RSPA believes that the inspection and test requirements will provide an incremental safety increase in the operation of these cargo tanks.

RSPA denies NTTC's petition opposing the exception provided for registered inspectors. Educational requirements are waived for a person who only performs annual external visual inspections and leakage tests on cargo tank motor vehicles owned or operated by that person. These cargo tank motor vehicles must have a

capacity of less than 3500 gallons and be used exclusively for transportation of flammable liquid petroleum fuels. The inspectors must register with DOT advising that they are performing inspections, thereby providing the Federal Highway Administration (FHWA) the identity and location of such inspection and testing facilities in order that they be included in FHWA's compliance program.

IV. Agricultural Operations (§ 173.5)

A petition bearing the names of 45 agricultural retailers and associations requested that RSPA revise § 173.5 "to incorporate language that will provide an exception from the HMR for both farmers and retailers who transport agricultural products from retail-to-farm, between fields, and from the farm back to the local source of supply." These parties stated that RSPA had failed to provide adequate relief from the HMR's requirements "for both farmers and retailers." (In a separate, letter, one of these agricultural organizations stated that: "Arizona members stand firmly behind current safety regulations and have no reason to adopt exceptions in our state, however, we encourage our state counterparts to have the opportunity to respond to their local needs.")

The petition asserted that farmers and retailers should not be forced to comply with the HMR for the "few brief periods during the year" that agricultural shipments take place: a 45-day period for planting crops and other periods in the fall when fertilizer is applied. Included with the petition was an estimate that it will cost each retail facility, assumed to handle 100 loads of agricultural products a day during the 45-day planting season, a total of \$12,300 per year to determine whether the HMR apply (*i.e.*, whether the agricultural product is a hazardous material) and, for those that are covered, comply with the HMR's shipping paper and placarding requirements. According to these parties, HM-200 does not achieve the goal of uniformity because movements of agricultural products from retail-to-farm will be subject to the HMR, but movements of the same products between fields of the same farm are excepted.

On this basis, these petitioners appear to seek a broad exception from the HMR for any retailer or farmer that transports agricultural products "from retail-to-field, between fields, and from the farm back to the local source of supply," that would be applicable throughout the United States, and not just in those few States that allow exceptions for movements of agricultural products.

The literal wording of the exception requested in this petition would apply to all hazardous materials transported by any retailer that made a single delivery of a hazardous material to a farmer. Under this interpretation, a company that delivers gasoline to a farm, for use in farm machinery, could claim that all its deliveries fit under the requested exception, even though other deliveries would be to businesses having no direct connection with agriculture.

In response to this petition, opposing comments were submitted jointly by the American Trucking Association, the Association of Waste Hazardous Materials Transporters, and NTTC. These organizations questioned whether agricultural retailers could or should be distinguished from other shippers and carriers of hazardous materials, stating that they did not believe agricultural retailers deserved "special treatment." These organizations also referred to:

- The availability of educational materials to foster understanding of the HMR and compliance, furnished by RSPA and other industry organizations.
- The many crop protection products which are EPA-designated "hazardous substances" and, accordingly, have been subject to the HMR in intrastate shipments since 1980, so that many agricultural retailers should already be complying with the HMR in shipping or transporting these hazardous substances.
- The inclusion among the petitioners of retailers and organizations in many States that have already adopted the HMR as State law and have not provided broad exceptions for agricultural operations, implying that these petitioners seek to "rollback" existing regulations.
- Questions about whether the petitioners estimates of the costs of compliance are valid and actually: (1) apply in those States where the transportation of agricultural products is already subject to the HMR; (2) consider existing inventory and delivery systems; and (3) account for the information provided to the retailer when it receives a shipment of hazardous materials from its supplier.
- The absence of any condition or qualification (distance, type of road, public access, etc.) that might limit public exposure to risks involved in the transportation of hazardous agricultural products.

Both the petition for reconsideration and the responding comments are set forth in full at the end of this section (IV).

RSPA denies the petition for reconsideration because it believes that the broad exception requested would eliminate or preclude application of many of the basic requirements that are designed to promote a safe transportation system. Shipping papers, labels, placards, and identification number displays are the basic elements of a hazard communication system that is recognized throughout the United States and the world. The hazard communication system provides basic information to emergency responders so that they can better respond to hazardous materials incidents and protect themselves, the public, and the environment. The chemical and physical hazards presented by hazardous materials are the same whether being transported in interstate or intrastate commerce by an agricultural supplier. Hazardous materials, such as gasoline, which is an extremely flammable liquid, and anhydrous ammonia, which is poisonous when inhaled, are frequently transported in both interstate and intrastate commerce by agricultural retailers. Hazardous materials releases can occur regardless of whether a motor carrier is a common carrier or a private carrier, such as an agricultural retailer. During a recent hearing, a Senator reminded RSPA of an incident in which six people were killed and 76 hospitalized as a result of a release of agricultural grade anhydrous ammonia from cargo tank in Houston, Texas.

Lack of adequate hazard information at the site of an incident can result in inappropriate responses. In some cases, an emergency responder may not realize a hazardous material is involved and not take appropriate action. In other cases, unnecessary actions could be taken that result in significant disruptions to transportation corridors and unnecessary evacuations until sufficient information is obtained about the commodity being transported. RSPA believes that the safe transportation of hazardous materials cannot be achieved without a hazard communication system that provides the minimum information necessary to the carrier, enforcement personnel, and emergency responders when hazardous materials are involved in transportation incidents.

In adopting § 173.5, RSPA provided significant relief to farmers who transport hazardous materials. Taking into account the limited potential for high-exposure incidents, RSPA completely excepted from coverage of the HMR a farmer's transportation of an agricultural product (other than a Class 2 gas) over local roads between fields of the same farm, so long as the movement

conforms to State requirements. RSPA also excepted a farmer from certain compliance requirements in the HMR involving training and emergency response (Part 172, Subparts G and H), when the farmer transports certain quantities of agricultural products to or from his or her farm, over distances up to 150 miles from the farm, if in conformance with State requirements. In the latter situation, RSPA did not provide exceptions from the HMR's other requirements, such as those for packaging, shipping papers, and placarding. Beyond a farmer's short trips between fields of a single farm over local roads, RSPA does not believe there is justification for waiving these fundamental requirements. Certain quantities of agricultural products that are hazardous materials remain eligible for the "materials of trade" exception in § 173.6, and non-specification packagings used by an intrastate carrier of agricultural products may also be authorized under the exception from the HMR's requirements in § 173.8.

Packaging requirements ensure that hazardous materials can survive normal transportation conditions, by assuring that the packaging material is compatible with its contents and that the container has been designed, constructed and closed in such a manner to prevent failure and an unintentional release of the hazardous material. Shipping papers, placards, and other forms of hazard communication are essential to provide emergency responders with the minimum information necessary to protect themselves, the public, and the environment, when an incident occurs during the transportation of hazardous materials. In the SNPRM, RSPA expressed its concern over "the potential for the lack of uniform communication and miscommunication to emergency responders in any location where they may encounter hazardous materials incidents." Under the exception requested by the petitioners, vehicles transporting agricultural products that are hazardous materials would not be required to bear placards; an emergency responder would have to assume that any unplacarded vehicle contained hazardous materials if it had an in-State license plate, no matter where the vehicle was found within the State.

The petitioners represent many types of commercial businesses, of varying sizes, that routinely offer and transport hazardous materials. Many of them are already subject to the HMR. Five companies listed in the petition that are interstate carriers have combined gross sales of more than \$11 billion per year

and combined annual profits of more than \$1 billion per year. All of the hazardous materials carried by any interstate carrier (not just those shipments between States) are already covered by the HMR. Other petitioners may operate within one of the many States that have adopted the HMR without exceptions for agricultural products, and the HMR requirements already apply to them. Still others transport agricultural products that are hazardous substances, such as anhydrous ammonia and many pesticides. That transportation has been subject to the HMR for 17 years, even within those States that have agricultural exceptions.

For these types of businesses, HM-200 does not impose new regulations, as the petition suggests. RSPA believes that Congress' intent, in mandating the extension of the HMR to all intrastate motor carriers, was to bring the remainder up to the same standard of safety, and not to eliminate the existing application of the HMR where it already exists. The latter would be the effect of the exception sought in the petition.

The petitioners' cost estimates appear overstated, if only for the fact that many retailers are already subject to the HMR, so that any marginal costs in evaluating shipments, adding necessary information to bills of lading (or other documentation that already exists), and applying placards would be minimal. It does not seem reasonable that retailers' employees would need an additional ten minutes, 100 times a day, throughout a 45-day period, to determine if the agricultural product being shipped is a hazardous material. As the opposing comment noted, all necessary information concerning an agricultural product, including whether it is hazardous, is already provided on documents that accompany the product, including shipping papers and material safety data sheets, when an agricultural retailer receives it from its supplier. In addition, packaged hazardous materials are marked with the shipping name and identification number of the hazardous materials and most display a hazard warning label. According to the requirements of the Occupational Safety and Health Administration, markings and labeling required by the HMR must remain on packages of hazardous materials until they have been emptied. Therefore, packages of hazardous materials in an agricultural retailer's storage area should already display the markings and labels required by the HMR.

A retailer should not have to apply new placards for each load of agricultural products subject to the

HMR, as petitioners' cost estimates assume. Placards can easily be reused or permanently mounted on vehicles. The estimated cost of \$1,575 per year for placards, for 25 loads per day, amounts to several times the cost of using permanently-mounted changeable metal placard sets on 25 separate vehicles (if that many separate vehicles were needed for the 25 loads per day assumed to require placarding), at approximately \$120 per vehicle (4 sets per vehicle), when the cost of metal placards is amortized over their expected ten-year life.

In the normal course of their business activities, retailers routinely prepare documents in connection with sales and deliveries of their agricultural products, such as invoices, bills of lading, and delivery receipts, many of which are generated by computer. Even in those situations where a permanent "laminated" shipping paper may not be feasible, any of these existing documents can be used as the shipping paper required by the HMR. Once standard forms or computer programs are prepared, there should be little or no additional cost to include any additional information required by the HMR on these documents.

Even using the petitioners' estimates, which RSPA finds to be excessive, given the discussion above, the total annual projected cost of \$12,300 for a retailer that handles 100 loads per day, over a 45-day period, works out to less than \$2.75 per load. This appears to be a small fraction of the sales price of a load of agricultural products that may consist of thousands of pounds of fertilizer or pesticides. These minimal additional costs are outweighed by the benefits of applying the safety requirements of the HMR to those commercial motor vehicle operations.

All hazardous materials, including agricultural products, pose the same flammable, toxic, or explosive risks regardless of who is transporting them. Petitioners have not demonstrated that the factors underlying the exceptions in § 173.5 should apply to retailers, nor that the broad additional exceptions requested would be justified.

The petition for reconsideration of the agricultural exception in § 173.5 and the responding comment are set forth below:

February 7, 1997.

Mr. Alan I. Roberts,
Administrator, Research & Special Programs
Administration, U.S. Department of
Transportation 400 Seventh Street, S.W.,
Washington, D.C. 20590

Re: Petition for Reconsideration of Docket
HM-200

Dear Mr. Roberts: As per 49 CFR 106.35, please accept this petition for reconsideration of HM-200 (62 Federal Register 1208), which in its present form will have a serious economic and operational impact on the agricultural industry in the United States.

Statement of Complaint

In the preamble of the HM-200 rule, RSPA acknowledges that it received "more than 500 comments from farmers and agricultural supply businesses who expressed concern that this rule would prohibit states from granting exceptions for farmers." In the final rule, RSPA provided an exception from the HMR for farmers who transport agricultural products between fields of the same farm. We appreciate this action by RSPA, as it will provide some relief for farmers. However, we know that many of the 500 comments to RSPA also expressed concern about the impact of the rule on ag retailers as well. RSPA failed to acknowledge the concerns of the retail segment of the industry, whose operations have a direct impact on the farmer, and whose transport of materials is often identical to that of the farmer.

We are also aware that RSPA was directed in a conference report accompanying the FY 1997 DOT appropriations bill "to give serious consideration to establishing an agriculture exception consistent with similar exemptions already granted by the department."

Finally, Dr. D.K. Sharma received a "Dear Colleague" letter signed by 48 Congressmen and Senators that urged RSPA to "carefully consider the concerns of the (ag) industry" when formulating this rulemaking.

Despite all the directives to do so, after evaluating the language in the final HM-200 rule we are deeply disappointed that RSPA has failed to provide adequate relief from the HMR for both farmers and retailers. The minimal exceptions granted in Section 173.5 will do little to facilitate the efficient and historically safe movements of ag inputs from retail to farm, and will take a devastating economic toll on the agricultural industry.

Final Rule Unreasonable, Impractical

HM-200 effectively negates state exceptions for ag retailers and farmers from the HMR. In most cases, these exceptions have existed for decades. Because many farmers and ag businesses have never had to comply with the HMR, they are unaware of the implications of applying these federal rules to movements of agricultural products from retail-to-farm.

This rule is unreasonable and impractical from several standpoints.

1. The rule is effective October 1. Beginning next fall and extending into the spring, it will cause tremendous confusion for farmers, ag businesses and state officials who must now deal with a federal law that dictates the application of complicated hazardous materials regulations on local, rural shipments of agricultural inputs. On average, the bulk of agricultural product shipments occur during a 45-day period when planting commences, and periodically in the fall when some fertilizer is applied. Farmers and ag businesses do not transport agrichemicals every day of the year. Forcing them to comply with this complex regulation

for a few brief periods during the year is not justified and will only result in confusion and misunderstanding as each planting season rolls around—and we don't see it getting any easier as time goes on.

2. Although farmers received some relief from the HMR for between-field movements of DOT regulated agrichemicals, agricultural retailers were dealt a massive blow when RSPA completely ignored their similar need for relief when delivering these same products to the farm, or when the farmer himself picks up these products at the retail site and takes them to the farm.

Based on valid industry estimates, it will cost a typical agricultural retail facility \$12,300 annually to comply with the mandates of HM-200. (See Attachment A for analysis of costs.) In the midwest alone, the number of ag retail facilities affected exceed 5,000 in number. At \$12,300 per facility, that's a cost of \$61,500,000 per year to comply with HM-200, and that's only in the midwest (i.e. Illinois, Indiana, Iowa, Wisconsin, Minnesota, Ohio). These are costs that will eventually be passed on in terms of higher costs of products and services to the farmer. The farmer, however, cannot pass along these costs due to the ag marketing structure. The added expense of complying with HM-200 will ultimately contribute to lower net farm income nationwide, without any significant increase in public safety.

3. Although the goal of HM-200 is uniformity, state officials in agricultural states will still be required to enforce the HMR only on certain types of agricultural movements, even though the movement of agricultural products—whether from retail-to-farm or between fields—will remain similar in their makeup. In essence, the same quantities and types of agricultural products will be on trucks leaving retail sites and on trucks traveling between fields.

We believe that for purposes of uniformity and enforcement, it makes more sense to allow exceptions from the HMR for both retail-to-farm and farm-to-farm shipments, whether the ag products are picked up by the farmer or delivered by the retailer. The excellent safety record of the ag industry merits this exception.

We believe HM-200 to be an unreasonable burden on the agricultural industry, impractical in terms of compliance and enforcement, and unnecessary based on the excellent safety record for retail-to-farm and farm-to-farm shipments of ag products. We stand behind our safety record and would welcome contradictory data from RSPA that proves that these movements of ag products pose an unreasonable threat to public safety.

We, the undersigned, petition RSPA to reconsider the impact that HM-200 will have on farmers and agricultural supply businesses. We urge RSPA to revise 49 CFR, Section 173.5 to incorporate language that will provide an exception from the HMR for both farmers and retailers who transport agricultural products from retail-to-farm, between fields, and from the farm back to the local source of supply.

We offer our knowledge and expertise to you in this endeavor, and would welcome the opportunity to sit down with RSPA and create a workable regulation—one that

recognizes the unique needs of the agricultural industry, streamlines enforcement and provides a framework in which we can continue to safely and efficiently provide farmers with the tools they need to feed the U.S. and the world.

Sincerely,

Agribusiness Association of Iowa
Agricultural Retailers Association
Alabama Farmers Cooperative, Inc.
Alliance of State Agri-Business Assoc.
American Farm Bureau Federation
Arizona Crop Protection Association
CF Industries, Inc.
Countrymark Coop, Inc.
Farmland Industries, Inc.
Georgia Agribusiness Council
Gold Kist, Inc.
GROWMARK, Inc.
Illinois Farm Bureau
Illinois Fertilizer & Chemical Assoc.
Indiana Farm Bureau, Inc.
Indiana Plant Food & Ag Chemical Assoc.
Iowa Farm Bureau Federation
Iowa Institute for Cooperatives
Kansas Fertilizer & Chemical Association
Kansas Grain & Feed Association
Louisiana Ag Industries Association
Michigan Agribusiness Association
Minnesota Crop Production Retailers
Mo-Ag Industries Council
Montana Agricultural Business Association
National Association of Wheat Growers
National Cotton Council
National Council of Farmer Cooperatives
Nebraska Cooperative Council
Nebraska Fertilizer & Ag-Chemical Inst., Inc.
New England Council for Plant Protection
Ohio Agribusiness Association
Ohio Farm Bureau Federation
Oklahoma Fertilizer & Chemical Association
Rocky Mountain Plant Food & Ag Chem Asc.
SF Services, Inc.
South Dakota Farm Bureau
South Dakota Fertilizer & Ag Chemical Asc.
Southern States Cooperative
Tennessee Farmers Cooperative
The Andersons
United Suppliers, Inc.
WILFARM L.L.C.
Wisconsin Agri-Service Association, Inc.
Wyoming Agri-Business Association

Attachment A

Cost to Retail Ag Facilities to Comply with HM-200.

- Manpower: 10 additional minutes per load to evaluate shipments of agricultural products to determine applicability to the HMR.

On average, during spring season each agrichemical facility processes 100 loads per day of agricultural products (both packaged and in solution), which includes loads picked up by the farmer and loads delivered by the retailer.

100 loads per day \times additional 10 minutes = 1000 minutes \div 60 min/hour = 16.666 additional manhours per day spent on compliance.

16.666 hours \times \$14 per hour average salary for personnel = \$233.333 per day for additional manhours to evaluate loads for compliance.

\$233.333 per day \times 45 days of peak movement of agricultural products = \$10,500

(rounded). This does not take into account movements made during off-season.

- Placards: Assume 25% of the 100 loads per day will require placarding. Most inexpensive placard is .35 cents. $.35 \times 4 = \$1.40$ per load. 25 loads per day \times \$1.40 = \$35 per day. $\$35 \times 45$ days of spring season = \$1575.

- Shipping Papers: It is highly unlikely that we can use "laminated" shipping papers as RSPA indicates in the preamble. Products, package sizes and shipping descriptions for ag products change too often to make pre-printed papers feasible. However, assuming we can generate some type of shipping paper at .05 cents per page, the costs are as follows: 100 loads per day \times .05 for shipping paper = \$5.00 \times 45 days of spring season = 225. This does not take into account unknown cost for software and software maintenance to keep the descriptions up to date.

Minimum Annual Cost to Comply for AG Businesses to Comply With HM-200

\$10,500	in manhours
1,575	in placards
225	in shipping papers (this cost likely to be substantially more)
\$12,300	annually for each retail ag facility—with thousands of facilities in the U.S., the economic impact may be in the hundreds of millions of dollars.

Source: Data provided by management personnel at retail agribusiness facilities.

March 17, 1997.

Alan I. Roberts,
Associate Administrator, Hazardous
Materials Safety, Research and Special
Programs Administration, U.S.
Department of Transportation, 400
Seventh St., SW., Washington, DC 20590

RE: HM-200

Dear Mr. Roberts: The undersigned associations representing carriers of hazardous materials are writing to express concern over the filing by the Agricultural Retailers Association (ARA), on behalf of a number of organizations with ties to the agribusiness, of a petition for reconsideration RSPA's final rule in the matter of HM-200, hazardous materials in intrastate commerce. We realize that these comments are not timely filed. However, we beg the indulgence of RSPA as provided by 49 CFR 106.23 to consider late filed comments "as far as practicable."

For over a decade, carriers we represent have been required to follow RSPA's hazardous materials regulations (HMRs) when engaged in the intrastate commerce of hazardous substances, hazardous waste, flammable cryogenic liquids and, more recently, marine pollutants. Our members have benefitted by the consistent application of hazardous materials rules to all operations whether the transportation is intrastate, interstate or foreign. Our review of the ARA petition causes us to raise the following concerns:

- For Whom Is Relief Requested?

The petitioner states that HM-200 provided relief for farmers, but did not

extend relief to "ag retailers." In describing why HM-200 is "unreasonable and impractical", the petitioner repeatedly links the retail segment of the industry with farmers. However, no information is provided to support the linkage other than both, as an incidental part of their business, may use the same roads for transport. We find it hard to believe that the business operation of a typical ag retailer described in the petitioner's "Attachment A" comports with the typical business operation of a farmer.

Just as we see little similarity between an ag retailer and a farmer, it is not clear what circumstance(s) distinguishes the retailer from other shippers/carriers of hazardous materials that do not ship/haul agricultural-related hazardous materials. We understand that the agricultural supply industry is quite diverse as to the size of company involved and the scope of these company operations. Companies engaged in agri-business range from multi-national corporations to those that would be considered local small businesses. We note, however, that we would hardly qualify as "small" operations which, according to the petitioner, ship on average from each facility 100 hazardous materials loads a day. In any event, we have to assume that the petitioner would not want to create price competitive advantages for one segment of its industry over another. Consequently, the relief sought must be assumed to apply to all sizes and configurations of shipper/carriers.

Non-agricultural shippers/carriers of hazardous materials, no matter the size of the operation, have not been granted universal relief from the HMRs simply by virtue of how the consignees served by the shipper/carriers use the commodity transported. Since the HMRs are established to "protect[] against the risks to life and property inherent in the transportation of hazardous material" [49 U.S.C. 5101.], we fail to see how the petitioner has justified special treatment that will allow ag retailers to ignore these protective measures.

• What Is the Justification for the Relief Being Sought?

The petitioner claims that HM-200 is "unreasonable and impractical" for a number of reasons, and that the only appropriate response to these concerns is to "provide an exception from the HMRs retailers who transport agricultural products from retail-to-farm, between field, and from the farm back to the local source of supply." Such a zero-sum proposal lacks credibility.

Based on the ag retailers' own justification for exception from the HMRs, we offer the following observations:

- **Complexity of Rules:** the rules may be "new", but "complex" is a relative term that deserves more analysis. For example, compared to rules issued under statutes administered by the U.S. Environmental Protection Agency (EPA), the HMRs are simple. Congress has granted DOT/RSPA authority to require nationally uniform and internationally harmonized rules. RSPA provides free, or at cost, numerous services and products to aid compliance. These services and products include a comprehensive advisory guidance document

published in the **Federal Register** to remind persons involved in the transportation of hazardous materials of their regulatory responsibilities, newsletters, conferences, training modules, and the like. Those representing the ag retail industry could perform a great service to their membership by informing members of these resources.

- **Hazardous Substances:** Congress mandated that DOT regulate EPA-designated "hazardous substances" as "hazardous materials." [42 U.S.C. 9656(a).] Hazardous substances have been regulated by RSPA in intrastate commerce since 1980. [49 CFR 171.1] Many crop protection products are regulated hazardous substances. In short, ag retailers should have been complying with the HMRs for the transport of these materials for the last 15 years. Any relief RSPA could grant from the HMRs will not change the fact that the materials are regulated by EPA.

In terms of any non-hazardous substance materials that are shipped/carried by ag retailers, the petitioner provides no information about the number, kind, and quantity of such materials now newly regulated by HM-200. Such information would be critical for RSPA to evaluate the merit of the level of relief requested.

- **Scope of the Exception Requested:** The HMRs apply nationally. Prior to HM-200, the federal government provided incentives to states to adopt the HMRs for intrastate commerce. According to data of the Federal Highway Administration, all but one state had adopted the HMRs and of those that adopted them only 8 provided exceptions specific to farmers and/or the broader agri-business community. In short, 41 states do not provide farm-specific exceptions from the HMRs. Yet, organizations that by their names represent agri-business in at least 18 states joined the ARA in support of this petition. Some organizations joining the petition appear to have nationwide representation. Is RSPA to infer that the petitioner wishes to rollback regulation that has already been implemented in 41 states?

- **Costs:** As noted above, agri-business has already been subject to the HMRs in the great majority of states. Any costs associated with the implementation of HM-200 should only reflect compliance costs that may ensue in the 9 states where some exceptions were granted to segments of the agri-business community. Also, some discount should be factored in for the proportion of the 100 shipments/day that are hazardous substances and have been subject to the HMRs even in those states that have not adopted these federal rules as a matter of state law.

Whatever is ultimately determined to be the proper scope in computing the cost basis, we question some of the cost estimates used by the petitioner in "Attachment A." The petitioner states that "[p]roducts, package sizes and shipping descriptions for ag products change * * * often * * *" Obviously, to serve their customers, the ag retail industry has systems in place to track and fill orders for ag products in a rapidly changing environment. At the same time, we are unaware of commercial transactions involving the exchange of freight where some sort of shipping paper does not accompany the load for proof of delivery and/or billing

purposes. Recognizing this fact, RSPA does not require a unique form to communicate the presence of hazardous materials in a load and to communicate appropriate emergency response information. [Shipments required by EPA to be tracked on the Uniform Manifest are the exception.] Additionally, we would assume that most deliveries to local ag retail facilities were transported in full compliance with the HMRs and that necessary shipping paper information could be readily transcribed from the papers accompanying these movements to the shipping papers necessary for further downstream distribution.

We specifically question the reliability of the estimate for placarding vehicles where the implication is given that placards are not reusable. Reusable configurations of placards can be purchased.

In short, we do not believe the economic analysis is accurate.

- **Risk:** The requested "retail-to-farm and from the farm back to the local source of supply" exception is subject to no qualification such as distance traveled, condition of the roads, access of the public, time-of-travel, or any other conditions that might limit the exposure of public to the excepted transportation events. We simply note that the roads used to support what would be movements subject to no official safety standards are public and shared by farmer and non-farmer alike. A public that, by law, RSPA must protect.

Conclusion

The petitioner references two congressionally-generated documents that request RSPA to carefully consider the concerns of the agriculture industry when issuing rules under HM-200. No evidence is provided that suggests RSPA did not fulfill this charge. To the contrary, we believe the attention drawn to this issue by agri-business ensured that RSPA not propose a rule that could not be supported on its merits. RSPA walked a careful balance between those in agri-business that advocated for exemption from the HMRs and those primarily in the emergency response community that opposed exceptions to safety rules.

RSPA provides many services to help the regulated community achieve compliance. We have no doubt that RSPA would make every effort to provide needed compliance services to ag retailers.

We appreciate the opportunity to submit these comments. Please contact us if additional input is necessary on any of the points raised above.

Sincerely,

Paul Bomgardner,
Hazardous Materials Specialist, American Trucking Associations, Inc.

Cynthia Hilton,
Executive Director, Association of Waste Hazardous Materials Transporters.

Cliff Harvison,
President, National Tank Truck Carriers, Inc.

This final rule delays for one year the mandatory compliance date for all requirements in the January 8, 1997, final rule under Docket HM-200 that

otherwise would become mandatory on October 1, 1997. Because of the relief provided by this final rule, it is effective October 1, 1997, without the customary 30-day delay following publication.

V. Regulatory Analyses and Notices

A. 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, was reviewed by the Office of Management and Budget. This final rule is considered significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034) due to significant public and congressional interest. A regulatory evaluation was prepared for the January 8, 1997 final rule and is available for review in the Docket. The regulatory evaluation was reviewed and determined not to require updating. The effect of this final rule will delay for one year the costs and benefits of applying the HMR to intrastate motor carriers. There is no delay in the materials of trade exception and its benefits.

B. Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 ("Federalism"). The Federal hazardous materials transportation law (49 U.S.C. 5101–5127) contains an express preemption provision that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

- (i) The designation, description, and classification of hazardous material;
- (ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous material;
- (iii) The preparation, execution, and use of shipping documents pertaining to hazardous material and requirements respecting the number, content, and placement of such documents;
- (iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or
- (v) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous material.

This rule concerns the packaging, marking, labeling, placarding and description of hazardous materials on shipping papers. This rule preempts State, local, or Indian tribe requirements

in accordance with the standards set forth above. RSPA lacks discretion in this area, and preparation of a federalism assessment is not warranted.

Title 49 U.S.C. 5125(b)(2) provides 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. That 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. RSPA determined that the effective date of Federal preemption for the requirements in this rule concerning covered subjects is January 1, 1998.

C. Regulatory Flexibility Act

The January 8, 1997 final rule affects many small business entities that ship or transport hazardous materials, however any adverse economic impact should be minimal. Many small entities affected by this final rule also receive relief from current regulatory requirements. The regulatory evaluation developed in support of the January 8, 1997 final rule includes a benefit-cost analysis that justifies its adoption, primarily due to the positive net benefits that may be realized by small entities under the materials of trade exception. RSPA has reviewed this regulatory evaluation and determined it was not necessary to update it. As noted earlier, RSPA is not delaying the materials of trade exception. This final rule, however, delays for one year the costs and benefits of applying the HMR to intrastate motor carriers.

D. Paperwork Reduction Act

There are no new information collection requirements in this final rule.

E. Regulations 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.

List of Subjects

49 CFR Part 173

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, 49 CFR parts 171 and 173 are amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for part 171 continues to read as follows:

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

§ 171.1 [Amended]

2. In § 171.1 as revised at 62 FR 1215 effective October 1, 1997, paragraph (a)(1) is amended by removing the last period in the paragraph and adding at the end of the last sentence the wording “, (except that until October 1, 1998, this subchapter applies to intrastate carriers by motor vehicle only in so far as this subchapter relates to hazardous waste, hazardous substances, flammable cryogenic liquids in portable tanks and cargo tanks, and marine pollutants).”

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

3. The authority citation for part 173 continues to read as follows:

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

§ 173.5 [Amended]

4. In § 173.5 as revised at 62 FR 1215 effective October 1, 1997, paragraph (a)(2) is amended by revising the date “July 1, 1998” to read “October 1, 1998”.

§ 173.6 [Amended]

5. In § 173.6 as added at 62 FR 1216 effective October 1, 1997, paragraphs (a)(1) introductory text, (a)(2), (b)(4), and (d) are revised; paragraph (a)(1)(iii) is amended by removing the semicolon and adding a period in its place; and a new paragraph (e) is added to read as follows:

§ 173.6 Materials of trade exceptions.

* * * * *

(a) * * *

(1) A Class 3, 8, 9, Division 4.1, 5.1, 5.2, 6.1, or ORM-D material contained in a packaging having a gross mass or capacity not over—

* * * * *

(2) A Division 2.1 or 2.2 material in a cylinder with a gross weight not over 100 kg (220 pounds), or a permanently mounted tank manufactured to ASME

standards of not more than 70 gallon water capacity for a non-liquefied Division 2.2 material with no subsidiary hazard.

* * * * *

(b) * * *

(4) For gasoline, a packaging must be made of metal or plastic and conform to the requirements of this subchapter or to the requirements of the Occupational Safety and Health Administration of the Department of Labor contained in 29 CFR 1910.106(d)(2) or 1926.152(a)(1).

* * * * *

(d) *Aggregate gross weight.* Except for a material of trade authorized by paragraph (a)(1)(iii) of this section, the aggregate gross weight of all materials of trade on a motor vehicle may not exceed 200 kg (440 pounds).

(e) *Other exceptions.* A material of trade may be transported on a motor vehicle under the provisions of this section with other hazardous materials without affecting its eligibility for exceptions provided by this section.

§ 173.8 [Amended]

6. In § 173.8 as added at 62 FR 1216 effective October 1, 1997, paragraph (d)(3) is amended by revising the date "July 1, 1998" to read "October 1, 1998".

Issued in Washington, DC on September 16, 1997 under authority delegated in 49 CFR, part 1.

Kelley S. Coyner,

Deputy Administrator.

[FR Doc. 97-25065 Filed 9-18-97; 8:45 am]

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