DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 172, 173, 174, 175, 176 and 177

[Docket No. RSPA–97–2850 (HM–169B)]

RIN 2137–AD14

Hazardous Materials: Withdrawal of Radiation Protection Program Requirement

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: RSPA is removing regulations on ''Radiation Protection Program'' and related modal provisions that require persons who offer, accept for transportation, or transport radioactive materials to develop and maintain a written radiation protection program. This action is necessary to address difficulties and complexities concerning implementation of and compliance with the requirements for a radiation protection program, as evidenced by comments received from the radioactive material transportation industry and other interested parties.

DATE: *Effective date:* September 10, 1998.

FOR FURTHER INFORMATION CONTACT: Dr. Fred D. Ferate II, Office of Hazardous Materials Technology, (202) 366–4545, or Charles E. Betts, Office of Hazardous Materials Standards, (202) 366–8553, RSPA, U.S. Department of Transportation, 400 Seventh Street SW, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

On September 28, 1995, RSPA published a final rule in the **Federal Register** under Docket No. HM–169A (60 FR 50292). The changes made in HM–169A were part of RSPA's ongoing effort to harmonize the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) with international standards and to improve radiation safety for workers and the public during the transportation of radioactive materials.

One of the substantive regulatory changes under HM–169A was a requirement to develop and maintain a written radiation protection program (RPP). The RPP requirements are found in subpart I of part 172 of the HMR. Implementation provisions for rail, air, vessel and highway are found in §§ 174.705, 175.706, 176.703, and 177.827, respectively. The RPP requirements apply, with certain exceptions, to each person who offers for transportation, accepts for transportation, or transports Class 7 (radioactive) materials. Compliance with the RPP requirements was required after October 1, 1997.

Following publication of the September 28, 1995 final rule, many comments were received concerning technical difficulties in implementing the RPP requirements. Subsequently, on April 19, 1996, RSPA published in the **Federal Register** a request for comments on the implementation of the RPP requirements (Notice 96–7; 61 FR 17349). In Notice 96–7, RSPA stated its intention to develop guidance for the radioactive material industry to facilitate compliance with the RPP requirements.

RSPA received 23 comments in response to Notice 96–7. After considering these comments, RSPA decided that the concerns expressed could not all be resolved through guidance; new rulemaking was required in order to adequately address many of the issues raised in the comments. RSPA determined that the current RPP requirements in subpart I of part 172, and §§ 173.441, 174.705, 175.706, 176.703 and 177.827 should be withdrawn, because the RPP could not be corrected without significant review and a further rulemaking action. Accordingly, RSPA published a direct final rule on September 2, 1997 (62 FR 46214), withdrawing the RPP requirements effective September 30, 1997, unless an adverse comment or notice of intent to file an adverse comment was received by September 30, 1997. Because RSPA received two adverse comments the direct final rule was revoked in a separate rulemaking action. As a result of the direct final rule revocation, on December 22, 1997 (62 FR 66898), RSPA published a notice of proposed rulemaking (NPRM) (HM–169B; 62 FR 66903) proposing to amend the Hazardous Materials Regulation by removing subpart I of 49 CFR part 172, ''Radiation Protection Program'' and related modal provisions that require persons who offer, accept for transportation or transport radioactive materials to develop and maintain a written radioactive protection program.

In a final rule published under HM–169B (62 FR 66900), RSPA also extended until October 1, 1999, the date for compliance with the RPP requirements, because RSPA believed that requiring compliance with requirements, which in the NPRM are being proposed to be withdrawn, would be inappropriate.

II. Comments Received

A total of 14 comments were received in response to the December 22, 1997 NPRM. Commenters represented electric power utilities, radiopharmaceutical manufacturers, and other offerors and carriers of radioactive materials. Thirteen of the fourteen commenters agreed with the proposal in the NPRM, citing modal differences as a factor which makes application of the RPP requirements difficult. Examples given by commenters include difficulties in tracking doses to railroad workers and ship crews because rail cars are generally transferred between carriers during transport, and because most ships are registered under foreign flags and also operate in foreign ports. Several commenters also stated that personnel involved in bulk or containerized transport of radioactive material by highway, rail, or vessel usually receive much lower doses of radioactivity than workers that handle non-bulk shipments.

Additional comments pointed to ambiguities in the RPP requirements. These commenters stated that the regulations do not make clear whether the 200 transport index (TI) threshold to qualify for an exception is to be applied over an entire company or at each site; that concepts such as ''approved by a Federal or state agency'' and ''occupationally exposed hazmat worker'' are vague; and that the requirement to monitor occupationally exposed hazmat workers appears to be too inclusive and may be interpreted to cover workers whose doses would be expected to be below the limit of detection of the dosimeters. Most commenters noted the difficulty of being able to assure compliance with the requirements cited in the regulations for dose and dose rate limits for members of the general public.

Several commenters cited inconsistencies with other regulations. For example, in contrast to the HMR, the Nuclear Regulatory Commission (NRC) regulations and Environmental Protection Agency guidelines do not include a quarterly occupational dose limit, or a weekly dose or a dose rate limit for members of the public; the HMR criteria for determining whether monitoring is required differ appreciably from those in the International Atomic Energy Agency (IAEA) regulations; the HMR annual limit for members of the public is different from that of the NRC and the IAEA regulations; the HMR recordkeeping requirements are different from the NRC's; and the HMR require monitoring of occupationally

exposed hazmat workers, while the NRC requires monitoring adult workers with personal dosimetry only if their annual dose is likely to exceed 5 millisieverts.

One commenter additionally noted that entities with an RPP are required to comply with the stated dose limits for members of the general public, while entities which qualify for an exception are not. Commenters also stated that implementation of the RPP requirements would force affected shippers and carriers to adopt the most conservative approach, leading to unnecessarily high costs and potentially causing some carriers to no longer carry radioactive materials.

One commenter stated that RSPA should not remove the RPP requirements from the HMR. The commenter stated that all shippers and consignees of radioactive materials already have formal, approved, written procedures for the handling of radioactive material and exposure monitoring for their personnel and as a result, all shippers and consignees already meet the RPP requirements. The commenter did not provide information on how those current formal, written procedures align with the provisions of the HMR's RPP requirements for shippers and how they could be implemented by carriers. For example, no information was provided on how a shipper or carrier could determine or measure exposure to the general public, which has been stated by other commenters to be a significant problem with the current RPP requirements. The commenter also stated that any such difficulties and complexities with the HMR's RPP can and should be dealt with in a combination of: (a) Amending the RPP; (b) issuing more detailed guidelines or other means; and (c) flexible cooperative enforcement. The commenter did not support this position by providing specific recommendations relative to revisions to the current RPP, the type of guidelines that could be developed, and did not explain what was meant by ''flexible and cooperative enforcement.''

RSPA agrees with commenters that the current RPP program is not clear in its application and is not fully compatible with other regulations, such as those issued by the EPA and NRC. RSPA further believes that certain aspects of the current RPP requirements are not able to be practically implemented, such as those addressing public exposure.

RSPA does believe that hazmat workers and the public should be protected from exposure to radiation. RSPA reminds hazmat employers that the training requirements in subpart H of part 172, require that each hazmat employer train each of its hazmat employees prior to performing any hazmat function under the HMR. Such training must provide a general awareness of the requirements of the HMR, including meanings of package markings and labels. A hazmat employee must receive function specific training applicable to their performance of specific regulatory requirements under the HMR. For example a hazmat employee that handles and transports packages of radioactive materials should receive specific training that includes: properly determining the Transport Index (TI) of a radioactive material package; determining the maximum TI allowed on a transport vehicle; and procedures that address the storage, segregation, and separation requirements for radioactive materials packages. Additionally, a hazmat employee must receive safety training that provides information regarding the hazards presented by radioactive materials, use of appropriate safety and monitoring equipment, and how to protect themselves from unnecessary exposure to radioactive materials (e.g., ''Do not sit on a package containing radioactive materials.''). The intent of the radioactive materials requirements of the HMR is to minimize radiation hazards to workers and the public. These provisions include: limits on the amount of radioactive materials that may be transported in a package; shielding requirements for packagings to limit surface radiation; specific testing of Type A packagings to ensure that they can survive conditions normally incident to transportation; testing of Type B packages for radioactive materials for both normal and accident conditions during transportation; hazard communication, including shipping paper information, labels, and markings to provide identification of the hazards of the material being transported; package surface contamination limits; and requirements addressing the segregation and separation of packages from passengers and hazmat employees. RSPA also notes that many radioactive material shippers, specifically Department of Energy contractors or NRC or Agreement State licensees, are already subject to RPP requirements, though not identical with the HMR's RPP. In addition, several carriers who transport radioactive materials under exemptions issued by RSPA are required to have an RPP in place which includes use of a qualified health physicist to monitor employee exposure. RSPA believes that the requirements in the HMR and the other agencies RPP's ensure an acceptable level of safety for both hazmat employees and the public.

RSPA will continue to review and evaluate criteria for developing RPP's, such as the Recommendations Approved by the President entitled ''Radiation Protection Guidance to Federal Agencies for Occupational Exposure,'' and criteria adopted by the IAEA Safety Standards Series No. ST–1. RSPA may propose a revised RPP as a means of incrementally improving safety for hazmat workers and the public in the future.

Based on the foregoing discussion and as proposed, RSPA is removing subpart I of 49 CFR part 172, ''Radiation Protection Program'' and related modal provisions that require persons who offer, accept for transportation or transport radioactive materials to develop and maintain a written radioactive protection program.

Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule provides relief to persons who offer for transportation, accept for transportation, or transport Class 7 (radioactive) materials by eliminating the need to develop and maintain a radiation protection program. This rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and was not reviewed by the Office of Management and Budget. This rule is not considered significant under the regulatory policies and procedures of the Department of Transportation (44 FR 11034, February 26, 1979).

RSPA has prepared a regulatory evaluation in support of the final rule that specifically addresses the issue of withdrawing requirements for a radiation protection program.

RSPA concludes that the benefits of removing the radiation protection program requirement are, at a minimum, the $6.6 million per year that the RPP requirements would cost to implement, as estimated by RSPA in the regulatory evaluation prepared in support of the final rule issued under Docket No. HM-169A. At that time, RSPA did not have sufficient data to quantitatively assess benefits to be derived from the radiation protection program requirements. However, the regulatory evaluation considered the health benefits to the transportation community of limiting radiation exposures to be significant.

RSPA now considers that the RPP requirements are so overly restrictive, ambiguous, and inconsistent with the requirements of other Federal agencies

that they would tend to cause affected parties to adopt the most conservative approach, leading to greater costs than previously estimated. Therefore, RSPA concludes that the costs of implementation of RPP requirements will exceed their benefits and that withdrawing the requirements is cost-effective.

B. Executive Order 12612

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 (''Federalism''). The Federal hazardous material transportation law, (49 U.S.C. 5101–5127) contains express preemption provisions at 49 U.S.C. 5125.

RSPA is not aware of any State, local, or Indian tribe requirements that would be preempted by a withdrawal of the RPP requirements. This final rule does not have sufficient federalism impacts to warrant the preparation of a federalism assessment.

C. Executive Order 13084

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

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (Act), as amended, 5 U.S.C. 601–612, directs agencies to consider the potential impact of regulations on small business and other small entities. In the regulatory evaluation originally prepared to consider requirements for a radiation protection program, RSPA estimated a total of 497 carriers (primarily motor carriers) would be subject to those requirements. All but a certain few of those carriers are thought to meet criteria of the Small Business Administration as ''small business,'' e.g., motor freight carriers with annual revenue of less than $18.5 million. The effect of withdrawing requirements for a radiation protection program is to allow those carriers to continue to transport radioactive materials without having to develop and implement a written plan that goes beyond what is now required of them by the HMR, by a RSPA exemption, or by other Federal departments and agencies.

Based upon the above, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

E. Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves the objective of the rule.

F. Paperwork Reduction Act

There are no information collection requirements in this final rule.

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.

List of Subjects

49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

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

49 CFR Part 174

Hazardous materials transportation, Radioactive materials, Railroad safety.

49 CFR Part 175

Air carriers, Hazardous materials transportation, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 176

Hazardous materials transportation, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR parts 172, 173, 174, 175, 176, and 177 are amended as follows:

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

1. The authority citation for part 172 continues to read as follows:

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

§§ 172.801—172.807 (Subpart I) [Removed]

2. In part 172, subpart I consisting of §§ 172.801 through 172.807, is removed.

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 1.45 and 1.53.

4. In § 173.441, paragraph (b)(4) is revised to read as follows:

§ 173.441 Radiation level limitations.

* * * * *

(b) * * *

(4) 0.02 mSv/h (2mrem/h) in any normally occupied space, except that this provision does not apply to carriers if they operate under the provisions of a State or federally regulated radiation protection program and if personnel under their control who are in such an occupied space wear radiation dosimetry devices.

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PART 174—CARRIAGE BY RAIL

5. The authority citation for part 174 continues to read as follows:

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

§ 174.705 [Removed]

6. Section 174.705 is removed.

PART 175—CARRIAGE BY AIRCRAFT

7. The authority citation for part 175 continues to read as follows:

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

§ 175.706 [Removed]

8. Section 175.706 is removed.

PART 176—CARRIAGE BY VESSEL

9. The authority citation for part 176 continues to read as follows:

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

§ 176.703 [Removed]

10. Section 176.703 is removed.

PART 177—CARRIAGE BY PUBLIC HIGHWAY

11. The authority citation for part 177 continues to read as follows:

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

§ 177.827 [Removed]

12. Section 177.827 is removed.

Issued in Washington, DC on September 4, 1998, under authority delegated in 49 CFR part 1.

Stephen D. Van Beek,

Deputy Administrator.

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